Section Chair's Message
by Hon. Xavier Rodriguez

I would bet that many of you are experiencing Zoom fatigue and anxiously awaiting whatever the new normal will look like. I have followed with interest the various articles and webcasts that have discussed what the practice of law will look like post-pandemic. I tend to agree with some of the predictions that virtual hearings and virtual depositions will continue in many cases because of the time and cost savings that have been realized. But as big of a technology enthusiast that I am, I remain in the skeptic camp about going all in for remote proceedings.

Virtual hearings for initial status conferences and motion hearings have been met with praise by most judges and practitioners. Absent any technical or bandwidth issues, lawyers can be just as effective arguing a point in a virtual space as they can be in a courtroom and the virtual practice advances the goal of making civil proceedings less costly, as litigants no longer have to bear the expense associated with time and travel to the courthouse. But even here there are limitations. Privacy or confidentiality concerns in certain cases can't be fully addressed

in the remote context where the public may have access to the proceedings.

Some mediators are reporting good outcomes in the virtual setting. That's surprising to me since in many cases a litigant needs to be heard and offered an opportunity to vent before serious movement is made towards settlement. How to achieve these cathartic opportunities in a virtual format will no doubt be the subject of psychological studies.

In an effort to resume trials some courts are exploring virtual jury trials. For now, a host of issues make this practice unwise to me. First, in many parts of the population there exists a digital divide, with individuals not having access to high speed internet access. Jurors facing this problem will likely not be able to hear or see all the evidence in a case adequately. Excusing jurors who do not have high speed internet access may result in challenges that the composition of the jury violates due process. Secondly, once a jury is selected how a court will monitor the attentiveness of a juror remains to be seen. Further, although courts have always had to rely upon jurors to adhere to admonishments not to do independent research or investigation in a case, at least in the open courtroom setting courts could watch for inappropriate activity. There will be no such check in the virtual setting. Lastly, juries engage in a collective bonding process while at the courthouse. How they replicate this interaction and deliberation process in the virtual setting requires yet additional study.

No doubt with time we shall see technology improvements and studies that will advance our understanding of human behavior in a remote setting. In the interim, count me in the camp of hoping for a safe and effective vaccine that becomes widely available soon.

Stay safe,

Xavier Rodriguez

Three Simple Rules for Removing Diversity Cases with Partnerships and LLCs

by Lauren Laux

The Supreme Court made clear in *Carden v. Arkoma Associates*, 494 U.S. 185, 195 (1990), that while corporations are treated as citizens of their state of incorporation, the citizenship of artificial entities such as partnerships instead must be determined by consulting the citizenship of "all of the entity's members." In 2008, the Fifth Circuit joined other circuits to hold that the citizenship of an LLC is determined by the citizenship of all of its members. *Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077 (5th Cir. 2008).

Despite this precedent, defendants often struggle with removals when LLCs and partnerships are parties. They either treat LLCs and partnerships like corporations or fail to properly plead their citizenship. But you can master such removals by remembering these three simple rules.

Rule 1 – Partnerships and LLCs are not like corporations; instead, they assume the citizenship of all their partners or members.

Partnerships and LLCs are *not* like corporations for purposes of diversity citizenship. Rather than looking to their state of formation or their principal place of business, their citizenship is determined by the citizenship of all their partners or members. Put simply, they will assume the citizenship of each of their partners or members, and not their state of formation or location. *Harvey*, 542 F.3d at 1080 ("Supreme Court precedent, case law from other circuits, and the statutory language of . . . Section 1332 . . . overwhelmingly support the position that a LLC should not be treated as a corporation for purposes of diversity jurisdiction. Rather, the citizenship of a LLC is determined by the citizenship of all of its members."); *Guaranty Nat'l Title Co. Inc. v. J.E.G. Assocs.*, 101 F.3d 57, 59 (7th Cir. 1996) ("There is no such thing as 'a [state name] limited partnership' for purposes of the diversity jurisdiction. There are only partners, each of which has one or more citizenships.").

Rule 2 – Distinctly and affirmatively identify each partner or member and plead their citizenship according to their form in the Notice of Removal.

The Fifth Circuit's requirement that the party asserting federal jurisdiction must *distinctly and affirmatively* allege parties' citizenship means that you must identify each member or partner

and plead their citizenship according to their form in the Notice of Removal.[1] *Settlement Funding, L.L.C. v. Rapid Settlements, Ltd.*, 851 F.3d 530, 536 (5th Cir. 2017); *Mullins v. TestAmerica, Inc.*, 300 F. App'x 259 (5th Cir. 2008). It is typically insufficient to say that members and partners are not citizens of the same state as the parties on the other side, as this is not a distinct and affirmative allegation. *Mullins*, 300 F. App'x at 259-60; *Getty Oil Corp., Div. of Texaco, Inc. v. Ins. Co. of N. Am.*, 841 F.2d 1254, 1259 (5th Cir. 1988).

Identify and properly plead the citizenship of every partner or member at the time the state-court petition was filed and at the time of removal,[2] even if there are numerous partners or members and identifying them is difficult or burdensome. If the partners or members are themselves partnerships, LLCs, corporations, or other entities (such as trusts), their citizenship must be alleged in accordance with the rules applicable to that entity, and citizenship must be traced through however many layers of members or partners there may be. *See Mullins v. TestAmerica Inc.*, 564 F.3d 386, 397-98 (5th Cir. 2009); *see also Lincoln Benefit Life Co. v. AEI Life, LLC*, 800 F.3d 99, 105 n.16 (3d Cir. 2015) ("Depending on the membership structure of the LLC, this inquiry can become quite complicated."); *Hart v. Terminex Int'l*, 336 F.3d 541, 543 (7th Cir. 2003) ("[W]e have explained that

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[1] Not all circuits require such affirmative allegations, but if you make them, you should satisfy the standards for any jurisdiction.

[2] *See Ashford v. Aeroframe Servs., LLC*, 907 F.3d 385, 386-87 (5th Cir. 2018). There are exceptions to the general rule that diversity must exist both at the time of filing the petition and at removal, but this article assumes they don't apply.

'the citizenship of unincorporated associations must be traced through however many layers of partners or members there may be.' This may create some extra work for the diligent litigant, and for those with less diligence the limited partnership has become 'a notorious source of jurisdictional complications,' in which "mistakes concerning the existence of diversity jurisdiction are most common.").

When you are done, the citizenship of the LLC or partnership will generally boil down to the citizenships of individuals or corporations. Remember that for individuals, you must plead their citizenship, not their residence. *MidCap Media Fin., L.L.C. v. Pathway Data, Inc.*, 929 F.3d 310, 313 (5th Cir. 2019) (an allegation of residency alone does not satisfy the requirement of an allegation of citizenship). For corporations, plead *both* their state(s) of incorporation and their principal place of business. *Id.*; 28 U.S.C. § 1332(c)(1); *Hertz Corp. v. Friend*, 559 U.S. 77, 80-81 (2010) (the "nerve center" test is used to determine a corporation's principal place of business).

You may not know the members or partners of some parties. LLC members in particular may be hard to discern from public records. Although the Fifth Circuit has not addressed this issue, some courts have recognized this problem and permit parties to allege citizenship facts upon information and belief after a diligent inquiry. To satisfy Rule 11, you must conduct a reasonable inquiry; "consult the sources at [your] disposal, including court filings and other public records." *Lincoln Benefit*,

800 F.3d at 108.[3] If, after this inquiry, you have no reason to believe that any of the defendants share the plaintiff's citizenship, you may allege complete diversity in good faith. A plaintiff may then mount a factual challenge, and parties would be entitled to jurisdictional discovery.

Rule 3 – Plead and prove citizenship according to the stage of litigation.

As the party invoking diversity jurisdiction, the removing party bears the burden of proof on jurisdictional facts, including the citizenship of the parties and amount in controversy. *Getty Oil*, 841 F.3d at 1259. The Fifth Circuit will remand cases when diversity is not established. *Id.* at 1260. "[L]itigants . . . should strive to establish relevant and accurate jurisdictional facts at the outset 'before unpleasant discoveries about jurisdictional facts require the parties and the judge to bemoan the waste of time and money invested in the litigation.'" *Hart*, 336 F.3d at 543

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[3] LLC members are the owners of the LLC. Consult the certificate of formation or articles of organization on file with the secretary of state or equivalent official or check the public records database on Westlaw or Lexis. The certificate of formation often does not include detailed information, and you may need to obtain a (non-public) operating agreement or company agreement for more detail.

The Texas Secretary of State website charges for access through a pre-paid account or a temporary login with a credit card (https://direct.sos.state.tx.us/acct/acct-templogin.asp). To locate other Secretary of State websites, use https://www.statelocalgov.net/50states-secretary-state.cfm. Once you have identified a member, you can run a "Comprehensive Person Search" in Lexis Advance Public Records to find business associates of that member.

You may also want to try a free "Taxable Entity Search" on the Texas Comptroller of Public Accounts website to get owner information: https://mycpa.cpa.state.tx.us/coa/search.do. Don't forget to check the business's website for information about principals, and do an internet search for news articles and social media on the LLC and its associates. Search court dockets for other litigation involving the LLC in which they may have identified their members. Apply these same strategies to find the partners of a partnership. You can also search a partnership's SEC filings through EDGAR.

How much evidence is required depends on the stage of litigation. *MidCap Media Fin.*, 929 F.3d at 315 n.1. Citizenship issues, like every factual issue necessary to support subject matter jurisdiction, "must be supported in the same way as any other matter on which the [party] bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.*

The Notice of Removal need only contain distinct and affirmative citizenship allegations and a plausible allegation that the amount in controversy exceeds the minimum; the removing party need not submit supporting evidence. *See Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 87 (2014).

But if jurisdiction is challenged by the plaintiff or the court, jurisdictional facts must be proved by a preponderance of the evidence. *See id.* at 89; *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936); *Guerrero v. State Farm Mut. Auto. Ins. Co.*, 181 F.3d 97, *2 (5th Cir. 1999) (per curiam); *Dupuis v. Lisco*, No. 6:15-CV-02137, 2015 WL 6511898, at *2 (W.D. La. Oct. 27, 2015).

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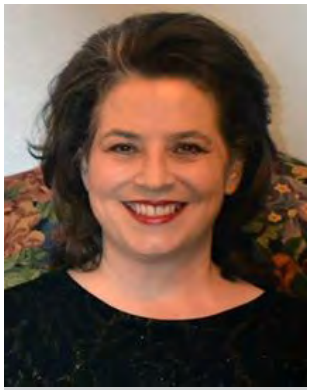
Remembering these three rules should ensure that you properly allege the existence of diversity jurisdiction when you remove a case with an LLC or partnership.



