PRESENTING DISPOSITIVE MOTIONS TO THE COURT: THE COURT'S PERSPECTIVE

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Introduction

No man ever reached to excellence in any one art or profession without having passed through the slow and painful process of study and preparation.

-Horace

This paper is intended to give the reader some of the benefit of the author's preferences for the form and content of certain types of motions that are routinely filed in Harris County civil district courts. The author's preferences–the Court's preferences– are based upon the author's 13 years as a civil litigator prior to taking the bench, as well as upon his first year as Judge of the 151st Civil District Court. The author hopes that the reader will gain some new insight into the process the Court goes through in reviewing motions and preparing for hearings, and in making decisions and writing opinions and orders. For this seminar, the author has been tasked to write about dispositive motions, but the author believes that many of these suggestions are applicable to other types of motions as well. In this paper, then, the author will discuss aspects of the following dispositive motions:

* traditional motions for summary Judgment (TRCP 166a);
* no-evidence motions for summary judgment (TRCP 166a(i));
* pleas to the jurisdiction (TRCP 85) (different evidentiary rules – based on pleadings, or can review extrinsic evidence to determine if jurisdiction if not clear from pleadings – treat hearing as evidentiary or not);
* motions to dismiss for want of prosecution (TRCP 165a);
* special exceptions (TRCP 91);
* special appearances (TRCP 120a);
* default judgment motions (TRCP 239); and
* civil death-penalty sanctions motions (TRCP 215)

Some of the suggestions are applicable to more than one of the different types of motions, of course. For brevity's sake, then, the author will discuss those separate points that are unique to the individual types of motions as the paper progresses. We will discuss what to do, and what not to do in the motions themselves, what else to file in conjunction with the motions, and briefly touch upon strategies for getting your pleadings and discovery in shape to be able to effectively

prepare these motions for the Court with a chance of winning. Finally, in discussing these dispositive motions, the author will discuss the flip side of the motions; the responses.

The idea of the paper is not to focus on the substance of the motions per se, but on their presentation. The goal is to give the reader of this paper ideas for presenting their motions or responses in a persuasive manner so that the audience – the court – can quickly digest the evidence, arguments and relevant authorities, compare them to the other side's presentation, and efficiently and fairly rule. To be succinct, the movant should recognize that its motion is one of many presented to the court at one time, and should therefore be direct, easy to read, broken down into bite-sized pieces, and should allow the court to easily reference information to compare to the other side's response.

Traditional Motions for Summary Judgment

I. Authority

Traditional motions for summary judgment are governed by Texas Rule of Civil Procedure 166a.

II. Overview

As far as the Court can tell, summary judgment motions are filed, either as partial or final summary judgment motions in just about every non-personal injury, non auto-accident case. Traditional summary judgment motions, to be effective, should be prepared with the audience (the court) in mind, and should allow the court to rule on the motion – and in your favor – with the least amount of effort and maximum amount of justice possible. What does this mean?

III. Discussion

Traditional motions for summary judgment are filed for a variety of reasons. Of course they are filed for their ostensible purpose – to win summary judgment. They are also filed to gain leverage in settlement discussions, and they are filed to gain what the Court has always called, "free discovery" – to figure out what the other side's arguments and claims are, are not, and what evidence they intend to use to support their claims and arguments.

These different purposes can impact the approach the movant takes to the motion. It may impact whether you focus on one element of the causes(s) of action or defense(s) on which you are moving for summary judgment, such as on a duty argument, or a statute of limitations defense, or on all of the elements, just to put pressure on the other side or make them disclose the cards in their hand.

Whatever the purpose, from the Court's perspective, the difference between a good motion and a less-good motion is the same. The motion has to be readable and understandable. Though this seems obvious, such obviousness often does not translate into readable and understandable motions being filed. Let's break this down into different components of the motion. These ideas also apply to the response, and of course, replies and sur-replies (and even sur-sur replies).

A. The Title

The title can contain a lot of information. Make that information understandable. Tell the court whether this is the first motion or not, or whether it is a new motion on the subject, or an amended version. When the court sees a summary judgment motion on its docket for that week, it will first see the title, listed verbatim (or almost verbatim) on its electronic docket sheet (a list of that week's oral hearing or submission motions). Often motions with imprecise or thoughtless titles will be confusing to the court. The court may vaguely recall something having been heard or ruled on in that case earlier, and will click on the entire file, and see earlier motions for summary judgment, for example, and the title of the one you just filed will not distinguish it from the earlier motions. Is this a new motion based on different causes of action or defenses? Is this a partial or final motion? Is this an amended motion in that it is presenting new bases for the same relief? Is it a supplemental motion presenting merely *additional* bases for the same relief previously requested? Is it directed to all of the opposite parties or only some? You get the idea. The time the court, its clerk, etc., have to spend determining the answers to these preliminary questions is (1) wasteful, (2) frustrating, (3) makes the court want to, uh, . . . well put it this way, the court will appreciate not having to figure this stuff out, so make your title crystal clear. There's nothing wrong with a title like, "Defendant John Smith's Supplemental Motion for Summary Judgment on his Affirmative Defense of the Statute of Frauds (This Motion Supplements but does not Replace Smith's June 1, 2008 Motion which the Court Previously Denied)." That could save a lot of time for the Court. If this information is not in the title, at least put it in a footnote on the first page of the Motion.

B. Parties/Claims for Relief

Either in the title or the first paragraph, the Court must be able to easily identify (a) who is moving for the traditional summary judgment; (b) against which parties, and in what capacities, (c) on what claims or defenses, and (d) whether the relief sought is interlocutory (partial) or final summary judgment. Feel free to use lists or bullet points or even tables to spell these matters out clearly for the court.

Regularly, the Court will receive traditional motions for summary judgment in cases in which there are several defendants and several plaintiffs. In many of those cases, the title will list the movant(s) as "Plaintiffs" (plural) or "Defendant" (singular) or vice versa. However, in the next paragraph, the "Plaintiffs" from the title have become "Plaintiff's" (singular possessive), or "Defendants'" (plural possessive) in discussing their respective claims or defenses. This will often switch throughout the course of the motion, the prayer, and even in the proposed order. As you can imagine, this is time consuming for the conscientious court to unravel, and may even result in partial relief being granted where you sought final summary judgment, or a motion for new trial (or even appellate reversal) where too much relief is granted where it was not expressly sought. Thus, the movant should be clear exactly who is moving for traditional summary judgment, and against whom, precisely, such relief is sought.

Likewise, if you–as a plaintiff--are moving for summary judgment on the defendant's counterclaim, as opposed to on your affirmative claims for relief, you should be explicit as to what claims you are moving on. As well, it is helpful to the court to specify WHAT CLAIMS

YOU ARE **NOT** MOVING FOR SUMMARY JUDGMENT ON. This can save the court a lot of time and consternation as well.

A corollary of this is, of course, that when you are specifying who the movants or non-movants are in your motion, you should clarify the capacity in which you are moving, or the capacity of the non-movant in which you are seeking summary judgment. What does this mean? Well, as you can understand, a plaintiff may sue in various capacities. For example, a plaintiff can sue individually as well as sue as the next friend of a minor or incapacitated person. Or they can sue individually and as a partner in a partnership, joint venturer, shareholder, etc. A defendant can be sued individually, and in representative capacities at the same time as well. A precise motion for summary judgment will clarify these capacities and state expressly the capacities in which the movant is moving, and will be likewise explicit in the non-movant's capacity(ies) on which they are moving as well. Again, the failure to do this requires the court to either take the time to do this, or fail to grasp the intent of your motion. Finally, just as with the claims discussed in the preceding paragraph, it can be very useful for the movant to specify WHAT CAPACITIES HE OR SHE IS **NOT** MOVING FOR SUMMARY JUDGMENT ON just to drive it home for the court.

C. Concise Summary

Hopefully, between the clear title, and the statement of who is moving for what relief against whom (all discussed above) these will be clear to the court. The next job for the movant (or non-movant) is to encapsulate your argument into a brief paragraph or two. Of course, if your entire motion is based upon one element or one straightforward defense, you can make this section shorter, or even eschew it altogether. However, if your motion or response is more involved, this section should spell out your arguments simply and precisely. The author believes that you should try to start your work with this section of your motion or response. It sounds hackneyed, but the author is convinced that you should work to hone your argument to several sentences before starting on your motion so that you have a clear direction in your writing. The author, having practiced as a solo litigator for many years, writing his own motions and responses, knows that time is extremely tight and precious, but it is really very valuable to take some extra time to hone your argument before starting to write. When a movant just starts writing, the motion can easily become unfocused. Then, with little time left for serious editing, that unfocused argument is what is presented to the court, decreasing its efficacy exponentially. Hone first, write second.

