APPELLATE PRACTICE FROM EVERY ANGLE

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State Bar of Texas
37TH ANNUAL ADVANCED FAMILY LAW COURSE
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San Antonio

CHAPTER 60
OF COUNSEL TO: WILSON & LAKE, LLP

EDUCATION

PROFESSIONAL  Southern Methodist University School of Law/Juris Doctorate, May 1989
GRADUATE      Amber University (f/k/a Abilene Christian at Dallas)/MBA-Marketing, May 1985
UNDERGRADUATE  Baylor University/Bachelor of Science, Nursing, May 1976

LICENSES HELD
Licensed to Practice Law in Federal District Court since February 1990 Northern Dist. of Texas
Licensed to Practice Law in Texas since November 1989
Licensed to Practice as a Registered Nurse in Texas since September 1976 (status: active)

ARTICLES AUTHORED/SPEAKER (partial listing)
- Case Law Update—Property (Speaker, 2011 Marriage Dissolution Seminar, 04/11)
- Cases to Consider in Calculating Net Resources for Child Support, Texas Lawyer (Aug. 9, 2010)
- Appellate Practice from Every Angle (Panel, 2010 Advanced Family Law Seminar 08/10)
- Family Law Case Law Update, Associate Judge's Conference, Texas Center for the Judiciary 07/10
- Property Case Law Update (Stand in speaker for Justice Ann McClure, 2010 Marriage Dissolution Seminar, 05/10)
- Preserving the Record from Every Angle: The Art of Preserving the Record Throughout Your Case, Not Just During the Trial (Speaker w/Chief Justice Linda Thomas, 2009 Advanced Family Law Seminar, (08/09)
- Family Law Appeals—Looking Outside the TRAPs and TCRP (Dallas Bar Association Headnotes 08/09)
- Case Law Update—Property (Speaker, 32nd Annual Marriage Dissolution Seminar, 04/09)
- TFC v. TRAP: Hidden Appellate Traps in the Texas Family Code and How to Use Them to Your Advantage (Speaker, Soaking Up Some CLE, a South Texas Litigation Seminar, 05/08)
- Appellate and Evidentiary Issues: Post-Trial Motions (Speaker, Advanced Family Law Drafting Course, 12/08).
- Dealing with the Death of a Parent (Speaker, UT Parent-Child Relationships Conference, 11/07)
- Avoiding an Appeal (Speaker, 29th Annual Marriage Dissolution Seminar, 04/06)
- Post-Trial Practice in Family Law/Tex. Family Law Practice Manual (Speaker, 2005 Poverty Law Conf., 04/05)
- Objections, Predicates, and Preservation of Error (Speaker, 2004 Ultimate Trial Notebook, 12/04)
- Family/Juvenile Law Case Update (Speaker, 2004 Tex. Center for the Judiciary Annual Conf., 09/04)
- Best Interest of the Child (Speaker, 2004 Tex. Center for the Judiciary Winter Regional Conf., 02/04)
- Mandamus and Accelerated Appeals (Speaker, 2003 Advanced Family Law Seminar, 08/03).
- New & Creative Uses of the Family Practice Manual (Speaker, 26th Annual Marriage Dissolution Sem., 05/03)
- Taking Me Higher: Preparing the Appeal (Speaker, 25th Annual Marriage Dissolution Seminar, 05/02)
- Family Violence Case Law Update (Speaker, 2002 Tex. Center for the Judiciary Family Violence Conf., 04/02)
- Appellate-Mandamus (Speaker, Advanced Family Law Drafting, 12/01)
- Multiple chapters and portions of chapters in Family Law Expert Witness Manual (08/99)
REPORTED CASES
- liff v. liff, ___ S.W.3d ___, 2011 WL 1446725 (Tex. 2011)
- Critz v. Critz, 297 S.W.3d 464 (Tex. App.—Fort Worth 2009, no pet.).
- In re S.J.A., 272 S.W.3d 678 (Tex. App.—Dallas 2008, no pet.).
- In re M.P.B., 257 S.W.3d 804 (Tex. App.—Dallas 2008, no pet.).
- In re Green, 221 S.W.3d 645 (Tex. 2007, orig. proceeding).
- In re C.M.B., 204 S.W.3d 886 (Tex. App.—Dallas 2006, pet. denied).
- Kieter v. Tousi, 197 S.W.3d 300 (Tex. 2006).
- In re E.A.C., 162 S.W.3d 438 (Tex. App.—Dallas 2005, no pet.).
- In re S.L.P., 123 S.W.3d 685 (Tex. App.—Fort Worth 2003, no pet.).
- In re A.A.F., 120 S.W.3d 517 (Tex. App.—Dallas 2003, no pet.).
- Burns v. Burns, 116 S.W.3d 916 (Tex. App.—Dallas 2003, no pet.).

HONORS /ACTIVITIES

Member: American Bar Association, Texas Bar Association, Dallas Bar Association
State Bar College member since 1997
to present (co-chairman as of 2010); Family Law Council, 2008 to present
Annette Stewart American Inn of Court – Master, 2003 to present
Texas Family Law Foundation, sustaining member

Honors: Briefing and Research Attorney for the Dallas Court of Appeals, 1989-1992
Editor-in-Chief – State Bar of Texas Family Law Section Report October 2007 to present
Named to Best Lawyers in America – Family Law 2010, 2011
Named to Best Women Lawyers in Dallas – Appellate 2010
Named to Best Lawyers in Dallas—2011
Named to Baylor University Louise Herrington School of Nursing “100 Legends in the Line.”
Course Director (with Jimmy Vaught)—Texas Academy of Family Law Specialists 26th Trial Institute
(02/10)
Dallas Bar Association—Family Law Section Board Member 2010 to present
Martindale-Hubbell A-V rated
Cover Story, Texas Lawyer, Aug. 1, 2005
Sustaining Life Fellow, American Bar Foundation, 2006 to present
The firm’s practice includes family law, divorce, child custody, collaborative law, mediation, arbitration, marital property agreements and civil appeals

PROFESSIONAL ACTIVITIES

Shareholder, VAUGHT LAW FIRM, P.C.
Board Certified, Civil Appellate Law (1988-present)
Board Certified, Family Law (2000-present)
Texas Board of Legal Specialization

LICENSED TO PRACTICE

The Supreme Court of Texas
The Supreme Court of the United States
The United States Courts of Appeals for the Fifth and Eighth Circuits
United States Federal District Court for the Western District of Texas

PROFESSIONAL MEMBERSHIPS & HONORS

Martindale-Hubbell - “AV” rating
Martindale-Hubbell Bar Register of Preeminent Lawyers
Fellow, American Academy of Matrimonial Lawyers
President-Elect (2010-2011), Vice-President (2009-2010), Secretary (2008-2009), Treasurer (2007-2008), Texas Chapter of American Academy of Matrimonial Lawyers
Certified as a Matrimonial Arbitrator by the American Academy of Matrimonial Lawyers
Member, Council, State Bar Family Law Section 2006-present, Treasurer (2011-12)
Member, Legislative Committee, State Bar Family Law Section
Member, Pro Bono Committee, State Bar Family Law Section
Chair (2009-present), Member (2007-present), Membership and Member Services Committee, State Bar Family Law Section
Member, Board of Editors, Family Law Section Report, State Bar Family Law Section 2007-present
Member, Family Law Pattern Jury Charge Committee, State Bar of Texas (2009-present)
McCullar ✯ Vaught, P. C. included in 2004 SEAK, Inc. National Directory of Physicians’ Counsel (one of only two Texas family law firms included in the publication)
Member, The Collaborative Law Institute of Texas
Member, Professionals for Collaborative Family Law
Course Director, 33rd Marriage Dissolution Seminar, San Antonio, Texas, May 2010.
Associate Chair, Family Law on the Front Lines (University of Texas 2002)
Co-Course Director, Texas Academy of Family Law Specialists Trial Institute (2010)
Member, Planning Committee, Texas Academy of Family Law Specialists Trial Institute (2009)
Member, Planning Committee, Advanced Family Law Drafting Course (2008)
Member, Planning Committee, Advanced Family Law Course (2003 & 2007, 2011)
Member, Planning Committee, Family Law on the Front Lines (University of Texas 2001-2007)
Member, Planning Committee, The Ultimate Trial Notebook - Family Law (2000)
Member, Planning Committee, Fifth, Sixth, Ninth, Tenth, Eleventh and Thirteenth Annual Advanced Civil Appellate Practice Courses (1991-92; 1995-97, 1999)
Member, Editorial Board, APPELLATE ADVOCATE, State Bar Appellate Practice & Advocacy Section 1994-97
Member, Council, State Bar Appellate Practice & Advocacy Section 1995-1998
Member, Task Force on Staff Diversity, Texas Commission on Judicial Efficiency 1995-96
Chair, Civil Appellate Law Section, Travis County Bar Association November 1991-1993, 1995-1997
Member, Texas Academy of Family Law Specialists
Texas Family Law Foundation
Member, Travis County Family Law Advocates; President (2002-2003), Secretary/Treasurer (2001-2002)
Public Service Award, The Women’s Advocacy Project (2003)
Member, Family Law Section Board of Directors, Austin Bar Association (2003-2007); Treasurer (2004-2005); President Elect (2005-2006); President (2006-2007)
Member, Planning Committee, Primer for Handling Civil Appeals, Travis County Bar Association, Austin 1995, 1996
Staff Attorney, Hon. Jack Hightower, Justice, The Supreme Court of Texas 1989-1995

EDUCATION

  Baylor University School of Law  J.D., cum laude  1980
  University of Texas  B.A. 1974

SELECTED APPELLATE CASES

Fish v. Lebrie, 2010 WL 5019411 (Tex. App.- Austin 2010, no pet.).
Cox v. Cox, 298 S.W.3d 726 (Tex. App.—Austin 2009, no pet.).
Holmes v. Kent, 221 S.W.3d 622 (Tex.2007).
Fox v. Fox, 2006 WL 66473 (Tex. App.—Austin 2006, no pet.).
Hart v. Webster, 2006 WL 1707975 (Tex. App.—Austin 2006, no pet.).

**SELECTED LAW RELATED PUBLICATIONS & PRESENTATIONS**

“The Road to Settlement: Rule 11 Agreements, Informal Settlement Agreements and Mediated Settlement Agreements,” 34th Marriage Dissolution Seminar, Austin, Texas, April 2011.


“Take This House and Shove It”, Texas Advanced Paralegal Seminar 2010.


“Different Ways to Trace Separate Property”, 35th Annual Advanced Family Law Course, Dallas, Texas, August 2009.

“Marital Property Agreements: And You Know It Don’t Come Easy,” 2009 State Bar of Texas Annual Meeting, Dallas, Texas, June 2009.


“Marital Property Agreements: Still Crazy After All These Years,” 32nd Annual Advanced Family Law Course, San Antonio, Texas, August 2006.


“Should the Abuse of Discretion Standard in Child Custody Cases Be Re-Examined?,” APPELLATE ADVOCATE, State Bar Appellate Practice & Advocacy Section Vol. XVIII, No. 5 (Summer 2006)


“The 10 Biggest Mistakes Physicians Make in a Divorce”, THE BIGGEST LEGAL MISTAKES THAT PHYSICIANS MAKE AND HOW TO AVOID THEM (SEAK, Inc. 2005).


“Family Law in Probate Court,” Travis County Family Law Section, Austin 2004.

“Appeals and Mandamus - How to Repair Your Case and Prevent the Need for Repairs (or What to Do When Your Case is in the Ditch)”, 29th Annual Advanced Family Law Course, San Antonio, Texas, August 2003.


“Termination and Adoption: It Ain’t Over Till It’s Over”, 28th Annual Advanced Family Law Course, Dallas, Texas, August 2002.


“Summary Judgments and Declaratory Judgments in Divorce,” Marriage Dissolution Seminar, Austin, Texas, May 2002.

“Termination and Adoption: It Ain’t Over Till It’s Over,” Marriage Dissolution Seminar, Austin, Texas, May 2002.


“Pretrial and Trial Strategies for the Complex Property Case”, Santa Fe, New Mexico, October 2000.


Internal Procedures in the Texas Supreme Court Revisited: The Impact of the Petition for Review and Other Changes, 31 TEX. TECH L. REV. 63 (2000)


“Fiduciary Duties of Spouses, Effective Use of the Remedy of the Constructive Trust, Recoveries for Violations of These Duties, and Issues Presented When Spouses are under Conflicting Fiduciary Duties,” New Frontiers in Marital Property Law, Sante Fe, New Mexico October 1998

“Appeal of the Coverage Suit,” Third Annual Insurance Law Institute (University of Texas School of Law, October 1998) (panelist/speaker and co-author);

“The New Appellate Rules -- At Last!” Eleventh Annual Advanced Civil Appellate Practice Course, Dallas September 1997 (speaker and author);

GUIDE TO THE NEW RULES OF APPELLATE PROCEDURE (State Bar of Texas 1997) (contributing author);

Motion Practice in the Texas Supreme Court, 59 TEX. B. J. 846 (October 1996)

“Factual and Legal Sufficiency in the Texas Supreme Court,” Tenth Annual Advanced Civil Appellate Practice Course, Austin 1996 (co-author)

"Inside the Texas Supreme Court," Ninth Annual Advanced Civil Appellate Practice Course, San Antonio 1995 (moderator and author)

Internal Procedures in the Texas Supreme Court, 26 TEX. TECH L. REV. 935 (1995)

"Internal Procedures and Motion Practice in the Supreme Court," Seventh Annual Advanced Civil Appellate Practice Course, Austin 1993 (speaker and author)
EDUCATION
J.D., Texas Tech University School of Law, 1999
B.A., University of Texas at Austin, 1996

EMPLOYMENT BACKGROUND
Law Office of Gary L. Nickelson, 2008-present
Partner with Shannon, Gracey, Ratliff & Miller, L.L.P., 2005-2007
Associate with Shannon, Gracey, Ratliff & Miller, L.L.P., 2001-2004
Staff Attorney to Justice David Chew of the El Paso Court of Appeals, 2000

OFFICES HELD
Member, Family Law Council, State Bar of Texas Family Law Section 2010-2015
Director, Tarrant County Bar Association Board of Directors, 2008-2009
Chair of the Tarrant County Bar Association Appellate Section, 2008-2009
Vice-Chair of the Tarrant County Appellate Section, 2007-2008
Secretary of the Tarrant County Appellate Section, 2006-2007

HONORS RECEIVED
Board Certified in Civil Appellate Law, 2006-present
Rising Star, Texas Monthly Magazine 2004-2010
Top Attorney, Fort Worth Magazine, 2007-2010

CLE ACTIVITIES
· Author and Presenter of Running a Law Office for Fun And Profit, 2011 State Bar of Texas Soaking Up Some CLE Seminar, South Padre, Texas.
· Author and Presenter of Appellate CYA, 2011 State Bar of Texas Marriage Dissolution Course, Austin, Texas.
· Co-Author and Co-Presenter of Appellate Practice from Every Angle, 2010 State Bar of Texas Advanced Family Law Course.
· Co-Author and Presenter of Preservation of Error (Including Making and Meeting Objections), 2009 Trial of Breach of Fiduciary Duty Litigation Cases, Fredericksburg, Texas.
· Author and Presenter of Equitable Remedies: Getting Out of Traps, Messes, and Other Problems to which You or Your Client May Have Unintentionally Agreed, 2009 State Bar of Texas Advanced Family Law Course.
· Course Director for the 2009 Boot Camp prior to the State Bar of Texas Advanced Family Law Course.
· Author and Presenter of, Appealing Your Family Law Case, 23rd Annual Family Law Conference, South Texas College of Law, March 2009, Houston, Texas.
- Course Director of Family Law Essentials Seminar, October 2008, San Angelo, Texas.
- Author and Presenter of *Brief Writing that Appeals to Your Audience*, 2008 State Bar of Texas Marriage Dissolution Course.
- Course Director for 2008 Brown Bag Seminar for Tarrant County Bar Association titled “*When Reasonable Minds Cannot Disagree: Summary Judgment Practice in Texas.*”
- Co-Author and Presenter of *Extraordinary Writs: When Ordinary Relief Just Won't Do* 2007 State Bar of Texas Marriage Dissolution Course, El Paso.
- Co-Author of *Appellate Advocacy: From the Judge's Perspective*; 2005 State Bar of Texas Advanced Family Law Course, Austin.
- Co-Author and Presenter of *Like Skeet and Sporting Clay: Direct and Collateral Attacks on Judgments*, August 2005 State Bar of Texas Advanced Family Law Course.
- Co-Author of *Preservation of Error for Discovery Issues*, 2005 Brown Bag Seminar for Tarrant County Bar Association, Appellate Section
- Author of *Relief is Just an Appeal Away: Drafting With Appeal*, 2003 State Bar of Texas Advanced Family Law Course.
- Author of *Puttin' on the Writs: Mandamus, Prohibition and Habeas Corpus*, 2002 State Bar of Texas Advanced Family Law Course.

**REPORTED CASES**


*Loaiza v. Loaiza*, 130 S.W.3d 894 (Tex.App.—Fort Worth 2004, no pet.).


EDUCATION
J.D.: Texas Tech University School of Law, 1999
M.A.: Baylor University, 1993
B.A.: Baylor University, 1991

EMPLOYMENT BACKGROUND
Partner, Mullin Hoard & Brown, L.L.P., 2007-present
Associate, Mullin Hoard & Brown, L.L.P., 2001-2007
Briefing Attorney to Hon. Sam R. Cummings, United States District Court for the Northern District of Texas, 1999-2001

HONORS/PROFESSIONAL ACTIVITIES
Member, Texas Bar Foundation 2008-present
Coach, Texas Tech University School of Law Moot Court Team, 2006-present

SELECTED APPELLATE CASES
U.S. Supreme Court

U.S. Court of Appeals
   • Oscar Renda Contracting, Inc. v. City of Lubbock, Tex., 463 F.3d 378 (5th Cir. 2006).
   • In re Brown, 178 Fed.Appx. 409 (5th Cir. 2006).
   • Barnard Const. Co., Inc. v. City of Lubbock, 457 F.3d 425 (5th Cir. 2006).
   • In re Jay, 432 F.3d 323 (5th Cir. 2005).

Supreme Court of Texas

Texas Courts of Appeals
   • In re Marriage of Watson, 2010 WL 346153 (Tex. App.—Amarillo 2010, no pet.).
   • Aurora Petroleum, Inc. v. Newton, 287 S.W.3d 373 (Tex. App.—Amarillo 2009, no pet.).
   • In re S.B.S., 282 S.W.3d 711 (Tex. App.—Amarillo 2009, pet. denied).
   • In re G.K.D., 2009 WL 136935 (Tex. App.—Amarillo 2009, no pet.).
   • In re K.D.W., 2008 WL 4889997 (Tex. App.—Amarillo 2008, no pet.).
   • Wells v. Wells, 251 S.W.3d 834 (Tex. App.—Eastland 2008, no pet.).
   • In re Graves, 217 S.W.3d 744 (Tex. App.—Waco 2007, orig. proceeding).
   • In re E.A.C., 2007 WL 836901 (Tex. App.—Amarillo 2007, no pet.).
   • In re ExxonMobil Corp., 153 S.W.3d 605 (Tex. App.—Amarillo 2004, orig. proceeding).
   • Ramirez v. Consolidated HGM Corp., 124 S.W.3d 914 (Tex. App.—Amarillo 2004, no pet.).
EDUCATION:
J.D. 2007 SMU Dedman School of Law, Dallas, Texas, cum laude
B.B.A. in Finance 2003 University of Texas at Austin, Austin, Texas

ACADEMIC HONORS:
The Order of the Barristers, National Member
SMU Law Review Association, 2005-2007, Articles Editor
National Criminal Procedure Moot Court Team
    2006: 2nd Place;
    2005: Best Appellant Brief
Client Counseling Competition, 2005: 2nd Place
University Scholar
Dean’s List Scholar

PROFESSIONAL ACTIVITIES:
Associate – KOONSFULLER, P.C. (Practice Limited to Matrimonial Law)
Member – Dallas Bar Association
    • Community Involvement Committee
    • Admissions and Membership Committee
Member – Dallas Association of Young Lawyers (DAYL)
    • Judiciary Committee
Member – State Bar of Texas (Family Law Section; Appellate Section)

CO-AUTHOR, AUTHOR AND SPEAKER:
Co-Author, Shared Custody: Solutions for Keeping the Lid on Pandora’s Box, Advanced Family Law (2010)
Co-Author, Discovery from Third Parties, Marriage Dissolution Institute (2009)
Co-Author, Trying and Defending the Contempt Case – Details, Details, Details, Advanced Family Law (2008)
Co-Author, Electronic Evidence in the Information Age, Marriage Dissolution Institute (2008)
    • Winner – Best Family Law CLE Article 2008
Co-Author & Speaker, Family Law Update, General Practice Institute (2008, 2007)
Co-Author, Estate Planning and Divorce, Estate Planning Council of North Texas (2007)
Co-Author, How to Get Above, Beyond, and Around the Child Support Cap, Parent Child Relationships: The Definitive Short Course (2007)
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APPellate Practice FROM EVERY ANGLE

I. INTRODUCTION

The time to start preparing for the appeal is on the first day of the case and with the first pleading. It is also the best way to prevent an appeal. The purpose of this paper is to take the practitioner through each step of the case and present the steps necessary to protect the record and to prepare for and in all probability prevent the necessity of an appeal.

II. PRESERVING ERROR PRETRIAL AND AT TRIAL

A. Introduction.

As trial practitioners are well aware, unless an issue is preserved at trial, the issue is waived on appeal. However, trial practitioners should also be mindful of preserving the record for appeal at other stages of litigation, namely both pre-trial and post-trial. While this paper includes a discussion of preservation of error both in rules and in case law, it also the best way to prevent an appeal. The purpose of this paper is to apprise the practitioner of the nature and basic issues of the controversy and what is preserved at trial, the issue is waived on appeal. The basic reason for the requirement that a party object at trial is that the trial court must be afforded an opportunity to correct the error or rule on the issue.

1. Preserving the record through special exceptions.

The purpose of special exceptions is to inform the opposing party of defects in its pleadings so the party can cure them, if possible, by amendment. Horizon/CMS Healthcare Corp. v. Auld, 34 S.W.3d 887, 897 (Tex. 2000). Texas follows a “fair notice” standard for pleading, which looks to whether the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant. See Broom v. Brookshire Bros., Inc., 923 S.W.2d 57, 60 (Tex. App.—Tyler 1995, writ denied).

When a party fails to specially except, courts should construe the pleadings liberally in favor of the pleader. See Boyles v. Kerr, 855 S.W.2d 593, 601 (Tex. 1993). A party waives any defect, omission, or fault in a pleading that is not specifically pointed out by a special exception. TEX. R. CIV. P. 90; J.K. & Susie L. Wadley Research Inst. & Blood Bank v. Beeson, 835 S.W.2d 689, 693 (Tex. App.—Dallas 1992, writ denied). The movant then has the burden to obtain a hearing to present its special exceptions to the trial court and obtain a ruling. Hanners v. State Bar, 860 S.W.2d 903, 912 (Tex. App.—Dallas 1993, no writ); R.I.O. Sys., Inc. v. Union Carbide Corp., 780 S.W.2d 489, 491 (Tex. App.—Corpus Christi 1989, writ denied). If the record does not show the movant obtained a ruling on the special exceptions, the movant has failed to preserve this complaint for appellate review. TEX. R. APP. P. 52(a); Hanners, 860 S.W.2d at 912.

2. Preserving the record through motions to compel discovery.

When a party refuses to comply with proper discovery requests, the party seeking discovery may file a motion to compel the other party to respond. TEX. R. CIV. P. 215.1(b). If a party seeking discovery does not ask for a hearing on the other party’s objections or motion for protection or on its own motion to compel, it waives its right to the requested discovery. Pace v. Jordan, 999 S.W.2d 615, 622 (Tex. App.—Houston [1st Dist.] 1999, pet. denied). If a party does not obtain a pretrial ruling on known discovery misconduct that occurred before the trial, the party waives any claim for sanctions based on that misconduct. Meyer v. Cathey, 167 S.W.3d 327, 333 (Tex. 2005).

Accordingly, practitioners should allow sufficient time prior to trial to: (1) ascertain whether discovery responses are sufficient, (2) file any necessary motions to compel responses to proper discovery requests, (3) obtain a setting on any motions to compel and provide opposing counsel with the requisite notice of the hearing, and (4) allow the trial court to rule on any motions to compel. The failure to follow this “full circle of discovery” will result in waiver of any complaint arising from discovery misconduct.

3. Preserving the record when the opposing party fails to timely designate an expert witness.

A party must designate experts by furnishing the information requested under Rule 194.2(f) by the later of thirty days after the request is served, or with regard to all experts testifying for a party seeking affirmative relief, ninety days before the end of the discovery
period.  

If a party fails to do so, then that witness may not testify at trial without a showing of good cause or unfair surprise.  

See TEX. R. CIV. P. 193.6.  Exclusion of an untimely designated expert’s testimony is mandatory if the plaintiff does not establish good cause for the late designation or a lack of unfair surprise or prejudice.  

Id.  Alternatively, the trial court, in its discretion, may grant a continuance to allow the late designation and to allow opposing parties to conduct additional discovery necessitated by new information presented.  

See TEX. R. CIV. P. 193.6(c).

Accordingly, practitioners should object or move to strike an expert who has not been timely designated.  If the opposing party can demonstrate good cause for the late designation or a lack of unfair surprise or prejudice, practitioners should request additional discovery in the form of the expert’s deposition.

4.  Preserving the summary judgment record.

a.  Avoiding exclusion of summary judgment evidence by timely supplementing discovery responses.

Although technically not a classic preservation issue, trial practitioners nevertheless should be aware of the recent Texas Supreme Court case law addressing evidentiary exclusion in summary judgment proceedings.  

See Fort Brown Villas III Condominium Ass’n, Inc. v. Gillenwater, No. 07-1028, 2009 WL 1028047 (Tex. 2009).  It is well-settled that under Rule 193.6, discovery that is not timely disclosed and witnesses that are not timely identified are inadmissible as evidence at trial.  

TEX. R. CIV. P. 193.6(a).

Prior to the introduction of the no-evidence motion for summary judgment in Texas, courts did not apply evidentiary sanctions and exclusions for failure to timely designate an expert witness in summary judgment proceedings.  See, e.g., State v. Roberts, 882 S.W.2d 512, 514 (Tex. App.—Austin 1994, no writ) (“Discovery rules and sanctions for failure to designate expert witnesses do not apply to summary judgment proceedings.”);  

see also Purvis Oil Corp. v. Hillin, 890 S.W.2d 931, 939-40 (Tex. App.—El Paso 1994, no writ);  

Gandara v. Novasad, 752 S.W.2d 740, 743 (Tex. App.—Corpus Christi 1988, no writ).  However, in 1997, the no-evidence summary judgment motion was introduced to the Texas Rules of Civil Procedure as Rule 166a(i), and in 1999, pretrial discovery rules were amended to include evidentiary exclusions under Rule 193.6.  

Id. at § 193.6.

Since that time, most courts of appeals have applied Rule 193.6 to summary judgment proceedings.  See, e.g., Thompson v. King, 2007 WL 1064078 *2 (Tex. App.—Tyler Apr. 11, 2007, pet. denied) (mem. op.);  

Blake v. Dorado, 211 S.W.3d 429, 432 (Tex. App.—El Paso 2006, no pet.).  On April 17, 2009, the Texas Supreme Court issued an opinion agreeing with those courts and holding that evidentiary exclusion under Rule 193.6 applies to summary judgment proceedings.  

Gillenwater, 2009 WL 1028047 *1.  Accordingly, trial practitioners should take care to confirm that their discovery responses are timely served and properly supplemented to avoid exclusion of summary judgment evidence and an adverse summary judgment.  


b.  Preserving objections to summary judgment evidence.

Before the revised Texas Rules of Appellate Procedure took effect on September 1, 1997, “a party objecting to summary judgment evidence had to obtain a written ruling on the objection or to have a lack of a ruling.”  

Frazier v. Yu, 987 S.W.2d 607, 609 (Tex. App.—Fort Worth 1999, pet. denied).  Rule 33.1(a), which replaced former Rule 52(a), relaxed the requirement of an express ruling and recognized implied rulings.  

See TEX. R. APP. P. 33.1(a) .  Under this substantive change, error is preserved as long as the record indicates in some way that the trial court ruled on the objection either expressly or implicitly.  

Id.

Some courts have held that a trial court may implicitly overrule objections to summary judgment evidence.  

See, e.g., Residential Dynamics, LLC v. Loveless, 186 S.W.3d 192, 195 (Tex. App.—Fort Worth 2006, no pet.);  


Frazier, 987 S.W.2d at 610 (Tex. App.—Fort Worth 1999, pet. denied).  But see Well Solutions, Inc. v. Stafford, 32 S.W.3d 313, 317 (Tex. App.—San Antonio 2000, no pet.) (rejecting the notion that a trial court’s ruling on an objection to summary-judgment evidence can be implicit in its ruling on the motion for summary judgment);  

Dolcefino v. Randolph, 19 S.W.3d 906, 926-27 & n.16 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (declining to infer from the record any implicit ruling by the trial court on objections to summary judgment evidence);  


In re Estate of Loveless, 64 S.W.3d 564, 573 (Tex. App.—Texarkana 2001, no pet.);  


C. Preserving the Record at Trial.

Nothing is more frustrating than winning a case at trial, then losing it on appeal because a proper objection was not made, a ruling was not obtained, a procedural rule for preservation was not followed, or a record was otherwise not preserved.

1. Right to object.

Every litigant has a right to object to the introduction of improper evidence, and the attorney has a duty to the client to assure that only competent evidence is introduced against his client. TEIA v. Drayton, 173 S.W.2d 782, 788 (Tex. Civ. App.—Amarillo 1943, writ ref’d n.r.e.).

2. Time for objection.

The party opposing the admission of evidence must object at the time the evidence is offered and not after it has been received. Fort Worth Hotel Ltd. Partnership v. Ensearch Corp., 977 S.W.2d 746, 756 (Tex. App. –Fort Worth 1998, no writ). When an objection is sustained as to testimony that has been heard by the jury, a motion to strike request for the court to instruct the jury to disregard the testimony should be made to preserve error. Hukaby v. Henderson, 635 S.W.2d 129, 131 (Tex. App.—Houston [1st Dist.] 1981, writ ref’d n.r.e.).

However, in some instances no objection may be required at all to preserve error, particularly in appeals involving expert testimony. See City of San Antonio v. Pollack, 284 S.W.3d 809, 816 (Tex. 2009) (holding that opinion evidence offered without an underlying factual basis is legally insufficient to support a judgment, even when the opposing party did not object to the testimony); Coastal Transp. Co. v. Crown Central Petrol. Corp., 136 S.W.3d 227, 232 (Tex.2004) (similar holding for conclusory statements by an expert).


To properly preserve error, the objection must be specific enough to enable the trial court to understand the precise question and to make an intelligent ruling affording the offering party the opportunity to remedy the defect if possible. McKinney v. Nat’l Union Fire Ins. Co., 772 S.W.2d 72, 74 (Tex. 1989) (op. on reh’g); In re C.J.B., 137 S.W.3d 814, 818-19 (Tex. App.—Waco 2004, no writ). To preserve an issue for appellate review, a party must make a timely, specific objection and obtain a ruling on that objection. TEX. R. APP. P. 33.1(a); In re M.D.S., 1 S.W.3d 190, 202 (Tex. App.—Amarillo 1999, no pet.)

4. Running objections.

Under the proper circumstances, a running objection will preserve error. The appellate court may consider the proximity of the objection to the subsequent testimony, the nature and similarity of the subsequent testimony as compared to the prior testimony and objection, whether the subsequent testimony was elicited from the same witness, whether a running objection was requested and granted, and any other circumstance that might suggest why the objection should not have been urged.
objection can satisfy the TRAP 33.1(a) requirement of a timely objection. The party requesting the running objection runs the risk of waiving same if cross examination goes deep into the objectionable information. Leaird’s, Inc., d/b/a Leaird’s White Elephant and White Elephant Store V. Wrangler, Inc., 31 S.W.3d 688, 690-91 (Tex. App.—Waco 2000, pet. denied).

5. Limited and conditional admissibility.

Where evidence is admissible for one purpose and inadmissible for another, it may be admitted for the proper purpose. The court must, upon motion of a party, limit the evidence to its proper purpose, and in the absence of such motion, the right to complain of the improper purpose is waived. Rendleman v. Clark, 909 S.W.2d 56, 58 (Tex. App. – Houston [14th Dist.] 1995, writ dism’d). Evidence may also be admitted, conditioned upon the representation of counsel that “it will be connected up at a later time.” If it is not connected up at a later time, the opposing party must request the prior testimony be stricken and request an instruction from the court to disregard the ‘unconnected’ testimony. Galveston H&SAR Co. v. Janert, 107 S.W. 963, 966-67 (Tex. Civ. App.—1908, writ denied).


The objecting party must secure a ruling on objections in order to complain on appeal or else error is waived. Cusak v. Cusak, 491 S.W.2d 714, 718 (Tex. Civ. App.—Corpus Christi 1973, writ dism’d). The objecting party is also entitled to an immediate ruling admitting or excluding the evidence. Thomas v. Atlanta Lumber Co., 360 S.W.2d 445, 447 (Tex. Civ. App.—Texarkana 1962, no writ). Even if a ruling is obtained, error cannot be predicated on a ruling admitting or excluding evidence unless a substantial right is affected and the substance of the excluded evidence is made known to the court. Hood v. Hayes Co., 836 S.W.2d 327, 328-29 (Tex. App.—Austin 1992, no writ).

7. Offer of Proof and Bill of Exceptions.

a. Purpose.

The primary purpose of an offer of proof and a bill of exceptions is to include excluded evidence in the record to allow the appellate court to determine whether the trial erred in excluding the evidence. Ludlow v. DeBerry, 959 S.W.2d 265, 269-70 (Tex. App.—Houston [14th Dist.] 1997, no writ); Sullivan v. Bickel & Brewer, 943 S.W.2d 477, 484 (Tex. App.—Dallas 1995, writ denied). Additionally, the purpose is to allow the trial court to reconsider its ruling in light of actual evidence. Ludlow, 959 S.W.2d at 270. An offer of proof is a trial-time offer of excluded evidence. TEX. R. EVID. 103(a)(2); Clone Component Distribrs. v. State, 819 S.W.2d 593, 596 (Tex. App. – Dallas 1991, no writ).

b. Offer of Proof.

Whenever possible, a party should preserve excluded evidence through an offer of proof. To preserve error in the exclusion of evidence through an offer of proof, a party must: (1) offer the evidence at trial; (2) if an objection is lodged, specify the purpose for which the evidence is offered and the reasons why the evidence is admissible; (3) obtain a ruling from the court; and (4) if the judge rules the evidence inadmissible, make an offer of proof. Estate of Veale v. Teledyne Indus., 899 S.W.2d 239, 242 (Tex. App.—Houston [14th Dist.] 1995, writ denied). The offer must show the substance of the evidence that was excluded; formal proof is not required, and courts prefer a concise statement over a lengthy presentation. In re N.R.C., 94 S.W.3d 799, 806 (Tex. App.—Houston [14th Dist.] 2002, pet. denied).

1) Oral Testimony.

The excluded evidence is presented in the form of a summary or in a question-answer format outside the presence of the jury. TEX. R. EVID. 103(b); Babcock v. Northwest Memorial Hosp., 767 S.W.2d at 708. If the substance of the evidence is apparent from the record, however, an offer of proof is not necessary. TEX. R. EVID. 103(a)(2); Marathon Corp. v. Pitzner, 55 S.W.3d 114, 143 (Tex. App.—Corpus Christi 2001), rev’d on other grounds, 106 S.W.3d 724 (Tex. 2003).

2) Documentary Evidence.

To preserve documentary evidence, the party should ask the court reporter to mark the document as an offer of proof, identify it with an exhibit number, and file it with the exhibits in the reporter’s record. See TEX. R. CIV. P. 75a; Owens-Illinois Inc. v. Chatham, 899 S.W.2d 722, 731 (Tex. App.—Houston [14th Dist.] 1995, writ dism’d).

3) Deadline.

An offer of proof must be made before the court reads the charge to the jury. TEX. R. EVID. 103(b).

c. Bill of Exceptions.

A bill of exceptions is a post-trial offer of evidence in written form and is necessary only when the complaint or evidence is not preserved in an offer of proof. See TEX. R. APP. P. 33.2. It should state the party’s objection and the trial court’s ruling. See TEX. R. APP. P. 33.2(a). The bill must then be presented to the trial judge for a ruling. TEX. R. APP. P. 33.2(c)(1).
1) Parties Agree.

If the parties agree on the contents of the bill, the judge must sign the bill and file it with the trial court clerk. TEX. R. APP. P. 33.2(c)(2).

2) Parties Disagree.

If the parties do not agree on the contents of the bill, the trial judge must, after notice and hearing, do one of the following:

- If the judge finds the bill correct, sign the fill and file it with the trial court clerk (TEX. R. APP. P. 33.2(c)(2)(A)); or
- Suggest to the complaining party the corrections that the judge believes are necessary to make it accurately reflect the proceedings in the trial court, and if the party agrees to the corrections, have the corrections made, sign the bill, and file it with the trial court clerk (TEX. R. APP. P. 33.2(c)(2)(B)); or
- If the complaining party will not agree to the corrections suggested by the judge, return the bill to the complaining party with the judge’s refusal written on it, and prepare, sign, and file with the trial court clerk a bill that, in the judge’s opinion, accurately reflects the proceedings in the trial court. TEX. R. APP. P. 33.2(c)(2)(C).