Application of the Alter-Ego Doctrine to Limited Partnerships Should Be Reconsidered

by Dawn R. Meade

Appeals Courts in Texas began refusing to apply the equitable doctrines of alter-ego/veil piercing to limited partnerships in 2002, finding that "there is no veil to pierce."[1] This model should be reconsidered, as its analysis focuses on the structure of limited partnerships, rather than the equitable purpose of "veil piercing" and in doing so ignores justice and the purpose of veil piercing itself.

I. Legal Fictions

The law is teeming with legal fictions:

> The assumption that a certain thing is true, and which gives to a person or thing, a quality which is not natural to it, and establishes, consequently, a certain disposition, which, without the fiction, would be repugnant to

[1] *Pinebrook Props., Ltd. v. Brookhaven Lake Prop. Owners Ass'n*, 77 S.W.3d 487 (Tex. App.—Texarkana 2002, pet. denied).

reason and to truth.[2]

Business entities, like a corporation, are legal fictions that "can act only through [their] agents."[3] The purpose of the legal fiction of the corporate form is to insulate shareholders, officers, and directors from liability for corporate obligations, while acknowledging that "when these individuals abuse the corporate privilege, courts will disregard the corporate fiction and hold them individually liable."[4]

II. Limited Partnerships

Texas Business Organizations Code Chapter 153 governs limited partnerships. Limited partnerships have two kinds of partners: general and limited. General partners (1) operate the entity, (2) are responsible for the entity's debts and obligations and (3) assume liability for the entity.[5] Limited partners (1) do not participate in the operation of the entity, (2) are not responsible for the entity's debts and obligations beyond their initial contributions and (3) are generally shielded from liability

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[2] Stephen M. Sheppard, *The Wolters Kluwer Bouvier Law Dictionary Desk Edition*, 2012 CCH Inc.

[3] *Underwriters Life Ins. Co. v. Cobb*, 746 S.W.2d 810, 821 (Tex. App.—Corpus Christi 1988, no writ.).

[4] *Castleberry v. Branscum*, 721 S.W.2d 270, 271 (Tex. 1986) citing *Gentry v. Credit Plan Corp. of Houston*, 528 S.W.2d 571, 573 (Tex. 1975); *Bell Oil & Gas Co. v. Allied Chemical Corp.*, 431 S.W.2d 336, 340 (Tex. 1968); *Pace Corp. v. Jackson*, 155 Tex. 179, 284 S.W.2d 340, 351 (Tex. 1955).

[5] Tex. Bus. Org. Code § 153.151-§ 153.153.

for the entity.[6]

> Essentially, limited partners are ... "silent investors." They ... invest in the limited partnership but do not ... have a say in how it is run. These arrangements are typically found where there is one person who has an idea for a business and that person is looking for investors to provide capital to get the business started.[7]

Unlike general partnerships, where all partners are responsible for the debts and obligations of the partnership, limited partnerships designate a "general partner" to fill that role, allowing those who don't participate to remain free of liability.

III. Veil Piercing

To "pierce the veil" means:

> [W]e disregard the corporate fiction (1) when the fiction is used as a means of perpetrating fraud; (2) where a corporation is organized and operated as a mere tool or business conduit of another corporation; (3) where the corporate fiction is resorted to as a means of evading an existing legal obligation; (4) where the corporate

[6] Tex. Bus. Org. Code § 153.101-§ 153.103.

[7] Brian Walters, *The Bare Bones Basics of Texas Business Entities*; Small Biz Austin, May 19, 2013, https://www.austintexas.gov/blog/bare-bones-basics-texas-business-entities.

> fiction is employed to achieve or perpetrate monopoly; (5) where the corporate fiction is used to circumvent a statute; and (6) where the corporate fiction is relied upon as a protection of crime or to justify wrong.[8]

The most common species of veil piercing is "sham to perpetrate a fraud," born of a 1955 Texas Supreme Court case:

> Courts will not disregard the corporation fiction and hold individual officers, directors or stockholders liable on the obligations of a corporation except where it appears that the individuals are using the corporate entity as a sham to perpetrate a fraud, to avoid personal liability, avoid the effect of a statute, or in a few other exceptional situations.[9]

"Because disregarding the corporate fiction is an equitable doctrine, Texas takes a flexible fact-specific approach focusing on equity."[10] The Court recognized the equitable nature of the doctrine, annunciated nearly 80 years ago:

> Dean Hildebrand, a leading authority on Texas corporation law, stated well the equitable approach: 'When this [disregarding the corporate fiction] should be done is a question of fact and common sense. The

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[8] *Castleberry,* 721 S.W.2d at 272.

[9] *Pace Corp. v. Jackson*, 284 S.W.2d 340, 351 (Tex. 1955).

[10] *Castleberry,* 721 S.W.2d at 273.

court must weigh the facts and consequences in each case carefully, and common sense and justice must determine [its] decision.'[11]

IV. *PineBrook* And Its Progeny

The Court in *Pinebrook Props., Ltd. v. Brookhaven Lake Prop. Owners Ass'n*, 77 S.W.3d 487 (Tex. App.—Texarkana 2002, pet. denied), citing the partnership statutes as authority, developed the doctrine that "alter ego" theories do not apply to limited partnerships.[12]

> Because officers and shareholders may not be held liable for the actions of the corporation, the theory of alter ego is used to pierce the corporate veil so the injured party might recover from an officer or shareholder who is otherwise protected by the corporate structure. Alter ego is inapplicable with regard to a partnership because there is no veil that needs piercing, even when dealing with a limited partnership, because the general partner is always liable for the debts and obligations of the partnership to third parties.[13]

The doctrine is perfectly acceptable if the veil piercing action is filed in an attempt to hold the partnership responsible

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[11] *Id.* citing Hildebrand, *Texas Corporations* § 5 at 42 (1942).

[12] *Id.* at 499.

[13] *Id.* at 499-500.

for injury. However, the wholesale, blind application of the *Pinebrook* precedent is inappropriate when veil piercing doctrines are applied to pierce through the partnership itself, to a non-partner, if the partnership was formed to perpetrate a fraud.

The best example of such a case is *Peterson Group, Inc. v. PLTQ Lotus Group, L.P.*, 417 S.W.2d 46 (Tex. App—Houston [1st Dist.] 2013, pet. denied). In *Peterson*, the President and 100% owner of Peterson Group formed a limited liability partnership through which Peterson Group executed a construction contract. Litigation ensued regarding the contract. The trial court directed a verdict on the issue of alter-ego holding Peterson Group responsible for the contractual damages. The Peterson Group appealed. The Majority of the Court relayed the facts and, in considering the alter-ego finding, the majority determined that:

> The need for any veil-piercing doctrine is fundamentally dubious as applied to the liabilities of a limited partnership. Unlike a person doing business with a corporation, a person doing business with a limited partnership always has recourse against any general partner in the same manner as partners are liable for the liabilities of a partnership without limited partners.[14]

The Majority went on to opine that:

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[14] *Peterson Group, Inc. v. PLTQ Lotus Group, L.P.*, 417 S.W.3d 46, 56 (Tex. App—Houston [1st Dist.] 2013, pet. denied).

> The veil-piercing doctrine as applied to corporate alter egos has never been indiscriminately applied to impute liability to arguably responsible bystanders—it is applied to the owners and operators of the firm, including "shareholders, officers, and directors" who otherwise would ordinarily be insulated from liability for corporate obligations.[15]

> The Dissent took a different view entirely, stating that: The purpose and spirit of the alter ego statute cannot be evaded merely by forming an illusory, special purpose phantom entity in the form of a limited partnership, with an equally illusory corporation as its general partner, to shield another corporate entity and an individual from liability for their actions under a contract they procured and would be obligated to perform in their own name had not illusory corporate and limited partnership entities been formed.[16]

The Dissent analyzed Texas Business Organization Code § 21.223 governing alter-ego theory and the proper construction thereof, as well as Supreme Court precedent[17] and First Court of Appeals precedent,[18] to articulate a two-part test that applies to

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[15] *Id.* at 59.

[16] *Id.* at 81.

[17] *SSP Partners v. Gladstrong Investments (USA) Corp.*, 275 S.W.3d 444, 451 n.29 (Tex. 2008).

[18] *Tryco Enters., Inc. v. Robinson*, 390 S.W.3d 497, 508 (Tex. App.—Houston [1st Dist.] 2012, pet. dism'd).

corporations and should also apply to limited partnerships:

> There is, therefore, a two-pronged test that must be satisfied before a creditor may pierce the corporate veil and hold a attach liability to person or entity as the alter ego of another: (1) that the persons or entities on whom he seeks to impose liability are alter egos of the debtor, and (2) that the corporate fiction was used for an illegitimate purpose.[19]

The Dissent concluded that limited partnerships, like corporations, are subject to application of the alter-ego doctrine when the limited partnership is formed for an illegitimate purpose.[20]

For any litigators facing alter-ego/veil piercing dilemmas, the arguments in favor of reversing and/or limiting *Pinebrook* and *Peterson's* wholesale application to limited partnerships are fair and equitable. Challenging precedent that artificially protects fraudsters is never frivolous. Further, today's appellate climate may be more open to such considerations.

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[19] *Peterson Group, Inc.*, 417 S.W.3d at 84.

[20] *Id.* at 87.

"Justice Delayed is Justice Denied"[1] - COVID Delayed Justice - Get It Back on Track with ADR/Private Judging![2]

by Justice (Fmr.) Douglas S. Lang
Of Counsel, Dorsey & Whitney LLP, Dallas

I. Covid Confusion.

Who knows when the pandemic, this utter confusion, will abate? The answer is simple. No one knows. That also goes for the trial of lawsuits. We just do not know when or even if our trial dockets will return to the "old normal." Are clients anxious about when their cases can be tried or even fully prepared for trial? You bet.

In the meantime, new lawsuits are being filed, courts are able to hold "virtual" hearings, and lawyers are experimenting with virtual depositions and mediations. When it comes to actual trials, the practice of actually conducting them varies

[1] Statement attributed to William E. Gladstone, former Prime Minister of England, 1868-1894.

[2] *Cf.* Douglas S. Lang, "Did COVID-19 Put a Hold on Your Lawsuit? Finish It With ADR-Private Judging," *Texas Lawyer*, August 2, 2020, Available at https://www.law.com/texaslawyer/2020/08/02/did-covid-19-put-a-hold-on-your-lawsuit-finish-it-with-adr-private-judging/ (Last accessed August 19, 2020).

from county to county and even court to court within a county. The progress is tenuous at best.