So what should go into this summary? It should be a short summary akin to a logical syllogism of what relief you are seeking, what the rule is, why the opponent's claims or defenses fail thereunder, and that you are entitled to the relief you seek. Rinse and repeat for each aspect of your motion or response. As an example:

> Dave Defendant is entitled to summary judgment on Pete Plaintiff's negligence claim (Dave Defendant is not moving for summary judgment on any of Pete Plaintiff's other claims, so this would be a partial summary judgment). The statute of limitations for a negligence claim in Texas is two years. Pete Plaintiff's

> negligence claim accrued on January 1, 2007 and Pete Plaintiff did not file this lawsuit until January 5, 2009. Therefore, Dave Defendant is entitled to interlocutory summary judgment against Pete Plaintiff on Pete Plaintiff's negligence claim.

Of course, this is a very simple claim and motion, but this is how straightforward an effective motion should be, broken down into bite-sized pieces for the court. It's not that courts cannot handle more complex arguments – of course we can – it's just that we have limited time to devote to each case, just as you do. You know your case better than the court does, so take the extra time to streamline your arguments so that we can rule fairly and efficiently.

D. Summary Judgment Evidence

Organizing your summary judgment evidence, and challenging the other side's summary judgment evidence is an often overlooked tool in your legal toolkit. These objections should be filed as far in advance of the hearing or submission date as possible so that the court can review them prior to the hearing. Very often, they are filed the morning of the hearing or the submission date, and can be overlooked. Or, at the very least, the court will not have the benefit of them in the context of your oral argument on the motion. If the court has had a chance to read a good objection to the form of an affidavit, or a hearsay objection to an important document, it can color the way the court hears the summary judgment oral argument. This is because a document on which an entire motion or response rests may simply be incurably inadmissible for the purpose for which it is offered, and may offer the court an easier path to ruling in your favor on your motion than deconstructing an otherwise complex securities law analysis. You may get a quick ruling in your favor in a matter of hours or days rather than a partial victory a week later with the right summary judgment evidentiary challenge. So the bottom line is, get your summary judgment evidentiary challenges filed at the earliest possible moment so the court can internalize them by the outset of your oral argument.

Why are these evidentiary challenges and rulings attractive to the court? The court's evidentiary rulings are reviewed by the court of appeals on an abuse of discretion standard. *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 906 (Tex. 2000). The traditional summary judgment ruling is reviewed on a *de novo* standard. *Mid-Century Ins. Co. v. Ademaj*, 243 S.W.3d 618, 621 (Tex. 2007). Thus, if all of the material summary judgment evidence disappears because it is inadmissible, the court's ruling based on the status of that summary judgment evidence will more likely be upheld. As a practical matter, that ruling is being reviewed on an abuse of discretion standard because the court of appeals is largely determining whether the evidence was properly excluded. If the trial court did not abuse its discretion in excluding the evidence, and the evidence is all, or mostly, gone, then it is hard to find that the court erred in basing its summary judgment ruling the absence of that evidence. The author does not particularly care about being proved right by the court of appeals, and would rather ultimately get to a just and correct outcome, but, like any busy professional, the author would also like to have to deal with the same matter once rather than more than once.

When you are the movant on a traditional motion for summary judgment, you should be sure that your evidence is admissible for the purpose for which it is being offered. Affidavits, in order to be utilized as summary judgment evidence, must satisfy a number of requirements as mandated by Texas courts. Namely, affidavits must: (a) be based upon the affiant's personal knowledge and must state that the facts in it are true, *Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 122 (Tex. 1996); *Humphreys v. Caldwell*, 888 S.W.2d 469, 470 (Tex. 1994); (b) state how the affiant came to have knowledge of those facts, *Radio Station KSCS v. Jennings*, 750 S.W.2d 760, 761-62 (Tex. 1988); (c) contain facts which would be admissible at a conventional trial on the merits, Tex. R. Civ. P. 166a(f); *see also, Northwest Texas Conference v. Happy ISD*, 839 S.W.2d 140, 143 (Tex. App.--Amarillo 1992, no writ); (d) not be based on hearsay, *Einhorn v. LaChance*, 823 S.W.2d 405, 410 (Tex. App.--Houston [1st Dist.] 1992, writ dism'd); and (e) state facts not conclusions, *Brownleee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984). The Texas Supreme Court has held that conclusory affidavits do not raise an issue of fact and are not competent summary judgment evidence. *Ryland Group, Inc.*, 924 S.W.2d at 122; *Anderson v. Snider*, 808 S.W.2d 54, 55 (Tex. 1991).

As you are constructing your motion (and the same goes for the response) you should be thinking about each piece of evidence you are employing, and what the argument for its admissibility is. There is no reason you cannot be reviewing your motion or response with the same critical eye that your opponent will. Almost every evidentiary problem is fixable if you give yourself enough lead time. It is usually those who wait until the last minute who get stuck, naturally.

What do you do if you find yourself stuck without a crucial piece of evidence? First, call the other side and ask if they will reset their motion to allow you to take more discovery or obtain the information in admissible format. Second, failing cooperation by the other side, file the appropriate motion with the court, either a continuance motion or a motion to compel if you have already asked for the discovery and need a ruling on an objection, or file both. In the view of the author, if a motion is filed earlier rather than later, the Court is more likely to appreciate your foresight and organization. Nothing is more difficult for the Court than resetting a summary judgment motion to the disadvantage of a movant who finds him or herself in an advantageous position on the morning of a summary judgment hearing because the opposition did not diligently pursue the discovery it needed to respond to the motion.

As for the evidence itself, first, the affidavit has to be in the correct format. At least fifty percent of the time, a movant or respondent will fail to use the "magic" words at the beginning of the summary judgment affidavit. It must state, among other things, that the information contained herein is "within my personal knowledge based upon (describe your involvement) and is true and correct." The blank should specify how you know that information. It might state that you know about the amount owed to the plaintiff because you are the manager of their accounting department, or it might state that you saw the slip and fall happen, or you studied this document or that document and are an expert in this field, etc. The affidavit has to be clear, positive and direct, free from inconsistencies, and readily controvertible. It cannot be conclusory, too legalistic, or self-serving. These problems can be fatal to an affidavit in whole or in part. The

author will look at these objections to an affidavit first before getting to the substance of a motion. Often, knocking out a key piece of evidence is tantamount to victory on a motion.

E. The Order on Objections to Summary Judgment Evidence

Routinely, a party challenging summary judgment evidence will not even bother to file a proposed order on their objections. This is a mistake. The party objecting to summary judgment evidence should always file a proposed order, but not just any order. It should be an order that is specific to your objections. On the occasions when a proposed order is actually submitted as to evidentiary objections, it is usually about one paragraph, or a couple of sentences, and says that "the court has considered the movant's objections to the non-movant's summary judgment evidence, and the movant's objections are hereby SUSTAINED." That does not do anyone any good. When raised, there are usually multiple objections to the other side's summary judgment evidence. A two sentence order that merely overrules or sustains all of them at one time is useless. It's a nice thought to file a proposed order, but the court can almost NEVER use that proposed order as is. Usually, if the court will take the time to rule on the summary judgment objections first, it will have to prepare its own order. The author almost always does this.

An ideal proposed order on summary judgment evidence objections will have multiple subparts– one for each evidentiary point raised by the party challenging the evidence. Thus, if a party is objecting to an affidavit as a whole because it does not state that the information is within the affiant's personal knowledge, or does not state that the information is true and correct, and then goes on to object to several additional points in the affidavit because they are conclusory, or legal conclusions, or include hearsay, then each of those legal points should be a separate decision point in the proposed order. This is likewise true if the objections are to individual pieces of evidence, such as documents, deposition testimony, photos or the like. Each objection, whether based on hearsay, authenticity, best evidence, or any other basis, should have its own subpart in the proposed order. Finally, each subpart to the proposed order should have either a line to check next to the words, "SUSTAINED" and "OVERRULED," or the words by themselves in a separate line so that the court may simply mark next to the words or circle the appropriate one for each legal evidentiary ruling, like so:

> It is therefore ORDERED that Defendant's objection to Paul Plaintiff's affidavit on the ground that the affidavit fails to state that the information contained therein is within Paul Plaintiff's personal knowledge is hereby:
>
> _____ SUSTAINED _____ OVERRULED
>
> or
>
> SUSTAINED OVERRULED (circle one)

Either format is fine, but allow the court to do the least amount of work to rule in your favor. This must be done for each separate evidentiary ruling you want the court to make. The order may go on for several pages, but a court can make quick work of ruling on the objections by

printing the order, reading through the objections (which are usually – when broken down into their subparts – very simple legal rulings), and checking or circling the appropriate ruling (overruled or sustained), signing off on the Order and then factoring those rulings into the substance of the motion.

