Civil Procedure

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Juvenile Law Specialization Review Course
August 2002

I. HOW DO YOU GET A COURT TO ACT?

A. You ask by way of a **motion, request or objection**, usually in writing.

B. All written documents must be filed with the court's **clerk** to be included in the record. (Oral motions, requests, and objections are in the record through the court reporter's notes.) Anything filed must be **served** upon opposing parties to give them notice of what you have put in the clerk's record. TRCP 21.

METHODS FOR FILING DOCUMENTS WITH THE COURT CLERK	
FILING METHOD	**EFFECTIVE FILING DATE**
Hand Delivery	Date Delivered
US Mail: TRCP 5	Mailbox Rule: Date mailed IF delivered to the court within 10 days after the due date. *Must be mailed 1st class U.S. mail to the clerk at the proper address.*
Fax	On Receipt. *Can be used only if permitted by local rule.*

METHODS FOR SERVING DOCUMENTS ON PARTIES: TRCP 21a	
SERVING METHOD	**EFFECTIVE SERVICE DATE**
Hand Delivery	Date Received
Certified Mail, Return Receipt Requested	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.

REMEMBER:
A **certificate of service**, noting compliance with the service rules, must be included on all filed documents.

C. After a party makes a written request, motion or objection the opponent will usually respond in writing. Often the rules require a response within a certain amount of time after **filing** or **service.**

RULES FOR COMPUTING TIME: TRCP 4

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.

D. The court will usually hold a **hearing,** at which time the parties may present proof of facts needed to support or oppose the request. Ordinarily, the proof must follow the rules of evidence. However, there will be some pretrial motions where the rules allow proof by **affidavit.**

REMEMBER:
Notice of hearing must be served at least **3 days** before the hearing. TRCP 21.

E. The court rules on the request by an **order,** which can be written or oral. A **judgment** is an order that determines the substantive claims presented in the litigation. Other orders are used to rule on other issues presented during the litigation that do not directly determine disputed substantive issues.

II. SUBJECT MATTER JURISDICTION

A. CONSTITUTION AND STATUTES

1. 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**. A court has no power to adjudicate a controversy outside of its subject matter jurisdiction, and any attempt to do so is **void.**

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

3. Family Code §51.04 requires the juvenile board to designate one or more courts in each county as the juvenile court.

B. CHALLENGES TO SUBJECT MATTER JURISDICTION

1. Made in a **plea to the jurisdiction**.

2. Timing--subject matter jurisdiction can be challenged at any time. The court has no power to proceed, and all actions are void.

3. **Consequences** of granting the plea. The case must be **dismissed** because 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 from dismissal to refile in proper court.

III. PERSONAL JURISDICTION

THE BIG PICTURE. 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.

A. TEXAS STATUTES: SERVICE OF PROCESS

1. 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).

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

a. **Personal service**
b. **Certified mail, return receipt requested**
c. 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 **an affidavit,** may allow service by some method reasonably effective to give D notice, such as leaving with an adult at usual place of abode or business. Service by **publication** is only allowed in LIMITED circumstances, e.g. a party swears that after due diligence that the defendant can't be located.

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

a. **Sheriff, constables** or other persons authorized by law.

b. **The Clerk** can serve by certified mail or publication.
c. Any disinterested person at least 18 years of age who is authorized by **court order** (private process servers must have this order).

b. Requirements -- exercise of personal jurisdiction must satisfy due process requirements of

1. **Minimum contacts**--established by
   a. **specific** jurisdiction--where cause of action is connected to D's contacts in Texas, **OR**
   b. **general** jurisdiction--where contacts are continuous and systematic,

AND

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

B. CHALLENGING EXERCISE OF PERSONAL JURISDICTION

THE BIG PICTURE. 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.

The special appearance (TRCP 120a)

1. Must be verified.
2. Must be asserted before any other pleading or motion (in "due order"), and
3. Must be heard and determined before any other motion.
4. At the hearing, the defendant has the burden to negate all bases for personal jurisdiction
5. The proof may include oral testimony or affidavits filed at least 7 days before the hearing.
6. The court's order is subject to immediate review by interlocutory appeal, **except in suits brought under the Family Code (mandamus may be available).**

C. CHALLENGING TECHNICAL DEFECTS IN THE FORM OF THE CITATION, JURISDICTION ALLEGATIONS, AND SERVICE OF CITATION

THE BIG PICTURE. 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 by a motion to quash service (TRCP 122). When a motion to quash is granted, the defendant need not be served again. The defendant must answer on the Monday following 20 days after the order quashing service is signed.

Remember
The motion to quash service does not object to the the court's power over the defendant under the due process clause—it merely raises defects in service of process that can be corrected. The motion to quash is a general appearance and will waive the jurisdictional challenge if filed first.

D. MOTION TO DISMISS FORUM NON CONVENIENS

THE BIG PICTURE. 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**.