Compared to "pre-Covid" times, only a few "virtual" or even live, "socially distanced" and "masked" non-jury and jury trials have been conducted. There have been mixed reviews of those. Some federal courts have conducted "live, in person" jury and non-jury trials,[3] but orders suspending jury trials have been issued by many federal courts.[4] In addition, the Texas Supreme Court suspended jury trials for several months, but has approved resumption of jury trials subject to supervision and guidance by the Office of Court Administration.[5]

Regardless of the court, the logistics of holding virtual or live trials is complicated. In fact, one federal judge has described conducting business in a court during these times is a lot like "building an airplane while you are flying it."[6]

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[3] "Federal Judges Reinventing the Jury Trial During Pandemic," August 27, 2020. Available at https://www.uscourts.gov/news/2020/08/27/federal-judges-reinventing-jury-trial-during-pandemic.

[4] *E.g.,* United States District Court for the Eastern District of Texas, Order of August 31, 2020, Available at http://www.txed.uscourts.gov/sites/default/files/judgeFiles/Divisional%20Standing%20Order%20Covid%20SEPTEMBER%202020_0.pdf.

[5] *See* Misc. Docket No. 20-9112, TWENTY-SIXTH EMERGENCY ORDER REGARDING THE COVID-19 STATE OF DISASTER (Order of the Texas Supreme Court, September 18, 2020), Available at https://www.txcourts.gov/media/1449738/209112.pdf; *see also* "Guidance for All Court Proceedings During COVID-19 Pandemic" (Effective October 1, 2020), https://www.txcourts.gov/media/1449740/guidance-for-all-court-proceedings-during-covid-19-pandemic-10-1-2020.pdf.

[6] "Federal Judges Reinventing the Jury Trial During Pandemic," August 27, 2020. Available at https://www.uscourts.gov/news/2020/08/27/federal-judges-reinventing-jury-trial-during-pandemic.

As courts start to schedule "live" jury trials, questions like these crop up: 1. Who will show up for jury service and will those who appear meet the Constitutional test of a jury of one's peers?[7] 2. Will the process be disruptive to an acceptable flow of a case and create error? and 3. Will there be a logjam so that cases cannot be expected to be tried even when scheduled?

There are some solutions to the many legal and practical issues—and of course, the logjam. One approach is the parties can always agree to mediate. However, if no settlement can be reached, one answer is: the parties could request the court to order ADR/Private judging.

II. Move the Case—Private Judging.

There are many statutorily authorized ways to move a case even in this chaos. The Tex. Civ. Prac. & Rem. Code provides for ADR through the use of a neutral, an *impartial third party*, or a *special judge*. Importantly, any of the methods discussed below can be conducted by video or, if the parties consent, in person.[8] The process can be scheduled when the parties want and need the procedure to take place. Importantly, the process can begin "now."

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[7] *See* "So today the Sixth Amendment's promise of a jury of one's peers means a jury selected from a representative crosssection of the entire community. *See* ***Strauder***, 100 U. S., at 307-308; ***Smith v. Texas***, 311 U. S. 128, 130, 61 S. Ct. 164, 85 L. Ed. 84 (1940); ***Taylor***, 419 U. S., at 527."

[8] To name a few, Zoom, Google Meet, UberConference, TrueConf Online, Skype, FreeConference, Lifesize Go, Slack Video Calls, Facebook Live, and YouTube Live.

Choose one of these:

1. ***Trial By Special Judge***.

    a. ***The Motion.*** On motion by all parties, the trial court may order trial by a special judge. In the motion, the party must expressly waive a jury trial, state the issues referred, state the time and place agreed upon for trial, and state the name of the special judge that has agreed to hear the case, and the fee agreed to by the judge and the parties. Tex. Civ. Prac. & Rem. Code § 151.001-.013.

    b. ***The Judge.*** The special judge must be a retired or former judge of a district, statutory county court, statutory probate court, or appellate court. Further, that special judge must have developed "substantial experience" in the judge's area of specialty, was not removed from office or resigned under investigation for discipline or removal, and have completed at least at least five days of state bar or supreme court approved continuing legal education. Tex. Civ. Prac. & Rem. Code § 151.003. Generally, the special judge has the powers of the referring judge. Tex. Civ. Prac. & Rem. Code § 151.006. A record shall be prepared by a certified court reporter. Tex. Civ. Prac. & Rem. Code § 151.008.

c. ***Right to Appeal.*** This is critical. The "verdict" of the special judge must be rendered "not later than 60 days after the day the trial adjourns" and it "stands as a verdict of the referring court." Tex. Civ. Prac. & Rem. Code § 151.011. The right of appeal is "preserved." That means an appeal may be taken from the special judge's verdict pursuant to the Texas Rules of Civil Procedure and Texas Rules of Appellate Procedure as if the appeal were taken from the referring court. Tex. Civ. Prac. & Rem. Code § 151.013.

d. ***Advantage Over Arbitration.*** In the opinion of many, this right to appeal is a distinct advantage over other ADR adjudicatory methods. Classic arbitrations allow extremely limited grounds for review by the trial court and appellate court. *See* Tex. Civ. Prac. & Rem. Code § 171.088 (grounds include, among others: award procured by fraud, corruption, or other undue means; evident partiality, corruption, or misconduct of arbitrator; arbitrators exceeded their powers); *Hoskins v. Hoskins*, 497 S.W.3d 490, 494 (Tex. 2016) (The trial court shall confirm the award unless vacatur is required under an enumerated ground in § 171.088).

e. ***Arbitration.*** There are at least three ways to pursue arbitration.

a. ***New Agreement.*** Even where the parties do not have an arbitration agreement before the suit is filed, they can agree to binding arbitration and take the case out of the line-up for trial in the district or county court. *Aguilar v. Abraham*, 588 S.W.2d 599, 600–601 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.).

b. ***Joint Motion for Arbitration.*** Upon agreement of the parties, non-binding arbitration before an *impartial third party* may be ordered by trial court. That *impartial third party*[9] will render a specific award. Tex. Civ. Prac. & Rem. Code § 154.027.

c. ***Move to Compel.*** A trial court can compel arbitration even over the objection of a party, where the parties entered into a valid agreement to arbitrate and the claims at issue fall within the scope of that agreement. *G.T. Leach Builders,*

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[9] *See* Tex. Civ. Prac. & Rem. Code § 154.051-.055. An *impartial third party* must be a person: 1. who has "completed a minimum of 40 classroom hours of training in dispute resolution techniques in a course conducted by an alternative dispute resolution system or other dispute resolution organization approved by the court making the appointment." 2. In matters involving the parent-child relationship special training as provided by for by § 154.052 (B), or 3. "In appropriate circumstances, a court may in its discretion appoint a person as an impartial third party . . . if the court bases its appointment on legal or other professional training or experience in particular dispute resolution processes." (*See* § 154.052 (c)).

LLC v. Sapphire V.P., LP, 458 S.W.3d 502, 525 (Tex. 2015). *See* Tex. Civ. Prac. & Rem. Code § 171.088 (Limited grounds for vacatur and appeal of award).

d. ***Mediation.*** Pursuant to Tex. Civ. Prac. & Rem. Code § 154.021, a court may, on its own motion or on the motion of a party, refer a case to mediation before *an impartial person*. *See also* Tex. Civ. Prac. & Rem. Code § 154.023.

e. ***Mini-Trial.*** Upon agreement of the parties, the court may direct the parties to present their case either to "selected representatives of the parties," or an *impartial third party*. In this process, the issues can be defined and a basis can be crafted for "realistic settlement negotiations." Tex. Civ. Prac. & Rem. Code § 154.024.

f. ***Moderated Settlement Conference.*** Each party and counsel will present its position before a panel of *impartial third parties.* The panel may issue an advisory, non-binding opinion as to liability or damages or both. Tex. Civ. Prac. & Rem. Code § 154.025.

g. ***Summary Jury Trial.*** Upon agreement of the

parties, in order to facilitate settlement, each party may present its case to a panel of six (unless otherwise agreed) jurors to issue an advisory, non-binding opinion on liability, damages, or both. Typically, a retired or former judge will preside. The jurors need not be told that the process is not binding on the parties. Tex. Civ. Prac. & Rem. Code § 154.026.

III. Conclusion: Get Out of the Log Jam with ADR!

In many cases, moving a case out of the doldrums is imperative. To effect any of the above expediting methods, the parties must agree upon a neutral, presiding third party. Trust in the fairness of the process is critical. That can only be achieved if the "neutral" is experienced, knowledgeable, and recognized by the parties as being unquestionably fair and impartial.

Error Preservation: Making a Record Without an Express Written Ruling

by Karen S. Precella
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The Texas Supreme Court is reluctant to turn away claims based on waiver.[1] As a result, Texas courts should not apply rules of error preservation "so strictly as to unduly restrain appellate courts from reaching the merits of a case"[2] and should construe the rules "liberally, so that decisions turn on substance rather than procedural technicality."[3] But, absent a rare fundamental error, arguments raised for the first time on appeal are not preserved and will not be considered.[4]

For preservation, the record must show that (1) a specific,

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1 *St. John Missionary Baptist Church v. Flakes*, 595 S.W.3d 211, 213 (Tex. 2020).

2 *Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 896 (Tex. 2018); *Greene v. Farmers Ins. Exchange*, 446 S.W.3d 761, 764 n.4 (Tex. 2014) ("We do not consider issues that were not raised in the courts below, but parties are free to construct new arguments in support of issues properly before the Court."); *Marino v. King*, 355 S.W.3d 629, 634 (Tex. 2011) ("Constitutional imperatives favor the determination of cases on their merits rather than on harmless procedural defaults.").

3 *St. John*, 595 S.W.3d at 213.

4 *Garza v. Harrison*, 574 S.W.3d 389, 405 (Tex. 2019).

timely request, objection, or motion was made to the trial court and (2) the court ruled, or refused to rule, on that request, objection, or motion. If the trial court refused to rule, the complaining party must object to that refusal.[5] An express written ruling obviously is the clearest, best path to preservation. But, in some circumstances, a lack of written order may not be fatal to preservation.

