

APPELLATE LAW FOR NON-APPELLATE LAWYERS

Or, Things that Go Bump in the Appellate Night

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LITIGATION FOCUS BREAKOUT

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Things that Go Bump In the Appellate Night

I. INTRODUCTION

Let's face it: appellate law can be scary. Lost-in-the-woods, stuck-in-a-weird-old-house, running-in-heels-from-the-monster scary. But, as in books and movies, the suspense and anxiety vanishes if you already know where the pitfalls and ambushes are. Here is a monster mish-mash of tips to help you have a terrific – not horrific – appellate experience.

II. REMOVAL AND VENUE CHALLENGES

Say that a plaintiff's initial pleading provides grounds for removal to federal court, and you want to go. You file a notice of removal, but alas, the federal court remands the case back to state court. Next, you file a motion to transfer venue. But, [cue scary music], the plaintiff contends that you've waived the venue challenge because you filed a notice of removal first.

As long as the motion to transfer venue is the first "pleading" filed in state court other than the notice of removal (*i.e.*, as long as you have "not invoke[d] the jurisdiction of the state court or otherwise address[ed] the merits of the case" before filing the motion), then you should be safe. *Toliver v. Dallas Fort Worth Hosp. Council*, 198 S.W.3d 444, 447 (Tex. App.—Dallas 2006, no pet. h.). The Dallas Court of Appeals determined that such a motion comports with the due order of pleadings requirement in Texas Rule of Civil Procedure 86(1). *Id.*

III. ADVANCE NOTICE OF ANSWER DOES NOT PREVENT DEFAULT JUDGMENT

In what can only be considered a shudder-inducing case, the Amarillo Court of Appeals recently addressed whether a defendant's counsel was entitled to notice of a default hearing after faxing an advance copy of defendant's post-deadline answer to plaintiffs' counsel. *Simmons v. McKinney*, 225 S.W.3d 706 (Tex. App.—Amarillo 2007, no pet. h.).

The plaintiffs had filed suit, and return of service was filed with the district clerk. *Id.* at 707. No answer was filed by the deadline. *Id.* After the deadline, on the night of July 19, counsel for the defendant faxed to the plaintiffs' counsel an advance copy of a general denial and counterclaim. *Id.* at 707-08. On the morning of July 20, the plaintiffs went to the trial court, proved up damages, and obtained a default judgment. *Id.* at 708. In the afternoon, on July 20, the defendant filed its answer and counterclaim with the district clerk. *Id.* Over a month later, the defendant received notice of the default judgment. *Id.*

The court of appeals rejected arguments that the defendant was entitled to actual notice of the default hearing because of the post-deadline answer faxed to plaintiffs' counsel. *Id.* at 708-09. The court then affirmed the trial court's determination under *Craddock* that the defendant's motion for new trial should be denied. *Id.* at 709-10.

IV. MANDAMUS ISSUES

A proceeding to obtain an "extraordinary" remedy can be intimidating, if not frightening, particularly if you seldom travel through mandamus-land.

A. "Deadline" to file mandamus proceeding

There is no official deadline for filing a petition for writ of mandamus. *See* TEX. R. APP. P. 52. The standard for timeliness in seeking this equitable-like remedy is laches. In equitable proceedings, laches requires a showing of both unreasonable delay and resulting prejudice. *Vickery v. Vickery*, 999 S.W.2d 342, 355 (Tex. 1999). However, in the mandamus context, some courts have dispensed with the prejudice prong of laches and look solely at whether any delay in filing the mandamus petition was justified. *See, e.g., In re Lexington Ins. Co.*, 2004 WL 210576 (Tex. App.—Houston [14th Dist.] Feb. 2, 2004, mand. denied) (not designated for publication); *In re Wise*, 20 S.W.3d 894 (Tex. App.—Waco 2000, orig. proceeding); *Quanto Int'l Co., Inc. v. Lloyd*, 897 S.W.2d 482 (Tex. App.—Houston [1st Dist.] 1995, orig. proceeding); *International Awards, Inc. v. Medina*, 900 S.W.2d 934 (Tex. App.—Amarillo 1995, orig. proceeding).¹ One court effectively imposes a standard for laches based solely on delay (*i.e.*, the passage of time), without regard for justification or prejudice. *See, e.g., In re Harbrook Tool & Mfg. Co.*, 181 S.W.3d 551 (Tex. App.—El Paso 2005, mand. denied).

These cases appear to misinterpret *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366 (Tex. 1993). Under the circumstances presented in *Rivercenter*, the Texas Supreme Court focused only on part of the laches standard – unjustified delay – and quoted part of a sentence from an earlier opinion ("Equity aids the diligent and not those who slumber on their rights"). 858 S.W.2d at 367. However, in the earlier opinion from which the quote was taken, the Court made clear that equitable laches applies in full to mandamus proceedings. *Callahan v. Giles*, 137 Tex. 571, 575-76,

¹ *But see In re Hinterlong*, 109 S.W.3d 611 (Tex. App.—Fort Worth 2003, mand. denied) (requiring both unjustified delay and prejudice); *In re Hamel*, 180 S.W.3d 226 (Tex. App.—San Antonio 2003, orig. proceeding); *Sanchez v. Hester*, 911 S.W.2d 173 (Tex. App.—Corpus Christi 1995, mand. overr.).

155 S.W.2d 793, 795-96 (1941). The Court reasoned, “The maxim that ‘Equity aids the diligent and not those who slumber on their rights’ is a fundamental principle of equity jurisprudence, resulting in a rule of practice which has made the defense of laches just as complete a bar to the assertion of an equitable right as the defense of limitation is a bar to the assertion of a legal right.”

Some courts of appeals have read the partial quote in *Rivercenter* as reflecting an intent to dispense with prejudice and require only unjustified delay when applying the laches defense in mandamus proceedings. The misinterpretation has led to differing mandamus laches standards in different courts of appeals: some courts require both unjustified delay and prejudice, other courts require only unjustified delay, and at least one court requires only delay.

