

**PRE- AND POST-TRIAL
PRESERVATION OF ERROR**

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PREPARATION FOR AND ADVOCACY IN TRIAL
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Pre- and Post-Trial Preservation of Error

Chapter 17

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PRE- AND POST-TRIAL PRESERVATION OF ERROR

I. Introduction

This paper focuses on preservation of error pre- and post-trial. Because of the breadth of the topic, preservation of error during trial, such as the jury charge and evidentiary objections, warrants separate examination and, thus, is not covered in the paper.

II. GENERAL RULES OF ERROR PRESERVATION¹

A. Goals of Preservation

The main goals of any preservation of error effort are to: (1) timely ask the trial court for whatever relief you deem important enough to potentially complain of its denial on appeal; (2) make sure that the trial court is fully apprised of the “what” and “why” of the relief you’re seeking; and (3) get a ruling, preferably in an order signed by the judge and filed with the clerk of the court or on the record, taken down by the court reporter such that it can be filed as part of the record in the appellate court. *See Wal-Mart Stores, Inc. v. McKenzie*, 997 S.W.2d 278, 280 (Tex.1999)(“To preserve a complaint for appellate review, a party must present to the trial court a timely request, motion, or objection, state the specific grounds therefor, and obtain a ruling.”); *see also* TEX. R. APP. P. 33.1(a)(1), (2). The key to preservation is: the appellate court is not going to give you any relief that you have not asked the trial court for and sufficiently explained why you’re entitled to it.

Post-verdict preservation is particularly important because it is one last shot to make sure that you have preserved everything. If you failed to move for a summary judgment or a directed verdict on a certain legal issue, in state court you can preserve that argument in post-verdict motions. Even though you could have advanced it earlier, you have not waived the error. Thus, that 30-day post-judgment time period is critical for checking to make sure that you’ve preserved every argument that you wish to make to the appellate court.

B. TEX. R. APP. P. 33.1

Rule 33.1(a) states that to preserve a complaint for appellate review, the objection must be sufficiently specific “to make the trial court aware of the complaint.” TEX. R. APP. P. 33.1(a)(1), (2). An objection is sufficiently specific if it identifies the issue, allows the trial court to make an informed ruling, and gives the other party an opportunity to remedy the defect. *Osterberg v. Peca*, 12 S.W.3d 31, 40 (Tex.1999), *cert. denied*, 530 U.S. 1244 (2000); *McKinney v. National Union Fire Ins.*, 772 S.W.2d 72, 74 (Tex.1989).

Rule 33.1 relaxes the error-preservation requirements that existed under former Rule 52. TRAP 33.1(a)(2), unlike former TRAP 52, which required an express ruling by the trial court, permits the trial court’s ruling to be express or implied. Moreover, Rule 33.1(c) states that a “signed, separate order” is not necessary to preserve error.

Since the enactment of Rule 33, the supreme court has made it clear that no written order is necessary to preserve error if the record indicates the trial court has implicitly ruled on the issue. *See, e.g., In re*

¹ The author wishes to thank Debbie McComas and Ben Mesches of the Dallas office of Haynes and Boone, L.L.P. for allowing her to include *in toto*, with some minor deletions and additions, their excellent paper on “Preserving Error Before Trial,” including this section on general rules of error preservation and the section on pre-trial error preservation. Their paper was presented at the State Bar of Texas’s Civil Appellate Practice Boot Camp 2005 on September 7, 2005.

Z.L.T., 124 S.W.3d 163, 165 (Tex.2003)(“By proceeding to trial without issuing the bench warrant, it is clear that the trial court implicitly denied Thompson’s request [for a bench warrant.]”); *Walker v. Gutierrez*, 111 S.W.3d 56, 60 n.1 (Tex.2003)(explaining that although the trial court did not explicitly rule on the plaintiffs’ request for a grace period under article 4590i, by granting the dismissal motion, the trial court implicitly denied the grace-period request); *Lenz v. Lenz*, 79 S.W.3d 10, 13 (Tex.2002) (“In this way, the trial court implicitly disposed of the motion for judgment notwithstanding the verdict.”).

Notwithstanding the relaxed requirements for obtaining a ruling by the trial court under Rule 33.1, one never wants to find oneself on appeal arguing about what the trial court implicitly intended to rule. Thus, the safest course is to obtain an express, signed order ruling on the motion, objection, or request whenever possible. Also note that a party cannot rely on a trial court’s docket entry as evidence that the trial court ruled; a trial court’s notation on the docket sheet suggesting a ruling on a motion or objection does not preserve error for appeal. *Guyot v. Guyot*, 3 S.W.3d 243, 248 (Tex.App.--Fort Worth 1999, no pet.). If the court refuses to rule, preserve that complaint for review by further objecting to the court’s refusal to rule. TEX. R. APP. P. 33.1(a)(2)(B).

III. ERROR PRESERVATION IN PARTICULAR PRE-TRIAL CONTEXTS

A. Pleadings

Although the pleading requirements in Texas are quite liberal, the plaintiff’s original petition must give fair notice of the claims and plead each independent ground for recovery. See TEX. R. CIV. P. 45, 47; *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 896-97 (Tex.2000); *Roark v. Allen*, 633 S.W.2d 804, 809-10 (Tex.1982); *Stoner v. Thompson*, 578 S.W.2d 679, 683 (Tex. 1979); see also *Castleberry v. Branscum*, 721 S.W.2d 270, 272, 275 n.5 (Tex.1986). Likewise, it is important for the defendant to plead each applicable defense in the answer to avoid waiving arguments on appeal. TEX. R. CIV. P. 93, 94; *Nootsie, Ltd. v. Williamson County Appraisal Dist.*, 925 S.W.2d 659, 662 (Tex.1996).

1. Special Exceptions

A defendant may file special exceptions to object to non-jurisdictional defects apparent on the face of the opponent’s pleadings and to force the pleader to clarify the statement of his claim. *Agnew v. Coleman County Elec. Coop. Inc.*, 153 Tex. 587, 272 S.W.2d 877, 879 (1954). To preserve error, the special exception must specifically state how the pleading is defective. *Huff v. Fidelity Union Life Ins. Co.*, 158 Tex. 433, 312 S.W.2d 493, 499 (1958). To avoid waiver, the specially excepting party must obtain a (nonevidentiary) hearing, bring the special exceptions to the attention of the trial judge before the instructions or charge to the jury or, in a non-jury case, before the judgment is signed, and obtain a ruling. TEX. R. CIV. P. 90. Failure to specially except waives pleading deficiencies that can be cured by repleading, and the issues raised by the defective pleadings will be tried by consent. *Roark*, 633 S.W.2d at 809. In the absence of special exceptions, pleadings will be liberally construed in favor of the pleader. *Roark*, 633 S.W.2d at 809. The pleader who repleads waives any error by the trial court in sustaining the special exceptions. *Long v. Tascosa Natl. Bank*, 678 S.W.2d 699, 703 (Tex.App.--Amarillo 1984, no writ).

2. The Answer

As a general rule, Texas law allows a party to answer a petition with a general denial. TEX. R. CIV. P. 92. A party’s general denial is sufficient to put at issue the allegations made in the petition. *Id.* However, the failure to specifically plead the affirmative defenses listed in Rule 94 and failure to verify certain defensive pleadings as required by Rule 93 waives the right to assert that defense at trial and on appeal. TEX. R. CIV. P. 93, 94; *Nootsie*, 925 S.W.2d at 662. Nonetheless, if an unpleaded defense is raised at trial

without objection, it may be deemed to be tried by consent. *See Roark*, 633 S.W.2d at 809.

From a practice standpoint, the difficulty often comes in determining whether a theory should be categorized as an affirmative defense. For instance, the plaintiff's failure to plead a cognizable claim would not be a Rule 94 affirmative defense. *See Retzlaff v. Deshay*, 2004 WL 2163173, at *6 (Tex. App.--Houston [14th Dist.] September 28, 2004, no pet.). However, no court appears to have expressly addressed whether a Remedies Code Chapter 33 percentage responsibility claim must be pled as an affirmative defense under Rule 94 to avoid waiver.

Despite the mandatory language of Chapter 33, several courts have referred to proportionate responsibility as an affirmative defense. *Estate of Barrera v. Rosamond Village Ltd. P'ship*, 983 S.W.2d 795, 799 (Tex.App.--Houston [14th Dist.] 1998, no pet.) ("A defendant is entitled to assert the affirmative defense of proportionate responsibility."); *Nat'l Union Fire Ins. Co. v. Ins. Co. of N. Am.*, 955 S.W.2d 120, 135 (Tex. App.--Houston [14th Dist.] 1997)(referring to "comparative responsibility" as an affirmative defense), *aff'd sub nom., Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co.*, 20 S.W.3d 692 (Tex.2000). One court has held that the mere assertion of a Rule 94 proportionate responsibility affirmative defense is not sufficient to preserve a claim that "the trial court erred in adjudging each appellant liable for the full amount of the judgment," thus implying that the theory must not only be pled, but actually pursued at trial. *Lyman D. Robinson Family Ltd. P'ship v. McWilliams & Thompson, PLLC*, 143 S.W.3d 518, 521 (Tex. App.--Dallas 2004, pet. denied). And section 33.003(b) precludes the submission of a party's "percentage of responsibility" to the jury in the absence of sufficient evidence to support the submission. *See TEX. CIV. PRAC. & REM. CODE* § 33.003(b). The cautious approach would be to plead Chapter 33 as an affirmative defense, actively pursue a claim of proportionate responsibility, present the issue to the jury, and object to the failure of the court to submit the theory. *See Robinson*, 143 S.W.3d at 521-22.

3. Amendments

If pleadings do not include all theories going to trial and all questions going to the jury, amend. Either party must obtain leave of court to amend pleadings within seven days of the trial setting. *Carr v. Houston Business Forms, Inc.*, 794 S.W.2d 849, 851 (Tex.App.--Houston [14th Dist.] 1990, no writ). However, the trial court lacks authority to refuse a pleading amendment, even post-trial, "unless (1) the opposing party presents evidence of surprise or prejudice; or (2) the amendment asserts a new cause of action or defense, and thus is prejudicial on its face." *Chapin & Chapin, Inc. v. Texas Sand & Gravel Co.*, 844 S.W.2d 664, 665 (Tex.1992); *see TEX. R. CIV. P. 67* ("In such case [when an issue is tried by consent] such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made by leave of court upon motion of any party at any time up to the submission of the case to the Court or jury. . . ."); *Whole Foods Market Southwest, L.P. v. Tijerina*, 979 S.W.2d 768, 777 (Tex.App.--Houston [14th Dist.] 1998, pet. denied) (permitting a post-verdict amendment). To preserve the right to complain when a pleading is untimely filed, a party must move to strike. *See ForScan Corp. v. Dresser Ind.*, 789 S.W.2d 389, 393 (Tex.App.--Houston [14th Dist.] 1990, writ denied). To preserve the right to complain about the court's error in granting a motion for leave to amend, move for a continuance alleging surprise and seek attorneys' fees. *See TEX. R. CIV. P. 70; State Bar of Texas v. Kilpatrick*, 874 S.W.2d 656, 658 (Tex.1994).