3) Bystander’s Bill.

If the complaining party disagrees with the judge’s corrections, that party must file the refused bill and a “bystanders bill,” in which at least three bystanders, who are not interested in the outcome of the case, state in affidavits they were present and observed the matter that the bill addresses. TEX. R. APP. P. 33.2(c)(3). Filing the bystanders’ affidavits without the bill does not preserve error. Citizens Law Inst. v. State, 559 S.W.2d 381, 383 (Tex. App.—Dallas 1977, no writ). Filing the refused bill without the bystanders’ affidavits does not preserve error. Boddy v. Canteau, 441 S.W.2d 906, 914 (Tex. App.—San Antonio 1969, writ ref’d n.r.e.).

4) Deadline.

A formal bill of exception must be filed no later than 30 days after the filing party’s notice of appeal is filed. TEX. R. APP. P. 33.2(e)(1). The appellate court may extend the time to file a formal bill of exception if, within 15 days after the deadline for filing the bill, the party files a motion in the appellate court. TEX. R. APP. P. 33.2(e)(3).

5) Refusal to Permit Offer or Bill.

It is reversible error for the trial court to refuse to allow a party to make an offer of proof or a bill of exceptions. State v. Biggers, 360 S.W.2d 516, 517 (Tex. 1962). If the evidence that the party was attempting to preserve, however, was immaterial to the outcome of the suit, then the court’s refusal is not reversible error. Dorn v. Cartwright, 392 S.W.2d 181, 186 (Tex. App.—Dallas 1965, writ ref’d n.r.e.).

d) Instructed Verdict.

A motion for instructed verdict may be oral rather than written, provided specific grounds are given therefor. Lack of specificity is not fatal if no fact issues are raised by the evidence. Tex. Employers Ins. Ass’n v. Page, 553 S.W.2d 98 (Tex. 1977). If, after the motion for instructed verdict is presented and overruled, the moving party presents evidence, the motion is waived unless it is re-urged at the conclusion of all of the evidence. Nelson Cash Register v. Data Terminal, 671 S.W.2d 594 (Tex. App.—San Antonio 1984, no writ); Wenk v. City Nat’l Bank, 613 S.W.2d 345 (Tex. Civ. App.—Tyler 1981, no writ). A ruling on the motion must be obtained before the verdict is returned in order to preserve error. State v. Dikes, 625 S.W.2d 18 (Tex. Civ. App.—San Antonio 1981, no writ).

III. PRESERVATION OF ERROR IN JURY TRIALS

A. Right to Trial by Jury.

A timely request for a jury plus a timely payment of the jury fee are essential to preserving the right to trial by jury. Huddle v. Huddle, 696 S.W.2d 895, 895 (Tex. 1985); Whiteford v. Baugher, 818 S.W.2d 423 (Tex. App.—Houston [1st Dist.] 1991, writ denied). The request and payment of the fee must be made at a reasonable time before trial, but not less than 30 days prior to the date of trial. TEX. R. CIV. P. 216. A demand made 30 days prior to trial is not necessarily timely, but a trial court would abuse its discretion if the jury trial were refused unless it is demonstrated that granting the request will result in injury to the opposing party or will disrupt the court’s docket and handling of court business. Dawson v. Jarvis, 627 S.W.2d 444 (Tex. Civ. App.—Houston 1981, writ ref’d n.r.e.). In Halsell v. Dehoyos, 810 S.W.2d 371 (Tex. 1991), the Supreme Court clarified the law relating to the deadline for requesting a jury trial. Before Halsell, many appellate courts held that if a party filed a jury demand more than 30 days before trial, but after the case was certified for trial on the nonjury docket, the request was not timely, and the party was not entitled to a jury trial. Since Halsell, a request for a jury trial that is made 30 days before the trial is timely, even if it is made after the case is certified for trial. If the case is re-set, the final trial date is the one that controls the 30
day deadline. \textit{Halsell}, 810 S.W.2d at 371; \textit{Whiteford}, 818 S.W.2d at 425. In calculating the 30 day period, the first day of the prescribed period is not included, while the last day of the period is included. \textit{Wittie v. Skees}, 786 S.W.2d 464 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

Payment of the jury fee in advance of the deadline creates a presumption that the jury demand has been made within a “reasonable time.” The opponent may rebut the presumption if the record shows that the granting of a jury trial would operate to injure the adverse party, disrupt the court's docket, or impede the ordinary handling of the trial court's business. \textit{Halsell}, 810 S.W.2d at 371; \textit{Grossnickle v. Grossnickle}, 865 S.W.2d 211, (Tex. App.—Texarkana 1993, no writ); \textit{Wittie}, 786 S.W.2d at 466. Rebuttal apparently requires affirmative action by the litigant to present competent evidence of injury, disruption or impediment. In \textit{Wittie}, the appellate court determined that since the appellee had presented no reporter’s record indicating such testimony, he had failed to rebut the presumption. Accordingly, the trial court's refusal to conduct a jury trial was reversible error.

Further, the refusal to grant a jury trial is harmless error only if the record shows that no material issues of fact exist and an instructed verdict would have been justified. \textit{Halsell}, 810 S.W.2d at 372; \textit{Caldwell v. Barnes}, 154 s.W.3d 93, 98 (Tex. 2004). In \textit{Grossnickle}, the court concluded that because jury findings as to characterization and valuation of community property are binding upon the trial court, fact issues existed concerning the extent and value of the community estate. Because an instructed verdict would have been inappropriate, the error required remand.

Note that TEX. R. CIV. P. 220 provides that the failure of a party to appear for trial shall be deemed a waiver of the right to trial by jury. It additionally provides that when any party has paid the jury fee, the cause may not be withdrawn from the jury docket over the objection of another party. This rule has been interpreted as requiring some affirmative action on the part of the litigant desiring the jury trial. Unless an objection is made to the withdrawal of the case, the non-requesting party has no right to a jury trial. Waiver may be shown by mere acquiescence to the withdrawal of the jury request. \textit{Lambert v. Coachman Indus. of Tex.}, 761 S.W.2d 82 (Tex. App.—Houston [14th Dist.] 1988, writ denied). See also \textit{Green v. W.E. Grace Mfg. Co.}, 422 S.W.2d 723 (Tex. 1968).

A party who gives the court the option to try the case as a bench trial may also waive the right to a jury trial. \textit{Barber v. Barber}, 621 S.W.2d 671 (Tex. Civ. App.—Waco 1981, no writ). In \textit{Duvall v. Sadler}, 711 S.W.2d 369 (Tex. App.—Texarkana 1986, writ ref’d n.r.e.), the parties began a jury trial and midway attempted to settle the case. Settlement attempts failed, and there was apparently some discussion of releasing the jury and continuing the trial to the bench on the basis of stipulations of fact. The trial court did in fact dismiss the jury and stated in the record that the remainder of the case would be heard by the court on stipulations. When the appellant challenged the court's dismissal of the jury, the judge stated the jury had been waived. He further attempted to read into the record facts which would support his finding that the jury had been waived. The appellate court reversed, holding that the right to trial by jury had not been waived because neither the judgment nor findings stated that the agreement or waiver was made in open court and the remainder of the record established that they were not. Without an agreement having been made in open court, no agreement could properly be entered of record.

\section*{B. Voir Dire.}


A party wishing to complain about error during voir dire must object and obtain an adverse ruling on the record in order to preserve its complaints. \textit{Loesch}, 538 S.W.2d at 441. Unless excused by agreement of the parties, the court reporter is required to attend all sessions of court and make a record of the proceedings. TEX. R. APP. P. 13; see also TEX. GOV'T CODE ANN. §52.046. Nonetheless, a party wishing to complain about error during voir dire must be sure that the reporter is transcribing the voir dire proceedings. Otherwise, a formal bill of exceptions must be secured.

1. \textbf{Specific Question Refused.}

A party wishing to voir dire the jury on certain questions which are not permitted by the trial court must make a bill of exceptions, offer the questions to the court, inform the court as to the necessity of the questions, and obtain a ruling. If the matters complained of are not in the reporter’s record or in a bill of exception, they are not preserved for appellate review. \textit{Lauderdale v. Insurance Company of North America}, 527 S.W.2d 841 (Tex. Civ. App—Fort Worth 1975, writ ref'd n.r.e.).

Must the specific questions which a litigant desires to ask of the panel be read into the record? The Supreme Court has considered this issue in \textit{Babcock v. Northwest Memorial Hospital}, 767 S.W.2d 705 (Tex. 1988). There, the plaintiff brought suit for medical
malpractice arising from her hospitalization. During her recovery from a broken pelvis, Mrs. Babcock developed blisters on her heels which ultimately resulted in the amputation of both of her legs. Two pretrial motions in limine were granted at the request of the defendant. The first prohibited the mention of any liability insurance crisis, medical malpractice crisis or other similar statement to the jurors regarding the current state of affairs in the liability insurance industry. The second prohibited calling the jury's attention to any advertisements of a malpractice crisis paid for by and credited to insurance companies. During voir dire, one of the panel members mentioned the advertisements and stated that his concern for the effect of jury awards on insurance premiums might impede his ability to be impartial. He was stricken for cause, but as a result, the plaintiffs renewed their request for permission to question the entire panel about the lawsuit crisis. The trial court denied the request. After the jury was selected, the plaintiffs again objected to the trial court's refusal and asked for an opportunity to include in the record the questions they would have asked the jurors. The trial court denied this request as well. The court of appeals concluded that since the Babcocks did not specifically state to the trial court in a timely fashion the questions they wished to ask on voir dire, they could not complain on appeal. The Supreme Court disagreed, noting that the Babcocks had properly preserved error because they presented a timely request to the trial court, stating the specific grounds for the ruling they desired, and obtained a ruling from the court. The Court declined to require that specific questions be placed in the record provided the nature of the questions is apparent from the context. The Court further found that the language of the motions in limine and the recorded voir dire of the excused juror made it obvious what questions the Babcocks wanted to ask. Additionally, the Babcocks attempted to place their proposed questions into the record, but their request was denied by the trial court.

Keep in mind that where an appellate court has before it only the portion of the voir dire in which the question is asked, objection lodged, and the right denied, nothing is preserved for review. Without the entire voir dire examination, the appellate court cannot determine whether the questions asked were duplicative or whether the answers sought were not otherwise obtained. Burkett v. State, 516 S.W.2d 147 (Tex. Crim. App. 1974); Dickson v. Burlington N. R. R., 730 S.W.2d 82 (Tex. App—Fort Worth 1987, writ ref'd n.r.e.).

2. Time Constraints.

In Kendall v. Whataburger, Inc., 759 S.W.2d 751 (Tex. App.—Houston [1st Dist.] 1988, no writ), the appellate court determined that a complaint as to the insufficiency of the time allotted for voir dire requires a showing of a desire to continue, a request for additional time, and the making of a bill of exceptions showing any questions that were not asked because of a lack of time. One other court has held that an additional step is required. In Hall v. Birchfield, 718 S.W.2d 313 (Tex. App.—Texarkana 1986, no writ), the court held there was no reversible error when the complaining party failed to show that they were required to take an objectionable person on the jury because of the trial court's refusal to permit questions to be asked during voir dire.

The Texas Court of Criminal Appeals has identified three factors that a litigant must demonstrate to successfully complain about the reasonableness of time constraints on voir dire:

- that it did not attempt to prolong the voir dire;
- that it was not permitted to ask proper and relevant questions; and
- it was not permitted to examine jurors who ultimately served on the jury because of insufficient time.

Ratliff v. State, 690 S.W.2d 597 (Tex. Crim. App. 1985); Moriss v. State, 1 S.W.3d 336 (Tex. App.—Austin 1999, no pet.). Criminal opinions which explain how voir dire should be conducted are generally persuasive authority in civil cases since the procedures and principals involved are similar. Dickson v. Burlington N. R. R., 730 S.W.2d 82 (Tex. App.—Fort Worth 1987, writ ref'd n.r.e.).

Many courts have undertaken yet another means by which to impose time constraints. The newest methodology is limiting the total amount of time available for trial. For example, you are advised at the outset that you will have 20 hours in which to present your side of the case. Your time allotment includes all of your direct testimony, all of your cross examination of your adversary's witnesses and all of your objections. To date, we have no appellate cases advising us as to whether such a restriction is constitutional and if so, what steps are necessary in order to preserve error on appeal as to the amount of time allotted. See Walton v. Canon, Short & Gaston, 23 S.W.3d 143, 155-156 (Tex. App—El Paso 2000, no pet.) (McClure, J., concurring). Is a "prior restraint" timetable a violation of the due process clause and/or the open courts provision of the Texas Constitution? One could argue that while a court certainly has the discretion, authority and probably the responsibility of controlling the docket [which would include the ability to tell counsel to "move along" or to begin restricting repetitive and cumulative testimony] the authority does not extend to a blanket prior restraint of the amount of testimony which may be tendered, particularly in light of the fact that the court has no knowledge at the beginning of the trial that such limitations will be
necessary. Furthermore, what steps must be taken to complain of an overly restrictive timetable? Must counsel comply with the restrictions imposed by the cases detailing how to preserve error from an imposition of a time restriction in the voir dire process? If so, then arguably more time must be requested, along with a tender by way of an offer of proof, of the evidence a party was unable to adduce because of the time limitations. It is also questionable whether we can equate a limitation of the right to question potential jurors with the ability to present evidence on the case in chief. In the meantime, to be on the safe side, cover all of these steps when complaining of an unreasonable time limitation.

C. Challenging Jurors for Cause.

A challenge for cause is an objection to a panelist, alleging some fact that by law disqualifies the person to serve as a juror or renders the person unfit to sit on the jury. TEX. R. CIV. P. 228. The rules provide that the court should decide the challenge, and if sustained, discharge the juror, but they do not provide the procedure to be used for preserving error when the challenge is not sustained and an objectionable juror is permitted to serve. In Hallett v. Houston Northwest Medical Ctr., 689 S.W.2d 888, 890 (Tex. 1985), the Supreme Court concluded that the refusal of the trial court to excuse an unqualified juror does not necessarily constitute harm. The harm occurs only if the party uses all of its peremptory challenges. It concluded that to preserve error where a challenge for cause is denied, a party must, before exercising peremptory challenges, advise the trial court that (1) all peremptory challenges will be used, and (2) after exercising the peremptory challenges, specific objectionable jurors would remain on the jury list. If a party fails to do so, then it waives any error committed by the court’s refusal to discharge jurors challenged for cause. Id.; Wooten v.S. Pac. Trans. Co., 928 S.W.2d 76 (Tex. App.—Houston [14th Dist.] 1995, no writ).

Unfortunately, Hallett left a few unanswered questions about what a litigant had to do to preserve error when the trial court denied a challenge for cause. Did the complaining party have to explain why the remaining objectionable jurors were objectionable? Did the litigant have to request an additional peremptory challenge? Texas appellate courts grappled with these questions for years without any answer from the Supreme Court. Sullemon v. U. S. Fid. & Guar. Co., 734 S.W.2d 10 (Tex. App.—Dallas 1987, no writ); White v. Dennison, 752 S.W.2d 714 (Tex. App.—Dallas 1988, writ denied).

After twenty years of silence on the issue, the Supreme Court recently issued three opinions on how to preserve error when a challenge for cause is denied. Hyundai Motor Corp. v. Vasquez, 189 S.W.3d 743 (Tex. 2006); Cortez v. HCCI-San Antonio, Inc., 159 S.W.3d 87 (Tex. 2005); El-Hafi v. Baker, 164 S.W.3d 383 (Tex. 2005). To preserve error, the complaining party must: (1) obtain an adverse ruling on its challenge for cause; (2) notify the trial court that as a result of the trial court’s refusal to sustain the challenge for cause, a specific objectionable juror will remain on the jury list once the complaining party uses its last peremptory challenge; and (3) turn in the complaining party’s peremptory strike list. Cortez v. HCCI-San Antonio, Inc., 159 S.W.3d 87 (Tex. 2005). Timing is critical to preserve error. The complaining party must notify the trial court that an objectionable juror will remain on the jury list before, or at the same time, the complaining party turns in its peremptory strike list. Cortez, 159 S.W.3d at 91. Unfortunately, the Supreme Court still has not clarified whether a party must request an additional peremptory strike or simply object to the refusal to strike for cause. Until this point is clarified, the complaining party should ask for both forms of relief when preserving error.

Litigants preparing for voir dire should read Vasquez, Cortez, and El Hafi carefully since these cases shed new light on what a litigant must do to prove that a juror possesses a disqualifying bias or prejudice. Under these three decisions, trial courts have more discretion to overrule a challenge for cause when the complaining party fails to elicit specific evidence showing that a juror possesses an actual bias as opposed to a general expression of bias based on the juror’s life experiences. In Cortez and El Hafi, the Supreme Court emphasized that all veniremembers have life experiences which color their view of the case. In both cases, the Court held that veniremembers are not required to leave behind their life’s experiences and that the voir dire process should focus on ensuring the jury panel will approach the evidence with an impartial mind. Cortez, 159 S.W.3d at 93; El Hafi, 164 S.W.3d at 384-85. Further, trial courts have more discretion to overrule a challenge for cause when the complaining party fails to pursue specific evidence of actual bias. The Supreme Court has held that equivocal statements of bias or sympathy are not enough to prove actual bias or prejudice. Cortez, 159 S.W.3d at 94; El Hafi, 164 S.W.3d at 384-85. The complaining party must show that the juror challenged for cause simply cannot put his or her biases aside and consider the evidence with an impartial mind. Finally, the Supreme Court has disapproved of “commitment questions” which ask a jury to prejudge an issue or commit to how much weight they would give certain evidence. Cortez, 159 S.W.3d at 94; Hyundai, 189 S.W.3d at 752. Under these opinions, trial courts have the discretion to overrule questions that seek to commit a potential juror to how much weight he or she would give an item of evidence.
D. Peremptory Challenges.

1. Equalization.

Pursuant to TEX. R. CIV. P. 233, each party to a civil action is entitled to six peremptory challenges in district court and three in county court. Where there are multiple parties, however, it shall be the duty of the trial court to decide whether any of the litigants aligned on the same side of the docket are antagonistic with respect to any issue to be submitted to the jury. Upon proper motion, the court shall equalize the number of peremptory challenges so that no litigant or side is given unfair advantage as a result of alignment of parties. In determining allocation of the challenges, the court shall consider the “ends of justice.” The existence of antagonism is a question of law. Garcia v. Central Power and Light Co., 704 S.W.2d 734 (Tex. 1986); Hyundai Motor Co. v. Alvarado, 989 S.W.2d 32, 42 (Tex. App.—San Antonio 1998, pet. granted), remanded by agmt.; Cecil v. TME Insvs., Inc., 893 S.W.2d 38 (Tex. App.—Corpus Christi 1994, no writ); Frank B. Hall & Co. v. Beach, Inc., 733 S.W.2d 251 (Tex. App.—Corpus Christi 1987, writ ref’d n.r.e.). In making this determination, the court shall consider the pleadings and discovery which has been conducted in the case, information presented and representations made during voir dire, and any other information brought to the attention of the trial court before the exercise of the strikes. Id.; Scurlock Oil Co. v. Smithwick, 724 S.W.2d 1 (Tex. 1986); Hyundai, 989 S.W.2d at 42. The trial court has wide discretion in determining the number of strikes, and in most cases a 2-to-1 ratio between sides would approach the maximum disparity allowed. Patterson Dental Co. v. Dunn, 592 S.W.2d 914 (Tex. 1979). On appeal, the complaining party must show that the trial which resulted was materially unfair, without having to show more. Id.; Hyundai, 989 S.W.2d at 42; Parker v. Associated Indem. Co., 715 S.W.2d 398 (Tex. App.—San Antonio 1986, writ ref’d n.r.e.). Whether an error in awarding peremptory strikes resulted in a materially unfair trial must be determined from an examination of the entire record. If the trial is hotly contested and there is sharply conflicting evidence, the error in awarding strikes results in a materially unfair trial. Lopez v. Foremost Paving, Inc., 709 S.W.2d 643 (Tex. 1986); Mann v. Ramirez, 905 S.W.2d 275 (Tex. App.—San Antonio 1995, writ denied). In general, all cases that are submitted to a jury involve conflicting evidence and contested issues; if there were no conflict, there would be no need for a trial. Hyundai, 989 S.W.2d at 42. Thus, the appellate court must delve deeper and review such facts as the number of questions which were submitted to the jury, whether the verdict was unanimous, and whether any motions for summary judgment or instructed verdict were made. Id. In Hyundai, the court of appeals noted that although Hyundai had moved for an instructed verdict, only eight questions were submitted to the jury and the verdict was unanimous. The jury did not find gross negligence and they failed to award punitive damages; they also failed to award damages on a bystander claim. A review of the entire record convinced the court that the trial had not been materially unfair. Id.

Note that in order to preserve error, the motion to equalize and/or objections to the allocation of peremptory challenges must be lodged prior to the exercise of the challenges.

2. Juror Discrimination.

a. Rule Applies to Both Criminal and Civil Cases.


Under Batson, the defendant is required to make a three-pronged showing. The first step requires that the defendant establish a prima facie case raising an inference of purposeful discrimination on the part of the prosecuting attorney. Brewer v. State, 932 S.W.2d 161, 164 (Tex. App.—El Paso 1996, no pet.); Belton v. State, 900 S.W.2d 886, 897 (Tex. App.—El Paso 1995, pet. ref’d). As for the second prong, once the accused establishes a prima facie case of racially motivated strikes, the burden of production shifts to the State to provide a race-neutral explanation. Emerson v. State, 851 S.W.2d 269, 271-72 (Tex. Civ. App. 1993); Calderon v. State, 847 S.W.2d 377, 382 (Tex. App.—El Paso 1993, pet. ref’d). In this context, a race-neutral explanation means one based on something other than the race of the juror. Hernandez v. New York, 500 U.S. 352, 358-60, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395 (1991); Francis v. State, 909 S.W.2d 158, 162 (Tex. App.—Houston [14th Dist.] 1995, no writ). It must relate to the particular case to be tried, but need not rise to the level justifying exercise of a challenge for cause. Batson, 476 U.S. at 97, 98, 106 S.Ct. at 1723, 1724; Francis, 909 S.W.2d at 162. Moreover, the explanation need not be persuasive, or even plausible. Purkett v. Elem, 514 U.S. 765, 767, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995); Francis, 909 S.W.2d at 162.

With regard to the third prong, if the prosecutor’s explanation is facially valid, the burden of production shifts back to the accused to establish by a preponderance of the evidence that the reasons given were merely a pretext for the State’s racially motivated use of its peremptory strikes. Salazar v. State, 818 S.W.2d 405, 409 (Tex. Crim. App. 1991); Calderon, 847 S.W.2d at 382. The defendant must do more than simply state his disagreement with some of the State’s explanations; he must prove affirmatively that the
State’s race-neutral explanations were a sham or pretext. *Davis v. State*, 822 S.W.2d 207, 210 (Tex. App.—Dallas 1991, pet. ref’d); *Straughter v. State*, 801 S.W.2d 607, 613 (Tex. App.—Houston [1st Dist.] 1990, no writ). In other words, the challenging party must prove purposeful discrimination. *Baker v. Sensitive Care-Lexington Place Health Care, Inc.*, 981 S.W.2d 753, 755 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

The Court of Criminal Appeals has established a non-exclusive list of factors that may be used by a defendant to carry this burden:

- the reasons given are not related to the facts of the case;
- there was a lack of questioning to the challenged juror, or a lack of meaningful questions;
- disparate treatment such that persons with the same or similar characteristics as the challenged juror were not stricken;
- disparate examination of members of the venire, such that a question designed to provoke a certain response likely to disqualify the juror was asked to minority jurors, but not to non-minority jurors;
- use of peremptory challenges to remove all minority members from the jury; and
- an explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically.


*Batson* was specifically expanded to civil causes in *Edmonson v. Leesville Concrete Co.*, Inc., 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991), in which the Court mandated that racial exclusion violates the equal protection rights of the challenged juror, and that those rights may be asserted by the party not exercising the peremptory challenge. The *Edmonson* rule was specifically adopted by the Texas Supreme Court in *Powers v. Palacios*, 813 S.W.2d 489 (Tex. 1991). In *Powers*, the plaintiff was an African-American woman. Only one juror on the panel was African-American, and she was stricken by the defense counsel. The plaintiff’s attorney inquired as to the reason for the strike, because he was concerned it was racially motivated. The defense attorney admitted that racial considerations "figured into" his decision, but that it was not the sole consideration. The Supreme Court reversed and remanded.

b. Standard of Review.

In reviewing *Batson* issues in criminal cases, the courts apply the clearly erroneous standard. *Emerson*, 851 S.W.2d at 273; *Vargas v. State*, 838 S.W.2d 552, 554 (Tex. Crim. App. 1992); *Davis*, 822 S.W.2d at 210. The appellate court will review the record in its entirety and consider the voir dire process, including the make-up of the venire, the prosecutor’s explanation, and the defendant’s rebuttal and impeachment evidence. *Whitsey v. State*, 796 S.W.2d 707, 726 (Tex. Crim. App. 1990) (opinion on rehe’g); *Davis*, 822 S.W.2d at 210. Further, the record is examined in the light most favorable to the trial court’s rulings. *Williams v. State*, 804 S.W.2d 95, 101 (Tex. Crim. App.), cert. denied, 501 U.S. 1239, 111 S.Ct. 2875, 115 L.Ed.2d 1038 (1991); *Davis*, 822 S.W.2d at 210. It is incumbent upon the appellant to provide a record illustrating that the trial judge’s findings are clearly erroneous. *Williams*, 804 S.W.2d at 101; *Mata v. State*, 867 S.W.2d 798, 805 (Tex. App.—El Paso 1993, no pet.); see also *Hill v. State*, 827 S.W.2d 860, 865 (Tex. Crim. App. 1992); *Wyle v. State*, 836 S.W.2d 796, 797 (Tex. App.—El Paso 1992, no writ). Under the “clearly erroneous” standard, an appellate court may only reverse if a review of the voir dire record, the State’s explanations, the composition of the jury panel, and the appellant’s rebuttal and impeachment evidence results in a definite and firm conviction that a mistake has been made. *Whitaker v. State*, 977 S.W.2d 869, 874 (Tex. App.—Beaumont 1998, no pet.). In reviewing *Batson/Edmonson* issues in civil cases, the courts apply the abuse of discretion standard, as enunciated in *Goode v. Shoukfeh*, 943 S.W.2d 441, 446 (Tex. 1997).

A reviewing court will not be bound by a finding of no discrimination under either the clearly erroneous standard or the abuse of discretion standard if the justification offered for striking a potential juror is “simply too incredible to be accepted.” *Id.*, citing *Hernandez*, 500 U.S. at 369, 111 S.Ct. at 1871, in turn citing *Norris v. Alabama*, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074 (1935)). For a study of the way in which appellate courts are handling the concept of “simply too incredible to be accepted,” see *Baker v. Sensitive Care-Lexington Place Health Care, Inc.*, 981 S.W.2d 753, 758 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (O’Connor, J., dissenting).

c. Focus on the Record.

Where the trial court finds no *prima facie* case, it is imperative that the challenging party include in the record evidence establishing that the challenged veniremembers were members of a protected class, together with a demonstration of the make-up of the jury panel as a whole. Where the trial court proceeds to a hearing on the *Batson* issue, the *prima facie* case has already been sustained and a presumption of discrimination arises. At that point, further evidence on the jury panel’s background becomes unnecessary. *Domínguez v. State Farm Ins. Co.*, 905 S.W.2d 713 (Tex. App.—El Paso 1995, writ dism’d by agr.). Thus,
where the State offers an explanation for the challenged strike and the trial court makes its ruling, the issue of whether the defendant presented a *prima facie* case is moot. *Hernandez*, 500 U.S. at 359, 111 S.Ct. at 1866, 114 L.Ed.2d at 406. Instead, the facial validity of the prosecutor’s explanation becomes the central issue. *Purkett v. Elem*, 115 S.Ct. at 1771; *Francis*, 909 S.W.2d at 162. As a result, an appellate court bypasses the first prong and moves directly to the second prong. Unless a discriminatory intent is inherent in the prosecutor’s explanation, the reason offered will be deemed race-neutral. *Id.*

To further complicate matters, it is not uncommon for an attorney’s reasons for striking a potential juror to be dependent on demeanor rather than a verbal response to a particular question. If the strike is indeed dependent upon a non-verbal response not reflected in the record (such as head nodding, facial expression, arm crossing), the attorney must describe the behavior relied upon. *Hill v. State*, 827 S.W.2d 860 (Tex. Crim. App. 1992); *Roberson v. State*, 866 S.W.2d 259 (Tex. App.—Fort Worth 1993, no writ). While an explanation for the exercise of a peremptory strike based on non-verbal responses or subjective reasons is not necessarily insufficient to rebut the presumption of discrimination, it merits closer scrutiny than an explanation based on objective reasons. *Goodwin v. State*, 898 S.W.2d 380, 382 (Tex. App.—San Antonio 1995, no writ); *Branch v. State*, 774 S.W.2d 781, 784-85 (Tex. App.—El Paso 1989, writ ref’d). Inattentiveness during voir dire is a sufficient racially neutral reason for striking a prospective juror. *Belton*, 900 S.W.2d at 897.

d. Timing is Everything.

Remember that an objection to the racial and ethnic composition of a jury is untimely if it is raised after the jury is empaneled and sworn. This is true because a party may object to the jury composition by either challenging the array or demanding a shuffle. Where neither remedy is requested, a complaint as to racial composition is waived.

e. *Batson* Expanded to Gender.

Initially, three of the federal circuit courts considered whether a *Batson* type challenge may be raised with regard to gender bias. The Ninth Circuit determined that *Batson* did extend to gender [*United States v. De Gross*, 960 F.2d 1433 (9th Cir. 1992) (*en banc*)] while the Fourth Circuit concluded that it did not. *United States v. Hamilton*, 850 F.2d 1038 (4th Cir. 1988). Our own Fifth Circuit considered the same question in *United States v. Broussard*, 987 F.2d 215, 218-220 (5th Cir. 1993), holding that the primary rationale for *Batson* is that race is entitled to more protection than other classifications. Aside from race, said the court, there is no reason to extend *Batson*:

Women are not a numerical minority and therefore do not face similar barriers to full jury participation. That women are not numerical minorities looms large because the focus of *Batson* is upon selecting a petit jury from a randomly chosen venire. This means that striking women, or men, for the sole reason of their sex is nigh pointless because it cannot succeed except in isolated cases.

This split among the circuits gave rise to *J.E.B. v. Alabama*, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994) in which the State of Alabama sued in civil court to establish paternity and obtain child support for a minor. The State's attorney used nine of its ten peremptory challenges on male veniremembers. The United States Supreme Court ultimately prohibited gender-based strikes:

> We have recognized that whether the trial is criminal or civil, potential jurors as well as litigants have an equal protection right to jury selection procedures that are free from state sponsored group stereotypes rooted in, and reflective of, historical prejudices. We hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality. *Id.* at 1421.

f. But Not to Religion.

As an aside, it is interesting to note that the Court of Criminal Appeals originally ruled that *Batson* applies to religious-based strikes. *Casarez v. State*, 913 S.W.2d 468 (Tex. Crim. App. 1994). This ruling was ultimately rejected on rehearing. *Casarez*, 913 S.W.2d at 496.

g. Tips for Preserving Error.

If we can glean any consistency from *Batson* and its progeny, it appears the following steps are necessary to preserve error:

- object before the panel is sworn and the remainder of the venire discharged;
- request, on the record, a copy of your adversary’s strike sheet to determine any suspect patterns;
- establish a *prima facie* case by delineating the suspect patterns; for example, all Hispanics were stricken; all women were stricken; disparate treatment of similar jurors; no questions were asked of the stricken jurors; disparate examination of the stricken jurors; and
- obtain a ruling on whether a *prima facie* case has been made.
Also note that both high courts have determined that your adversary’s voir dire notes are subject to disclosure if they are relied upon by the attorney while giving sworn testimony. *Pondexter v. State*, 942 S.W.2d 577, 579 (Tex. Crim. App. 1996); *Salazar v. State*, 795 S.W.2d 187, 193 (Tex. Crim. App. 1990); *Goode*, 943 S.W.2d at 449. Absent such reliance, the notes constitute privileged work product.

If the court rules that a *prima facie* case has been established, be prepared to counter your adversary’s efforts to rebut the presumption with a neutral explanation for its strike. Argue the factors that weigh against the legitimacy of a neutral explanation:

- the reason given for the strike is not related to the facts of the case;
- the challenged juror was not asked meaningful questions;
- people with similar characteristics were treated differently;
- the attorney evoked a certain response from the challenged juror without asking the same question to other prospective jurors; and
- the attorney gives an explanation based on group bias but does not show that the group trait applies to the specific challenged juror.

THE MORAL OF THE STORY IS ALWAYS HAVE THE COURT REPORTER PRESENT FOR VOIR DIRE. IF NO IRREGULARITIES OCCUR, YOU NEED NOT HAVE THAT PORTION TRANSCRIBED OR FILED WITH THE REPORTER’S RECORD.

E. Jury Charge.

Although family law disputes tend to have fewer issues decided by juries, the general rules on preserving error in jury charges are no less important. The Supreme Court of Texas has previously held that a party who opposes a particular instruction or question in a jury charge must submit an objection to preserve the presumption at a time that the court could have corrected the problem. *In re B.L.D.*, 113 S.W.3d 340, 350-51 (Tex. 2003); *In re A.F.*, 113 S.W.3d 363, 364 (Tex. 2003).

With regard to error preservation in jury charges, the Supreme Court of Texas has essentially asked whether the trial court knew of the substance of the jury charge complaint at a time that the court could have corrected the problem. *Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex. 2000); *State Dept. of Highways v. Payne*, 838 S.W.3d 235, 239-40 (Tex. 1992). Following this question, then, error preservation in the jury charge requires the following at a minimum:

1. When a definition or instruction is omitted, the party must request an instruction/definition in substantially correct wording.
2. When a jury question is omitted, the party must request a question in substantially correct form if it hopes to complain of the missing question on appeal.
3. When a definition, instruction, or jury question is defective, the party must object by specifically pointing out the objectionable matter and explaining why the matter is in error. Despite the Supreme Court’s holding in *Payne* merely requiring an objection to preserve error in a defective question, courts still disagree on whether a party is also required to request a definition/instruction/jury question in substantially correct form. See *City of Weatherford v. Catron*, 83 S.W.3d 261, 271-72 (Tex. App.—Fort Worth 2002, no pet.); *Schlafly v. Schlafly*, 33 S.W.2d 863, 867 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). As a result, the authors also recommend that an objecting party request inclusion of the matter in the charge out of an abundance of caution.
4. Requests and objections should be made separately from one another. TEX. R. CIV. P. 273.
5. Objections should be made clearly and succinctly, and should not overlap with unfounded objections. Further, objections cannot be incorporated by reference from objections submitted earlier in a charge conference.

The following paragraphs discuss this summary in greater detail.

1. Instructions and Definitions.

A trial court must submit “such instructions and definitions as shall be proper to enable the jury to render a verdict.” TEX. R. CIV. P. 277. A party is entitled to a jury instruction or definition if the pleadings and evidence raise an issue. TEX. R. CIV. P. 278. An instruction is proper if it (1) assists the jury, (2) accurately states the law, and (3) finds support in the pleadings and evidence. TEX. R. CIV. P. 278; see also Texas Workers’ Comp. Ins. Fund v. Mandlbauer, 34 S.W.3d 909, 912 (Tex. 2000). A requested instruction or definition must be substantially correct, otherwise it preserves nothing for review. “Failure to submit [an instruction] shall not be deemed a ground for reversal of the judgment unless a substantially correct [instruction] has been requested in writing and tendered by the party complaining of the judgment.”

The trial court has great discretion in submitting the jury charge. See Baker Marine Corp. v. Moseley, 645 S.W.2d 486, 489 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.); Tex. R. Civ. P. 277. This discretion is subject to the requirement that the questions submitted must control the disposition of the case, be raised by the pleadings and evidence, and properly submit the disputed issues for the jury's deliberation. A party is entitled to a jury question if the pleadings and evidence raise an issue. Tex. R. Civ. P. 278; Texas Dept. of Transp. v. Ramming, 861 S.W.2d 460, 463 (Tex. App.—Houston (14 Dist.) 1993, writ denied). A trial court may refuse to submit a question only if no evidence exists to warrant its submission. Tex. R. Civ. P. 278; Elbaor v. Smith, 845 S.W.2d 240, 243 (Tex. 1992). If there is some evidence to support a jury question and the court does not submit it, the court commits reversible error. Elbaor, 845 S.W.2d at 243; Cherokee Water Co. v. Freeman, 145 S.W.3d 809, 820, n.5 (Tex. App.—Texarkana 2004, pet. denied). A requested question must be substantially correct, otherwise it preserves nothing for review. "Failure to submit a question shall not be deemed a ground for reversal of the judgment unless a substantially correct question has been requested in writing and tendered by the party complaining of the judgment." Tex. R. Civ. P. 278. When a trial court refuses to submit a proper question, reversal is not required unless the error probably caused the rendition of an improper judgment. See Tex. R. App. P. 44.1; Union Pac. R.R. Co. v. Williams, 85 S.W.3d 162, 170 (Tex. 2002).