A. Substitutes for a written ruling.

1. Implicit or deemed ruling in an ordinary appeal.

Rule 33.1(a)(2) permits preservation by an implicit ruling. An implicit ruling is one that may be reasonably inferred from something else in the record.[6] But the implication must be clear.[7] "An express ruling on one motion may imply a contrary ruling on an opposing motion."[8] For example, granting one remedy rather than a competing or alternative remedy may impliedly deny that competing or alternative remedy.[9] But a ruling on

5 Tex. R. App. P. 33.1; *see, e.g.*, *Seim v. Allstate Tex. Lloyds*, 551 S.W.3d 161, 164 (Tex. 2018).

6 *Trevino v. City of Pearland*, 531 S.W.3d 290, 299 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (by awarding the attorney's fees trial court implicitly denied the motion and objections to fees' evidence).

7 *Seim*, 551 S.W.3d at 166.

8 *Triex Tex. Holdings, LLC v. Marcus & Millichap Real Estate Inv. Servs., Inc.*, No. 07-18-00077-CV, 2019 WL 1868793, at *2 (Tex. App.—Amarillo April 25, 2019, no pet.) (mem. op.) (leave to amend pleadings in response to the summary judgment motion impliedly denied when trial court granted summary judgment and dismissed claims (citing *Salinas v. Rafati*, 948 S.W.2d 286, 288 (Tex. 1997)).

9 *See, e.g., Lenz v. Lenz*, 79 S.W.3d 10, 13 (Tex. 2002) (by granting alternative remedy trial court "implicitly disposed of the motion for judgment notwithstanding the verdict"); *Jang Won Cho v. Kun Sik Kim*, 572 S.W.3d 783, 805 (Tex. App.—Houston [14th Dist.]

a motion alone does not necessarily imply a ruling on other requests. For example, "if sustaining the objections to [summary judgment evidence] was not necessary for the trial court to grant summary judgment, the summary-judgment ruling [cannot be] an implication that the objections were sustained."[10] If there is any doubt about whether one ruling implicitly rules upon a different request, consider asking for an express ruling.

Some rules provide mechanisms by which a motion is deemed overruled by operation of law after a specified time. The most commonly occurring deemed ruling is probably a motion for new trial overruled by operation of law seventy-five days after the judgment is signed. But other deemed rulings also exist by rule or statute.[11] Again, if there is any doubt about

2019, no pet.) (motion for judgment notwithstanding the verdict impliedly overruled by judgment against defendant); *Williams v. Bank One, Tex., N.A.*, 15 S.W.3d 110, 114-15 (Tex. App.—Waco 1999, no pet.) (motion for continuance filed two days before summary judgment hearing impliedly overruled by granting motion for summary judgment).

10 *Seim*, 551 S.W.3d at 166; *see also Bass v. Waller Cty. Sub-Reg'l Planning Comm'n*, 514 S.W.3d 908, 912-16 (Tex. App.—Austin 2017, no pet.) (neither summary-judgment ruling nor order on Rule 91a dismissal motion impliedly ruled on jurisdiction issue, when trial court expressly deferred the jurisdiction issue until trial); *Whisenhunt v. Lippincott*, 474 S.W.3d 30, 41 (Tex. App.–Texarkana 2015, no pet.) ("[T]he trial court's conclusion that [the plaintiff] failed to make a prima facie case on his dismissed claims did not necessarily dispose of his motion for limited discovery because the court could have granted limited discovery, but still dismissed the claims."); *Penrod v. Schecter*, 319 S.W.3d 737, 744 (Tex. App.—El Paso 2010, pet. denied) (recognizing implied ruling on objection to charge under Rule 33.1 and *Accord*).

11 Tex. R. Civ. P. 329b(c); *see also* Tex. Civ. Prac. & Rem. Code § 27.008(a) (motion to dismiss under TCPA); Tex. R. Civ. P. 165a(3) (motion to reinstate case after dismissal for want of prosecution); *Sandberg v. STMicroelectronics, Inc.*, 600 S.W.3d 511, 538 (Tex. App.—Dallas 2020, pet. filed) (noting that motion to re-tax costs not overruled by operation of law and Rule 33.1(a)(2) not met by verbal statement by trial that "I will sign" an order changing the costs).

whether the matter is deemed overruled or there is a reason to need an express ruling, consider whether there is any downside to asking the court for an express ruling.

2. Other documents in a mandamus proceeding.

Some courts will consider preservation for mandamus under the second half of Texas Rule of Appellate Procedure 52.3(k)(1)(A)—"or any other document showing the matter complained of"—in the absence of a written order if the record shows a "clear, specific, and enforceable" ruling. Under that provision, sometimes an oral ruling clearly recorded in a reporter's record may suffice.[12]

[12] *See, e.g., In re Cisneros*, No. 13-20-00094-CV, 2020 WL 1856471, at *4 (Tex. App.—Corpus Christi April 7, 2020, orig. proceeding) (mem. op.) (oral ruling reviewable if "clear, specific, enforceable, and adequately shown by the record"); *In re M.B.*, Nos. 05-19-00971-CV, 05-00973-CV, 2019 WL 4509224, at *2 (Tex. App.—Dallas Sept. 19, 2019, orig. proceeding) (mem. op.) (oral ruling on record at hearing clear, specific, and enforceable and thus reviewable); *In re Mares*, No. 13-15-00549-CV, 2016 WL 362783, at *2 n.5 (Tex. App.—Corpus Christi Jan. 28, 2016, orig. proceeding) (mem. op.) ("The divorce was orally rendered. An oral order may be the subject of mandamus relief if the court's ruling is a clear, specific, and enforceable order that is adequately shown by the record. The order at issue meets these requirements under the circumstances at issue in this case."); *In re State ex rel. Munk*, 448 S.W.3d 687, 690 (Tex. App.—Eastland 2014, orig. proceeding); *In re Bledsoe*, 41 S.W.3d 807, 811 (Tex. App.—Fort Worth 2001, orig. proceeding) ("While we do not encourage parties to file mandamus actions based upon a court's oral pronouncements, we conclude that rule 52.3(j)(1)(A) allows consideration of an oral order if the court's ruling is a clear, specific, and enforceable order that is adequately shown by the record."). *Cf. In re Cypress Tex. Lloyds*, Nos. 14-11-00579-CV, 14-11-00580, 2011 WL 3805911, at *1-2 (Tex. App.—Houston [14th Dist.] Aug. 25, 2011, orig. proceeding) (mem. op.) (without signed order, oral ruling must be clear, specific and enforceable on the record); *In re Colony Ins.*, 978 S.W.2d 746, 747 (Tex. App.–Dallas 1998, orig. proceeding) (oral statement of intent to change prior written ruling insufficient).

A futility exception also may sometimes apply.[13] But petitions for writ of mandamus are often denied when the relator fails to include in the appendix and mandamus record either the order or other document showing the ruling complained of.[14]

B. A refusal to rule.

A trial court occasionally fails or refuses to rule on a pending matter. To complain of that failure, a practitioner should make sure the record clearly preserves that complaint.

1. Demonstrate the refusal in an ordinary appeal.

Rule 33.1(a)(2) permits preservation if the record shows a refusal to rule over objection.[15] But a failure to object to the refusal does not preserve the alleged error and waives the complaint.[16]

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[13] *See, e.g.*, *In re Perritt*, 992 S.W.2d 444, 446 (Tex. 1999) (orig. proceeding) (presentation of objection and refusal of same not required if presentation would have been futile and no more than a formality).

[14] *See e.g.*, *In re RCH*, No. 12-17-00232-CV, 2017 WL 3769769, at *1 (Tex. App.—Tyler Feb. 14, 2018, orig. proceeding) (mem. op.) (failure to furnish reporter's record did not show oral ruling complained of); *In re Thomason*, No. 05-17-00373-CV, 2017 WL 1427697, at *1 (Tex. App.—Dallas April 18, 2017, orig. proceeding) (mem. op.) (same); *In re Cokinos, Boisien & Young*, 523 S.W.3d 901, 903-04 (Tex. App.—Dallas 2016, orig. proceeding) (same); *In re Kelton*, No. 12-11-00355-CR, 2011 WL 5595219, at *1 (Tex. App.—Tyler Nov. 17, 2011, orig. proceeding) (mem. op.) (same and stating that rule satisfied so long as the ruling is "clear, specific, enforceable, and adequately shown by the record");

[15] *See, e.g. Great W. Drilling, Ltd. v. Pathfinder Oil & Gas, Inc.*, No. 11-14-00206-CV, 2020 WL 373096, at *6 n.5 (Tex. App.—Jan. 23, 2020, pet. filed) (mem. op.) (record showed objection to refusal to rule on motion for judgment notwithstanding the verdict).

[16] *See, e.g., Optio Sols., LLC v. Ying Peng*, No. 05-19-00384, 2020 WL 831610, at *1-2

2. Consider mandamus relief for an interlocutory refusal to rule.

If the trial court refuses to rule, mandamus relief may be available in limited circumstances. Mandamus is not available to instruct the trial court what ruling to make on pending matters.[17] But it may be available to order the trial court to make a ruling if the court refuses to rule or a matter has pended for an unreasonable amount of time without a ruling.[18]

The record must show that the matter was brought to the

(Tex. App.—Dallas Feb. 20, 2020, no pet.) (mem. op.); *Bui v. Beck & Co. Real Estate Servs., Inc.*, No. 03-16-00810-CV, 2018 WL 454784, at *2 (Tex. App.—Austin Jan. 11, 2018, no pet.) (mem. op.); *Doan v. Transcanada Keystone Pipeline, LP*, 542 S.W.3d 794, 806-07 (Tex. App.—Houston [14th Dist.] 2018, no pet.); *Establissement v. Amegy Bank N.A.*, 525 S.W.3d 875, 884 (Tex. App.—Houston [14th Dist.] 2017, no pet.); *Jain v. PlainsCapital Bank*, No. 10-15-00396-CV, 2017 WL 1540715, at *2 (Tex. App.—Waco April 26, 2017, no pet.) (mem. op.).

[17] *See, e.g., In re Trevino*, No. 04-20-00283-CR, 2020 WL 5370593, at *1 (Tex. App.—San Antonio Sept. 9, 2020, orig. proceeding) (mem. op.); *In re Emerson*, No. 12-19-00049-CV, 2019 WL 1141767, at *2, 4 (Tex. App.—Tyler March 12, 2019, orig. proceeding) (mem. op.).