B. Jurisdiction/Venue

1. Plea to the Jurisdiction

The court's subject matter jurisdiction is one of those rare issues that cannot be waived. Ordinarily, subject matter jurisdiction should be challenged through a plea to the jurisdiction in the trial court. *Texas*

Highway Dept. v. Jarrell, 418 S.W.2d 486, 488 (Tex. 1967). However, an error concerning subject matter jurisdiction can be raised for the first time on appeal. *Texas Ass'n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440, 441 (Tex. 1993). The Texas Supreme Court has noted that evidence related to the court's jurisdiction, but not to the merits of the underlying claims, should be considered in disposing a plea to the jurisdiction. *Bland Ind. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000).

2. Special Appearance

To challenge the court's jurisdiction over the person, a party must file a special appearance *before any other plea, pleading or motion*, and any other pleading must be urged subject to the special appearance or the special appearance is waived. TEX. R. CIV. P. 120a; *see, e.g., Liberty Enters. v. Moore*, 690 S.W.2d 570, 571-72 (Tex. 1985)(defendant waived special appearance by filing motion to set aside default judgment and agreeing to order granting motion); *Exito Elecs. Co. v. Trejo*, 142 S.W.3d 302, 305 (Tex. 2004)(Rule 11 agreement to extend defendant's time to file initial responsive pleading does not waive special appearance; defective verification and affidavit does not waive special appearance); *HMS Aviation v. Layale Enters., S.A.*, 149 S.W.3d 182, 189-90 (Tex.App.--Fort Worth 2004, no pet.)(defendant's motion to increase sequestration bond was made subject to special appearance and was not heard before the special appearance was determined; therefore, special appearance not waived).

The special appearance must be verified and factual allegations should be supported by affidavit. TEX. R. CIV. P. 120a(1)(3); *see Casino Magic Corp. v. King*, 43 S.W.3d 14, 18 (Tex.App.--Dallas 2001, pet. denied). "[A] challenge to personal jurisdiction by special appearance, which is a dilatory plea, almost always requires consideration of evidence, and the rules of procedure set out the process for adducing such evidence." *Bland*, 34 S.W.3d at 555 (citing TEX. R. CIV. P. 120a). The trial court determines the special appearance on the basis of the pleadings, stipulations, affidavits and attachments, discovery products, if any, and any testimony. TEX. R. CIV. P. 120a(3). Use of discovery to obtain evidence regarding a special appearance does not waive the special appearance. TEX. R. CIV. P. 120a(1) ("The issuance of process for witnesses, the taking of depositions, the serving of requests for admissions, and the use of discovery processes, shall not constitute a waiver of such special appearance."). Rule 120a does not limit discovery to the special appearance; rather, courts have held that discovery beyond personal jurisdiction issues does not waive a special appearance. *Minucci v. Sogevalor*, 14 S.W.3d 790, 800 (Tex.App.--Houston [1st Dist.] 2000, no pet.)(filing a notice of oral hearing on a motion to dissolve writ of garnishment and asking a deposition witness questions relating to writ of garnishment did not waive special appearance); *Case v. Grammar*, 31 S.W.3d 304, 311 (Tex.App.--San Antonio 2000, no pet.)(following plain language of Rule 120a, holding that seeking discovery exceeding scope of the jurisdictional issue did not waive special appearance).

Obtain a ruling on the special appearance or it is waived. Any affidavits must be based on personal knowledge and filed at least seven days before the hearing. *Slater v. Metro Nissan of Montclair*, 801 S.W.2d 253, 254-55 (Tex.App.--Fort Worth 1990, writ denied). The appellate court will consider all the evidence that was before the trial court at the hearing on the motion. Without a record, the appellate court must presume that the evidence was sufficient to support the trial court's judgment. *Matthews v. Proler*, 788 S.W.2d 172, 174 (Tex.App.--Houston [14th Dist.] 1990, no writ).

Findings of fact and conclusions of law may be requested but are not required on appeal. *See id.* When a trial court does not file findings of fact in a special appearance, all questions of fact are presumed to support the judgment. *BMC Software, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex.2002). Such implied findings are reviewed only for legal and factual sufficiency. *Id.* The standard of review on appeal is de novo. *North Coast Commercial Roofing Systems, Inc. v. RMAX, Inc.*, 130 S.W.3d 491, 495 (Tex.App.--Dallas 2004, no pet.). Whether to request findings of fact should be considered in light of the fact that the

court of appeals will in any event “examine de novo whether the facts negate all bases for personal jurisdiction.” *Id.*

3. Motion to Transfer Venue

By filing the lawsuit, the plaintiff chooses venue. “If the plaintiff’s venue choice is not properly challenged through a motion to transfer venue, the propriety of venue is fixed in the county chosen by the plaintiff.” *Wilson v. Texas Parks & Wildlife Dep’t*, 886 S.W.2d 259, 260 (Tex.1994). If a defendant objects to the plaintiff’s venue choice and properly challenges that choice through a motion to transfer venue, the question of proper venue is raised. *In re Masonite Corp.*, 997 S.W.2d 194, 197 (Tex.1999)(orig. proceeding).

A motion to transfer venue must be filed concurrently with or prior to any other plea, pleading or motion except a special appearance. Otherwise, the objection is waived. TEX. CIV. PRAC. & REM. CODE § 15.063; TEX. R. CIV. P. 86(1). The motion should be accompanied by affidavits supporting the venue facts alleged, but it need not be verified. *GeoChem Tech Corp. v. Verseskes*, 962 S.W.2d 541, 543 (Tex. 1998); TEX. R. CIV. P. 86(3). The motion must: (a) specifically deny the facts pleaded by the plaintiff, and (b) state the legal and factual bases asserted for the transfer by either specifying the county of proper venue and stating that the county chosen by the plaintiff is not proper, or that venue is mandatory in the allegedly proper county by virtue of a specific statute, which must be clearly indicated in the motion. TEX. R. CIV. P. 87(3)(a).

It is questionable whether the trial court must allow an oral hearing before ruling on a motion to transfer venue. *Orion Enters., Inc. v. Pope*, 927 S.W.2d 654, 657-58 (Tex.App.--San Antonio 1996, orig. proceeding). Rule 87 merely requires the court to make its determination “promptly” and seems to contemplate the possibility of a hearing by written submission. *Id.*; TEX. R. CIV. P. 87 (trial court shall consider the pleadings, stipulations, the motion to transfer and response, and all affidavits and discovery products, if any, on file); *but see Flores v. Arietta*, 790 S.W.2d 75 (Tex.App.--San Antonio 1990, writ denied)(record was required for appellate review). To obtain a hearing, the movant has a duty to request a setting. TEX. R. CIV. P. 87(1); *see also Grozier v. L-B Sprinkler & Plumbing Repair*, 744 S.W.2d 306, 309-10 (Tex.App.--Fort Worth 1988, writ denied). If the trial court refuses a request to set the motion for a hearing, the movant will not waive its right to complain of venue on appeal by failing to re-urge its request or by failing to request a continuance. *Marshall v. Mahaffey*, 974 S.W.2d 942, 946 (Tex.App.--Beaumont 1998, pet. denied). To preserve error on the grounds of inadequate time to conduct discovery or prepare for a hearing on venue, move for a continuance. *See Beard v. Gonzalez*, 924 S.W.2d 763, 765 (Tex.App.--El Paso 1996, no writ).

In 2003, the legislature enacted a new venue-appeal statute permitting interlocutory review of venue orders in cases involving multiple plaintiffs and intervening plaintiffs. *See* TEX. CIV. PRAC. & REM. CODE § 15.003(c). Significantly, this statute changes the standard of review from “abuse of discretion” to “de novo.” *Id.* The availability of interlocutory review on the narrow question of venue (as opposed to review after final judgment involving multiple substantive and procedural issues) further highlights the importance of properly presenting a venue motion to the trial court.

C. Jury Demand/Waiver

A jury demand requires a written request and payment of a fee. TEX. R. CIV. P. 216; *see ForScan Corp. v. Dresser Indus., Inc.*, 789 S.W.2d 389, 392 (Tex.App.--Houston [14th Dist.] 1990, writ denied). The party must comply with these rules within “a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than thirty days in advance.” TEX. R. CIV. P. 216(1). A request and

payment of the fee is presumed timely if the requirements are satisfied more than 30 days before the case is set for trial. *Halsell v. Dehoyos*, 810 S.W.2d 371, 371 (Tex.1991). This presumption can only be rebutted if the granting of a jury trial would harm the opposing party or interfere with the court's management of its docket. *Id.*

With respect to contractual jury waivers, the Texas Supreme Court held in *In re Prudential Ins. Co.*, 148 S.W.3d 124, 134-35 (Tex.2004)(orig. proceeding), that contractual jury waivers are enforceable by mandamus review. One issue that has arisen on the heels of this decision is when a motion to enforce the jury waiver must be presented to the trial court. In a recent case in the Dallas Court of Appeals, the defendant moved to quash the jury demand immediately after the issuance of *Prudential*, and the trial court granted the motion. See *In re C-Span Entertainment, Inc.*, 162 S.W.3d 422, 426 (Tex.App.--Dallas 2005, orig. proceeding). On mandamus review, the plaintiff urged that the defendant had waived the right to enforce the contractual jury-waiver provision based on the timing of the motion to quash. The court of appeals denied mandamus relief, noting the "evolving nature of the law" regarding jury waivers and concluding that the defendant was not obligated "to urge a motion to quash until the supreme court resolved the issue in a different fashion from this Court's resolution." *Id.* at 426 (holding that the plaintiff did not establish waiver as a matter of law).