F. Your pleadings

Very often, the movant or respondent's pleadings will not support the relief they are seeking. Be sure to go over your pleadings well in advance of filing your traditional summary judgment motion, or response. If your pleading must be amended and you are fewer than 8 days from the date of the hearing or submission, then you will need to seek leave to amend your pleading. Tex. R. Civ. P. 63; *Sosa v. Central Power & Light*, 909 S.W.2d 893, 895 (Tex. 1995). Failure to file the motion for leave to amend concurrently with the late-filed pleading usually requires the court to reject the late filing even if you later file a motion for leave.

G. Organizing your Motion and Arguments

On page 6 of this paper, the author discussed honing your arguments into the brief summary to be placed at the beginning of the motion or response. This type of organization and honing should continue through the body of the motion. The author has written countless summary judgment motions and responses in 13 years of practice, and has read and ruled on at least 100 more traditional summary judgment motions and responses in the year he has been on the bench. Some are well written, some are not. The main culprits in what the author considers a poorly written motion or response–aside from simply having no facts or law to support your side of the case–include lack of thought, lack of organization, and lack of knowledge about the case. When you are first planning to write a motion (or if you reasonably expect a motion to be filed against your client(s)), you should know enough about your case to write a strong motion or response. If not, then you have to make sure you have obtained the discovery you need to do so. This has to be done well in advance. If you need deposition testimony, interrogatory answers, admissions, or documents, then these need to be sought at the earliest possible moment. This will make your motion or response more effective. It will help to avoid those uncomfortable hearings (especially if your client tags along) in which you are asking for a continuance on *the* potentially dispositive motion in the case because you never asked for or obtained the key documents you needed in discovery. There is nothing worse than receiving a motion for summary judgment from the other side when you have not done your job in obtaining discovery. The other side will often be a lot less generous in making witnesses available or producing documents when they have you over the summary-judgment-hearing barrel. You will frequently need the court's assistance at this point, which may have the natural and unfortunate effect of causing the court to think that maybe you were not as diligent as you could have been since the inception of the lawsuit.

H. Caselaw

If discovery is not the issue, then another problem can be a lack of diligence in researching or briefing the legal issues involved. Inserting legal authority into your motion or response should not be an afterthought, but something that is done well in advance, if possible. The court really

does not need another formal recitation of the *Clear Creek Basin Authority* standard for summary judgment. What the court does need, however, is clear authority for each case-specific point of law that is not exceedingly obvious. Very often, by reading through the caselaw in researching a point of law in a complex motion, the attorney will find other arguments or counter-arguments that he or she had not thought of. These can strengthen your arguments, or be held in reserve for a reply brief.

Further, the authorities on which you rely in your motion or response should be on point, and should be controlling where possible. In a recent unnamed case in which the Court held oral argument on cross-summary judgment motions, the matter involved justifiable reliance in a fraud claim involving the purchase of securities. While the defendant's motion honed in on facts and caselaw regarding the specific treatment of justifiable reliance under common law fraud in making its arguments in its motion, the plaintiff's response got off track. The plaintiff's response went down rabbit trails about the materiality of the alleged misrepresentations and discussed some federal caselaw dealing with federal securities statutes and regulations. The plaintiff's response never got around to actually using the words "justifiable reliance." The Court set the briefing aside because it seemed like the parties were talking past each other, and it would take some time to whittle down to the essence of the plaintiff's response. Eventually, the Court believes it figured out the arguments that the plaintiff was making by way of analogy (more or less), but it took a lot of time and effort to do so. The Court expressly admonished the plaintiff in its order that it would have been a lot easier for the Court if the plaintiff had discussed and cited Texas caselaw addressing the justifiable reliance element of common law fraud, rather than the materiality element of federal securities laws.

Of course, sometimes there isn't any caselaw or other authority on point. There is nothing wrong with citing caselaw that is persuasive by analogy, or from another state or even federal caselaw that may be persuasive authority. The key, however, is to be both persuasive and intellectually honest about it. First, if you are going to use authority from another jurisdiction, do it effectively and based upon thorough research. Second, if an attorney strives to be intellectually (and otherwise) honest with the court about weaknesses in the client's case or in its legal authority, it will earn significant credibility points. The author is much more likely to be persuaded by analogous or "on-point" caselaw from another jurisdiction (even if the attorney is arguing for a change in otherwise clear Texas law) if the attorney is up front about what they are doing. The author likes to believe he has a good legal baloney detector, and will often sniff out something that does not sound right anyway. Be up front and make your best arguments based on solid legal research.

Finally, while the author has access to Westlaw, including all states caselaw and all federal caselaw, the author cannot take the time to read every case that is cited to him. It is immensely helpful for the attorney to include both pinpoint (page specific) cites, and parentheticals with the cases he or she cites. That is, after the citation, give a brief description of the point of law for which the case is cited and what the case says about it, such as: "(holding that a negligence cause of action accrues when the plaintiff suffers a legal injury)" or "(discussing what steps an employee may and may not take in preparing to compete with an employer prior to separation

from the employer)." The point is, the effective motion or response will allow the court to more quickly grasp what the arguments and authorities are, and show that the cited cases stand for the propositions for which they are cited. If the attorney includes both the pinpoint cite—and in the case of an unpublished opinion, a cite to the starred or asterisk page—as well as a useful parenthetical, it can only help. Then, when the court double checks the cites and sees that the cases stand for what they are represented to stand for, that party's credibility will only increase with the judge.

I. The Response

Throughout the discussion above regarding the tradition motion for summary judgment, the author has discussed points where the same arguments apply to both the motion and the response. However, there are a few tips that apply only to the response.

First, contrary to popular belief, it is not necessary or always advantageous to plead the same set of facts under 10 different causes of action. Give up dead-end arguments. The author has, on several occasions, dismissed causes of action for negligent misrepresentation, fraud, and Deceptive Trade Practices Act (DTPA) claims which were simply recast breach of contract claims. While the author recognizes that such claims can sometimes coexist in the same lawsuit based upon independent extra-contractual representations, and even a few other grounds, often, there is no basis for anything but a breach of contract claim. Of course, every case is different, but some are less different than others. If the only representation that you can come up with when the other side invariably moves for summary judgment on your negligent misrepresentation, fraud and DTPA claims is that the defendant promised he or she would perform under the contract, and then failed to do so, maybe it is time to consider non-suiting those claims and going forward with your breach of contract claim. You can gain credibility with everyone involved by being intellectually honest about the strengths and weaknesses of your claims.

Second, remember that some elements of causes of action, like fraudulent intent, a meeting of the minds in a conspiracy, and breach of duty of ordinary care are often left to the trier of fact and determined by circumstantial evidence. Of course, courts all over the country rule on such issues as a matter of law every day. Nevertheless, it is more common that such determinations are left to the trier of fact, and a good response will cite the relevant caselaw and analogous facts of those cases for the proposition that such fact intensive inquiries are rarely well suited for summary disposition. Do not be afraid to make such arguments, and take the time to find cases that have similar fact patterns in which courts have denied summary judgment. Those cases are legion. Likewise, be sure to point out when the issue is a legal one for the court if the law and facts are in your favor as well.

Third, do not forget the basic "blocking and tackling" of distinguishing the other side's cases. Take the time in your response to discuss the other side's cases. If left unchallenged, the court may conclude that you do not disagree that they stand for the proposition for which the other side has cited them. Figure out the gravamen of the holding if it appears contrary to your position on its face. Often, a good hard reading of the case will reveal an important distinction from the facts

of your case that can be dispositive. The author was frequently amazed to find, both as a litigator, and now as a judge, that cases do not stand for the proposition for which they are cited. Similarly, sometimes a case may stand on all fours against your position, but not cite any authority for its holding, and not be cited anywhere else for that proposition since it was published. The author calls those "lone ranger" or "one-off" cases and, when appropriate, gives them all of the "weight" to which they are entitled.