3. Broad Form Submission.

For decades the rule in Texas was that issues had to be submitted "distinctly and separately" to the jury. Fox v. Dallas Hotel Co., 111 Tex. 461, 475, 240 S.W. 517, 522 (1922). Texas began to move away from granulated jury issues, and toward broad form submission, with the 1973 amendment to Texas Rule of Civil Procedure 277. Under the amended rule, the trial court was given discretion to decide whether to submit jury issues in granulated or broad form. Mobil Chem. Co. v. Bell, 517 S.W.2d 245, 255 (Tex. 1974). Over the next decade, the court repeatedly expressed its preference for broad form submission. Brown v. Am. Trans. & Storage Co., 601 S.W.2d 931, 937 (Tex. 1980); Burk Royalty Co. v. Walls, 616 S.W.2d 911 (Tex. 1984); Lemos v. Montez, 680 S.W.2d 798, 801 (Tex. 1984). In 1988, Texas made broad form submission the preferred method of jury charge submission when it amended Rule 277 to read that broad form questions "shall" be submitted "whenever feasible." Tex. R. Civ. P. 277.

Under broad form practice, jury questions can submit multiple legal and factual theories of liability under one question to which a jury has to answer "yes" or "no." A "yes" answer to a broad form question is often problematic when the question contains multiple legal and factual grounds some of which are supported by evidence and others which are not. For example, a jury question asking whether a person's parental rights should be terminated could include a number of the grounds for termination and then ask the jury to give one "yes" or "no" answer for the entire list of grounds for termination. Obviously, if one of the grounds is not supported by any evidence, then it becomes doubtful whether there is a proper verdict since it is ambiguous with regard to whether ten jurors have agreed upon a single proper ground for termination.

In Texas Dept' of Human Services v. E.B., the Supreme Court was faced with this problem, but the court refused to grapple with the issue, concluding that it did not matter whether ten jurors agreed on the specific grounds for termination so long as they answered the broader question of termination in the affirmative. This was the high-water mark for broad form submission in Texas. The penchant for simple-to-read jury questions had led some practitioners to the dubious conclusion that the reasons behind a "yes" answer to a broad form question did not matter as much as the "yes" answer itself. The form of the jury's answer had literally triumphed over its substance.

Two years later, the Texas Supreme Court handed down two decisions which conceded that broad form submission was not a cure-all for solving all the problems related to trying a legally and factually complex case to a bunch of lay people. H.E. Butt Grocery Co., 845 S.W.2d 258 (Tex. 1992); Westgate, Ltd. v. State, 843 S.W.2d 448 (Tex. 1992). In both cases, the court relented from its broad form preference and held that an otherwise correct separate and distinct submission would not be reversed for failure to follow broad form. In a footnote, the court opined that separate and distinct submission was appropriate when the law is unsettled as to one or more theories of recovery. Westgate, 843 S.W.2d at 455, n.6.
In 2000, the Supreme Court began the first of several retreats from broad form practice. In *Crown Life Ins. Co. v. Casteel*, the court held that it was harmful error to submit a single broad form liability question which erroneously commingles valid and invalid liability theories when it cannot be determined whether the improperly submitted liability theories formed the sole basis for the jury’s “yes” answer. *Casteel*, 22 S.W.3d 378, 390 (Tex. 2000). Two years later, the court extended its holding in *Casteel* to damage questions which incorporate multiple elements of damage some of which are valid and others which are invalid. *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002). If an objection is made to the broad form submission of such a question, and an element of damage is shown to be erroneous on appeal, then the appellate court must reverse if the court is unsure whether the jury’s damage award was based on the improperly submitted invalid element of damage. Three years after its decision in *Smith*, the court extended its holding in *Casteel* to questions used to apportion liability in tort cases. In *Romero v. KPH Consolidated, Inc.*, 166 S.W.3d 212 (Tex. 2005), the trial court submitted two separate theories of liability to the jury, both of which flowed into a single apportionment question and a single damage question. The Supreme Court concluded that there was no evidence supporting one of the two theories of liability. The court then reversed the case for a new trial since it was unsure whether the apportionment and damage findings were based on the invalid theory of liability.


Sometimes, despite the best efforts of the attorneys and the judge to present a proper jury charge, there are problems with an incomplete or inconsistent verdict from the jury. Texas Rule of Civil Procedure 295 requires a party to object to an incomplete or inconsistent jury verdict. A party cannot “lie behind the log” and later complain of a partial/inconsistent verdict without a timely objection. *Osterberg v. Peca*, 12 S.W.3d 31, 55-56 (Tex. 2000); *Norwest Mort. Inc. v. Salinas*, 999 S.W.2d 846, 865 (Tex. App.—Corpus Christi 1999, pet. denied).

If a party believes that certain answers to the jury charge are immaterial, the party must object to the trial court at such a time that the problem can be cured without the need to order a new trial. *Wal-Mart Stores v. McKenzie*, 997 S.W.2d 278, 279-80 (Tex. 1999); *Holland v. Wal-Mart Stores*, 1 S.W.3d 91 (Tex. 1999). In other words, when a jury makes an award that is not supported by law, the immaterial finding may be challenged prior to rendition of judgment. *Id.* However, if the immaterial finding cannot simply be disregarded because it relates to other findings in the verdict (as in inconsistent verdicts or *Casteel*-type problems in interpreting whether a jury intended for an award to relate to a specific finding), the immaterial finding should be challenged before the jury is dismissed from service.

F. Jury Argument.

When an improper jury argument can be corrected by a jury instruction to disregard the statement, then any error is harmless. To preserve error on curable argument, an objection must be made along with a request for an instruction to disregard. Otherwise it is waived. *Am. Home Assurance Co. v. Coronado*, 628 S.W.2d 818 (Tex. Civ. App.—Amarillo 1981, no writ). Also be certain that a ruling is obtained on any objection made to argument. Failure to secure a ruling will result in failure to preserve error. *Duke v. Power Elec. &Hardware*, 674 S.W.2d 400 (Tex. App.—Corpus Christi 1984, no writ).

Incurable argument is one which is so prejudicial or inflammatory that it could not have been cured by an instruction. Failure to object to incurable argument will not waive the error. *Magic Chef Inc. v. Sibley*, 546 S.W.2d 851 (Tex. Civ. App.—San Antonio 1977, writ ref’d n.r.e.). There are only rare instances of incurable harm from improper argument. *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 839-40 (Tex. 1979). Note that Texas Rule of Civil Procedure 324(b) requires the filing of a motion for new trial to preserve error for appeal with regard to a claim of incurable jury argument if it has not otherwise been ruled upon by the trial court.

How can you determine whether error is “curable” or “incurable”? In *Dayton Hudson Corp. v. Altus*, 715 S.W.2d 670 (Tex. App.—Houston [1st Dist.] 1986, writ ref’d n.r.e.), the plaintiff brought suit for false imprisonment. She had been restrained by two security guards, both of whom were African-American. The plaintiff was Caucasian. During final argument, counsel for the plaintiff portrayed her as a God-fearing Christian woman and the appellant’s security guards as “those two black people.” No objection was made. The court of appeals, citing *Standard Fire Insurance Co. v. Reese* 584 S.W.2d 835 (Tex. 1979), determined that any error in improper jury argument was waived for failure to object. By interpretation, we can only assume that the majority found that the argument was "curable." In his dissenting opinion, Justice Hoyt concluded that the argument had provoked the jury and inflamed their passions, leading to a verdict of $150,000 in actual damages and $225,000 in exemplary damages.

A decision by the First District appellate court in Houston has discussed the test for determining whether improper argument is curable. *See, In re W.G.W.*, 812 S.W.2d 409 (Tex. App.—Houston [1st Dist.] 1991, no writ). There, a mother suffered from cervical cancer. During the course of the trial, the opposing counsel had
made side bar remarks insinuating the mother had been involved in a homosexual relationship and his theory throughout the trial was that the mother's immorality would significantly impair the child's physical health or emotional development. During final argument, the opposing counsel made the following statement: "Think about cervical cancer and how you get it." No objection was lodged at trial, but on appeal, the mother contended that this statement was designed to inflame the jury, was completely unprovoked, and was incurable. The appellate court noted that to obtain reversal on the basis of improper jury argument, a litigant must prove four elements:

- Was the argument error? [here, the court commented that in searching the record, it could find nothing to support an inference that cervical cancer is caused by immoral conduct or abortions, which was the clear implication of the statement]
- Was the argument invited or provoked?
- Was the argument by its nature, degree, and extent, reversible error? And
- Did the appellant preserve error by making a proper trial objection?

Here, since no objection had been made, the court reasoned that the mother must demonstrate that the argument was incurable, which under these circumstances, becomes a fifth element:

- Is the probability that the improper argument caused harm greater than the probability that the verdict was based upon proper proceedings and evidence?

This requires that the court evaluate the improper jury argument in light of the entire case, beginning with voir dire and ending with closing argument. Finding the argument to be incurable, the court reversed and remanded. See also, Household Credit Services, Inc., v. Driscoll, 989 S.W.2d 72, 95 (Tex. App.—El Paso 1998, pet. denied).

Don't run the risk. The better practice of course is to object, secure a ruling, request an instruction, or in the case of incurable argument, move for a mistrial.

IV. POST TRIAL AND PREJUDGMENT
A. Motion to Reconsider.
A motion to reconsider is not a motion for new trial and is not a motion set forth in the rules. A motion to reconsider is merely a motion to get the trial court to take another look at its ruling. It can be used as an opportunity to file a brief that more fully sets out legal arguments or the evidence. At a minimum, this is the time for trial counsel to consult with an appellate attorney and not wait for the judgment to be entered.

B. Motion for Entry of Judgment.
There are several rules which partially address the process for entering judgment. For example, Rule 301 of the Texas Rules of Civil Procedure addresses the court's duty to enter judgment. It generally requires that “[t]he judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity.” See TEX. R. CIV. P. 301. In addition, Rules 304, 305, and 306, of the Texas Rules of Civil Procedure describe what should go in a judgment, where it should be entered, and the process for submitting a proposed judgment to the court. See TEX. R. CIV. P. 304, 305, and 306.

However, there is no rule which specifically governs motions for entry of judgment or the exact process that should be followed to obtain judgment in your client's favor. As a result, the procedure for such motions is governed primarily by case law. See Joann Storey, PRESERVATION OF ERROR POST-TRIAL: PRACTICE AND STRATEGIES, State Bar of Texas Appellate Boot Camp, Chapter 2, page 1 (September 2006).

1. Deadline for Filing?
There is no deadline for filing a motion for judgment.

2. Effect of Filing on Appellate Deadlines?
A motion for entry of judgment does not extend the appellate deadlines. See Brazos Elec. Power Co-op, Inc. v. Callejo, 734 S.W.2d 126, 128 (Tex. App.—Dallas 1987, no writ); see also, TEX. R. CIV. P. 329b (enumerating motions that extend the trial court’s plenary power and the appellate deadlines); TEX. R. APP. P. 26.1(a) (describing motions and other actions taken in the trial court which extend the appellate deadlines).

3. Effect of Filing on Court’s Plenary Power?
A motion for entry of judgment does not extend the trial court’s plenary power. Brazos Elec. Power Co-op, Inc. v. Callejo, 734 S.W.2d 126, 128 (Tex. App.—Dallas 1987, no writ); see also, TEX. R. CIV. P. 329b (enumerating motions that extend the trial court’s plenary power and the appellate deadlines); TEX. R. APP. P. 26.1(a) (describing motions and other actions...
taken in the trial court which extend the appellate deadlines).

4. Preservation of Error?

A motion for entry of judgment does preserve error when the trial court enters a judgment that differs from the judgment sought by a party. \textit{Emerson v. Tunnel}, 793 S.W.2d 947 (Tex. 1990); \textit{Storey, PRESERVATION OF ERROR POST-TRIAL}, Chapter 2, page 1.

5. Beware of Waiver of Error!

When your client prevails on all of his or her theories at trial, requesting a judgment is easy. Simply ask for judgment on all your claims and/or defenses. Unfortunately, this does not happen as frequently as we like and we are often required to come to grips with the fact that the trial court or jury has rejected all or some of our client’s claims and/or defenses. When your client has prevailed on some, but not all of his or her claims and/or defenses, be careful what you ask for in a motion for entry of judgment! You may get what you ask for and it may act as a waiver of error as to complaints you would otherwise like to raise in a subsequent appeal.

The Texas Supreme Court has held that a motion for judgment on the verdict is an affirmation of the jury’s verdict and waives any subsequent complaint that the verdict is not supported by evidence. \textit{Litton Indus. Prods., Inc. v. Gammage}, 668 S.W.2d 319, 322 (Tex. 1984); see also, \textit{Cruz v. Furniture Technicians of Houston, Inc.}, 949 S.W.2d 34, 35 (Tex. App—San Antonio 1997, pet denied); \textit{Storey, PRESERVATION OF ERROR POST-TRIAL}, Chapter 2, page 1.

There is a split of authority among the courts of appeals as to the extent of waiver caused by a motion for judgment based on the fact finder’s verdict. Some courts hold that only challenges to the sufficiency of the evidence are waived. See \textit{Stewart & Stevenson Servs., Inc. v. EnsERVE, Inc.}, 719 S.W.2d 337 (Tex. App.—Houston [14th Dist.] 1986, writ ref’d n.r.e.) (ruling that sufficiency challenges were waived, but error in jury charge was not); \textit{Harry v. Univ. of Tex. Sys.}, 878 S.W.2d 342 (Tex. App.—El Paso 1994, no writ) (accord). However, other courts adhere to a more strict rule that an unqualified motion for entry of judgment preserves nothing for further review. \textit{Casu v. Marathon Ref. Co.}, 896 S.W.2d 388, 389-91 (Tex. App.—Houston [14th Dist.] 1995, writ denied); \textit{Storey, PRESERVATION OF ERROR POST-TRIAL}, Chapter 2, page 1.

There are three exceptions to the foregoing waiver rule: (1) when the jury’s findings are ambiguous; (2) when the points of error on appeal are not inconsistent with the motion for entry of judgment; or (3) when the movant expressly reserves the right to complain about certain findings while seeking entry of judgment on other, favorable findings. See \textit{Miner-Dederick Constr. Corp. v. Mid-County Rental Serv., Inc.}, 603 S.W.2d 193, 197-99 (Tex. 1980) (holding that party did not waive complaint about jury findings where findings were ambiguous); \textit{Litton Indus. Prods., Inc. v. Gammage}, 668 S.W.2d 319, 322 (Tex. 1984) (holding that party did not waive complaint about jury finding where complaint on appeal was not inconsistent with motion for entry of judgment); \textit{First Nat’l Bank of Beeville v. Fotjik}, 775 S.W.2d 632, 633 (Tex. 1989) (holding that party did not waive complaint about findings where party expressly reserved the right to challenge the trial court’s judgment on appeal); see also, \textit{Storey, PRESERVATION OF ERROR POST-TRIAL}, Chapter 2, page 2.

To avoid waiver, it is strongly recommended that counsel expressly identify the findings and/or rulings his or her client disagrees with and then state that, by tendering a proposed judgment, your client agrees with the form of the judgment but does not agree with the substance of the judgment and expressly reserves the right to challenge the identified findings and/or rulings by post-trial motion or appeal. The Supreme Court’s decision in \textit{Fotjik} is required reading for anyone planning to file a motion for entry of judgment. \textit{Fotjik}, 775 S.W.2d at 633 (holding that party did not waive complaint about jury findings where party stated in its motion for judgment, “While plaintiffs disagree with the findings of the jury and feel there is a fatal defect which will support a new trial, in the event the Court is not inclined to grant a new trial prior to entry of judgment, plaintiffs pray the court enter the following judgment. Plaintiffs agree only as to the form of the judgment but disagree and should not be construed as concurring with the content and the result.”).

C. Motion for JNOV.

Prior to 1931, a trial judge who erroneously overruled a motion for directed verdict, or erroneously submitted a question that was not supported by the evidence, had no way to correct his or her mistake without granting a new trial. See \textit{McDonald & Carlson, Texas Civil Practice, Vol. 5, § 27:77 (2nd Ed.)} (1991) (citing authorities). “This situation was anomalous, since the court of civil appeals could render judgment for the proper party.” \textit{Id.} In 1931, the legislature rectified the situation by adopting what is now Rule 301 of the Texas Rules of Civil Procedure.

A motion for judgment \textit{non obstante veredicto}, or motion for JNOV, is expressly authorized by Rule 301. The Rule generally requires that “[t]he judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity.” \textit{See Tex. R. Civ. P. 301.} However, the rule expressly authorizes the court, upon motion and reasonable notice, to enter
judgment notwithstanding the verdict if a directed verdict would have been proper. See id.; Fort Bend Co. Drainage Dist. v. Sbrusch, 818 S.W.2d 392, 394 (Tex. 1991).

There are four reasons for granting a motion for JNOV: (1) there is no evidence to support a jury finding, Tiller v. McLure, 121 S.W.3d 709, 713 (Tex. 2003); (2) a factual issue was established as a matter of law which is contrary to a jury finding, John Masek Corp. v. Davis, 848 S.W.2d 170, 173-74 (Tex. App.—Houston [1st Dist.] 1992, writ denied); (3) a legal principle prevents a party from prevailing on its claim or defense regardless whether the plaintiff proves all the allegations in its pleadings, Id. at 173, and (4) a jury finding is immaterial. City of Brownsville v. Alvarado, 897 S.W.2d 750, 752 (Tex. 1995).

1. Deadline for Filing?

Although Rule 301 expressly authorizes a party to file a motion for JNOV, the rule does not expressly set forth a procedure for doing so. This ambiguity has left many unanswered questions. For example, what is the nature of motion for JNOV? Is it governed by the deadlines set forth in Rule 329b of the Texas Rules of Civil Procedure which governs other types of post-trial motions (i.e., motions for new trial and motions to modify, correct, or reform the judgment)? Is there a deadline for filing such a motion? See Tex. R. Civ. P. 301. The answer depends upon which court you are in.

Some courts hold that a motion for JNOV is timely filed if it is filed any time after judgment is announced so long as the trial court has plenary power to grant the motion. Spiller v. Lyons, 737 S.W.2d 29, 29 (Tex. App.—Houston [14th Dist.] 1987, no writ); Cleaver v. Dresser Indus., 570 S.W.2d 479, 483 (Tex. Civ. App.—Tyler 1978, writ ref’d n.r.e.).

Other courts hold that the motion must be filed within thirty days after the judgment is signed. Commonwealth Lloyd’s Ins. Co. v. Thomas, 825 S.W.2d 135, 141 (Tex. App.—Dallas 1992), judgment vacated by agr., 843 S.W.2d 486, (Tex. 1993) (reasoning that a motion for JNOV is the equivalent of a motion to modify, correct or reform the judgment and must therefore be filed within the time deadlines set forth in Rule 329b of the Texas Rules of Civil Procedure).

Until the Texas Supreme Court resolves the issue over when to file a motion for JNOV, the best practice is to make sure you file such a motion within thirty days after the judgment is signed. Storey, PRESERVATION OF ERROR POST-TRIAL, Chapter 2, page 5.

2. Deadline for Obtaining Ruling?

The next question to be asked about motions for JNOV is when is the deadline for obtaining a ruling on these types of motions?

If no motion for new trial is filed, then a motion for JNOV must be filed and ruled upon within thirty days of when the court signs its judgment. Walker v. S & T Truck Lines, Inc., 409 S.W.2d 942, 943 (Tex. Civ. App.—Corpus Christi 1966, writ ref’d); see also, Tex. R. Civ. P. 306a; 329b. Although some courts have equated motions for JNOV with motions to correct, modify, or reform a judgment, you should not assume that all courts will do this and therefore risk not having your motion heard and ruled upon in a timely manner. Storey, PRESERVATION OF ERROR POST-TRIAL, Chapter 2, page 4.

If a motion for new trial is filed (and plenary power is therefore extended), then the motion for JNOV should be ruled upon before the motion for new trial is overruled, either by written order or by operation of law. Spiller v. Lyons, 737 S.W.2d 29, 29 (Tex. App.—Houston [14th Dist.] 1987, no writ); Commercial Standard Ins. Co. v. S. Farm Bureau Cas. Ins. Co., 509 S.W.2d 387, 392 (Tex. Civ. App.—Corpus Christi 1974, writ ref’d n.r.e.). Storey, PRESERVATION OF ERROR POST-TRIAL, Chapter 2, page 4.

3. Effect of Filing on Appellate Deadlines?

Rule 26 of the Texas Rules of Appellate Procedure governs when an an appeal must be perfected. See Tex. R. App. P. 26.1 (setting forth deadlines for filing notice of appeal in civil cases). Motions for JNOV are not expressly mentioned in Rule 26. Thus, the straight forward answer to the question as to whether a motion for JNOV extends the deadline for filing a notice of appeal is: “No.” This position is the traditional position maintained by Texas courts. See Walker v. S & T Truck Lines, Inc., 409 S.W.2d 942, 943 (Tex. Civ. App.—Corpus Christi 1966, writ ref’d); First Freeport Nat’l Bank v. Brazoswood Nat’l Bank, 712 S.W.2d 168, 170 (Tex. App.—Houston [14th Dist.] 1986, no writ); see also, Storey, PRESERVATION OF ERROR POST-TRIAL, Chapter 2, page 4.

However, the strength of this traditional position has been called into doubt. See Kirschberg v. Lowe, 974 S.W.2d 844, 847-48 (Tex. App.—San Antonio 1998, no pet.) (treating motion for JNOV as motion to modify, correct, and reform, and holding that timely filed motion for JNOV extended appellate timetable); see also, Lane Bank Equip. Co. v. Smith S. Equip., Inc., 10 S.W.3d 308, 312 (Tex. 1999); Gomez v. Texas Dep’t of Criminal Justice, 896 S.W.2d 176, 177 (Tex. 1995). In her paper on preservation of error, Joann Storey notes that the Texas Supreme Court “has created some confusion with its pronouncement in a bill of review case that ‘any post-judgment motion, which, if granted, would result in a substantive change in the judgment as entered, extends the time for perfecting the appeal.’” Storey, PRESERVATION OF ERROR POST-TRIAL, Chapter 2, page 4.
v. Texas Dep’t of Criminal Justice, 896 S.W.2d 176, 177 (Tex. 1995), and Lane Bank Equip. Co. v. Smith S. Equip., Inc., 10 S.W.3d 308, 312 (Tex. 1999)).

Until this issue is resolved, the best practice is to take Rule 26.1 literally and not assume that a motion for JNOV will extend the deadline for filing a notice of appeal.

4. Effect of Filing on Court’s Plenary Power?

Rule 329b of the Texas Rules of Civil Procedure provides that a trial court’s plenary power is extended if a motion for new trial or motion to modify, correct, or reform the judgment is filed within thirty days after the judgment is signed. See Tex. R. Civ. P. 329b. The amount of time that a trial court’s plenary power is extended depends upon whether the motion for new trial or to modify, correct, or reform is overruled by written order or by operation of law. Id. However, if the motion is overruled by operation of law, then the court’s plenary power lasts for 105 days after the judgment is signed. Id.

Rule 329b makes no mention of motions for JNOV. Thus, Texas courts have traditionally held that a motion for JNOV, by itself, does not extend the court’s plenary power over its judgment. Walker v. S & T Truck Lines, Inc., 409 S.W.2d 942, 943 (Tex. Civ. App.—Corpus Christi 1966, writ ref’d); see also Tex. R. Civ. P. 306a; 329b. Although some courts have equated motions for JNOV with motions to correct, modify, or reform a judgment, you should not assume that all courts will do this. Until the Texas Supreme Court resolves the conflict with regard to the nature of a motion for JNOV, you should follow the plain language of Rule 329b and not assume that a motion for JNOV extends the trial court’s plenary power. Storey, PRESERVATION OF ERROR POST-TRIAL, Chapter 2, page 4.

5. Preservation of Error.

A motion for JNOV is one of five recognized ways to preserve a legal sufficiency challenge to a jury finding. See Aero Energy, Inc. v. Circle C Drilling Co., 699 S.W.2d 821, 822-23 (Tex. 1985) (holding that legal sufficiency challenge is preserved by: (1) objection to the charge; (2) motion for directed verdict; (3) motion for JNOV; and (4) motion to disregard; and (5) motion for new trial). Heibsen v. Nassau Dev. Co., 754 S.W.2d 345, 348-49 (Tex. App.—Houston [14th Dist.] 1988, writ denied) (holding that a legal sufficiency point may be preserved in a motion for new trial, but if sustained will result in remand and not rendition).

A motion for JNOV can be used to preserve four different types of appellate complaints:

- First, it will preserve a contention that the evidence is legally insufficient to support the verdict of the jury. TEX. R. CIV. P. 301; Tiller v. McLure, 121 S.W.3d 709, 713 (Tex. 2003); Aero Energy Corp. v. Circle C Drilling Co., 699 S.W.2d 821, 822 (Tex. 1985). WARNING: a motion for JNOV will not preserve a factual sufficiency point, which must be preserved in a motion for new trial. TEX. R. CIV. P. 324(b)(2)-(3).

- Second, a motion for JNOV will preserve for appeal an argument that a jury finding must be disregarded because the evidence conclusively establishes as a matter of law the opposite factual proposition found by the jury. John Masek Corp. v. Davis, 848 S.W.2d 170, 173-74 (Tex. App.—Houston [1st Dist.] 1992, writ denied).


- Fourth, a motion for JNOV will preserve for appeal an argument that a jury finding is immaterial. City of Brownsville v. Alvarado, 897 S.W.2d 750, 752 (Tex. 1995).

It is important to note that a party may request JNOV even if it requested the submission of the very jury questions it seeks to have disregarded. Storey, PRESERVATION OF ERROR POST-TRIAL, Chapter 2, page 3, (citing Holland v. Wal-Mart Stores, Inc., 1 S.W.3d 91, 94-95 (Tex. 1999), and Neller v. Kirschke, 922 S.W.2d 182, 187 (Tex. App.—Houston [1st Dist.] 1995, writ ref’d)).

In Holland, the Texas Supreme Court held that a party could raise, for the first time, by way of a motion for JNOV, the argument that attorney fees were barred as a matter of law because they were not recoverable under the statute plaintiffs sought recovery under. Holland, 1 S.W.3d at 94-95.

Consistent with the foregoing rule, an objection to the charge is not necessary to preserve a legal sufficiency complaint. Storey, PRESERVATION OF ERROR POST-TRIAL, Chapter 2, page 3, (citing Kirschke, 922 S.W.2d at 187.).
6. **Standard of Review on Appeal.**

When the motion for JNOV addresses the sufficiency of the evidence to support one or more essential elements of a claim or defense, the grant or denial of the motion is evaluated on appeal under the legal sufficiency standard of review. *Garza v. Alviar*, 395 S.W.2d 821, 823-24 (Tex. 1965). The basic test for legal sufficiency is whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review. See *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). In conducting a legal sufficiency analysis, the reviewing court must credit favorable evidence if reasonable jurors could do so and disregard contrary evidence unless reasonable jurors could not. *Id.*

When the motion for JNOV raises a non-evidentiary point, such as a legal proposition which would determine the case, the appellate court must look to see if, as a matter of law, the proposition advanced in the motion entitles the movant to judgment notwithstanding the jury’s findings. *ARCO v. Misty Prods., Inc.*, 820 S.W.2d 414, 420-21 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

When the motion for JNOV addresses an immaterial jury finding, the appellate court should determine whether the finding is immaterial and, if so, whether the movant is entitled to judgment when the finding is disregarded. *Spencer v. Eagle Star Ins. Co.*, 876 S.W.2d 154, 157 (Tex. 1994).

Where a motion for JNOV raises several grounds, and the order sustaining the motion does not specify the grounds upon which the motion was granted, the party seeking to overturn the JNOV on appeal must show that the JNOV cannot be sustained on any of the grounds stated in the motion for JNOV. *Fort Bend Co. Drainage Dist. v. Sbrusch*, 818 S.W.2d 392, 394 (Tex. 1991).

7. **Cross Points on Appeal.**

If a motion for JNOV is granted, the prevailing party should consider raising cross-points on appeal to protect against rendition on the jury’s verdict if the JNOV is reversed. Cross points include factual insufficiency challenges and any other challenges that would vitiate the jury’s verdict or prevent entry of judgment on the jury’s verdict. See TEX. R. CIV. P. 324(c); *Winograd v. Clear Lake Water Auth.*, 811 S.W.2d 147, 159 (Tex. App.—Houston [1st Dist.] 1991, writ denied); see also *Storey, PRESERVATION OF ERROR POST-TRIAL*, Chapter 2, page 5.

**D. Motion to Disregard Jury Findings.**

A motion to disregard jury findings is distinguished from a motion for JNOV on the grounds that a motion to disregard jury findings asks the court to disregard only certain findings and enter judgment on the remaining findings, while a motion for JNOV asks the court to disregard all findings and enter judgment in contravention of the jury’s decision. See, e.g., *Kish v. Van Note*, 692 S.W.2d 463, 466-67 (Tex. 1985); *Dewberry v. McBride*, 634 S.W.2d 53, 55 (Tex. App.—Beaumont 1982, no writ).

Rule 301 of the Texas Rules of Civil Procedure authorizes the trial court to disregard any jury finding on a question that has no support in the evidence. TEX. R. CIV. P. 301. Although the rule is framed in terms of “no evidence,” a motion to disregard is used to address jury issues that should not have been addressed in the first place, or that have been rendered immaterial by other findings. *Storey, PRESERVATION OF ERROR POST-TRIAL*, Chapter 2, page 5; see also *Cecil v. Smith*, 804 S.W.2d 509, 510-11 (Tex. 1991); *Spencer v. Eagle Star Ins. Co.*, 876 S.W.2d 154, 157 (Tex. 1994).

There are three reasons for disregarding a jury finding. One, there is no evidence to support the finding. *Tiller v. McLure*, 121 S.W.3d 709, 713 (Tex. 2003). Two, a factual issue was established as a matter of law which is contrary to the finding. *John Masek Corp. v. Davis*, 848 S.W.2d 170, 173-74 (Tex. App.—Houston [1st Dist.] 1992, writ denied). Three, the finding is immaterial. *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 752 (Tex. 1995).

1. **Deadline for Filing?**

Although Rule 301 implicitly authorizes a party to file a motion to disregard jury findings, the rule does not set forth a procedure for doing so. This ambiguity leaves the same unanswered questions that motions for JNOV do. What is the nature of motion to disregard jury findings? Is it governed by the deadlines set forth in Rule 329b of the Texas Rules of Civil Procedure which governs other types of post-trial motions (i.e., motions for new trial and motions to modify, correct, or reform the judgment)? Is there a deadline for filing such a motion? See Tex. R. Civ. P. 301. The answer may depend upon which court you are in.

Some courts hold that a motion to disregard jury findings is timely filed if it is filed any time after judgment is announced so long as the trial court has plenary power to grant the motion. See *Eddings v. Black*, 602 S.W.2d 353, 356-57 (Tex. Civ. App.—El Paso 1980, writ ref’d n.r.e.) (discussing motions to disregard jury findings); *Cf. Spiller v. Lyons*, 737 S.W.2d 29, 29 (Tex. App.—Houston [14th Dist.] 1987, no writ) (discussing motions for JNOV); *Cleaver v. Dresser Indus.*, 570 S.W.2d 479, 483 (Tex. Civ. App.—Tyler 1978, writ ref’d n.r.e.) (accord).

As discussed in Section II (B), above, some courts have begun to treat motions for JNOV as motions to modify, correct, and reform, under Rule 329b, and have held broadly that any motion which assails the trial court’s judgment must be filed within thirty days after the judgment is signed. See *Commonwealth*
Lloyd’s Ins. Co. v. Thomas, 825 S.W.2d 135, 141 (Tex. App.—Dallas 1992), judgment vacated by agr., 843 S.W.2d 486, (Tex. 1993) (reasoning that a motion for JNOV is the equivalent of a motion to modify, correct or reform the judgment and must therefore be filed within the time deadlines set forth in Rule 329b of the Texas Rules of Civil Procedure). It is unclear whether motions to disregard jury findings will be treated this way.

Until the Texas Supreme Court resolves the issue over when to file a motion to disregard jury findings, the best practice is to make sure you file such a motion within thirty days after the judgment is signed. Storey, PRESERVATION OF ERROR POST-TRIAL, Chapter 2, page 3.

2. Deadline for Obtaining Ruling?

The next question to be asked about motions to disregard jury findings is when is the deadline for obtaining a ruling on these types of motions?

If no motion for new trial is filed, then a motion to disregard jury findings must be filed and ruled upon within thirty days of when the courts signs its judgment. See Eddings v. Black, 602 S.W.2d 353, 356-57 (Tex. Civ. App.—El Paso 1980, writ ref’d n.r.e.) (discussing motions to disregard jury findings); Cf., Walker v. S & T Truck Lines, Inc., 409 S.W.2d 942, 943 (Tex. Civ. App.—Corpus Christi 1966, writ ref’d) (discussing motions for JNOV); see also, Tex. R. Civ. P. 306a; 329b.

Although some courts have begun to equate motions for JNOV with motions to correct, modify, or reform a judgment, you should not assume that all courts will do this, or even go a step further and assume that a motion to disregard jury findings will be equated with a motion to modify, correct, or reform. Storey, PRESERVATION OF ERROR POST-TRIAL, Chapter 2, page 4. The best practice is to stick with a plain language reading of Rule 329b, and not assume that a motion to disregard jury findings will extend the court’s plenary power to rule on the motion.

If a motion for new trial is filed (and plenary power is therefore extended), then the motion to disregard jury findings should be ruled upon before the motion for new trial is overruled, either by written order or by operation of law. See Tex. R. Civ. P. 329b; Cf., Spiller v. Lyons, 737 S.W.2d 29, 29 (Tex. App.—Houston [14th Dist.] 1987, no writ) (discussing motions for JNOV); Commercial Standard Ins. Co. v. S. Farm Bureau Cas. Ins. Co., 509 S.W.2d 387, 392 (Tex. Civ. App.—Corpus Christi 1974, writ ref’d n.r.e.)(accord); Storey, PRESERVATION OF ERROR POST-TRIAL, Chapter 2, page 4 (accord).

3. Effect of Filing on Appellate Deadlines?

Rule 26 of the Texas Rules of Appellate Procedure governs when an appeal must be perfected. See Tex. R. App. P. 26.1 (setting forth deadlines for filing notice of appeal in civil cases). Motions to disregard jury findings are not expressly mentioned in Rule 26. Thus, the straight forward answer to the question as to whether a motion to disregard jury findings extends the deadline for filing a notice of appeal is: “No.” This position is the traditional position maintained by Texas courts. See Walker v. S & T Truck Lines, Inc., 409 S.W.2d 942, 943 (Tex. Civ. App.—Corpus Christi 1966, writ ref’d) (discussing motions for JNOV); First Freeport Nat’l Bank v. Brazoswood Nat’l Bank, 712 S.W.2d 168, 170 (Tex. App.—Houston [14th Dist.] 1986, no writ)(accord); see also, Storey, PRESERVATION OF ERROR POST-TRIAL, Chapter 2, page 6.

However, the strength of this traditional position has been called into doubt. See Kirschberg v. Lowe, 974 S.W.2d 844, 847-48 (Tex. App.—San Antonio 1998, no pet.) (treating motion for JNOV as motion to modify, correct, and reform, and holding that timely filed motion for JNOV extended appellate timetable); see also, Lane Bank Equip. Co. v. Smith S. Equip., Inc., 10 S.W.3d 308, 312 (Tex. 1999); Gomez v. Tex. Dept’ t of Criminal Justice, 896 S.W.2d 176, 177 (Tex. 1995). In her paper on preservation of error, Joann Storey notes that the Texas Supreme Court “has created some confusion with its pronouncement in a bill of review case that ‘any post-judgment motion, which, if granted, would result in a substantive change in the judgment as entered, extends the time for perfecting the appeal.’” Storey, PRESERVATION OF ERROR POST-TRIAL, Chapter 2, page 4, (citing Gomez v. Tex. Dept’ t of Criminal Justice, 896 S.W.2d 176, 177 (Tex. 1995), and Lane Bank Equip. Co. v. Smith S. Equip., Inc., 10 S.W.3d 308, 312 (Tex. 1999)).

Until this issue is resolved, the best practice is to take Rule 26.1 literally and not assume that a motion to disregard jury findings will extend the deadline for filing a notice of appeal.

4. Effect of Filing on Court’s Plenary Power?

Rule 329b of the Texas Rules of Civil Procedure provides that a trial court’s plenary power is extended if a motion for new trial or motion to modify, correct, or reform the judgment is filed within thirty days after the judgment is signed. See Tex. R. Civ. P. 329b. Rule 329b makes no mention of motions to disregard jury findings. Thus, the plain language of Rule 329b does not embrace the idea that a motion to disregard jury findings will extend the court’s plenary power over its judgment.

Although some courts have begun to equate motions under Rule 301 (i.e., motions for JNOV or motions to disregard), with motions to correct, modify,
or reform a judgment, you should not assume that all courts will do this. Until the Texas Supreme Court resolves the conflict with regard to the nature of a motion under Rule 301, you should follow the plain language of Rule 329b and not assume that a motion to disregard jury findings extends the trial court’s plenary power. Storey, PRESERVATION OF ERROR POST-TRIAL, Chapter 2, page 4.