D. Summary Judgment Practice

1. Presentation of the Grounds for Summary Judgment

A summary judgment must "state the specific grounds therefor." TEX. R. CIV. P. 166a(c). If the moving party does not expressly present the grounds for summary judgment in the motion itself, the motion is inadequate as a matter of law. *McConnell v. Southside Ind. Sch. Dist.*, 858 S.W.2d 337, 341 (Tex.1993). Likewise, the nonmovant must expressly present the reasons summary judgment should not be granted in a written response. *Id.* at 343. Nevertheless, if the movant's grounds will not support summary judgment *as a matter of law*, a written response or answer is not necessary and a motion for new trial is sufficient to preserve error. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 679 (Tex.1979); *Castellow v. Swiftex Mfg. Corp.*, 33 S.W.3d 890, 895 (Tex.App.--Austin 2000, no pet.), *abrogated on other grounds*, *Lawrence v. CDB Servs., Inc.*, 44 S.W.3d 544 (Tex.2001).

Special exceptions are "required" if a nonmovant wants to complain "that the grounds relied on by the movant were unclear or ambiguous." See *McConnell*, 858 S.W.2d at 342. Notwithstanding Rule 33.1's relaxed preservation standards, courts have required an express ruling on special exceptions complaining about the specificity of the summary judgment grounds to preserve the issue for appeal. *Franco v. Slavonic Mut. Fire Ins. Ass'n*, 154 S.W.3d 777, 785 (Tex.App.--Houston [14th Dist.] 2004, no pet.). But "no special exception would be required to preserve an appellate complaint about a total lack of grounds in the motion." *Segal v. Emmes Cap., L.L.C.*, 155 S.W.3d 267, 272 (Tex.App.--Houston [1st Dist.] 2004, pet. dismissed).

With respect to no-evidence summary judgment motions under Texas Rule of Civil Procedure 166a(i), the motion must state the elements of the opposing party's claim or defense as to which there is no evidence. TEX. R. CIV. P. 166a(i). A no-evidence motion that states "there is no evidence of causation . . . adequately identified causation as the challenged element." *In re Mohawk Rubber Co.*, 982 S.W.2d 494, 498 (Tex.App.--Texarkana 1998, orig. proceeding). However, a no-evidence motion that simply states there is no evidence of negligence, without identifying the specific elements being attacked will not suffice. *Oasis Oil Corp. v. Koch Refining Co.*, 60 S.W.3d 248, 255 (Tex.App.--Corpus Christi 2001, pet. denied).

Some courts have held that a no-evidence motion that fails to identify each element as to which there is no evidence is legally insufficient and that the non-moving party can raise this complaint for the first time on appeal. *See, e.g., Cuyler v. Minns*, 60 S.W.3d 209, 213 (Tex.App.--Houston [14th Dist.] 2001, pet. denied). Other courts have held that the non-moving party has the burden to challenge an insufficient no-evidence motion in the trial court. *See, e.g., Walton v. Phillips Petroleum Co.*, 65 S.W.3d 262, 268 n.1 (Tex.App.--El Paso 2001, pet. denied).

2. Additional Time for Discovery

In the traditional summary judgment context, the nonmoving party may seek additional time for discovery. *See* TEX. R. CIV. P. 166a(g). Rule 166a(i) permits a party to move for a no-evidence summary judgment “[a]fter adequate time for discovery.” TEX. R. CIV. P. 166a(i). In a traditional summary judgment, the non-movant has the burden of seeking additional time for discovery. *See Tenneco Inc. v. Enter. Prod. Co.*, 925 S.W.2d 640, 647 (Tex.1996). “When a party contends that it has not had an adequate opportunity for discovery before a summary judgment hearing, it must file either an affidavit explaining the need for further discovery or a verified motion for continuance.” *Tenneco*, 925 S.W.2d at 647.

The no-evidence rule does not expressly address whether Rule 166a(g) applies -- although most Texas courts have held that the burden for obtaining additional time for discovery, even in the face of a no-evidence summary judgment motion, is on the non-movant. *Quesada v. Am. Garment Finishers, Corp.*, 2003 WL 1889602, at *2 (Tex.App.--El Paso April 17, 2003, no pet.), quoting *Tenneco Inc. v. Enter. Prod. Co.*, 925 S.W.2d 640, 647 (Tex.1996); *see also Blanche v. First Nationwide Mortgage Corp.*, 74 S.W.3d 444, 451 (Tex.App.--Dallas 2002, no pet.). This is consistent with Rule 166a(i)’s provision placing the burden of overcoming a no-evidence summary judgment on the non-moving party. *See* TEX. R. CIV. P. 166a(i). Thus, in the no-evidence summary judgment motion context, the prudent practice is for the non-moving party to raise the issue of whether there has been an adequate time for discovery in the trial court. *See, e.g., Quesada*, 2003 WL 1889602, at *2; *Dolcefino v. Randolph*, 19 S.W.3d 906, 917 n.6 (Tex. App.--Houston [14th Dist.] 2000, pet. denied).

Courts have typically held that a trial court implicitly overrules a continuance motion or a complaint that the non-moving party lacks adequate time for discovery when it decides the summary judgment motion. *See* TEX. R. APP. P. 33.1(a)(2)(A); *Dagley v. Haag Eng’g Co.*, 18 S.W.3d 787, 795 n.1 (Tex.App.--Houston [14th Dist.] 2000, no pet.). Nevertheless, the most cautious approach is to obtain a signed order from the trial court.

3. Denial or Grant of Motion

Generally, there is no right to appeal the denial of summary judgment, even after trial on the merits. *Cincinnati Life Ins. v. Cates*, 927 S.W.2d 623, 625 (Tex.1996). However, when the trial court grants a summary judgment for one party and denies the opposing party’s motion for summary judgment, the appellate court can review both the grant and the denial. *Embrey v. Royal Ins. Co. of Am.*, 22 S.W.3d 414, 415-16 (Tex.2000). When the trial court grants a partial summary judgment dismissing some but not all claims, the party appealing the partial summary judgment after trial on the merits must include in the appellate record the pleadings containing the causes of action dismissed by summary judgment or risk waiver. *Worthy v. Collagen Corp.*, 967 S.W.2d 360, 365-66 (Tex.1998).

4. Specific Complaints

To preserve a complaint that an opposing party violated Texas Rule of Civil Procedure 63 by filing a pleading within seven days of the summary judgment hearing, a party must *both* demonstrate surprise *and*

request a continuance. *Fletcher v. Edwards*, 26 S.W.3d 66, 74 (Tex.App.--Waco 2000, pet. denied).

To preserve a complaint that a party did not receive 21-days notice before the summary judgment hearing under Texas Rule of Civil Procedure 166a, a party must promptly bring the error to the trial court's attention, usually by filing a motion for continuance and a post-trial motion complaining of lack of notice. *Walker v. Gonzales County Sheriff's Dept.*, 35 S.W.3d 157, 160 (Tex.App.--Corpus Christi 2000, pet. denied); *White v. Wah*, 789 S.W.2d 312, 319 (Tex.App.--Houston [1st Dist.] 1990, no writ).

To preserve a complaint that movant's pleadings do not support the requested summary judgment, raise the defect in the trial court, usually in the non-movant's summary judgment response. *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 494 (Tex.1991).

5. Evidentiary Objections

Objections that a summary judgment motion or a response contains inadmissible evidence must be preserved by written objection filed in the trial court. *Dolcefino*, 19 S.W.3d at 926; *Dolenz v. A.B.*, 742 S.W.2d 82, 83-84 n.2 (Tex.App.--Dallas 1987, writ denied). Objections to form, such as authentication, challenges to the form of the affidavit, and hearsay objections, are waived if not raised in the trial court. *See Stewart v. Sanmina Texas, L.P.*, 156 S.W.3d 198, 207 (Tex.App.--Dallas 2005, no pet.) However, objections to the substance of the testimony or evidence provided in the affidavit -- the type of complaints that go to whether the moving party has met its summary judgment burden -- are not waived by failing to state them expressly in the trial court. *Id.* "Substantive defects are those that leave the evidence legally insufficient, and include affidavits which are nothing more than legal or factual conclusions." *Id.*

As discussed *supra*, under Texas Rule of Appellate Procedure 33.1, rulings can be implied and need not be in writing. Despite the rule change, courts have disagreed about whether a trial court's ruling on a motion for summary judgment impliedly disposes of objections to summary judgment evidence. Some courts have held that a party may preserve error regarding objections to summary judgment evidence based on an implied ruling. *See Mowbray v. Avery*, 76 S.W.3d 663, 689 n.45 (Tex.App.--Corpus Christi 2002, pet. denied); *Frazier v. Yu*, 987 S.W.2d 607, 610 (Tex.App.--Fort Worth 1999, pet. denied); *Blum v. Julian*, 977 S.W.2d 819, 823 (Tex.App.--Fort Worth 1998, no pet.). Other courts, however, have disagreed and have held that a party must obtain a written order with respect to summary judgment evidence objections. *Stewart*, 156 S.W.3d at 207; *Chapman Children's Trust v. Porter & Hedges, L.L.P.*, 32 S.W.3d 429, 435 (Tex.App.--Houston [14th Dist.] 2000, pet. denied); *Well Solutions, Inc. v. Stafford*, 32 S.W.3d 313, 316 (Tex.App.--San Antonio 2000, no pet.); *Dolcefino*, 19 S.W.3d at 926.

Courts have also held that a party fails to preserve error regarding the trial court's exclusion of summary judgment evidence by not raising the issue in the trial court. *See Community Initiatives, Inc. v. Chase Bank of Texas*, 153 S.W.3d 270, 281 (Tex.App.--El Paso 2004, no pet.); *Brooks v. Sherry Lane Nat'l Bank*, 788 S.W.2d 874, 878 (Tex.App.--Dallas 1990, no writ); *Mangione v. Gov't Personnel Mut. Life Ins. Co.*, 2002 WL 1677457, at *4-5 (Tex.App.--San Antonio 2002, pet. denied)(not designated for publication).

Finally, one appellate court has held that a prevailing summary judgment movant "is required to object to claimed defects in the form of summary judgment affidavits" and obtain a ruling on such an objection. *Trusty v. Strayhorn*, 87 S.W.3d 756, 763-64 (Tex.App.--Texarkana 2002, no pet.). Because the defendants did not obtain a ruling from the trial court on their objections to the plaintiff's summary judgment evidence, the defendants waived their argument that the affidavit was not proper summary judgment evidence. *Id.*

E. Pre-trial Motions And Hearings

Many rules require the filing of written motions. Even if not specifically required by the rules, the best practice is always to file a written motion to preserve your requests or objections on appeal. As a general rule, to preserve arguments in opposition to any pre-trial motion, file a response, oppose the motion at hearing, and get a record. *See Moore v. Wood*, 809 S.W.2d 621, 622-23 (Tex.App.--Houston [1st Dist.] 1991, orig. proceeding).