J. The Proposed Order

Just as with the proposed order on summary judgment evidentiary objections, the proposed order accompanying the motion or response should be user-friendly. Try to put yourself in the shoes of the court when drafting the order. First, the proposed order should be clear as to the relief you are seeking. That means, it should specify whether you are seeking a final or interlocutory (partial) judgment – if you are the movant. This is a great indicator for the author, who usually reviews the proposed orders before digging in to the substance of the motion and response.

Second, the proposed order should be broken into subparts so that the court may actually make use of the proposed order. Often the court will not grant all of the relief that the movant is asking for, but will grant some of it. If the proposed order is broken into parties as well as causes of action or even elements of causes of action, as appropriate, the court can GRANT or DENY those subparts of the relief sought by simply handwriting in a few words here or there, or even circling GRANTED or DENIED if those words are provided for the court. In contrast, if the proposed order relates to a motion with several different parts, and the court finds it appropriate to grant some relief and deny other relief, a three sentence proposed order stating that the entirety of the motion is GRANTED or DENIED is of little help. The take-away should be that the proposed order should be "granulated" as that term has been used lately relating to jury charges so that the court can make use of the order with a few simple interlineations, and sign off. Otherwise, the court will find it necessary to draft its own order, which, at a minimum, may delay its ruling.

Third, the proposed order should, if it is intended to be final, state clearly that it resolves all claims and causes of action involving all parties, and is intended to be a final, appealable judgment. That can, for better or worse, convert an otherwise interlocutory judgment into a final one if no one brings it to the court's attention, so be careful.

Fourth, most often, traditional summary judgment motions are not seeking final affirmative relief, but some do. Some seek to prove not only liability in favor of a party seeking affirmative relief, but also their actual damages. Sometimes these damages are liquidated and sometimes they are not. For liquidated damages, the amount in dispute is usually readily ascertainable and is simply the principal amount of a debt or account, plus interest. If the damages are unliquidated, it is difficult to prove them by summary judgment, but in those cases where all that is left to do is to prove unliquidated damages, the parties may agree to a bench trial or summary trial, or may require a jury trial solely on damages.

Fifth, the successful party may often be entitled to **attorney's fees** under the DTPA, the Civil Practice and Remedies Code, or under the express terms of a contract. The summary judgment evidence for attorney's fees requires expert testimony from a qualified attorney in the form of an affidavit, or deposition testimony. The attorney should remember that they are entitled to not only attorney's fees up to the time of judgment, but also for successfully defending the judgment on appeal. The language of both the affidavit and the proposed order should couch the appellate attorney's fees as reasonable and necessary fees "in the event that [the opponent] is unsuccessful in its appeal to the court of appeals; [x dollars] in the event that the [the opponent] brings a petition for review to the Texas Supreme Court but that the petition is ultimately unsuccessful, and [x dollars] in the event that the petition for review is granted to the Texas Supreme Court but the Texas Supreme Court ultimately upholds the judgment." The court may not award fees in the event of an appeal unless the fees are conditioned upon the recipient's success during the course of that appeal. That is why the language of the affidavit and the proposed order should be phrased in those contingent terms.

Sixth, the attorney's fee testimony in deposition or affidavit must be segregated under the Texas Supreme Court's holding in *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 313-14 (Tex. 2006). That means if you are seeking summary judgment on both your breach of contract and breach of fiduciary duty claims, you can only recover attorney's fees for your breach of contract claim, of course. Therefore, under *Tony Gullo Motors*, you and your client must present evidence of the time and fees expended on the breach of contract claim work as distinct from the work on the fiduciary duty claim. Without this evidence of segregation, the trial court cannot conclude that there is *any* evidence on which to base an award of attorney's fees. This failure to segregate fees issue has been raised in almost every post jury-trial motion that the author has been involved in over the last few years as a litigator and judge. The court of appeals will not hesitate to remand for a determination of the attorneys fees, or render judgment awarding no fees absent this evidence.

Seventh, the proposed order should be sure to request taxable costs of court. Taxable court costs DO NOT usually include postage and copy costs and other office expenses. Rather, they include things like deposition costs, filing fees, subpoena costs, costs for service of process, costs of abstracts and other items like these. It is not usually worthwhile or prudent for an attorney to try to calculate taxable costs of court by him or herself and insert the amount into the proposed judgment. Rather, they should simply state that they have been awarded all taxable costs of court. In this way, when the judgment is abstracted by the district clerk's office, all of the taxable court costs in the record will be tallied up. Further, the attorney who puts a specific amount into the judgment may cheat his or her client when, down the road, he or she has spent significant money in court costs in trying to collect the judgment which may later be abstracted and added into the judgment total.

Eighth, the attorney should be sure to include an award of prejudgment interest and postjudgment interest. The prejudgment interest amount is either 5% or 6% right now depending on the type of claim involved. This is governed by the Texas Finance Code. The 5% figure fluctuates with the prime rate, but 5% is a floor. Moreover, it can also be governed by the

contract between the parties, such as a promissory note. Prejudgment interest begins to accrue either 180 days after defendant receives written notice of the claim or the date the suit was filed, whichever is earlier. Tex. Fin. Code Ann. § 304.104 (Vernon 2006); *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 531 (Tex. 1998). It helps the court tremendously for the party seeking prejudgment interest to include the precise amount of interest up to the date of the oral hearing or submission, and also include a daily amount of prejudgment interest so that the court may then calculate the additional interest after the day of the hearing, if any, and plug that amount into a blank in the proposed judgment.
Did you know that you can be awarded prejudgment interest on a partial judgment? *See Malone v. Federal Deposit Ins. Corp.*, 611 S.W.2d 855, 859 (Tex. Civ. App.—Houston [14th Dist] 1980, writ ref'd n.r.e.) (holding that postjudgment interest in a summary judgment should have been awarded from the date the interlocutory summary judgment was rendered against the defendant, not the date that a final judgment was rendered against the defendant after severance of the other defendant, when "[t]he amount awarded, the rate of interest payable on the judgment, and the date interest began to run, were the same in each judgment").

Ninth, and finally, in a case involving statutory fraud under Texas Business and Commerce Code section 27.01 et seq., certain additional expenses may be awarded including "reasonable and necessary attorney's fees, expert witness fees, costs for copies of depositions, and costs of court." These amounts should be proven by the appropriate testimony and sought in the motion and proposed judgment as well.

K. Certificate of Service and Certificate of Conference

Traditional motions for summary judgment (and responses) require a certificate of service. Tex. R. Civ. P. 21 & 21a. Ideally, the certificate of service should specify by name to whom the documents were sent, and how. In the 151st Civil District Court, and some other courts now as well, all new lawsuits must be electronically filed unless the plaintiff is *pro se*. The Order in the 151st also requires that all parties not only file documents electronically, but also that all parties MUST accept service of documents via the e-filing system. In that way, once the documents are e-filed, they are automatically served on all other counsel of record. A certificate of service is nevertheless still required. Other additional forms of service are acceptable as long as the appropriate e-filing method is also employed.

No **certificate of conference** is required for a traditional or no-evidence motion for summary judgment. Every other motion requires a certificate of conference. Leaving a message with no response is NOT an acceptable certificate of conference. If that is all you can do before filing a motion, then it is requested by the author that you file a supplemental or amended certificate of conference after you have had a chance to meaningfully discuss the matter with opposing counsel. In other words, please actually CONFER.

L. Dealing with Voluminous Exhibits

One question the author is often asked is how to deal with voluminous exhibits. As stated above, our Court is an e-filing court, so the exhibits should be filed electronically as attachments through the e-filing system. There should be no problem scanning in large exhibits and attaching

them to your filing. Leave plenty of time for snafus, of course. If your case is not required to be e-filed, you are still welcome to e-file your pleading. If you choose not to, then of course the court will still need to have the exhibits.

If there is plenty of time and the case does not need to be e-filed, then the large documents will be scanned by the Court's clerks and will be available to the court through its computer system. If you are short on time prior to the hearing, courtesy copies may be brought to the court. This is discouraged as the Court views it is a waste of paper to deliver one large chunk of documents to the district clerk and another to the court itself. If you must do so, however, please present them in well-marked three-ring binders with the exhibits.

