

## **Texas Rules of Civil Procedure**

*This outline is provided to give clients a general understanding of the processes and issues that may be involved in the clients case. This is an outline that may not be up to date and the outline is far from comprehensive. It is not a substitute for legal advice and is not intended to assist in the prosecution of any case. It is offered solely as information to make the litigation process more decipherable to the client. It is not intended and should not be used as a substitute for legal advice.*

### **TEXAS CIVIL PROCEDURE-PROCEDURE OVERVIEW**

Abbreviations used in this outline:

ADR	Alternative Dispute Resolution
CPRC	Civil Practices and Remedy Code
PC	Penal Code
TRAP	Texas Rules of Appellate Procedure
TRE	Texas Rules of Evidence
TRCP	Texas Rules of Civil Procedure
P	Plaintiff/Petitioner
D	Defendant/ Respondent
SJ	Summary Judgement
CMRRR	Certified Mail Return Receipt Requested

The more you know about the final use of the information you obtain and provide to an attorney and the bars to that information will make you a better party to the litigation.

### **CHAPTER ONE: BASICS**

#### **I. Filing and serving documents**

##### **A. Filing Documents**

#### **METHODS FOR FILING DOCUMENTS WITH THE COURT CLERK**

<b>FILING METHOD</b>	<b>EFFECTIVE FILING DATE</b>
Hand delivery	Date Delivered
Certified Mail RRR	Mailbox Rule: Date mailed IF delivered to the court within 10 days after the due date. Must be mailed first class U. S. mail to the clerk at the proper address.
Fax On Receipt	Can be used only if permitted by local rule.

##### **B. Serving Documents on Parties**

#### **METHODS FOR SERVING DOCUMENTS ON PARTIES**

<b>SERVING METHOD</b>	<b>EFFECTIVE SERVICE DATE</b>
Hand delivery	Date Received
CMRRR	Mailbox Rule - postmark date; add 3 days to the response period.
Fax	Date Transmitted, unless sent after 5 p.m. Then it is considered served the next day. Add 3 days to the response period.
Other	Any other manner as the court may direct.

## C. Rules for Computing Time

### REMEMBER:

Notice of hearing must be served at least 3 days before the hearing.

### RULES FOR COMPUTING TIME

1. Don't count the first day (the day of the triggering event, e.g., filing or service). The first day is day 0.
2. Count the last day. The last day of the time period is the day you must act (e.g., if you have 30 days to respond, your response is due on the 30th day).
3. If the last day is a Saturday, Sunday, or legal holiday, then the day you must act is the next day that is not a Saturday, Sunday, or legal holiday.
4. Count intervening Saturdays, Sundays, and legal holidays, even for the 3-day notice of hearing rule, the 3-day period added for mail or fax service and for time periods under the FED rules. Intervening Saturdays, Sundays, and legal holidays are NOT counted, however, for other time periods of 5 days or less.

## CHAPTER TWO:

### SUBJECT-MATTER JURISDICTION

**OVERVIEW.** The power of a court to adjudicate a particular controversy is its subject-matter jurisdiction. Subject-matter jurisdiction is granted in the Constitution or in a statute. Courts have limited subject-matter jurisdiction. A court has no power to adjudicate a controversy outside of its subject-matter jurisdiction, and any attempt to do so is void.

#### I. FEDERAL COURTS

A claim may be filed in federal court only if there is: (1) diversity OR (2) federal question.

##### A. DIVERSITY JURISDICTION

The requirements for diversity jurisdiction:

1. The amount in controversy exceeds \$75,000, AND
2. There is complete diversity of citizenship between the parties.

##### Hypothetical

If Yankee's owner, George Steinbrenner, sues Vandelay Industries, which is incorporated in Delaware with its principal office in New York, on a state law claim for \$100,000 in damages, does the federal court have jurisdiction? No - Individual citizenship based on domicile, corporation based on place of incorporation or principle office.

For individuals, citizenship is determined by domicile, which is where the person resides with the intent to reside indefinitely. Individuals can have only one domicile. Corporations may have multiple citizenship: in the state of incorporation and in the state in which the corporation's principle office is located.

##### B. FEDERAL QUESTION JURISDICTION

The federal courts have jurisdiction over all civil actions arising under the Laws, Constitution, or Treaties of the United States, regardless of the citizenship of the parties or the amount in controversy.

##### C. SUPPLEMENTAL JURISDICTION

Under the doctrine of supplemental jurisdiction, the federal court has discretion to hear most claims arising from the same nucleus of operative facts as the federal claim that could not independently be brought in federal court.

#### II. TEXAS COURTS

**OVERVIEW.** Justice of the Peace, County and District courts are created by the Constitution. The Texas legislature cannot take away the constitutional jurisdiction of a court, but it can add to the constitutional jurisdiction. The legislature also can create additional courts, Statutory or legislative courts include the County Court at Law, the Probate Court, and the Family District Court.

Three factors determine which Texas court has jurisdiction over a particular case:

What TYPE of case is it?

Amount in controversy

RELIEF sought

Note: All courts can render a judgment for damages, but other types of relief may be limited (e.g., a Justice of the Peace Court cannot grant an injunction).

**A. JUSTICE OF THE PEACE COURT**

1. Exclusive jurisdiction over forcible entry and detainer cases (FED), suits to determine possession of premises, but
2. No jurisdiction to determine title to real property, which must be decided by the district court.
3. \$.01 to \$5,000.

**B. CONSTITUTIONAL COUNTY COURT**

1. General probate jurisdiction, but goes to district court if contested.
2. \$200.01 to \$5,000.

**C. DISTRICT COURT**

1. Residual jurisdiction of all matters except where another court is given exclusive jurisdiction, AND
2. Exclusive jurisdiction over  
Divorce  
Escheats  
Elections  
Land Titles  
Slander & libel

3. \$500.01 to infinity. (But some courts have held that the minimum jurisdictional amount is \$200.01.)

**D. COUNTY COURT AT LAW (STATUTORY COURT)**

1. For any particular county court at law, you must look at the creating statute. A particular court must have jurisdiction over anything, and may even have the same jurisdiction as a District court.
2. Some generally applicable statutes give county courts at law at least:
  - a. Eminent domain jurisdiction, except if title is at issue, then the case must go to district court, except in large counties, where the county court at law has been given jurisdiction.
  - b. The probate jurisdiction of the county court, and also jurisdiction to determine contested matters.
  - c. Appeals from the Worker's Compensation Commission.
  - d. \$200.01 to \$100,000.

**E. STATUTORY PROBATE COURT** has jurisdiction over probate matters, all contested matters incident to an estate and matters by or against a personal representative (including a

wrongful death action filed on behalf of the deceased, and those involving title to real property).

F. CHALLENGES TO SUBJECT-MATTER JURISDICTION are made in a plea to the jurisdiction.

1. Timing: subject-matter jurisdiction can be challenged at any time. The court has no power to proceed.
2. Consequences of granting a plea. The case must be dismissed; the court has no power to do anything else. If dismissed because in good faith filed in the wrong court, the statute of limitations is tolled for 60 days to refile in proper court.

REMEMBER:

To determine amount in controversy:

1. Look at plaintiff's good faith allegations.
2. Include all pleaded damages, including punitive damages, attorney's fees, and interest as damages (e.g., pre-judgment interest).
3. Do not include fees and costs, such as court costs, and interest as interest (interest provided for in a note for detention of money).

REMEMBER:

In Texas, add together multiple plaintiffs' claims against a single defendant, but do not add together a single plaintiff's claims against multiple defendants. In federal court, each plaintiff must have a claim in excess of \$75,000 against each defendant.

CHAPTER THREE:

PERSONAL JURISDICTION

OVERVIEW. Personal jurisdiction is the power of the court to order a D to appear and to follow its orders. There are limits over whom the court has power.

Determining whether there is jurisdiction is a two-step process:

1. Is there a statute allowing the exercise of jurisdiction? The statutes provide for service of process over resident and non-resident defendants, which provides them with notice of suit.
2. Does the exercise of jurisdiction satisfy the due process clause of the U. S. Constitution? The Constitution requires that (i) the notice must be reasonable; and (ii) the exercise of jurisdiction must be fair.

I. TEXAS STATUTES: SERVICE OF PROCESS

A. WHAT IS PROCESS:

D must be served with process, which means D is given a citation and a copy of the petition.

The citation orders D to appear by the deadline or suffer default. The deadline for appearance is 10 a.m. on the Monday following the expiration of 20 days after service (10 days in Justice Court). In federal court, appearance day is generally 20 days after service.

B. HOW IS PROCESS VALIDLY SERVED IN TEXAS? (TRCP 106)

1. Personal service
2. Certified Mail RRR
3. If the D can't be served by either of these, use a method of substituted service. The court, by order, after considering a motion supported by affidavit, may allow service by some method reasonably effective to give D notice, such as leaving with an adult at the usual place of abode or business. Service by publication is only allowed in LIMITED circumstances, e.g., P swears that after due diligence that D can't be located.