1. Hearings

If there is no evidence presented, error is not waived by failure to obtain a hearing on the motion. *See Martin v. Cohen*, 804 S.W.2d 201, 203 (Tex.App.--Houston [14th Dist.] 1991, no writ). If the motion requires presentation of evidence, and no hearing is held, any error is waived. You may be entitled to findings of fact and conclusions of law when the trial court grants a pre-trial motion. *Hopkins v. NCNB Texas Nat'l Bank*, 822 S.W.2d 353, 345-55 (Tex.App.--Fort Worth 1992, no writ). To be on the safe side, present the appellate court with a record reflecting a timely request for findings and conclusions and, if necessary, a reminder. TEX. R. CIV. P. 296.

2. Record

Make a record of all evidentiary hearings. On appeal, the appellant has the burden to present a record showing error requiring reversal. TEX. R. APP. P. 33.1(a). Absent a record, the evidence is presumed to support the trial court's order. *Pyles v. United Services Auto. Assn.*, 804 S.W.2d 163, 164 (Tex.App.--Houston [14th Dist.] 1991, writ denied).

3. Motion for Continuance

The motion for continuance must be in writing and must strictly comply with the rules. *See* TEX. R. CIV. P. 251; *City of Houston v. Blackbird*, 658 S.W.2d 269, 272-73 (Tex.App.--Houston [1st Dist.] 1983, writ dismissed). It must be verified or accompanied by affidavits. Failure to verify is fatal. *Rogers v. Continental Airlines*, 41 S.W.3d 196, 200-01 (Tex.App.--Houston [14th Dist.] 2001, no pet.); *Blackbird*, 658 S.W.2d at 272.

To preserve error regarding a motion for continuance sought to complete discovery (including the absence of a witness), include the following in the motion: (a) allege and prove the testimony is material; (b) show your diligence in attempting to obtain it; (c) explain the cause of your failure to obtain it, if known; (d) show the evidence is not available from other sources; and (e) state that the continuance is not for delay only, but so that justice will be done. TEX. R. CIV. P. 251; *See, e.g., Laughlin v. Bergman*, 962 S.W.2d 64, 65-55 (Tex.App.--Houston [1st Dist.] 1997, pet. denied); *McAx Sign Co. v. Royal Coach, Inc.*, 547 S.W.2d 368, 370 (Tex.Civ.App.--Dallas 1977, no writ).

To preserve error on the denial of a motion for continuance based on the absence of counsel, show: (a) counsel's absence was not the party's fault and did not occur through his lack of diligence, *State v. Crank*, 666 S.W.2d 91, 94 (Tex.1984), and (b) no other attorney could handle the case, *Echols v. Brewer*, 524 S.W.2d 731, 734 (Tex.Civ.App.--Houston [14th Dist.] 1975, no writ).

4. Expert Issues

Typically, the threshold inquiry as to an expert's qualifications and the reliability of his testimony is addressed pre-trial. *See E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556-57 (Tex.1995).

Regardless of whether the trial court holds such a pre-trial hearing on an expert's qualifications, a party seeking to exclude expert testimony should object both before trial in a motion to exclude expert testimony and at trial at the time the expert is called to testify. See *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 409 (Tex.1998)(recognizing that a party can object "before trial or when the evidence is offered"). The Texas Supreme Court has also held that a motion to strike expert testimony can be raised as late as "immediately after cross-examination when the *basis* for the objection [*becomes*] *apparent*." *Kerr-McGee Corp. v. Helton*, 133 S.W.3d 245, 252 (Tex.2004) (emphasis added); see also *General Motors Co. v. Iracheta*, 161 S.W.3d 462, 471 (Tex.2005).

There can be risks associated with objecting *only* before trial. For example, the court may conclude that the objection is premature. See *Farm Servs., Inc. v. Gonzalez*, 756 S.W.2d 747, 750 (Tex.App.--Corpus Christi 1988, writ denied). Or the basis for the objection may not be apparent until the expert testifies at trial. *Kerr-McGee Corp.*, 133 S.W.3d at 252. But one thing is certain -- filing a motion in limine does not preserve error on appeal. See, e.g., *Methodist Hosps. of Dallas v. Corporate Communicators, Inc.*, 806 S.W.2d 879, 883 (Tex.App.--Dallas 1991, writ denied). Instead, if the party is seeking to object to expert testimony, a motion to exclude expert testimony is necessary. See *Huckaby v. A.G. Perry & Son, Inc.*, 20 S.W.3d 194, 203-04 (Tex.App.--Texarkana 2000, pet. denied)(distinguishing a motion to exclude from a motion in limine in the expert testimony context).

The Texas Supreme Court has recently made clear that some error survives a failure to make a *Daubert/Robinson* objection to an expert's testimony. The two types of challenges to expert testimony and the difference in preservation is: (1) an attack on the scientific methodology, technique, or foundational data underlying the expert's opinion, which requires an objection to scientific reliability of the testimony; and (2) an attack on the legal sufficiency of the expert's opinion as speculative or conclusory on the face of the record, for which no pre-verdict objection is required. *Coastal Transport Co. v. Crown Central Petroleum Corp.*, 136 S.W.3d 227, 232-33 (Tex.2004). Thus, if there is no *Daubert* objection, a party cannot complain on appeal of the expert's methodology or the science of his underlying studies.

F. Sanctions

A party who does not obtain a pre-trial ruling on a discovery dispute existing before trial has waived a claim of sanctions based on the alleged misconduct. See *Remington Arms Co. v. Caldwell*, 850 S.W.2d 167, 170 (Tex.1993)(orig. proceeding).

A party seeking to challenge the trial court's sanctions ruling on appeal should be careful to bring the complaint to the trial court's attention. See, e.g., *Garcia v. Mireles*, 14 S.W.3d 839, 843 (Tex.App.--Amarillo 2000, no pet.)(appellant's failure to raise sanctions issue in the trial court and to request findings of fact and conclusions of law waives its appellate complaint); *Kiefer v. Continental Airlines, Inc.*, 10 S.W.3d 34, 41 (Tex.App.--Houston [14th Dist.] 1999, pet. denied)(when an attorney does not complain of the trial court's sanction order and does not request the trial court to reconsider its order, the attorney has waived any appellate complaint about the sanctions order). In *Cire v. Cummings*, 134 S.W.3d 835, 844 (Tex. 2004), a case in which the Texas Supreme Court set aside the court of appeals' reversal of the trial court's death penalty sanctions, the Court agreed that "'doing nothing in the face of a pending [discovery] motion and then complaining on appeal runs afoul of the policy underlying Appellate Rule 33.1.'"

G. Jury Selection

The Texas Supreme Court recently decided two cases setting forth preservation standards for jury selection errors.

1. Voir Dire

In *Hyundai Motor Co. v. Vasquez*, ___ S.W.3d ___, 49 Tex. Sup. Ct. J. 420, 2006 WL 572207 (March 20, 2006), a child who was not wearing a seat belt was killed by a deploying air bag. The Supreme Court reviewed a trial judge's refusal to allow plaintiff's counsel to inquire of the venire panel whether they would be predisposed against the plaintiffs because the child was unbelted. The San Antonio Court of Appeals, sitting en banc, had reversed the trial court, holding that it had abused its discretion because the proposed question focused on the ability of the jurors to be fair. The Supreme Court disagreed, holding that the trial court could have reasonably concluded that the substance of the proposed question did not present a basis for disqualifying a juror for cause, but rather sought to test the weight jurors would place on the relevant fact the child was not wearing a seat belt; therefore, the trial court did not abuse her discretion in refusing to allow it. The court noted that while trial court should allow broad latitude to counsel to discover any bias or prejudice so that peremptory challenges could be intelligently exercised, peremptory strikes were not intended to permit a party to select a favorable jury. The court emphasized that voir dire was not for the purpose of inquiring what weight jurors would give relevant evidence or trying to pre-test their opinions about the evidence. Instead, that skewed the process by trying to commit jurors to a specific verdict.

While asking this particular question was not proper, the trial court did err by not allowing counsel to ask general question about seat belts to discern any biases held by the veniremen. However, counsel failed to preserve that error because he failed to alert the trial court as to alternative questions he wished to pursue. Instead, he merely posed another question identical to the improper question. Therefore, error was not preserved.

2. Challenge for Cause

Cortez v. HCCI-San Antonio, Inc., 159 S.W.3d 87 (Tex. 2005), examined challenging a juror for cause. During voir dire, venireman Snider, an automobile claims insurance adjustor, stated that his experience would give him preconceived notions and that he would feel bias. During rehabilitation, Snider stated that he was "willing to try" to make his decision based on the evidence and the law. The Supreme Court noted that is all that you can ask of any juror; and it affirmed the trial court's refusal to strike Snider for cause. *Id.* at 93. The court deemed this an "equivocal" bias and stated that in order for bias to disqualify a veniremen, it must appear that his state of mind leads to the natural inference that he will not act with impartiality. *Id.* at 94.

The Court was also critical of the voir dire in the case because counsel had summarized the evidence and then asked the panel whether either party was starting out ahead. It stated that such inquiries are improper because they seek an opinion about the evidence. Voir dire inquiry should address bias and prejudice, not veniremen's opinion about the evidence. Attempts to preview a venireman's likely vote as a juror is not permitted. *Id.* at 94.

Reiterating *Hallett v. Houston Northwest Medical Center*, 689 S.W.2d 888, 890 (Tex. 1985), the Court held that to preserve error on a challenge for cause, a party must: (1) use a peremptory strike against he challenged-for-cause venireman; (2) exhaust its remaining peremptory strikes; and (3) notify the court that a specific objectionable venireman will remain on the jury. *Cortez*, 159 S.W.3d at 90-91. This notice to the trial court must be made before the jury is seated. However, the Court held that Cortez was not required to state the basis of his objections to the identified juror in order to preserve error; he merely had to identify who remained on the jury that he would have used his peremptory strike against. *Id.* at 91.