Please be sure to copy the documents **double sided** on paper with a high recycled content to reduce both paper waste and allow them to be carried around more easily.

Another option that the author would like to see implemented is to create a Google or other web-page or other form of shared online document that will allow the court to go to a hyperlinked URL (website address) that you provide to the court's designated e-mail recipient (our coordinator, Corina Teniente) to view a document. This will save on paper and allow the court to view the document from any internet connection. This URL should, likewise, be provided to all parties, of course. Again, these are solutions if there is a shortage of time and you cannot file the document electronically, and are not required to do so.

Once again, the preferred method is to e-file a document to make it available to the court with enough lead time.

Other electronic options in the future may include documents that are e-filed that contain hyperlinks in the body of the document with links to exhibits that are stored somewhere else on the internet. In that way, the court can click on a reference to an exhibit and be directed straight to the document, page and line where that information is contained in an exhibit. Similarly, the Court envisions a day not too far off when documents presented to the court contain hyperlinks to relevant authority on Westlaw or LexisNexis. One supposes that could be done now within a CD onto which the party burns all of the relevant documents and caselaw. Even without the hyperlinks, a party is welcome to deliver a courtesy copy of documents to the court on a memory stick or CD in .pdf format with .pdf formatted exhibits as attachments. If time is short, this would allow the Court to take documents home to review prior to a hearing.

M. The Hearing

The author often finds that power point presentations are useful in summarizing key aspects of the parties' motions and responses. They are by no means necessary. The Court's A/V system allows the court to view the presentation at the bench on its own monitor. Please be sure to familiarize yourself with attaching your laptop to the system so that there are no delays at the hearing. Any such presentation is most effective if it contains specific citations to summary judgment evidence, or key quotes from cases with pinpoint cites. It is also worth the extra time

and effort, in the appropriate case, to learn how to blow up and highlight sections of documents to call them to the court's attention.

Finally, the author makes every effort to read motions and responses ahead of the hearing, so please be prepared to answer specific questions, and to jump to the middle of your argument if asked.

N. Unfiled Discovery

Sometimes information that is necessary to move for summary judgment or to respond to a motion has not been provided to the other side at the time that a motion is contemplated or a response is due. What can the litigator do? First, review TRCP 166a(d). That rule specifies:

> Discovery products not on file with the clerk may be used as summary judgment evidence if copies of the material, appendices containing the evidence, or a notice containing specific references to other instruments, are filed and served on all parties together with a statement of intent to use the specified discovery as summary judgment proofs: (i) at least twenty-one days before the hearing if such proofs are to be used to support the summary judgment; or (ii) at least seven days before the hearing if such proofs are to be used to oppose the summary judgment.

Of course, under the more recently created Rule 191.4(a)(3), parties no longer file documents and tangible things produced in discovery, but the principle most likely still applies. If the documents or discovery responses have not yet been served on the other side, it is necessary to follow Rule 166a(d)'s procedure to be able to use the material in support of or in response to a motion for summary judgment. It is also prudent to immediately supplement your discovery responses thereafter.

The flip side of this is, of course, that if a party has asked for certain information in discovery, and it has not been objected to, and it has not been produced, and the procedure in Rule 166a(d) has not been followed, it is prudent to object to the inclusion of the information in the summary judgment record. Because a summary judgment hearing is treated like a trial for almost every other purpose, such as under TRCP 63 (amendments of pleadings prior to trial), *Goswami v. Metropolitan S&L Ass'n*, 751 S.W.2d 487, 490 (Tex. 1988), the same rules about late or absent discovery responses should also apply, and the party seeking to use the material will have the burden to demonstrate good cause or lack of unfair surprise or unfair prejudice under TRCP 193.6(a), (b). Courts will frequently allow leave to supplement the summary judgment record, and in return, may even reset the hearing to a time when the party objecting to the summary judgment evidence has had a chance to supplement its briefing to address the late-filed evidence.

If all else fails and the court will not allow the material to be used in connection with the summary judgment, the attorney may, of course, look to the non-movant's pleadings or summary judgment evidence for information demonstrating the existence of a genuine issue of material fact. Sometimes a judicial admission may be found in the non-movant's pleadings. Other times

the opponent may have attached and referenced the same deposition testimony that you have. Normally you will not be so lucky, but it is worth a look.

Finally, do not be afraid to ask for a continuance of the hearing. This is not ideal, of course, but it is necessary to protect your record on appeal if the court denies the motion, and living to fight another day is better than losing a winnable case.

No-Evidence Motions for Summary Judgment

I. Discussion

No-evidence motions for summary judgment are a relatively new creature under Texas law and are governed by Texas Rule of Civil Procedure 166a(i) (Subsection (i) was added to TRCP 166a on September 1, 1997. *See* Historical Notes of TRCP 166a, Vernon's Texas Rules Annotated). A no-evidence motion may be brought without affidavits or other summary judgment proof. Tex. R. Civ. P. 166a(i). They may only be addressed to causes of action or defenses on which the non-movant has the burden of proof. *Id*; *see also Waite v. Woodard, Hall & Primm, P.C.*, 137 S.W.3d 277, 280 (Tex. App.—Houston [14th Dist.] 2004, no pet.) ("A party cannot move for a no-evidence summary judgment on claims on which that party has the burden of proof."). This rule is often ignored, and will result in a denial of the motion in whole or in part.

A. Form of the Motion

No-evidence motions for summary judgment are usually short and straightforward. When filed on their own (as opposed to as a "hybrid" or combined traditional and no-evidence motion) it is just a matter of specifying that the motion is directed at the non-movant's claims or defenses pursuant to Texas Rule of Civil Procedure 166a(i).

Further, the motion must specify the claims or causes of action attacked by the motion. It must then **expressly list each element** of the challenged cause of action or defense to which it is directed. *See Thomas v. Omar Invs.*, 156 S.W.3d 681, 684 (Tex. App.—Dallas 2005, no pet.). It is insufficient to merely state that "there is no evidence to support plaintiff's negligence claim." *See Ortiz v. Collins*, 203 S.W.3d 414, 425 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). Rather, the movant must address each individual element for which it claims there is no evidence, such as duty, breach, causation and damages. The movant should cite caselaw to demonstrate the actual elements of the challenged claim or defense.

B. A Sufficient Time for Discovery Has Elapsed

Non-movants regularly challenge no-evidence motions for summary judgment by contending that a sufficient time for discovery has not yet elapsed. The author's typical docket control order states that no-evidence motions will not generally be heard until after the discovery cutoff in the case. Indeed, the Notes and Comments to TRCP 166a(i) state that "[a] discovery period set by pretrial order should be adequate opportunity for discovery unless there is a showing to the contrary . . . ." 1997 Comment following TRCP 166a, Vernon's Texas Rules Ann. The author has granted motions for continuance on no-evidence motions for summary judgment after the discovery cutoff where additional discovery is shown to be reasonably necessary and where the

non-movant has otherwise been diligent in conducting discovery. Likewise, in cases where the no-evidence motion for summary judgment is sought prior to the end of the discovery period, whether an "adequate time" for discovery has elapsed is decided on a case-by-case basis. *See McInnis v. Mallia,*261 S.W.3d 197, 201 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (citing various factors, such as the nature of the case, the amount of discovery the parties have already conducted, and the type of evidence necessary to respond to the motion). The author has heard no-evidence motions prior to the discovery cutoff date in cases where a motion for leave to file the motion early is filed and it is clear that the non-movant is not conducting any meaningful discovery, or discovery will not likely enable the non-movant to overcome the summary judgment motion.

C. The Motion Must be Granted

If no response is filed, and the motion is otherwise in the proper format, the author will not hesitate to grant the motion. Indeed, TRCP 166a(i) requires that the motion be granted "unless the respondent produces summary judgment evidence raising a genuine issue of material fact." Because 166a(i) requires the trial court to grant the no-evidence MSJ if the nonmovant does not produce evidence that raises a genuine issue of material fact, the court may grant a no-evidence summary judgment by default if the nonmovant does not file a response and the motion is sufficient, i.e., specifies element(s) (as to which there is allegedly no evidence) of the nonmovant's claims on which the nonmovant would have the burden of proof at trial, to warrant a no-evidence summary judgment. *See Roventini v. Ocular Sciences, Inc.*, 111 S.W.3d 719, 722-24 (Tex. App.—Houston [1st Dist.] 2003, no pet.). This requirement for the non-movant (respondent) to respond applies to each challenged element expressly addressed in the motion. It is important to note that a trial court may not render a traditional motion for summary judgment under Rule 166a(c) by default because of the nonmovant's failure to respond. *Id*. at 722.