1. **COMMON LAW FNC** -- In federal court and in some state court actions, the court balances private interest factors (interests of parties and witnesses) and public interest factors (interest of the state). This is available in any action not subject to statutory FNC.

2. **STATUTORY FNC** under CPRC §71.051 applies **only** to personal injury or wrongful death actions.

IV. PLEADINGS

THE BIG PICTURE. Parties' 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.

A. PLAINTIFF'S PLEADINGS (TRCP 45, 47)

The plaintiff commences the case by filing **a petition** in state court. The petition identifies the parties, alleges facts showing that the Texas court has jurisdiction over the defendant, states a cause of action by pleading facts and legal theories, and seeks relief from the court.

B. DEFENDANT'S PLEADINGS

THE BIG PICTURE: 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 is the defendant's pleading that gives the plaintiff fair notice of the defendant's position in the lawsuit.

1. **DENIALS:** allegations that deny the truth of the P's allegations and require P to prove the allegation at trial.
   a. Defendant can file a **general denial** which denies all of P's allegations, and puts P to its burden of proof. (TRCP 92)
   b. **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. There are 2 rules that require special denials:

1. when P has alleged under TRCP 54 that all conditions precedent to P's recovery have been met, D must file a special denial to put P to its proof of a particular requirement for recovery.
2. **Verified Denials:** This is a special denial that is effective only when made under oath. They are listed in TRCP 93.

MATTERS REQUIRING VERIFICATION (RULE 93)

(1) Denial of sworn account petition
(2) Defects in parties
(3) Attacks related to party capacity
(4) Pendency of another Texas suit between the same parties involving the same claim
(5) Denial of execution of an instrument or of genuineness of an endorsement or assignment of a written instrument
(6) No consideration
(7) Contract is usurious
(8) Denial that a party is a partnership or corporation
(9) Notice and proof of loss not given as alleged
(10) Denial of matters on appeal from the Industrial Accident Board
(11) Denials that party is doing business under an assumed name
(12) Denials of conditions precedent in an suit against an auto insurer

2. PLEADING OBJECTIONS

1. **Special exceptions** (TRCP 90-91) are used 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.

2. Any defects in pleading that are not objected to are waived.

3. PLEA IN ABATEMENT

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) defects in parties, e.g. additional parties should be joined
   c) when case is already filed in another court (normally court where dispute first filed has dominant jurisdiction)
   d) when dispute has been submitted to arbitration

2. if court grants the plea, the case is abated (postponed) until the defect is cured

4. **AFFIRMATIVE DEFENSES:** A matter asserted by the defendant upon which the plaintiff's relief will be denied, even if the plaintiff´s claim is admitted as true. D has the burden of pleading and proving, and is entitled to a jury question on affirmative defenses. TRCP 94 set forth a non-inclusive list of common affirmative defenses.

Remember:
If D files a counterclaim against P, P need not file an answer to the counterclaim because the rules presume that plaintiff files a General Denial. But P must file an answer to assert any affirmative defenses, special denials or verified denials that P wants to rely upon, that would not be included in the general denial.

C. SIGNING PLEADINGS

1. The first lawyer to sign the pleadings is the attorney in charge unless another is so designated. (TRCP 10)

2. SANCTIONS FOR FRIVOLOUS PLEADINGS

a. TRCP 13 - signature operates as a certificate that to the best of the signor's knowledge, formed after reasonable inquiry, that the instrument is not **groundless** **and** not brought in **bad faith** or brought for the purpose of **harrassment.**

b. Chapter 10 of CPRC - sanctions may be available if pleadings lack **evidentiary** or **legal support**, **or** are filed for an "**improper purpose**," or without "**due diligence**".

c. What's the primary difference between the two?
Chapter 10 does not provide proof of a bad motive to impose sanctions.

D. AMENDED AND SUPPLEMENTAL PLEADINGS (TRCP 63, 66-69)

1. TYPES

What do you file:

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

An **amended** pleading supersedes or replaces the previous pleading and must be **complete**.

2. TIMING

Amendment of pleadings freely allowed until **7 days** before trial. During this period, opposition to amendment raised by **a motion to strike.** Within 7 days of trial, a motion and order **for leave to amend** is required before a new pleading is filed.

3. STANDARD FOR AMENDING PLEADINGS

1. Who has the burden?
   At all times, court must allow amendment unless the opponent proves that the amendment causes **surprise** to the party opposing the amendment, and asks for a **continuance.** If there is no evidence of surprise, 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 alone constitutes evidence of surprise, 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 **procedural** amendment and does not constitute evidence of surprise. The trial court must allow the amendment if this is the only evidence.

Remember

When the plaintiff offers evidence of a matter that is not fairly included in the pleadings:
The defendant should object to the evidence as being outside the pleadings.
The plaintiff should seek leave to make a trial amendment to add to the pleadings.
The defendant should then attempt to prove surprise to prevent the amendment.
The court must allow the amendment if there is no proof of surprise. However, if there is evidence of surprise, the court has discretion to allow or not allow it.