IV. MOTIONS FOR DIRECTED/INSTRUCTED VERDICT IN STATE COURT²

A. The Standard

A directed verdict motion under TEX. R. CIV. P. 268 is proper under limited circumstances: (1) a defect in the opponent's pleading makes it insufficient to support a judgment; (2) the evidence proves conclusively the truth of factual propositions that, under the substantive law, establishes the right of the movant to judgment, or negates the right of the movant's opponent to judgment; or (3) the evidence is legally insufficient to raise an issue of fact on one or more fact propositions that must be established for the movant's opponent to be entitled to judgment. *Sherman v. Elkowitz*, 130 S.W.3d 316, 319 (Tex.App.--Houston [14th Dist.] 2004 no pet.); *Horton v. Horton*, 965 S.W.2d 78, 84 (Tex.App.--Fort Worth 1998, no pet.); *Neller v. Kirschke*, 922 S.W.2d 182, 187 (Tex.App.--Houston [1st Dist.] 1995, writ denied). A directed verdict is warranted when the evidence is such that no other verdict can be rendered and the moving party is entitled to judgment as a matter of law. *Walden v. Affiliated Computer Services, Inc.*, 97 S.W.3d 303, 324 (Tex.App.--Houston [14th Dist.] 2003, pet. denied); *Cain v. Pruett*, 938 S.W.2d 152, 160 (Tex.App.--Dallas 1996, no writ); *Beauchamp v. Hambrick*, 901 S.W.2d 747, 749 (Tex.App.--Eastland 1995, no writ).

B. Time for Filing and Effect

A party may move for a directed verdict at several stages of trial: when an opponent rests, when an opponent closes, and when all parties close. *Wedgeworth v. Kirskey*, 985 S.W.2d 115 (Tex.App.--San Antonio 1998, pet. denied) (reversible error to grant a directed verdict against plaintiff before plaintiff presented all its evidence). The motion for directed verdict is one of several alternative methods for raising a legal sufficiency complaint. *Cecil v. Smith*, 804 S.W.2d 509, 510 (Tex. 1991). Note, however, that if evidence is introduced following the denial of a motion for directed verdict, the movant must re-urge the motion; otherwise, any error in the denial is waived. *1986 Dodge 150 Pickup v. State*, 129 S.W.3d 180, 183 (Tex.App.--Texarkana 2004, no pet.); *Cliffs Drilling Co. v. Burrows*, 930 S.W.2d 709, 712 (Tex.App.--Houston [1st Dist.] 1996, no writ); *McMeens v. Pease*, 878 S.W.2d 185, 190 (Tex.App.--Corpus Christi 1994, writ denied).

C. Motion to Re-Open

When faced with a motion for directed verdict, the non-movant may request that the court re-open the evidence to allow the non-movant to supply the necessary evidence. *Villegas v. Griffin Indus.*, 975 S.W.2d 745, 751 (Tex.App.--Corpus Christi 1998, pet. denied); *Uhlir v. Golden Triangle Dev. Corp.*, 763 S.W.2d 512, 517 (Tex.App.--Fort Worth 1988, writ denied). The court may admit additional evidence at any time before the case goes to the jury where it clearly appears necessary to the administration of justice. TEX. R. CIV. P. 270. The decision to grant or deny a motion to re-open is within the sound discretion of the trial court. *Uhlir*, 763 S.W.2d at 517. In deciding whether to exercise its discretion, the court may consider: (1) the diligence of a party in presenting its evidence; (2) the undue delay re-opening will cause; (3) the injustice of the refusal to re-open; and (4) the decisiveness of the evidence to be introduced. *Lopez v. Lopez*, 55 S.W.3d 194, 201 (Tex.App.--Corpus Christi 2001, no pet.); *C.F. v. State*, 897 S.W.2d 464, 473-74 (Tex.App.--El Paso 1995, no writ); 4 ROY W. McDONALD & ELAINE A. GRAFTON CARLSON, TEXAS CIVIL PRACTICE § 21:52 (2d ed. 2001).

² The author wishes to thank her fellow Crofts & Callaway shareholder Jacqueline S. Stroh for allowing her to include *in toto*, with some minor deletions and additions, her wonderfully comprehensive paper on "Preservation Post Trial," including the sections on state court motions for directed verdicts and post-verdict and post-judgment motions. Ms. Stroh's paper was presented at the State Bar of Texas's Civil Appellate Practice Boot Camp 2005 on September 7, 2005.

D. Non-Jury Trials

Technically, a directed or instructed verdict is incorrect in a bench trial. *Grounds v. Tolar I.S.D.*, 856 S. 2d 417, 422 (Tex.1993)(Gonzalez, J., concurring). Rather, in a non-jury trial, the proper vehicle for challenging legal sufficiency is a motion for judgment. *Qantel Business Systems, Inc. v. Custom Controls Co.*, 761 S.W.2d 302, 304 (Tex.1988). The distinction is key. Not only are the motions reviewed differently; but, in the context of a bench trial, a trial court is authorized to grant a motion for judgment if it concludes that the plaintiff's evidence is *factually* insufficient. *Qantel*, 761 S.W.2d at 303-04; *Grounds*, 856 S.W.2d at 422.

V. POST-VERDICT/PRE-JUDGMENT MOTIONS

A. Motions for Judgment Notwithstanding the Verdict and Motions to Disregard Jury Findings

Like motions for directed verdict, motions for judgment n.o.v. and to disregard jury findings under TEX. R. CIV. P. 301 are vehicles for attacking legal sufficiency of the evidence, and they preserve legal sufficiency challenges for appellate review. The difference between the two lies in their scope. A motion for judgment n.o.v. challenges the entire verdict; a motion to disregard a jury finding challenges only certain findings as unsupported by the evidence. Regardless of the motion used to preserve a no-evidence challenge to fact findings, the same standard of review applies. *City of Keller v. Wilson*, 168 S.W.3d 802 (Tex.2005). A successful party will use a motion for judgment on the verdict to preserve error when the trial court renders judgment for the movant, but the judgment is for less than the verdict. *Emerson v. Tunnell*, 793 S.W.2d 947, 947-48 (Tex.1990).

1. Standard

A court may grant a motion for judgment notwithstanding the verdict if a directed verdict would have been proper. *Fort Bend County Drainage Dist. v. Sbrusch*, 818 S.W.2d 392, 394 (Tex.1991). Rule 301 motions should be granted, for example, when there is no evidence. *Mancorp, Inc. v. Culpepper*, 802 S.W.2d 226, 227 (Tex.1990); *Juliette Fowler Homes, Inc. v. Welch Assocs., Inc.*, 793 S.W.2d 660, 666 (Tex.1990); *County of Dallas v. Wiland*, 124 S.W.3d 390, 401 (Tex.App.--Dallas 2003, pet. granted). Thus, Rule 301 motions are viable when the record discloses one of the following: (1) there is complete absence of evidence of a vital fact; (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a scintilla of evidence; or (4) the evidence conclusively establishes the opposite of a vital fact. *Id.* at 666, n. 9. *See also Hawkins v. Ehler*, 100 S.W.3d 534, 539 (Tex.App.--Fort Worth 2003, no pet.); *Horton v. Horton*, 965 S.W.2d 78, 85 (Tex.App.--Fort Worth 1998, no pet.). Additionally, "[e]ven if the jury findings are supported by evidence, a judgment notwithstanding the verdict still may be proper if a claim or defense is barred as a matter of law or a jury answer is immaterial." *Chapa v. Tony Gullo Motors I, L.P.*, 2004 WL 1902533, at *1 (Tex.App.--Beaumont 2004, pet. granted); *see also Hoffman-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438, 449-50 (Tex.2004)(party sufficiently preserved challenge to legal availability of tort by including it in post-verdict motion for jnov).

A trial court may disregard a jury finding not only if it is unsupported by evidence, but also if the issue is immaterial. *Spencer v. Eagle Star Ins. Co. of America*, 876 S.W.2d 154, 157 (Tex.1994). A finding is immaterial when the question should not have been submitted, or when it was properly submitted but has been rendered immaterial by other findings. A question that calls for a finding beyond the province of the jury, such as a question of law, may also be deemed immaterial. *Id.*

2. Time for Filing

Ordinarily, Rule 301 motions are filed before the trial court renders judgment and are considered at the same time as the prevailing party's motion for judgment. However, neither Rule 301 nor any other rule provides a time limit for filing motions for judgment n.o.v. or to disregard jury findings. *Kirschberg v. Lowe*, 974 S.W.2d 844, 846 (Tex.App.--San Antonio 1998, no pet.). Therefore, Rule 301 motions may be filed before or after the judgment is signed. *Id.*

Do Rule 301 motions filed after judgment extend the appellate timetables? It appears so, in light of two Supreme Court decisions. In *Gomez v. Texas Dep't of Criminal Justice*, 896 S.W.2d 176 (Tex.1995), the court suggested that any motion that assails the trial court's judgment extends the appellate timetables under Rule 329b. And in *Lane Bank Equipment Co. v. Smith Southern Equipment, Inc.*, 10 S.W.3d 308 (Tex.2000), the court recognized that any timely-filed post-judgment motion that seeks a substantive change in the existing judgment qualifies as a motion to modify under Rule 329b. Because Rule 301 motions, if filed after judgment, both assail the judgment and seek substantive change, they should also serve to extend the appellate timetable.

How long after judgment may Rule 301 motions be filed and still be considered? The Dallas Court of Appeals determined that Rule 301 motions must be filed within 30 days after judgment and cannot be considered if filed later, even if the trial court still has plenary power over the judgment. *Commonwealth Lloyds Ins. Co. v. Thomas*, 825 S.W.2d 135 (Tex.App.--Dallas 1992, writ granted), *op. vacated*, 843 S.W.2d 486 (Tex.1993). Although the issue remains unresolved by the Supreme Court, the better view appears to be that the trial court may look to an untimely motion for guidance in exercising its inherent power to grant a post-judgment motion during its plenary jurisdiction. *Kirschberg v. Lowe*, 974 S.W.2d at 848, n. 5; 4 ROY W. McDONALD & ELAINE A. GRAFTON CARLSON, TEXAS CIVIL PRACTICE § 26:10 (2d ed. 2001). Note, however, that to the extent that post-judgment Rule 301 motions are treated like Rule 329b motions, any amended motion filed more than 30 days after the trial court signs a final judgment is untimely, and thus a nullity for purposes of preserving issues for appellate review. *Moritz v. Preiss*, 121 S.W.3d 715, 720 (Tex.2003). Until the Supreme Court addresses the issue, the safest practice is to file the motion within 30 days after judgment is signed.