D. The Response

The response should follow the same guidelines as set forth above in the section discussing traditional motions for summary judgment and the response thereto. It should be noted that a respondent does not need to marshal its proof to defeat a no-evidence motion for summary judgment, but rather "need only point out evidence that raises a fact issue on the challenged elements." 1997 comment following TRCP 166a, Vernon's Texas Rules Annotated. Further, if the movant fails to specify the particular elements of the cause of action or defense attacked by the motion, it is appropriate to challenge the form of the no-evidence motion for summary judgment and/or specially except to the motion to clarify the relief sought by the motion.

Pleas to the Jurisdiction

I. Discussion

Another dispositive motion is a plea to the jurisdiction. This motion is only mentioned in passing in the Texas Rules of Civil Procedure in Rule 85. However, it is used in myriad situations to point out to the court that it is lacking in subject matter jurisdiction. *See Texas Dep't of Transp. v. Arzate*, 159 S.W.3d 188, 190 (Tex. App.—El Paso 2004, no pet.) ("A plea to the jurisdiction is a dilatory plea by which a party contests the trial court's authority to determine the

subject matter of the cause of action."). Most often the author sees it employed in cases involving governmental immunity. The motion is also brought to challenge standing of a party to bring the suit, lack of a justiciable issue, ripeness of a claim, to show that another court or an administrative agency has exclusive jurisdiction, or federal law preempts the claim. The plea/motion does not address the merits of the claim, but rather, the court's subject matter jurisdiction. *See Bland Independent School Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000) (stating that the purpose of a plea to the jurisdiction is to "defeat a cause of action without regard to whether the claims asserted have merit").

A. Time for the Motion

Because subject matter jurisdiction may be challenged at any time, including for the first time on appeal, there is no deadline for bringing such a motion. *See Tex. Ass'n of Business v. Air Control Bd.*, 852 S.W.2d 440, 443-44 (Tex. 1993) ("Subject matter jurisdiction is never presumed and cannot be waived."). Even if the motion is a dispositive motion filed after the DCO deadline, the court will have to hear the motion to protect its own jurisdiction. The author cannot imagine a situation in which he would not listen to a challenge to the Court's subject matter jurisdiction, even in mid-trial, or post-trial for that matter. Furthermore, a court can, *sua sponte*, raise the issue of subject matter jurisdiction at any time, even at the appellate level. *Id* at 445-46; *Texas Workers' Compensation Com'n v. Garcia*, 893 S.W.2d 504, 517 n. 15 (Tex. 1995).

A plea to the jurisdiction need not be verified as it is not listed in TRCP 93 with other pleas requiring verification. *Ab-Tex Beverage Corp. v. Angelo State University*, 96 S.W.3d 683 (Tex. App.—Austin 2003, no pet.); *see also* Tex. R. Civ. P. 93 (not listing a plea to the jurisdiction as a pleading or defense which requires verification).

Evidence may be necessary to demonstrate the court's jurisdiction or lack thereof. A court must consider evidence when necessary to determine jurisdictional facts. *See Texas Dept. of Parks and Wildlife v. Miranda*, 133 S.W.3d 217 (Tex. 2004) ("[I]f a plea to the jurisdiction challenges the existence of jurisdictional facts, we consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised, as the trial court is required to do.") Usually, a court will only consider evidence related to the jurisdictional issues, and avoid evidence related to the merits of the case. *See Bland ISD v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000) ("The court should, of course, confine itself to the evidence relevant to the jurisdictional issue.").

If evidence is disputed, may require resolution by jury or court in a bench trial. If there is no dispute, the court can rule as a matter of law. The court will not dismiss, however, if the jurisdictional defect may be cured by amendment.

Motions to Dismiss for Want of Prosecution

I. Discussion

Such motions are governed by TRCP 165a as well as under the court's inherent power to manage its docket. *See Villareal v. San Antonio Truck & Equip.*, 994 S.W.2d 628, 630 (Tex. 1999). Rule 165a(1) states that "[a] case may be dismissed for want of prosecution on failure of any

party seeking affirmative relief to appear for any hearing or trial of which the party had notice." At a subsequent dismissal hearing, the court is *required* to dismiss unless there is good cause for the case to be maintained on the docket. Texas Rule of Civil Procedure 165a(1). Moreover, a court may place any matter on its dismissal docket that is not disposed of within the time standards promulgated by the Texas Supreme Court. Texas Rule of Civil Procedure 165a(2). Furthermore, under the common law, a court has inherent power "to dismiss independently of the rules of procedure when a plaintiff fails to prosecute his or her case with due diligence." *Villareal*, 994 S.W.2d at 630. Regardless of whether a court is relying on Rule 165a or its inherent authority, it must provide each attorney of record and each party not represented by an attorney with notice and an opportunity to be heard. *See id; Villareal*, 994 S.W.2d at 630.

Most often, the Court will dismiss a case for want of prosecution (DWOP) on its own motion after notice. This usually comes after the court has sent out a warning notice, and asks the plaintiff to file a motion to retain. The author signs such dismissals each week when no motion to retain is filed (or another requirement of the notice is not satisfied).

However, such a motion can be a good tool for a defense attorney where the plaintiff continually fails to prosecute the case, seeks repeated continuances, and will not answer discovery. This may sometimes be seen where a case has been remanded from the court of appeals, and the plaintiff or his or her attorney seems to have abandoned the case for several months or even years. Likewise, the parties may settle the case, yet provide no final closing documents, such as take-nothing judgments or nonsuits. Interestingly, under Rule 165a(1), even if the court retains the case on the docket, the Rule requires that a continuance thereafter be granted only for "valid and compelling reasons specifically determined by court order." Thus, a party may seek to gain an advantage in opposing a continuance under these circumstances on the ground that a potentially heightened standard of "valid and compelling" has not been met. The Court has not seen this, but it would be an interesting argument.

The author routinely dismisses cases for want of prosecution after notice to the parties. This has often resulted in agreed motions to reinstate so that the parties may then file their closing documents, which courts usually grant.

At a minimum, a motion to dismiss for want of prosecution will bring the plaintiff's lack of diligence to the court's attention, and may actually result in the plaintiff prosecuting the case. Sometimes there is a problem, such as a deceased, sick or retired attorney, or confusion about who is responsible for the matter after a law firm is dissolved. A motion to dismiss for want of prosecution can quickly bring everyone's attention back to the lawsuit and resolve such problems.

A. Form and Content of the Motion

There is no particular form for a motion to dismiss for want of prosecution. Generally, the defense attorney should detail the procedural history of the case to demonstrate the lack of diligence on the part of the plaintiff(s). This may include the date the suit was filed, the dates on which citation was sought (if at all), dates for service of process and any attendant delays. This

may also include the failure of the plaintiff to pursue written discovery, take depositions, provide witnesses or dates for depositions or answer discovery. Finally, it may include a discussion of motions for continuances. Feel free to throw in other facts that may demonstrate a lack of diligence. However, be sure to be honest with the court (always!) about issues you know about such as illness or other special circumstances affecting the plaintiff or their attorney. If it is shown to the court at the dismissal hearing that defense counsel knew about special problems hampering the plaintiff or its counsel and did not disclose those to the court, you are likely to lose credibility with the court.

Special Exceptions

I. Discussion

Special exceptions are not generally thought of as dispositive motions. However, the author has effectively used such motions in the past either as a precursor to a plea to the jurisdiction or to obtain dismissal. Plaintiffs and defendants may file special exceptions to the other side's pleadings. As a plaintiff's attorney, the author routinely filed special exceptions to defense attorney's shotgun answers that included laundry lists of defenses or inferential rebuttals that probably did not apply to the case. In an auto-accident case, defense attorneys would routinely plead sudden emergency, unavoidable accident, comparative fault, and sole proximate cause. Very often when the author would specially except to these issues, the answer would be amended and some or all of these would be left out. Others would be clarified, thereby making discovery more focused and effective. This would, naturally, simplify the lawsuit and eliminate some otherwise nasty surprises at trial.