5. Preservation of Error.
A motion to disregard jury findings is used to preserve two basic complaints for appeal. First, it is used to preserve a contention that the evidence is legally insufficient to support the verdict of the jury. TEX. R. CIV. P. 301; Cecil v. Smith, 804 S.W.2d 509, 510-11 (Tex. 1991). Second, it is used to preserve a contention that a jury finding has been rendered immaterial by the jury’s answers to other questions. Spencer v. Eagle Star Ins. Co., 876 S.W.2d 154, 157 (Tex. 1994) see also, Storey, PRESERVATION OF ERROR POST-TRIAL, Chapter 2, page 5.

WARNING: a motion to disregard jury findings will not preserve a factual sufficiency point, which must be preserved in a motion for new trial. TEX. R. CIV. P. 324(b)(2)-(3).

When the motion to disregard addresses the sufficiency of the evidence to support one or more essential elements of a claim or defense, the grant or denial of the motion is evaluated on appeal under the legal sufficiency standard of review. Garza v. Alviar, 395 S.W.2d 821, 823-24 (Tex. 1965). The basic test for legal sufficiency is whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review. See City of Keller v. Wilson, 168 S.W.3d 802, 827 (Tex. 2005). In conducting a legal sufficiency analysis, the reviewing court must credit favorable evidence if reasonable jurors could do so and disregard contrary evidence unless reasonable jurors could not. Id.

When the motion for JNOV addresses an immaterial jury finding, the appellate court should determine whether the finding is immaterial and, if so, whether the movant is entitled to judgment when the finding is disregarded. Spencer v. Eagle Star Ins. Co., 876 S.W.2d 154, 157 (Tex. 1994).

E. Obtaining a Final Judgment
Before an appeal may be pursued, a final order must be signed by the court. A judgment routinely goes through three stages: rendition, reduction to writing, and entry. Oak Creek Homes, Inc. v. Jones, 758 S.W.2d 288, 290 (Tex. App.—Waco 1988, no writ). Rendition of judgment occurs when the trial judge officially announces a decision on the law as to the matters at issue, either orally in open court or by written memorandum filed with the clerk. Garza v. Texas Alcoholic Beverage Comm’n, 89 S.W.3d 1, 6 (Tex. 2002); Formby’s KOA v. BHP Water Supply Corp., 730 S.W.2d 428, 429–30 (Tex. App.—Dallas 1987, no writ). The subsequent reduction of the pronouncement to writing, signed and dated by the court, is a ministerial act of the court. Oak Creek Homes, 758 S.W.2d at 290. The reduction of the pronouncement to writing does not change the date of a prior rendition to the date of the signing of the written draft. Knox v. Long, 257 S.W.2d 289, 292 (Tex. 1953), overruled in part on other grounds by Jackson v. Hernandez, 285 S.W.2d 184, 191 (Tex. 1955). A judgment is “entered” by a purely ministerial act of the clerk of the court, and “entered” is synonymous with neither “signed” nor “rendered” when used in relation to a judgment or the date of the judgment. Burrell v. Cornelius, 570 S.W.2d 382, 384 (Tex. 1978). The trial court’s rendering of its order is fully effective for all purposes, except calculation of the time by which an appeal must be perfected. Tex. R. App. P. 26.1; see Galbraith v. Galbraith, 619 S.W.2d 238, 240 (Tex. Civ. App.—Texarkana 1981, no writ). Once the trial court renders its decision, the court’s orders are valid from that time forward until vacated or set aside. Ex parte Cole, 778 S.W.2d 599, 600 (Tex. App.—Houston [14th Dist.] 1989, no writ).

Texas law does not require specific words of rendition, but merely states that “rendition of judgment is the pronouncement by the court of its conclusions and decisions upon the matter submitted to it for adjudication.” Golodetz Trading Corp. v. Curland, 886 S.W.2d 503, 505 (Tex. App.—Houston [1st Dist.] 1994, no writ). “Oral rendition is proper under the present rules, but orderly administration requires that form of rendition to be in and by spoken words, not in mere cognition, and to have effect only insofar as those words state the pronouncement to be a present rendition of judgment.” Reese v. Piperti, 534 S.W.2d 329, 330 (Tex. 1976). The words used by the trial court must clearly indicate the intent to render judgment at the time the words are expressed. See Reese, 534 S.W.2d at 330. Judges’ oral pronouncements, however, are often necessarily tentative and may not cover all the details of a final decree, since judges know that they will review the draft of the judgment before signing it. Stallworth v. Stallworth, 201 S.W.3d 338, 349 (Tex. App.—Dallas 2006, no pet.) (judge orally announced fifty-fifty division of retirement benefits, but decree awarded each party own retirement benefits).

The Texas Supreme Court has found a trial court rendered judgment when the judge made the parties stand while he said, “It appearing to the court that all of you did agree in open court to this settlement, the court approves the settlement made in open court and
orders all parties to sign any and all papers necessary to carry out this agreement and to carry out the agreement that was made and dictated into the record.” Samples Exterminators v. Samples, 640 S.W.2d 873, 874–75 (Tex. 1982). The Dallas court of appeals has held that, although a written judgment was not entered until several months later, a binding judgment was rendered after a settlement was announced and the agreement read into the record, and the judge stated, “I will render judgment based on the agreements that I have read into the record.” Milwee v. Milwee 757 S.W.2d 429, 430–31 (Tex. App.—Dallas 1988, no writ). Rendition has also been found when the trial court judge stated, after the parties had agreed to a settlement, “It is a judgment of this court and will be binding as a settlement agreement incorporated as a court judgment.” Kelley v. Pirtle, 826 S.W.2d 653, 654 (Tex. App.—Texarkana 1992, writ denied). The Texas Supreme Court has also held that, when the trial court specifies the terms of the judgment on the docket sheet along with the words “decree to be entered,” rendition has occurred. See Burnaman v. Heaton, 240 S.W.2d 288, 290–91 (Tex. 1951).

Docket sheet entries alone, without a decree of divorce or a record, are insufficient to constitute a judgment or decree of the court. A docket sheet entry is a memorandum made for the convenience of the trial court and the court clerk. Docket sheet entries are inherently unreliable because they lack the formality of orders and judgments. Bailey-Mason v. Mason, 122 S.W.3d 894, 897 (Tex. App.—Dallas 2003, pet. denied).

2. Agreed Judgments.

An agreed judgment must be interpreted as if it were a contract between the parties, and its interpretation is governed by the laws relating to contracts, rather than laws relating to judgments. McCray v. McCray, 584 S.W.2d 279, 281 (Tex. 1979). The supreme court has also held that, although rules relating to contract interpretation apply, an agreed judgment is accorded the same degree of finality and binding force as a final judgment rendered at the conclusion of an adversary proceeding. McCray, 584 S.W.2d at 281; Treadway v. Shanks, 110 S.W.3d 1, 7 (Tex. App.—Dallas 2000), aff’d, Shanks v. Treadway, 110 S.W.3d 444 (Tex. 2003). A court must look to the intentions of the parties as they are manifested in the written agreement. See Coker v. Coker, 650 S.W.2d 391, 393 (Tex. 1983). A court is bound by the express stated intent of the parties as manifested within the four corners of the instrument itself, absent any allegations of ambiguity. See Nat’l Union Fire Ins. Co. v. CBI Indus., 907 S.W.2d 517, 520 (Tex. 1995) (per curiam). The intent of the trial court is not the controlling consideration in determining whether a judgment is final. In re Cobos, 994 S.W.2d 313, 315 (Tex. App.—Corpus Christi 1999, orig. proceeding). If a judgment contains language such as a Mother Hubbard clause that purports to deny all relief not expressly granted and that disposes of all claims or parties, regardless of the intent of the parties or the trial court, that judgment is final as to all claims and all parties. See In re J.G.W., 54 S.W.3d 826, 831 (Tex. App.—Texarkana 2001, no pet.).

V. POST JUDGMENT/PRE-APPEAL

After the trial, the lawyer must review the case and determine if the court did or did not do anything that his client wants to complain about on appeal. If the lawyer failed to timely and specifically object or failed to obtain a ruling on an objection, the lawyer may still be able to preserve the error through the use of a post-trial motion. Also, some complaints may only be made for the first time in a post-trial motion.

A. Motion for New Trial.

1. Why file the motion?

The primary reasons for filing a motion for new trial are to give the trial court a chance to correct any mistakes, to preserve error for appeal, and to extend the appellate deadlines.

The trial court may grant a new trial and set aside the judgment for good cause on the motion of any party or on the court’s own motion on the terms the court directs. If it appears to the court that a new trial should be granted on a point or points that affect only a part of the matters in controversy and that the part is clearly separable without unfairness to the parties, the court may grant a new trial as to that part only. TEX. R. CIV. P. 320.

A trial court in a divorce proceeding has discretion to grant a new trial within the time frame that the court has plenary jurisdiction, even if one party dies after the divorce decree is entered. Nichols v. Nichols, 907 S.W.2d 6, 10 (Tex. App.—Tyler 1995, writ denied). The negligence, inadvertence, or mistake of an attorney is attributable to his client so that the attorney’s failure to defend the case properly or to develop fully the available evidence does not constitute “good cause” authorizing a new trial. A motion for new trial may not be used as a vehicle by which the case may be tried over and differently. Scheffer v. Chron., 560 S.W.2d 419, 420 (Tex. Civ. App.—Beaumont 1977, writ ref’d n.r.e.).

2. When is it necessary to file a motion to preserve a complaint for appeal?

A motion for new trial is not necessary to preserve error in either a jury or a nonjury case, except under very limited circumstances. See TEX. R. CIV. P. 324(a). After either a jury or a nonjury trial, a motion for new trial is necessary to preserve post-trial complaints on which evidence must be heard, such as
newly discovered evidence or failure to set aside a default judgment (TEX. R. CIV. P. 324(b)(1)) and complaints that were not brought to the trial court’s attention during a jury trial (TEX. R. CIV. P. 324(b)(2)–(5)). The motion for new trial, however, does not negate the need for the party to have objected at trial to preserve error for an appeal.

If a motion for new trial is a prerequisite of appeal, error not complained of in the motion is waived. *Beacon Nat’l Ins. Co. v. Young*, 448 S.W.2d 812, 814 (Tex. Civ. App.—Dallas 1969, writ ref’d n.r.e.). A party whose motion for judgment on verdict of a jury is denied may forgo the filing of a motion for new trial and predicate his points of error on appeal on matters included in the motion. The party following that course may complain on appeal only of denial of the motion for judgment. *Abbott v. Earl Hayes Chevrolet Co.*, 384 S.W.2d 782, 784 (Tex. Civ. App.—Tyler 1964, no writ).

The filing of a motion for new trial in order to extend the appellate timetable is a matter of right, regardless of whether there is any sound or reasonable basis for the conclusion that a further motion is necessary. *Old Republic Ins. Co. v. Scott*, 846 S.W.2d 832, 833 (Tex. 1993).

3. What form should the motion take?

The motion must be in writing and signed by the attorney or the party. TEX. R. CIV. P. 320. Each point relied on in a motion for new trial or in arrest of judgment shall briefly refer to that part of the ruling of the court, charge given the jury or charge refused, admission or rejection of evidence, or other proceedings that are designated to be complained of, in such a way that the objection can be clearly identified and understood by the court. TEX. R. CIV. P. 321. Grounds of objection couched in general terms shall not be considered by the court. TEX. R. CIV. P. 322. The motion must specifically request a new trial; if the request is for a different judgment, it is not a motion for new trial. See *Mercer v. Band*, 454 S.W.2d 833, 836 (Tex. App.—Houston [14th Dist.] 1970, no writ).

4. When should the motion be filed?

A motion for new trial must be filed before or within thirty days after the judgment or other order complained of is signed. TEX. R. CIV. P. 329b(a). Within that same thirty-day period, a party may file one or more amended motions for new trial without leave of court as long as the trial court has not already overruled an earlier motion for new trial. TEX. R. CIV. P. 329b(b). With leave of the court, a party may file an amended motion even if the court has overruled an earlier motion for new trial. This rule also applies to supplemental motions. See *Equinox Enters., Inc. v. Associated Media, Inc.*, 730 S.W.2d 872, 875 (Tex. App.—Dallas 1987, no writ). Motions, whether original, amended, or supplemental, filed after this thirty-day period, are a nullity and cannot be considered by appellate courts. *Equinox*, 730 S.W.2d at 875. A court may not lengthen the period for taking any action under the Texas Rules of Civil Procedure relating to new trials except as stated in those rules. TEX. R. CIV. P. 5. A court is without authority to grant leave to file an amended motion for new trial after this thirty-day period. *Lind v. Gresham*, 672 S.W.2d 20, 22 (Tex. App.—Houston [14th Dist.] 1984, no writ).

Although a motion for new trial filed more than thirty days after the trial court signs its judgment is untimely, a trial court may, at its discretion, consider the grounds raised in an untimely motion and grant a new trial under its inherent authority before it loses plenary power. *Moritz v. Priest*, 121 S.W.3d 715, 720 (Tex. 2003). A prematurely filed motion for new trial is deemed to be filed on the date of, but subsequent to, the time that the court signs the judgment. TEX. R. CIV. P. 306c. The judgment date still serves as the date from which the appellate timetable begins to run. The problem with filing a premature motion, however, is that if the court denies the motion immediately following entry of the final order, a party must ask for leave of court to file an amended motion for new trial, which may not be granted.

Although the Texas Rules of Civil Procedure require that a motion for new trial be filed within thirty days of the judgment, the rules do not address the filing of a brief in support of the motion. Therefore, the practitioner should consider filing such a brief if it is later determined that more detail or explanation is needed that was inadvertently omitted from the motion for new trial.

Exceptions to the general rule requiring filing of the motion within 30 days of the signing of the judgment apply when a party receives a late notice of judgment, see TEX. R. CIV. P. 306a, when the trial court signs a judgment rendered after citation by publication, see TEX. R. CIV. P. 329(a), or when a party files an original petition in a Texas court to enforce a foreign judgment. See TEX. CIV. PRAC. & REM. CODE § 35.003(b)-(c).

5. What form should the Order on the motion take and by when must it be entered?

An order granting a motion for new trial must be written and signed. *Faulkner v. Culver*, 851 S.W.2d 187, 188 (Tex. 1993). A docket entry is not an order and may not be considered as part of the record. *Jauregui Partners, Ltd. v. Grubb & Ellis Commercial Real Estate Servs.*, 960 S.W.2d 334, 336 (Tex. App.—Corpus Christi 1997, writ denied). An order granting a new trial must be entered prior to the trial court losing plenary power. An order is insufficient unless it clearly states that the trial court has granted the motion for new trial. See *In re Nguyen*, 155 S.W.3d 191, 194.
(Tex. App.—Tyler 2003, orig. proceeding) (“Here, the scheduling order does not contain any reference to the pending motion for new trial and does not expressly grant a new trial. Consequently, we conclude that the scheduling order does not constitute a written, signed order granting a new trial.”). The order granting a new trial after a jury trial must clearly identify the reasons for granting the new trial; it is no longer sufficient for a trial court to grant a new trial “in the interest of justice.” In re Columbia Med. Ctr. of Las Colinas, 290 S.W.3d 204, 213 (Tex. 2009, orig. proceeding); In re C.R.S., No. 04-09-00814-CV., 2010 WL 454965, *1 (Tex. App.—San Antonio, Feb. 10, 2010, orig. proceeding).

6. What is the effect on the trial court’s plenary power?
   The filing of a motion for new trial extends the trial court’s plenary power to grant a new trial until 30 days after such motion has been overruled, either by a written and signed order or by operation of law, whichever occurs first. TEX. R. CIV. P. 324b(e). Therefore, if the motion for new trial is denied on the same day as the judgment is signed, the trial court loses plenary power thirty days later unless another plenary power extending motion is filed. The filing of the motion also has the effect of extending the time to file the notice of appeal from 30 days after the judgment is signed to 90 days. TEX. R. APP. P. 26.1(a)(1).

7. What should a party do if the trial court grants the other party’s motion for new trial?
   Until recently, the rule was that a trial court retained the power to vacate or “ungrant” a new trial and reinstate the original judgment only during the seventy-five day period when it continues to have plenary power over the original judgment. Porter v. Vick, 888 S.W.2d 789, 789-90 (Tex. 1994) (per curiam). However, on August 29, 2008, the Texas Supreme Court acknowledged and overruled its precedent in Porter v. Vick, concluding that it had based that opinion on a: (1) version of Texas Rule of Civil Procedure 329b that was changed in 1981; and (2) hypothetical assuming that a vacated judgment became final. In re Baylor Med. Ctr. at Garland, 280 S.W.3d 227, 230 (Tex. 2008). The Supreme Court ultimately quoted the following reasoning of federal courts and commentators: “‘There is no sound reason why the court may not reconsider its ruling [granting] a new trial’ at any time.” Id. at 232. Therefore, if the trial court grants the other party’s motion for new trial, the practitioner should file a motion for reconsideration and try to get the trial court to “ungrant” the motion for new trial.

8. The party opposing the grant of a new trial may have one other option at its disposal.
   In 2009, the Supreme Court of Texas conditionally granted mandamus relief when the trial court failed to state the specific grounds for why a new trial should be ordered. In re Columbia Med. Ctr. of Las Colinas, 290 S.W.3d 204, 213 (Tex. 2009, orig. proceeding). Accordingly, if a trial court fails to specify the reasons for granting a new trial, mandamus relief may be available to obtain judicial review of the order.

B. Motion to Modify, Correct, or Reform the Judgment.
1. Why file the motion?
   A motion to modify, correct, or reform the judgment is filed to request the trial court to change its judgment. See TEX. R. CIV. P. 324b(g). It should be filed to correct any error in the judgment, such as when the trial court does not award attorney’s fees or does not award the correct amount of attorney’s fees, see Texas Educ. Agency v. Maxwell, 937 S.W.2d 621, 623 (Tex. App.—Eastland 1997, writ denied), or when the judgment does not award costs or awards an incorrect amount. See Portland S&L Ass’n v. Bernstein, 716 S.W.2d 532, 541 (Tex. App.—Corpus Christi 1985, writ ref’d n.r.e.).

2. What form should the motion take?
   The motion must be in writing and signed by the party or his attorney and must specify what aspects of the judgment should be modified, corrected, or reformed. TEX. R. CIV. P. 324b(g).

3. What is the effect of filing the motion?
   Like the motion for new trial, the filing of this motion has the effect of extending the trial court’s plenary power to grant a new trial until 30 days after such motion has been overruled, either by a written and signed order or by operation of law, whichever occurs first. TEX. R. CIV. P. 324b(e). It also has the effect of extending the time to file the notice of appeal from 30 days after the court signs the judgment to 90 days. TEX. R. APP. P. 26.1(a)(2).

4. When should the motion be filed?
   The motion to modify, correct, or reform the judgment must be filed within 30 days of the date the court signed the judgment. TEX. R. CIV. P. 324b(g). A party may file a motion to modify, correct, or reform the judgment even if the court has already overruled a motion for new trial as long as it is filed while the court retains plenary power. L.M. Healthcare, Inc. v. Childs, 929 S.W.2d 442, 443 (Tex. 1996).
5. Motion to Modify, Correct, or Reform the judgment versus Motion for JNOV.

Although a motion for JNOV is not one of the motions listed in rule 26.1 of the Texas Rules of Appellate Procedure as one of the motions that extends the appellate timetable, at least one jurisdiction has held that it also extends the appellate timetable. No other jurisdiction has done so. Kirschberg v. Lowe, 974 S.W.2d 844, 847-48 (Tex. App.—San Antonio 1998, no pet.). The better practice is to clearly delineate these motions, especially if the practitioner is relying on the extension benefits of the motion to modify, correct, or reform the judgment.

6. Motion to Modify, Correct, or Reform versus Motion to Clarify.

A motion to modify differs from a motion to clarify. A court may clarify an order rendered by the court if the court finds, on the motion of a party or on the court’s own motion, that the order is not specific enough to be enforced by contempt. Lundy v. Lundy, 973 S.W.2d 687, 688 (Tex. App.—Tyler 1998, writ denied); TEX. FAM. CODE ANN. § 157.421 (Vernon 1999). A court, however, may not change the substantive provisions of an order to be clarified, and a substantive change is not enforceable. Lundy, 973 S.W.2d at 688; TEX. FAM. CODE ANN. § 157.423 (Vernon 1999). The only basis for clarifying a prior decree is when a provision is ambiguous and non-specific. Lundy, 973 S.W.2d at 688; see Bina v. Bina, 908 S.W.2d 595, 598 (Tex. App.—Fort Worth 1995, no writ). In the absence of an ambiguity, the trial court is without authority to modify the judgment. Lundy, 973 S.W.2d 688-89. A court may not modify the original judgment under the guise of clarification. Dunn v. Dunn, 708 S.W.2d 20, 23 (Tex. App.—Dallas 1986, no writ)(citing McGehee v. Epley, 661 S.W.d 924, 925 (Tex. 1983)). A motion to clarify does not extend the time to file the notice of appeal. See TEX. R. APP. P. 26.1.

C. Second Judgment Issues.

If the court grants a motion for new trial or motion to modify, correct, or reform, in whole or in part, and signs a second judgment, then appellate counsel must be aware of the effect of a previously filed motion for new trial or motion to modify, correct, or reform, with regard to: (1) preserving error as to the second judgment; (2) extending the court’s plenary power; and (3) extending the appellate deadlines. If the court signs a second judgment, a motion for new trial which was filed to assail the first judgment is still effective in assailing the second judgment (for the purpose of preserving error and extending the court’s plenary power and appellate deadlines) if the substance of the motion still challenges some substantive component of the second judgment. See Tex. R. Civ. P. 306c (holding that prematurely filed motion for new trial is deemed filed on the day of but after judgment is signed); Tex. R. App. P. 27.2 (allowing appellate court to treat actions taken before an appealable order is signed as relating to an appeal of that order); Fredonia State Bank v. General Life Ins. Co., 881 S.W.2d 279, 281 (Tex. 1994). However, it is important to note that if the court grants all the relief asked for in a motion for new trial and a second judgment is signed, the previously filed motion will not preserve error or extend the court’s plenary power or the appellate deadlines as to the second judgment. Wilkins v. Methodist Health Care Sys., 160 S.W.3d 559, 562 (Tex. 2005).

D. Request for Findings of Fact and Conclusions of Law.

1. Why file the request?

In a non-jury trial, a court’s findings of fact serve the same purpose as a jury’s findings, i.e., they resolve the factual disputes in the case. Conclusions of law are the court’s statement of the legal bases that it applied to resolve the facts in the case.

2. What is the effect of filing the request?

Like a motion for new trial and a motion to modify, correct, or reform the judgment, filing a request for findings of fact if required under rule 296 of the Texas Rules of Civil Procedure (or, if not required, could properly be considered by the appellate court) extends the time to file the notice of appeal from 30 days after the court signs the judgment to 90 days. TEX. R. APP. P. 26.1(a)(4).

3. When is it necessary to request findings of fact?

Findings of fact are necessary:

a. in any case tried without a jury, TEX. R. CIV. P. 296;
b. in a nonjury case, which is resolved by a judgment after the petitioner rests, Qantel Bus. Sys., Inc. v. Custom Controls Co., 761 S.W.2d 302, 304 (1988);
c. when the jury omits elements of an issue, see TEX. R. CIV. P. 296; and

d. when part of the case is tried to a jury and another part is tried to the court, findings of fact should be requested on the issues decided by the court, Roberts v. Roberts, 999 S.W.2d 424, 433-34 (Tex. App.—El Paso 1999, no pet.).

4. When are findings of fact helpful?

Findings of fact are helpful:

a. when the court rules on jurisdiction challenges after an evidentiary hearing, see
Goodenour v. Goodenour, 64 S.W.3d 69, 76 (Tex. App.—Austin 2000, pet. denied);
b. after the court holds a hearing on a motion to transfer venue, see Coke v. Coke, 802 S.W.2d 270, 278 (Tex. App.—Dallas 1990, writ denied); and

5. When are findings of fact inappropriate?
   Findings of fact are inappropriate and will not extend the time within which to perfect the appeal:
   a. when issues are tried to a jury, IKB Indus., Ltd. v. Pro-Line Corp., 938 S.W.2d 440, 443 (Tex. 1997);
   b. when the court renders a summary judgment, IKB, 938 S.W.2d at 443;
   c. when the court grants a directed verdict in a jury trial, Id.; and
   d. when the court grants a JNOV, Id.

6. Who should make the request for findings of fact?
   Findings of fact governed by Rule 296 of the Texas Rules of Civil Procedure should be requested by the party who loses; otherwise, facts are deemed in favor of the judgment. Worford v. Stamper, 801 S.W.2d 108, 109 (Tex. 1990).

7. When should the request for findings of fact be made?
   As noted above, findings of fact regarding child support and periods of possession should be made orally at the hearing or within 10 days of the hearing.

a. Marital Property/Tort Claims.
   Unlike findings of fact for child support and possession, the timetable for findings of fact associated with the division of the marital property are not subject to special provisions set forth in the Texas Family Code. Accordingly, rule 296 of the Texas Rules of Civil Procedure should be strictly followed. Therefore, the first request for findings of fact must be filed within 20 days of the date that the court signs the judgment. TEX. R. CIV. P. 296. It is the clerk’s duty to immediately call the request to the attention of the judge who tried the case. Id. The trial court should file FOF within 20 days of receiving the request. TEX. R. CIV. P. 297. Except for the specific findings required by the Texas Family Code to be recited in the judgment, the trial court is prohibited from reciting findings of fact in the judgment and doing so does not fulfill the requirements of rules 296-268 of the Texas Rules of Civil Procedure. TEX. R. CIV. P. 299a; Frommer v. Frommer, 981 S.W.2d 811, 814 (Tex. App.—Houston [1st Dist.] 1998, pet. dism’d).
b. Second Request for findings of fact and conclusions of law.
   If the trial court fails to file findings of fact and conclusions of law within 20 days after the first request, the requesting party has 30 days from the date of the original request to file a “Notice of Past Due Findings of Fact and Conclusions of Law.” TEX. R. CIV. P. 297. If the requesting party fails to file a “Notice of Past Due Findings of Fact and Conclusions of Law,” then, the right to complain of the court’s failure to file findings of fact and conclusions of law is waived. Curtis v. Comm’n for Lawyer Discipline, 20 S.W.3d 227, 231-32 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

c. Third Request for findings of fact and conclusions of law.
   Once a party files a Notice of Past Due Findings of Fact and Conclusions of Law, the trial court has 40 days from the date of filing of the party’s first request to file findings and conclusions. TEX. R. CIV. P. 297.

8. What is the effect of trial court’s failure to file findings of fact and conclusions of law after proper request?
   If a party timely and properly files a request for findings of fact, the trial court has a mandatory duty to file findings of fact, and harm will be presumed if a reporter’s record is made part of the record on appeal. Cherne Indus., Inc. v. Magallanes, 763 S.W.2d 768, 772 (Tex. 1989). If the record shows, however, that the appellant suffered no harm, this presumption may be rebutted. Sheldon Pollack Corp. v. Pioneer Concrete of Tex., Inc., 765 S.W.2d 843, 845 (Tex. App.—Dallas 1989, writ denied). Whether the requesting party suffers harm rests on whether the circumstances of a particular case require an appellant to guess the reason or reasons that the trial court ruled against him. Thomas James Assoc. v. Owens, 1 S.W.3d 315, 319 (Tex. App.—Dallas 1999, no pet.).

9. What findings of fact are the trial court required to make?
   For a comprehensive article on drafting findings of fact, please refer to Smythe, Sally S., Findings of Fact and Conclusions of Law: The Rhyme and Reason of the Ruling, Advanced Family Law Drafting Course, Dec. 2001. The Texarkana Court of Appeals held in 2002 that “Findings of fact are ultimate determinations
of what specifically occurred, who did or did not do certain acts, what the values of services and property are worth, and the answer to any other specific inquiry necessary to establish conduct or the existence or nonexistence of a relevant matter. On the other hand, conclusions of law may be a statement of a principle of law or the application of the law to the ultimate facts in the case.” Pac. Empl. Ins. Co. v. Brown, 86 S.W.3d 353, 356 -357 (Tex. App.—Texarkana 2002, no pet.).

However, some statements by the trial court are not sufficient “findings of fact” to preserve a factual sufficiency issue on appeal. For example, statements made by the trial court at the conclusion of trial do not constitute findings of fact. In re Doe 10, 78 S.W.3d 338, 340 n.2 (Tex. 2002) (oral comments by trial judge); In re W.E.R., 669 S.W.2d 716 (Tex. 1984) (oral comments by trial judge); Wells v. Wells, 251 S.W.3d 834, 840 (Tex. App.—Eastland 2008, no pet.) (oral comments by trial judge).

Disagreement exists among the courts regarding whether “findings of fact” that are denominated as such and contained in the judgment/order appealed are sufficient to preserve factual sufficiency review. Rule 299a of the Rules of Civil Procedure provides that findings of fact shall be made separately from the judgment. The First Court of Appeals in Houston, and the courts of appeals in Dallas and Texarkana have held that “findings” contained in a judgment cannot be used to support a claim on appeal when no party has requested findings and conclusions. Colbert v. DFPS, 227 S.W.3d 799, 809 (Tex. App.—Houston [1st Dist.] 2006), pet. denied sub nom., In re D.N.C., 252 S.W.3d 317 (Tex. 2008); Guridi v. Waller, 98 S.W.3d 315, 317 (Tex. App.—Houston [1st Dist.] 2003, no pet.); Casino Magic Corp. v. King, 43 S.W.3d 14, 19 n.6 (Tex. App.—Dallas 2001, pet. denied); Frommer v. Frommer, 981 S.W.2d 811, 813-14 (Tex. App.—Houston [1st Dist.] 1998, pet. dism’d); Sutherland v. Cobern, 843 S.W.2d 127, 131 n. 7 (Tex. App.—Texarkana 1992, writ denied). On the other hand, courts in Amarillo, Beaumont, and the Fourteenth Court of Appeals in Houston have held that findings contained in a judgment may be sufficient to support a claim on appeal if no one complains or requests them. See In re C.A.B., 289 S.W.3d 874, 880-881 (Tex. App.—Houston [14th Dist.] 2009, orig. proceeding); In re Estate of Jones, 197 S.W.3d 894, 900 (Tex. App.—Beaumont 2006, no pet.); In the Interest of U.P., 105 S.W.3d 222, 229 n.3 (Tex. App.—Houston [14th Dist.] 2003, pet. denied); In re Castillo, 101 S.W.3d 174, 179 (Tex. App.—Amarillo 2003, pet. denied); Hill v. Hill, 971 S.W.2d 153, 157 (Tex. App.—Amarillo 1998, no pet.). Until this uncertainty is resolved by the Supreme Court of Texas, the advised practice is to timely request separately-filed findings of fact and conclusions of law.


If findings are required by section 154.130 of the Texas Family Code, the court shall state whether the application of the guidelines would be unjust or inappropriate and shall state the following in the child support order:

1. the monthly net resources of the obligor per month are $____;
2. the monthly net resources of the obligee per month are $____;
3. the percentage applied to the obligor’s net resources for child support by the actual order rendered by the court is ___%;
4. the amount of child support if the percentage guidelines are applied to the first $6000 of the obligor’s net resources is $____;
5. if applicable, the specific reasons that the amount of child support per month ordered by the court varies from the amount stated in (4) are ______________________; and
6. if applicable, the obligor is obligated to support children in more than one household; and:

(A) the number of children before the court is _____;
(B) the number of children not before the court residing in the same household with the obligor is _____; and
(C) the number of children not before the court for whom the obligor is obligated by a court order to pay support, without regard to whether the obligor is delinquent in child support payments, and who are not counted under paragraph (A) or (B) is _____.”


NOTE: If it becomes necessary to seek findings of fact in regards to the amount of child support, note that the monthly net resources of obligee is a mandatory finding. Accordingly, such information should be sought and obtained during discovery in case it becomes an issue at trial. Typically, when this information is requested during discovery in cases where the obligor is not seeking custody, a relevance objection is raised. However, this information is clearly relevant to the obligor’s decision to seek a variance from guideline support.

b. Possession.

When possession of the child varies from the Standard Possession Order, the trial court must state the specific reasons for the variance from the standard

c. Division of the Marital Estate.

In cases in which the trial court has rendered a judgment dividing the parties’ estate, a party’s written request obligates the trial court to make in writing findings of facts and conclusions of law concerning (1) the characterization of each party’s assets, liabilities, claims, and offsets on which disputed evidence has been presented; and (2) the value or amount of the community estate’s assets, liabilities, claims, and offsets on which disputed evidence has been presented.  TEX. FAM. CODE ANN. § 6.711(a) (Vernon Supp. 2001).  Unlike child support and possession findings, a request for findings of fact and conclusions of law under this section is governed by the Texas Rules of Civil Procedure and requires no special deadlines.  TEX. FAM. CODE ANN. § 6.711(b).  When seeking these specific findings, the request for findings of fact and conclusions of law should specify not only Civil Rule of Procedure 296, but also Family Code Section 6.711, without the specific family code reference, the trial court is under no obligation to provide these specific findings of fact.

This statute certainly assists the practitioner in obtaining some of the findings needed to pursue an appeal, but it still leaves several hurdles for an appellant to overcome should a trial court limit itself to just the statutory findings.  For example, although the Family Code allows the trial court to take into consideration the value of a party’s separate estate in making the division of property, it is not mandatory for the trial court to put a value on the separate estates of the parties.  Without this information, it would be virtually impossible for an appellate court to determine whether the trial court had made a full and equitable division.  Smythe, Sally S., Findings of Fact and Conclusions of Law:  The Rhyme and Reason of the Ruling.  Advanced Family Law Drafting Course, Dec. 2001.

VI. THE APPEAL

A. Notice of Appeal.

Unless the deadlines are extended by filing a motion for new trial, a motion to modify the judgment, a motion to reinstate under Rule 165a, or a request for findings of fact and conclusions of law (in cases in which findings and conclusions are appropriate), a party desiring to file an ordinary appeal must file a request for findings and conclusions or one of the motions identified in TEX. R. APP. P. 26.1(a), the time period for filing a regular appeal is extended to 90 days.  TEX. R. APP. P. 26.1(a).

If a party does not receive notice that the judgment or appealable order was signed more than 20 days but no more than 90 days after the order was signed, then the order is considered to be “signed” for regular appeal deadlines on the date that the party receives notice or actual knowledge of the order’s signing.  TEX. R. APP. P. 4.2(a)(1).  Under these circumstances, a party would need to file a motion to gain additional time pursuant to TEX. R. CIV. P. 306a.5 and present evidence at a hearing in the trial court.  TEX. R. APP. P. 26.1(b–c).

A party perfects an appeal by filing a written notice of appeal with the trial court clerk.  If the party mistakenly files the notice of appeal with the appellate court, the notice is deemed to be filed with the trial court clerk on that same day, and the appellate clerk must immediately send the trial court clerk a copy of the notice.  The filing of a notice of appeal invokes the jurisdiction of the appellate court.  The party that is seeking to alter the trial court’s judgment is the person who files the notice of appeal.  Parties whose interests are aligned may file a joint notice of appeal.  TEX. R. APP. P. 25.1(a)–(c).  The notice should (1) identify the trial court and the cause number and style of the case; (2) state the date of judgment or order from which the party is appealing; (3) state that the party desires to appeal; (4) designate the court to which the appeal is taken, unless the appeal is to either the first or fourteenth court of appeals, in which case the notice must state that the appeal is to either of those courts; and (5) state the name of each party filing the notice.  TEX. R. APP. P. 25.1(d)(1)–(5).

The appellant must serve the notice of appeal on all parties to the trial court’s final judgment and file a copy with the appellate court clerk.  TEX. R. APP. P. 25.1(e).  In an accelerated appeal, the notice must also state that the appeal is accelerated.  TEX. R. APP. P. 25.1(d)(6).  In a restricted appeal, the notice must also state that the appellant is a party affected by the judgment but that he did not participate in the hearing resulting in the judgment; state that the appellant did not file a timely postjudgment motion, request for findings of fact and conclusions of law, or notice of appeal; and be verified by the appellant if the appeal is pro se.  TEX. R. APP. P. 25.1(d)(7).  The appellant is not required to specify issues in a general or restricted notice of appeal under TEX. R. APP. P. 25.1(d).  Vázquez v. Vázquez, 292 S.W.3d 80, 82 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

Although a cost bond is not required, the court clerk and the court reporter are not responsible for preparing, certifying, and timely filing the record unless the appellant either has paid the fees, is entitled to appeal without paying the fees, or has “made satisfactory arrangements” to pay the fees.  TEX. R. APP. P.
Section 9.007(c) of the Texas Family Code states:
“The power of the court to render further orders to assist in the implementation of or to clarify the property division is abated while an appellate proceeding is pending.” Thus, the debate comes down to whether a court’s order is one that is actually “assisting in the implementation of the property division.” This statute is a relatively recent addition to the Texas Family Code, so the case law analyzing it is still evolving, and the reported decisions are drawing very subtle lines as to what is a permissible order and what is not.