C. WHO CAN VALIDLY SERVE PROCESS IN TEXAS? (TRCP 103)

1. Any Sheriff or Constable or persons authorized by law.

2. Clerk of Court can serve by certified mail or publication.
3. Any disinterested person at least 18 years of age who is authorized by law or written order.

D. WHOM TO SERVE - Texas residents

1. If D is a person?

That individual.

2. If D is a corporation?

- (a) its President
- (b) any Vice-President
- (c) its Registered Agent.

3. If D is a partnership? Serve any partner for partnership liability. Each partner for individual liability.

E. RETURN OF SERVICE (TRCP 107)

The person serving the citation fills out the form on the back and states when and how the citation was served and files it with the court. This acts as proof of service of process in the record. The P cannot get a default judgment unless the completed return was on file for at least 10 days (3 days in JP court) before the default judgment is rendered.

II. SERVING NON-RESIDENTS

A. HOW DO YOU SERVE A NON-RESIDENT?

1. Use any method allowed for service of process to serve non-residents either in Texas or in another state (TRCP 108); or
2. Follow procedures set forth in some long arm statute, and serve the non-resident's Texas Agent appointed by the statute.
3. General Long-Arm Statute;
  - (a) provides for in-state service of non-residents doing business in Texas, but having no regular place of business or registered agent for service in Texas, by serving Texas Secretary of State, who then forwards the process to the defendant by CMRRR.
  - (b) Pleading Long-Arm Statute: petition must allege (i) Secretary of State is agent for service, (ii) because the non-resident is engaged in business in Texas, (iii) non-resident doesn't maintain a regular place of business in Texas, (iv) non-resident doesn't have designated agent for service, (v) lawsuit arises out of non-resident's business in Texas.
  - (c) Doing Business in Texas: (1) non-resident contracts with Texas resident and either party is to perform contract in whole or in part in state or (2) non-resident commits a tort in whole or in part in the state.
  - (4) Other long-arm statutes may apply, e.g., non-resident motorist involved in an accident may be served by serving the chair of the Texas Department of Transportation.

NOTE: In federal court the challenge to personal jurisdiction is made by a motion to dismiss or a defense asserted in the answer, and is waived if not filed before or with the answer. The plaintiff has the burden to prove jurisdiction.

B. CONSTITUTIONAL DUE PROCESS

1. Which non-residents can you serve with Texas process? Those amenable to Texas process. The general long arm statute and Rule 108 authorize the Texas courts to reach as far as due process allows in serving non-residents with process.
2. Requirements: exercise of personal jurisdiction must satisfy due process requirements of
  - a. Minimum contacts, established by
    1. specific jurisdiction - where cause of action is connected to D's contacts in Texas, OR
    2. General jurisdiction - where contacts are continuous and systematic, AND

b. Comport with the traditional notions of fair play and substantial justice.

### III. CHALLENGING EXERCISE OF PERSONAL JURISDICTION

OVERVIEW. If the court's exercise of jurisdiction over the defendant violates due process, the defendant must object by filing the appropriate motion. The failure to properly object waives the constitutional challenge and subjects the defendant to the court's jurisdiction. In Texas, the special appearance is the procedure by which a defendant objects to the court's power to exercise personal jurisdiction under constitutional due process. It is distinguished from a general appearance, which is any appearance before the court other than a special appearance (such as filing an answer or any other objection or motion). A general appearance waives the constitutional challenge to jurisdiction.

### IV. CHALLENGING DEFECTS IN THE CITATION, JURISDICTIONAL ALLEGATIONS, AND SERVICE OF CITATION OVERVIEW.

If there is something wrong with the citation, the method of service, or the jurisdictional allegations in plaintiff's petition the defendant can object instead of filing an answer in response to the defective service of process. (no special appearance).

A. In Texas state court, by a motion to quash service.

B. In federal court, defects in service raised by a motion or defense asserted in answer.

### V. MOTION TO DISMISS FORUM NON CONVENIENS

OVERVIEW. Although the court has jurisdiction, it may make sense to have the case tried in the courts of another state or another country for the convenience of litigants and witnesses and in the interest of justice.

## CHAPTER FOUR: PLEADINGS

OVERVIEW. The pleadings control the discovery, evidence, jury charge, and form the basis for judgment and appeal. The pleadings must give fair notice of the facts and legal theories at issue.

### I. PLAINTIFF'S PLEADINGS

The plaintiff initiates the case by filing petition in state court, and in federal court by filing a complaint.

A. PLEADS A DISCOVERY LEVEL IN THE FIRST NUMBERED PARAGRAPH.

B. STATES A CAUSE OF ACTION by pleading facts and legal theories.

C. PLEADS DAMAGES

1. A general damages allegation (AP has suffered injury and damages@) supports recovery only for damages that naturally and necessarily flow from the harm alleged. In personal injury actions, this is limited to pretrial pain and suffering.

2. Special damages must be specifically alleged (e.g., lost wages, medical expenses, loss of consortium).

3. When damages are unliquidated (not specified in a contract or written instrument, but determined by the fact finder, e.g., in a personal injury action), the plaintiff should not allege a specific amount sought, but allege only that the damages are within the court's jurisdictional limits.

D. DEMAND FOR JUDGMENT: a request for the specific type of judgment sought

1. A general prayer (for Aall the relief to which plaintiff is entitled@) will allow recovery of damages consistent with the pleadings.

2. A special prayer is needed for other types of relief, such as an injunction, rescission of a contract, appointment of a receiver, declaratory judgment.

### II. DEFENDANT'S PLEADINGS

OVERVIEW. After being served with process, the defendant must appear in the court and respond to the lawsuit to prevent a default judgment. Usually, this is done by filing an answer, which serves as the defendant's pleading giving the plaintiff fair notice of the defendant's position in the lawsuit.

A. DENIALS: Allegations that deny the truth of the P's allegations and require P to prove the allegation at trial.

1. Federal court: For each allegation in P's complaint, the D must admit, deny or state that D is without sufficient information to admit or deny.

2. State court: Defendant can file a general denial which denies all of P's allegations, and puts P to its burden of proof.

3. Special Denials: The Texas rules require specific denials of certain matters to put them at issue. A general denial is not sufficient, and if there is no special denial, the matter is taken as true. Two rules that require special denials:

a. Conditions Precedent: When has alleged under TRCP 54 that all precedent to P's recovery have been performed or have occurred, D must file a special denial to require plaintiff to prove the performance or occurrence.

b. Verified Denials: This is a special denial that is effective only when made under oath. They are listed in TRCP 93.

REMEMBER: VERIFIED DENIALS

P arty defects

I AB denials

G enuineness of instrument

S worn account denials

C apacity of party attacks

A ssumed name denial

L oss (proof of denial)

P artnership/corporation denial

S ame claim pending in another court

A uto insurance denial

U sury assertion

C onsideration denial

E xecution of instrument denial

B. PLEADING OBJECTIONS

1. In state court, use special exception to object to any defect in pleading

a) Must be in writing and specifically describe the defect in the opponent's pleading.

b) If granted, the opposing party must amend or risk the claim being struck or the case dismissed.

c) If plaintiff has sued in excess of minimum jurisdictional limits (no specific amount given), defendant files special exception to get plaintiff to specify dollar amount sought.

d) Special exceptions also can be used to attack untenable causes of action. If the cause of action isn't allowed under Texas law, D can specially except to petition, and, ultimately, move to dismiss.

2. In federal court

a) File a Motion for more definite Statement to challenge a vague or ambiguous pleading; or a

b) Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted if the P's complaint does not state a claim.

### C. PLEA IN ABATEMENT [DILATORY PLEA]

1. Raises defects not apparent from the face of the pleading that prevent the case from going forward in its present state, such as:
  - a) No legal capacity to sue or be sued
  - b) Defect in parties, e.g., additional parties should be joined
  - c) When case is pending in another court (normally court where dispute first filed has dominant jurisdiction)
  - d) When dispute has been (or should be) submitted to arbitration.
2. If court grants the plea, the case is abated (postponed) until the defect is cured.
3. Some pleas in abatement must be verified because of TRCP 93 (e.g., capacity to sue, defect in parties)

D. AFFIRMATIVE DEFENSES : a defense asserted by the defendant that provides an independent reason to prevent plaintiff's recovery, even if the plaintiff's claim is admitted as true. Yes, but . . . .

#### REMEMBER: AFFIRMATIVE DEFENSES

D has burden of pleading and proving, and is entitled to a jury question on these matters. Rule 94 sets forth a non-inclusive listing of common affirmative defenses.