[18] *See, e.g., In re ABC Assembly, LLC*, No. 14-19-00419-CV, 2019 WL 2517865, at *1-3 (Tex. App.—Houston [14th Dist.] June 18, 2019, orig. proceeding) (mem. op.) (eight months unreasonable delay); *In re G.P.*, 495 S.W.3d 927, 929-32 (Tex. App.—Fort Worth 2016, orig. proceeding) (refusal to set hearing on motion to modify child's primary residence); *In re Reynolds*, No. 14-14-00329-CV, 2014 WL 3002429, at *6 (Tex. App.—Houston [14th Dist.] July 1, 2014, orig. proceeding) (mem. op.) (instructing court to enter an order rendering a final judgment or otherwise disposing of the pending request for sanctions); *In re Marez*, 345 S.W.3d 503, 504 (Tex. App.—San Antonio 2011, orig. proceeding) (three-year delay in ruling on motion for judgment nunc pro tunc unreasonable); *In re Bonds*, 57 S.W.3d 456, 457 (Tex. App.–San Antonio 2001, orig. proceeding) (six-month delay in ruling on request to preserve evidence from destruction unreasonable).

attention of the trial court who had actual knowledge of it but did not rule on it after a reasonable time.[19] The mere filing of a motion does not operate to bring the matter to the attention of the court.[20] And what constitutes a reasonable time is a fact-specific inquiry that looks to, among other things, the trial court's knowledge of the matter and the state of its docket, balanced against the court's inherent authority to control its own docket.[21] An insufficient record often results in denial of the petition for writ of mandamus.[22]

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19 *In re Allen*, No. 09-20-00203-CR, 2020 WL 5371796, at *1 (Tex. App.—Beaumont Sept. 9, 2020, orig. proceeding) (mem. op.); *In re Flanigan*, 578 S.W.3d 634, 635-36 (Tex. App.—Houston [14th Dist.] 2019, orig. proceeding); *In re Foster*, 503 S.W.3d 606, 607 (Tex. App.—Houston [14th Dist.] 2016, orig. proceeding).

20 *See, e.g.*, *In re Pete*, 589 S.W.3d 321, 322 (Tex. App.—Houston [14th Dist.] 2019, orig. proceeding); *In re Craig*, 426 S.W.3d 106, 107 (Tex. App.—Houston [14th Dist.] 2012, orig. proceeding).

21 *In re Coffey*, No. 14-18-00124-CV, 2018 WL 1627592, at *1-2 (Tex. App.—Houston [14th Dist.] Apr. 5, 2018, orig. proceeding) (mem. op.) (no reason for four-month delay); *In re Harris Cty. Appraisal Dist.*, No. 14-19-00078-CV, 2019 WL 1716274, at *3-4 (Tex. App.—Houston [14th Dist.] Apr. 18, 2019, orig. proceeding) (mem. op.) (six-month delay ruling on plea unreasonable); *In re Mesa Petroleum Partners, LP*, 538 S.W.3d 153, 158 (Tex. App.—El Paso 2017, orig. proceeding) (eight months sufficient time to rule); *In re Salazar*, 134 S.W.3d 357, 358 (Tex. App.—Waco 2003, orig. proceeding) (seven-month delay unreasonable). *Cf. In re Sanchez*, No. 08-20-00126-CR, 2020 WL 5015446, at *1 (Tex. App.—El Paso Aug. 25, 2020, orig. proceeding) (mem. op.) (reminder of pending motion at beginning of pandemic and time passage during court's limited operations did not show abuse of discretion).

22 *See In re Prado*, 522 S.W.3d 1, 2 (Tex. App.—Dallas 2017, orig. proceeding) ("Consideration of a motion that is properly filed and before the court is a ministerial act. A relator must establish the trial court (1) had a legal duty to rule on the motion; (2) was asked to rule on the motion; and (3) failed to do so. It is relator's burden to provide the court with a record sufficient to establish his right to relief.") (citations omitted); *see also In re Brager*, No. 05-20-00682-CV, 2020

C. Conclusion

Obviously, a written ruling makes the best record of preservation and the cleanest way to avoid a waiver ruling. But if no order was needed or made, consider whether other preservation avenues exist. Was there a deemed, implied, or oral ruling that suffices under the Rules? Does the record establish a refusal to rule over objection on a matter of which the trial court was aware? These alternate avenues may sometimes support appellate review of the underlying substantive issue.

WL 4746573, at *1 (Tex. App.—Dallas Aug. 17, 2020, orig. proceeding) (mem. op.); *In re Bealefield*, No. 14-19-000924-CR, 2019 WL 6765820, at *1 (Tex. App—Houston [14th Dist.] Dec. 12, 2019, orig. proceeding) (mem. op.); *In re Henry*, 525 S.W.3d 381 (Tex. App.—Houston [14th Dist.] 2017, orig. proceeding); *In re Chavez*, 62 S.W.3d 225, 228-29 (Tex. App.—Amarillo 2001, orig. proceeding).

The Rules They are A-Changin'

by Cade W. Browning

The Texas Supreme Court recently announced amendments to the Texas Rules of Civil Procedure, which will affect the practice of most litigants. Although still available for comment from December 1, 2020, the Court indicated it would be amending the Rules, drastically changing the requirements of Rule 194 Request for Disclosures, and expanding what constitutes an Expedited Action, effective January 1, 2021.

A. 194 Required Disclosures f/k/a ~~Requests for Disclosure~~

Effective January 1, 2021, Rule 194 will now more parallel Federal Rule 26(a). The disclosures outlined in the Rule will be mandatory and are not contingent upon a request. The comments to this proposed change indicate it is in response to the adoption of Texas Government Code Section 22.004(h-1) which calls for rules "to promote the prompt, efficient, and cost-effective resolution of civil actions filed in county courts at law in which the amount in controversy does not exceed $250,000" that

"balance the need for lowering discovery costs in these actions against the complexity of and discovery needs in these actions." However, the Rule 194 changes will apply to all cases, not just those pending in county court at laws or amounts in controversy under $250,000. Further, "[a] party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures."

Unless otherwise agreed to by the parties or ordered by the court, a party cannot serve discovery until after the initial disclosures are due. Tex. R. Civ. P. 192.2. Thus, serving interrogatories and request for production with the petition are no longer allowed.

So, what are the proposed changes?

1. 194.1 Duty to Disclose; Production f/k/a ~~Request~~

A party must make the initial disclosures at or within 30 days after the filing of the first answer unless a different time is set by the parties' agreement or court order. A party that is first served or otherwise joined after the filing of the first answer must make the initial disclosures within 30 days after being served or joined, unless a different time is set by the parties' agreement or court order. Tex. R. Civ. 194.2(a).

The content of the disclosure remains unchanged except for:

- **194.2(b)(4) f/k/a 194.2(d) ~~The Amount and any Method of Calculating Economic Damages~~**

194.2(d) is being stricken in its entirety and replaced with the following required disclosure:

> a computation of each category of damages claimed by the responding party—who must also make available for inspection and copying the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered;

Tracking the federal rule, the change is potentially significant in the striking of the term "economic damages." The proposed language could be interpreted to include both non-economic and economic damages. Further, replacing the "method of calculating" language with "a computation of each category of damages," is another issue the Courts will have to wrestle with. Finally, the party must also make "available for inspection and copying the documents or other evidentiary material on which each computation is based." This includes materials bearing on the nature and extent of injuries suffered. A party may still withhold such documents and materials under the attorney-client privilege but now the disclosure is required at the beginning of a case.

Disclosures under Rule 194.2(b)(3)(legal theories and factual bases of a responding party's claims or defenses) and

194.2(b)(4) (computation of damages), that are amended or supplemented, will not be admissible and may not be used for impeachment. Tex R. Civ. P. 194.6.

- **194.2(b)(6) Copies of Non-impeachment Documents**

Similar to requiring the production of documents used in computing damages and, again, tracking the federal rule, the proposed Required Disclosure Rule also adds a new subpart to Request for Disclosures, Subpart 6, which provides a litigant "must provide to the other parties: (6) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the responding party has in its possession, custody, or control, and may use to support its claims or defenses, unless the use would be solely for impeachment."

- **194.3 f/k/a 194.2(f) Testifying Expert Disclosures**

194.2(f) would be stricken and a new 194.3 added, which indicates

> In addition to the disclosures required by Rule 194.2, a party must disclose to the other parties testifying expert information as provided by Rule 195.

Rule 195 is to be amended to require disclosure of testifying expert information without awaiting a discovery request. Further, the disclosure is to be expanded to include the following three

new disclosures, based on FRCP 26(a)(2)(B):

> (C) the expert's qualifications, including a list of all publications authored in the previous 10 years;
>
> (D) a list of all other cases in which, during the previous four years, the expert testified as an expert at trial or by deposition; and
>
> (E) a statement of the compensation to be paid for the expert's study and testimony in the case.

The time requirement for testifying expert disclosures is unchanged.

- **194.4 Pretrial Disclosures**

The changes would also add Rule 194.4, wherein a party must provide ***and file*** its witness list (separating probable from potential witnesses) and exhibits list (including summaries and separating probable from potential exhibits) at least 30 days before trial, unless ordered otherwise by the Court. Tex. R. Civ. P. 194.4. The proposed Rule tracks the federal rule, but does not include a deposition excerpt requirement.

The proposed Rule 194.4 reads:

> **(a) In General.** In addition to the disclosures required by

Rule 194.2 and 194.3, a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(1) the name and, if not previously provided, the address, and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises;

(2) an identification of each document or other exhibits, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises.

B. Rule 169 - Expedited Actions

In the last Session, the Legislature passed Texas Government Code Section 22.004(h-1) which states "[i]n addition to the rules adopted under Subsection (h), the supreme court shall adopt rules to promote the prompt, efficient, and cost-effective resolution of civil actions filed in county courts at law in which the amount in controversy does not exceed $250,000." However, the Legislature left in place Section 22.004(h) which requires rules to expedite district court actions where the claim of relief is under $100,000.

In response, the Supreme Court is changing Rule 47 to mandate a statement in an original pleading if a party seeks

monetary relief above or below $250,000.00 or above $1,000,000.

If that party pleads for monetary relief below $250,000, the case will be governed by Rule 169 as an Expedited Action. Despite Section 22.004(h-1) reference to county courts at law, the Court's proposed Rule 169 would apply to all cases, whether in a district court or a county court at law.

Importantly, the $250,000 expedited trial threshold, though, no longer is inclusive of all damages, but specifically excludes "interest, statutory or punitive damages and penalties, and attorney's fees and costs." Tex. R. Civ. P. 47(c)(1); 169(a).

Rule 190 Level 1 Discovery Control Plans would also be expanded to apply to all cases involving $250,000 or less. Ostensibly, in response to the larger cases being handed by Level 1 Discovery Control Plans, the amount of time for oral deposition would increase to 20 hours from 6. Tex. R. Civ. P. 190.2(b)(1).