3. Strategy Considerations

Note that a motion for directed/instructed verdict is *not* a prerequisite to a Rule 301 motion. This makes waiting until post-verdict, and asserting a "no evidence" challenge or pleading deficiency in a Rule 301 motion a powerful strategy. A motion for directed verdict educates the opponent on the deficiencies in his proof or pleadings, and gives him the opportunity to request leave to amend his pleadings or re-open the evidence. By waiting until after the verdict is returned, these options are foreclosed, as the evidence cannot be re-opened after the jury is discharged, nor generally can pleadings be amended. If the trial court denies a motion for judgment notwithstanding the verdict, it may still render a judgment that, in fact, disregards the verdict, so long as it acts within its plenary power. *Tri v. J.T.T.*, 162 S.W.3d 552, 561 (Tex.2005).

B. Prematurely Filed Motions

Under TEX. R. CIV. P. 306c and TEX. R. APP. P. 27.2, certain documents are effective to preserve error and extend appellate deadlines even though they are prematurely filed. *Padilla v. LaFrance*, 907 S.W.2d 454, 458 (Tex.1995). These rules prevent the procedural trap that otherwise could occur if a party prematurely filed a motion that was intended to assail the final judgment. *Id.*

What if the trial court amends or modifies the judgment? Is the prematurely filed motion still effective? The answer is “yes” so long as the motion still “assails” the second judgment. TEX. R. APP. P. 27.3.

What if the prematurely filed motion is overruled before the subsequent judgment is signed? The motion is effective for purposes of error preservation, so long as it still “assails” the subsequent judgment. *Fredonia State Bank v. General American Life Ins. Co.*, 881 S.W.2d 279, 282 (Tex.1994). However, the Supreme Court expressly refused to address whether, in such a situation, the prematurely filed motion extends the appellate timetables. *Id.* n. 2. The appellate courts have been in conflict on this issue. Compare *Harris County Hospital Dist. v. Estrada*, 831 S.W.2d 876, 880 (Tex.App.--Houston [1st Dist.] 1992, no writ)(appellate deadlines extended), with *A.G. Solar & Co., Inc. v. Nordyke*, 744 S.W.2d 646, 647-48 (Tex.App.--Dallas 1988, no writ)(premature motion already disposed of cannot “assail” a subsequent judgment and cannot extend appellate timetables). The Supreme Court of Texas recently held that a premature motion for new trial generally extends appellate timetables on the judgment that it assails. *Wilkins v. Methodist Health Care Sys.*, 160 S.W.3d 559, 562-64 (Tex.2005). However, if the motion for new trial is granted, then it does not “assail” the subsequent judgment. *Id.* (“[w]e hold that a motion for new trial that has been granted cannot ‘assail’ a subsequent judgment for purposes of determining the deadline for filing a notice of appeal”).

VI. POST-JUDGMENT MOTIONS IN STATE COURT

In addition to the preservation-of-error function that post-judgment motions serve, they can also extend the time to take an appeal. TEX. R. APP. P. 26.1(a) provides that the timely filing of a motion for new trial, a motion to modify the judgment, a motion to reinstate under TEX. R. CIV. P. 165a, or a request for findings of fact and conclusions of law if findings and conclusions are either required or proper, extends the time to perfect an appeal. In fact, a timely-filed motion for new trial will extend the appellate deadlines even if the motion is defective. *Keenan v. Keenan*, 2005 WL 471186, at *1 (Tex.App.--San Antonio March 2, 2005, no pet.)(not designated for publication). There is an important caveat, however.

The Supreme Court of Texas has recently clarified that the rules of appellate procedure do not permit post-judgment motions to extend the appellate deadline for filing an accelerated, *i.e.*, interlocutory appeal. *In re K.A.F.*, 160 S.W.3d 923, 924, 927 (Tex.2005)(“in an accelerated appeal, absent a rule 26.3 motion, the deadline for filing a notice of appeal is strictly set at twenty days after the judgment is signed, with no exceptions, and filing a rule 26.1(a) motion for new trial, motion to modify the judgment, motion to reinstate, or request for findings of fact and conclusions of law will not extend that deadline”); *see also* TEX. R. APP. P. 26.1(b) (“in an accelerated appeal, the notice of appeal must be filed within 20 days after the judgment or order is signed”); TEX. R. APP. P. 28.1 (“[f]iling a motion for new trial will not extend the time to perfect the [interlocutory] appeal”); *Goodyear Dunlop Tires No. Am., Ltd. v. Gamez*, 151 S.W.3d 574, 592 (Tex.App.--San Antonio 2004, no pet.)(request for findings of fact and conclusions of law does not extend time to perfect interlocutory appeal). However, if a post-judgment motion is timely filed and a trial court modifies its judgment while it retains plenary power, the time for filing the notice of appeal is calculated from the date of the new final judgment. *In re J.L.*, 163 S.W.3d 79, 82 (Tex.2005).

Note that if *any* party to the trial court’s judgment timely files a motion for new trial, then the time for filing a notice of appeal is extended for all parties. TEX. R. APP. P. 26.1(a). Also, practitioners should keep in mind the difference between the timeline for perfecting an appeal and the timeline for the expiration of the trial court’s plenary power. As expected, the courts consider the substance of a motion in determining whether it qualifies as one of the types of motions that will preserve error, extend plenary power, and toll the time to take an appeal. *IPM Prods. Corp. v. Motor Parkway Realty Corp.*, 960 S.W.2d 879, 882 (Tex. App.--El Paso 1997, no pet.)(motion for reconsideration is equivalent to motion for new trial); *Homart Dev.*

Co. v. Blanton, 755 S.W.2d 158, 159 (Tex.App.--Houston [1st Dist.] 1988, orig. proceeding) (motion to set aside default judgment has same effect and is subject to same deadlines as a motion for new trial).

A. Motions for New Trial

1. Necessity

TEX. R. CIV. P. 324(b) requires a motion for new trial in the following instances:

- (1) A complaint on which evidence must be heard such as one of jury misconduct or newly discovered evidence or failure to set aside a judgment by default;
- (2) A complaint of factual insufficiency of the evidence to support a jury finding;
- (3) A complaint that a jury finding is against the overwhelming weight of the evidence;
- (4) A complaint of inadequacy or excessiveness of the damages found by the jury; or³
- (5) Incurable jury argument if not otherwise ruled on by the trial court.

If one of the enumerated complaints does not exist in the case, a motion for new trial is generally unnecessary. Nevertheless, a motion for new trial may be used to preserve other types of error. *See, e.g., Wheeler v. Green*, 157 S.W.3d 439, 442 (Tex.2005)(per curiam)(attack on deemed admissions and request to allow a late response to a summary judgment could be asserted for the first time in a motion for new trial where nothing in the record showed that the party realized its mistake before judgment); *see also Babajide v. Citibank (South Dakota), N.A.*, 2004 WL 2933575, at *1 (Tex.App.-- Houston [14th Dist.] 2004, no pet.) (“a nonmovant must file a motion for new trial to preserve a complaint that she did not receive notice of a summary judgment hearing). Indeed, the filing of a motion for new trial in order to extend the appellate timetable is a matter of right, whether or not there is any sound or reasonable basis for the conclusion that a further motion is necessary. *Old Republic Ins. Co. v. Scott*, 846 S.W.2d 832, 833 (Tex.1993). A motion for new trial implicates several rules, including Rules 320, 321, and 322 of the Texas Rules of Civil Procedure. Rule 320, for example, requires that the motion be signed by the movant or its attorney. Rule 322 requires that generality be avoided. And Rule 321 requires the motion to refer to the part of the court’s ruling challenged so that the objection can be clearly identified and understood by the court.

Note that it is unnecessary, in non-jury trials, to preserve in the trial court a complaint of factual insufficiency through a motion for new trial. TEX. R. APP. P. 33.1(d). A complaint about the legal or factual insufficiency of the evidence to support a finding in the context of a bench trial may be raised for the first time on appeal. *Id.*

2. Time for Filing

³ A request for remittitur may be filed as part of a motion for new trial or as an independent motion, but the same timelines govern. *C.M. Asfahl Agency v. Tensor, Inc.*, 135 S.W.3d 768, 796 (Tex.App.--Houston [1st Dist.] 2004, no pet.). A trial court cannot order a remittitur, but can only suggest a remittitur conditioned on a new trial. *Snoke v. Republic Underwriters Ins. Co.*, 770 S.W.2d 777, 777 (Tex.1989)(per curiam).

The date the judgment is signed determines the beginning of the Rule 329 thirty-day time for filing a motion for new trial. TEX. R. APP. P. 306a(1); *see S & A Restaurant Corp. v. Leal*, 892 S.W.2d 855, 858 (Tex.1995)(distinguishing between date of rendition and date of signing); *Oak Creek Homes, Inc. v. Jones*, 758 S.W.2d 288 (Tex.App.--Waco 1988, no writ)(distinguishing among rendition, signing, and entry of judgment); *see also In re Bennett*, 960 S.W.2d 35, 38 (Tex.1997)(signed order dismissing case, rather than filing of nonsuit, is the starting point for appellate timetables).⁴ Rule 329b permits amended motions, but only within the same 30-day window for original motions. *Lind v. Gresham*, 672 S.W.2d 20, 22 (Tex.App.--Houston [14th Dist.] 1984, no writ)(because rule 5 prohibits trial court from enlarging time to file a motion for new trial, court had no authority to grant motion for leave to file amended motion for new trial more than 30 days after judgment signed). The trial court may look to an untimely amended motion for guidance in the exercise of its inherent power, and acting before its plenary power has expired, may grant a new trial. *Moritz v. Preiss*, 121 S.W.3d 715, 720 (Tex.2003). An untimely amended motion for new trial, however does not preserve issues for appellate review, even if the trial court considers and denies the untimely motion within its plenary power period. *Id.* at 721.