If there is no objection to a lack of pleading, and no amendment to ever put it in the pleadings, the matter is **"tried by consent."** The lack of pleading cannot be a basis for reversal on appeal.

E. JOINING ADDITIONAL CLAIMS AND PARTIES

THE BIG PICTURE. 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.

1. TYPES OF JOINDER

When parties want to add new parties or add new claims, they must file particular pleadings with the court.

Action Desired	File this
The Plaintiff joins an additional defendant or an additional claim	Amended Petition (TRCP 40, 51)
The defendant files a claim for relief against the plaintiff	Counterclaim (TRCP 97)
The defendant files a claim against a co-defendant	Cross-Claim (TRCP 97)
The defendant joins a party that may be liable for all or part of the claim that the plaintiff filed against her **Note**: These are used for joining parties for **contribution** or **indemnity.** **Limitation:** Leave of court required if filed more than 30 days after D's answer.	Third Party Petition (TRCP 38)

3. PERMISSIVE JOINDER OF PARTIES (TRCP 40)

6. COMPULSORY JOINDER OF PARTIES (TRCP 39)

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 were present. A party files a plea in abatement to raise the absence of parties, asking the court to delay the suit until the absent parties are joined or, if the parties cannot be joined, dismiss the suit in favor of a forum where all parties can be joined.

V. VENUE

THE BIG PICTURE. 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 a county of mandatory venue, or the court finds that convenience and justice requires transfer to another county of proper venue.

A. SUBSTANTIVE VENUE PROVISIONS

Chapter 15 of the CPRC identifies counties where venue is proper. These provisions provide for permissive and mandatory venue.

1. **General rule (permissive venue)**
   a. Venue is proper in the counties
      1) where **all or substantially all** 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.**
      4) If subdivisions 1-3 don't apply, where **the plaintiff** resides at the time the cause of action accrued.

   b. The defendant can **move to transfer venue** from a county of proper venue to another county of proper venue for **convenience and justice**, which requires proof that:
      1) Defendant's economic and personal hardship requires transfer,
      2) Balance of interests of all the 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. For example,
   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 in the contract** 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 venue provision applies.

a. **Land suits**, including title and partition actions, suits for damages to real property, and landlord tenant disputes: where the land is located.
b. **Injunctions against suit** or against execution of judgment: where the suit is pending or the judgment was rendered.
c. **Mandamus** against the state: Travis County
d. Action against a **county**: in that county
e. **Libel**, slander or privacy 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
f. Venue by agreement in actions arising from “major transactions” where the consideration is at least $1 million
g. **Other statutes that provide for venue**. CPRC §15.016 allows other statutes to provide for mandatory venue. For example, Family Code §51.06 provide for mandatory venue in juvenile cases.

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
c. The county is **fair and convenient** for **all parties**.

6. **Consent to venue**. Parties can file a consent to transfer venue to any county after suit is filed.

B. CHALLENGES TO VENUE (TRCP 86-89)

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, permissive exception, or other permissive venue statute; 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.
   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 proper 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.

The defendant is a resident of San Antonio, and the offense occurred in San Antonio. Suit was filed in Webb County against the defendant. Explain any substantive basis for the defendant to challenge venue in Webb County and the procedure through which this is asserted.

Substantive basis for challenge:
Where is venue proper? Bexar County is the proper county because it is where the D resides and where the offense occurred. Webb County is not proper.

Procedure:

1. **File a 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. (E.g. here the D would file an affidvavit that would establish that D resides in Bexar County and/or that the offense occurred in Bexar County.) **No live testimony** can be considered.
4. **Standard of decision**: If the plaintiff presents **prima facie proof** that venue is proper in the county of suit, there can be no transfer. If the plaintiff fails in this burden, and D has presented prima facie proof that venue is proper in the county to which transfer is sought, the case is transferred.

REMEMBER:

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

1. mandatory venue applies in another county
2. convenience and justice compels transfer to another proper county

C. APPELLATE REVIEW OF THE VENUE DECISION

1. Generally, review is available only after **final judgment**, BUT
   a. The trial court's decision on transfers for convenience and justice are **not reviewable.**
   b. **Mandatory** venue provisions can be enforced by **mandamus.**
   c. Venue rulings concerning **multiple plaintiffs** are reviewable by **interlocutory appeal**.

2. Standard of Review for Appeal.
   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.

D. MOTION TO CHANGE VENUE BASED ON LOCAL PREJUDICE AND INABILITY TO GET AN IMPARTIAL TRIAL (TRCP 257)

A motion to **change venue for local prejudice** 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. Any party (plaintiff or defendant) can file this motion.

VI. MOTION FOR SUMMARY JUDGMENT (TRCP 166a)

When there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law , in a civil case, the court can render summary judgment without a trial. However, in *State v. L.J.B.,* 561 S.W.2d 547 (Tex.Civ.App.--Dallas 1977), the court held that summary judgment is **not appropriate in juvenile cases** because of language in Family Code section 54.03(a) requiring a hearing for adjudication.