C. Speak now or Forever….

The Supreme Court has reserved the right to change these proposed rules before January 1, 2021, in response to public comments. Written comments should be sent to rulescomments@txcourts.gov. The Court has requested that comments be sent by **December 1, 2020**.

The Young Lawyers' Corner: Six Do's and Don'ts of a Zoom Trial

by Matt Meyer[1]

Do you practice with a lawyer who does not do "the emails?" If so, I wish them luck in 2021. Coronavirus has changed the way we practice law—perhaps permanently. One change that could be here to stay is Zoom. On August 5, 2020, my firm and I began a six-week bench trial entirely over the now-ubiquitous software. Here is a grab bag of six quick dos and don'ts from my hard-earned experience:

1 **DO: Bring Your Poker Face.** Sometimes your witness kills it, and sometimes your witness gets killed. It is hard enough to mask your reactions at a counsel table several feet from the Judge, the Jury, or opposing counsel. A Zoom trial brings all the drama of a regular trial, but there is a camera literally in your face the entire time. As soon as you

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move, groan in agony, or smile after a small victory, Zoom will blow your face up onto everybody's computer screen. Bring your poker face.

2 **DON'T: Assume Your Witnesses Know How to Zoom.** As clumsy as it is to communicate with that one colleague who is not quite as technologically gifted as you are, your witness may be even worse. Maybe your witness does not own a computer. Maybe your witness does not have a good internet connection. Maybe your witness plans to use their iPhone, and therefore, is unable to read critical documents on their tiny phone screen. All of these nightmares become your problem unless you have thought ahead to avoid them. Don't assume your witnesses are as capable as you are.

3 **DO: Consider Hiring a Videographer.** To be frank, a Zoom trial consists of all the work of a normal trial plus the additional burdens of using the share-screen function to read documents, relying on your (and everybody else's) internet connection being stable, worrying about any feedback if there are multiple computers logged into Zoom, and dealing with any number of other unforeseeable tech issues. If you can justify it fiscally, consider hiring a videographer to whom you can outsource all of these tech headaches. We used Austin Greenberg of DFW MultiMedia, and the man is a Zoom wizard. If you can do it, find yourself a good videographer.

4 **DON'T: Forget to Test Your Setup.** If you decide to be your own Zoom wizard, double and triple check your setup. One of the most difficult problems is feedback from multiple computers. One solution that I would *not* recommend: muting your computer microphone and calling into the Zoom by phone. While tempting, because your office has a great speaker phone and multiple lawyers plan to speak, it creates major problems. When you or the witness speaks, you want the audience to see your pretty face. But if you or the witness are calling by phone for your audio, Zoom chooses to focus its visuals on that clipart-style phone picture. Solving the feedback problem requires some forethought, and you will probably want to do that calculus beforehand.

5 **DO: Dress the Part.** Although Zoom calls typically take a more casual bent, remember that you are in Court, and the same courtroom rules of professionalism and decorum apply. As "pants optional" as your other Zoom calls may or may not be, you do not want to be caught underdressed. At some point, your colleague may hand you a document, or need some technical assistance, or start a fire in your office—any or all of which may require you to stand up on camera. Remember to dress the part.

6 **DON'T: Forget to Use the Mute Button.** We have discussed the camera that is in your face literally the whole time, but we have not mentioned that, in a Zoom trial, your office and your witnesses' office now contain potentially

hot microphones. Besides the worst-case scenario—where your woodshed-talk with your witness is broadcast to all parties and the Court—a hot microphone can lead to any number of frustrating interruptions: a dog barking, a child shouting, noisy construction outside your office window, or you receiving a call at your office desk on your office line. Remember to liberally use the mute button.

But perhaps the best advice is to be patient. Thanks to patient and cooperative opposing counsel, and an even more patient Court, my experience in a Zoom trial went smoothly. If you have not yet had such an experience, I suspect it is likely a matter of "when" not "if" you find yourself in a similar position.

Service of Process Via Social Media Comes to Texas

A look at rules, concerns, and what it means going forward

by John G. Browning

Originally published in the September 2019 issue of *Circuits*, and reprinted courtesy of the Computer & Technology Section of the State Bar of Texas.

Back in 2010, the *Texas Bar Journal* published my article *Served Without Ever Leaving the Computer: Service of Process Via Social Media*, in which I described the early but growing trend of various foreign countries and jurisdictions here in the United States recognizing the availability of using social networking platforms as a form of substituted service. Since then, the Texas Family Code (Annotated) has cited this article approvingly, the Texas Legislature in 2013 considered a bill to expressly authorize service using social media as an alternative means of service, and the number of American state and federal courts to give their blessing to "service by Facebook" has steadily grown. And while a number of Texas judges have informally approved of such electronic notification as an acceptable form of substituted service, the 2019 Texas Legislature finally made it official: service of process via social media is now a thing in Texas.

The text of Senate Bill 891 (an omnibus bill that amends multiple statutes) amends Chapter 17 of the Texas Civil Practice

and Remedies Code specifically by adding Section 17.033, entitled *Substituted Service Through Social Media Presence*. It provides that, in cases that meet the requirements for substituted service under the existing Texas Rules of Civil Procedure, the court "may prescribe as a method of service an electronic communication sent to the defendant through a social media presence." The new 17.033, which was signed into law by Gov. Abbott on June 10, 2019, also specifies that the Supreme Court of Texas must adopt rules to provide for such "substituted service of citation by an electronic communication sent to a defendant through a social media presence" no later than December 31, 2020. In addition to this rule requirement, the new Section 17.033 will only apply to actions commenced "on or after the effective date of the rules adopted by the Supreme Court."

What might such rules involve for determining the appropriate circumstances for serving someone via social media? For guidance, one might look to the criteria discussed in an earlier legislative effort to authorize substituted service through social networking platforms—2013's H.B. 1989. In H.B. 1989's language, a court would have discretion to order such service of process after determining several factors. These factors were (1) whether the party to be served has an active social media profile on the site selected for service; (2) whether the social media profile is actually the profile of the party; (3) whether the party uses the social media profile on a regular basis; and (4) whether the party could reasonably be expected to receive the notice if the electronic communication is sent to the party's social media account.

These factors make sense, since they address some of the chief concerns about service of process via social media. One of these concerns is the authenticity of the defendant's profile. Given the ease with which fake profiles can be created, it won't be enough to simply point to a profile that has a picture of the defendant. The court will need greater assurances of authenticity such as the age of the profile, quantity and history of posts, instances of direct communication with the subject through the social media account in question, etc. As one New York federal court noted in rejecting a request for service of process via social media, "anyone can make a Facebook profile using real, fake, or incomplete information, and thus there is no way for the Court to confirm whether the Facebook page belongs to the defendant to be served."[1] Another understandable concern is the extent to which the defendant regularly uses that social media profile and can reasonably be expected to get notice of the lawsuit. While the issue of the service reaching its intended recipient exists with other forms of service, there are any number of ways an intended service of process via Facebook might go astray. For example, what if a Facebook account was left logged in on someone else's computer?

Concerns such as these, along with some discomfort with technology itself, were prominent when the Oklahoma Supreme Court addressed the issue of service of process via Facebook in a 2014 family law case.[2] *In re Adoption of K.P.M.A.* involved the

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[1] Fortunato v. Chase Bank, 2012 U.S. Dist. LEXIS 80594 (S.D.N.Y. June 7, 2012).

[2] *In re* Adoption of K.P.M.A., 341 P.3d 38 (Okla. 2014).

termination of a father's parental rights for a child born out of wedlock and put up for adoption. The father appealed the termination of his rights, arguing that he had received improper, inadequate notice that he was the father. The child's mother had sent him a Facebook message "informing him that she was pregnant and plan[ned] to give the child up for adoption."[3] The father testified that he didn't see the message until later and did not know how long it had been in his inbox. Holding that notice provided via Facebook did not satisfy the due process requirements of either the U.S. or Oklahoma constitutions, the Oklahoma Supreme Court noted that the mother could have used a more direct means of relaying the message. The court also observed that "Facebook. . . is an unreliable method of communication if the accountholder does not check it regularly or have it configured in such a way as to provide notification of unread messages by some other means."[4]

But other jurisdictions have been more willing to embrace the concept of service via social media, especially in family court cases or in scenarios involving international defendants. In *Baidoo v. Blood-Dzraku*, New York State Supreme Court Justice Matthew Cooper permitted a divorce summons to be served solely by private message to the spouse's account.[5] The court held that such service "is the form of service that most comports with the constitutional standards of due process" after the plaintiff

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[3] *Id.* at 40.

[4] *Id.* at 51.

[5] Baidoo v. Blood-Dzraku, 48 Misc.3d 309, 5 N.Y.S. 3d 709 (N.Y. Sup. Ct. 2015).

established that the account belonged to her husband, that he regularly logged on to the account, and that she did not have his current email or street address (making personal service impossible). Judge Cooper went on to note that regarding the idea of service via social media,

> . . . a concept should not be rejected simply because it is novel or non-traditional. This is especially so where technology and the law intersect. In this age of technological enlightenment, what is for the moment unorthodox and unusual stands a good chance of sooner or later being accepted and standard, or even outdated and passé. And because legislatures have often been slow to react to these changes, it has fallen on courts to insure that our legal procedures keep pace with current technology.[6]

Similarly, in another New York family court case, the court allowed a father seeking modification of child support payments to serve the mother via Facebook.[7] After multiple efforts using traditional means of service had failed, the court permitted service through Facebook after the father showed the mother's active use of her Facebook account (by pointing out the mother's "likes" of photos posted by the father's current wife). And in a New Jersey case of first impression, the court allowed the plaintiff to serve an out-of-state defendant

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[6] *Id.*

[7] Noel B. v. Anna Maria A., 2014 N.Y. Misc. LEXIS 4708 (Fam. Ct. Sept. 12, 2014).

through Facebook after traditional methods proved ineffective and the plaintiff demonstrated that the defendant had been communicating with her through his Facebook account.[8]

But when plaintiffs cannot establish that other avenues of service have proven ineffective and that service via social media will be reasonably calculated to apprise the defendant of the action against him or her, courts will not hesitate to deny permission to use social media as a form of substituted service. For example, one Pennsylvania court denied an application to serve the defendant via his LinkedIn account because the plaintiff failed to describe in sufficient detail the other efforts at effecting service.[9] And in *Qaza v. Alshalabi*, the court denied an application to perfect service through Facebook because the plaintiff couldn't establish that the defendant's Facebook account was still being used by the defendant, casting doubt on whether such service would have actually put the defendant on notice of the lawsuit against him.[10]

Substituted service via social media—a concept already recognized in eight countries and multiple state and federal courts here in the U.S.—has finally and officially come to Texas. Given the ubiquity of social media use and the advantages it offers over other alternatives like service by publication (read any good legal notices lately?), it may prove, in the proper

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[8] K.A. v. J.L, 450 N.J. Super. Ct. 247 (Ch. Div. 2016).