I l legality

D uress/discharge in bankruptcy

S tatute of frauds and limitations

C ontributory negligence

R eleases/res judicata

A ccord & satisfaction/assumption of risk/arbitration award

P ayment

F ailure of consideration/fraud

E stoppel

W aiver

### III. SIGNING PLEADINGS

A. The first lawyer to sign the pleadings is the attorney in charge unless another is so designated.

#### B. SANCTIONS FOR FRIVOLOUS PLEADINGS

1. Under TRCP 13, the signature operates as a certificate that to the best of the signer's knowledge, formed after reasonable inquiry, that the instrument is not groundless and brought in bad faith, or brought for the purpose of harassment.
2. Under Chapter 10 of CPRC, sanctions may be available if pleadings lack evidentiary or legal support, are filed for an improper purpose, or without due diligence. What's the primary difference between the two? Chapter 10 does not require bad motive.

### IV. AMENDED AND SUPPLEMENTAL PLEADINGS

#### A. TYPES

To add to or withdraw matters from your original pleading? Amended Pleading

If you previously have filed a pleading and now you want to add something to respond to last previous pleading of your opponent? Supplemental Pleading

If you want to add to or withdraw matters from your pleadings during trial? Trial Amendment

#### B. TIMING

Amendment of pleadings freely allowed until 7 days before trial. During this period, opposition to amendment raised by motion to strike. Within 7 days of trial, motion for leave required.

In federal court, each party is entitled to one amended pleading within 20 days of service; otherwise leave of court generally is required.

### C. STANDARD

#### 1. Who has the burden?

At all times, court must allow amendment unless the opponent proves that the amendment causes surprise and prejudice and asks for a continuance. If there is no such evidence, the trial court must allow the amendment.

#### 2. Proof

What if the amendment seeks to add an entirely new cause of action? This is a substantive amendment, and constitutes evidence of surprise and prejudice, so the court can refuse to allow the amendment. What if the amendment seeks to add a verification that was mistakenly omitted? This is a formal amendment and does not constitute evidence of surprise and prejudice. The trial court must allow the amendment if this is the only evidence.

### V. JOINING ADDITIONAL CLAIMS AND PARTIES

OVERVIEW. Joinder involves decisions about whether to include multiple claims and multiple parties in the same lawsuit. Generally, claims that arise from the same transaction or occurrence should be joined. Joinder rules balance two policies: one favors joinder in the interest of judicial economy; the other disfavors joinder that adversely affects fair adjudication.

#### A. TYPES OF JOINDER

1. Counterclaim: defendant wants to file a claim against the plaintiff
2. Cross-Claim: defendant wants to file a claim against a co-defendant
3. Interpleader: there are competing claims to a sum of money or property that a party (such as a trustee, insurer, or bank holds. The money or property is deposited into the registry of the court, and a disinterested stakeholder may recover attorney's fees.
4. Plea in Intervention: a nonparty wants to become a part of an existing lawsuit. No leave of court required, so allowed unless opposing party files a motion to strike.
5. Amended Petition: plaintiff wants to join an additional defendant or an additional claim.
6. Third-Party Petition or Impleader: defendant wants to join a party that may be liable for all or part of the claim that the plaintiff filed against her. These are used for joining parties for contribution or indemnity.

#### B. PERMISSIVE JOINDER OF CLAIMS: SINGLE P AND SINGLE D

1. The parties can generally join unrelated claims against one another, e.g., P could sue D for negligence and the D could file an unrelated counterclaim against P for libel.
2. Obscure Restriction: Tort can't not be the subject of set-off or counterclaim against a contractual demand and vice versa, unless they arise out of the same transaction or occurrence. (Delaney Case)

#### C. PERMISSIVE JOINDER OF PARTIES (TRCP 40)

##### REMEMBER

When there are multiple parties, the claims must:

- a. Arise out of the same transaction or occurrence and
- b. Involve common questions of law or fact. (Logical Relationship Test)

#### D. COMPULSORY CLAIMS: barred from a subsequent suit.

1. For plaintiffs: Once a party has brought a claim against another party, the doctrine of Res Judicata requires that all same transaction/occurrence claims be brought.

2. For defendants: If a party has claims asserted against her, the compulsory counterclaims rule requires her to bring all same transaction/occurrence claims against her opponent. Rule 97 sets out the requirements. The counterclaim must:

- a. Be within subject matter jurisdiction of court.
- b. Not be filed elsewhere.
- c. Be mature (ready to be brought).
- d. Not require the presence of third-parties over whom the court doesn't have jurisdiction.
- e. Be against the opposing party in the same capacity.
- f. Arise out of the same transaction or occurrence.

A counterclaim that does not meet these requirements is: permissive. It can be brought in this lawsuit, but it won't be barred in a subsequent lawsuit.

3. A cross-claim is generally permissive, but will be compulsory if one co-party brings a claim against another co-party. The parties become opposing parties; res judicata and the compulsory counterclaim rule apply.

E. SEVERANCE AND SEPARATE TRIALS. When claims are disjoined, or properly joined but for some reason they should not be tried together, the court can order

1. Separate trials - different parts of case tried separately, but are still part of the same case.
2. Severance - one case is split up into independent cases with their own dockets and final judgments. Used when there is more than one cause of action
3. Dismissal - is not appropriate, even if claims are disjoined.
4. Consolidate - two separate cases become one.

F. COMPULSORY JOINDER OF PARTIES (TRCP 39)

OVERVIEW. Parties whose interest will be affected by the litigation should be joined if feasible. If they can't be joined, the court has to decide whether to proceed without them or dismiss the suit. If the absence of parties is not raised at trial, parties present cannot later complain, and the judgment will bind the parties who are present.

G. CLASS ACTIONS

OVERVIEW: When; many similarly situated plaintiffs have claims against the same defendants, it may be more efficient to have one lawsuit that binds all of them, even though they cannot all be joined as parties. Because all are not parties, the court must be more involved than usual to make sure the procedure is faire to everyone, including absent plaintiffs and defendants.

1. Requirements - Persons seeking class certification must
  - a. Show that all the following requirements are met
    - 1) Numerosity - class is so numerous that joinder of all members is impractical.
    - 2) Commonality - involves questions of law or fact common to the class.
    - 3) Typicality - looks at individual claims of the class representatives. Individual claims must have same essential characteristics as those of class as whole .
    - 4) Representative ness - representatives will fairly and adequately represent the class, AND

(All four required plus one of these)

b. Show that the class action fits into one of these categories of class actions:

- 1) Will eliminate a risk of separate adjudications, or
- 2) Appropriateness of declaratory or injunctive relief for the entire class, or
- 3) Involves claims affecting specific property, or
- 4) Common questions of law or fact predominate over individual questions, and the class action is a superior method of adjudication.

2. Court order granting or denying certification can be
  - a. Changed or withdrawn before final judgment.
  - b. Immediately reviewed by interlocutory appeal.
3. Once certified the court orders notice to all class members, so those notified will be bound by judgment, unless opt out.
4. Class action can't be dismissed or settled without a court order.

## CHAPTER FIVE: VENUE

**OVERVIEW:** Under the Texas venue statutes, certain counties are proper venue for a particular case. If the plaintiff does not sue in a proper county, the defendant can get the case moved to a proper county. Even if the plaintiff sues in a proper county, the defendant can get the case transferred if another county is mandatory venue, or the court finds that convenience and justice requires transfer to another proper county.

**A. SUBSTANTIVE VENUE PROVISIONS UNDER THE CPRC** - identifies counties where venue is proper under the general rule, permissive provisions, or mandatory provisions.

1. General rule.
  - a. Venue is proper in the counties
    - 1) Where all or most of the events or omissions giving rise to the claim occurred.
    - 2) Where the defendant resides when the cause of action accrued if the defendant is a natural person.
    - 3) Where D's principal office in Texas is located, if D is not a natural person. A principal office means the organization's Texas office where decision makers conduct the organization's daily affairs (nerve center approach). (Can have more than one principal office.)
  - b. The defendant can move to transfer venue from a county of proper venue to another county of proper venue for convenience and justice.
    - 1) Defendant's economic and personal hardship requires transfer,
    - 2) Balance of interests of all parties predominates in favor of transfer, AND
    - 3) Transfer is not unjust to any party.
2. Permissive exceptions to the general rule. Permissive venue exceptions provide for proper venues in addition to those found in the general rule. The most important are:
  - a. The county where the P resided when the cause of action accrued is proper venue for suits against insurance companies and breach of warranty suits against manufacturers.
  - b. When suit is for breach of a nonconsumer written contract, venue is proper in the county expressly named as the place for performance of the obligation sued upon.
3. Mandatory exceptions to the general rule. Even if venue is proper under the general rule or some permissive exception, D can still have the case transferred if a mandatory exception applies.
  - a. Land suits, including title and partition actions, suits for damages to real property, and landlord tenant disputes:  
Must be filed in county where land located.
  - b. Injunctions against suit or against execution of judgment:  
Where suits pending or Judge rendered.
  - c. Mandamus against the state of Texas: Travis County.
  - d. Lawsuit against a county: In that county.
  - e. Libel or slander suit: county where
    - 1) P resided at the time the action accrued;

- 2) D resided when suit was filed,
- 3) Any D's residence, or
- 4) Corporate D's domicile.
4. Multiple claims and multiple defendants. If venue is proper against one defendant, venue is proper against all defendants and for all claims that arise from the same transaction.
5. Multiple plaintiffs. Each plaintiff must independently establish proper venue. However, the court may allow a plaintiff to stay in the suit if it is fair and just to do so, which means that:
  - a. Joinder is proper,
  - b. Joinder doesn't unfairly prejudice another party,
  - c. There is an essential need for plaintiff to stay, and
  - d. The county is fair and convenient for all.