VII. DISMISSAL FOR WANT OF PROSECUTION (DWOP) (TRCP 306a)

THE BIG PICTURE: If a party seeking affirmative relief (usually the plaintiff) fails to set the case for trial, fails to show up 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.

A. DWOP NOTICE

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

B. FOLLOWING DISMISSAL

1. P can refile lawsuit (if no statute of limitations problem) because DWOP is not an action on the merits.
2. P can file **motion to reinstate** the case within **30 days** after the order of dismissal is signed.

VIII. NONSUIT (TRCP 162)

P has an absolute right to voluntarily dismiss its case.
DEADLINE: before P has introduced all its evidence other than rebuttal evidence.

IX. DEFAULT JUDGMENT-- rendered when defendant fails to answer or to appear at trial.

1. Requirements (other than no answer filed on behalf of D)
   a. 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 judgment. (TRCP 107)
   b. A certificate of D´s last known address must be filed with the clerk.

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

X. PRETRIAL CONFERENCE (TRCP 166)

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 pleading deadlines set in rules).
3. Statements of parties' contentions, contested and uncontested issues of fact.
4. Discovery schedule (can change discovery deadlines set in rules).
5. Exchange of list of trial witnesses (fact and expert), and trial exhibits.
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 "aid in the disposition of the action."

XI. SCHEDULING THE TRIAL (TRCP 245)

Notice required: all parties entitled to not less than 45 days notice of the **first** trial setting (thereafter, parties must get **reasonable** notice).

XII. JURY DEMAND (TRCP 216)

THE BIG PICTURE: 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 for demanding a jury
   a. Request in **writing**.
   b. Accompanied by the appropriate **fee**, which is set by Gov't Code §51.604 ($30 in district court and $22 in county court – ignore the fee set in TRCP 216).
   c. 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 (so you can rely on your opponent's jury demand and fee). (TRCP 220)

XIII. SUBPOENAING WITNESSES (TRCP 176)

Through a subpoena, an unwilling witness can be forced to come to court and testify at trial. Although a subpoena is a court order, it is enforceable only within **150 miles** of the county in which suit is pending.

XIV. MOTION FOR CONTINUANCE (TRCP 251-254)

THE BIG PICTURE: 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 in an affidavit.

2. **Sufficient Cause** -- an attorney has to have a good reason for requesting a continuance, and the record must support that reason.
   a. **Unavailability of an attorney or a party** can be sufficient cause.
   b. 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.
   c. Continuance for **want of testimony** requires showing of:
      1) Materiality and content of testimony,
      2) Diligence of movant in attempting to obtain testimony, i.e. movant subpoenaed the witness and paid the witness fee,
      3) Cause of the failure to obtain testimony,
      4) No other source for the testimony (need not be shown in first motion), and
      5) 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.

XV. MOTIONS IN LIMINE

THE BIG PICTURE: 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.

1. **If the Motion in Limine is denied**:
   a. Opposing counsel may offer the evidence without seeking permission first.
   b. Movant must object when the evidence is actually offered.

2. **If the Motion in Limine is granted**:
   a. Opposing counsel must approach the bench before asking or injecting into the trial those matters covered by the Motion.
   b. Movant must object to the particular matter being offered at the bench.

XVI. JURY SELECTION

THE BIG PICTURE: In order to be selected to serve on a jury, potential jurors must meet certain basic qualifications, and they do not have to serve if they can take advantage of certain applicable exemptions. Attorneys may contest the manner in which juror names are selected for a jury panel, and may challenge prospective jurors for "cause" or just because, within certain limitations.

A. CHALLENGE TO THE ARRAY.

A party may challenge the method by which the jury pool is chosen **before** the panel is assembled. (TRCP 221)

B. JUROR QUALIFICATION

1. Jurors must meet **general statutory** qualifications including
   a. At least 18 years of age.
   b. Citizen of county and state.
   c. Not convicted or accused of a felony.
   d. Qualified to vote.
   e. Able to read and write.
   f. Sound mind and good moral character.

2. Qualified jurors can exercise an available **exemption** (e.g. for persons over 65, persons with custody of young children, students).

3. Jurors can be **disqualified from serving in a particular case,** if the juror is:
   a. A **witness** in the case, or
   b. Has an **interest** in the case, or
   c. Is **related** within the 3rd degree to a party in the case, or
   d. Has a **bias or prejudice** in favor or against a party in the case, or
   e. 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.
   a. Before voir dire, any party may request that the panel list be shuffled to reorder the potential jurors Only one shuffle in each case. (TRCP 223)
   b. Voir dire is used to gain information.
      1) To wisely use peremptory challenges.
      2) To determine if some juror should be challenged for cause.