Moreover, if the court grants one's special exceptions, it will usually place a deadline in the order by which the pleading in question was required to be amended. Indeed, it is good practice to supply a form order with a blank for the date by which the pleading must be amended.

A. Granulated Proposed Order

Likewise, the order should be granulated in the same manner as discussed on pages 9 and 13, above, to allow the court to simply SUSTAIN or OVERRULE each separate ground contained in the special exceptions motion. Normally, a court will make quick work of such special exceptions by printing out the proposed order, reading the special exception motion, and circling the appropriate ruling. If the court has to create its own order to rule on each separate ground in the special exceptions, there will necessarily be delay in obtaining your desired relief.

B. How is this a Dispositive Motion?

Special exceptions can become dispositive motions when the other side fails to timely amend its pleading. If the non-movant fails or refuses to amend, most courts will simply strike the offending pleading upon further motion by the movant. This may result in a dismissal of the entire petition or answer or a substantial part thereof, possibly resulting in a final dismissal or default judgment.

Special Appearances

I. Discussion

A special appearance, as set out in Rule 120a, is used by a defendant to challenge a court's exercise of personal jurisdiction over his person or property. *See* Tex. R. Civ. P. 120a(1). It must be **sworn to** and filed before a motion to transfer venue or any other motion, plea or pleading. *Id*. In particular, the facts stated in the motion or response itself must actually be sworn to be true. See *Casino Magic Corp. v. King*, 43 S.W.3d 14, 18 (Tex. App.—Dallas 2001, pet. denied) (finding that an affidavit stating that the facts in the *affidavit* were true and correct, rather than stating that the facts in the special appearance motion were true and correct, did not strictly comply with TRCP 120a).

However, a motion to transfer venue and any other plea, pleading or motion can be filed in the same instrument or subsequent to a special appearance without waiving the properly filed special appearance. *Id*. Any other appearance made that is not in compliance with Rule 120a(1) is a general appearance. *Id*; *see also Exito Electronics Co., Ltd. v. Trejo*, 142 S.W.3d 302 (Tex. 2004) ("[A] party enters a general appearance when it (1) invokes the judgment of the court on any question other than the court's jurisdiction, (2) recognizes by its acts that an action is properly pending, or (3) seeks affirmative action from the court.").

An in-depth analysis of this dispositive motion is beyond the scope of this paper, but the author would like to offer a few suggestions based on his experience.

A. Discovery

First, all kinds of discovery are permissible in connection with a special appearance and will not waive a special appearance. Discovery may be on any subject relevant to the case, though a court will often limit the subject matter and allow a second deposition if and when the special appearance is denied. For specific jurisdiction, for example, the discovery as to personal jurisdiction will often overlap the discovery on the merits, and the individual judge and circumstances will determine whether to allow broad or more focused discovery.

Second, sometimes defendants will object to travelling to Texas to be present for a deposition from wherever they are, and a court, observing that personal jurisdiction is tenuous at best, may not require the trip, and will, instead, require the attorney to travel to where the defendant is located. If the deposition is to be limited to minimum contacts and purposeful availment, etc., consider taking a deposition on written questions to save costs, or a telephonic or video conference deposition to save travel costs and hourly fees.

B. The Response

Unverified special appearance or other defects may be cured by amendment.

In order to obtain a continuance to discover additional information to respond to a special appearance, it must "appear from the affidavits of the party opposing the [special appearance]" that he or she cannot, for the reasons stated, present by affidavit facts essential to justify his

opposition. TRCP 120a(3). The author often gets very general motions for continuance in response to special appearances but they do not comply with this rule. That is, they do not attach affidavits discussing in detail why they cannot present the information. The Rule requires specific allegations in the affidavit itself. These might include the need for specific discovery, and the reasons why it has not been taken, among other things.

C. The Court's Ruling

If the court sustains the special appearance, then it will dismiss the defendant from the lawsuit. If it is overruled, then a subsequent general appearance by the moving defendant will not be considered a waiver of the objection to jurisdiction. TRCP 120a(4). An interlocutory appeal is expressly permitted under Civil Practice and Remedies Code section 51.014(a)(7) whether it is granted or denied.

Default Judgment Motions

I. Common Mistakes Attorneys Make or "10 Things I Hate About You:"

1. **WarGames**: No Defense Manpower Data Center (DMDC) printout as an exhibit to the non-military affidavit. A link to this website is on the Court's judicial homepage which may be located at http://www.justex.net/Courts/Civil/CourtSection.aspx?crt=10&sid=40.
2. **Saving Private Ryan**: Conducting a DMDC search without a SSN (which is not bad in and of itself—just means the DMDC cannot authoritatively assert that this is the same individual that the query refers to) and not providing corroborating evidence in non-military affidavit that the individual is not in the military. Corroborating information such as a family member's statement, or proof that the person is too old or young to be on active duty, etc., is especially necessary when the person has a common first and last name.

3. **Beyond a Reasonable Doubt and Necessary Roughness**: Improper proving up of fees in attorney's fees affidavit: use of neither "reasonable" nor "necessary" or one and not the other, but not both as required.

4. **The Debt Collector**: Filing a proposed order that seeks attorney's fees for post-judgment/collection efforts. There is no authority that the author has seen allowing for post-judgment collection attorney's fees (as opposed to appellate attorney's fees).

5. **The Bad News Bears**: Not conditioning an award of appellate attorney's fees on an unsuccessful appeal by the defaulting defendant in the proposed order or the attorney's fees affidavit. That is, it has to be bad news for the appellant for you to be entitled to your appellate attorney's fees.

6. **The Blues Brothers**: Asking for a specific amount to be awarded as costs, rather than just asking for "taxable costs of court" in both the proposed order and the motion for default judgment. Don't cheat yourself out of taxable costs by inserting a specific amount. Let the abstract clerk in the district clerk's office figure out how much the taxable costs are. You may have missed some, and you will surely incur more post-judgment, such as fees for a

writ of execution, abstract fees, and recording fees. This self-sabotage can give you the blues.

7. **The Departed**: Filing a proposed order seeking an interest rate that departs from the standard—5%--currently under Texas Finance Code section 304.003, or 6% under Texas Finance Code section 302.002 in creditor/obligor suits—without stating in the affidavit and motion the legal basis for departing from the standard, such as a contractual interest rate.

8. **50 First Dates**: Filing a proposed order seeking pre-judgment interest which accrues from a particular date without stating the legal significance of the date in an affidavit and motion. Texas Finance Code section 304.104 allows for prejudgment interest to start accruing, at least in wrongful death, personal injury or property damage cases, on the earlier of the 180th day after the defendant receives written notice of the claim, or the date the suit is filed, and ending on the day preceding the date judgment is rendered. Tell the court the starting date for your prejudgment interest calculation, and why that date is significant (((isn't there a case that says other types of cases use the same starting date?))).

9. **My Cousin Vinny**: This common failure might be limited to the author's unique procedures, but could be used to illustrate the necessity of learning each particular court's rules/requirements with regard to each motion: In a case involving substitute service of process, failing to comply with the additional requirements required before service is deemed to be perfected (i.e., not including result of mailing of certified and regular mail in return of service, not filing a copy of the returned green card, etc.). While the author is not quite as mean as Fred Gwynn's Judge Chamberlain Haller, and you will not likely spend the night in jail for failing to adhere to them (the first time!), learning each court's procedures is nevertheless important. A form-order in Word format is linked on the court's procedures page (see number 1, above).

10. **The Paper Chase**: With regard to R. 736 Expedited Foreclosure Defaults, not providing the proper paper trail from the original lender to the applicant to show that the latter is entitled to an order allowing a foreclosure sale to go forward. Very often, the court is left to wonder what relationship, if any, exists between the original lender and the party seeking to foreclose. Obtaining this paperwork after the motion is filed will, of course, delay your requested relief, at a minimum.

11. **21 Jump Street**: Filing a certificate of last known address for a corporation containing an address that is not that of the corporation itself, but is rather the address of the agent designated for service of process. Texas Rule of Civil Procedure 239a requires certification of, and mailing to, the last known address *of the defendant* notwithstanding that the defendant may have a different office registered for service of process. Whether that address is on Jump Street or somewhere else, it has to be the party's own last known address.

12. **The Count of Monte Cristo**: Not showing in the damages affidavit the math used to arrive at the calculation of interest to be added to the principal.