This difference can have a huge impact on your mandamus proceeding. Until the Texas Supreme Court resolves the issue, pay particular attention to the standard used by the court you will be filing in. If your court of appeals uses a standard that does not require prejudice, plan to file your mandamus petition as soon as possible. If you are seeking relief in parallel proceedings – e.g., a mandamus proceeding and an interlocutory appeal – do not assume that you can wait to file your mandamus petition on the same date you file your appellant’s brief. That delay, even if it seems reasonable and does not prejudice the other party/ies, can result in the denial of your mandamus petition based on laches.

Perhaps to address this type of problem, at least one court has carved out an exception to the “no prejudice needed” rule in the context of arbitration appeals. Where it is unclear whether the Texas General Arbitration Act or the Federal Arbitration Act applies, parties generally seek relief from orders denying a motion to compel arbitration by parallel interlocutory appeal and mandamus proceedings. See *Jack B. Anglin Co, Inc. v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992); see also *Failure to Expressly Invoke the Federal Arbitration Act*, Section V, *infra*. The usual practice is to file a combined appellant’s brief/mandamus petition at the time when the appellant’s brief is due. However, in courts that use the “no prejudice needed” laches standard, the “delay” in filing the mandamus petition could be considered laches. Therefore, the Houston 14th Court of Appeals has decided that, in “arbitration mandamus” proceedings, laches will require a showing of prejudice. E.g., *AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190, 202 (Tex. App.—Houston [14th Dist.] 2003, no pet.); see also *In re Delta Homes, Inc.*, 5 S.W.3d 237, 240 (Tex. App.—Tyler 1999, orig. proceeding) (using same standard).

B. Mandamus when there is no written order

In the past, mandamus was not an option without a written order. Today, it is possible to mandamus an oral ruling if it is a clear, specific, and enforceable order that is adequately shown by the record. *In re Bledsoe*, 41 S.W.3d 807, 811 (Tex. App.—Fort Worth 2001, orig. proceeding); see also *In re Perritt*, 973 S.W.2d 776, 779-80 (Tex. App.—Texarkana 1998, orig. proceeding). The Fort Worth Court of Appeals examined changes to the mandamus procedural rule and noted that, although the former version expressly required a “certified or sworn copy of the order complained of,” the current version allows either “a certified or sworn copy of any order complained of, or any other document showing the matter complained of.” *Id.* (emphasis original); compare also TEX. R. APP. P. 52.3(j)(1)(A); with TEX. R. APP. P. 121(a)(2)(C).

Although the rule does not expressly require that the “document showing the matter complained of” be part of the trial court record, the Fort Worth Court of Appeals has indicated that this requirement exists. *Parker v. Parker*, 131 S.W.3d 524, 528-29 (Tex. App.—Fort Worth 2004, pet. denied). In *Parker*, the court was asked to take judicial notice of the records in a previous mandamus proceeding involving the same underlying case. *Id.* at 528. In the mandamus proceeding, the relator had filed a transcription and tape recording of a voicemail message in which the trial judge purportedly orally recused himself. *Id.* In the later appeal, the court of appeals refused to take judicial notice of the transcription or recording. *Id.* The court noted that the items had not been offered into evidence in the trial court or otherwise included in the trial court record. *Id.* Thus, the court opined that it would not have been able to consider the items in the prior mandamus. *Id.*

Because most oral rulings will be evidenced in a reporter’s record (see, e.g., *Perritt*, 973 S.W.2d at 779), the requirement that the oral ruling be contained in the trial court record generally should not be a problem. However, there are times when trial court hearings are not recorded by a court reporter (e.g., when no evidence is being offered). Rule 52.7(a)(2) seems to absolve a relator of the responsibility of obtaining a reporter’s record of a hearing where “no testimony was adduced in connection with the matter complained.” If you suspect that you may need to pursue mandamus relief based on the outcome of a hearing, the safest practice would be to request a court reporter to record the hearing, even if it is non-evidentiary.

Courts do “not encourage parties to file mandamus actions based upon a court’s oral pronouncements” (*Bledsoe*, 41 S.W.3d at 811), and the high standard keeps mandamus proceedings based on oral rulings relatively rare. Yet, this can provide a

valuable option where the trial court has made a sufficient oral ruling and time does not permit you to wait (or to wait any longer, depending on how much time has passed) for a written order before seeking mandamus relief.

C. The nuances of mandamus filings

Verifications. Many practitioners know off the tops of their heads that a verification is required when filing a mandamus proceeding. But some do not realize that there generally are *two* verifications required: one for the petition, and one for the record. Texas Rule of Appellate Procedure 52.3 requires that “[a]ll factual statements in the petition must be verified by affidavit made on person knowledge by an affiant competent to testify to the matters stated.” Rule 52.7 independently requires that the mandamus record contain “a certified *or sworn* copy of every document that is material to the relator’s claim for relief and that was filed in any underlying proceeding,” along with a “properly authenticated” transcript of any relevant testimony. These two verification requirements are separate, and each must be met in order to obtain mandamus relief.

Verifying everything in the “document” vs. everything in the petition/record. Sometimes, verifying affidavits are drafted such that the affiant is swearing that everything “herein” or “in this document” is within his/her personal knowledge and is true and correct. The problem is that “this document” is the affidavit, not the petition or record. When drafting a verifying affidavit, it is important to specify what the affiant is swearing to (*i.e.*, “the factual statements *contained in the Petition*”). Appellate courts are understandably hesitant to grant swift mandamus relief – or temporary stays – where it is unclear whether anyone was willing to unequivocally swear that the facts and record documents are accurately presented.