#### B. CHALLENGES TO VENUE

To challenge venue, D files a Motion to transfer Venue.

1. Grounds
  - a. P has filed suit in a county that is not proper under the general rule or permissive exception; OR
  - b. Even if the county is proper under the general rule or permissive exception, D can move to transfer venue if:
    - 1) A mandatory provision applies, compelling transfer; or
    - 2) Convenience and justice compel transfer to another proper county.
2. Timing
  - a. Due order of pleading applies. Motion must be filed prior to or concurrently with any defensive pleading, except for a special appearance. (Can be filed with answer).
  - b. If D files an answer before filing a Motion to Transfer venue, D has waived his venue rights. The case stays in the county chosen by the P, even if the county is not proper, and even if D seeks transfer to a mandatory county.
  - c. If multiple defendants are involved, an act or omission of one D does not affect the right of another D to challenge venue.
3. Content
  - a. Why transfer? Motion must state the factual and legal basis for the transfer.
  - b. D's choice. Motion must state the county to which transfer is sought.
  - c. D's choice is proper. The motion must specifically plead venue facts supporting transfer.
  - d. D must specifically deny P's venue facts because P's venue facts are taken as true if not denied.

Procedure:

1. Motion to Transfer Venue: D files motion to transfer venue before filing any other pleading. The motion states that Webb County is not proper under the statute, and that D seeks transfer to Bexar County, a proper county. If P has alleged venue facts in the petition that are not true, D must specifically deny them.
2. Deadlines: D sets a hearing on the motion, giving P 45 days notice; P must respond 30 days before the hearing; and D can reply 7 days before the hearing.
3. Proof: Venue facts are established by pleadings that have not been specifically denied; affidavits or discovery products supported by affidavit. Live testimony? No.
4. Standard of decision: Prima Facie Proof (PFP) = minimum quantity of evidence necessary to support a rational inference that the allegation is true.

REMEMBER:

If P presents prima facie proof that venue is proper in the county of suit, there is no transfer UNLESS

1. Mandatory Venue
2. Transfer for convenience or justice

#### C. APPELLATE REVIEW OF THE VENUE DECISION

1. Generally, review is available only after final judgement, BUT
  1. The trial court's decision on transfers for convenience and justice are not reviewable by mandamus or Appeal and is not reversible error.
  2. Mandatory venue provisions can be enforced by: Mandamus - filed no later than 90 days before trial or 10th day after date notice of trial setting.
  3. Venue rulings affecting multiple plaintiffs are reviewable by interlocutory appeal (if Joinder).
2. Standard of Review.

The appellate court reviews the entire record (including the trial on the merits) to determine if there is any evidence that venue is proper in the county where P filed suit. If venue was not proper in the county in which the case was tried, the error is not harmless, and the court of appeals must reverse and remand with instructions to transfer.

#### 4. MOTION TO CHANGE VENUE BASED ON LOCAL PREJUDICE AND INABILITY TO GET AN IMPARTIAL TRIAL

This motion does not address whether venue is proper or not under the venue statutes. It addresses only whether a party can get a fair trial in the county of suit. If the court finds local prejudice, it transfers the case to an adjoining county where venue is proper, or any county of proper venue, or any county where an impartial trial is available. Either party can file this motion.

#### 5. FEDERAL VENUE

Federal court venue is concerned with federal judicial districts which are much larger than counties. Generally, venue is proper in any district where any D resides, or in any district where a substantial part of the claims or omissions giving rise to the claim occurred. Transfer is available even from a proper venue to serve interests of convenience and justice.

#### CHAPTER SIX:

#### DISPOSING OF A CASE WITHOUT A TRIAL

##### 1. MOTION FOR SUMMARY JUDGEMENT (MSJ) (TRCP 166a)

OVERVIEW: When there is no genuine issue of material fact and the Movant is entitled to judgement as a matter of law, the court should render judgment without a trial.

##### 1. REQUIREMENTS

1. Need written motion stating specific grounds for the SJ
2. Supporting summary judgement proof
  1. Pleadings are not proof
  2. Proof includes:
    - 1) Affidavits based on personal knowledge,
    - 2) Certified court documents
    - 3) Discovery products (including deposition excerpts) filed and served
  3. Affidavits from interested and expert witnesses must be clear, positive, direct, credible, free from contradictions and subject to being readily controverted.
4. Oral testimony? No

##### 2. DEADLINES

1. Motion and supporting proof due 21 days before hearing.

2. Nonmovant's response and supporting proof due 7 days before the hearing.

3. BURDENS (Traditional MSJ)

1. D as movant must

1. Show that P can't recover on (conclusively disprove) at least one element of the cause of action. D has the burden of proof.

OR (No evidence MSJ)

2. After a reasonable time for discovery, D's motion asserts that P has no evidence, putting P to burden of presenting some evidence of an element of P's cause of action. If P fails to do so, D gets SJ. A no-evidence motion is similar to a motion for directed verdict: the nonmovant must produce more than a scintilla of proof to raise a genuine issue of material fact.

OR

3. Conclusively establish all elements of an affirmative defense. D has the burden of proof.

2. P as movant must conclusively establish all elements of the cause of action, but does not have to conclusively disprove any affirmative defense that are merely raised in D's pleadings.

An otherwise valid motion for summary judgement will not be defeated by D's mere pleading of an affirmative defense. An affirmative defense would prevent the granting of P's motion only if D supported each element of the affirmative defense with summary judgement evidence.

4. Appealability. Ordinarily, the granting of MSJ is appealable when it results in a final judgement; the denial of a MSJ is not appealable. Exception: First Amendment or governmental immunity.

II. DISMISSAL FOR WANT OF PROSECUTION (DWOP)

OVERVIEW: If a party seeking affirmative relief (usually the plaintiff) fails to set the case for trial, fails to appear for a hearing or trial, or otherwise fails to act to dispose of the case, the court can dismiss the case for want of prosecution.

1. DWOP NOTICE

Court notifies of intent to DWOP unless P sets case for trial, takes other action court specifies, or shows good cause for the case remaining on the docket.

2. FOLLOWING DISMISSAL

1. P can refile lawsuit (if no statute of limitations problem) because DWOP is not an action on the merits. Not dismissed with prejudice.

2. P can file motion to reinstate the case within 30 days after the order of dismissal is signed.

III. NONSUIT

1. P has an absolute right to nonsuit and dismiss its case.

2. DEADLINE: p May nonsuit any time before introducing all its evidence other than rebuttal evidence.

3. To take a nonsuit, a party can file a motion or announce the nonsuit in open court.

IV. DEFAULT JUDGEMENT rendered when defendant fails to answer or to appear at trial.

1. OBTAINING DEFAULT JUDGEMENTS

1. Requirements (other than no answer filed on behalf of D)

1. Return of service must be on file at least 10 days (3 days in justice court), exclusive of the date of filing and the date of judgement.

2. A certificate of D's last known address must be filed with the clerk.

2. For unliquidated damages, P must present evidence on damages.

3. Even if the answer date has passed, D can file an answer to prevent a default judgement.

Leave of court is not required.

## 2. ATTACKING DEFAULT JUDGEMENTS

### 1. Motions for New Trial

a. Filed in trial court within 30 days after the judgement is signed (2 years after judgement signed if D was served by publication).

2. Types - can be based on legal grounds related to some defect in the proceeding or can be based on equitable grounds.

3. Requirements for equitable motions for new trial.

1) That the failure to answer:

1) Was not intentional or due to conscious indifference,

or

2) Was due to mistake or accident.

4) That the motion sets up a meritorious defense. But meritorious defense is not needed if the D's failure to appear was due to no notice, and

5) That there is no delay or other injury to the P if new trial is granted.

2. Restricted Appeal (formerly known as writ of error)

1. File petition seeking review by Court of Appeals.

2. Requirements:

1) Can be filed up to 6 months after judgement signed.

2) Error must be on the face of the record, and

3) The petitioner did not participate in the proceeding at which the judgement was rendered.

3. Equitable bill of review

a. File new sworn petition in the trial court.

2. Requirements

1) Previous judgement procured by extrinsic fraud or its equivalent.

2) Existence of meritorious defense.

NOTE: Items 1) & 2) need not be established if D had no notice of the action.