C. CHALLENGES FOR CAUSE (TRCP 228)

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 which, when proven, disqualifies the juror as a matter of law. The most frequent "for cause" challenges is that the juror has a bias or prejudice against one of the parties in the case. A trial judge also has the power to excuse any "unfit person" for cause.
2. Challenges for cause are **unlimited** in number.
3. Procedure:
   a. Move to strike the juror for cause.
   b. If the motion is **denied**, and an objectionable juror remains on the panel even after you have exercised your peremptory challenges, then you must tell the court **which objectionable juror remains** on the panel and renew your challenge for cause. (This must be done to preserve reversible error when the judge erroneously denies a strike for cause.)

D. PEREMPTORY CHALLENGES (TRCP 232-34)

THE BIG PICTURE. The "just because" 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 racial or gender-based challenges (*Batson*)

   a. The party raising the Batson objection must make prima facie proof of a discriminatory strike
   b. Burden then shifts to opponent (the party making the stikes) to give a nuetral reason for the strike.
   c. The objecting party can offer rebuttal evidence
   d. The trial court makes a decision, in view of all of the evidence and circumstances, which is reviewed upon an abuse of discretion standard.

2. Determining the number of strikes.

   a. Each side (P of D) has
      1) 6 peremptory challenges in District Court,
      2) 3 peremptory challenges in County and JP Court, and
   b. **But**, when **antagonistic** parties are on the **same side** of a case, each is entitled to its own peremptory strikes. Thus, one side may have more strikes than the other. (E.g., P, a single person, sues O, the owner, M, the manager, and F the manufacturer, who are antagonistic -- there is one plaintiff with 6 strikes, but three defendants with a total of 18 strikes).
   c. 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. (E.g., in the example above, the court might allocate strikes 8 -- 12.)

E. 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:
   a. The first 12 remaining jurors on the list become the jury in District Court.
   c. The first 6 remaining jurors on the list become the jury in County or JP Court.

F. REVERSAL FOR ERROR IN JURY SELECTION

Relaxed harmless error role - reversal only if the resulting trial was "**materially unfair**", which means that the evidence was "sharply conflicting" and the issues "hotly contested."

XVII. THE TRIAL

A. OPENING STATEMENTS (TRCP 266)

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 defenses.

B. OBJECTIONS TO EVIDENCE

1. There are two reasons for making an evidentiary objection:
   a. To keep evidence out of the trial, and
   b. To preserve error.
2. Procedural Requirements
   a. 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).
   b. If the witness has already blurted out something objectionable, the party can make a **motion to strike** the response and ask the judge for an **instruction to disregard** what was said.
   c. The party making the objection must state the **basis or grounds** for the objection (e.g., hearsay).
   d. The party making the objection must obtain a **ruling** from the judge.

C. BILLS OF EXCEPTION

THE BIG PICTURE. 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. TRAP 52. The procedure by which a party gets the evidence into the record is called "making a bill," or "making 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
   a. Present a concise statement of the excluded evidence (e.g., "If 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.).
   b. State the grounds for admitting the evidence (e.g., a hearsay exception).
   c. Ask for admission of the evidence.
   d. Get a court ruling (admitted/not admitted).
   e Make the offer before the charge is read to the jury.

2. **Formal Bill of Exception**. (If you cannot or did not make an informal bill.)
   a. The offering party makes a written offer of proof.
   b. The written offer must be made within 60 days after judgment (or within 90 days of judgment if a motion for new trial is filed.)
   c. 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.

D. WITNESSES PLACED UNDER "THE RULE" (TRCP 267).

When "The Rule" is invoked, witnesses are sworn in and excluded from the courtroom. These witnesses cannot talk to anyone other than attorney's about the case, and may not read any report or comment about the case. Parties and witnesses whose presence is essential to the presentation of the case are excluded from "The Rule".

XVIII. JURY CHARGE (TRCP 272-279)

THE BIG PICTURE. 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 fact questions the jury is supposed to answer to reach a verdict. The charge is designed to give some structure to jury deliberations regarding the contested fact issues raised by the pleadings and the evidence.

A. BROAD FORM CHARGE SHALL BE USED WHEN FEASIBLE

1. **Broad form questions**
   Ask controlling fact questions that support a judgment. May include multiple elements within a single question, e.g. "Did the negligence of X proximately cause the injury?"

2. **Instructions**
   a. Instructions assist the jury in answering questions and are used to submit
      1) Elements of cause of action
      2) Defensive issues.
      3) the burden of proof
   b. Instructions cannot be used to:
      1) comment on the weight of the evidence or to nudge jurors to one side.
      2) tell jurors the effect of their answers.

3. **Definitions** are used to define legal, technical or confusing words that are included in the charge.

A. PRESERVING ERROR IN THE CHARGE

Note: In criminal cases, the failure to give a required charge can be error even without an objection and is reversible if the defendant can show egregious harm from the error. *Almanza v. State*, 686 S.W.2d 157 (Tex.Crim.App. 1984). This rule probably applies in juvenile cases, although there is no case in which that question has been raised. Nevertheless, it doesn't hurt to know how to preserve the error!