Record vs. appendix. Many people think that the record and the appendix in a mandamus proceeding are the same. In fact, the record is the stand-alone volume or volumes that substitute for the clerk’s and reporter’s record one would find in a normal appeal. The record contains all of the relevant documents filed in the underlying proceeding, and any relevant hearing transcripts. TEX. R. APP. P. 52.7(a). On the other hand, the appendix is ancillary to the petition (just like an appendix in a normal appeal is ancillary to the brief). TEX. R. APP. P. 52.3(j). The appendix is usually bound with the petition, but it may be a stand-alone document depending on its size. Rule 52.3(j) sets forth the necessary contents required to be included in the appendix, and also describes optional contents that may be added at the attorney’s discretion.

Page limits. The page limits for a mandamus petition and response (exclusive of certain portions) vary depending on whether the mandamus proceeding is filed in a Texas court of appeals (50 pages) or the Texas Supreme Court (15 pages). TEX. R. APP. P. 52.6. However, under the current rules, the page limit for mandamus replies is the same in all appellate courts: only 8 pages. *Id.*

Mandamus briefing. Because Rule 52.6 limits mandamus petitions and responses in the Texas Supreme Court to 15 pages (exclusive of certain portions), the Court may request full mandamus briefing on the merits before making the ultimate decision of whether to grant or deny the mandamus petition. There is no provision in the rules for this optional procedure, but in practice, it mirrors the briefing procedures used by the Court in connection with petitions for review. Courts of appeals do not use any comparable procedure, since the page limit for petitions and responses already is 50 pages in those courts.

Fees for petition, response, and reply. The Texas appellate courts require a filing fee to be paid when a mandamus petition is filed. An additional fee is required if there is an accompanying motion for temporary relief. Some courts of appeals do not require fees for mandamus responses and replies (treating them as analogous to response and reply briefing in regular appeals). Other courts of appeals consider a mandamus response and reply to be equivalent to the response and reply to a motion, which do require a filing fee. It is generally not possible to ascertain from the courts of appeals’ websites whether they do or do not require filing fees for mandamus responses and replies, so the safest course is to call the clerk’s office and ask.

Giving the clerk’s office a heads up. Mandamus proceedings don’t just strike fear in the hearts of attorneys; they can also terrorize appellate court clerks. You can reduce the trauma in certain cases by calling the clerk’s office in advance to alert them that your mandamus is coming. For example, if circumstances are forcing you to file a mandamus on Friday regarding a trial court order requiring action by the following Tuesday, you may want to call the appellate court clerk in advance – even before you have everything ready to file – to let him/her know a short-fuse mandamus is coming. On the other hand, if you are about to file a mandamus on a Friday afternoon that is *not* an emergency, you may want to call the clerk and let him/her know that the mandamus about to be filed is not something that should cause alarm.

Bottom line: take some time to review all the details of Rule 52 before you start drafting your mandamus petition. The rule itself provides a valuable checklist for the steps you’ll need to follow in order to

successfully file all the various documents involved in mandamus proceedings.

V. FAILURE TO EXPRESSLY INVOKE THE FEDERAL ARBITRATION ACT

Texas still uses the fearsome procedure of dual interlocutory appeal and mandamus proceedings when challenging a trial court's ruling on a motion to compel arbitration, where there is any doubt about whether the federal or Texas arbitration acts apply. *See Jack B. Anglin*, 842 S.W.2d at 272. In 2006, the Waco Court of Appeals *sua sponte* examined the chilling effect of using only one of these proceedings. *In re Olshan Foundation Repair Co. of Dallas, LLC*, 192 S.W.3d 922 (Tex. App.—Waco 2006, orig. proceeding). In a *per curiam* opinion, the majority denied the petition for writ of mandamus regarding the trial court's denial of a motion to compel arbitration, stating that relator had not invoked the Federal Arbitration Act or raised its applicability in the trial court. *Id.* at 923. If the Texas Arbitration Act applied, it would have afforded an interlocutory appeal (*i.e.*, an adequate remedy at law precluding mandamus relief).

In a dissent, Justice Vance noted that the relator had not invoked/chosen either the FAA *or* the TAA in the trial court. *Id.* at 928. However, the relator had alleged and introduced evidence in the trial court showing that the contract involved interstate commerce (indicating that the FAA should apply). *Id.* In seeking review, the relator filed the mandamus along with a companion appeal (which would have been appropriate if the Texas Arbitration Act governed). *Id.* However, after the real party in interest filed its response and did not question jurisdiction under the FAA, the relator sought and the court of appeals granted dismissal of the appeal. *Id.* at 929. Thus, the dissent disagreed that the failure to expressly invoke the FAA by name defeated the mandamus. *Id.* After analyzing the merits of the mandamus proceeding, the dissent concluded that mandamus should have issued. *Id.* at 931.

VI. "SNAP BACK" DOESN'T APPLY TO ALL EXPERTS

The Texas Supreme Court analyzed the interplay between Texas Rules of Civil Procedure 192.3(d) and 192.3(e)(6) in *In re Christus Spohn Hospital Kleberg*, 222 S.W.3d 434 (Tex. 2007). The Hospital mistakenly forwarded work-product privileged documents to its testifying expert witness. *Id.* at 436. When the mistake was brought to the Hospital's attention, the Hospital filed a motion pursuant to the "snap-back" provision in Rule 193.3(d), seeking to recover the privileged documents. *Id.*

The plaintiff did not dispute the privileged nature of the documents, but instead argued that the "snap-back" provision in Rule 193.3(d) does not apply to

information provided to testifying expert witnesses, which is made discoverable under Rule 192.3. *Id.* at 437. The Court held that Rules 192.3(e)(6) and 192.5(c)(1), regarding work-product provided to an expert, prevail over the "snap-back" provision in Rule 193.3(d) "so long as the expert intends to testify at trial despite the inadvertent document production." *Id.* at 440-41. Therefore, any documents provided to an expert anticipated to testify at trial (or on whose opinions a testifying expert will rely) should be carefully previewed for possible privilege.