[9] Miller v. Native Link Const. LLC, 2016 WL 247008 (W.D. Pa. Jan. 21, 2016).

[10] Qaza v. Alshalabi, 43 N.Y.S.3d 713, 717 (N.Y. Sup. Ct. 2016).

circumstances, to be the only method to comply with due process and reasonably apprise the defendant of the legal proceedings against him. Courts might be hesitant at first, but as one federal court observed about the "relatively novel concept" of service by Facebook, "history teaches that, as technology advances and modes of communication progress, courts must be open to considering requests to authorize service via technological means of then-recent vintage, rather than dismissing them out of hand as novel."[11]

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[11] FTC v. PCCare247 Inc., 2013 WL 841037 (S.D.N.Y. Mar. 7, 2013).

Case Highlight: Nettles v. GTECH Corporation, __S.W.3d__, Tex., June 12, 2020

by John J. Janssen*

In *Nettles v. GTECH Corporation*, No. 17-1010, and *Steele v. GTECH Corp.*, No. 18-0159,[1] the Texas Supreme Court considered whether derivative sovereign immunity bars claims against a private contractor that had provided consulting services to the Texas Lottery Commission. In the majority opinion, the Court held that the private contractor, GTECH Corporation, was not entitled to derivative sovereign immunity regarding fraud claims. The Court, however, also ruled that GTECH is immune from the allegations of aiding and abetting the Lottery Commission's fraud and conspiracy with the Commission in that these latter charges are matters of derivative or vicarious liability in which the sovereign immunity of the Commission is implicated. The Court, focusing on the degree of discretion afforded to GTECH as the basis for determining whether GTECH would qualify for

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[1] *Nettles v. GTECH Corp.*, __ S.W.3d__, 2020 WL 5754456 (Tex. June 12, 2020).

derivative sovereign immunity, and within a fractured majority opinion, ultimately (1) side-stepped the question of whether the doctrine of derivative sovereign immunity is actually recognized in Texas, (2) allowed certain fraud claims to be pursued against the government contractor because of discretion afforded the contractor, and (3) held that the contractor was immune from the conspiracy and aiding and abetting claims.

Background

The Court's opinion relates to two consolidated cases, one suit against GTECH appealed to the Dallas Court of Appeals and another suit against the company appealed to the Austin Court of Appeals.[2] The plaintiffs in the cases had generally complained that the instructions on a scratch-off lottery ticket were misleading, causing them to believe they had winning tickets, when, in fact, they did not.[3] GTECH had provided instant ticket manufacturing services for the Texas Lottery Commission for the game in question. These included GTECH's proposal for a "Fun 5's" scratch-off game, which it had operated in other states. The Lottery Commission had selected the game, and GTECH had submitted images of the ticket, detailed specifications and game parameters.[4] The Lottery Commission had responded with changes to the game; specifically, although GTECH designed the multiplier symbol on the ticket for use only on winning tickets, the symbol also appeared on some non-winning tickets

[2] *Nettles*, 2020 WL 5754495 at *1.

[3] *Id.*

[4] *Id.*

per the Commission's instructions.[5] Immediately after the Lottery Commission began selling the Fun 5's scratch-off game, lottery players began registering complaints with the Lottery Commission.[6] James Steele and more than 1,200 other named plaintiffs filed a lawsuit against GTECH in Travis County, pursuing claims of fraud, fraud by nondisclosure, aiding and abetting the Lottery Commission's fraud, tortious interference with the plaintiffs' contracts with the Texas Lottery, and conspiracy with the Commission.[7] Dawn Nettles filed suit against GTECH in Dallas County, asserting claims of common-law fraud, fraud by non-disclosure, aiding and abetting the Lottery Commission's fraud, and conspiracy with the Lottery Commission. Nettles also sued the Lottery Commission, but the trial court granted the Lottery Commission's plea to the jurisdiction.[8]

Asserting derivate sovereign immunity, GTECH filed pleas to the jurisdiction in both the Dallas County and Travis County cases. GTECH argued that sovereign immunity barred all claims against it because the suits were premised on alleged conduct directed and controlled by the Lottery Commission. While, on the one hand, the Dallas County trial court granted GTECH's plea to the jurisdiction, the Travis County trial court, on the other hand denied the plea. On appeal, the Dallas Court of Appeals affirmed the trial court's dismissal, holding that GTECH had not exercised independent discretion in making

5 *Id.* at *1-2.

6 *Id.* at *2.

7 *Id.*

8 *Id.*

the changes to the lottery tickets that were the basis of Nettles' claims. However, the Austin Court of Appeals affirmed in part and rendered in part. The Court held that Steele's claims of aiding and abetting fraud, tortious interference and conspiracy implicated sovereign immunity because the claims substantively challenged Lottery Commission decisions and directives. Still, the Court held the plea had been properly denied with respect to the fraud claims because they related to actions taken by GTECH within its independent discretion. The Supreme Court granted the petitions for review filed in both cases and consolidated the cases.

Justice Busby delivered the opinion of the Court, with three other justices joining. Three other justices joined in Part III of the opinion. One justice joined in Parts I and II of the opinion. Part I of the opinion relates to the standard of review. In Part II the Court explains why GTECH is not entitled to derivative immunity from suit on the fraud claims while in Part III the Court spells out its reasoning as to why GTECH is entitled to immunity from the allegations of conspiracy and aiding and abetting.

Standard of Review

In Part I, the Court notes that immunity from suit implicates subject-matter jurisdiction and is properly asserted in a plea to the jurisdiction, adding that as subject-matter jurisdiction is a question of law, the Court reviews *de novo* a trial court's ruling

on a plea to the jurisdiction.[9]

Derivative Sovereign Immunity and Fraud

At the outset of Part II, the Court observed that it has not had many opportunities to address whether a Texas government agency's immunity from suit might extend to private contractors.[10] Looking to its most recent case involving the subject of such derivative immunity for private contractors, *Brown & Gay Eng'g, Inc. v. Olivares*, 461 S.W.3d 117 (Tex. 2015), which arose out of a fatal traffic accident, the Court pointed out that in that instance the Court had not actually decided whether sovereign immunity could ever apply to a government contractor.[11] It had not been necessary for the Court to make such a decision regarding derivative sovereign immunity as the engineering company contractor in that case was found not to be entitled to a toll road authority's immunity because the toll road authority had exercised no control over the contractor's conduct.[12]

Applying this same approach to the GTECH cases, the Court held that because GTECH exercised discretion in choosing the lottery ticket game instructions, it would not be entitled to derivate immunity from the fraud claims based on those instructions. On the basis of jurisdictional facts adduced, the Court found several instances of independent discretion

[9] *Id.* at *3.

[10] *Id.*

[11] *Id.* at *5.

[12] *Id.*

exercised by GTECH.[13]

The Court, moreover, rejected the GTECH argument that extending immunity to the fraud claims would serve a pecuniary justification for sovereign immunity, *i.e.*, protecting the public fisc.[14] In this case, the Court notes, plaintiffs' fraud claims are directed at GTECH's choices, not at any decision by the Lottery Commission. The Court noted that GTECH is free to make the argument that the Commission itself made the representations at issue in a motion for summary judgment or at trial, and held that allowing courts to entertain the claims would not force the Commission to make unexpected financial expenditures or interfere with its responsibilities.[15]

Immunity as to Conspiracy and Aiding and Abetting

In Part III of its opinion, the Court ruled that GTECH is entitled to immunity from allegations of conspiracy and aiding and abetting. In short, the Court observed that conspiracy and aiding and abetting are theories of derivative or vicarious liability, and, as such, they "survive or fail alongside that tort."[16] The Court found that the plaintiffs' conspiracy and aiding-and-abetting theories are wholly derivative of an alleged fraud by the Lottery Commission alone, not by GTECH.[17] In other words, the

[13] *Id.* at *6-7.

[14] *Id.* at *9.

[15] *Id.*

[16] *Id.*

[17] *Id.* at *10.

plaintiffs could prove their conspiracy and aiding and abetting theories against GTECH only by proving that the Commission's actions within its delegated power were fraudulent. However, the Court held, the purpose of sovereign immunity is implicated here—"preventing the judiciary from interfering with the policymaking responsibilities of other branches of government and seeking to control their choices regarding the use of public funds."[18] Because the plaintiffs must override the substance of the Lottery Commission's underlying decisions in order to impose liability on GTECH, and the sovereign immunity of the Lottery Commission presents a barrier in that regard, the Court determined that GTECH is entitled to immunity from the conspiracy and aiding-and-abetting theories.[19]

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[18] *Id.*

[19] *Id.*

Case Highlights:

- ***B.C. v. Steak N Shake Operations, Inc.***
  598 S.W.3d 256, 257 (Tex. 2020)
- ***Bella Palma LLC v. Young***
  601 S.W.3d 799 (Tex. 2020)

by Nicholas Reisch

In many Texas counties, it is common for judges to require a party filing a motion to include a form proposed order granting the motion when she files the motion. It is also common for such form orders to include prefatory language stating that the court considered "the motion, response, evidence, and arguments of counsel" (or something similar). Almost equally as common is a trial court signing such a form order without adjustment. However, a Texas Supreme Court case from earlier this year demonstrates that there can be a danger in using this form language.

B.C. v. Steak N Shake Operations, Inc.

In this case, the defendant filed a combined traditional and no-evidence summary judgment.[1] The plaintiff filed a response with supporting evidence, but the response was untimely

[1] *B.C. v. Steak N Shake Operations, Inc.*, 598 S.W.3d 256, 257 (Tex. 2020).

because it was filed less than seven days prior to the hearing.[2] The defendant filed a reply that addressed the merits and the untimeliness and objected to the untimely response at the hearing.[3] However, the trial court never ruled on the objection.[4]

Under Texas law, a trial court may grant leave to permit the filing of a late response to summary judgment and supporting evidence.[5] If the plaintiff does not receive leave of court for the untimely response, appellate courts presume that the trial court did not consider the untimely response and evidence in deciding the motion.[6] The plaintiff can only overcome the presumption if there is an affirmative indication in the record that the trial court accepted or considered the untimely filing.[7]

If the plaintiff does not overcome the presumption, then the appellate court cannot consider the untimely response or evidence in deciding whether the grant of summary judgment was proper.[8] In addition, if the summary judgment motion includes a no-evidence motion, the absence of a timely response and supporting evidence is fatal to the claim.[9]

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[2] *Id.* at 258.