THE BIG PICTURE: The judge shows the lawyers the charge that will be submitted to the jury. The lawyers must **object** to **defects** in the charge and make **requests** in substantially correct form for matters **omitted** from the charge. In order to preserve error, the party must make the proper objections or requests and have the court overrule them. All must be on the **record** otherwise the erroneous charge cannot be used as a point of error for appeal.

1. **Request or Object**
   a. One way to look at it:
      1) **Omissions from the charge** (it's not there!) **Object** to the omission, **and request** it in substantially correct form, unless it is your **opponent's question** that is omitted, in which case you can either request **or** object.
      2) **Defects in the charge** (it's there, but it's wrong!) You **must** object.

b. Another way to look at it
    1) **Request** when there is
        a) an omitted instruction or definition, or
        b) an omitted question, if you need the affirmative answer to that question
    2) Make an **objection** when there is
        a) a defective question, instruction or definition, or
        b) an omitted question, instruction, or definition. The objection accompanies a request, unless the omission is an omitted question to which your opponent needs an affirmative answer, in which case an objection to the omission alone is sufficient.

2. **Form** of requests and objections
    a. Requests and objections must be made **separately** before the charge is submitted to the jury.
    b. **Requests**
        1) Made in **writing**
        2) In **substantially correct form**.
        3) Judge endorses the request "refused" or "modified as follows", and signs it.
    c. **Objections**
        1) Distinctly point out the objectionable matter and grounds for objection
        2) Valid objection waived if obscured or concealed by voluminous unfounded objections.
        3) May be in writing or stated orally on the record.

3. **BUT** the Texas Supreme Court, in the *Payne* case, has stated that the test for preserving error in the charge is whether the complaining party "**made the court aware of the complaint, timely and plainly and obtained a ruling."** Therefore, if you object when you should request, or your request is not in substantially correct form, you may have succeeded in preserving error anyway!

POP QUIZ

1. You represent the defendant in a case being tried to a jury. The court prepares the charge to the jury and you determine that one question is a comment on the weight of the evidence because it assumes the truth of a disputed fact issue.
   (a) What type of error is this? It´s a **defective question**.
   (b) What must you do to preserve appeal? **Object** (but, if you fail to do so, the *Payne* case may save you).
2. You represent the defendant in a case being tried to a jury. The charge omits the definition of an element of plaintiff's cause of action.
   (a) What type of error is this? It´s an **omitted instruction**.
   (b) What must you do to preserve appeal? **Request** the instruction in substantially correct form, and **object** to the omission. (If it were an omitted question that was your opponent's question, then an objection alone would be sufficient (and again, if you do the wrong thing, *Payne* may save you).
3. What objection would you make to a jury charge wherein you believe that one question is not supported by any probative evidence (or "there is no legally sufficient evidence") and should not be presented to the jury?
   The question is there, but it should not be, so object on no evidence grounds.

END OF POP QUIZ

C. EFFECT OF OMISSIONS IN THE CHARGE: WAIVED GROUNDS AND DEEMED FINDINGS

1. **Grounds omitted entirely.**
   If an entire independent ground of recovery or of a defense is not submitted to a jury, and the party relying on the ground fails to preserve error to the omission, then the ground has been entirely **waived.**

2. **Elements omitted.**
   If some of the elements of a ground of recovery or of a defense are not submitted to the jury, but others are, the party that fails to preserve error to the omission waives a **jury finding** on the omitted element. If no objection or request is made to an omitted element, a judge can make an **express** finding in accordance with the evidence. If there is no express finding, the appellate court will **deem** the trial court to have found the element to support the judgment if there is sufficient evidence in the record below to support the finding.

XIV. JURY ARGUMENTS (TRCP 269)

A. TIMING

In Texas, jury arguments are made after the charge is read to the jury and before the jury retires to deliberate.

B. IMPROPER ARGUMENTS

1. These rules apply whenever a lawyer is talking to the jury, including voir dire and opening statements.

2. Arguments should not
   a. Go outside the record (beyond the admitted evidence, reasonable inferences, and matters of common knowledge).
   b. Make personal attacks.
   c. Appeal to prejudice and passion of the jury, e.g. appeal based on religion or ethnicity.
   d. Appeal to juror's personal interest
   e. Ask jurors to put themselves in a party's shoes (no golden rule arguments), but general appeals to fairness are OK.
   f. Tell the jury the effect of its answers.

C. RESPONSES TO IMPROPER ARGUMENTS

1. **Curable**
   Both an **objection** to the improper argument and a motion for **instruction** to the jury to **disregard** if granted, cures any harm caused by the improper argument.

2. **Incurable**
   Incurable arguments are those which are so prejudicial or inflamatory that no jury instruction can “cure” the damage done.
   a. Incurable arguments must be brought to the attention of the trial judge either by an objection at the time of the argument **or** through a motion for new trial made after judgment
   b. If no motion for new trial is made, then objection is waived
   c. Incurable arguments are generally limited to those appealing to racial and religious prejudice.