VII. SUMMARY JUDGMENT OBJECTIONS

There is an ongoing debate among the courts of appeals about whether the granting of a summary judgment motion creates an inference that the trial court implicitly reviewed and overruled the non-movant's objections to the movant's summary judgment proof. This debate began when the appellate rule regarding preserving error changed to allow a party to complain on appeal of error where the trial court ruled on an objection "either expressly or implicitly." TEX. R. APP. P. 33.1(a)(2)(A). In general, a trial court's ruling is implicit if it is unexpressed but capable of being understood from something else. *Well Solutions, Inc. v. Stafford*, 32 S.W.3d 313, 316 (Tex. App.—San Antonio 2000, no pet.), *citing* WEBSTER'S THIRD NEW INT'L DICTIONARY 1135 (1981).

The Fort Worth Court of Appeals embraces the idea that granting a summary judgment motion creates an implication that the non-movant's objections were reviewed and overruled. *See Frazier v. Yu*, 987 S.W.2d 607, 610 (Tex. App.—Fort Worth 1998, pet. denied); *Blum v. Julian*, 977 S.W.2d 819, 823 (Tex. App.—Fort Worth 1998, no pet.). The court's initial holding appears to state a broad principle that any grant implicitly overrules objections. *Blum*, 977 S.W.2d at 823-24. In a later case, however, the court either narrowly applied or actually narrowed the principle by noting that the trial court's implied ruling arose from: (a) specific and extensive written objections; and (b) a statement in the summary judgment that the trial court had reviewed "all *competent* summary judgment evidence." *Frazier*, 987 S.W.2d at 610 (emphasis added).

Most other courts of appeals that have examined the issue reject the Fort Worth court's approach. *Delfino v. Perry Homes, J.V.*, 223 S.W.3d 32, 34-35 (Tex. App.—Houston [1st Dist.] 2006, no pet. h.); *Palacio v. AON Props., Inc.*, 110 S.W.3d 493, 496 (Tex. App.—Waco 2003, no pet.); *Mitchell v. Baylor Univ. Med. Ctr.*, 109 S.W.3d 838, 842-43 (Tex. App.—Dallas 2003, no pet.); *In re Estate of Loveless*, 64 S.W.3d 564, 573 (Tex. App.—Texarkana 2001, no pet.); *Chapman Children's Trust v. Porter & Hedges, L.L.P.*, 32 S.W.3d 429, 436 n.4 (Tex. App.—Houston

[14th Dist.] 2000, pet. denied); *Stafford*, 32 S.W.3d at 317. These courts reason that granting a summary judgment motion and denying objections to summary judgment evidence are not mutually exclusive alternatives. *Stafford*, 32 S.W.3d at 317. Accordingly, a ruling on an evidentiary objection is not “capable of being understood” from the ruling on the summary judgment motion. *Id.*

Two items are noteworthy here. First, if you encounter a situation in which the grant of the summary judgment necessarily required overruling an objection to summary judgment evidence, then it would appear you have an argument that, in your particular case, a ruling on the objection can be implied from the summary judgment. Second, it may be possible to place language in the summary judgment itself that would create an implication that the evidentiary objections were overruled. However, you do not want to request an adverse order without making clear, in writing or on a reported record, that you are not waiving your right to appeal the judgment and are submitting language only because the court has directed you to or has indicated the order it intends to enter. See *Proposed Orders and Judgments*, Section XI, *infra*.

VIII. TIMELY REQUESTS FOR JURY SHUFFLE

After a venirepanel is assigned to the trial court and prior to *voir dire* examination by any party or attorney, a party may demand a jury shuffle. TEX. R. CIV. P. 223. The shuffle requires that the names of the panelmembers be placed in a receptacle, shuffled, drawn, and transcribed on the jury list in the order drawn. *Id.* Only one shuffle is allowed in each case. *Id.*

“Prior to *voir dire* examination” means before any question – whether written in a questionnaire or oral – is asked of the panel and reviewed by counsel. *Carr v. Smith*, 22 S.W.3d 128, 133-34 (Tex. App.—Fort Worth 2000, pet. denied). Standard juror form cards are distinct from case-specific questionnaires; a shuffle may be requested after the standard form cards are filled out. *Id.* at 134. However, the shuffle must be requested *before* a case-specific questionnaire is distributed to the panel because “[a]fter the venire panel has been sworn and once substantive inquiry begins and responses have been observed or made available to the parties or their counsel, whether verbally or in writing, *voir dire* has begun.” *Id.* Although this principle leaves a possible loophole for a request between the time the questionnaire is distributed to the panel and the time the attorneys or parties are provided with the responses, the safer course of action is to request a shuffle (or to make the

decision not to request one) before any case-specific questionnaire is distributed to the panel.

IX. PRESERVING CHALLENGES TO THE VENIREPANEL

In May, the Fort Worth Court of Appeals had the opportunity to apply the standards set forth in *Cortez v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87, 93 (Tex. 2005) regarding rehabilitation of veniremembers and preservation of error. *Smith v. Dean*, ___ S.W.3d ___, 2007 WL 1377668, No. 02-06-00042-CV (Tex. App.—Fort Worth May 10, 2007, no pet. h.). The court of appeals found that challenges to four veniremembers had not been properly preserved under *Cortez*. 2006 WL 1377668 at * 7. As to the remaining four challenged veniremembers, the court of appeals determined that: (1) the members were not biased as a matter of law; and (2) they were successfully rehabilitated. *Id.* at **8-9. In addition to the legal analysis, the court of appeals’ opinion reproduces portions of *voir dire* to guide other practitioners. *Id.* at **1-5.