Though these requirements may be onerous, if you diligently prepare your default judgments with consideration of the foregoing, you will be much more likely to quickly obtain your default judgments, and move on to the wonderful world of post-judgment collections.

Civil Death-Penalty Sanctions

The final dispositive motion discussed in this paper is the civil "death penalty" sanction of striking a petition or answer from the lawsuit. The author has rarely sought sanctions against another attorney in his practice as a litigator. He has also rarely awarded discovery sanctions in cases in the 151st District Court. He likes to believe that this is because he has made himself available early and often in cases to resolve discovery disputes before they become larger discovery wars.

Of course, Texas Rule of Civil Procedure 215 et seq. governs discovery sanctions. You can read the rule, but the author would like to impart some advice about conducting discovery that will enable you to avoid motions for sanctions, including death-penalty sanctions, and/or which will let you know when the filing of such a motion may be appropriate.

First, as is obvious, diligence prevents this problem from occurring in the first place. If the court sees that you and your client are diligently pursuing and answering discovery, then it is likely that any discovery dispute that arises will be the result of either (1) hardball discovery advocacy, or (2) a legitimate disagreement about the discoverability of something, or perhaps both. Very few courts will sanction someone over this – rather, they will, hopefully, make a decision and enter an order.

Second, the flip side of this, of course, is that sloth almost always equals sanctions. If you are casual or disorganized about discovery, and ignoring discovery, or merely lodging laundry lists of objections with little or no substantive responses, you will invariably draw a motion for sanctions in conjunction with a motion to compel. Don't be that attorney, though sometimes it is unavoidable. Start your discovery very early on. As a plaintiff, the author would usually prepare discovery to be filed and served with the original petition. The defendant should endeavor to do so with their answer if possible. This not only gets it done, but sends a signal to the other side that you are serious about the case.

When you receive the discovery, get started right away. It is tempting to put it off until the 30th day, and to rely on the 3 extra days for mailing or faxing, but do not do this. There is little more satisfying in litigation then sending off a complete set of discovery responses that require little or no supplementation down the road.

Third, what do you do if the other side has not answered discovery or just objected to everything? First, read the responses. Maybe your discovery was poorly conceived. Assuming you are entitled to what you have asked for, it is important to start the process of communicating

with the other side. The main point is to be as professional and generous as you can. Tackling the problem of the unresponsive opponent MUST begin right away. If you wait to complain about discovery responses until the dispositive motion deadline, you may find yourself out of luck.

You need to:

i. Call the other attorney. Maybe they are under a time crunch and will promise to get you what you need as soon as they put out whatever fire is going on in their office.

ii. The next step, if this does not work, is to send a letter. Don't just send a letter asking generally for more complete responses, though. Do the hard work of drafting a letter spelling out the reasons why the other side's objections are not valid, and why you are entitled to the information. This letter should be point by point. In doing so, you have demonstrated that you are ready to proceed with a detailed motion to compel if the other side does not respond.

iii. The next step, if this does not work, is to cut and paste your detailed letter into a motion to compel. Happily, this hard work will already have been done in preparing your letter described above. You should then send a copy of the unfiled, proposed motion to the other side and follow up with a call to opposing counsel. This will be your conference for the certificate of conference. It will be another chance for the other side to produce the information.

iv. If this does not work, then the next step is to file the motion to compel. This should, as you have undoubtedly deduced by now, be accompanied by a granulated proposed order that allows the court to rule on each subpart of the motion to compel. Also include a blank for the date by which the opposing party must comply.

v. Include a request for attorney's fees and expenses as a sanction, and be sure to include an affidavit detailing the time spent and reasonable and necessary attorney's fees and expenses associated with seeking this discovery, preparing the motion, and participating in the hearing.

vi. If you have done all this hard work and given the other side this many chances to comply, and they have failed to do so, then the Court may very well consider awarding attorney's fees as a sanction.

vii. The court will also sometimes consider who the source of the problem is. If the opposing party themselves is the problem, as the attorney is having

> client control problems, then the court may award sanctions against the party him or herself. If it is the attorney who is the problem, then the court may award sanctions against the attorney, or jointly severally against the attorney and opposing party.

Once again, it is important for the litigator to be as generous and professional as humanly possible in this circumstance. Sometimes opposing counsel is inexperienced and confused. Sometimes, as suggested above, they are in crisis for other reasons unrelated to the case. Sometimes they are merely lazy. You will usually find that your generosity and kindness will be repaid in triplicate down the road. This may even entail setting a conference with the court to bring the problem to the court's attention. Perhaps the attorney needs to withdraw from the case because they are, for one reason or another, incapable of proceeding, need help, and are incapable of asking for it. Ask the court for assistance in this regard so that the other side's interests will not be unnecessarily prejudiced and the court can work with the parties to find the best solution.

Nevertheless, if the court has already compelled the discovery responses, and the non-movant has not complied, then the author would consider imposing a more severe sanction against the non-movant, up to and including striking their operative pleading from the lawsuit. Any proposed order imposing sanctions, including death-penalty sanctions, must include a detailed procedural history of the non-movant's conduct which led to the sanction. Without a detailed finding, the sanction may not hold up on appeal.

Lastly, the one sanction that this Court has imposed in its year on the bench that really stands out is one in which he was forced to remove an attorney from the case as the attorney for the plaintiffs. The attorney had served thirty-one thousand requests for admissions upon a total of four defendants, and had served over four thousand requests for production as well. Not only did the attorney serve these ALL on each party, the attorney FILED them IN PAPER FORM with the court, and the court's clerks were forced to scan in each of the thousands of pages into the Court's electronic system. The defendants moved for protection. The Court sua sponte set an oral hearing on Rule 215 sanctions as well. After the hearing, the Court entered an order pursuant to its understanding of its inherent power and Rule 215.2(b) removing the attorney as the attorney for plaintiffs in the case. The Court could have struck the plaintiffs' pleadings, or held the attorney in contempt, or construed all of the discovery matters against the plaintiffs, but felt, at the time, that the source of the problem was the attorney only, and that the plaintiffs should not be unduly prejudiced by that conduct over which they likely had little say.

Tips on Presenting Motions to the Court at Oral Hearing

Okay, you have done all the prep work, written a detailed, well organized motion or response broken into bite-sized subparts for maximum ease of digestion and understanding. You have electronically filed it well ahead of the hearing date, and submitted a granulated proposed order which the court can easily employ. Now it is time for the oral hearing. What do you do?

First, be prepared. Do not expect to just read your motion to the court. First, the court has likely read the motion and the response. Second, your time will be limited. You need to have a short outline that allows you to make your points succinctly to the court in a manner that complements and reinforces your written materials.

Have a brief opening to state what relief you're asking for – what causes of action are involved, which parties, which defenses. Have copies of the relevant caselaw highlighted or in your PPT quoted accurately and in a fair way.

Be honest and objective – but feel free to be an advocate. Be intellectually honest and admit deficiencies in your arguments if any – you'll gain credibility with the court. Don't misstate what a case says because the court may ask for the case and read it, either at the hearing, or later, or he or she may have already read it in connection with your case or another one. Moreover, most judges have a good feel for what sounds right and what sounds like wishful thinking in terms of Texas law.

ANSWER THE COURT'S QUESTIONS DIRECTLY. The court will usually have questions about the case, your arguments, the law, and other things. Answer the question as directly as possible. Do not be evasive because your credibility will suffer. If the answer is "yes," "no," or "I don't know," that is fine. Even if you feel the need to qualify or redirect, just answer the court's question first. Then go ahead and explain why a bad answer does not affect your arguments. There is no substitute for the kind of hard work and preparation that will enable you to field curveballs from the bench. You have to do it.

Finally, try to avoid ascribing motives to the other side even if they're being unreasonable – no need to raise your voice or call each other names. The court will be able to tell if the other side is unreasonable or unprofessional.

Conclusion

If you employ the techniques discussed in this paper you will come across as more professional and prepared than most of the other attorneys. Most if not all of these suggestions come down the following few concepts all falling under the heading of the quotation that began this paper:

> *No man ever reached to excellence in any one art or profession without having passed through the slow and painful process of study and preparation.*
>
> -Horace

1. Think before you write;

2. Think of your audience;

3. Be concise;

4. Start early;

5. Be prepared;

6. Be fair;

7. Be generous;

8. Be honest; and

9. Be a professional.