3) Absence of fault or negligence on the part of the bill of review petitioner.

4) Can be filed for up to 4 years after signed judgement.

REMEMBER:

If you are asked a question concerning overturning a default judgement: First, look at the date of the judgement. If you are within 30 days, MNT (always the best option) is available; if within 6 months, restricted appeal may be available. Second, look at the error in the judgement. MNT can cure any error. A restricted appeal must have an error appearing in the record. If you have service but no notice, go for the bill of review.

## 22. ALTERNATE DISPUTE RESOLUTION (ADR)

OVERVIEW: By statute, a trial or appellate court can require opposing parties to submit to alternative dispute resolution procedures using an impartial third party to attempt to reach a settlement. Court-ordered ADR must be non-binding.

### 1. TYPES OF ADR THAT CAN BE ORDERED

The difference between Amediation@ and Anon-binding arbitration under the Texas ADR statutes:

1. Mediation: an impartial person (mediator) facilitates communication between the parties to promote reconciliation, settlement or understanding.

2. Mini-trial: conducted by agreement before either selected representatives for each party or before an impartial third party who may render an advisory NON-BINDING opinion.

3. Moderated settlement conference: each party and counsel present their position before a panel of impartial third parties who may issue a NON-BINDING advisory opinion.
4. Summary jury trial: each party and counsel present their position before a panel of 6 jurors, unless the parties agree to a different number. The panel may issue a NON-BINDING advisory opinion.
5. Arbitration: each party and counsel present their position before an impartial third party who renders a specific award. Award is NON-BINDING unless parties agree otherwise.

## 2. OBJECTIONS

To object, a party must object to ADR in writing, within 10 days of the referral.

## C. CONFIDENTIALITY

Any communication made by a participant in an ADR procedure relating to the dispute is confidential. Confidentiality applies to any ADR procedure (not just court-ordered ones).

4. IMMUNITY. Volunteer impartial third parties are given qualified immunity from civil liability for negligence but not gross negligence (wanton and wilful disregard).

## 5. BINDING ADR

1. Parties agree in contract to refer any dispute to arbitration.
2. By agreement of parties.

## VI. SETTLEMENT

### 1. SETTLEMENT AGREEMENTS

1. Governed by contract law.
2. Only persons specifically identified or named are released.
3. Mary Carter agreements, where one D settles but remains in the case with a stake in the P's recovery, are void in Texas.

### 2. ENFORCING SETTLEMENT AGREEMENTS

1. Agreed judgements. Upon settlement, the parties will agree to dispose of the lawsuit with a dismissal or nonsuit with prejudice or an agreed judgement incorporating the terms of the settlement. After the judgement or order is rendered the parties cannot withdraw consent, and the judgement will be enforced.
2. Withdrawal of consent. The court cannot render an agreed judgement upon a settlement if any party has withdrawn consent. The settlement agreement can be enforced in a suit on the contract, however, if it complies with Rule 11, which requires that the agreement
  1. Be in writing, signed and filed with court papers; OR
  2. Be made in open court and entered of record.

## CHAPTER SEVEN: DISCOVERY

### 1. SCOPE OF DISCOVERY

IN GENERAL. A party can obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action. It is not grounds for objection that the information would be inadmissible at trial if it appears reasonably calculated to lead to the discovery of admissible evidence.

1. LIMITATIONS. The court should limit discovery if it determines that:

1. The discovery sought is unreasonably cumulative or duplicative or is obtainable from other sources less burdensome or expensive; OR
2. The burden or expense of discovery outweighs the likely benefit.

### 2. POTENTIAL WITNESSES - DISCOVERABLE

3. TRIAL WITNESSES other than rebuttal or impeaching witnesses.

4. STATEMENTS OF A PARTY OR WITNESS discoverable regardless of when made. Any person may discover his or her own statement from a party.
  5. INDEMNITY, INSURING, AND SETTLEMENT AGREEMENTS discoverable, even if not admissible
  6. MEDICAL RECORDS or authorization to obtain medical records from provider
  7. INCOME TAX RECORDS discoverable if particular need for them, such as a claim for lost wages.
  8. DEFENDANT'S NET WORTH discoverable in punitive damage case.
- In punitive damage cases, a defendant can request a bifurcated trial. Liability and compensatory damages determined in the first phase; exemplary damages in second phase. (Only in second phase D's net worth disclosed).

I CONTENTIONS. A party's legal contentions and the factual basis for those contentions. However, parties are not required to marshal their evidence to respond.

## II. DISCOVERY CONTROL PLANS AND LIMITATIONS

### 1. DISCOVERY CONTROL PLANS

1. Every case must be governed by a discovery control plan which provides specific discovery limitations and a discovery period during which all discovery must be conducted. The plaintiff must plead a discovery level in its original petition. The initial pleading is to notify the court and the parties of the plaintiff's intentions.

#### 2. LEVEL 1 - SUITS INVOLVING \$50,000 OR LESS

1. Applicability: Level 1 applies to any suit in which all plaintiffs affirmatively plead that they seek only monetary relief aggregating \$50,000 or less, excluding costs, pre-judgment interest and attorney's fees; and, any suit for divorce not involving children in which the party pleads that the value of the material estate is more than 0 but not more than \$50,000. Level 1 will not apply 1) if the parties agree that Level 2 should apply, 2) the court orders a Level 3 plan, or 3) a party amends its pleading seeking relief other than that to which Level 1 applies. Leave to file such an amendment must be sought within 45 days of trial.

#### 2. Limitations:

a. Discovery period begins when the suit is filed and continues until 30 days before trial.

2. Each party may have no more than 6 hours of deposition time, but can agree to expand the limit to 10 hours per party.

3. Each party may serve on the other party no more than 25 interrogatories. Interrogatories asking a party to authenticate or identify specific documents are unlimited in number.

#### 3. LEVEL 2 - DISCOVERY CONTROL PLAN BY RULE Application: Level 2 applies to all suits that are not governed by a Level 1 or Level 3 plan.

#### 1. Limitations:

1. For Family Code cases the discovery period begins when suit is filed and continues until 30 days before trial. For other cases, the discovery period begins when the first oral deposition is taken or the date the first response to written discovery is due and continues for 9 months (or until 30 days before trial, if earlier).

2. Each side may have no more than 50 hours of deposition time to examine and cross-examine parties on the opposing side, experts designated by those parties, and persons subject to their control. If one side designates more than 2 experts, the opposing side may have an additional 6 hours per additional expert designated. The comment to the rule explains that a Aside refers to all litigants with generally common interest in the litigation. Most cases will

have only two Asides. A complex case with multiple defendants, however, may have more than two Asides.

3. Each party may serve on the other party no more than 25 interrogatories (unlimited for authentication or identification of specific documents).

#### 4. LEVEL 3 - DISCOVERY CONTROL PLAN BY ORDER

1. Application: Level 3 applies only when a court orders a discovery control plan tailored to the circumstances of a specific suit, pursuant to a party's motion or its own initiative.

2. Limitations: The plan can address any matter concerning discovery and may change any limitations in the rules. It must include 1) a date for trial or for a conference to determine a trial setting; 2) a discovery plan for the entire case or an appropriate part of it; 3) appropriate discovery limits; and 4) deadlines for joining additional parties, amending or supplementing pleadings and designating experts.

#### 5. MODIFYING PROCEDURES AND LIMITATIONS

Generally, the procedures and limitations of the discovery rules can be changed by agreement or court order for good cause. Further, the court may modify a discovery control plan at any time and must do so when the interest of justice requires. The court must allow additional discovery

1) when new information is disclosed at the deadline for completion of discovery if the adverse party would be prejudiced without additional discovery, or 2) if trial is set more than 3 months after the discovery period ends regarding matters that have changed materially.

### III. WRITTEN DISCOVERY

#### 1. GENERALLY APPLICABLE RULES

1. Discovery materials not to be filed: (a) requests, deposition notices, and subpoenas required to be served only on parties; (b) responses and objections to discovery requests and deposition notices, regardless on whom the requests or notices were served, (c) documents and tangible things, and (d) withholding statements are not filed with the clerk, but are served upon all parties.

2. Discovery materials to be filed: discovery requests, deposition notices, and subpoenas to non-parties; motions and responses to motions relating to discovery; and, discovery agreements are filed with the court. (Hint: just memorize the three discovery things that must be filed; everything else isn't filed.)

3. Requests must be served no later than 30 days before the end of the discovery period.

4. Responses are due 30 days after service of the request; however, if the request is served before D's answer is due, the response is due 50 days after service. The time for response can be changed by agreement and by court order.

5. All requests, responses and objections must be signed by attorney certifying that the disclosure is complete and correct as of the time made and that the request, response or objection is consistent with the procedural rules, has a good faith factual basis, is not for any improper purpose, and is not unreasonably burdensome or expensive.