The *Cortez* standard for preserving challenges for cause requires the objecting attorney to:

1. Use a peremptory challenge against the veniremember(s) challenged for cause.
2. Exhaust your remaining peremptory challenges.
3. Notify the court on the record:
 - a. which veniremember(s) you used a peremptory challenge to strike, that he/she/they should have been stricken for cause, and on what basis each should have been stricken for cause; and
 - b. which specific objectionable veniremember(s) will remain on the jury list as a result..

Cortez, 159 S.W.3d at 90-91. Error is not waived by failing to state why the remaining member is objectionable because peremptory challenges generally do not require a reason. *Id.* at 91.

This procedure is in place because, when a court denies a challenge for cause, the error can be corrected by striking the veniremember peremptorily. *Id.* at 90. Thus, the error is harmful only if the used peremptory challenge would have been used on another objectionable veniremember. *Id.* Using the procedure ensures that the court is informed of the problem while there is still time for it to consider whether the party was, in fact, forced to take objectionable jurors.” *Id.* at 91.

X. SEGREGATION OF ATTORNEYS' FEES BETWEEN CLAIMS

This dilemma is or is not frightening depending on which party you are or represent. The general rule regarding recovery of attorneys' fees is that the claimant must show the fees were incurred while suing on a claim that allows recovery of such fees. *Tony Gullo Motors I, L.P. v. Chapa* 212 S.W.3d 299, 311 (Tex. 2006), citing *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 10 (Tex. 1991). What injects some suspense into the mix is the longstanding exception that, when the attorney's fees are rendered in connection with multiple claims that arise out of the same transaction and are so interrelated that their prosecution or defense entails proof or denial of essentially the same facts. *Chapa*, 212 S.W.3d at 311. In true horror flick fashion, this exception has "threatened to swallow the rule." *Id.*

Not only does the exception lead the attorneys and court into a grey area (much like a foggy swamp), it also can encourage inconsistency from the party seeking fees. For example, the Court noted in *Chapa* that:

the effort to recover 100 percent of their fees has required Chapa's attorneys to take a position inconsistent with her underlying claims. As noted above, Chapa has insisted (and we have agreed) that her claims were more than a mere breach of contract—they could be asserted in fraud. But when it came time to segregate fees, her attorneys testified that their work on the fraud claim could not possibly be distinguished from that on the contract and DTPA claims. Having prevailed in her argument that the claims are distinct, it is hard to see how she can also claim they are inextricably intertwined.

Id. at 313.

The Court took the opportunity to clarify *Sterling* and announce a (somewhat) clearer standard for determining whether fees must be segregated. As the Court reasoned:

It is certainly true that Chapa's fraud, contract, and DTPA claims were all "dependent upon the same set of facts or circumstances," but that does not mean they all required the same research, discovery, proof, or legal expertise. Nor are unrecoverable fees rendered recoverable merely because they are nominal; there is no such exception in any contract, statute, or "the American Rule." *To the extent Sterling suggested that a common set of underlying facts necessarily made all claims arising therefrom "inseparable" and all legal fees recoverable, it went too far.*

Id. (emphasis added, internal footnote omitted).

The Court confirmed that *Sterling* was correct to the extent that many, if not most, legal fees in multiple-claim cases do not have to be allocated precisely to one claim or the other. *Id.* However, when determining whether recoverable and unrecoverable fees are "inextricably intertwined," the focus is on whether "discrete legal services advance both a recoverable and unrecoverable claim . . ." *Id.* at 313-14. The old test examined whether the claims themselves – either based on the facts supporting the claims or the elements of the claims – were inextricably intertwined. *Id.* at 313.

It should be noted that, in her dissent (which disagreed with the majority on the punitive damages issue and on the application of the clarified attorneys' fees standard), Justice O'Neill posited that the majority's discussion about the attorneys' fees standard was advisory. *Id.* at 319 (O'Neill, J., dissenting).

XI. PROPOSED ORDERS AND JUDGMENTS

A. Adverse orders and judgments

As rare as they are, there are times when we actually lose in the trial court. (The horror!) Either by default or in response to the court's express request, the prevailing party usually will draft and submit the proposed order or judgment. However, there are times when the non-prevailing party – a/k/a the loser (again, mostly not you or I) – would find it useful to submit its own proposed order or judgment. Other times, the court demands that both parties submit competing forms.

This way invited error comes. The invited error doctrine prohibits a party from complaining about error for which he or she asked. *Morse v. Delgado*, 975 S.W.2d 378, 381 (Tex. App.—Waco 1998, no pet.); *Texas Indus., Inc. v. Vaughan*, 919 S.W.2d 798, 804 (Tex. App.—Houston [14th Dist.] 1996, writ denied). For example, a party cannot urge the trial court to enter a judgment on the jury's verdict and then complain about the jury's verdict on appeal. *Litton Indus. Prods., Inc. v. Gammage*, 668 S.W.2d 319, 321-22 (Tex. 1984).

How, if at all, can a non-prevailing party comply with a trial court's request to submit a proposed order embodying the court's adverse ruling? The Texas Supreme Court has stated that "[t]here must be a method by which a party who desires to initiate the appellate process may move the trial court to render judgment without being bound by its terms." *First Nat'l Bank v. Fotjik*, 775 S.W.2d 632, 633 (Tex. 1989). In doing so, the party must solidly reserve the right to complain later. *Id.* There are two recognized methods: (1) make an express statement on the record when submitting your proposed order/judgment; or (2) sign

the proposed order/judgment as “Agreed as to form only.” *See id.*; *Morse*, 975 S.W.2d at 381.

What sort of “express statement on the record” will do? In *Fotjik*, the Texas Supreme Court determined that the right to complain had been preserved when the non-prevailing party filed a motion for judgment that stated:

While Plaintiffs disagree with the findings of the jury and feel there is a fatal defect which will support a new trial, in the event the Court is not inclined to grant a new trial prior to the entry of judgment, Plaintiffs pray the Court enter the following judgment. Plaintiffs agree only as to the form of the judgment but disagree and should not be construed as concurring with the content and result.