The rules governing computation and enlargement of time apply to motions for new trial, *except* the court may not enlarge the period for “taking any action under the rules relating to new trials except as stated in these rules.” TEX. R. CIV. P. 4 & 5. Thus, a motion for new trial is deemed timely if it is sent to the proper clerk by first-class United States mail properly addressed and stamped and is deposited in the mail on or before 30 days after the judgment is signed, and received not more than 10 days tardily. *Id.*; *Stokes v. Aberdeen Ins. Co.*, 917 S.W.2d 267, 268 (Tex.1996). In *Stokes*, the supreme court held that for purposes of timely filing, mailing a document to the proper court address is *conditionally effective* as mailing to the proper court clerk’s address. Nevertheless, the clerk still must actually receive the motion within 10 days to perfect the filing. *Id.* As the court noted in *Stokes*, the “cautious practitioner would benefit by making doubly sure that the clerk actually receives a copy within ten days.” *Id.*

At the time a motion for new trial is filed, the district clerk is to collect a filing fee “for services performed by the clerk.” TEX. GOV’T CODE § 51.317(a) & (b). What if the filing fee isn’t paid at the time of filing? In that instance, the motion is considered “conditionally filed” on the date of filing, and that date controls for appellate timetable purposes, so long as the filing fee is paid during the time the trial court retains plenary power over the judgment. *Tate v. E.I. DuPont de Nemours & Co., Inc.*, 934 S.W.2d 83, 84 (Tex.1996); *Jamar v. Patterson*, 868 S.W.2d 318, 319 (Tex.1993). Because the filing is not completed until the fee is paid, the supreme court has cautioned that “absent emergency or other rare circumstances, the court should not consider [the motion for new trial] before then.” *Jamar v. Patterson*, 868 S.W.2d at 319, n. 3.

Tate and *Jamar* left two unanswered questions. First, must the filing fee be paid while the trial court retains plenary power over its judgment in order to extend appellate timetables? And second, does the failure to pay the filing fee before the motion is overruled by operation of law waive error? The Supreme Court recently resolved both issues in *Garza v. Garcia*, 137 S.W.3d 36 (Tex.2004), holding that although the filing fee need not be paid to extend appellate deadlines, such a motion does not preserve error for review:

This is not to say filing fees are irrelevant. We have held that “absent emergency or other rare circumstances” a motion for new trial should not be considered until the filing fee is paid. Here, Garcia’s factual sufficiency complaint had to be raised in a motion for new trial,

⁴ Generally, it is a final judgment that triggers deadlines to file post-judgment motions and perfect appeals. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191 (Tex. 2001).

but because she never paid the \$15 fee, the trial court was not required to review it. As her complaint was never properly made to the trial court, it preserved nothing for review

Id. at 38.

3. Effect of Filing

When a party files a motion for new trial within thirty days of a judgment, the trial court has plenary power for seventy-five days following the date the court signed the judgment to act on the motion. *In re Dickason*, 987 S.W.2d 570, 571 (Tex.1998); TEX. R. CIV. P. 329b(e). Once the trial court overrules a timely-filed motion for new trial, the court retains plenary power for another thirty days. *Id.*; *see also Thompson v. Gibbs*, 504 S.W.2d 630, 632 (Tex.Civ.App.--Dallas 1973, orig. proceeding) (trial judge could set aside original judgment and grant new trial during plenary power period after overruling of motion for new trial by operation of law). Filing an amended motion for new trial does not extend the court's plenary power. *In re Dickason*, 987 S.W.2d at 571.

A party's right to file a motion for new trial carries with it the right to withdraw that motion at any time before it is heard. *Rogers v. Clinton*, 794 S.W.2d 9, 11 (Tex.1990). As written, Rule 329b does not authorize a trial court to order a new trial when the movant has deliberately withdrawn his motion and more than 30 days have passed since the judgment was signed. *Id.* Consequently, if a party withdraws a motion for new trial, the period of time for the trial court's plenary power reverts back to 30 days from the date the judgment was signed. *Id.*; *In re Dilley Independent School Dist.*, 23 S.W.3d 189 (Tex.App.--San Antonio 2000, orig. proceeding). If the withdrawal occurs more than 30 days after judgment was signed, the court is instantly divested of its plenary power over the judgment. *In re Dilley Independent School Dist.*, 23 S.W.2d at 191-2. It is unclear whether withdrawal of the motion for new trial affects the extended appellate timetable triggered by the initial filing. 5 ROY W. McDONALD & ELAINE A. GRAFTON CARLSON, TEXAS CIVIL PRACTICE, § 28:12 (2d ed. 1999).

Filing is generally enough to preserve the points contained in a motion for new trial. *Cecil v. Smith*, 804 S.W.2d 509, 510 (Tex.1991). In other words, there is no presentment requirement for a motion for new trial and a motion to modify, correct, or reform the trial court's judgment. *Id.* However, some courts have declined to extend this reasoning to motions not expressly mentioned in Texas Rule of Appellate Procedure 33.1(b). *In re East Texas Med. Ctr. Athens*, 154 S.W.3d 933, 936-37 (Tex. App.--Tyler 2005, orig. proceeding). As a result, an abundance of caution would dictate a request for a hearing on post-judgment motions not referenced in Rule 33.1(b) and a "presentation" of those motions to the trial court. Also, when motions for new trial or motions to modify require the taking of evidence, a hearing is required. TEX. R. APP. P. 33.1(b); *see also In re Z.L.T.*, 124 S.W.3d 163, 166 (Tex.2003)(when motion based on grounds listed in TEX. R. CIV. P. 324(b)(1), including newly discovered evidence or any other ground that requires presentation of evidence at a hearing, it is necessary to verify motion for new trial and include affidavits). Additionally, because only motions for new trial and motions to modify are referenced as being "overruled by operation of law," a movant will want to exercise caution and obtain a ruling on any other post-judgment motions it files. TEX. R. APP. P. 33.1(a)(1)(2).

4. Disposition

A motion for new trial can be disposed of in two ways: (1) by a written and signed order; or (2) by operation of law. If the trial court has not acted on the motion within 75 days after judgment was signed, the motion is overruled by operation of law. TEX. R. CIV. P. 329b(c). On the other hand, any order granting a new trial or modifying, correcting, or reforming a judgment must be written and signed. *Faulkner v. Culver*, 851 S.W.2d 187, 188 (Tex.1993). A trial judge's oral pronouncement granting a

motion for new trial cannot substitute for a written order required by Rule 329b. *Id.* Nor does a ruling in open court suffice to vacate a judgment if it is not reduced to writing within the statutory period. *Ex parte Olivares*, 662 S.W.2d 594, 595 (Tex.1983); *Texas Property and Cas. Ins. Guar. Ass'n v. De Los Santos*, 47 S.W.3d 584, 588 (Tex.App.--Corpus Christi 2001, no pet.); *see also In re Barber*, 982 S.W.2d 364 (Tex. 1998)(judge's rubber-stamped signature acceptable where evidence was undisputed that judge instructed court coordinator to place his signature on agreed order setting aside default judgment).

If the trial court modifies the judgment, the appellate timetables start over from the signing of the modified judgment. *Mackie v. McKenzie*, 890 S.W.2d 807, 808 (Tex.1994). Any change, whether or not material or substantial, made in a judgment while the trial court retains plenary power, operates to delay the commencement of the appellate timetable until the date the modified judgment is signed. *Check v. Mitchell*, 758 S.W.2d 755, 756 (Tex.1988). This rule applies as long as there is nothing on the face of the record to indicate that the modified judgment was signed for the sole purpose of extending the appellate timetable. *Farmer v. Ben E. Keith Co.*, 907 S.W.2d 495, 496 (Tex.1995).

If the trial court grants a motion for new trial, what is the extent of its authority to "un-grant" that motion? It is clear that the trial court can reconsider and vacate an order granting a new trial within the 75-day period under Rule 329b(c). *Fruehauf Corp. v. Carrillo*, 848 S.W.2d 83, 84 (Tex.1993); *Fulton v. Finch*, 162 Tex. 351, 355, 346 S.W.2d 823, 827 (1961). Commentators and courts continue to debate whether Rule 329b(e) applies to extend the power to un-grant a motion for new trial for an additional 30 days. 5 ROY W. McDONALD & ELAINE A. GRAFTON CARLSON, TEXAS CIVIL PRACTICE, § 28:2 (2d ed. 1999), *citing* Thomas H. Crofts, Jr., *Perplexities of Post-Judgment Plenary Power*, 20 TEX. TECH L. REV. 1129, 1149-51 (1989) (noting that the 75-day rule is incompatible with prior holdings explaining and defining trial court's plenary powers).

Nevertheless, the case law among intermediate appellate courts now appears to consistently hold that the trial court's power to un-grant an order granting a motion for new trial continues in effect only for seventy-five days after the date the original judgment was signed. *In re Luster*, 77 S.W.3d 331 (Tex.App.--Houston [14th Dist.] 2002, orig. proceeding). These holdings are based on the literal language of Rule 329b(e) which extends the trial court's plenary power for 30 days following the *overruling* of a motion for new trial, but is silent as to *granting* a new trial. Thus, the rule provides no authority for extending a trial court's authority over an order *granting* a new trial for an additional 30 days.

Before *Luster*, the Fourteenth Court had disagreed with this rationale, and held that the additional 30 days applied to extend the trial court's power to 105 days after judgment was signed. *Biaza v. Simon*, 879 S.W.2d 349, 357 (Tex.App.--Houston [14th Dist.] 1994, writ denied); *Gates v. Dow Chemical Co.*, 777 S.W.2d 120, 124 (Tex.App.--Houston [14th Dist.]), *judgment vacated by agr.*, 783 S.W.2d 589 (Tex. 1989). In *Luster*, however, the Fourteenth Court overruled *Biaza* and *Gates*, placing it in line with other intermediate appellate courts. *See Health Care Centers of Texas, Inc. v. Nolen*, 62 S.W.3d 813, 816 (Tex.App.--Waco 2001, no pet.); *Ferguson v. Globe-Texas Co.*, 35 S.W.3d 688, 690-91 (Tex.App.--Amarillo 2000, pet. denied); *In re Marriage of Wilburn*, 18 S.W.3d 837, 843, n. 3 (Tex.App.--Tyler 2000, pet. denied); *Hunter v. O'Neill*, 854 S.W.2d 704, 706 (Tex.App.--Dallas 1993, no writ); *Homart Development Co. v. Blanton*, 755 S.W.2d 158, 159 (Tex.App.--Houston [1st Dist.] 1988, orig. proceeding).