XV. JURY DELIBERATIONS

A. COMMUNICATING WITH JURORS (TRCP 283-86)

1. Generally, once the jury has retired, court officers´ only communication with them should be asking them whether they´ve reached a verdict.
2. Until the verdict is announced, the jurors communicate with the court only through the presiding juror. They may receive further instructions when requested.

B. MATERIALS IN THE JURY ROOM (TRCP 281)

1. Jurors can review all written evidence, including exhibits and photographs.
2. Jurors cannot review depositions and pleadings.
3. On jurors' request, oral testimony can be read to them from court reporter notes.

C. JURY MISCONDUCT (TRCP 327)

1. Occurs when jurors don't follow judge's instructions, e.g. jurors consider evidence excluded by the court, reach a verdict by some formula or have improper communications or influence from somebody outside the jury.
2. Raised by a motion for new trial, but these are seldom successful because juror testimony related to deliberations is limited to whether any **outside influence** was improperly brought to bear on any juror, e.g. juror was bribed by someone not on the jury.

XVI. JURY VERDICT

A. REQUISITE NUMBER OF JURORS WHO AGREE (TRCP 292)

1. Verdict must be rendered by at least
   a. 10 out of 12 jurors in district court
   b. 5 out of 6 jurors in county court
2. In a non-unanimous verdict, all of the answers must be made by **the same** 10 jurors (district sourt) or 5 jurors (county court).

B. INCOMPLETE VERDICT -- the jurors fail to answer one or more questions in the charge.

1. If the unanswered questions are **immaterial** (an answer either way will not benefit either party), the judge shall render verdict in accordance with the answered questions.

2. If the unanswered questions are **material** (an answer will benefit one party), the judge orders the jury to resume deliberations.

> **REMEMBER--"DYNAMITE CHARGE"**
> If a jury is hopelessly deadlocked, the judge can use a "dynamite charge" to move them along, so long as the charge is not **coercive.**

3. When further deliberations are unsuccessful, the judge should declare a mistrial.

4. If the proponent does not object to an incomplete verdict before the jury is discharged, the answer is waived and the proponent cannot benefit from the unanswered question in obtaining a judgment.

5. If the jury's answers conflict, and the jury cannot resolve the conflict or has been discharged, no judgment on the verdict is possible. There must be a new trial.

XVII. ATTACKS ON SUFFICIENCY OF THE EVIDENCE -- LEGAL OR FACTUAL

A. LEGAL SUFFICIENCY

THE BIG PICTURE. A jury's function is to decide disputed fact issues. If the evidence presented on an essential issue at trial is not disputed or conflicting, the jury has nothing to decide, and we say that the fact is determined as a matter of law. If the jury decides the fact question contrary to the evidence, the finding can be attacked on a legal sufficiency point of error. Parties have several mechanisms to preserve legal sufficiency points.

1. **Plaintiff.** To determine whether plaintiff is entitled to judgment as a matter of law, courts apply a conclusive evidence standard. That is, P has presented conclusive evidence of all of the facts essential to its case and D has presented no contrary evidence, and P is entitled to judgment as a matter of law.

2. **Defendant.** To determine whether defendant is entitled to judgment as a matter of law, courts apply a no evidence standard. That is, if P has presented no credible evidence on any one element of P´s cause of action, then P has not satisfied its burden of proof to get to the jury, and D is entitled to judgment as a matter of law.

3. **The scintilla rule.** A mere *scintilla* of evidence is the same as no evidence.

4. **Preserving legal sufficiency points**--To preserve a legal sufficiency point, a party must file one of the following:

   a. **Motion for directed (instructed) verdict**--written or oral motion made after the opponent rests or at the close of all of the evidence, before the charge is read to the jury. The argument is that there is nothing for the jury to do.

   b. **Object to the submission of a jury question** on legal sufficiency grounds--this is an objection to the jury charge and must follow those rules. The argument is that the question should not be given to the jury because the evidence raises no fact question.

   c. **Motion for judgment notwithstanding the verdict (JNOV)**--written motion made after the jury returns verdict, asking the judge to disregard the jury's verdict and render judgment as a matter of law. The argument is that the jury shouldn't have gotten the questions in the first place and they answered the questions wrong.

   d. **Motion to disregard jury findings**--like motion for jnov except it attacks a specific jury finding and asks the court to render judgment accordingly.

4. **Remedy on appeal.** If the appellate court finds that the trial court's judgment should be overturned because of legal sufficiency of the

evidence, the trial court's judgment should reversed and rendered; the prevailing party is entitled to judgment as a matter of law.