In the Fischer-Stoker case, both parties had been ordered to deliver an accounting of their bank accounts along with a check made payable to the other spouse by a date certain. In re Fischer–Stoker, 174 S.W.3d 268 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding). Fisher-Stoker failed to comply and filed a notice of appeal. Id. at 269. Stoker responded with a motion for enforcement and contempt and Fisher-Stoker filed a motion to dismiss, claiming that the trial court did not have jurisdiction under 9.007(c) to consider the motion for enforcement/contempt. Id. The trial court denied his motion to dismiss, and Stoker filed a mandamus. Id. The appellate court construed the relief sought as a request for an order to assist in the implementation of the property division: “The instant case, however, does not concern execution of the judgment, which is ‘merely a direction to a ministerial officer to permit enforcement of the judgment.’” Id. at 272 (citing English v. English, 44 S.W.3d 102, 106 (Tex. App.—Houston [14th Dist.] 2001, no pet.). Rather, Stoker has proceeded against Fischer-Stoker in the trial court with a motion to enforce the terms of the property division in the final divorce decree by criminal contempt if she fails to provide an accounting of her bank accounts and a check for 50% of the money in those accounts on a date certain. Id. The appellate court granted the writ of mandamus and ordered the trial court to dismiss the motion for enforcement/contempt pending the appeal. Id.

In Sheikh v. Sheikh the appellate court found that the trial court had subject matter jurisdiction, after former husband had noticed his appeal of parties' final divorce decree, to enter turnover and receivership order sought by former wife insofar as it assisted her in enforcing monetary judgment she obtained against former husband in divorce action, where former husband failed to supersede divorce decree. 248 S.W.3d 381, 391-92 (Tex. App.—Houston [1st Dist.] 2007, no pet.). The court found that the turnover-and-receivership order did not assist in implementing only the decree's property division because the divorce decree itself not only divided property, but also awarded a money judgment of $330,000. Id. at 389. However, ultimately, the court held that, to the extent

C. Enforcing the Judgment Pending Appeal.

In family law matters, the courts of appeals disagree about whether the trial court retains enforcement authority during an appeal, and recent case law in this area has done little to clear up the confusion.

B. Suspension of Judgment Pending Appeal.

The filing of the notice of appeal does not suspend enforcement of the judgment, and enforcement of the judgment may proceed, unless the judgment is superseded in accordance with rule 24 of the Texas Rules of Appellate Procedure. TEX. R. APP. P. 25.1(g)(1). In a divorce action, a judgment requiring a party to take a specific action, such as signing a special warranty deed, stock transfers, a qualified domestic relations order, or any other type of document to effectuate a property transfer, or to pay a money judgment would need to be superseded in order to stay the enforcement of that judgment. A party has an absolute right to supersede a money judgment pending appeal. TEX. R. APP. P. 24.1; Ex parte Kimbrough, 146 S.W.2d 371, 372 (Tex. 1941, orig. proceeding); State ex rel. State Highway & Public Trans. Comm'n v. Schless, 815 S.W.2d 373, 375 (Tex. App.—Austin 1991, orig. proceeding). The judgment creditor may supersede the judgment by (1) filing with the trial court clerk a written agreement with the judgment creditor for suspending the enforcement of the judgment; (2) filing with the trial court clerk a good and sufficient bond; (3) making a deposit with the trial court clerk in lieu of a bond; or (4) providing alternate security ordered by the court. TEX. R. APP. P. 24.1(a). Once a judgment is superseded, enforcement of a judgment is suspended and, if already begun, must cease. If execution has been issued, the clerk will promptly issue a writ of supersedeas. TEX. R. APP. P. 24.1(f). The power of a court to render further orders to assist in the implementation of or to clarify a property division is abated while an appellate proceeding is pending. TEX. FAM. CODE § 9.007(c).

Section 9.007(c) of the Texas Family Code states: “The power of the court to render further orders to assist in the implementation of or to clarify the property division is abated while an appellate proceeding is pending.” Thus, the debate comes down to whether a court’s order is one that is actually “assisting in the implementation of the property division.” This statute is a relatively recent addition to the Texas Family Code, so the case law analyzing it is still evolving, and the reported decisions are drawing very subtle lines as to what is a permissible order and what is not.

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that the turnover-and-receivership order allowed the receiver to take and to dispose of the property awarded to Wife and still in Husband’s possession, the order violated section 9.007(c). Id. at 392 (citing Fischer-Stoker, 174 S.W.3d at 272).

In the recent Phillips case the parties’ divorce decree provided for the marital home to be sold, and the proceeds split to where each party was given a $125,000 disbursement as their relative separate property. The proceeds were paid into an interest bearing account with Wife’s attorney. Id. at 684. Husband filed a motion to disburse the $125,000 funds which the court granted. Id. Wife then sought mandamus relief. Id. The El Paso Court of Appeals looked at whether the trial court was violating 9.007(c) by making that disbursement award. The court distinguished the Fischer-Stoker case in holding that “[t]he order of which [Wife] complains is not an order of contempt. It provided for the distribution of the sale proceeds, including the payment of $125,000 to each party for their separate property interest. Only then was [Wife] to be paid all or part of the money judgment. She has not filed a supersedeas bond. We conclude that the order of disbursement is not a further order assisting in the implementation of the property division. Rather, it is merely a direction to a ministerial officer to enforce the judgment.” Id. at 687. Accordingly, the court denied Wife’s request for mandamus relief. Id.

In the very recent but mostly unhelpful Mandell case, Wife filed a notice of appeal from a divorce decree on July 7, 2008. Mandell v. Mandell, 2010 WL 5118347 at *1 (Tex. App.—Fort Worth 2010, orig. proceeding). Wife appealed, and during the appeal, after some more legal wrangling, the house sold and all the proceeds were paid into an interest bearing account with Wife’s attorney. Id. at 684. Husband filed a motion to disburse the $125,000 funds which the court granted. Id. Wife then sought mandamus relief. Id. The El Paso Court of Appeals looked at whether the trial court was violating 9.007(c) by making that disbursement award. The court distinguished the Fischer-Stoker case in holding that “[t]he order of which [Wife] complains is not an order of contempt. It provided for the distribution of the sale proceeds, including the payment of $125,000 to each party for their separate property interest. Only then was [Wife] to be paid all or part of the money judgment. She has not filed a supersedeas bond. We conclude that the order of disbursement is not a further order assisting in the implementation of the property division. Rather, it is merely a direction to a ministerial officer to enforce the judgment.” Id. at 687. Accordingly, the court denied Wife’s request for mandamus relief. Id.

In the recent but mostly unhelpful Mandell case, Wife filed a notice of appeal from a divorce decree on July 7, 2008. Mandell v. Mandell, 2010 WL 5118347 at *1 (Tex. App.—Fort Worth 2010, orig. proceeding). On November 12, 2008, the trial court issued an order granting husband’s post-judgment motion to enforce the division of the marital property, the court of appeals reversed and remanded, holding that under Section 9.007(c) of the Texas Family Code, the trial court had no power to render the November 12, 2008 enforcement order because the appeal from the divorce decree was then pending. Id. Although this case does not elaborate as to what relief husband was requesting in his post-judgment motion to enforce the division of the marital property, this case bolsters Fischer-Stoker and the like that suggest that only under very limited circumstances may the trial court enforce a property division pending an appeal. So far, the only example of those limited circumstances comes from the Phillips case, wherein it was determined that ordering the disbursement of funds was a “direction to a ministerial officer to enforce the judgment.” Obviously the distinction is a subtle one, but the Phillips case is the only case giving guidance on this issue so far.

When it comes to enforcing child-related issues while an appeal is pending, the case law appears more clear – the trial court has the authority to enforce its orders. In re Phillips, 981 S.W.2d 313 (Tex. App.—San Antonio 1998, pet. denied), involved the trial court’s dismissal of a post-judgment enforcement proceeding for child support and arrearages against the father. The father appealed but did not file a supersedeas bond. The Court of Appeals, relying in part on Sections 109.001(b) and 109.002(c) of the Family Code, held that the trial court retained jurisdiction to enforce its order unless the appellate court supercedes the order. Id. at 314-15. In In re Taylor, 39 S.W.3d 406 (Tex. App.—Waco 2001, orig. proceeding), the former husband appealed the divorce and subsequently filed a motion for enforcement and contempt in the trial court against his former wife. The trial court denied the motion. The Court of Appeals considered whether the trial court had jurisdiction to enforce the provisions of the divorce decree by contempt. The Court held that the trial court had jurisdiction of the motion for enforcement and contempt. Id. at 409-10. The Court also noted that the enactment of Section 109.002(c) of the Family Code evidences an intention by the legislature that the trial court retains jurisdiction to enforce its orders even though a divorce is pending on appeal. Id. at 411.

It also appears clear that the trial court may enforce an award of spousal maintenance pending an appeal. In In re Sheshtawy, 154 S.W.3d 114 (Tex. 2004), the Texas Supreme Court considered whether an award of spousal maintenance was enforceable by contempt during the pendency of an appeal. The Supreme Court was “unable to discern a compelling reason for withdrawing a trial court’s authority to enforce a final judgment pending appeal when that judgment has not been superseded or stayed and no statute or rule of procedure removes the trial court’s authority.” Id. at 124. Because there was no statutory or procedural prohibition, the court concluded that the trial court could indeed enforce its judgment by contempt. Id. at 125.

D. Temporary Relief Pending Appeal

1. Suit for Divorce, for Annulment, or to Declare Marriage Void:

Not later than the thirtieth day after the date an appeal is perfected, on the court’s motion or on that of a party and after notice and hearing, the trial court may render a temporary order necessary for the preservation
of the property and for the protection of the parties during the appeal. In addition to other matters, an order may require the support of either spouse, require the payment of reasonable attorney’s fees and expenses, appoint a receiver for the preservation and protection of the parties’ property, or award one spouse exclusive occupancy of the parties’ residence pending the appeal. The trial court retains jurisdiction to enforce those orders unless the appellate court, on a proper showing, supersedes the trial court’s orders. TEX. FAM. CODE ANN. § 6.709. The breadth of this section is broad including but not limited to such relief as temporary spousal support and attorney’s fees. See In re Marriage of Joiner, 755 S.W.2d 496, 499 (Tex. App.—Amarillo 1988, no writ); Love v. Bailey-Love, 217 S.W.3d 33, 36 (Tex. App.—Houston [1st Dist.] 2006, no pet.); Griffith v. Case, No. 03-06-007220CV (Tex. App.—Austin May 22, 2007, no pet. history) (mem. op.). The order granting temporary relief pending appeal must be signed within thirty days of the filing of the notice of appeal. Love v. Bailey-Love, 217 S.W.3d 33, 36–37 (Tex. App.—Houston [1st Dist.] 2006, no pet.). Temporary orders pending appeal may be challenged by mandamus if trial court abused its discretion and if the party does not have an adequate remedy by appeal. If there is no abuse of discretion, then the party has an adequate remedy by appeal and the temporary orders pending appeal may be challenged by an interlocutory appeal or along with the pending appeal on the merits of the final judgment. In re Merriam, 228 S.W.3d 413 (Tex. App.—Beaumont 2007, orig. proceeding).

2. Suit Affecting Parent-Child Relationship:

Within thirty days after the date an appeal is perfected, the court may, on its own motion or that of any party after notice and hearing, make any order necessary to preserve and protect the safety and welfare of the child during the pendency of the appeal as the court may deem necessary and equitable. In addition to other matters, an order may appoint temporary conservators for the child and provide for possession of the child by a party, restrain a party from molesting or disturbing the peace of the child or another party, prohibit a person from removing the child beyond a geographical area identified by the court, require payment of reasonable attorney’s fees and expenses, or suspend the operation of the order or judgment that is being appealed (except an order or judgment terminating the parent-child relationship in a suit brought by certain governmental agencies). TEX. FAM. CODE ANN. § 109.001(a), (d). The court retains jurisdiction to enforce these orders unless the appellate court, on a proper showing, supersedes the court’s order. TEX. FAM. CODE ANN. § 109.001(b). The order granting temporary relief pending appeal must be signed within thirty days of the filing of the notice of appeal. See Love, 217 S.W.3d at 36–37.

The clear intent of this section it to extend the power of the trial court to enter temporary orders after an appeal has been perfected to preserve and protect the safety and welfare of the child, preserve the community property and protect the parties, when such relief has not been ordered in the decree. See In re Boyd, 34 S.W.3d 708, 710–11 (Tex. App.—Fort Worth 2000, orig. proceeding). Temporary orders pending appeal may be challenged by mandamus if trial court abused its discretion and if the party does not have an adequate remedy by appeal. If there is no abuse of discretion, then the party has an adequate remedy by appeal and the temporary orders pending appeal may be challenged by an interlocutory appeal or along with the pending appeal on the merits of the final judgment. In re Merriam, 228 S.W.3d 413 (Tex. App.—Beaumont 2007, orig. proceeding). See Marcus v. Smith, 2009 WL 4854755 at 6 (Tex. App. – Houston [1st Dist.] 2009, no pet.) (“Mandamus is the appropriate remedy to attack a temporary order under section 109.001.”).

3. Attorney’s Fees on Appeal.

The trial court has the discretion to order one spouse to pay the other spouse attorney’s fees pending appeal. See Love v. Bailey-Love, 217 S.W.3d at 36 (the trial court signed an order which required Robert to pay Sophia $5,000 for appeal). In addition, the trial court has the discretion to order the appealing spouse to deposit funds into the registry of the court as attorney’s fees that would be returned to the appealing party should he prevail on appeal. Griffith v. Case, No. 03-06-007220CV (Tex. App.—Austin May 22, 2007, no pet. history) (mem. op.). In Griffith v. Case, the Temporary Orders Pending Appeal stated in part:

It is ORDERED that Respondent, [HUSBAND] shall pay $18,000.00 into the registry of the Court as and for attorney’s fees and expenses incurred by [WIFE] in connection with the appeal of this cause initiated by [HUSBAND].

It is further ORDERED that the Clerk of the Court shall remit to [WIFE] all or part of amount ordered herein to be paid into the registry of the Court immediately upon the issuance of the mandate in connection with the appeal of this cause following the rendition of an opinion affirming in whole or in part the Final Decree of Divorce rendered by the Court, said amount to be that amount of attorney’s fees actually incurred by [WIFE] in connection with the appeal.
It is further ORDERED that the Clerk of the Court shall remit to [HUSBAND] the entire amount ordered herein to be paid into the registry of the Court immediately upon the issuance of the mandate in connection with the appeal of this cause following the rendition of an opinion reversing the entire Final Decree of Divorce rendered by the Court.

In the event [WIFE] does not receive the entire amount deposited in the registry, any remaining amount shall be remitted to [HUSBAND].

When the appealing party, the husband, failed to deposit the funds into the registry of the court, the wife filed a motion to dismiss the appeal. The wife requested that the Court of Appeals grant her Motion to Dismiss Appeal, or in the alternative, abate the appeal for a limited period of time (but no more than 14 days) so that the husband could deposit the $18,000.00 into the registry of the Court as ordered by the trial court and if he fails to do so, dismiss the appeal. On April 5, 2007, the Court of Appeals abated the appeal until April 18, 2007 to allow the husband to comply with the trial court’s order. On May 22, 2007, when the husband had still not deposited the funds into the registry of the court, the Court of Appeals dismissed the appeal.

4. Estoppel to Appeal

This is also known as the “acceptance of benefits doctrine.” A litigant cannot treat a judgment as both right and wrong. Thus, a party who has voluntarily accepted the benefits of a judgment cannot appeal from that judgment. Carle v. Carle, 234 S.W.2d 1002, 1004 (Tex. 1950); see Tex. State Bank v. Amaro, 87 S.W.3d 538, 544 (Tex. 2002). The “acceptance of benefits doctrine” applies in direct appeals, direct appeals by writ of error (now restricted appeals) and equitable bill of review proceedings. See Carle v. Carle, 234 S.W.2d at 1003 (direct appeal); Bloom v. Bloom, 935 S.W.2d 942, 946-47 (Tex. App.—San Antonio 1996, no writ) (direct appeal by writ of error); Biggs v. Biggs, 553 S.W.2d 207, 209 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ dism’d) (bill of review).

The burden is on appellee to prove that appellants are estopped by the acceptance of benefits doctrine. See Gonzalez v. Gonzalez, 614 S.W.2d 203, 204 (Tex. App.—Eastland 1981, writ dism’d); Mallia v. Mallia, 2009 WL 909588 at *1 (Tex. App.—Houston [14 Dist.] 2009, no pet.). In order to consider whether a party is estopped from appealing, the record must reflect the relevant facts showing voluntary acceptance of the benefits of the judgment. Rogers v. Rogers, 806 S.W.2d 886, 889 (Tex App.—Corpus Christi 1991, no writ); Miller v. Miller, 569 S.W.2d 592, 593 (Tex. Civ. App.—San Antonio 1978, no writ).

The “acceptance of benefits doctrine” frequently arises in divorce cases because a spouse tends to take and use the property awarded to him or her in the divorce while appealing from the divorce judgment. See, e.g., Roye v. Roye, 531 S.W.2d 242 (Tex. Civ. App.—Tyler 1975, no writ); Nixon v. Nixon, 348 S.W.2d 434 (Tex. Civ. App.—Houston [1st Dist.] 1961, writ ref’d n.r.e.). However, even if an appealing party accepts a portion of a divorce judgment, the appealing party is not necessarily estopped from appealing the entire judgment. In Roa v. Roa, 970 S.W.2d 163, 166 (Tex. App.—Fort Worth 1998, no pet.), the appellate court held that even though the appealing party had accepted the decree of divorce and division of property, she had not accepted those portions of the judgment addressing child custody, visitation, and support. The appellate court also recognized that issues related to the custody of children are severable from the remainder of a divorce decree. Id.

There are two narrow exceptions to the “acceptance of benefits doctrine” even when the appealing party accepts benefits under the judgment. First, the “entitlement exception” that applies when the appealing party accepts nothing more than what he or she would be entitled to receive on retrial. Carle v. Carle, 234 S.W.2d at 1004. See Tex. State Bank v. Amaro, 87 S.W.3d 538, 544 (Tex. 2002); Samara v. Samara, 52 S.W.3d 455 (Tex. App.—Houston [1st Dist.] 2001, pet. denied). Second, the “economic necessity exception” which applies when the acceptance of benefits is not voluntary because the appealing party is driven to accept benefits out of economic necessity. See Waite v. Waite, 150 S.W.3d 797 (Tex. App.—Houston 2004, pet. den.). McAlister v. McAlister, 75 S.W.3d 481, 483 (Tex. App.—San Antonio 2002, pet. denied); Cooper v. Bushtong, 10 S.W.3d 20, 23 (Tex. App.—Austin 1999, pet. denied); Gonzalez v. Gonzalez, 614 S.W.2d 203 (Tex. Civ. App.—Eastland 1981, writ dism’d w.o.j.).

In Waite v. Waite, 150 S.W.3d 797 (Tex. App.—Houston [14th Dist.] 2004, pet. denied), Mr. Waite filed an affidavit in support of his economic necessity argument in which he stated that he needed the money he received from the registry of the Court pursuant to the final judgment to pay his daily living expenses and the costs of his appeal, and (2) to complete repairs on the family home awarded to him as his separate property. Id. at 805. His affidavit stated in pertinent part as follows:

The funds I received from the registry of the Court pursuant to the final judgment were needed by me to pay my daily living expenses, including, but not limited to, food,
utilities, clothing, rent, taxes, gasoline, auto and homeowners insurance, health insurance and other miscellaneous day to day living expenses. In addition, I needed the funds to pay the costs of my appeal including attorney's fees, court courts [sic], and the appeal bond, including the supercedeas bond. I have posted a supercedeas bond in the amount of $440,000.00 (nearly half the amount received). Without the use of these funds, I could not have paid all of the financial obligations set forth above and I could not have posted my supercedeas bond. I paid $144,000.00 for past due attorney's fees and appellant [sic] attorney's fees which were due and owing which I could not previously pay due to the restrictive orders of the Court. I also needed the funds to effectuate and complete repairs on the house and to pursue my employment as a remodeler. For these reasons the use of the funds I received from the registry of the Court was not voluntary.

Id. at 805 n.7. The Court of Appeals, noting that the exception to the acceptance of the benefits doctrine is narrow and is to be applied stingily, granted Mrs. Waite’s motion to dismiss the appeal on the basis of the acceptance of the benefits doctrine because Mr. Waite’s evidence did not show that he fell within the exception. Id. at 807-08.

In addition, Texas courts have declined to consider an appeal from a custody decree when the appealing party refuses to obey the adverse judgment. See Baker v. Baker, 588 S.W.2d 677 (Tex. Civ. App.—Eastland 1979, writ ref’d n.r.e.). In Baker, after the wife filed suit and the husband answered, the husband absconded from the state with the minor child and continued to withhold the child from the wife, the managing conservator. The husband did not personally appear at the hearing but appeared by attorney of record. Under these circumstances, the appellate court dismissed the husband’s appeal. Id. at 678.

5. Protective Orders.

E. Types of Appeal other than a Regular Appeal.
1. Interlocutory Appeals:
An interlocutory appeal is filed during the course of the proceedings. It has a very limited application, especially in family law cases. Texas Civil Practice and Remedies Code Section 51.014 sets forth the orders from which a party may file an interlocutory appeal. TEX. CIV. PRAC. & REM. CODE § 51.014. Except in the rarest of cases the only orders routinely entered in family law cases from which an interlocutory appeal may be taken are the appointment of a receiver or trustee or the overruling of a motion to vacate an order that appoints a receiver or trustee. See TEX. CIV. PRAC. & REM. CODE § 51.014(a)(1), (2). In these instances, the filing of an interlocutory appeal will stay the commencement of a trial in the trial court pending resolution of the appeal. TEX. CIV. PRAC. & REM. CODE § 51.014(b). An appeal from an interlocutory order, when allowed, will be accelerated. TEX. R. APP. P. 28.1(a). Under certain circumstances, if the parties agree, a court may allow an interlocutory appeal not otherwise permitted. TEX. CIV. PRAC. & REM. CODE § 51.014(d). Specific requirements pertain to such agreed interlocutory appeals. See TEX. R. APP. P. 28.2.

Additionally, when a trial court improperly denies a motion to compel arbitration or improperly stays arbitration, a party may now file an interlocutory appeal. See TEX. CIV. PRAC. & REM. CODE § 51.016. Prior to September 1, 2009, a party denied the right to arbitrate under the Federal Arbitration Act (FAA) by a state court had no adequate remedy by appeal and was entitled to mandamus relief. In re Multifuels, L.P. 2010 WL1981570 (Tex. App.—Houston [1st Dist.] 2010, orig. proceeding). However, Section 51.016 of the Texas Civil Practice and Remedies Code now provides for an interlocutory appeal in a matter subject to the Federal Arbitration Act (FAA), “under the same circumstances that an appeal from a federal district court’s order or decision would be permitted by” the

Notably, under both the TAA and FAA, an order granting a motion to compel arbitration or staying pending arbitration is not subject to an interlocutory appeal. Chambers v. O’Quinn, 242 S.W.3d 30, 31 (Tex. 2007) (The Act is one-sided, allowing interlocutory appeals solely from orders that deny arbitration.”). Texas courts do not view favorably “creative” attempts to circumvent this rule. See, e.g., Elm Creek Villas Home Owner Ass’n v. Beldon Roofing & Remodeling Co., 940 S.W.2d 150, 154-56 (Tex. App.—San Antonio 1996, no writ) (sanctioning lawyer for “cloaking” interlocutory appeal of order granting motion to compel arbitration as interlocutory appeal of injunctive order). However, the United States Supreme Court has held that orders compelling arbitration can be reviewed after final judgment in the case. Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 89, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000). As discussed supra, under limited circumstances pre-final judgment review of an order compelling arbitration is available via mandamus. See In re Gulf Exploration LLC, 289 S.W.3d 836, 838-39 (Tex. 2009).

2. Accelerated Appeals:
Accelerated appeals are given preference over other appeals and are put on a faster track in the appellate court. See Tex. R. App. P. 26.1. An appeal from an interlocutory order, when allowed, must be accelerated. TEX. R. APP. P. 28.1; see Stanton v. Univ. of Tex. Health Sci. Ctr., 997 S.W.2d 628, 629 n.1 (Tex. App.—Dallas 1998, pet. denied). Appeals required by statute to be accelerated or expedited and appeals required by law to be filed or perfected within less than thirty days after the date of the order or judgment being appealed are also accelerated appeals. TEX. R. APP. P. 28.1(a). All appeals in which termination of the parent-child relationship is an issue and all appeals of final orders for placement of children under the care of the Texas Department of Family and Protective Services are subject to accelerated appeals. TEX. FAM. CODE §§ 109.002(a), 263.405(a).

If a case involves child custody or support issues, the appellant should consider filing an accelerated appeal, which, although it involves onerous deadlines, can decrease the time in the appellate court from approximately two years in the larger courts of appeal to six to eight months. See Provost v. Yates, 734 S.W.2d 671, 673 (Tex. 1987) (orig. proceeding) (justice demands speedy resolution of child custody and child support issues) (although the case involved mandamus, the principles enunciated would also support acceleration in the interest of justice if an erroneous custody or possession order is not in the best interest of the child); TEX. FAM. CODE § 105.004 (although the statute does not specifically relate to appeals, it clearly enunciates the legislature’s intent to place cases involving the best interest of children before routine civil matters).

3. Restricted Appeal:
Restricted appeals replace writ of error appeals to the court of appeals. Statutes pertaining to writ of error appeals to the court of appeals apply equally to restricted appeals. TEX. R. APP. P. 30. A restricted appeal is a direct attack on the judgment of a trial court. See O’Neal v. O’Neal, 69 S.W.3d 347, 348 (Tex. App.—Eastland 2002, no pet.). The requirements filing a restricted appeal are jurisdictional “and will cut off a party’s right to seek relief by way of a restricted appeal if they are not met.” Clopton v. Pak, 66 S.W.3d 513, 515 (Tex. App.—Fort Worth 2001, pet. denied). A restricted appeal requires that, (1) the appellant filed notice within six months after the judgment or order appealed from was signed; (2) the appellant was a party to the underlying suit; (3) the appellant did not timely file a postjudgment motion, request for findings of fact and conclusions of law, or notice of appeal; (4) the appellant did not participate, either in person or through counsel, in the actual trial of the case; and (5) the trial court erred, and the error is apparent from the face of the record. TEX. R. APP. P. 30; Wright Bros. Energy Inc. v. Krough, 67 S.W.3d 271, 273 (Tex. App.—Houston [1st Dist.] 2001, no pet.); see also TEX. R. APP. P. 26.1(c); Norman Commc’ns v. Tex. Eastman Co., 955 S.W.2d 269, 270 (Tex. 1997). Review by restricted appeal affords an appellant the same scope of review as an ordinary appeal, that is, a review of the entire case. The only restriction on the scope of the restricted appeal is that the error must appear on the face of the record. The face of the record consists of all the papers on file in the appeal, including the statement of facts. In addition to citation and service issues, a restricted appeal confers jurisdiction on the appellate court to review whether the evidence is legally and factually sufficient to support the judgment. Norman Commc’ns, 955 S.W.2d at 270. The record must affirmatively show strict compliance with the rules for service of citation in order for a default judgment to withstand a direct attack. If strict compliance is not affirmatively shown, the service of process is invalid. There are no presumptions in favor of valid issuance, service, or return of citation in the face of a restricted appeal attack on a default judgment. Hercules Concrete Pumping Serv., Inc. v. Bencon Mgmt. & Gen. Contracting Corp., 62 S.W.3d 308, 309–10 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).
a. Participation in trial:
The nature and extent of participation precluding a restricted appeal in any particular case is a matter of degree, because trial courts decide cases in a myriad of procedural settings. The issue is whether the appellant participated in the decision-making event resulting in the judgment adjudicating the appellant’s rights. It is the fact of nonparticipation, not the reason for it, that determines the right to a restricted appeal. *Texaco, Inc. v. Cent. Power & Light Co.*, 925 S.W.2d 586, 589–90 (Tex. 1996).

b. Postjudgment motion:
If a postjudgment answer does not seek to set aside an existing judgment and request litigation of the issue, it does not constitute a motion for new trial or postjudgment motion that would preclude the filing of a restricted appeal. *See Barry v. Barry*, 193 S.W.3d 72, 74 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

c. Error on face of record:
If the return of service of citation does not include an endorsement on the process of the day and hour of its receipt by the officer for service, there is ordinarily error on the face of the record. *In re Z.J.W.*, 185 S.W.3d 905, 907 (Tex. App.—Tyler 2006, no pet.). However, in child support review process suits brought under Chapter 233 of the Family Code, the failure to comply with rules for service of citation do not constitute error and are not grounds for vacating a default judgment. *In re S.B.S.*, 282 S.W.3d 711, 715-16 (Tex. App.—Amarillo 2009, pet. denied). If the court grants a party more relief than the party requested in his petition, there is error on the face of the record. *Binder v. Joe*, 193 S.W.3d 29, 33 (Tex. App.—Houston [1st Dist.] 2006, no pet.); see also *In re B.M.*, 228 S.W.3d 462 (Tex. App.—Dallas 2007, no pet.) (father requested only temporary relief regarding conservatorship and custody, and trial court entered final order granting him sole managing conservatorship and custody of child).

F. Deadlines for Filing the Notice of Appeal

1. Deadline for Filing Accelerated Appeal
In an accelerated appeal, the notice of appeal must be filed within twenty days after the judgment or order is signed. *Tex. R. App. P. 26.1(b).* Unless otherwise provided by statute, an accelerated appeal is perfected by filing a notice of appeal within the time allowed by rule 26.1(b) or as extended by rule 26.3. *Tex. R. App. P. 28.1(b).* Filing a motion for new trial, any other post-trial motion, or a request for findings of fact will not extend the time to perfect an accelerated appeal. *Tex. R. App. P. 28.1(b).*

Certain statutes and rules mandate the acceleration of certain types of appeals and require that the appeal be placed on a shortened time-table for filing of the notice of appeal, filing of the record, briefs, and submission. There are two grounds for acceleration:

a. Mandatory:
Acceleration of the appeal may be mandatory because of some statute or rule, including (1) appeals in suits in which termination of the parent-child relationship is in issue (see Tex. Fam. Code § 109.002; *In re J.C.*, 146 S.W.3d 741 (Tex. App.—Texarkana 2004, no pet.) (appeal dismissed because notice not filed within twenty days of judgment); (2) appeals of final orders rendered under chapter 263, placement of children under the care of TDFPS (see Tex. Fam. Code § 263.405(a)); (3) appeals of cases involving the Uniform Child Custody Jurisdiction and Enforcement Act, which must be in accordance with expedited appellate procedures as in other civil cases (Tex. Fam. Code § 152.314; *In re K.L.V.*, 109 S.W.3d 61, 67 (Tex. App.—Fort Worth 2003, pet. denied) (appeal dismissed because notice of appeal filed outside deadline provided by Texas Rules of Appellate Procedure)); and (4) appeals from interlocutory orders (see Tex. R. App. P. 28.1(a)), which would include in the family law context an order that appoints a receiver or trustee, an order that grants or denies a temporary injunction, and an order that grants or denies a defendant’s special appearance made under rule 120(a) of the Texas Rules of Appellate Procedure (see Tex. Civ. Prac. & Rem. Code § 51.014(a)(1), (4), (7)) and an order denying the intervention or joinder of parties (Tex. Civ. Prac. & Rem. Code § 15.003).

b. Preference in Interests of Justice:
Appeals may also be accelerated in the interests of justice. The Texas Supreme Court has held that justice demands a speedy resolution of child custody and child support issues. *See Proffer v. Yates*, 734 S.W.2d 671, 673 (Tex. 1987) (orig. proceeding). Although Proffer involved mandamus, the principles enunciated would also support acceleration in the interest of justice if an erroneous custody or possession order is not in the best interest of the child. The Family Code also recognizes that, in cases involving children, if ordinary scheduling practices will unreasonably affect the best interest of the children, the case should be given a preferential setting. *See Tex. Fam. Code § 105.004. Although the statute does not specifically relate to appeals, it clearly enunciates the legislature’s intent to place cases involving the best interest of children before routine civil matters.

In cases involving children, the attorney should always consider requesting that the appeal be accelerated in the interests of justice. Although the rules of appellate procedure do not expressly address how to obtain an accelerated appeal on this basis, it is suggested that the practitioner file a verified motion or
attach an affidavit setting forth facts that would warrant an acceleration of the appeal in the interests of justice.

2. **Deadline for Filing Regular Appeal.**

   Usually, a notice of appeal must be filed within thirty days after the judgment is signed. However, the notice must be filed within ninety days after the judgment is signed if any party timely files a motion for new trial, a motion to modify the judgment, a motion to reinstate after a dismissal for want of prosecution, or a request for findings of fact and conclusions of law if findings and conclusions are required by the Rules of Civil Procedure or, if not required, could be properly considered by the appellate court. TEX. R. APP. P. 26.1(c). Specifically, under the following circumstances, findings of fact and conclusions of law are not appropriate and the time to file the notice of appeal will not be extended beyond thirty days: (1) after a jury trial, on issues tried to the jury, IKB Indus. (Nig.) Ltd. v. Pro-Line Corp., 938 S.W.2d 440, 443 (Tex. 1997); (2) after the trial court renders a summary judgment, IKB, 938 S.W.2d at 441–42; (3) in a case tried to a jury but resolved by a directed verdict, IKB, 938 S.W.2d at 443; (4) after the trial court renders a judgment notwithstanding the verdict, IKB, 938 S.W.2d at 443; or (5) after the trial court renders a judgment based upon an agreed statement of facts as provided under rule 263 of the Texas Rules of Civil Procedure, City of Galveston v. Giles, 902 S.W.2d 167, 170 n.2 (Tex. App.—Houston [1st Dist.] 1995, no writ).

3. **Deadline for Filing Restricted Appeal.**

   In a restricted appeal, the notice of appeal must be filed within six months after the judgment or order is signed. TEX. R. APP. P. 26.1(c). A party who did not participate, either in person or through counsel, in the hearing that resulted in the judgment complained of and who did not timely file a postjudgment motion or request findings of fact and conclusions of law or a notice of appeal within the deadlines set forth in rule 26.1(a) may file a restricted appeal. TEX. R. APP. P. 30.

4. **Citation by Publication.**

   The time to file a notice of appeal on a motion for new trial filed more than thirty days after judgment following citation by publication runs as if the judgment were signed on the date the motion for new trial was filed. TEX. R. APP. P. 4.4; TEX. R. CIV. P. 306a(7). The parties adversely interested shall be cited as in other cases. TEX. R. CIV. P. 329(a). The citation form would ordinarily require an answer on the “Monday next following the expiration of twenty days” after service. See TEX. R. CIV. P. 99(c).

5. **Extension of Time for Filing of Notice of Appeal.**

   The appellate court may extend the time to file the notice of appeal if, within fifteen days after the deadline for filing the notice of appeal, the party files in the trial court the notice of appeal and files in the appellate court a motion requesting the extension. TEX. R. APP. P. 26.3. Filing of the notice of appeal within fifteen days of the date that it was due implies a motion requesting an extension. The appellant, however, must still provide a reasonable explanation for the late filing. Verburgt v. Dorner, 959 S.W.2d 615, 617 (Tex. 1997).

Although rule 26.3 does not make exceptions for accelerated appeals, one court has stated, in dicta, that it agrees with the general rule that extensions of time are not permitted in accelerated appeals. Cf. Cameron County v. Carrillo, 7 S.W.3d 706, 708 (Tex. App.—Corpus Christi 1999, no pet.). Other courts, however, have held that the recently amended statutes (Family Code sections 109.002 and 263.405) allow a fifteen-day extension if a reasonable explanation for the delay is offered. See In re B.G., 104 S.W.3d 565, 567 (Tex. App.—Waco 2002, no pet.); In re T.W., 89 S.W.3d 641, 642–43 (Tex. App.—Amarillo 2002, no pet.).

Restricted appeals are exempted from the rule allowing for an extension of time for perfecting the appeal beyond the six-month period. TEX. R. APP. P. 4.2(a)(2); Maldonado v. Macaluso, 100 S.W.3d 345, 346 (Tex. App.—San Antonio 2002, no pet.).

6. **Premature Filing of Notice of Appeal.**

   “In a civil case, a prematurely filed notice of appeal is effective and deemed filed on the day of, but after, the event that begins the period for perfecting the appeal.” TEX. R. APP. P. 27.1(a).

7. **Apellee’s Notice of Appeal.**

   If a party timely files a notice of appeal, any other party may file a notice of appeal within the applicable period, as provided in rule 26.1(a)–(c), or fourteen days
after the first filed notice of appeal, whichever is later. TEX. R. APP. P. 26.1(d).

G. Appeal from Final Order Involving TDFPS Placement of Children.

An appeal of a final order rendered under chapter 263, placement of children under the care of the Texas Department of Family and Protective Services, is governed by the procedures for accelerated appeals (which means the notice of appeal must be filed within twenty days of the signing of the judgment). See TEX. FAM. CODE §263.405(a). In 2011, the Legislature amended Section 263.405 to simplify the appeal of a final order rendered under chapter 263. It repealed virtually all of Section 263.405 as it previously existed. For example, it removed the 15 day deadline for filing a statement of points which has been called a “trap for the unwary.” See In re R.J.S., 219 S.W.3d 623, 627 (Tex. App. - Dallas 2007, pet. denied). It would also alert parents and attorneys to the requirements applicable to accelerated appeals in a prominently displayed statement in boldfaced type, capital letters, or underlined. The final order must include the following language:

A PARTY AFFECTED BY THIS ORDER HAS THE RIGHT TO APPEAL. An APPEAL IN A SUIT IN WHICH TERMINATION OF THE PARENT-CHILD RELATIONSHIP IS SOUGHT IS GOVERNED BY THE PROCEDURES FOR ACCELERATED APPEALS IN CIVIL CASES UNDER THE TEXAS RULES OF APPELLATE PROCEDURE. FAILURE TO FOLLOW THE TEXAS RULES OF APPELLATE PROCEDURE FOR ACCELERATED APPEALS MAY RESULT IN THE DISMISSAL OF THE APPEAL.