[3] *Id.*

[4] *Id.* at 262.

[5] *Id* at 259.

[6] *Id.*

[7] *Id.* at 259-60.

[8] *Landers v. State Farm Lloyds*, 257 S.W.3d 740, 746 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

[9] *Id.*

The court of appeals in *Steak N Shake* never considered whether the plaintiff's evidence created a fact issue precluding summary judgment.[10] Instead, it determined that nothing in the record affirmatively showed that the trial court had considered the untimely response.[11] Thus, it affirmed the grant of summary judgment on the no-evidence basis.[12]

The Texas Supreme Court acknowledged that the court of appeals made the correct inquiry, but held that it made the wrong decision.[13] Of critical importance to that decision was language in the trial court's order stating, "after considering the pleadings, evidence, and arguments of counsel, the Court finds that the motion should be granted."[14] In particular, the Texas Supreme Court stated that the recital that the trial court considered "'evidence and arguments of counsel' without any limitation, is an 'affirmative indication'" that the trial court considered the plaintiff's response and attached evidence.[15]

The conclusion reached by the Texas Supreme Court about the trial court's treatment of the untimely response and evidence makes sense if we knew the trial judge chose that particular language after the summary judgment hearing. However, the

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[10] *B.C. v. Steak N Shake Operations, Inc.*, 532 S.W.3d 547, 552 (Tex. App.–Dallas 2017), *review granted, judgment rev'd*, (Tex. Mar. 27, 2020).

[11] *Id.* at 551.

[12] *Id.* at 551-52.

[13] *Steak .N Shake*, 598 S.W.3d at 260.

[14] *Id.* 260-62.

[15] *Id.*

conclusion may seem questionable if the trial court merely signed a proposed order created prior to the response being untimely. Notably, neither the Texas Supreme Court nor the court of appeals acknowledged that the key language may have been form language from a proposed order filed prior to any response (and before the movant knew the response would be late).[16]

Ultimately, the ruling in *Steak N Shake* makes a trial judge's actual intent irrelevant. If similar language is in an order granting a motion (summary judgment or otherwise), practitioners should expect appellate courts to conclude that the trial court considered untimely filed responses and evidence based on the *Steak N Shake* holding. Thus, practitioners should eliminate any reference to a response, arguments of counsel or evidence in proposed orders.

Bella Palma, LLC v. Young

It is understandable if practitioners may be confused about what language in a trial court order actually amounts to a final judgment. The Texas Supreme Court even discussed the contribution to the confusion from its various decisions in *Lehmann v. Har-Con Corp*.[17] Lehmann ultimately tried to dispel

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[16] In the past, the Texas Supreme Court has concluded that common form language was used too frequently to ascribe meaning to it. *Lehmann v. Har-Con Corp*., 39 S.W.3d 191, 204 (Tex. 2001) (Concluding that form "Mother Hubbard" clause could not establish trial court's intention to render a final judgment.).

[17] *Lehmann v. Har-Con Corp*., 39 S.W.3d 191, 200-204 (Tex. 2001).

much of the confusion by holding that a Mother Hubbard clause does not provide a basis to conclude that a judgment is final in the absence of a full trial on the merits.[18] While *Lehmann* explained what language **does not definitively** create a final judgment, *Bella Palma, LLC v. Young* explains what language **definitively does** create a final judgment.[19]

In *Bella Palma*, the plaintiff sued two brothers for declaratory judgment and damages: Mark Young and Timothy Young.[20] Mark filed a motion to quash on behalf of both brothers.[21] The plaintiff never served Timothy.[22] The trial court signed a final judgment granting summary judgment against Mark in November 2016.[23]

However, in December 2016, the trial court signed an order granting the motion to quash. Mark then moved to vacate the final judgment based on the unresolved claims against Timothy.[24] The trial court ultimately withdrew its order granting the motion to quash and stated in an order that the motion was denied when summary judgment was granted.[25] Thus, there was no court order that specifically resolved the claims against Timothy.

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[18] *Id.* at 204.

[19] *Bella Palma, LLC v. Young*, 601 S.W.3d 799, 801–02 (Tex. 2020).

[20] *Id.* at 800.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

In February 2018, the court of appeals abated the appeal and asked the trial court to clarify the judgment's finality.[26] The trial court issued an order clarifying that it intended the judgment to be final and that it considered the claims against Timothy discontinued because he had not been served, appeared, or answered in the three years the case was pending.[27]

Despite the trial court's clarifying order, the court of appeals concluded that it did not have jurisdiction because the claims against Timothy were never properly resolved by an order of nonsuit or otherwise.[28]

The Texas Supreme Court reversed the court of appeals decision.[29] It explained that the court of appeals should not have examined the record to determine whether all the claims were actually resolved.[30] A judgment is final if *either* it actually disposes of every pending claim and party *or* "it clearly and unequivocally states that it finally disposes of all claims and all parties."[31] The Texas Supreme Court concluded that the trial court's clarifying order unambiguously stated that it intended

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[26] *Id.*

[27] *Id.*

[28] *Young v. BellaPalma, L.L.C.*, 566 S.W.3d 829, 834–35 (Tex. App.—Houston [14th Dist.] 2018), *review granted, judgment rev'd sub nom. Bella Palma, LLC v. Young*, 601 S.W.3d 799 (Tex. 2020)

[29] *Bella Palma,* 601 S.W.3d at 801–02.

[30] *Id.*

[31] *Id.*

to dispose of all claims.[32] Thus, the judgment was final even if it improperly disposed of the claims against Timothy (by omission or otherwise).[33]

In *Bella Palma*, the Texas Supreme Court reiterated its rejection of "magic language" such as a Mother Hubbard clause.[34] Instead, a judgment is final—even if it did not properly resolve all claims or parties—if the judgment describes its action as (1) final, (2) a disposition of all claims and parties, and (3) appealable.[35] Thus, any practitioner intending to ensure a judgment is final should focus on these characteristics, rather than a Mother Hubbard clause or any other language.

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[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

2020 Luke Soules Award

Harper Estes is the 2020 Luke Soules Award recipient. For decades, he has served as a leader in Texas bar activities: he was State Bar President, was Chair of the Fellows of the State Bar Foundation, and has served locally as the President of the Midland County Bar Association. Over the years, Mr. Estes has authored and co-authored numerous articles, book reviews and opinion columns in the Texas Bar Journal and is a frequent speaker at Continuing Legal Education events. Mr. Estes is a well-known and well-respected litigator, mediator and arbitrator practicing at Lynch, Chappell and Alsup in Midland. On occasion, he can be found singing with the bluegrass-gospel group, Backsliders, at retirement homes and churches.

Mr. Estes was presented with the Luke Soules Award on June 23 as part of the virtual CLE presentation, *Litigation Lessons:*

Legends and Luke Soules Presentations. Mr. Estes gave a powerful presentation as part of his acceptance of the Award, *What You Mean to the Rule of Law*, reminding lawyers of the importance of the rule of law and the access to justice by all in our society:

> *One need only to watch the nightly news from around the world to see the chaos that exists when the rule of law is absent. It would be arrogance on our part, however, to not recognize that this chaos is not far from us and that is only our remarkable system of justice that protects us from it.*

Mr. Estes presentation is available as part of the Litigation Section's free online CLE located on its website, available at www.litigationsection.com/learning/online-cle for Section Members.

Nominations for 2021

The Litigation Section will begin accepting nominations for the 2021 Luke Soules Award November 1, 2020. For more information about the Award and its criteria, please go to www.litigationsection.com/honors/luke-soules-award.

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Proposed Amendments to the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure

Texas attorneys will have a chance to vote on eight proposed disciplinary rule changes next year. See the Supreme Court of Texas Order here: https://www.txcourts.gov/media/1449826/209114.pdf.

Voting will take place by paper and online ballot from February 2 to March 4, 2021, on the following subjects:

A. Scope and Objectives of Representation; Clients with Diminished Capacity

B. Confidentiality of Information—Exception to Permit Disclosure to Secure Legal Ethics Advice

C. Confidentiality of Information—Exception to Permit Disclosure to Prevent Client Death by Suicide

D. Conflict of Interest Exceptions for Nonprofit and Limited Pro Bono Legal Services

E. Information About Legal Services (Lawyer Advertising and Solicitation)

F. Reporting Professional Misconduct and Reciprocal Discipline for Federal Court or Federal Agency Discipline

G. Assignment of Judges in Disciplinary Complaints and Related Provisions

H. Voluntary Appointment of Custodian Attorney for Cessation of Practice

COVID-19 Resources

ABA Resources

https://www.americanbar.org/advocacy/the-aba-task-force-on-legal-needs-arising-out-of-the-2020-pandem/

State Bar of Texas Resources

https://www.texasbar.com/Content/NavigationMenu/Coronavirus_COVID_19/default.htm

Supreme Court of Texas Orders

https://www.txcourts.gov/supreme/administrative-orders/

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*Visit TexasBarCLE.com and search for a specific course to receive updates regarding live events.

Event / Course	Date	Location
Prosecuting and Defending Truck and Auto Collision Cases	Nov. 19-20, 2020	Webcast
Advanced Civil Trial Course	Dec. 2-4, 2020	Webcast
Advanced Trial Skills for Family Lawyers	Dec. 10-11, 2020	Webcast
Fiduciary Litigation	Dec. 10-11, 2020	Webcast
Advanced Trial Skills for Family Lawyers	January 7-8, 2021	Webcast
Prosecuting and Defending Truck and Auto Collision Cases	January 7-8, 2021	San Antonio (video)
Fiduciary Litigation	January 14-15, 2021	Webcast
Litigation Update Institute	January 21-22, 2021	Webcast
Litigation Section Council Meeting	January 21-22, 2021	San Antonio
Advanced Trial Strategies	February 4-5, 2021	Webcast
Grant Application Deadline	February 12, 2021	
Litigation Update Institute	February 16-17, 2021	Webcast
Damages in Civil Litigation	February 25-26, 2021	Webcast
Grant Application Receipt Deadline	March 1, 2021	
Litigation Section Council Meeting	April 8-9, 2021	Dripping Springs
Advanced Evidence and Discovery (registration details available later)	May 20-21, 2021	San Antonio
State Bar Annual Meeting	June 17-18, 2021	Fort Worth

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