775 S.W.2d at 633.

B. Judgment interest

Another panic-inducing issue that comes up in preparing proposed judgments is judgment interest. Here’s a step-by-step guide.

1. How to figure out the rate

Section 304 of the Texas Finance Code is your guide to judgment interest. If a money judgment is based on a contract providing for interest, section 304.002 tells you what to do (*i.e.*, the lesser of the rate specified in the contract and 18% per year). If the money judgment is not based on a contract providing for interest, then section 304.003 tells you what to do. Generally, under section 304.003(c), post-judgment interest is assessed at: (1) the prime rate as published by the Federal Reserve Bank of New York on the date of computation; (2) five percent a year if the prime rate as published by the Federal Reserve Bank of New York described by Subdivision (1) is less than five percent; or (3) 15 percent a year if the prime rate as published by the Federal Reserve Bank of New York described by Subdivision (1) is more than 15 percent.

2. Huh? (*Translation: How do I find the non-contractual rate without a calculator?*)

Section 304.003(b) provides a little help in figuring out which non-contractual post-judgment rate applies at any given time. “On the 15th day of each month, the consumer credit commissioner shall determine the postjudgment interest rate to be applied to a money judgment rendered during the succeeding calendar month.” TEX. FIN. CODE § 304.003(b). The rate is available online at the Texas Office of Consumer Credit Commissioner site (<http://www.occc.state.tx.us/>). Click on the “Interest Rates” button on the left side, and check out the list of “Current Rates,” which includes the “Judgment Rate” for the current month (<http://www.occc.state.tx.us/>

[pages/int_rates/Index.htm](#)). Past month’s rates also can be viewed in the “Judgment Rate Summary.”

3. How to calculate it

Post-judgment interest is compounded annually. TEX. FIN. CODE § 304.007.

4. How much to use for supersedeas bonds

Eighteen months is a generally accepted period for bonding post-judgment interest. Less or more may be appropriate depending on the circumstances of the case. Under Texas Rule of Appellate Procedure 24.3, the trial court has continuing jurisdiction, even after its plenary power expires, to modify the amount of type of security if circumstances change.

5. Prejudgment interest

Prejudgment interest is addressed in sections 304.101 through 304.107 and section 304.201. The rate for prejudgment interest, where applicable, is the same as the rate for post-judgment interest at the time of the judgment. TEX. FIN. CODE § 304.103. However, prejudgment interest is simple and not compound. *Id.* at § 304.104.

XII. SUPERSEDEAS BONDS

A. Supersedeas bonds and post-judgment discovery

Attorneys and clients generally expect that, once a supersedeas bond is filed, all efforts to collect on the judgment – including all post-judgment discovery – must cease. However, it is possible for post-judgment discovery to continue even after a bond is posted. *See In re Emeritus Corp.*, 179 S.W.3d 112, 115 (Tex. App.—San Antonio 2005, mand. dism’d).² Texas Rule of Civil Procedure 621a authorizes post-judgment discovery for two purposes: (1) to obtain information to aid in enforcing a judgment; and (2) to obtain information relevant to a motion under Texas Rule of Appellate Procedure 24 (formerly rules 47 and 49). *Id.* at 116-17; TEX. R. CIV. P. 621a. Rule 621a expressly states that the first type of post-judgment discovery may be used “so long as said judgment has not been suspended by a supersedeas bond” This statement is not used in conjunction with the second type. *See* TEX. R. CIV. P. 621a.

The San Antonio Court of Appeals concluded that the absence of the phrase meant that the Texas

² After briefing was requested and filed, the parties filed a joint motion to dismiss. Thus, there is mandamus briefing available online (<http://www.supreme.courts.state.tx.us/ebriefs/FILES/20050726.HTM>), but the Texas Supreme Court, in the end, did not issue an opinion on the merits of the mandamus.

Supreme Court intended for supersedeas to halt one type of discovery but not the other. *Emeritus*, 179 S.W.3d at 115. The second type of discovery may be pursued even after a supersedeas bond is filed. *Id.* This type includes discovery relating to: (a) a motion about the type and sufficiency of the bond; or (b) a motion to enjoin a judgment debtor from dissipating or transferring its assets to avoid satisfaction of a judgment. *Id.*; TEX. R. CIV. P. 621a; TEX. R. APP. P. 24.

In *Emeritus*, the judgment creditors filed a motion to enjoin Emeritus from dissipating or transferring its assets to avoid satisfaction of the judgment. 179 S.W.3d at 117. After the injunction was granted, the creditor sought post-judgment discovery to obtain information about Emeritus's ongoing compliance with the injunction. *Id.* The court of appeals determined that this discovery was permissible because it "related to a motion allowed by Rule of Appellate Procedure 24 and [was] for a relevant purpose." *Id.*

Although the court did not opine on discovery filed in advance of a Rule 24 motion, there is nothing in the opinion or the rules indicating that such discovery would not be allowed under the same rationale. *See id.* at 115-17. However, the court of appeals' statement that the discovery was permissible both because it related to a motion *and was for a relevant purpose* indicates that the discovery standard should be objective (*e.g.*, to obtain information either relevant or reasonably calculated to lead to the discovery of admissible evidence), not subjective (*e.g.*, the judgment creditor related the request to a Rule 24 motion).

B. Surety requirements for supersedeas bonds for privately held companies and individuals

The general requirements by sureties for supersedeas bonds vary depending on whether the judgment debtor is a public company, a privately held company, or an individual. It is advisable to check with an agency or particular surety to determine the applicable requirements. In addition to these factors, another important aspect to determining a surety's supersedeas requirements is whether or not a case is insured. If insurance is involved, that may change the surety's underwriting requirements.