#### 6. Objections:

1. What to file: When a party objects because a discovery request is improper that party files an objection in the response. A non-party objecting to discovery files a motion for protective order.

2. When to file: Within the time for the recourse.

3. Although a party objects to a request, the party must comply with as much of the request to which there is no objection unless it is unreasonable to do so.

4. An objection is waived if not made within the time required or is obscured by a bunch of unfounded objections.
7. Asserting privilege: A party responding to a request but withholding materials that are privileged should not object, but should make a withholding statement, identifying the privileges asserted. The requesting party can request a description of the withheld materials, which must be served within 15 days. The party asserting the privilege prepares a privilege log that describes the information or material withheld and asserts a specific privilege.
8. Inadvertent Production: A privilege is no longer waived by inadvertent production. If a party inadvertently produces materials that are protected by privilege, the privilege is not waived if, within 10 days of discovering such production was made, the party asserts the privilege. Upon amendment, the other side must return the documents.
9. Hearing
  1. If the party requesting discovery requests a hearing, the objecting party has the burden to establish why discovery is not proper.
  2. Proof at hearing
    1. Oral testimony or affidavits filed 7 days before the hearing.
    2. Make documents subject to specific privileges available for court's in camera inspection.
  10. Federal court: Generally allows the same types of discovery, but requires parties to make certain disclosures soon after the D answers. The Texas rules do not contain the automatic disclosure provisions of the federal rules.
  2. REQUEST FOR DISCLOSURE - IN TEXAS - MUST ASK
    1. Request and Responses: A party may make a simple request for disclosure from another party. No objection is permitted.
    2. Content:
      1. The correct names of the parties;
      2. The name, address and telephone number of any potential parties;
      3. The legal theories and; in general, the factual basis of the responding party's claim or defenses (the responding party need not marshal all evidence that may be offered at trial);
      4. The amount and any method of calculating economic damages;
      5. The name, address and telephone number of persons with knowledge of relevant facts and a brief statement of their connection with the case;
      6. Testifying expert;
      7. Any discoverable indemnity and insuring agreements;
      8. Any discoverable witness statements (a witness statement includes: (1) a written statement signed or adopted or approved in writing by the person making it; or (2) any type of recording of the witness's oral statement or any substantially verbatim transcription of such a recording);
      9. In a personal injury suit, all medical records and bills reasonably related to the injuries or damages asserted, or in lieu thereof, an authorization furnished by the requesting party.
      10. In a personal injury suit, all medical records and bills obtained by virtue of an authorization furnished by the requesting party.
  3. REQUESTS FOR PRODUCTION AND REQUESTS FOR ENTRY
    1. Used to obtain documents and things in a party's custody and control for inspection, copying, sampling and testing, and to enter upon designated real property.
    2. Requests must be specific, describing items or categories of items to be produced, and specify a time and place for production.
    3. Response states objections and states either:

1. Requested action will be permitted as requested.
2. Requested items served with response.
3. Requested action will take place at another time and place.
4. After a diligent search, no responsive items identified.
5. Entry cannot be permitted for reasons stated in the response.
4. Party's production of documents authenticates the document against that party.
5. Non-parties can be compelled to produce documents and things by subpoena or court order. They can be compelled to allow entry on property by order upon a showing of good cause.

#### 4. INTERROGATORIES

1. Used to obtain sworn answers to questions that can be used against the party answering them.
2. Responses signed under oath by the party, not attorney.
3. Verification is not required when answers are based on information obtained from other persons, or answers pertaining to persons with knowledge of relevant facts, trial witnesses, and legal contentions.

#### 5. REQUESTS FOR ADMISSIONS

1. Used to request a party to admit or deny the truth of statements. The purpose is to narrow the issues at trial or facilitate the admissions of documentary evidence. An admission can preclude the party from introducing at trial evidence contrary to the admission.
2. Failure to respond results in a deemed admission.
3. Admissions can be withdrawn upon showing of good cause and if the party relying on the admissions will not be unduly prejudiced and the presentation of the merits will be subserved. Good cause is shown when the failure to respond is accidental or the result of mistake, rather than intentional or the result of conscious indifference.

### IV. DEPOSITIONS

#### 1. DEPOSITIONS ON ORAL EXAMINATION

1. Used to interrogate witnesses (parties or non-parties) who have knowledge of relevant facts. Questions and answers are transcribed or shown by videotape for later use.
2. Notice - written notice of deposition (deponent, place and time) is served on all parties. If deposition is to be recorded by alternate means or additional people are to be present, notice should so state.
3. Compelling appearance
  1. Party (and party's agents and employees). By notice.
  2. Non-party witness - By subpoena.
  3. Parties and non-parties can be compelled to bring documents and things. A request to a party must comply with the rules concerning document discovery, including 30 day notice requirement.
  4. Deposition of a corporation - Notice describes matters upon which examination is requested, causing entity to designate persons to testify on its behalf and the matters upon which each will testify a reasonable time before the deposition.
4. Where can you notice a deposition to take place?
  - a. County where witness resides.
  2. County where witness employed.
  3. County where the case is pending if witness is a party.

4. Other convenient place ordered by the court or designated by agreement.
5. If witness not a resident of Texas, county where witness was subpoenaed or within 150 miles of place of service.
5. How soon can you notice the deposition to take place? Reasonable time after notice but 30 days for documents.
6. Objections to place, time, or general scope of questioning - file Motion to Quash the notice or Motion for Protective Order before deposition begins. If motion filed by the 3rd business day after service of notice, the deposition is stayed until motion is determined.
7. No side may examine or cross-examine a witness for more than 6 hours.
8. No private conferences between witness and the witness's lawyer during the deposition, except regarding an assertion of privilege.
9. Objections during deposition are limited to:
  1. Objection, Form
  2. Objection, Leading
  3. Objection, Non-responsive

These objections are waived if not stated as phrased in the rules. All other objections may be raised later.

10. A clear and concise explanation for the objection can be requested. A lawyer may instruct a witness not to answer to:
  1. Preserve a privilege,
  2. Comply with a court order or the rules,
  3. Protect witness from an abusive question or one that necessitates a misleading response.
11. The deposition may be suspended if the time limitations have expired, or the deposition is being conducted or defended in violation of the rules.

#### **B. OTHER KINDS OF DEPOSITIONS**

1. Depositions on written questions. Witnesses orally answer written questions and cross-questions under oath. Answers are transcribed by court reporter.
2. Depositions before suit or to investigate claims. Used to preserve evidence when a person anticipates a suit and fears that relevant testimony may be lost unless deposition taken or when a person needs a deposition to investigate a potential lawsuit or claim. Court authorizes deposition upon filing of verified petition. The petition must state:
  1. either that the petitioner anticipates a lawsuit or seeks to investigate a claim
  2. the subject matter of the anticipated lawsuit, if any, and the petitioner's interest
  3. if suit anticipated, either the names, addresses, and phone numbers of the persons who are adverse to the petitioner's interests or that those persons can't be determined
  4. the names, addresses, and phone numbers of the persons to be deposed, the substance of the testimony the petitioner hopes to elicit, and the petitioner's reasons for wanting such testimony

#### **3. MOTIONS FOR PHYSICAL AND MENTAL EXAMINATIONS**

Upon motion, a party can request that the court order a physical or mental examination be made of another party whose mental or physical condition is at issue. The examination must be made by a physician or, in some cases, a psychologist.

#### **22. LIMITATIONS ON DISCOVERY: EXEMPTIONS AND PRIVILEGES**

**OVERVIEW:** Often matter is requested in discovery that is relevant, however, the parties contend it is confidential and state law compels that it not be produced to an opponent. When policy dictates secrecy, a privilege is created. Privileges protect confidential relationships (e.g., between attorney and client) and work done to prepare for litigation.

1. WORK PRODUCT PRIVILEGE protects work done in anticipation of litigation. Test: a reasonable person would conclude from a totality of the circumstances that there was a substantial chance of litigation (objective test); and the party resisting discovery had a good faith belief that there was a substantial chance that litigation would ensue and prepared the material requested for litigation purposes (subjective test).

1. Definition: Work product comprises

1. Material prepared or mental impression developed in anticipation of litigation or for trial by or for a party or a party's representatives; or

2. A communication made in anticipation of litigation or for trial between a party and the party's representatives or among the party's representatives (including attorneys, consultants, insurers, employees, agents).

2. Work Products is Protected From Discovery

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

2. Other work product is discoverable only upon a showing that the party seeking discovery has substantial need of the materials in preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent. In ordering discovery, however, the court must protect against disclosure of mental impressions, opinions, conclusions and legal theories.

3. Exceptions. The following are not protected by the work product privilege:

1. Information concerning experts, trial witnesses, witness statements and contentions that are discoverable.

2. Trial exhibits that the trial court orders disclosed.

3. Identities of potential parties or persons with knowledge of relevant facts.

4. Photographic or other electronic images of underlying facts or that the party intends to offer into evidence.

5. Work product created under circumstances within an exception to attorney-client privilege.

2. OTHER PRIVILEGES

1. Material protected by evidence and statutory privileges (e.g., communications between patient/physician, attorney/client, hospital peer review committee materials) are also protected from discovery.