See TEX. FAM. CODE §263.405(b). The Legislature also directed the Supreme Court to adopt rules accelerating the disposition by the appellate court and the supreme court of an appeal of a final order granting termination of the parent-child relationship. See TEX. FAM. CODE §263.405(c).

The changes to Section 263.405(a), (b) apply only to a final order rendered on or after the effective date. i.e., September 1, 2011. A final order rendered before the effective date is governed by the law in effect on the date the order was rendered, and the former law is continued in effect for that purpose. The Supreme Court shall adopt rules of appellate procedure as required by Section 263.405(c) as soon as practicable after the effective date of this Act, but not later than March 1, 2012.

H. Appointment of Attorney on Appeal.

The Legislature amended Section 107.016 to attempt to assure effective counsel for indigent parents who seek to appeal. It also seeks to prevent a “gap” between trial counsel and appellate counsel by requiring trial counsel to remain attorney of record until relieved or replaced by other counsel. See TEX. FAM. CODE §107.016. As amended, Section 107.016 now provides that in a suit filed by a governmental entity in which termination of the parent-child relationship or appointment of the entity as conservator of the child is requested, an attorney appointed to serve as an attorney ad litem for a parent or an alleged father continues to serve in that capacity until the earliest of: (1) the date the suit affecting the parent-child relationship is dismissed; (2) the date all appeals in relation to any final order terminating parental rights are exhausted or waived; or (3) the date the attorney is relieved of the attorney's duties or replaced by another attorney after a finding of good cause is rendered by the court on the record. See TEX. FAM. CODE §107.016.

The Legislature also amended Section 107.013 to provide a mechanism for reevaluating the indigency of a parent. See TEX. FAM. CODE §107.013(e). It creates a presumption that once a parent is determined by the court to be indigent, the parent remains indigent for the remainder of the proceedings including an appeal unless the court, after reconsideration on the motion of the parent, the attorney ad litem for the parent, or the attorney representing the governmental entity, determines that the parent is no longer indigent due to a material and substantial change in the parent's financial circumstances. See TEX. FAM. CODE §107.013(e).

The amendments to Section 107.013 and 107.016 apply only to a suit affecting the parent-child relationship pending in a trial court on or filed on or after the effective date, i.e., September 1, 2011.

I. Costs of Appeal—Affidavit of Indigence.

1. Establishing Indigence:

The Texas Rules of Appellate Procedure provide that a party who cannot pay the costs in an appellate court may proceed without advance payment of costs if (1) the party files an affidavit of indigence in compliance with rule 20; (2) the claim of indigence is not contestable, is not contested, or, if contested, the contest is not sustained by written order; and (3) the party timely files a notice of appeal. TEX. R. APP. P. 20.1(a)(2). If the appellant proceeded in the trial court with a certificate under rule 145(c) of the Texas Rules of Civil Procedure confirming that the appellant was screened for eligibility for free legal services (a “TAJF certificate”), an additional certificate may be filed in the appellate court confirming that the appellant was rescreened after rendition of the trial court’s judgment.
and again found eligible; a party’s affidavit of inability accompanied by the certificate may not be contested. TEX. R. APP. P. 20.1(a)(1).

In addition to the requirements of rule 20, a party seeking to obtain free or reduced-cost clerk’s and reporter’s records must also comply with section 13.003 of the Civil Practice and Remedies Code. See Pena v. Garza, 61 S.W.3d 529, 531 (Tex. App.—San Antonio 2001, no pet.) (rules of procedure are general rules; statutes are specific). A court reporter shall provide without cost a statement of facts and a clerk of a court shall prepare a transcript for appealing a judgment from the court only if (1) an affidavit of inability to pay the cost of the appeal has been filed under the Texas Rules of Appellate Procedure and (2) the trial judge finds that the appeal is not frivolous and that the statement of facts and the clerk’s transcript are needed to decide the issue presented by the appeal. TEX. CIV. PRAC. & REM. CODE § 13.003(a). In determining whether an appeal is frivolous, a judge may consider whether the appellant has presented a substantial question for appellate review. TEX. CIV. PRAC. & REM. CODE § 13.003(b). A proceeding is “frivolous” when it lacks an arguable basis either in law or in fact. See TEX. CIV. PRAC. & REM. CODE § 13.001(b)(2); Johnson v. Lynaugh, 796 S.W.2d 705, 706 (Tex. 1990). Necessarily, therefore, both questions of fact and questions of law may be involved in a determination that an appeal is frivolous. De La Vega v. Taco Cabana, 974 S.W.2d 152, 154 (Tex. App.—San Antonio 1998, no pet.).

2. Contents of Affidavit:

The affidavit must contain (1) the identity of the party filing the affidavit; (2) how much of the costs, if any, the indigent can pay; (3) the nature and amount of the party's current income from employment, government entitlements, and other sources; (4) the income of the party’s spouse and whether it is available to the party; (5) all real and personal property owned by the party; (6) the cash on hand and cash on deposit that the party can withdraw; (7) all other assets of the party; (8) the number of dependents and their relationship to the party; (9) all the party’s debts, including the nature and amount; (10) the nature and amount of the party’s monthly expenses; (11) the party's ability to obtain a loan to pay court costs; (12) whether an attorney is providing free legal services without a contingent fee; (13) whether an attorney has agreed to pay or advance the court costs for the appeal; and (14) if applicable, the party’s lack of the skill and access to equipment necessary to prepare the appendix, as required by TEX. R. APP. P. 38.5(d). TEX. R. APP. P. 20.1(b). The affidavit must state that the person claiming indigence is unable to pay all or part of the costs of the appeal or original proceeding. TEX. R. APP. P. 20.1(b), (k); see also White v. Schiweitz, 793 S.W.2d 278, 281 (Tex. App.—Corpus Christi 1990, no writ). Necessarily, therefore, the affidavit must include the cost of the clerk’s record and the reporter’s record. See In re White, 967 S.W.2d 507, 510 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding). The affidavit of indigence must be a proper affidavit. Swearing to the statement by the party making and signing it is essential to the validity of an affidavit. Brown Found. Repair & Consulting, Inc. v. Friendly Chevrolet Co., 715 S.W.2d 115, 118 (Tex. App.—Dallas 1986, writ ref’d n.r.e.).

3. Filing Affidavit:

An appellant must file the affidavit of indigence in the trial court, not the appellate court, with or before the notice of appeal. The prior filing of an affidavit of indigence pursuant to Tex. R. Civ. P. 145 does not suffice; a separate affidavit and proof of current indigence are required. TEX. R. APP. P. 20.1(c)(1). The appellate court may extend the time to file an affidavit of indigence if, within fifteen days after the deadline for filing the affidavit, the party files a motion in the appellate court. The court may not dismiss the appeal or affirm the trial court’s judgment on the ground that the appellant has failed to file an affidavit or a sufficient affidavit without first giving the appellee notice of the deficiency and a reasonable time to remedy it. TEX. R. APP. P. 20.1(c)(3).

4. Contest to Affidavit:

The clerk, the court reporter, the court recorder, or any party may challenge an affidavit of indigence that is not accompanied by a TAJF certificate by filing in the court in which the affidavit was filed a contest to the affidavit. The contest must be filed within ten days after the date when the affidavit was filed in the trial court. The contest need not be sworn. TEX. R. APP. P. 20.1(e). Unless a contest is timely filed, no hearing will be conducted, the affidavit’s allegation will be deemed true, and the party will be allowed to proceed without advance payment of costs. TEX. R. APP. P. 20.1(f); see Rios v. Calhoon, 889 S.W.2d 257, 258 (Tex. 1994) (orig. proceeding). Before a contest of the affidavit is filed, the trial court does not have jurisdiction to set a hearing. If a hearing is set, the party claiming indigency is entitled to adequate notice of the hearing. Monroy v. Estrada, 149 S.W.3d 847, 851, 853 (Tex. App.—El Paso 2004, no pet.). If a contest is filed, the party who filed the affidavit of indigence must prove the affidavit’s allegations. TEX. R. APP. P. 20.1(g); see White v. Bayless, 40 S.W.3d 574, 576 (Tex. App.—San Antonio 2001, pet. denied). A party claiming indigence must prove by a preponderance of the evidence that he would be unable to pay costs if he “really wanted to and made a good-faith effort to do so.” Allred v. Lowry, 597 S.W.2d 353, 355 (Tex. 1980). The party claiming indigence must also establish that the appeal is not frivolous. See TEX. CIV. PRAC. & REM. CODE § 13.003. The trial court must either conduct a hearing
or sign an order extending the time to conduct a hearing within ten days after (1) the contest was filed, if filed in the trial court, or (2) the trial court received a contest referred from the appellate court. TEX. R. APP. P. 20.1(i)(2).

5. Review of Contest:
   If the trial court sustains the contest, review is by appeal, not mandamus. In re Arroyo, 988 S.W.2d 737, 739 (Tex. 1998).

J. Appellate Record.
   The appellate record consists of the clerk’s record and, if necessary, the reporter’s record. TEX. R. APP. P. 34.1.

1. Clerk’s Record:
   The trial court clerk, or in some counties the district clerk, is responsible for preparing, certifying, and timely filing the clerk’s record if a notice of appeal has been filed and the appellant has paid the clerk’s fee, has made satisfactory arrangements with the clerk to pay the fee, or is entitled to appeal without paying the fee. TEX. R. APP. P. 35.3(a). The appellate court may dismiss the appeal for want of prosecution if the appellant has failed to pay or make arrangements to pay the clerk to prepare the record. TEX. R. APP. P. 37.3(b).

2. Reporter’s Record:
   If the proceedings were stenographically recorded, the reporter’s record consists of the court reporter’s transcription of so much of the proceedings, and any of the exhibits, that the parties to the appeal designate. TEX. R. APP. P. 34.6(a)(1). At or before the time for perfecting the appeal, the appellant must (1) request in writing that the official reporter prepare the reporter’s record; (2) designate the exhibits to be included, and (3) designate the portions of the proceedings to be included. TEX. R. APP. P. 34.6(b)(1). Because more than one court reporter may have been involved and because the court reporter has many cases for which the reporter is responsible, it is very helpful to advise the court reporter of the date of the judgment and whether a 329b motion has been filed or findings of fact that have the effect of extending the deadline for the filing of the reporter’s record and the specific date on which the reporter’s record is due to be filed. Without a pleading being filed that extends the date for filing the notice of appeal, the reporter’s record is due 60 days after the date the court signs the judgment. With a pleading being filed that extends the date for filing the notice of appeal, the reporter’s record is due 120 days after the date the court signs the judgment. It is also very helpful to list the dates of the specific hearings, what was heard at that hearing in the request, and whether the hearing was previously transcribed.

3. Partial Reporter's Record:
   TRAP 34.6(c)(1) permits a party to request a partial reporter's record while simultaneously including the points or issues to be presented on appeal. TRAP 34.6(c)(4) provides that when a partial reporter's record is properly designated, “[t]he appellate court must presume that the partial reporter's record designated by the parties constitutes the entire record for purposes of reviewing the stated points or issues. This presumption applies even if the statement includes a point or issue complaining of the legal or factual sufficiency of the evidence to support a specific factual finding identified in that point or issue.”

   However, when the reporter’s record is not properly requested by filing and serving a request for a partial reporter’s record which states the points of error or issues to be presented on appeal, the presumption that the partial reporter's record constitutes the entire record for purposes of reviewing the stated points or issues does not apply. See Jaramillo v. Atchison, Topeka & Santa Fe Ry. Co., 986 S.W.2d 701, 702 (Tex. App.—Eastland 1998, no pet.); Richards v. Schion, 969 S.W.2d 131, 133 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (“When an appellant appeals with a partial reporter’s record but does not provide the list of points as required by rule 34.6(c)(1), it creates the presumption that the omitted portions support the trial court's findings.”); CMM Grain Co., Inc. v. Ozgunazu, 991 S.W.2d 437, 439 (Tex. App.—Fort Worth 1999, no pet.). Greco v. Greco, No. 04-07-00748-CV, 2008 WL 4056328 at *1 (Tex. App.—San Antonio 2008, no pet.).
Many courts of appeals require “strict compliance” with all of Rule 34.6’s provisions to preserve appellate review. See, e.g., Brown v. McGuyer Homebuilders, Inc., 58 S.W.3d 172, 175 (Tex. App.—Houston [14th. Dist.] 2001, pet. denied) (appellant's failure to file statement of points in compliance with Rule 34.6 required appellate court to presume record's omitted portions supported trial court's judgment); In re R.C., 45 S.W.3d 146, 149 (Tex. App.—Fort Worth 2000, no pet.) (appellate court permitted to review only those issues properly designated in appellant's statement of points); Hilton v. Hillman Distrib. Co., 12 S.W.3d 846, 847 (Tex. App.—Texarkana 2000, no pet.) (requiring both request for partial record and statement of points to be timely filed). However, the Supreme Court has adopted a more flexible approach in cases when a rigid application of Rule 34.6 would result in denying review on the merits, even though the appellee has not established any prejudice from a slight relaxation of the rule. Bennett v. Cochran, 96 S.W.3d 227, 229 (Tex. 2002).

In Schafer v. Conner, 813 S.W.2d 154, 155 (Tex. 1991), the Supreme Court rejected an interpretation of Rule 53(d)–Rule 34.6(c)’s predecessor—that would require an appellant to actually file its statement of points or issues “in” its request for the reporter's record. See also Furr’s Supermarkets, Inc. v. Bethune, 53 S.W.3d 375, 377 (Tex. 2001) (stating appellee's issue statement in its notice of appeal was sufficient to invoke the presumption that the partial reporter's record constituted the entire record for purposes of reviewing the stated issue). In Gallagher v. Fire Ins. Exch., 950 S.W.2d 370, 370-71 (Tex. 1997), the Supreme Court reiterated its commitment to ensuring that courts do not unfairly apply the rules of appellate procedure to avoid addressing a party's meritorious claim. In Gallagher, the Supreme Court reversed a court of appeal’s holding that the appellant waived review by failing to file a complete statement of facts in strict compliance with Rule 53(d). Id. at 371. The Court reasoned:

The court of appeals was correct in holding that, absent a complete record on appeal, it must presume the omitted items supported the trial court's judgment. For the courts of appeals to affirm the trial court's judgment on the basis of omitted items after having denied pre-submission supplementation of those items without having determined that such would unreasonably delay disposition of the appeal, however, offends the spirit of [our appellate rules].

Id. (quoting Crown Life Ins. Co. v. Estate of Gonzalez, 820 S.W.2d 121, 122 (Tex.1991)).

The Supreme Court has noted that the appellate rules are designed to further the resolution of appeals on the merits and that these rules will be interpreted, when possible, to achieve that aim. Bennett, 96 S.W.3d at 230 see also Gallagher, 950 S.W.2d at 370-71. However, the Supreme Court warned that litigants should not view its relaxation of rules in a particular case as endorsing noncompliance; litigants who ignore the rules do so at the risk of forfeiting appellate relief. Bennett, 96 S.W.3d at 230.

In Bennett, the Supreme Court stated that the objective behind Rule 34.6(c)(1) was fully served. The appellee did not allege that he was deprived of an opportunity to designate additional portions of the reporter's record, nor did he assert that the appellant’s delay otherwise prejudiced the preparation or presentation of his case. The Court held that under these circumstances, Rule 34.6 did not preclude appellate review of the appellant’s legal and factual sufficiency issues. Bennett, 96 S.W.3d at 230.

4. Electronic Recording:
Under the Texas Rules of Appellate Procedure, the Supreme Court will continue to authorize electronic reporting on a court-by-court basis, through Supreme Court order. However, numerous rule changes have been made to protect the integrity of the process of electronic reporting. These are set out in TRAP 13.2.

TRAP 34.6(a)(2) defines the reporter's record which was recorded electronically to include:

- certified copies of all tapes or other audio-storage devices on which the proceedings were recorded;
- any exhibits that the parties designate; and
- certified copies of the original logs prepared by the court recorder pursuant to TRAP 13.2.

In an appeal using an electronically-recorded reporter’s record, each party must file one copy of an appendix containing a transcription of all portions of the recording that the party considers relevant. A copy of relevant exhibits must be included. TEX. R. APP. P. 38.5.

5. Inaccuracies in Reporter’s Record:
Under TRAP 37.2, the appellate court clerk should automatically check the reporter's record to see that it complies with the Supreme Court's and Court of Criminal Appeals' order on preparation of the record. If not, the clerk of the appellate court is to contact the court reporter to bring the reporter's record into compliance with the rule. TEX. R. APP. P. 37.2., 34.6(e) provide that inaccuracies in the reporter’s record can be corrected by agreement of the parties without recertification by the court reporter. If a dispute arises as to the accuracy of the reporter's re-
cord, the trial judge, after notice and hearing, can settle the dispute. TEX. R. APP. P. 34.6(e)(2). If the dispute arises after the record is filed in the appellate court, that court can submit the matter to the trial court. TEX. R. APP. P. 34.6(e)(3).

6. Lost or Destroyed Records - Reporter’s Record:
Under TRAP 34.6(f), if part of the reporter’s record is missing, without the appellant's fault, then a new trial will be ordered but only if a significant portion of the record has been lost or destroyed. The same is true if the trial was electronically recorded and a significant portion of the recording has been lost or destroyed. TEX. R. APP. P. 34.6(f).

7. Make a Record in a Parent-Child Case:

K. Docketing Statement.
The appellant, on perfecting the appeal, must file with the court of appeals a docketing statement containing specified information. TEX. R. APP. P. 32.1. The rules do not prescribe a standard form for the statement, and the courts of appeals have developed various forms, which can be downloaded from the various court websites. The rules do not provide a specific process for compelling the filing of the docketing statement. If the appellant’s failure to file the docketing statement is deemed to constitute want of prosecution or a failure to comply with a requirement of the appellate rules, a court order, or a deadline of the appellate court, dismissal of the appeal or affirmance of the appealed judgment or order may be ordered. See TEX. R. APP. P. 42.3.

L. Briefs in Appeals to the Court of Appeals.
Briefs in appeals that are filed in the intermediate courts of appeals must contain a number of sections and comply with the rules for printing and binding. Any brief that fails to confirm to the Rules of Appellate Procedure and of court may be stricken and ordered to be refiled. Tex. R. App. P. 9.4.

1. Filing of Briefs, Petitions, and Other Documents.
The Rules of Appellate Procedure provide that appellate briefs may be filed in a number of different ways. The brief may be filed through the clerk’s office, or by delivering to a justice of the appellate court, if the justice is willing to accept delivery. TEX. R. APP. P. 9.2(a). The document is also deemed to be filed when placed in the United States Mail, as long as (1) the package was sent first class, express, registered, or certified mail, (2) the envelope was properly addressed to the court, and (3) it was placed in the mail on or before the deadline for filing. TEX. R. APP. P. 9.2(b). Notice that the mailbox requirements for filing do not permit “filing” by overnight courier services, such as Fed-Ex or UPS! If you intend to use the mailbox rule to file your document, you must use United States Mail. Proof that you mailed the document in a timely manner may be proven by a number of ways, including a postmark. However, be warned that because the date on a postage machine may be changed, some clerks do not consider an office’s metering machine to make an adequate postmark for proving the date of mailing. Be prepared to show another proof of mailing if you use your metering machine to affix postage on your document’s deadline date.

The Rules of Appellate Procedure have been modified to permit courts of appeals to make their own local rules to permit electronic filing. TEX. R. APP. P. 9.2(c). At the time of printing, electronic filing of some matters is permitted in the Supreme Court, and in the First (Houston), Third (Austin), Fifth (Dallas), and Fourteenth (Houston) Court of Appeals. If you’re thinking about filing your document electronically, be sure to check your court’s local rules and internal operating procedures.

2. Number of Copies.
In all appeals in the Supreme Court of Texas, parties must file 12 total briefs: an original, and eleven copies. TEX. R. APP. P. 9.3(b). However, with the new electronic filing rules, fewer copies are required, so check with the court beforehand. Unless modified by local rule, parties to an appeal in the intermediate courts of appeals must file three briefs: an original, and three copies. TEX. R. APP. P. 9.3(a).

Briefs and other documents filed in appellate courts must comply with certain specific requirements. Briefs must be printed in black on paper that is white (or “nearly white”) and 8½ by 11 inches; you may print on both sides of the paper. TEX. R. APP. P. 9.4(a)(b). All briefs require at least one-inch margins on all sides. TEX. R. APP. P. 9.4(d). The brief must be typed in double-spaced text, with the exception of footnotes, block quotes, or issues on appeal. Id. The type-size should be at least 13 point in size, with footnotes of at least 10 points in size. TEX. R. APP. P. 9.4(e).

Brief covers should be durable, and may not be printed on red, black, or dark blue paper. The cover must include (1) the style of the case, (2) cause number, (3) title of the document, (4) party’s name, and (5) the attorney’s name, address, etc. If you desire to participate in oral argument, you must say so on the cover of your first brief. TEX. R. APP. P. 9.4(g). The brief may be held together in any number of ways, so that you “ensure that it will not lose its cover or fall apart in regular use.” TEX. R. APP. P. 9.4(f). If the brief requires an appendix, you may submit the appendix separately or attached to your brief. TEX. R. APP. P. 9.4(h). If the appendix is filed separately, it must also follow the document basics set forth above and include a table of contents.

4. Contents of Briefs In Appeals

a. In the Courts of Appeals.

The party bringing an appeal in the 14 courts of appeals is called the “appellant”. TEX. R. APP. P. 38.1(a). The party opposing the appeal is called the “appellee”. TEX. R. APP. P. 38.1(c). The rules for appellate briefs in the courts of appeals are set out in Rule 38 of the Texas Rules of Civil Procedure. These requirements are in addition to the Document Basics set out above for generally filing any document in the court of appeals.

(i) Appellant’s Brief.

The appellant’s brief, in addition to the Document Basics set forth above, must contain the following contents:

(a) A list of all parties, and the names, and addresses of all counsel. TEX. R. APP. P. 38.1(a);
(b) A table of contents that includes the subject matter of each issue brought, and the page numbers where the issues may be found. TEX. R. APP. P. 38.1(b);
(c) An index of authorities that alphabetically lists each case, statute, or other authority cited in the brief, along with the page numbers of where such may be found. TEX. R. APP. P. 38.1(c);
(d) A “statement of the case” which briefly describes the nature of the underlying suit, the course of proceedings, and the trial court’s disposition. TEX. R. APP. P. 38.1(d). The statements should be supported by record references but not discuss the facts of the case, and should “seldom” exceed one-half page. Id.;
(e) If a party desires to participate in oral argument, the brief “may” include a statement regarding why oral argument should be permitted. TEX. R. APP. P. 38.1(e). If the party believes oral argument is unnecessary, a statement about the lack of a need for oral argument may be included. Id. If oral argument is desired, the statement should also be made on the front cover of the initial brief. TEX. R. APP. P. 9.4(g);
(f) A statement of all issues presented for review. TEX. R. APP. P. 38.1(f). Unlike the former “point of error” practice, an issue will be construed as covering every sub issue that can be reasonably inferred from the issue. Id.;
(g) A concise statement of the facts relevant to the issues on appeal, accompanied by references to the appellate record. TEX. R. APP. P. 38.1(g). If no party contests the facts in another brief, the court will accept the stated facts as true. Id.;
(h) A summary of the arguments that are found in the body of the brief. TEX. R. APP. P. 38.1(h);
(i) Argument of the contentions made on appeal, accompanied by references to applicable authority. TEX. R. APP. P. 38.1(i);
(j) A prayer or conclusion that sets out the relief the party seeks. TEX. R. APP. P. 38.1(j); and
(k) An appendix, described in more detail below.

The appellant’s brief may not exceed 50 pages in length, not counting those pages that contain identity of the parties and counsel, a statement on oral argument, the table of contents, the index of authorities, the statement of the case, the issues presented, the signature, the proof of service, and the appendix. TEX. R. APP. P. 38.4.

If the appellant fails to file a brief (or if the appellant’s brief is stricken for failure to comply with the rules), the court of appeals may take action on the case in its discretion. The court may dismiss the appeal for want of prosecution. TEX. R. APP. P. 38.8. Or, the court may retain the appeal and (1) give further directions or (2) adopt the appellee’s discussion of the case as correct and affirm the judgment without examining the appellate record. Id.
(2) Appellee’s Brief.

The appellee’s brief must include many of the same contents as the brief submitted by the appellant:

(a) A table of contents;
(b) An index of authorities;
(c) Summary of argument
(d) Argument for why the judgment should be affirmed, accompanied by references to authority;
(e) A prayer/conclusion
(f) Appendix of any matter that the appellee believes is relevant to appeal but was omitted by the appellant.

TEX. R. APP. P. 38.2. The appellee’s brief may include the other sections included in the appellant’s brief if the appellee is dissatisfied with statements in the initial brief, or as desired to advance the position of the responding party. TEX. R. APP. P. 38.2.

If the appellee desires to point out that the trial court’s rendition of a judgment notwithstanding the verdict (JNOV) should be affirmed on other independent grounds, the appellee is also required to include cross-points on these issues or risk waiver of these grounds on appeal. TEX. R. APP. P. 38.2.

(3) Appellant’s Reply.

After the appellee files its response, the appellant may file a reply brief addressing any matter in the appellee’s brief. TEX. R. APP. P. 38.3. However, the court of appeals is not required to await the filing of a reply before it renders a decision in the appeal. Id. A reply brief filed in the court of appeals should not exceed 25 pages, excluding the same matters not charged against brief page lengths in the appellant’s or appellee’s briefs. TEX. R. APP. P. 38.4.

(4) The Appendix in Civil Appeals in the Courts of Appeals.

Although the court reporter and the clerk forward their respective portions of the appellate record to the court of appeals, the parties are required to include some documents as an appendix to their briefs. The appellant, as the party to file the first brief, must file these documents. Unless it is too voluminous or impracticable to do so, the appendix must contain:

(a) the trial court’s judgment or other order from which the appeal is being sought;
(b) if applicable following a jury trial, the jury charge and verdict;
(c) if applicable following a bench trial or other ruling in which findings and conclusions were made, the trial court’s findings of fact and conclusions of law;
(d) the text of any rule, regulation, ordinance, statute, constitutional provision, or other law (excluding case law) on which the argument is based; and
(e) the text of any contract or other document that is central to the argument.

Of course, any party may also include in its appendix any other item relevant to the issues on appeal.

b. In the Supreme Court of Texas.

The party bringing an appeal by way of petition for review to the Supreme Court of Texas is called the “petitioner.” TEX. R. APP. P. 3.1(e). The party opposing the petition and appeal in the Supreme Court is called the “respondent.” TEX. R. APP. P. 3.1(h). Appeals by the appealing party to the Supreme Court of Texas may require the filing of two brief-like documents, depending on whether the court decides to hear the case. The initial civil appeals document filed in the Supreme Court is called a “Petition for Review”; if the court permits further briefing, the petitioner later files a “Brief on the Merits.” The rules, below, set forth the requirements for briefing in the Supreme Court. In addition, all documents filed in the Supreme Court (including petitions, responses, and briefs) must comply with the “Document Basics” discussed above.

(1) Contents of a Petition for Review.

The requirements for the contents of a petition for review are set forth in Rule 53 of the Texas Rules of Civil Procedure. In the petition for review, the petitioner must include the following sections:

(a) A list of all parties, and the names, and addresses of all counsel. Tex. R. App. P. 53.2(a);
(b) A table of contents that includes the subject matter of each issue brought, and the page numbers where the issues may be found. Tex. R. App. P. 53.2(b);
(c) An index of authorities that alphabetically lists each case, statute, or other authority cited in the brief, along with the page numbers of where such may be found. Tex. R. App. P. 53.2(c);
(d) A “statement of the case” which contains the a brief description of the nature of the case, as well as the following:

(i) the name of the trial judge in the underlying case;
(ii) the designation of the trial court and the county in which it is located;
(iii) the disposition of the case by the trial court;
(iv) the parties in the court of appeals;
(v) the district of the court of appeals;
(vi) the names of the justices who participated in the decision, the author of the appellate opinion, and any separate opinion;
(vii) the citation for the court of appeals’ opinion; and
(viii) the disposition of the case by the court of appeals, including any post-appeal motions and whether such motions remain pending at the time the petition for review is filed.

TEX. R. APP. P. 53.2 (d). The statements should be supported by record references but not discuss the facts of the case, and should “seldom” exceed one page. Id.;

(e) A statement of how the Supreme Court possesses jurisdiction over the appeal. TEX. R. APP. P. 53.2(e).

(f) A statement of all issues presented for review. TEX. R. APP. P. 53.2(f). An issue will be construed as covering every subsidiary issue that can be reasonably inferred from the issue. Id. The court will only consider those issues for appeal that were preserved from the trial court through the lower appellate court. Id.

(g) If the petitioner disagrees with the court of appeals’ statement of the facts in its opinion, it should concisely state the facts, with references to the appellate record. TEX. R. APP. P. 53.2(g). Otherwise, the petition for review should state that the court of appeals’ recitation of facts is correct. Id.

(h) A summary of the arguments that are found in the body of the brief. TEX. R. APP. P. 53.2 (h);

(i) Argument of the contentions made on appeal, accompanied by references to applicable authority. TEX. R. APP. P. 53.2(i). Unlike briefs in the lower courts of appeal, a petition for review is not required to contain argument on every issue presented for appeal. Id. If the Supreme Court requests further briefing, those issues may be addressed in that brief. In addition, the argument should refer to the factors set forth in Texas Rule of Appellate Procedure 56.1(a) and articulate why the petition for review should be granted. Id.

(j) A prayer or conclusion that sets out the relief the party seeks. TEX. R. APP. P. 53.2(j); and

(j) An appendix, that may include any item relevant to the appeal, but must include the following:

(1) the trial court’s judgment or other order from which the appeal is being sought;
(2) if applicable following a jury trial, the jury charge and verdict;
(3) if applicable following a bench trial or other ruling in which findings and conclusions were made, the trial court’s findings of fact and conclusions of law;
(4) the text of any rule, regulation, ordinance, statute, constitutional provision, or other law (excluding case law) on which the argument is based; and
(5) the text of any contract or other document that is central to the argument.

Petitions for review should not exceed 15 pages, exclusive of pages containing the identity of parties and counsel, the table of contents, the index of authorities, the statement of the case, the statement of jurisdiction, the issues presented, the signature, the proof of service, and the appendix. TEX. R. APP. P. 53.6.

(2) Contents of a Response to the Petition for Review.

The respondent in a petition for review is not required to file any response. Tex. R. App. P. 53.3. It may submit a “waiver” to the court indicating that it does not desire to file a response at this time. Declining to file a response or filing a waiver does not actually waive the right to respond to the petition for review at a later time. Before the Supreme Court may grant a petition for review or order briefs on the merits, the Court is first required to request a response (if a response has not already been filed).

When a respondent files a response to a petition for review, it should include the following sections:

(a) A table of contents;
(b) An index of authorities;
(c) Statement of issues presented for review;
(d) Argument for why the petition should be denied, accompanied by references to authority;
(e) A prayer/conclusion
(f) Appendix of any matter that the respondent believes is relevant to appeal but was omitted by the petitioner.

TEX. R. APP. P. 53.3. As with briefs in the intermediate courts of appellate courts, a respondent in the Supreme Court may include other sections required of the petitioner if the respondent is dissatisfied with the petitioner’s discussion of the facts, issues, or authority that relate to that section. Id.
Responses to petitions for review should not exceed 15 pages, exclusive of pages containing the identity of parties and counsel, the table of contents, the index of authorities, the statement of the case, the statement of jurisdiction, the issues presented, the signature, the proof of service, and the appendix. TEX. R. APP. P. 53.6.

(1) Reply in support of a petition for review.

A petitioner may file a reply to any issue presented in a respondent’s response, but the Supreme Court may rule on the petition before the reply is filed. TEX. R. APP. P. 53.5. A reply in support of a petition for review should not exceed eight pages in length. TEX. R. APP. P. 53.6.

(2) Contents of a Brief on the Merits.

The requirements for the contents of a petition for review are set forth in Rule 55 of the Texas Rules of Civil Procedure. Before the Supreme Court may grant a petition for review or take any action other than to deny or dismiss the petition, the court must request briefs on the merits from the parties. However, requesting briefs should not be construed to mean that the court has granted the petition for review; the court may request briefs on the merits before it rules on the petition. TEX. R. APP. P. 55.2. If the court requests briefs on the merits, the petitioner’s brief must include:

(a) Identity of Parties and Counsel.
(b) Table of Contents.
(c) Index of Authorities.
(d) Statement of the Case containing the same items as in the petition for review.
(e) Statement of Jurisdiction.
(f) Issues Presented.
(g) Statement of Facts, supported by record references.
(h) Summary of the Argument.
(i) Argument. Although the petition for review permitted a petitioner to reserve some issues, all issues must be discussed in the brief on the merits to be considered by the court.
(j) Prayer / Conclusion.

TEX. R. APP. P. 55.2. The petitioner’s brief on the merits should not exceed 50 pages exclusive of pages containing the identity of parties and counsel, the table of contents, the index of authorities, the statement of the case, the statement of jurisdiction, the issues presented the signature, and the proof of service. TEX. R. APP. P. 55.6. The respondent’s brief on the merits must include:

(a) Table of Contents.
(b) Index of Authorities.
(c) Summary of the Argument.
(d) Argument responding to all issues presented to the court.
(e) Prayer / Conclusion.

TEX. R. APP. P. 55.3. As with other responding briefs, a respondent’s brief on the merits may include any other section contained in the petitioner’s brief if the respondent is dissatisfied with the petitioner’s discussion of the facts, issues, or relevant authority. TEX. R. APP. P. 55.3. The respondent’s brief on the merits should not exceed 50 pages containing the identity of parties and counsel, the table of contents, the index of authorities, the statement of the case, the statement of jurisdiction, the issues presented the signature, and the proof of service. TEX. R. APP. P. 55.6.

If the petitioner desires to file a brief in reply, it may do so. TEX. R. APP. P. 55.4. However, the Supreme Court may act on the appeal before the reply is filed. Id. Briefs in reply may not exceed 25 pages in length. TEX. R. APP. P. 55.6.

M. Mediation.

In accordance with the general policy of the state of Texas, mediation is also an option at the appellate level. For example, the Dallas court of appeals, as a part of the docketing statement, asks whether the parties have mediated and, if so, the name of the mediator and whether mediation would be appropriate at this stage of the litigation. Several of the courts of appeals will order the parties to mediation even over the objection of the appellee. Other appellate courts ask the parties if they want to mediate and will order it unless a party objects. The attorney should check each court’s policy in this regard at the specific court’s Web site.

N. Bankruptcy during Appeal.

TRAP 8 addresses the effect of bankruptcy on Texas appellate deadlines and codifies much of the existing “common law” bankruptcy procedure.

1. Notice of Bankruptcy:

TRAP 8 specifically describes the following requirements of a notice of bankruptcy: (1) the bankrupt party’s name; (2) the court in which the bankruptcy proceeding is pending; (3) the bankruptcy proceeding’s style and case number; (4) the date when the bankruptcy petition was filed; and (5) an authenticated copy of the page or pages of the bankruptcy petition that show when the petition was filed. In addition, any party may file a notice of bankruptcy. TEX. R. APP. P. 8.1.

2. Automatic Stay:

In a general civil case, if the bankrupt party was the defendant in the trial court, the automatic stay applies and any further action against the bankrupt party is stayed. See Freeman v. Comm’r, 799 F.2d
1091, 1092-93 (5th Cir. 1986); O'Neill v. Cont'l Airlines, Inc., 928 F.2d 127, 128-29 (5th Cir. 1991). In other words, if the debtor was the plaintiff in the trial court, the automatic stay does not apply; but if the debtor was the defendant in the trial court, any further action is stayed. When the automatic stay applies, the bankruptcy suspends the appeal and all periods from the date when the bankruptcy petition is filed.

It is unclear how the debtor, to whom the automatic stay applies, is determined in family law cases. In Thiel v. Thiel, 780 S.W.2d 930 (Tex. App.—San Antonio 1989, no writ), the appellate court applied the traditional rule to a family law case, holding that since the debtor/husband was the petitioner who filed for divorce in the trial court (i.e., the equivalent of a plaintiff in a general civil case), the automatic stay did not apply to the appeal. However, in Burns v. Burns, 974 S.W.2d 820 (Tex. App.—San Antonio 1998, no pet.), the appellate court interpreted Texas Rule of Appellate Procedure 8.2 in a probate-related case. The court held that Rule 8.2 required the imposition of the automatic stay if any party files a bankruptcy petition. The appellate court declined to follow its former opinion in Thiel v. Thiel because Rule 8.2 was promulgated afterwards. As explained by the Court:

According to Rule 8.2, “[a] bankruptcy suspends the appeal and all periods in [the rules of appellate procedure] from the date when the bankruptcy petition is filed until the appellate court reinstates or severs the appeal in accordance with federal law.” TEX. R. APP. P. 8.2 (emphasis added). This rule was intended to simplify the effect of federal bankruptcy law. See Minutes, Supreme Court Advisory Committee 4010 (Nov. 18, 1994), 5221 (Jan. 20, 1995). Because the rule applies to any party to the trial court's judgment, we read the italicized phrase “in accordance with federal law” as modifying the reinstatement and severance procedures more fully described in Rule 8.3. Because Rule 8.2 was drafted after our opinion in Thiel, we decline to follow its holding. Accordingly, by separate order, we suspend the appeal and all appellate deadlines.