Here is some general information that may guide you on your way:

1. For publicly traded companies

The financial information needed to decide whether the bond can be issued without collateral generally can be accessed by the agency and surety online. The annual premium ranges from 1%-2% of the amount of the bond, and advance payment requirements vary. Premium rates differ depending

upon whether or not collateral is involved, the type of collateral utilized, on whose behalf the bond is required, and the size bond needed.

2. For privately held companies

A surety generally will want to review the most current year-end audited financials, plus any interim statements that may be available, to determine if collateral will be required. Unfortunately, privately held companies may be hesitant to release the non-public information or simply do not have it. Moreover, providing financials does not guarantee that no collateral will be required. Even after the surety reviews adequate financials, it is not unusual for the surety to require collateral valued at 100% of the bond amount. Much depends upon the bond size in relation to the company's financials. Certainly, if no financial information is provided, then 100% collateral likely will be required.

3. For individuals

A surety generally requires collateral valued at 100% of the bonded amount to secure the bond. The preferred form of collateral is a letter of credit from a bank approved by the surety, using the surety's required letter of credit form. Providing the insurance/surety agent (or the surety itself) with the name and address of the bank (from which the client proposes to obtain the letter of credit) allows the agent to try and get pre-approval from potential sureties. Because it may take a bank several days to perfect a letter of credit, the bank's turnaround time – as well as the time to obtain a surety – should be factored into the lead time you need to make supersedeas arrangements. The annual premium for individuals generally is 2% of the bond amount, and the surety most likely will require 2 years' advance payment.

XIII. REVIEW OF PUNITIVE DAMAGES AWARDS

In another part of the *Chapa* majority opinion (*see Segregation of Attorneys' Fees Between Claims*, Section X, *supra*), the Texas Supreme Court clarified that appellate review of punitive damages awards is two-pronged: (1) whether the award meets the statutory requirements under chapter 41 of the Texas Civil Practice and Remedies Code; **and separately**, (2) whether the award meets federal constitutional standards. *Chapa*, 212 S.W.3d at 307.

The jury had awarded the plaintiff punitive damages under both a DTPA and fraud claim. *Id.* at 306. By statute, the plaintiff's punitive damages recovery was capped at \$21,369 under the DTPA or \$200,000 for fraud. *Id.* at 306 & nn.27, 28 (citing TEX. BUS. & COMM. CODE § 17.50(b)(1) and TEX. CIV. PRAC. & REM. CODE § 41.008(b)). The trial court had

disregarded the punitive damages award (on the ground that Chapa's only claim was for breach of contract), and the court of appeals reinstated the punitive damages award, but only in the amount of \$125,000. *Chapa*, 212 S.W.3d at 303. In the Supreme Court, the defendant argued that the punitive damages award was unconstitutional. *Id.* at 306-07. The plaintiff countered that the Legislature had rendered any award up to the cap “constitutionally permissible.” *Id.* at 307.

The majority opinion rejected the plaintiff’s argument and stated that a punitive damages award – regardless of whether it satisfies the Texas statutory cap – “is still ‘subject to an ultimate federal constitutional check for exorbitancy.’” *Id.* In reviewing the award for constitutionality, the appellate courts are not supposed to judge “exorbitancy,” but rather: (a) the nature of the defendant’s conduct; (b) the ratio between exemplary and compensatory damages; and (c) the size of civil penalties in comparable cases. *Id.* at 308. The nature of the defendant’s conduct, which is the most important factor, has five sub-factors:

- whether the harm caused was physical as opposed to economic;
- whether the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others;
- whether the target of the conduct had financial vulnerability;
- whether the conduct involved repeated actions or was an isolated incident; and
- whether the harm was the result of intentional malice, trickery, or deceit, or mere accident.

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419, 123 S.Ct. 1513 (2003).

In the *Chapa* case, the Court noted that “the court of appeals’ award exceeds four times Chapa’s total compensatory award, and is more than 17 times her economic damages.” 212 S.W.3d at 308. The Court also compared the punitive damages award to statutory civil penalties authorized in comparable cases. *Id.* at 309. Therefore, the Court concluded that the court of appeals’ award exceeded the constitutional limitations on exemplary damages. *Id.* at 310. The Court remanded to the court of appeals to figure out a constitutionally permissible remittitur. *Id.*

Justice Johnson filed a concurring opinion, and Justice O’Neill dissented. Both justices agreed that the statutory cap did not preclude a finding of unconstitutionality. *Id.* at 316 (Johnson, J., concurring), 317 (O’Neill, J., dissenting). However, Justice Johnson believed that the court of appeals’ analysis of the constitutionality issue and the constitutionality of its award was unclear. *Id.* at 316

(Johnson, J., concurring). He would have remanded to the court of appeals for reconsideration of the punitive damages issue and a more complete explanation of its analysis. *Id.* Justice O’Neill would have applied the standard that reviewing courts should accord “substantial deference” to legislative judgments concerning appropriate sanctions (*i.e.*, the caps). *Id.* at 317 (O’Neill, J., dissenting). She also disagreed that the court of appeals’ award violated the three-part test for unconstitutionality. *Id.* at 318.

XIV. TECHNOLOGY IN THE COURTS

A. E-briefing

E-briefs are becoming more and more common in appellate courts generally.

1. Texas Supreme Court

In the Texas Supreme Court, parties are requested to submit e-briefs if and when briefing is requested on the merits. At that point, the parties are requested to prospectively submit e-copies of their briefs on the merits, and retrospectively submit e-copies of the earlier papers (*i.e.*, petition and reply, or response, depending on the party) that were filed. The Court then posts the e-briefs (and copies of petition-related papers) on the website.

Electronic briefs can be found at <http://www.supreme.courts.state.tx.us/ebriefs/ebriefs.asp>. Briefs are stored by year/case number, so before visiting the electronic briefing page, jot down the case number of the cause(s) you’ll want to find.