2. Attorney/Client privilege

1. Protects confidential communications between a client or client representative and a lawyer or lawyer representative made for the purpose of facilitating the rendition of legal services.

2. A Client representative of a corporate client in Texas is someone who is part of the control group (someone with the authority to obtain legal advice and act on that advice),

OR

someone who makes or receives a confidential communication while acting in the scope of employment for the client.

VI. EXPERT WITNESSES

OVERVIEW: Expert witnesses are employed and consulted in anticipation of litigation, and seemingly fit into the investigative privilege realm. However, some experts will testify at trial concerning their mental impressions and opinions, and public policy dictates that their work done in anticipation of litigation be discoverable so that they can adequately be cross-examined at trial. The 1999 discovery rules have a detailed procedure for discovery of experts.

1. There are three kinds of experts:

1. Purely consulting experts. They will not testify at trial, and their identities, mental impressions, and opinions that were prepared in anticipation of litigation are privileged from discovery.

2. Testifying experts. They will testify at trial. These experts are generally discoverable. You must disclose when requested: identity, subject matter of testimony, mental impressions and opinions, facts known, any bias, the expert's current resume and bibliography, reports, data compilations, and anything else prepared for expert's testimony.

3. Reviewed consultant experts. They will not testify at trial, but their mental impressions and opinions have been reviewed by a testifying expert. For discovery purposes, these experts are considered the same as a testifying expert. Everything is discoverable when requested.

4.

## 2. DISCOVERY REGARDING TESTIFYING EXPERTS

### 1. Requests For Disclosure

Parties may be required to designate testifying experts through requests for disclosure. Parties may be required to:

1) identify any testifying expert,

2) specify the subject matter upon which the expert will testify and,

3) identify the substance of the expert's mental impressions and opinions. For experts employed by or in the control of the party, requests for disclosure require a party also produce a report and things provided to, reviewed by, or prepared for the expert in anticipation of the expert's testimony and the expert's current resume and bibliography.

### 2. Schedule for Designation

A party seeking affirmative relief must respond to the requests for disclosure 90 days before the end of the discovery period (or, if later, 30 days after service of the request).

### 3. Available for Deposition

Parties seeking affirmative relief must make their experts available for deposition:

1) If no report provided upon designation reasonably promptly after designation, before other experts are designated.

2) If report provided upon designation, only after all other experts are designated.

3) Party that retains the expert pays fees and expenses.

### 4. Reports

Court can order that report be reduced to tangible form and produced.

## VII. DUTY TO SUPPLEMENT DISCOVERY RESPONSES

1. Party has the duty to supplement previous written discovery responses when:

1. Party knows that the response was incorrect or incomplete when made, or the response was correct and complete when made, but is no longer complete and correct; and

2. The written discovery sought (1) identification of potential witnesses, trial witnesses, or expert witnesses or (2) other information and the new information has not been made known to the other parties in writing, or on the record at a deposition, or through other discovery responses.

2. A party must also supplement a testifying expert's deposition testimony and report only with regard to the expert's mental impressions and opinions and the basis for them.

3. DEADLINE. Must supplement reasonably promptly and at least 30 days before trial.

4. The sanction for failing to timely respond or supplement is automatic exclusion of the evidence. The evidence is excluded unless the party offering the evidence can show (1) good

cause for failure to timely supplement, or (2) that the failure to timely respond or supplement will not unfairly surprise or unfairly prejudice the other parties.

#### VIII. SANCTIONS FOR DISCOVERY ABUSE

A. If your opponent is abusing discovery either through abusive requests or abusive failure to respond to proper requests, you may ask the court to punish him by filing a motion for sanctions.

2. Possible sanctions (suggested in Rule 215) include:

1. Monetary sanctions, (including charging costs or attorney fees).
2. Limiting further discovery.
3. Contempt. (But contempt doesn't apply to mental and physical exams).
4. Death Penalty: In the most severe sanction, the court strikes the P's petition and dismisses the case OR strikes the D's answer and enters a default judgement.
3. Limitation on sanctions: Sanction must be appropriate, or just, measured by two standards:
  1. Direct relationship: between the offensive conduct and the sanction.
  2. Sanctions are not excessive: The punishment must fit the crime.
  3. Death penalty sanction is appropriate only if the offending party's actions Justify a presumption that its claims or defenses lack merit.

D. Review: Ordinarily, only after final judgement, but immediate review by mandamus may be available if the sanction has the effect of adjudicating the underlying claim (e.g., what the death penalty would do), or of preventing access to the courts (e.g., the fine requires such a large financial outlay that the party can no longer continue).

#### CHAPTER EIGHT: JURY TRIAL

##### 1. PRELIMINARY MATTERS: GEARING UP FOR TRIAL

##### 1. PRETRIAL CONFERENCE (TRCP 166)

OVERVIEW: The court can require counsel to attend one or more pretrial conferences that may address any number of issues relating to simplifying issues for trial. A pretrial order is issued after the conference is concluded. The court may consider:

1. Pending motions or objections.
2. Pleading amendments (can change deadline set in rules).
3. Statements of parties' contentions, contested and uncontested issues of fact.
4. Discovery schedule (can change deadline set in rules).
5. Exchange of list of trial witnesses (fact and expert), and trial exhibits. (Note: Trial exhibits are not discoverable under request for production; must be by court order.)
6. Objections to trial exhibits.
7. Proposed jury charge or findings of fact and conclusions of law.
8. Address any legal issues.
9. Settlement.
10. Any other matter that may Aaid in the disposition of the action.@

##### 2. SCHEDULING THE TRIAL

Notice required: All parties entitled to not less than 45 days notice of the first trial setting. Thereafter, parties must get reasonable notice.

##### 3. JURY DEMAND

OVERVIEW: In Texas, a party has a Constitutional right to a jury trial in most civil suits and suits in equity, but the party does not get that jury trial automatically. Cases are usually set on the non-jury docket; to receive a jury trial, a party must request one.

1. Texas Constitutional Right to Jury Trial - Applies to civil suits in law as well as equity (e.g., injunctive relief).

2. Procedural requirements
  - a. In writing.
2. Accompanied by the appropriate fee, which is set by statute.
3. Timely filed, which means within a reasonable time before the non-jury setting, but not less than 30 days before the setting.
3. If either party demands a jury, then the jury demand cannot be withdrawn over the objection of any party.

#### 4. WITNESS SUBPOENAS

OVERVIEW: Through a subpoena, an unwilling witness can be forced to come to court and testify. Although a subpoena is a court order, it is enforceable only within certain geographic limits, and obtaining the testimony of witnesses outside of the court's subpoena range may require other tactics.

#### 5. MOTION FOR CONTINUANCE

OVERVIEW: Sometimes you just can't go to court on the day you planned. If you have good cause for not being able to attend, you can ask the trial judge, through a motion for continuance, to set the trial for another day.

##### 1. Procedurally

Motions for continuance must be in writing, with notice to opposing parties, and must be made under oath. Any supporting evidence must be attached as an affidavit.

2. Sufficient Cause: An attorney has to have a good reason for requesting a continuance, and the record must support that reason.

1. Unavailability of an attorney or a party can be sufficient cause.

2. A legislative continuance is mandatory if the trial setting is within 30 days of a legislative session, and a party or lawyer is a member of the legislature. If a session is more than 30 days away, a legislative continuance may be granted at the discretion of the trial judge.

3. Continuance for want of testimony requires showing:

C Materiality and content of testimony,

C Diligence of movant in attempting to obtain testimony, i.e., movant subpoenaed the witness and paid the witness fee,

C Cause of the failure to obtain testimony,

C No other source for the testimony (need not be shown in first motion), and

C Continuance is not for delay, but so that justice may be done.

3. Judge's Discretion: The ruling on a motion for continuance is entirely within the judge's discretion. If the requirements for a motion are not met, it is presumed that there was no abuse of discretion.

#### 6. MOTIONS IN LIMINE

OVERVIEW: Parties often seek, through a motion in limine, a pretrial ruling from the trial judge that references to certain matters cannot be made in open court without first approaching the bench and seeking permission. A motion in limine, when granted, is an order requiring that counsel approach the bench before delving into certain topics; it is NOT a ruling on the admissibility of the evidence being discussed. A ruling on a motion in limine does not preserve error.

1. If the ML is denied:

1. Opposing counsel may offer the evidence without seeking permission first.

2. Movant must object when the evidence is actually offered.

2. If the ML is granted:
  1. Opposing counsel must approach the bench before asking or injecting into the trial those matters covered by the ML.
  2. Movant must object to the particular matter being offered at the bench.