B. FACTUAL SUFFICIENCY

THE BIG PICTURE. Sometimes the plaintiff presents more than a scintilla of evidence or the defendant presents more than a scintilla of evidence contrary to plaintiff's evidence (the evidence does not meet the no evidence/conclusive evidence standard, so judgment cannot be rendered as a matter of law), but the evidence is so overwhelmingly favorable to one side or the other, it seems that there is only one reasonable judgment that can be rendered. Nevertheless, the parties are entitled to a jury determination of the facts and the charge must be given to the jury. Sometimes the jury renders a verdict that the judge thinks is wrong because it is contrary to the overwhelming evidence. Under such circumstances, the judge cannot render judgment contrary to the jury's verdict, but the judge can grant a new trial.

1. **Preserving factual sufficiency points**--the only way to preserve factual sufficiency points is to file a written **motion for new trial**.

2. **D is entitled to a new trial on a factual sufficiency point.** If P has presented some evidence (more than a scintilla), P is entitled to a jury determination of facts. But if the evidence is factually insufficient to support a verdict for P, D gets a new trial.

3. **P is entitled to a new trial on a factual sufficiency point.** If D has presented some evidence contrary to P's evidence, or P's evidence is simply not strong enough to meet the standard for legal sufficiency, D is entitled to a jury determination of facts. But if the jury's verdict for D is against the great weight and preponderance of P's evidence, P gets a new trial.

4. **Remedy on appeal.** If the Court of Appeals finds that the trial court's judgment should be overturned because of factual sufficiency of the evidence, the trial court's judgment should reversed and remanded for a new trial.

5. The **Supreme Court** has **no jurisdiction** over "fact questions," so has no jurisdiction to decide factual sufficiency points of error.

XVIII. Judgments (TRCP 301)

A. FINAL JUDGMENT

1. A final judgment disposes of **all parties** and **all claims** in the lawsuit.

2. Generally, only final judgments maybe appealed or enforced.

3. After a **conventional trial on the merits**, the judgment is presumed to dispose of all claims and all parties and is final, unless the judgment specifically says otherwise.

4. When a judgment is rendered, but there has been **no conventional trial on the merits** (e.g. a summary judgment, or default judgment), an order or judgment is not final for purposes of appeal unless it actually disposes of every pending claim and party or unless it clearly and unequivocally states that it finally disposes of all claims and all parties.

REMEMBER:
In *Lehman v. Har-Con Corp.* (Tex. 2001), the Texas Supreme Court said that a judgment that says **"This judgment finally disposes of all parties and all claims and is appealable"** is final. The court overruled prior caselaw that had said that a judgment saying "all relief not expressly granted is denied" (called a Mother Hubbard clause) is final. The Mother Hubbard clause no longer supplies the "magic language" to make a judgment final.

B. MOTIONS FOR JUDGMENT

1. **Motion for judgment on the verdict. --** made after the jury's verdict.

2. **Motion for JNOV** -- see above on legal sufficiency.

3. **Motion to disregard jury finding and for judgment.**
   a. Legal Sufficiency Grounds--see above.
   b. Argues that a finding is immaterial and should be disregarded.

4. **Motion for judgment nunc pro tunc** -- Used to correct clerical errors (not judicial errors), and can be filed at any time.

5. **Motion to modify judgment.**
   a. Used to change the actual terms of the judgment.
   b. Due within 30 days after judgment is signed.

C. TRIAL COURT'S PLENARY POWER AFTER JUDGMENT. (TRCP 329b)

1. **Plenary power**--period of time during which the trial court maintains power over the cause after the judgment is signed. During this time the court can modify the terms of the judgment or vacate the judgment and grant a new trial.

2. If **no motion** for new trial or motion to modify the judgment is filed, the plenary power expires **30** days after the **judgment is signed**.

3. If a **motion for new trial** or motion to modify the judgment is timely filed, the plenary power expires **30** days after the **motion is overruled** by order or by operation of law (75 days after the judgment is signed).

XIV. MOTIONS FOR NEW TRIAL (TRCP 320, 324)

THE BIG PICTURE: This is a last-chance, written motion that seeks to obtain a new trial to correct an injustice or error. It can be filed to extend the appellate timetables or to preserve error for appeal for certain errors.

A. PRESERVING ERROR

A motion for new trial is required to preserve error for appeal only when the complaint:

1. requires that **evidence be heard** to decide whether an error was made, including complaints based on:
   a. newly discovered evidence;
   b. jury misconduct;
   c. erroneous default judgment.
2. Factual sufficiency points: The judgment is based on the **factual insufficiency** of the evidence to support a jury finding, or that a jury finding is **against overwhelming weight** of the evidence.
3. The amount of damages found by the jury is **excessive or inadequate.**
4. based on **incurable jury argument**, if no objection was made during argument.

B. TIMING

30 days after the judgment is signed (absolute cutoff--cannot be extended, because otherwise plenary power expires).

C. ORDER

A motion for new trial is overruled:

1. When the judge **signs a written** order **, or**
2. If there is no signed order, **by operation of law** 75 days after the judgment is signed.