2. Waco Court of Appeals

In the Waco Court of Appeals, parties are requested to submit e-briefs in addition to filing hard copies. 10TH DIST. L. R. 12(g). The court prefers searchable PDF format. *Id.* The e-brief may be submitted on CD-ROM or by e-mail. Additional format guidelines and the required certificate of compliance may be found on the court’s website (not in the local rules) at <http://www.10thcoa.courts.state.tx.us/ebriefs/ebriefs.asp>.

3. San Antonio Court of Appeals

The San Antonio Court of Appeals does not require or request parties to submit e-briefs, but the court does ask that parties follow certain guidelines if they choose to submit e-briefs for convenience or courtesy. The guidelines, including certificate of compliance, are similar to those in Waco, and can be found at <http://www.4thcoa.courts.state.tx.us/ebriefs/ebriefs.asp>.

B. E-notices

The Texas appellate courts make their dockets available online. You can sign up to receive automatic notices by e-mail whenever the docket in a particular case is updated. These notices are not foolproof. Sometimes, automatic notices are generated when a minimal, technical, “housekeeping” kind of change is made. Also, as with any other computerized record, errors can be made and omissions can occur. That said, the automatic e-notices are a great tool to keep apprised of activity in pending appeals. They also provide a method to track activity in appeals in which you are not involved but which may impact cases you’re working on.

1. Dallas Court of Appeals

The Dallas Court of Appeals was one of the first Texas appellate courts to develop a website, which is run through Courtstuff (<http://courtstuff.com/5th/>). In order to sign up for e-notices, open the docket for the particular case you are interested in (using the “Search” and “Search Case Information” features). Scroll down to the bottom of the docket information, where there are several listed options, including “Subscribe for vNotices! on this case (Must Register first! - see below).” If you already registered once, just click on the link and send the e-mail that pops up. If you are not registered, click on the link further down that says, “Register an email address so Subscribe for vNotices!” and follow the directions.

2. Other courts of appeals and Texas Supreme Court

The other Texas courts of appeals and the Texas Supreme Court use a unified system called CaseMail in order to provide e-notices. There is a “CaseMail” area on the right-hand side of these courts’ homepages, from which you can launch various features. Alternatively, you can sign up for CaseMail via the docket page for the particular case you are interested in. At the top (right-hand side) of each docket page there is a “CaseMail” link. You have to register for CaseMail one time, but that registration will be good across the CaseMail system thereafter.

C. Internal operating procedures available online

The appellate courts’ websites can be great sources of information about the various courts’ internal operating procedures and preferences.

1. Houston First Court of Appeals

This court provides information and preferred procedures regarding “Filing Documents (and Motions),” available at http://www.1stcoa.courts.state.tx.us/rules/mot_sheet.asp, or by clicking “General Filings” under “Practice Before the Court” on the

right-hand side of the court’s homepage. The Court also provides tips on common problems with civil filings, available at <http://www.1stcoa.courts.state.tx.us/rules/problems.asp>, or by clicking “Civil Filing Problems” under “Practice Before the Court.”

2. Austin Court of Appeals

This court does not have local rules, but has posted a memorandum online detailing its general procedures and guidelines. The memorandum is available at <http://www.3rdcoa.courts.state.tx.us/rules/procedures.asp>, or by clicking “Local Practices” under “Practice Before the Court” on the right-hand side of the court’s homepage.

3. San Antonio Court of Appeals

This court has drafted a seventeen-page document describing its internal operating procedures. This is a wealth of information that you should mine if you have an appeal in this court. The IOPs are available at <http://www.4thcoa.courts.state.tx.us/forms/iopforcases.pdf>, or by clicking “Procedures-IOPs” under “Practice Before the Court” on the right-hand side of the court’s homepage.

4. Texarkana Court of Appeals

This court does not have local rules, but has published its internal policies for dealing with motions for extensions of time. The policies are available online at <http://www.6thcoa.courts.state.tx.us/rules/tips.asp>, or by clicking “Tips & Guidelines” under “Practice Before the Court” on the right-hand side of the court’s homepage.

5. Tyler Court of Appeals

This court has drafted some “Helpful Tips and Guidelines” to aid lawyers in the absence of local rules. My personal fave is Tip #7 – “Extension Motions: When Requesting Brief Extensions, Give the Court More than a Handful of Kibbles N’ Bits.” Check these out at <http://www.12thcoa.courts.state.tx.us/court/tips.asp>, or by clicking “Tips & Guidelines” under “Practice Before the Court” on the right-hand side of the court’s homepage.

6. Houston Fourteenth Court of Appeals

This court posts helpful information about its appellate mediation program at <http://www.14thcoa.courts.state.tx.us/rules/adr.asp>. You also can pull up this page by clicking “Mediation ADR” under “Practice Before the Court” on the right-hand side of the court’s homepage.

D. Webcasts of oral arguments in the Texas Supreme Court

The Supreme Court of Texas, in partnership with St. Mary's School of Law, has begun live video webcasts of oral arguments. The live stream is available at <http://www.stmarytx.edu/law/webcasts>, and also may be available through the Court's website (<http://www.supreme.courts.state.tx.us>). The video arguments will be archived through St. Mary's website.

A schedule of upcoming oral arguments is available at <http://www.supreme.courts.state.tx.us/oralarguments/oa.asp#smis>. Although it appears that all oral arguments will be slotted for webcasting, the Court has issued a policy allowing motions to opt out of webcasting for a particular argument.

Currently, the webcasts are available for up to 300 simultaneous viewers. The Court will monitor usage to evaluate whether more capacity is needed. The Court also posts audio recordings (in MP3 format) of all oral arguments, usually within a few hours of the oral argument. Audio files are available at <http://www.supreme.courts.state.tx.us/oralarguments/audio.asp>.