Id. at 820-21. Clearly Rule 8.2 stays all proceedings regardless of which party is the debtor.

A document that is filed during the time when the appeal is suspended by bankruptcy is not void, but is deemed filed on the same day, but after, the court reinstates or severs the appeal and is not considered void or ineffective because it was filed while the appeal was suspended by bankruptcy. TEX. R. APP. P. 8.2. Rule 8.2 clarifies an area of conflicting court opinions concerning whether filings or actions taken in violation of the automatic bankruptcy stay is void or voidable. See Paine v. Sealey, 956 S.W.2d 803, 805-07 (Tex. App.—Houston [14th Dist.] 1997, no pet.).

3. Calculation of Time Periods:
Rule 8 also clarifies the calculation of time periods. A time period that began to run but had not expired when the appeal was suspended by bankruptcy begins over when the appellate court reinstates or severs the appeal. For example, during the ninety day period for filing the notice of appeal after the judgment and the filing of a motion for new trial, the defendant files a bankruptcy petition which suspends the appeal. The ninety day period for filing the notice of appeal “starts over” or “begins anew” when the court reinstates the appeal (when, for example, the bankruptcy court lifts the bankruptcy stay) or severs the bankruptcy party. TEX. R. APP. P. 8.2., see also Costilla Energy, Inc. v. GNK, Inc., 15 S.W.3d 579, 580 (Tex. App.—Waco 2000, no pet.); Holdampf v. H. E. Butt Grocery Co., 2003 WL 549966 (Tex. App.—El Paso 2003, no pet.); Meece v. OCC Constr. Corp., 264 S.W.3d 928 (Tex. App.—Waco 2008, order) see also Roadside Stations, Inc. v 7HBF, Ltd., 905 S.W.2d 1, 2-3 (Tex. App. – Fort Worth 1994, no writ); Gantt v. Gantt, 208 S.W.3d 27, 30-31 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (The Bankruptcy Code extends the deadline for appeal 30 days from the date the stay is lifted).

4. Motions to Sever and Reinstate:
The suspended Texas appeal does not automatically become reinstated simply because of a lifting of the stay by the bankruptcy court, or dismissal or resolution of the bankruptcy. The Texas appeal is reinstated only when the Texas appellate court issues an express order reinstating the appeal. See TEX. R. APP. P.8.3. An order reinstating the appeal would be proper under federal law only if the bankruptcy court has lifted the automatic stay, or the bankruptcy proceeding has been resolved. An order of severance would reinstate the appeal only as to non-debtor parties if their claims are severed from the claims of the debtor.

If the motion to reinstate is based upon expiration or lifting of the stay by court order, a certified copy of the bankruptcy order must be attached. TEX. R. APP. P.8.3(a). Any party may move to sever the appeal with respect to the debtor and to reinstate the appeal as to all other parties. However, the motion must show that the case is severable and must comply with applicable federal law regarding severance of a bankrupt party. TEX. R. APP. P.8.3(b).
**O. Oral Argument.**

Texas Rule of Appellate Procedure 39 addresses the specific rules regarding oral argument before the appellate court. Now, it is in the appellate court’s discretion to decide a case without oral argument “if argument would not significantly aid the court.” TEX. R. APP. P. 39.8. The previous rule allowed the court to forego oral argument if argument would not “materi ally aid” the court. Former TEX. R. APP. P. 75(f) (Tex. & Tex. Crim. App. 1986, amended Sept. 1, 1997). This change may have the effect of decreasing the number of oral arguments. Unless a request for oral argument appears on the front cover of the party’s brief, that party waives oral argument except if the court directs the party to appear and argue before the court. See TEX. R. APP. P. 39.7 see also Green v. Tex. Elec. Wholesalers, Inc., 647 S.W.2d 1, 1 (Tex. App.—Houston [1st Dist.] 1982, no writ) (per curiam). Even though a party waives his or her right to oral argument, the court of appeals may nevertheless direct a party to appear and submit oral argument on the submission date of the case. If a party, who has requested oral argument, disagrees with the court of appeals’ decision to submit the case without argument, the party should consider making an objection by written motion that substantially complies with Rule 10 immediately after receiving the notice of submission. Cayce, John Hill, Jr., Anne Garnder, and Felicia Harris Kyle, Civil Appeals in Texas: Practicing Under the New Rules of Appellate Procedure, 49 BAYLOR L. REV. 867, 944-45 (1997). Practitioners may also consider including in their initial briefs a short statement similar to that mandated in the Fifth Circuit Local Rules, succinctly stating the reasons why oral argument would be helpful or a “significant aid” to the court in deciding the case. Id. at 945(citing Fifth Cir. Loc. R. 28.2.4).

Rule 39.2 provides that the purpose of oral argument is to emphasize and clarify the arguments in the briefs, thereby cautioning appellate counsel not to rely on the briefs and not to refer to matters outside the record. The rule further instructs counsel to assume that the court has read the briefs and that counsel should be ready to respond to questions from the panel. TEX. R. APP. P. 39.2. Rule 39.9 mandates that the appellate clerk provide the parties twenty-one days' notice of submission. The notice must set forth the following information: (1) whether oral argument will be permitted; (2) the date of argument or submission; (3) the time allotted for argument, if allowed; and (4) the names of all members of the panel who will decide the case. TEX. R. APP. P. 39.9. Seemingly, the purpose for providing the names of the panel members is so a party may determine whether to attempt to recuse a justice or judge under Rule 16. However, as further discussed below, this information also provides the appellate litigator with valuable information regarding the makeup of the panel before which the counsel will be arguing, which can significantly aid in the preparation of his argument.

**P. Appellate Sanctions.**

1. **Appeals and Petitions for Review:**

Texas Rules of Civil Procedures 45 and 62 govern sanctions for petitions for review in the Supreme Court and appeals in the courts of appeal. Under these rules, the court can award a sanction if the “appeal is frivolous.” The sanction is awarded to “each prevailing party” and there is no limit on the amount of the sanction. The rules do impose a requirement of “notice and a reasonable opportunity for response.” TEX. R. APP. P. 45, 62. Appellate sanctions will be imposed only if the record clearly shows the appellant has no reasonable expectation of reversal, and the appellant has not pursued the appeal in good faith. See City of Houston v. Morua, 982 S.W.2d 126, 131 (Tex. App.—Houston [1st Dist.] 1998, no writ) (relying on case law interpreting former TEX. R. APP. P. 84 to construe new Rule 45). In deciding whether to impose sanctions under Rule 45, the appellate court looks at the record from the viewpoint of the advocate and determines whether it had reasonable grounds to believe the judgment should be reversed. See James v. Hudgins, 876 S.W.2d 418, 424 (Tex. App.—El Paso 1994, writ denied). The courts of appeals have recited four factors which tend to indicate that an appeal is frivolous: (1) the unexplained absence of a statement of facts; (2) the unexplained failure to file a motion for new trial when it is required to successfully assert factual sufficiency on appeal; (3) a poorly written brief raising no arguable points of error; and (4) the appellant's unexplained failure to appear at oral argument. See Faddoul, Glasneen & Valles, P.C. v. Oaxaca, 52 S.W.3d 209, 213 (Tex. App.—El Paso 2001, no pet.); In reS.R.M., 888 S.W.2d 267, 269 (Tex. App.—Houston [1st Dist.] 1994, no writ); Baw v. Baw, 949 S.W.2d 764, 768 (Tex. App.—Dallas 1997, no writ). In Swate v. Crook, 991 S.W.2d 450 (Tex. App.—Houston [1st Dist.] 1999, pet. denied), the Court of Appeals sanctioned the appellant/father for bringing a frivolous appeal and awarded appellate/mother $5,000.00 in attorney's fees as damages. In awarding sanctions, the Court explained that sanctions “will be imposed only if the record clearly shows the [appellant] father has no reasonable expectation of reversal, and the [appellant] father has not pursued the appeal in good faith. Id. at 455. However, bad faith is not required to impose sanctions. Smith v. Brown, 51 S.W.3d 376, 381 (Tex. App.—Houston [1st Dist.] 2001, pet. denied). In fact, bad faith is not dispositive or necessarily even material in deciding whether an appeal is frivolous although the presence of bad faith, of course, would be relevant. Id. at 381.
Courts awarding sanctions for a frivolous appeal under rule 45 typically award attorney's fees for the appeal. See, e.g., Smith v. Brown, 51 S.W.3d at 382 ($5,000); Chapman v. Hootman, 999 S.W.2d 118, 125 (Tex. App.—Houston [14th Dist.] 1999, no pet.) ($5,000); Mid-Continent Cas. Co. v. Safe Tire Disposal Corp., 2 S.W.3d 393, 397 (Tex. App.—San Antonio 1999, no pet.) ($5,000); Diana Rivera & Assoc., P.C. v. Calvillo, 986 S.W.2d 795 (Tex. App.—Corpus Christi 1999, pet. denied) ($8,800). Proof by affidavit is a proper method of establishing the appropriate sanction for the filing of a frivolous appeal, Smith, 51 S.W.3d at 382, although some courts have awarded damages even when the appellee provided no evidence of damages, see Lee v. Aurora Loan Servs., L.L.C., No. 06-08-00077-CV, 2009 WL 167067, at *3 (Tex. App.—Texarkana 2009, no pet.) (mem.op.) ($7,500); Njiku v. Middleton, 20 S.W.3d 176, 178 (Tex. App.—Dallas 2000, pet. denied) ($5,000); Salley v. Houston Lighting & Power Co., 801 S.W.2d 230, 232 (Tex. App.—Houston [1st Dist.] 1990, writ denied) (awarding $6,000 when trial court's judgment was non-monetary).

2. Original Proceedings:
Sanctions are also available in original proceedings. The standard is whether the party or attorney is “not acting in good faith.” TEX. R. APP. P.52.11. The rule sets out several criteria for determining whether the person was acting in good faith. They include whether the petition is “clearly groundless”; whether the petition was filed “solely for delay of an underlying proceeding”; whether the petition or appendix “grossly misstate[s] or omit[s] an obviously material fact” or if the appendix or record is “clearly misleading because of the omission of obviously important and material evidence or documents.” TEX. R. APP. P. 52.11.

VII. MANDAMUS

A. In General.
Mandamus is a suit brought in a court of competent jurisdiction to order an inferior court to do or not do an act. The functions of a mandamus action are to set in motion and to compel action. Mandamus is a legal remedy, but it is governed to some extent by equitable principles. Although it is an extraordinary remedy, the Texas Rules of Civil Procedure apply. Vondy v. Commrs Court of Uvalde County, 620 S.W.2d 104, 108 (Tex. 1981). The person seeking relief by mandamus is the “relator.” TEX. R. APP. P. 3.1(f), 52.2. The person against whom relief is being sought is the “respondent.” TEX. R. APP. P. 3.1(h)(2), 52.2. A person whose interest would be directly affected by the relief sought is a “real party in interest” and a party to the case. TEX. R. APP. P. 52.2.

B. Standard of Review.
Generally, mandamus will lie to prevent a clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy provided by law. Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 917 (Tex. 1985) (orig. proceeding).

1. No Adequate Remedy by Appeal:
In order to determine whether a writ should issue, the court of appeals must first decide whether the relator had an adequate remedy by appeal. Walker v. Packer, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding). Mandamus will not issue if there is a clear and adequate remedy at law, such as a normal appeal. State v. Walker, 679 S.W.2d 484, 485 (Tex. 1984). Mandamus is intended to be an extraordinary remedy, available only in limited circumstances. Walker, 827 S.W.2d at 840. The writ will issue “only in situations involving manifest and urgent necessity and not for grievances that may be addressed by other remedies.” Holloway v. Fifth Court of Appeals, 767 S.W.2d 680, 684 (Tex. 1989) (citation omitted). The requirement that persons seeking mandamus relief establish the lack of an adequate appellate remedy is a “fundamental tenet” of mandamus practice. Holloway, 767 S.W.2d at 684. An appellate remedy is not inadequate merely because it may involve more expense or delay than obtaining an extraordinary writ. Walker, 827 S.W.2d at 842. Delay until appeal is more than a mere inconvenience if the matter at issue has a profound impact on the parent-child relationship, or if there is a threat of irreparable harm to the children, See In re R.R., 26 S.W.3d 569, 573 (Tex. App.—Dallas 2000, orig. proceeding); In re Office of the A.G., 276 S.W.3d 611, 622 (Tex. App.—Houston 2008, orig. proceeding).

The second requirement for mandamus relief, that the relator has no adequate remedy by appeal, “has no comprehensive definition.” See In re Ford Motor Co., 165 S.W.3d 315, 317 (Tex.2005) (citing In re Prudential, 148 S.W.3d 124, 136 (Tex.2004)). As explained by the Texas Supreme Court,

Whether a clear abuse of discretion can be adequately remedied by appeal depends on a careful analysis of costs and benefits of interlocutory review. As this balance depends heavily on circumstances, it must be guided by analysis of principles rather than simple rules that treat cases as categories.

The most frequent use we have made of mandamus relief involves cases in which the very act of proceeding to trial-regardless of the outcome—would defeat the substantive right involved. Thus we have held appeal is not an adequate remedy when it will mean:
• forcing parties to trial in a case they agreed to arbitrate;
• forcing parties to trial on an issue they agreed to submit to appraisers;
• forcing parties to a jury trial when they agreed to a bench trial;
• forcing parties to trial in a forum other than the one they contractually selected;
• forcing parties to trial with an attorney other than the one they properly chose;
• forcing parties to trial with an attorney who should be attending the Legislature; and
• forcing parties to trial with no chance for one party to prepare a defense.


insisting on a wasted trial simply so that it can be reversed and tried all over again creates the appearance not that the courts are doing justice, but that they don’t know what they are doing. Sitting on our hands while unnecessary costs mount up contributes to public complaints that the civil justice system is expensive and outdated.

Id. at 466 (footnote omitted). In McAllen Medical Cntr., the Supreme Court stated that “the hospital could have avoided significant expense and delay had the trial court followed the law as set out in the statute; unquestionably, the hospital will continue to incur costs and delay in the future if we deny relief today. Accordingly, we hold the hospital has shown it has an adequate remedy by appeal.” Id. at 467.

2. Legal Right to Performance:

Mandamus also lies to enforce the performance of a nondiscretionary act or duty and will issue only when the act or duty is ministerial in character. An act is ministerial when the law clearly spells out the duty to be performed with such certainty that nothing is left to the exercise of discretion or judgment. Forbes v. City of Houston, 356 S.W.2d 709, 711 (Tex. Civ. App.—Houston 1962, no writ). A trial court giving consideration to a properly filed and pending motion is a ministerial act. In re Winters, 2008 WL 5177835 at *3 (Tex. App.—Dallas 2008, orig. proceeding). A trial court clearly abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. Johnson, 700 S.W.2d at 917. This standard, however, has different applications in different circumstances. Walker, 827 S.W.2d at 839.

With respect to resolution of factual issues or matters committed to the trial court’s discretion, the reviewing court may not substitute its judgment for that of the trial court. Walker, 827 S.W.2d at 839. The relator must establish that the trial court could reasonably have reached only one decision. Walker, 827 S.W.2d at 840. A mere error in judgment is not an abuse of discretion. Johnson, 700 S.W.2d at 918. Even if the reviewing court would have decided the issue differently, it cannot disturb the trial court’s decision unless it is shown to be arbitrary and capricious. Walker, 827 S.W.2d at 840.

On the other hand, review of a trial court’s determination of the legal principles controlling its ruling is much less deferential. A trial court has no “discretion” in determining what the law is or applying the law to the facts. Thus, a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion and may result in appellate reversal by extraordinary writ. Walker, 827 S.W.2d at 840. A trial court’s wrong decision in applying or analyzing the law, even in an unsettled area of the law, is an abuse of discretion. See Huie v. DeShazo, 922 S.W.2d 920, 927–28 (Tex. 1996) (orig. proceeding).

C. Subjects of Mandamus

1. Arbitration.

Whether mandamus relief is available pursuant to a trial court’s orders arbitration orders depends on whether the order is one to compel the parties to arbitration or one denying a party’s motion to compel arbitration. Arbitration agreements may be governed by the Federal Arbitration Act (FAA) or the Texas Arbitration Act (TAA). See Omoruyi v. Grocers Supply Co., Inc., No. 14-09-00151-CV, 2010 WL 1992585 at *3 (Tex. App.—Houston [14 Dist.] May 20, 2010) (mem. op.). Under the TAA, a party can pursue an interlocutory appeal of a trial court’s order that: (1) denies an application to compel arbitration made under section 171.021; or (2) grants an application to stay arbitration under section 171.023. TEX. CIV. PRAC. & REM. CODE ANN. § 171.098(a)(1), (2); Chambers v. O’Quinn, 242 S.W.3d 30, 30 (Tex. 2007). Similarly, pursuant to Section 51.016 of the Texas Civil Practice and Remedies Code, amended September 1, 2009, a party may now pursue an interlocutory appeal for a trial court’s denial of a motion to compel arbitration. TEX. CIV. PRAC. & REM. CODE ANN. § 51.016; see also In re Chestnut Energy Partners, Inc., 300 S.W.3d 386, 394 n.4 (Tex. App.—Dallas 2009, pet denied). Prior to September 1, 2009, if a trial court denied a parties motion to compel arbitration, the parties’ only relief was through mandamus. Kilroy v. Kilroy, 137 S.W.3d 780 (Tex. App.—Houston [1st Dist.] 2004, orig. proceeding). When a trial court denies arbitration under the FAA, relief must be sought in a petition for writ of mandamus. In re Pham, 314 S.W.3d 520, 523 (Tex. App.—Houston [14th Dist.] 2010, orig. proceeding).
Interlocutory appeals, however, are not available to parties wishing to appeal trial orders compelling arbitration under either the FAA or the TAA. Chambers v. O’Quinn, 242 S.W.3d 30, 30 (Tex. 2007); Elm Creek Villas Homeowner Ass’n, Inc v. Beldon Roofing & Remodeling, 940 S.W.2d 150, 153 (Tex. App.—San Antonio 1996, no pet.). Accordingly, mandamus is the only relief available to a party seeking appellate review of a trial court’s order compelling arbitration. In 2009 the Supreme Court of Texas clarified the availability and—to a lesser extent—the standard for challenging an order compelling arbitration via mandamus. See In re Gulf Exploration LLC, 289 S.W.3d 836, 838-39 (Tex. 2009). Because parties will generally have an adequate remedy by appeal of an order compelling arbitration after a final judgment, mandamus relief is available only in very limited circumstances. See id. at 843 (holding that “the balance will generally tilt toward reviewing orders compelling arbitration only on final appeal”). However, mandamus relief might be available upon a showing “clearly and indisputably that the district court did not have the discretion to stay the proceedings pending arbitration” or in “those rare cases when legislative mandates conflict.” Id. at 838, 843.

In In re Gulf, the Texas Supreme Court reasoned that in deciding whether mandamus was appropriate, legislative acts encouraging or discouraging interlocutory review should be considered. Id. The Court highlighted the fact that both the FAA and the TAA “pointedly exclude immediate review of orders compelling arbitration, any balancing must tilt strongly against mandamus review.” Id. The Court refused to summarily bar mandamus review or to establish a list of permissible circumstances allowing mandamus review of an order compelling arbitration. Id. at 842-44. The Court noted, however, that even if mandamus review of an order compelling arbitration frustrates the purposes of the FAA or the TAA, the order may be subject to mandamus review if denying mandamus risked frustrating a different statutory purpose. Id. (citing In re Poly-America, 262 S.W.3d 337, 352 (Tex.2008) (grant of mandamus review of order compelling arbitration proper when arbitration involved waiver of statutory workers compensation rights)). Presumably, to meet the requirements of entitlement to mandamus, the party seeking review of an order compelling arbitration must show that the benefits of granting mandamus review outweigh the detrimental effect the review has on the legislative intent of the arbitration acts. Id. at 842, n37.

2. Attorney Disqualification.

Under appropriate circumstances, a mandamus may be sought to review a trial court’s order or an appellate court’s order, granting or denying a motion to disqualify an attorney. A party “is not required to simply hope that the pending case is concluded without disclosure of its confidences,” nor is a party “required to wait until any damage will have been done and will be irreparable.” Nat’l Med. Enters., Inc v. Godbey, 924 S.W.2d 123, 133 (Tex. 1996) (orig. proceeding).

3. Bill of Review.

Mandamus relief is appropriate when a trial court grants a bill of review and pleadings fail to meet the initial requirements for bringing the bill of review, which are an allegation in the pleading that the prior judgment was rendered as the result of fraud, accident, or wrongful act of the opposing party or official mistake and an allegation of sworn facts that constitute a meritorious defense. In re Attorney General, 184 S.W.3d 925, 929 (Tex. App.—Beaumont 2006, orig. proceeding). Mandamus relief is also appropriate when a trial court grants a bill of review based on a misrepresentation that constitutes intrinsic, not extrinsic, fraud. In re Att’y Gen., 193 S.W.3d 690, 692–93 (Tex. App.—Beaumont 2006, orig. proceeding).


There are two types of contempt: civil and criminal. The classifications of civil and criminal contempt have nothing to do with the characterization of the underlying case or the burden of the contempt order. Rather, the distinction between civil and criminal contempt lies in the nature and purpose of the penalty imposed. In a civil contempt order, the court exerts its contempt power to persuade the contemner to obey a previous order, usually through a conditional penalty. Because the contemner can avoid punishment by obeying the court’s order, the contemner is said to “ear[y] the keys of imprisonment in his own pocket.” Conversely, a criminal contempt order is punitive in nature and is an exertion of the court’s inherent power to punish a contemner for some completed act that affronted the court’s dignity and authority. In criminal contempt proceedings, the court punishes the contemner for improper past acts, and no subsequent voluntary compliance can enable the contemner to avoid punishment. Cadle Co. v. Lobingier, 50 S.W.3d 662, 667 (Tex. App.—Fort Worth 2001, pet. denied). A contempt judgment is reviewable only via a petition for writ of habeas corpus (if the contemner is confined) or a petition for writ of mandamus (if no confinement is involved). In re Long, 984 S.W.2d 623, 625 (Tex. 1999) (orig. proceeding). When contempt is punished by a fine, mandamus is the only remedy available to the relators. Ex parte Sealy, 870 S.W.2d 663, 667 (Tex. App.—Houston [1st Dist.] 1994, orig. proceeding); Kidd v. Lance, 794 S.W.2d 586, 587 n.1 (Tex. App.—Austin 1990, orig. proceeding). If fines and confinement are both imposed, they may not be considered separately and therefore may not be
challenged by mandamus even if suspended. Deramus v. Thornton, 333 S.W.2d 824, 826–27 (Tex. 1960) (orig. proceeding). Additionally, where contempt is also sanctioned by an award of attorney’s fees, mandamus is the only means to review such a sanction. Ex parte Sealy, 870 S.W.2d at 667. Decisions in contempt proceedings cannot be reviewed on appeal because contempt orders are not appealable, even when appealed along with a judgment that is appealable. Cadle Co., 50 S.W.3d at 671. A timely objection to a show cause order that could lead to a contempt order is a proper subject for a mandamus. Dunn v. Street, 938 S.W.2d 33, 35 (Tex. 1997) (orig. proceeding).

5. Continuance.

a. Legislative Continuance:

A trial court is under the ministerial duty to grant a legislative continuance when the statutory criteria are met. Section 30.003 of the Texas Civil Practice and Remedies Code provides the following:

Except as provided by subsections (c) and (c–1), at any time within 30 days of a date when the legislature is to be in session, at any time during a legislative session, or when the legislature sits as a constitutional convention, the court on application shall continue a case in which a party applying for the continuance or the attorney for that party is a member or member-elect of the legislature and will be or is attending a legislative session. The court shall continue the case until 30 days after the date on which the legislature adjourns.

TEX. CIV. PRAC. & REM. CODE § 30.003(b). Subsection (c) provides that if the attorney for a party to the case is a member or member-elect of the legislature who was employed on or after the thirtieth day before the date on which the suit is set for trial, the continuance is discretionary with the court. TEX. CIV. PRAC. & REM. CODE § 30.003(c). Subsection (c–1) provides that if the attorney for a party to any criminal case is a member or member-elect of the legislature who was employed on or after the fifteenth day on which the suit is set for trial, the continuance is discretionary with the court. TEX. CIV. PRAC. & REM. CODE § 30.003(c–1). The legislature’s intent under section 30.003 was to create a window of time that begins thirty days before session and ends thirty days after session in which a legislator may seek a continuance. During that time frame, when an application for legislative continuance is made, the trial court must grant it. In re Smart, 103 S.W.3d 515, 520–21 (Tex. App.—San Antonio 2003, orig. proceeding) (trial court abused discretion in granting legislative continuance, but other party had adequate remedy at law). It is not relevant whether the attorney is necessary to the party or the extent of the legislator’s participation in the lawsuit. Amoco Prod. Co. v. Salyer, 814 S.W.2d 211, 213 (Tex. App.—Corpus Christi 1991, orig. proceeding). But see Broesche v. Jacobson, 218 S.W.3d 267 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (trial court found wife hired legislator for purposes of delay, and wife’s counsel’s failure to timely notify husband’s counsel of legislator’s retention, which caused husband’s counsel to work over Christmas holiday, was intended to cause husband unnecessary additional litigation fees). The trial court, however, is allowed the discretion in those cases in which the party opposing the continuance alleges that a substantial existing right will be defeated or abridged by delay. In cases of this type, the trial court has a duty to conduct a hearing on the allegations. If the allegations are shown to be meritorious the court should deny the continuance. Waites v. Sondock, 561 S.W.2d 772, 776 (Tex. 1977) (orig. proceeding) (trial court abused discretion in granting continuance rather than recognizing due-process exception; right to child support could not be enforced by any other means).

b. Nonlegislative Continuance:

The granting or denial of a motion for continuance is within the trial court’s sound discretion. Mandamus is generally not available to review such a ruling. Similarly, the denial of a motion for continuance is an incidental trial ruling ordinarily not reviewable by mandamus. In the absence of any other error, a court will not grant mandamus relief merely to revise a trial judge’s scheduling order. Only under special circumstances will mandamus relief be available. Gen. Motors Corp. v. Gayle, 951 S.W.2d 469, 477 (Tex. 1997) (orig. proceeding) (trial court abused discretion in not granting continuance to allow for jury trial because trial court had already determined that multiple interruptions in trial were anticipated and continuance would not have injured other party); see also Union Carbide Corp. v. Moya, 798 S.W.2d 792, 792–93 (Tex. 1990) (orig. proceeding) (denial of continuance to allow defendant to supplement record with more affidavits and discovery products pertinent to motion for change of venue effectively denied right to reasonable discovery); Fountain v. Knebel, 45 S.W.3d 736, 740 (Tex. App.—Dallas 2001, no pet.) (trial court abused discretion by not granting continuance so that major asset of community, husband’s interest in law firm, could be valued; such valuation necessary for just and right division of marital estate); Harrell v. Fashing, 562 S.W.2d 544, 545–46 (Tex. Civ. App.—El Paso 1978, orig. proceeding) (trial court did not abuse discretion by granting continuance to allow for mental and physical exam and was not limited to contempt proceedings).
c. Withdrawal of Counsel:
The trial court has wide discretion in granting or denying a motion for continuance. When the ground for a continuance is withdrawal of counsel, the movant must show that the lack of counsel is not due to their own fault or negligence. When an attorney is permitted to withdraw, the trial court must give the party time to secure new counsel and time for new counsel to investigate the case and prepare for trial. *Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex. 1986); *In re Posadas USA, Inc.*, 100 S.W.3d 254, 258 (Tex. App.—San Antonio 2001, orig. proceeding).

6. Discovery
   a. Pretrial Discovery:
      A party is entitled to full, fair discovery within a reasonable period. *In re Colonial Pipeline Co.*, 968 S.W.2d 938, 941 (Tex. 1998) (orig. proceeding). Mandamus is available in some circumstances to protect a party against an order compelling a response to a discovery request or to require a trial court to compel a party to respond. In the discovery context, the three situations in which a remedy by appeal will be inadequate are—

   1. if the appellate court would not be able to cure the trial court’s discovery error—for example, the trial court erroneously orders the disclosure of privileged information that will materially affect the rights of the aggrieved party;
   2. if the party’s ability to present a viable claim or defense at trial is vitiated or severely compromised by the trial court’s discovery error; and
   3. if the trial court disallows discovery and the missing discovery cannot be made part of the appellate record, or the trial court after proper request refuses to make it part of the record, and the reviewing court is unable to evaluate the effect of the trial court’s error on the record before it.

*Walker v. Packer*, 827 S.W.2d 833, 843–44 (Tex. 1992) (orig. proceeding). In other words, if the denied discovery goes to the heart of the case, there is no adequate remedy at law. *See In re Colonial Pipeline*, 968 S.W.2d at 942.

When a discovery order potentially violates First Amendment rights, there is no adequate remedy by appeal and mandamus is appropriate. *In re Maurer*, 15 S.W.3d 256, 259 (Tex. App.—Houston [14th Dist.] 2000, orig. proceeding). Mandamus is the only remedy when a protective order shields the witnesses from deposition and thereby prevents the evidence from being part of the record. *See Tom L. Scott, Inc. v. McIlhany*, 798 S.W.2d 556, 558 (Tex. 1990) (orig. proceeding). The blanket denial of all discovery from a witness in a civil case, when that witness is also a defendant in a pending criminal case arising out of the same facts and the witness is also expected to testify in that criminal case, is subject to mandamus. *See In re R.R.*, 26 S.W.3d 569, 574 (Tex. App.—Dallas 2000, orig. proceeding).

Additionally, in suits involving the establishment of parentage in which an acknowledgment of paternity has been signed, until the acknowledgment of paternity is set aside genetic testing is premature discovery and is not relevant. An order for such testing may be challenged by mandamus. *See In re Att’ye Gen.*, 195 S.W.3d 264, 270 (Tex. App.—San Antonio 2006, orig. proceeding).

b. Discovery Sanctions:
   Generally, discovery sanctions are not appealable until the district court renders a final judgment and an appeal is an adequate remedy for review of discovery sanctions. However, if the imposition of monetary sanctions threatens a party’s continuation of the litigation, appeal affords an adequate remedy only if payment of the sanctions is deferred until final judgment is rendered and the party has the opportunity to supersede the judgment and perfect his appeal. *Braden v. Downey*, 811 S.W.2d 922, 928–29 (Tex. 1991) (orig. proceeding). An appeal of sanctions is also inadequate in situations requiring the expenditure of time, such as the ordering of an attorney to perform community service during the pendency of the litigation. Nor can the attorney recover damages for service the district court may have erred in requiring him to perform. *Braden*, 811 S.W.2d at 929.

The trial court may not award grandparents possession and access unless there is evidence that the child’s parent is unfit, that the child’s health or emotional well-being would suffer if the court deferred to the parent’s decisions, or that the parent intended to exclude the grandparents from access to the child. An order for grandparent access in such circumstances may be challenged by mandamus. *In re Chambless*, 257 S.W.3d 698 (Tex. 2008) (orig. proceeding); *In re Mays- Hooper*, 189 S.W.3d 777 (Tex. 2006) (orig. proceeding).

8. Habeas Corpus.
The trial court may not deny the writ of habeas corpus based on the best interests of the child. On proof of the prior order, absent dire emergency, the grant of the writ of habeas corpus should be automatic, immediate, and ministerial, based on proof of the bare legal right to possession. *Schoenfeld v. Onion*, 647 S.W.2d 954, 955 (Tex. 1983) (orig. proceeding); see also *In re deFilippi*, 235 S.W.3d 319 (Tex. App.—San Antonio 2006, orig. proceeding).
Antonio 2007, orig. proceeding) (even though father was a suspect in mother’s death, such evidence of wrongdoing was speculative and not dire emergency to children). If the trial court fails to grant the writ of habeas corpus, mandamus is the proper remedy to compel enforcement of a relator’s right in habeas corpus proceedings to custody of a child. Lamphere v. Chrisman, 554 S.W.2d 935, 938 (Tex. 1977) (orig. proceeding); In re Lau, 89 S.W.3d 757, 759 (Tex. App.—Houston [1st Dist.] 2002, orig. proceeding); see also Greene v. Schuble, 654 S.W.2d 436, 437–38 (Tex. 1983).

9. Intervention.
Mandamus is proper when a trial court strikes an intervention absent a motion to strike. In re Marriage of J.B. and J.B., 326 S.W.3d 654, 660 (Tex. App.—Dallas 2010, orig. proceeding).

10. Jurisdiction
a. Jurisdictional Conflict:
Mandamus will lie to settle a jurisdictional conflict created when two courts interfere with each other by issuing conflicting orders or injunctions. In re Cornyn, 27 S.W.3d 327, 335 (Tex. App.—Houston [1st Dist.] 2000, orig. proceeding); see also HCA Health Servs. v. Salinas, 838 S.W.2d 246, 248 (Tex. 1992) (orig. proceeding) (no adequate remedy by appeal for litigation deadlocked when two courts attempted to exercise jurisdiction). Mandamus is proper when there is a jurisdictional conflict under the Uniform Child Custody Jurisdiction and Enforcement Act. Powell v. Stover, 165 S.W.3d 322 (Tex. 2005, orig. proceeding); In re Forlenza, 140 S.W.3d 373 (Tex. 2004, orig. proceeding).

b. Lack of Standing:
A component of subject-matter jurisdiction, standing is a constitutional prerequisite to maintaining a suit under Texas law. Mandamus will lie to challenge a party’s lack of standing. In re Smith, 262 S.W.3d 463, 465 (Tex. App.—Beaumont 2008, orig. proceeding); In re Roxsane R., 249 S.W.3d 764, 775 (Tex. App.—Fort Worth 2008, orig. proceeding).

11. Lis Pendens.
Mandamus is proper to challenge the trial court’s grant or denial of a motion seeking to remove or void a lis pendens. In re Collins, 172 S.W.3d 287 (Tex. App.—Fort Worth 2005, orig. proceeding) (challenge to trial court’s grant of motion to void lis pendens); In re Med Plus Equity Investments, L.P., 2005 WL 1385238 (Tex. App.—Dallas 2005, orig. proceeding) (mem. op.) (because property is only collaterally involved in plaintiff’s claims, lis pendens is void, and trial court erred when it refused to cancel lis pendens); In re Kroupa-Williams, 2005 WL 1367950 (Tex. App.—Dallas 2005, orig. proceeding) (mem. op.) (trial court erred when it ordered dissolution of lis pendens without conditioning that dissolution on making of deposit required by section 12.008 of Texas Property Code).

A trial court’s failure to specifically state the reason for the granting of the new trial in a jury trial may be challenged by mandamus. In re Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P., 290 S.W.3d 204 (Tex. 2009).

If an order violates the relator’s state constitutional rights and the relator has no other legal remedy, mandamus is the appropriate vehicle to assail the order.

a. Relator Not Required to Violate Order and Subject Self to Contempt:
When no appealable order has been entered and the relator may test the order only by violating it and subjecting himself to contempt, there is no adequate remedy. San Antonio Express-News v. Roman, 861 S.W.2d 265, 266–67 (Tex. App.—San Antonio 1993, orig. proceeding). The Texas Supreme Court has acknowledged that mandamus may issue where the legal process itself would violate the relator’s constitutional rights. See Tilton v. Marshall, 925 S.W.2d 672, 682 (Tex. 1996); In re Aubin, 29 S.W.3d 199, 203 (Tex. App.—Beaumont 2000, orig. proceeding).

b. Due-Process Right to Notice:
Mandamus may issue to correct an abuse of discretion in imposing sanctions without notice or meaningful hearing in violation of due process. In re Acceptance Ins. Co., 33 S.W.3d 443, 448 (Tex. App.—Fort Worth 2000, orig. proceeding); see also In re Bennett, 960 S.W.2d 35, 40 (Tex. 1997) (court of appeals abused discretion by issuing writ of mandamus directing trial court to vacate sanctions order where sanctioned counsel were afforded due process by being given notice of trial court’s intent to consider sanctions and opportunity to respond), cert. denied, In re Hilliard, 525 U.S. 823 (1998). Due process requires that full and unambiguous notice of an accusation of contempt be served on the alleged contemnor in a motion for contempt, show cause order, or equivalent legal process stating how, when, and by what means the party has been guilty of the alleged contempt. In re Acceptance, 33 S.W.3d at 448. Absent such notification, a contempt order is a nullity. Ex parte Blanchard, 736 S.W.2d 642, 643 (Tex. 1987). A court, however, has the inherent power to punish without prior notice and meaningful hearing with respect to “direct” contempt. A direct contempt is one that occurs within the court’s
presence, whereas a constructive contempt is one that occurs outside the court’s presence. The distinction between direct and constructive contempt is also significant because cases involving constructive contempt are afforded more procedural protections. *In re Acceptance*, 33 S.W.3d at 449. Notice of the charges and an opportunity to defend against them are an alleged contemnor’s most fundamental due-process right. *Ex parte Jackman*, 663 S.W.2d 520, 523 (Tex. App.—Dallas 1983, orig. proceeding). The notice must conform to any relevant procedural requirements and be actually delivered to the contemnor in a timely fashion. *Ex parte Gordon*, 584 S.W.2d 686, 689–90 (Tex. 1979). Notice must be personally served on the contemnor; notice that does not reach the contemnor is inadequate even if delivered to his attorney. *Ex parte Herring*, 438 S.W.2d 801, 803 (Tex. 1969). Notice must also be given a reasonable time before the hearing to comply with due process. *Hayes v. Hayes*, 920 S.W.2d 344, 346–47 (Tex. App.—Texarkana 1996, writ denied). At a minimum, an application for an order and notice of any hearing not presented to the court during a trial or other proceeding must be served on all parties not less than three days before the time set for the hearing, unless the time is shortened by the court. *TEX. R. CIV. P. P. 21*. Oral notice is insufficient as a matter of law. *In re Acceptance*, 33 S.W.3d at 451. The power to sanction, like contempt, exists to allow a court to enforce its orders by imposing a penalty for their violation. *Hayes*, 920 S.W.2d at 346.

c. Due-Process Right to Trial:
A trial court has no authority to refuse to set a trial and stay proceedings until interim attorney’s fees are paid. Although an appellate court does not have mandamus power to compel the trial judge to reach a result that necessarily involves his discretion, it may mandamus him to hold a trial or hearing and to exercise his discretion. *In re Flores*, 135 S.W.3d 863 (Tex. App.—Houston [1st Dist.] 2004, orig. proceeding).

d. Prior Restraints on Speech:
Mandamus may be used to challenge a gag order prohibiting discussion of a civil case outside of the courtroom. Without findings supported by evidence that imminent or irreparable harm to the judicial process will deprive the parties of a just resolution of their dispute and that the gag order is the least restrictive means to prevent the harm, a trial court’s issuance of a gag order instructing parties’ counsel not to interview discharged jurors is an unconstitutional prior restraint on speech. *In re State Farm Lloyds*, 254 S.W.3d 632, 634 (Tex. App.—Dallas 2008, orig. proceeding).