## II. JURY SELECTION

OVERVIEW: To be selected to serve on a jury, potential jurors must meet certain basic qualifications. They do not have to serve if certain exemptions apply. Attorneys may contest the manner in which juror names are selected for a jury panel. An attorney may challenge prospective jurors for Cause or use their peremptory strikes to bar potential jurors.

### 1. JUROR QUALIFICATION

1. Jurors must meet general statutory qualifications, including
  1. At least 18 years of age.
  2. Citizen of county and state.
  3. Not convicted or accused of a felony.
  4. Qualified to vote.
  5. Able to read and write.
  6. Sound mind and good moral character
2. Qualified jurors can exercise an available exemption, e.g., for persons over 70, persons with custody of young children, students.
3. Jurors can be disqualified from serving in a particular case, if the juror is:
  1. A witness in the case, or
  2. Has an interest in the case, or
  3. Is related within the 3rd degree to a party in the case, or
  4. Has a bias or prejudice in favor or against a party in the case, or
  5. Was a member of a previous jury that tried the same case or a case involving the same fact questions.
4. Voir dire - questioning to jury panel of at least 24 in District Court, 12 in County Court.
  1. Conducted by lawyer in state court. In Federal court the judge usually conducts voir dire, but may allow counsel to do so.
  2. Voir dire is used to gain information.
    - 1) To wisely use peremptory challenges.
    - 2) To determine if some juror should be challenged for cause.
2. CHALLENGES FOR CAUSE. When an attorney believes a legal reason exists which would disqualify a juror for a particular case, she may make a challenge for cause.
  1. A juror may be challenged for cause when a legal reason, if proven, disqualifies the juror as a matter of law. The most frequent for cause challenge is that the juror has a bias or prejudice against one of the parties in the case. Bias or prejudice also includes a bias or prejudice toward the subject matter of the lawsuit.
  2. Challenges for cause are unlimited in number.
  3. Denial of a proper challenge is error, but not reversible error unless the party making the challenge can show that prejudice results from leaving an objectionable juror on the panel.
  4. To preserve error, the party must object to the failure of the court to strike a panel member for cause. Before exercising its peremptory strikes, the party must again object, informing the court that it has exhausted its strikes and has kept an objectionable juror that it would have otherwise struck.

### EXAMPLE

As P's investigator in a personal injury lawsuit, you are watching the voir dire examination of the prospective jurors in a case where the P is seeking punitive damages. In response to a general question on punitive damages, a prospective juror blurts out that he is the president of a group called Texans Against Greedy Lawyers and Investigators, and that he believes that all plaintiffs are liars or communists or both and that punitive damages are a form of communism and should be eliminated. What should you and your attorney do?

1. You can get the juror stricken from the panel by
  1. Move to strike the juror for cause (bias and prejudice subject matter).
  2. If the motion is denied, and an objectionable juror would remain on the panel even after you have exercised your peremptory challenges, then you must tell the court which specific juror remains on the panel and renew your challenge for cause. (This must be done to preserve error.)
2. You can attempt to undo the prejudice caused to the jury pool by the statement just blurted out by the prospective juror by asking the judge for
  1. An instruction to disregard; or
  2. A mistrial.

#### 4. PEREMPTORY CHALLENGES

OVERVIEW: These challenges are those that an attorney can use to strike potential jurors without having to give a reason for doing so. Peremptory challenges are limited in number, and they may not be used to unconstitutionally discriminate.

1. No discriminatory challenges (Batson).

Example

Following the voir dire of the jury panel, and the striking of the jury, you find that your opponent has struck every African-American on the panel with his peremptory strikes. When you object to the court your opponent responds, It's my peremptory and I'll strike who I want to - this is a civil not a criminal case! Explain whether there is any proper basis for your objection and the proper method through which any error is preserved.

1. Race and gender based strikes are prohibited in civil as well as criminal cases.
2. Procedure:
  1. Make prima facie proof of discriminatory strike
  2. Burden then shifts to opponent to give a neutral reason for the strike.
  3. Objecting party can offer rebuttal evidence.
  4. The trial court makes a decision, which is reviewed upon an abuse of discretion standard.
3. Timing must object before jury sworn and rest of panel discharged.

Determining the number of strikes.

1. Each side (P or D) has
  - 1) 6 peremptory challenges in District Court.
  - 2) 3 peremptory challenges in county and JP court, and
  - 3) 3 peremptory challenges in federal court.
2. But, when antagonistic parties are on the same side of a case, each is entitled to its own peremptory strikes. To determine antagonism, the court can consider the pleadings, voir dire, or any other information a party makes the court aware of. One side may have more strikes than the other (e.g., plaintiff, a single person, sues three defendants, who are antagonistic; there is one P and 6 strikes, but three D's with a total of 18 strikes).

3. In order to equalize the number of peremptory challenges, the side with fewer parties will file a motion to equalize. The decision is within the court's discretion, and the court need not make each side absolutely equal - a ratio of up to 2:1 is generally allowed.

#### 5. SEATING THE JURY

1. All challenges are executed by scratching the jurors' names off the jury list.

2. The first remaining names constitute the seated jury:

1. The first 12 remaining jurors on the list become the jury in District Court.

2. The first 6 remaining jurors on the list become the jury in County or JP Court.

3. In federal court, the jury consists of at least 6, but not more than 12 jurors.

### III. THE ORDER OF THE TRIAL

#### 1. THE RULE

1. At the request of any party, the trial court shall order witnesses excluded so that they cannot hear the testimony of other witnesses.

2. Exceptions: The court can't exclude party and spouse; entity representative; and, a person whose presence is essential to the presentation of the party's case.

#### 2. OPENING STATEMENTS

1. The party with the burden of proof on the whole case (usually the P) has the right to open and close evidence and arguments (i.e., to go first and last).

2. D may get the right to open and close by admitting all of P's claims (including damages) and the only issue is D's affirmative defense by D.

#### 3. OBJECTIONS TO EVIDENCE

1. There are two reasons for objecting to evidence:

1. To keep evidence out of the trial, and

2. To preserve error.

#### 2. Procedural Requirements

1. Objections must be timely (it does no good to make objections after the jury has heard the very evidence you didn't want them to hear).

2. If the witness has already blurted out something objectionable, the party can make a motion to exclude the response and ask the judge to instruct the jury to disregard what was said.

3. The party making the objection must state the basis for the objection (e.g., hearsay).

4. The party making the objection must obtain a ruling from the judge. Now express or implied from the record. If court refuses to rule, that's a ruling.

#### 4. BILLS OF EXCEPTION

OVERVIEW: If an evidentiary ruling has gone against you, and you were unable to introduce the evidence in question, you want to make sure that the evidence gets into the record for purposes of appellate review. The procedure by which a party gets the evidence into the record is called Amaking a bill, or Amaking an offer of proof, and there are three mechanisms for doing so.

1. Informal Bill of Exception. This is the easiest option because you simply get the excluded evidence in the court reporter's record outside the jury's presence.

1. Present a concise statement of the excluded evidence (e.g., AIf X had been permitted to testify he would have said Y.), or make the offer in question-and-answer format (e.g., call the witness, read from a deposition, etc.).

2. State the grounds for admitting the evidence (e.g., a hearsay exception).

3. Ask for admission of the evidence.

4. Get a court ruling (admitted/not admitted).

5. Make the offer before the jury charge is read to the jury.
2. Formal Bill of Exception. (If you cannot or did not make an informal bill.)
  1. The offering party makes a written offer of proof.
  2. The written offer must be made within 60 days after judgement (or within 90 days of judgement if a motion for new trial is filed.)
  3. The trial judge must sign the bill. (The judge can reject the bill as drafted by the offering party).
  3. Bystander's Bill. As a last resort, if an offering party disagrees with the formal bill signed by the judge, she can have 3 bystanders attest to the correctness of her formal bill and file it.

#### IV. JURY CHARGE

OVERVIEW. Jury charges are designed to instruct jurors in the law applicable to the case, to provide them with relevant definitions, and to set forth the questions the jury is supposed to answer to reach a verdict. The charge is designed to give some structure to jury deliberations on the contested fact issues raised by the pleadings and the evidence.

##### 1. BROAD-FORM CHARGE

###### 1. Broad-Form Questions

The charge should contain controlling fact questions that will support a judgement. A single question may include multiple elements, e.g., "Did the negligence, if any, of Hans Solo proximately cause the injury?" To avoid a multiplicity of questions, broad-form questions are to be used whenever feasible. It's not always feasible. A charge that includes both valid and invalid theories of liability under a single broad-form question is improper because a court would be unable to determine whether properly submitted theories constituted the basis of the jury's verdict. The charge should not inform jurors of the effect of its answers. However, the rules expressly allow for a damages question to be predicated upon affirmative findings of liability, although such a submission incidentally informs the jury of the effect of its answer. Then pray that the 12 people too stupid to get off the jury panel and who know the least of any other persons in the courtroom will find for your side while on the governments payroll.