14. Protective Orders:
With two exceptions, protective orders issued under subtitle B of title 4 of the Family Code may be appealed. A protective order rendered against a party in a suit for dissolution of marriage may not be appealed until the final decree of dissolution becomes a final, appealable order. A protective order rendered against a party in a suit affecting the parent-child relationship may not be appealed until an order providing for support of the child or possession of or access to the child becomes a final, appealable order. *TEX. FAM. CODE § 81.009.*

15. Temporary Orders:
Since temporary orders are not subject to an interlocutory appeal, except appointment of receiver and injunctive relief, mandamus is an appropriate remedy to attack the issuance of temporary orders in a suit affecting the parent-child relationship. See *Dancy v. Daggett*, 815 S.W.2d 548, 549 (Tex. 1991); *In re Lemons*, 47 S.W.3d 202, 203–04 (Tex. App.—Beaumont 2001, orig. proceeding). A relator may challenge temporary orders pending appeal obtained pursuant to Family Code section 6.709 by mandamus only if the trial court’s order constitutes an abuse of discretion and the pending appeal provides an inadequate remedy. *In re Merriam*, 228 S.W.3d 413 (Tex. App.—Beaumont 2007, orig. proceeding). A trial court abused its discretion when it entered temporary orders changing the designation of the person with the right to designate the primary residence of the child, because there was no evidence that the child’s present living environment endangered her physical health or significantly impaired her emotional development. *In re Levay*, 179 S.W.3d 93 (Tex. App.—San Antonio 2005, orig. proceeding). A trial court abused its discretion when it entered temporary orders confirming the father as the joint managing conservator with the right to determine domicile and enjoining the mother from visiting with the child outside the county instead of enforcing a Canadian order, obtained pursuant to the Hague Convention, that the father return the child to the mother in Canada. *In re Lewin*, 149 S.W.3d 727 (Tex. App.—Austin 2004, orig. proceeding). A trial court abused its discretion when it refused to dismiss the husband’s posttrial motion for contempt pending appeal, because the trial court’s power to issue such an order (to assist in enforcing the terms of the property division in the decree) is abated pursuant to section 9.007(c) of the Texas Family Code. *In re Fischer-Stoker*, 174 S.W.3d 268 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding). A trial court abused its discretion by issuing a temporary order granting custody to the mother without setting a date for the end of mother’s custody or for another hearing. *In re Bradshaw*, 273 S.W.3d 851, 859-860 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding).
16. Third-Party Actions for Fraud on Community:
Mandamus was found to be proper in a situation where the trial court had severed out a third-party action involving fraud on the community. Third-party actions involving fraud on the community should not be severed and should be tried with, or before, the divorce action. See In re Burgett, 23 S.W.3d 124, 127–28 (Tex. App.—Texarkana 2000, orig. proceeding).

17. Turnover Order during Pendency of Divorce:
Mandamus was found to be proper when the husband was ordered to turn over funds in the trial court’s registry to pay the wife’s attorney’s fees in an ongoing divorce action. Without a final judgment, a turnover order is void. Further, a trial court may not include in a turnover order a nonjudgment third party, such as the wife’s attorney. In re Alsenz, 152 S.W.3d 617 (Tex. App.—Houston [1st Dist.] 2004, orig. proceeding).

18. Venue:
Venue determinations generally are incidental trial rulings that are correctable on appeal and are not appropriate for mandamus relief. Bridgestone/Firestone, Inc. v. Thirteenth Court of Appeals, 929 S.W.2d 440, 441 (Tex. 1996). Exceptions to the general rule include the following.

a. Supplementation of Record:
The trial court abuses its discretion when it fails to afford a party seeking a transfer under rule 257 of the Texas Rules of Civil Procedure a reasonable opportunity to supplement the venue record before the venue hearing with affidavits and discovery products. See Union Carbide Corp. v. Moye, 798 S.W.2d 792, 793 (Tex. 1990).

b. Suit Affecting the Parent-Child Relationship:
The Family Code provides for mandatory transfer of a suit affecting the parent-child relationship in certain circumstances. See TEX. FAM. CODE §§ 103.002, 155.201, 155.301. If the trial court refuses to transfer a case, in violation of the mandatory provisions, the proper remedy is mandamus. See Leonard v. Paxson, 654 S.W.2d 440, 441 (Tex. 1983). Mandamus is available to compel mandatory transfer in suits affecting the parent-child relationship. Proffer v. Yates, 734 S.W.2d 671, 673 (Tex. 1987) (orig. proceeding); Arias v. Spector, 623 S.W.2d 312, 313 (Tex. 1981) (orig. proceeding). Transfer of a case to a county in which the child has resided for more than six months is a mandatory ministerial duty under section 155.201 of the Texas Family Code. “Parents and children who have a right under the mandatory venue provisions to venue in a particular county should not be forced to go through a trial that is for naught. Justice demands a speedy resolution of child custody and child support issues.” Proffer, 734 S.W.2d at 673. If parties are sharing custody of a child on an every-other-week or similar basis and live in two different counties, suit must be brought in the county in which the parent in actual possession of the child on the date of the filing of the cause of action resides. See In re Narvaez, 193 S.W.3d 695, 700 (Tex. App.—Beaumont 2006, orig. proceeding). If children are placed in foster care for six months or longer before a suit affecting the parent-child relationship is filed, the trial court has a mandatory duty to transfer the suit to the county in which the children reside with the foster parents. In re Kerst, 237 S.W.3d 441, 444–45 (Tex. App.—Texarkana 2007, orig. proceeding).

c. Failure to Give Notice of Hearing:
It is an abuse of discretion, correctable by mandamus, for a trial court to rule on a motion to transfer venue without giving the parties the notice required by rule 87(1) of the Texas Rules of Civil Procedure. Henderson v. O’Neill, 797 S.W.2d 905, 905 (Tex. 1990) (per curiam).

19. Void Orders:
Mandamus is proper to correct a void order, one which a trial court has no power to render. Geary v. Peavy, 878 S.W.2d 602, 603 (Tex. 1994); Urbish v. 127th Jud. Dist. ct, 708 S.W.2d 429, 431 (Tex. 1986); Erbs v. Bedard, 760 S.W.2d 750, 753–54 (Tex. App.—Dallas 1988, orig. proceeding). Mandamus will lie to nullify an order entered without legal authority. See Eckels v. Gist, 743 S.W.2d 330, 330 (Tex. App.—Houston [1st Dist.] 1987, orig. proceeding); State ex rel. Wade v. Stephens, 724 S.W.2d 141, 143 (Tex. App.—Dallas 1987, orig. proceeding). If a trial court enters an order that it does not have the constitutional, statutory, or inherent authority to enter, mandamus will lie. See Shelvin v. Lykos, 741 S.W.2d 178, 185 (Tex. App.—Houston [1st Dist.] 1987, orig. proceeding). Mandamus will lie when a trial court acts after its plenary power is expired. In re Lovito-Nelson, 278 S.W.3d 773, 776 (Tex. 2009). Mandamus is also appropriate when a trial court grants relief against an entity not before the court. In re Ashton, 266 S.W.3d 602, 604 (Tex. App.—Dallas 2008, orig. proceeding).

When an assigned judge overrules a timely objection to his assignment, all of the judge’s subsequent orders are void and the objecting party is entitled to mandamus relief. In re Canales, 52 S.W.3d 698, 701 (Tex. 2001) (orig. proceeding). Similarly, if a foreign judgment creditor seeks to enforce its judgment in Texas, it must comply with the statutory requirements for enforcing a foreign judgment. The trial court has jurisdiction to enforce the judgment only when the creditor complies with the statutory requirements. Allen v. Tennant, 734 S.W.2d 743, 744 (Tex. App.—Houston [14th Dist.] 1984, orig. proceeding).
the creditor fails to do so, all orders pertaining to the foreign judgment should be set aside as void. *Allen*, 678 S.W.2d at 744. Mandamus is proper in the absence of an adequate remedy when a district court fails to observe a mandatory statutory provision, and its failure to comply with the mandatory provision renders its order or judgment void. *Allen*, 678 S.W.2d at 745. Contempt orders violating the automatic bankruptcy stay are void. *In re Small*, 2009 WL 1312076 (Tex. App.—Houston[14th Dist.] 2009, no pet.). Mandamus is also proper when a court fails to grant a statutorily required motion to dismiss. *In re DPFS*, 273 S.W.3d 637, 645 (Tex. 2009).

Voidable orders are readily appealable and must be attacked directly, but void orders may be circumvented by collateral attack or remedied by mandamus. *Sanchez v. Hester*, 911 S.W.2d 173, 176 (Tex. App.—Corpus Christi 1995, orig. proceeding). Appeal is therefore wholly unnecessary to establish the invalidity of a void order. *See Sanchez*, 911 S.W.2d at 177. An attack may be made in any proceeding having as its general objective a finding that such judgment was void when entered; mandamus is a proper mode of attack on a void judgment. *Thomas v. Miller*, 906 S.W.2d 260, 262–63 (Tex. App.—Texarkana 1995, orig. proceeding).

20. Withdrawal of Counsel;

Withdrawal of counsel is an appropriate subject of a mandamus proceeding. *In re Posadas USA, Inc.*, 100 S.W.3d 254, 256 (Tex. App.—San Antonio 2001, orig. proceeding).

D. Pleadings.

In an action for mandamus, the pleadings require greater certainty than in ordinary civil cases, and necessary facts must be stated clearly, fully, and unreservedly by direct and positive allegation. *Alice Nat'l Bank v. Edwards*, 383 S.W.2d 482, 484 (Tex. Civ. App.—Corpus Christi 1964, writ ref'd n.r.e.). The petition for mandamus must be verified by affidavit, and a verification merely reciting that the facts contained in the petition are true to the best of the affiant’s knowledge and belief is insufficient. Further, if the sworn allegations in a respondent’s answer to a petition for mandamus are not denied, the allegations in the respondent’s answer must be accepted as true. *Cantrell v. Carlson*, 313 S.W.2d 624, 626 (Tex. Civ. App.—Dallas 1958, no writ). On the motion of any party or on its own initiative, an appellate court may impose sanctions on a party or attorney who is not acting in good faith. TEX. R. APP. P. 52.11.

E. Procedure.

Mandamus is an original proceeding in the appellate court. The petition is captioned “*In re* [name of party seeking relief], Relator.” TEX. R. APP. P. 52.1. Rule 52.3 sets out in detail the contents of the petition. *See* TEX. R. APP. P. 52.3. If the petition is filed in the supreme court after the same relief was requested in the court of appeals, the petition must give details of the action in the lower court. TEX. R. APP. P. 52.3(d)(5). If the petition is filed first in the supreme court, the petition must state the compelling reason that the petition was not first presented to the court of appeals. TEX. R. APP. P. 52.3(e). The person filing the petition must certify that he or she has reviewed it and concluded that every factual statement in it is supported by competent evidence included in the appendix or record. TEX. R. APP. P. 52.3(j).

Any party may file a response, but it is not mandatory. TEX. R. APP. P. 52.4. The court may deny relief without requesting or receiving a response. *See* TEX. R. APP. P. 52.8(a). However, the court must request a response before granting relief. TEX. R. APP. P. 52.8(b).

If temporary relief is requested (such as a motion for emergency stay), the relator must notify or show a diligent effort to notify all parties by expedited means of the motion for the emergency temporary relief; further, the relator must so certify to the court. TEX. R. APP. P. 52.10.

When it grants relief, the court must write an opinion. TEX. R. APP. P. 52.8(d).

Any party may file a motion for rehearing within fifteen days after the final order is rendered. TEX. R. APP. P. 52.9.

F. Contents of Mandamus Petitions & Responses.

Petitions for writ of mandamus and responses generally follow the requirements for briefs from traditional appeals, with some exceptions.

1. Filing of Briefs, Petitions, and Other Documents.

Just like with all papers filed in an appellate court, mandamus briefs may be filed with the clerk, or by delivering to a justice of the appellate court, if the justice is willing to accept delivery. TEX. R. APP. P. 9.2(a). The document may also be filed by placing the document in the United States Mail, as long as (1) the package was sent first class, express, registered, or certified mail, (2) the envelope was properly addressed to the court, and (3) it was placed in the mail on or before the deadline for filing. TEX. R. APP. P. 9.2(b). The Rules of Appellate Procedure permit courts of appeals to make their own local rules to permit electronic filing. Check with the local rules of court before electronically filing a mandamus petition or response.

2. Number of Copies.

In original proceedings in the Supreme Court of Texas, parties must file 12 total briefs: an original, and eleven copies. TEX. R. APP. P. 9.3(b). In the courts of
appeals, parties must file four briefs: an original, and three copies. TEX. R. APP. P. 9.3(a).

3. Contents of Briefs In Original Proceedings.
In addition to complying with the “Document Basics” that are required for briefs in traditional appeals (see above), documents filed in original proceedings must contain a number of sections to comply with the Rules of Appellate Procedure.

a. The Petition for Mandamus.
The party seeking relief in a mandamus proceedings is called the “relator.” If a party affected by a mandamus responds to the relator’s petition, it is typically called the “real party in interest.” The court or agency who made the decision from whom relief is sought is called the “respondent.” TEX. R. APP. P. 52.2. When a petition for writ of mandamus is filed, it must be brought under the caption, "In re [name of relator]." TEX. R. APP. P. 52.1. The Petition for Mandamus must contain the following contents:

1. A list of all parties, and the names, and addresses of all counsel. TEX. R. APP. P. 52.3(a);
2. A table of contents that includes the subject matter of each issue brought, and the page numbers where the issues may be found. TEX. R. APP. P. 52.3(b);
3. An index of authorities that alphabetically lists each case, statute, or other authority cited in the brief, along with the page numbers of where such may be found. TEX. R. APP. P. 52.3(c);
4. A “statement of the case” which briefly describes the nature of the underlying suit and its procedural posture. If the petition is being filed in the Supreme Court, the relator must also describe the outcome of the matter in the court of appeals and name justices who participated. This section of your petition “should seldom exceed one page and should not discuss the facts.” TEX. R. APP. P. 52.3(d);
5. A statement of how the relator believes the appellate court possesses jurisdiction over the proceeding. If the mandamus petition is being filed in the Supreme Court without being first filed in the court of appeals, you must also include a “compelling reason” why the lower appellate court was bypassed. TEX. R. APP. P. 52.3(e).
6. A brief summary of all issues for which the relator seeks relief. Unlike the old point of error practice, it is unnecessary to list every sub-point before the court as long as a fair reading of your issues would cover the subsidiary matters. TEX. R. APP. P. 52.3(f);
7. A concise description of the facts that are relevant to the proceeding. Every fact cited must be accompanied by a reference to the appendix or record. TEX. R. APP. P. 52.3(g);
8. A clear argument, accompanied by references to the appendix/record, and citations of law. TEX. R. APP. P. 52.3(h);
9. A prayer or conclusion that states the relief sought by the relator. TEX. R. APP. P. 52.3(i);
10. A certification that every factual statement in the petition is supported by competent evidence included in the appendix or record. TEX. R. APP. P. 52.3(j).

The petition for writ of mandamus may not exceed 50 pages, if filed in the court of appeals, or 15 pages, if filed in the Supreme Court. TEX. R. APP. P. 52.6. However, the identity of parties and counsel, table of contents, index of authorities, statement of the case, statement of jurisdiction, issues presented, signature, proof of service, certification, and appendix are not included when calculating the length of the petition. Id.

b. Response to the Petition for Mandamus.
A real party in interest is not required to file a response to the petition for mandamus. Before the appellate court can grant the relief sought in the petition, it must first request a response if one has not already been filed. TEX. R. APP. P. 52.4. Whether a responding party decides to initially file a response to a petition for mandamus, or wait for a request for a response, is therefore largely a matter of strategy to be determined by the attorney and her client. If a response is filed, the document must include many of the same contents as the Petition for Mandamus:

1. A table of contents;
2. An index of authorities;
3. Argument for why the petition should be denied;
4. A prayer/conclusion
5. A certification that every factual statement in the petition is supported by competent evidence included in the appendix or record.

TEX. R. APP. P. 52.4. The response may include the other sections included in the Petition for Mandamus if the responding party is dissatisfied with the relator’s statements, or as desired to advance the position of the responding party. TEX. R. APP. P. 52.4. However, response may not exceed 50 pages in the court of appeals, or 25 pages in the Supreme Court. Just as for mandamus petitions, some sections are omitted from the page count limit. TEX. R. APP. P. 52.6.
c. Reply by Relator.

If a response is filed, the Relator may file a reply that addresses any matter in the response. TEX. R. APP. P. 52.5. Counsel should understand, however, that the court may act on the petition before the reply is filed. Replies in the court of appeals may not exceed 15 pages in length. Replies in the Supreme Court are limited to eight pages.

4. The Appendix in Original Proceedings.

Because petitions for writ of mandamus and other proceedings typically occur in the middle of a pending case, there is no “Reporters Record” or “Clerk’s Record” to be forwarded by the court’s staff. As a result, the court of appeals looks to the parties to provide correct copies of the documents that are relevant to the proceeding and necessary for the court’s decision. As a result, every petition for mandamus must include an appendix. The authenticity of every document in the appendix must be certified or sworn to. TEX. R. APP. P. 52.3(k). The appendix must contain:

1. A copy of every order complained of;
2. A copy of every document relevant to showing what is being complained of;
3. Any order and opinion of the court of appeals (if the petition is being filed in the Supreme Court);
4. Unless the document would be impracticable or too voluminous, the text of every rule, regulation, ordinance, statute, constitutional provision, or other law (excluding case law) on which the argument is based; and
5. The appendix may also contain any other document relevant to the proceeding that is necessary for the court’s decision.

A party responding to a petition for mandamus is not required to submit an appendix, unless a document relevant to the proceeding is omitted by the relator. It is not necessary to duplicate an item already contained in another party’s appendix TEX. R. APP. P. 52.4.

5. Other Documents in the Record.

If not already included in the appendix, the relator is required to separately file a certified/sworn copy of every document that is material to the relator's claim for relief and that was filed in any underlying proceeding. TEX. R. APP. P. 52.7. If there was any testimony in the underlying suit, an authenticated record of the transcript and all exhibits should be submitted; otherwise, there should be a statement that no testimony was obtained.

VIII. WRIT OF HABEAS CORPUS

A. Nature of the remedy.

The primary use of the writ of habeas corpus is to compel the release of a person whose liberty is unlawfully restrained by an order of contempt issued because of a violation of an order, previously made, rendered, or entered by the court or judge in a civil case. TEX. GOV’T. CODE ANN. § 22.221(d). The remedy of habeas corpus is in the nature of a collateral attack and its purpose is not to determine the ultimate guilt or innocence of the relator, but only to ascertain whether the relator has been unlawfully imprisoned. See Ex Parte Gordon, 584 S.W.2d 686, 687-88 (Tex. 1979). Where the judgment ordering confinement is “void,” the confinement is illegal and the relator is entitled to discharge. Ex Parte Rhodes, 163 Tex. 31, 34, 352 S.W.2d 249, 250 (Tex. 1961). Because habeas corpus is a collateral attack, the reviewing court has no authority to reform the order being attacked. Ex Parte Morris, 171 Tex. Crim. 499, 352 S.W.2d 125, 129 (1961) (the reviewing court can only order the relator discharged from custody). Thus, the central question in a habeas corpus proceeding is whether the confinement is illegal.

B. Types of Contempt.

1. Direct versus constructive:

Broadly defined, contempt of court is disobedience of a court by an action in opposition to its authority. In re, Johnson, 996 S.W.2d 430, 433 (Tex. App.-Beaumont 1999)(orig. proceeding, citing, Ex Parte Chambers, 898 S.W.2d 257, 259 (Tex. 1995. There are two basic types of contempt: direct contempt and constructive contempt. Direct contempt involves disobedience or disrespect which occurs within the presence of the court, while constructive contempt occurs outside the court’s presence. Johnson, 996 S.W.2d at 433. This distinction has more significance than merely identifying the physical location of a contemptuous act, since more procedural safeguards are afforded to constructive contemnors than to direct contemnors. Ex Parte Werblud, 536 S.W.2d 542, 546 (Tex. 1976. In direct contempt cases, the court is not required to give the contemnor notice and a hearing before holding the contemnor in contempt. Ex Parte Chambers, 898 S.W.2d at 259. However, in constructive contempt cases, the trial court must give the contemnor notice and a hearing before holding the contemnor in contempt. Ex Parte Gordon, 584 S.W.2d at 688. Thus, a judge may hold a person in contempt without notice and a hearing, for violating a court order when the violation occurred outside of court.
2. Civil versus Criminal:

When a person is guilty of contempt, the court may resort to civil contempt, criminal contempt, or both. *In re, Weise*, 1 S.W.3d 246, 247 (Tex. App.—Corpus Christi 1999, orig. proceeding, (citing, *Ex Parte Sanchez*, 703 S.W.2d 955, 957 (Tex. 1986)) The distinction between civil and criminal contempt lies in the nature and purpose of the penalty imposed. *Ex Parte Bushy*, 921 S.W.2d 389 (Tex. App.—Austin 1996, pet. ref’d). A judgment that provides that a contemnor is to be committed unless and until he or she performs the affirmative act required by the court’s order is a civil contempt order. This type of conditional penalty is civil because it is designed to compel the doing of some act. *Ex Parte Johns*, 807 S.W.2d 768, 770 (Tex. App.—Dallas 1991) (orig. proceeding). Conversely, a criminal contempt order is punitive in nature and is an exertion of the court’s inherent power to punish a contemnor for some completed act which affronted the dignity and authority of the court. In criminal contempt proceedings, the court punishes the contemnor for improper actions and no subsequent voluntary compliance can enable the contemnor to avoid punishment for past acts. *Ex Parte Bushy*, 921 S.W.2d at 391.

C. Grounds for Relief.

1. *Relator must be restrained:*

A writ of habeas corpus can issue only when the relator is actually restrained in his or her liberty in some way. *Ex Parte Williams*, 690 S.W.2d 243, 244 (Tex. 1985). It is not required that the relator actually be confined in a jail. *Ex Parte Calhoun*, 127 Tex. 54, 91 S.W.2d 1047, 1048 (1936). Any character of restraint which precludes absolute and perfect freedom of action will justify the issuance of the writ. *Id.; Gibson v. State*, 921 S.W.2d 747, 754 (Tex. App.—El Paso 1996, writ denied). Thus, a contempt order that places the relator on probation constitutes a sufficient restraint on the relator’s liberty where the terms of the order required the relator to report to a probation officer once a month. *Ex Parte Duncan*, 796 S.W.2d 562, 564 (Tex. App.—Houston [1st Dist.] 1990, orig. proceeding). Further, habeas corpus is also available when the appellate court allows the relator to be released on bond while it considers the habeas corpus petition, because the petition may be denied and the relator remanded back into custody. *Ex Parte Williams*, 690 S.W.2d 243, 244 (Tex. 1985).

If the relator has not been incarcerated or restrained, then habeas corpus relief is inappropriate. Mandamus is available to remedy a contempt order that does not assess confinement. *See Deramus v. Thornton*, 160 Tex. 494, 333 S.W.2d 824, 827 (Tex. 1960) (orig. proceeding); *In re Long*, 984 S.W.2d 623, 625 (Tex. 1999) (orig. proceeding). Thus, mandamus is the proper vehicle for challenging a contempt order which assesses only a monetary fine. *See Rosser v. Squire*, 902 S.W.2d 962 (Tex. 1995) (orig. proceeding) (mandamus available to review contempt order imposing excessive fine against former husband). Further, mandamus is available when the trial court denies a motion for contempt or refuses to hold a hearing on the motion. *See Blair v. Blair*, 408 S.W.2d 257, 258 (Tex. Civ. App.—Dallas 1966) (mandamus was proper remedy of former wife upon denial of her motion to have former husband held in contempt for failure to pay child support); *Chiles v. Schuble*, 788 S.W.2d 205, 207 (Tex. App.—Houston [14th Dist.] 1990) (mandamus is appropriate to compel trial court to hold hearing on former wife’s motion for contempt).

2. *Order must be void:*

An appellate court will only issue a writ of habeas corpus when the contempt order or the underlying order is void. *Ex Parte Rhode*, 163 Tex. 31, 34, 352 S.W.2d 249, 250 (Tex. 1961); *Ex Parte Shaffer*, 649 S.W.2d 300, 302 (1983). An order is void if: (1) the order was beyond the power of the court to make the order, (2) the order is not supported by any evidence, (3) the person conclusively established an inability to comply with the underlying order, or (4) the person was deprived of due process of law in relation to the issuance of the order. *Ex Parte Barnett*, 600 S.W.2d 252, 254 (Tex. 1980) (holding that contempt order is void when the order is beyond the trial court's power or when it is entered in violation of due process); *Rosser v. Squire*, 902 S.W.2d 962; *Ex Parte William*, 690 S.W.2d 243, 244 (Tex. 1985) (holding that contempt order was void for lack of evidence); *Ex Parte Chambers*, 989 S.W.2d 257, 261-62 (Tex. 1995) (holding that contempt order was void because relator conclusively proved inability to comply with order).

a. No power to make the order.

There are three prerequisites that must be established before a court can hold a person in contempt: (1) jurisdiction over the subject matter; (2), jurisdiction over the person; and (3) authority of the court to enter the particular order. *Ex Parte Saffen*, 618 S.W.2d 766, 769 (Tex. Crim. App. 1981). If the trial court lacks any of these three things, then the order of contempt is void. *In re, Dickinson*, 829 S.W.2d 919, 921 (Tex. App.—Amarillo 1992) (contempt order was void because trial court lacked subject matter jurisdiction to enforce child support order six months after the child became an adult); *Rosser v. Squire*, 902 S.W.2d 962 (Tex. 1995) (contempt order was void because trial court lacked authority to enter fine which exceeding statutory maximum).
b. The order is not supported by any evidence.
   This ground is self-explanatory. If there is no evidence to support the contempt order, then it is void and must be set aside. *Ex Parte Williams*, 690 S.W.2d at 244 (contempt order was void for lack of evidence contemnor violated temporary injunction).

c. Inability to perform.
   An order of contempt which imposes a coercive restraint is void if the condition for purging the contempt is impossible for the relator to perform. See *Ex Parte Dustman*, 538 S.W.2d 409, 410 (Tex. 1976); see also *Ex Parte Chambers*, 989 S.W.2d 257, 261-62 (Tex. 1995) (contempt order was void because relator conclusively proved inability to comply with order). For example, a contempt order based on the relator's failure to pay child support is void if the relator proves by a preponderance of the evidence that he is unable to pay. *In re, J.M.M.*, 80 S.W.3d 232, 251 (Tex. App.—Fort Worth 2002, orig. proceeding); *Ex Parte Bregenzer*, 802 S.W.2d 884, 887 (Tex. App.—Houston [1st Dist.] 1991, orig. proceeding).

d. Due process.
   A contempt order is void if entered without due process of law. *Ex Parte Barnett*, 600 S.W.2d 252, 254 (Tex. 1980) (contempt order was void because order was never reduced to writing). Due process requires a court, before imprisoning a person for violating a prior order, to sign a written judgment or order of contempt and a written commitment order. *Ex Parte Proctor*, 398 S.W.2d 917, 918 (Tex. 1966). Further, the order must set out the terms for compliance in clear and unambiguous terms. *Ex Parte Brister*, 801 S.W.2d 833, 834 (Tex. 1990). If the order or judgment does not meet these requirements, the person cannot be held in contempt for violating the order or judgment and habeas corpus is available if the relator’s liberty is restrained as a result. *Ex Parte Hodges*, 625 S.W.2d 304, 306 (Tex. 1981).

As discussed in section B above, the amount of process afforded the contemnor will vary depending on the classification of the contempt (i.e., direct or constructive, civil or criminal). *Ex Parte Werblud*, 536 S.W.2d 542, 545-46 (Tex. 1976) (orig. proceeding) (explaining classifications of contempt). In a case involving conduct outside the presence of the court (i.e., constructive contempt cases), due process requires that the alleged contemnor receive full and unambiguous notice of the accusation of contempt and be given an opportunity to be heard. *Ex Parte Adell*, 767 S.W.2d 521, 522 (Tex. 1989); *Ex Parte Vetterick*, 744 S.W.2d 598, 599 (Tex. 1988). This notice should be by show cause order or equivalent legal process personally served on the alleged contemnor, and it should state when, how and by what means the defendant has been guilty of contempt. *Ex Parte Vetterick*, 744 S.W.2d at 599. Failure to give the alleged contemnor notice and a hearing will result in a void order that may be attacked by writ of habeas corpus if the contemnor’s liberty has been restrained. *Ex Parte Swate*, 922 S.W.2d 122, 124 (Tex. 1996) (commitment order that enhanced punishment without giving relator notice or opportunity to be heard deprived relator of due process and was void).

3. Severability of the Order:
   If a contempt order contains both valid and void provisions, most reviewing courts sever the void provision when it is possible to do so. See, e.g., *Rosse*, 902 S.W.2d at 962 (writ granted to reduce amount of excessive fine); *Ex Parte Ramzy*, 424 S.W.2d 220, 226 (Tex. 1968) (reforming contempt order to delete portions which relator could not perform); *Ex Parte Ramon*, 821 S.W.2d 711, 715 (Tex. App.—San Antonio 1991, orig. proceeding) (coercive portion of contempt order vacated, but punitive portion left intact). However, if an order assesses one punishment for multiple acts of contempt and one act of contempt is not punishable by contempt, the entire order is void. *Ex Parte Davila*, 718 S.W.2d 281, 282 (Tex. 1986). Similarly, a contempt order is void if it divides one contemptuous act into several acts and assesses punishment for each allegedly separate act. *In re Long*, 984 S.W.2d 623, 625 (Tex. 1999).

4. Burden of proof:
   In a habeas corpus proceeding, relator has the burden of proving that the contempt order is void and not merely voidable. *Ex Parte Lowery*, 518 S.W.2d 897, 899 (Tex. Civ. App.—Beaumont 1975, orig. proceeding). The relator must conclusively show his or her entitlement to the writ. *In re, Pruitt*, 6 S.W.3d at 364. Similarly, if a contempt order contains both valid and void provisions, the relator has the burden of proving that the contempt order is void and not merely voidable. *Ex Parte Lowery*, 518 S.W.2d 897, 899 (Tex. Civ. App.—Beaumont 1975, orig. proceeding). The relator must conclusively show his or her entitlement to the writ. *In re, Pruitt*, 6 S.W.3d at 364.

5. Standard of review:
   The order or judgment challenged on habeas corpus is presumed to be valid and the appellate court will not weigh the evidence offered at the contempt hearing to determine whether it preponderates against the judgment. *Ex Parte Helms*, 152 Tex. 480, 259 S.W.2d 184, 186 (Tex. 1953) (orig. proceeding); *In re, Pruitt*, 6 S.W.3d at 364. Instead, the reviewing court will determine whether the trial court’s contempt
findings are so completely without evidentiary support that the trial court’s judgment is void because it deprives a relator of liberty without due process of law. Id. at 364 (explaining that the reviewing court will not review the trial court’s exercise of its discretion nor the sufficiency of the evidence to support the trial court’s action).

IX. WRIT OF PROHIBITION
A. Standard for Issuance.

The purpose of the writ of prohibition is to stop an inferior court from exercising jurisdiction it has no lawful right to exercise. Tilton v. Marshall, 925 S.W.2d 672, 676 (Tex. 1996) (orig. proceeding) (writ of prohibition is invoked to correct the unlawful assumption of jurisdiction by an inferior court); Canadian Helicopters, Ltd. v. Wittig, 876 S.W.2d 304, 309 (Tex. 1994) (orig. proceeding) (same). The writ of prohibition has two functions: (1) preventing interference with a higher court in deciding a pending appeal, and (2) preventing an inferior court from interfering with the superior court’s orders and judgments. See McDonald & Carlson, Texas Civil Practice, Ch. 37, § 4, pp. 1011-1012, (1998 2nd Edition).

Accordingly, to obtain a writ of prohibition, the relator must first demonstrate that the lower courts’ actions interfere with the higher courts’ actual jurisdiction (i.e., a pending appeal or an order or judgment issued by the higher court). See Jones v. McDonald, 880 S.W.2d 260, 263 (Tex. App.—Waco 1994, orig. proceeding) (a writ of prohibition can only be used to prevent litigation of an issue barred by res judicata when the issue’s litigation will disturb or interfere with the higher courts’ judgment or its execution) (citing, Holloway v. Fifth Court of Appeals, 767 S.W.2d 680, 684 (Tex. 1989) (orig. proceeding)). Once this is shown, relator must also show that he or she has no adequate remedy by appeal. See Prince v. Miller, 123 Tex. 118, 69 S.W.2d 52 (Tex. 1934); Pannill v. Mulanax, 573 S.W.2d 563, 565 (Tex. Civ. App.—Texarkana 1978, orig. proceeding).

B. Specific Instances Where Prohibition is Appropriate.

1. Remand: Prohibition is appropriate where the trial court exceeds the scope of remand on retrial of a case. See Jones v. Strauss, 800 S.W.2d 842, 844 (Tex. 1990); Cherokee Water Co. v. Ross, 698 S.W.2d 363, 365 (Tex. 1985).

2. Contempt: Prohibition is available where the trial court seeks to enforce by contempt an order or judgment that is on appeal to a higher court. Ex Parte Boniface, 650 S.W.2d 776 (Tex. 1983) (trial court does not retain jurisdiction to enforce by contempt an order that is on appeal); Gano v. Villareal, 745 S.W.2d 586, 587 (Tex. App.—Corpus Christi 1988, orig. proceeding) (prohibition is the proper remedy where a trial court attempts to enforce by contempt an order that is on appeal); Atkins v. Snyder, 597 S.W.2d 779, 782 (Tex. Civ. App.—Fort Worth 1980, orig. proceeding) (prohibition issued to stop wife from seeking contempt enforcement of an award of attorney’s fees while that award was on appeal).

3. Lack of Jurisdiction: Prohibition is also available to prevent a court from exercising jurisdiction it does not have. See Tilton, 925 S.W.2d at 676. Counsel should be aware that the Supreme Court and courts of appeals have granted the writ to prevent a lower court from exercising jurisdiction it did not have even when the lower court’s action did not threaten the higher court’s jurisdiction or interfere with the execution of its orders and judgments. See State Bar of Texas v. Jefferson, 942 S.W.2d 575, 576 (Tex. 1997) (granting writ of prohibition to prevent a trial court from improperly exercising jurisdiction even though an appeal was not pending and the trial court was not attempting to decide an issue previously decided by the supreme court); Soto-Ruphuy v. Yates, 687 S.W.2d 19, 22 (Tex. App.—San Antonio 1984, orig. proceeding) (issuing mandamus and prohibition to prohibit trial court from exercising jurisdiction in custody modification suit after child had acquired a new “home state”). This use of the writ is clearly not authorized by the Texas Constitution or Government Code §§ 22.002 and 22.221. See TEX. CONST. ART. V, §§ 3, 6; TEX. GOV’T. CODE ANN. §§ 22.002, 22.221; see also, Holloway v. Fifth Court of Appeals, 767 S.W.2d 680, 683 (Tex. 1989) (appellate courts have no authority to issue writs of prohibition to protect unappealed district court judgment); Jones v. McDonald, 880 S.W.2d 260, 263 (Tex. App.—Waco 1994, orig. proceeding) (writ of prohibition can only be used to prevent litigation that interferes with a higher court’s judgment or its execution). Any complaint about this erroneous use of the writ may be academic because the Supreme Court and courts of appeals have the authority to accomplish the same result by issuing a writ of mandamus. See TEX. CONST. ART. V, §§ 3 and 6; TEX. GOV’T. CODE ANN. §§ 22.002, 22.221. Nonetheless, the practical effect of the foregoing is that counsel should seek a writ of mandamus or alternatively a writ of prohibition when seeking to prohibit a lower court from exercising jurisdiction it does not have.