B. Motions to Modify, Correct, or Reform

A motion to modify, correct, or reform a judgment has the same effect on the trial court's plenary power and the appellate deadlines as the motion for new trial. TEX. R. CIV. P. 329b(g); TEX. R. APP. P. 26.1(a). The motion can be filed by either the successful or unsuccessful party. It, and a new trial, are proper vehicles for preserving error in the judgment. *See, e.g., Miller v. Kendall*, 804 S.W.2d 933, 945

(Tex.App. -- Houston [1st Dist.] 1990, no writ) (complaint regarding failure to award prejudgment interest will be waived if not preserved in motion to modify, correct or reform, or in motion for new trial); *WLR, Inc. v. Borders*, 690 S.W.2d 663, 668-69 (Tex.App. -- Waco 1985, writ ref'd n.r.e.) (complaint regarding failure to award attorney fees must be brought to trial court's attention via motion to modify, correct, or reform judgment or for new trial, or error is waived).

In determining what constitutes a motion that will extend the trial court's plenary power and the appellate timetable, the supreme court continues to elevate substance over form. In *Lane Bank Equipment Co. v. Smith Southern Equipment, Inc.*, 10 S.W.3d 308 (Tex. 2000), the court determined that a timely filed post-judgment motion that seeks a substantive change in an existing judgment qualifies as a motion to modify under Rule 329b(g). The distinction remains, however, between the type of change in a judgment that will re-start the appellate timetable and the type of motion that will extend the trial court's plenary power. Any change to a judgment made by the trial court while it retains plenary jurisdiction will restart the appellate timetable under Rule 329b(h), but only a motion seeking substantive change will extend the appellate deadlines and the court's plenary power under Rule 329b(g). *Id.* at 313. See also *Guajardo v. Conwell*, 30 S.W.3d 15, 16 (Tex.App.--Houston [14th Dist.] 2000), *aff'd*, 46 S.W.3d 862 (Tex. 2001) (motion for sanctions for failure to comply with judgment does not seek substantive change, and therefore, does not extend appellate timetables).

C. Motion for New Trial Following Late Notice of Judgment

Under Rule 306a(1), all periods within which parties may file various post-judgment motions and trial courts may exercise their plenary jurisdiction run from the date judgment is signed. Rule 306a(3) requires clerks to notify parties or their attorneys immediately when a judgment is signed. If the party adversely affected by the judgment does not receive the clerk's notice (or actual knowledge) within 20 days of signing, Rule 306a(4) & (5) provide a vehicle to extend the effective date of the judgment. In such a situation, the time for filing post-judgment motions begins on the date that the party or his attorney' receives notice or acquires actual knowledge of the signing, whichever occurs first; but in no event may the period begin more than 90 days after the original judgment or other appealable order was signed. *Levit v. Adams*, 850 S.W.2d 469, 470 (Tex.1993); see *In re Jones*, 974 S.W.2d 766, 767 n.2 (Tex. App.--San Antonio 1998, orig. proceeding)(cautioning that "actual notice" is not the standard and should not be used in Rule 306a motions or orders). After 90 days, the complaining party must seek relief by restricted appeal or bill of review.

In order to come within the exception, the aggrieved party must request that the effective date of judgment be extended by sworn motion and notice. The motion must show that the attorney or party received notice of judgment, or acquired actual knowledge of its signing, more than 20 days after judgment was signed. See also *In re Jones*, 974 S.W.2d at 769 (movant must also establish that neither they nor their attorney received the clerk's notice between the twentieth day after the date the judgment was signed and the date the party or attorney first acquired actual knowledge the judgment had been signed). A sworn 306a motion serves the purpose of establishing a *prima facie* case, invoking the trial court's jurisdiction for the limited purpose of holding a hearing to determine the date of notice. *Powell v. McCauley*, 126 S.W.3d 158, 160 (Tex.App.--Houston [1st Dist.] 2003, no pet.). The movant must also obtain an order finding the date that the party or its attorney first either received notice or acquired actual knowledge of the judgment. TEX. R. APP. P. 4.2(c). Compliance with the provisions of Rule 306a is a jurisdictional prerequisite. *Memorial Hosp. v. Gillis*, 741 S.W.2d 364, 365 (Tex.1987). Rule 306a contains no deadline for filing these motions, but the supreme court recently held that the only requirement is that the motion be filed before expiration of the trial court's plenary power. *John v. Marshall Health Services, Inc.*, 58 S.W.3d 738, 741 (Tex.2001).

D. Requests for Findings of Fact and Conclusions of Law

Like the other post-judgment motions discussed above, a request for findings and conclusions extends the appellate timetable. TEX. R. APP. P. 26.1. A premature request for findings of fact and conclusions of law is effective to extend the appellate timetable. TEX. R. CIV. P. 306c. In order to request findings of fact and conclusions of law, a party must make a formal request within 20 days of the date the judgment is signed. TEX. R. CIV. P. 296.

Note, however, that a request for findings of fact and conclusions of law will only extend the appellate timetables when such request either is “required by the Rules of Civil Procedure or, if not required, could properly be considered by the appellate court.” TEX. R. APP. P. 26.1(a)(4).

A request for findings of fact and conclusions of law does not extend the time for perfecting appeal of a judgment rendered as a matter of law, where findings and conclusions can have no purpose and should not be requested, made, or considered on appeal. Examples are summary judgment, judgment after directed verdict, judgment *non obstante veredicto*, default judgment awarding liquidated damages, dismissal for want of prosecution without an evidentiary hearing, dismissal for want of jurisdiction without an evidentiary hearing, dismissal based on the pleadings or special exceptions, and any judgment rendered without an evidentiary hearing. A timely filed request for findings of fact and conclusions of law extends the time for perfecting appeal when findings and conclusions are required by Rule 296, or when they are not required by Rule 296 but are not without purpose -- that is, they could properly be considered by the appellate court. Examples are judgment after a conventional trial before the court, default judgment on a claim for unliquidated damages, judgment rendered as sanctions, and any judgment based in any part on an evidentiary hearing.

IKB Ind. Ltd. v. Pro-Line Corp., 938 S.W.2d 440, 443 (Tex.1997). Furthermore, no rule provides that the filing of a request for findings and conclusions extends the period of the trial court’s plenary power over its judgment, and two courts of appeals have held that because a request for findings and conclusions does not seek a substantive change in the judgment, it does not extend plenary power. *In re Gillespie*, 124 S.W.3d 699, 703 (Tex.App. -- Houston [14th Dist.] 2003, orig. proceeding) (overruling previous holding to the contrary in *Electronic Power Design, Inc. v. R.A. Hanson Co., Inc.*, 821 S.W.2d 170 (Tex.App.--Houston [14th Dist.] 1991, no writ); *Pursley v. Ussery*, 982 S.W.2d 596, 599 (Tex.App.--San Antonio 1998, pet. denied).

1. Trial Court’s Obligation

When a party misses the original deadline, he waives the right to complain on appeal about the trial court’s failure to prepare findings and conclusions. *Las Vegas Pecan & Cattle Co. v. Zavala City*, 682 S.W.2d 254, 255 (Tex.1984). A party can still request findings and conclusions after the deadline, but the trial court has no obligation to comply. *Wagner v. GMAC Mortg. Corp.*, 775 S.W.2d 71, 72 (Tex. App. -- Houston [1st Dist.] 1989, no writ). The trial court retains jurisdiction to file late findings and conclusions, *Morrison v. Morrison*, 713 S.W.2d 377, 380-81 (Tex.App.--Dallas 1986, writ dism’d), and the appellate court can consider late-filed findings and conclusions, but may disregard them if they are substantially late. *See Summit Bank v. The Creative Cook*, 730 S.W.2d 343, 345 (Tex.App.--San Antonio 1987, no writ) and *Labar v. Cox*, 635 S.W.2d 801, 803 (Tex.App.--Corpus Christi 1982, writ ref’d n.r.e.), respectively. A prematurely-filed original request will be deemed filed the day the judgment is signed. *Pursley v. Ussery*, 982 S.W.2d 596, 599 (Tex.App.--San Antonio 1998, pet. denied).

If after proper request, the trial court fails to file findings and conclusions within 20 days of the date the party requested findings, then the party who asked for findings must file a Notice of Past Due Findings of Fact and Conclusions of Law within 30 days of its original request. TEX. R. CIV. P. 297. Again, failure to file a notice of past due findings and conclusions waives any complaint regarding the trial court's failure to file findings and conclusions. TEX. R. CIV. P. 297; *see also Las Vegas Pecan & Cattle Co.*, 682 S.W.2d at 255. Note also that a prematurely filed notice of past due findings will *not* be deemed timely filed. *Estate of Gorski v. Welch*, 993 S.W.2d 298, 301 (Tex.App.--San Antonio 1999, pet. denied); *Echols v. Echols*, 900 S.W.2d 160, 161 (Tex.App.--Beaumont 1995, writ denied).

If a trial court files findings and conclusions, either party may ask the court to make specific additional findings and conclusions within ten days of the date the court files the original findings. TEX. R. CIV. P. 298. A trial court is not required to make additional findings and conclusions when they are directly contrary to, or inconsistent with, the original findings and conclusions filed by the trial court. *Starcrest Trust v. Berry*, 926 S.W.2d 343, 354 (Tex. App.--Austin 1996, no writ).

2. Necessity

If findings of fact or conclusions of law are neither filed nor properly requested, the judgment of the trial court implies all necessary findings of fact to support it. *In re W.E.R.*, 669 S.W.2d 716, 717 (Tex. 1984). When implied findings of fact are supported by the evidence, the appellate court must uphold the judgment on any theory of law applicable to the case. *Allen v. Allen*, 717 S.W.2d 311, 313 (Tex. 1986). Also, with respect to requests for additional findings and conclusions, if a trial court's original findings do not address a ground of recovery or a defense, then the party relying on that ground or defense must request additional findings to avoid waiver on appeal. *Limestone Group, Inc. v. Sai Thong, L.L.C.*, 107 S.W.3d 793, 799 (Tex.App.--Amarillo 2003, no pet.).

E. Correction of a Judgment Nunc Pro Tunc

A judgment nunc pro tunc is used in the trial court to correct clerical errors and may be executed after the trial court loses plenary power. TEX. R. CIV. P. 329b(f); *Riner v. Briargrove Park Prop. Owners, Inc.*, 976 S.W.2d 680, 682 (Tex. App. -- Houston [1st Dist.] 1997, no pet.). A clerical error is an error in entering a final judgment. *Escobar v. Escobar*, 711 S.W.2d 230, 231 (Tex. 1986). On the other hand, a judicial error, which is an error in rendering a final judgment, cannot be corrected after a trial court's plenary power has expired. *Id.* Whether an error is clerical or judicial is a question of law. *Id.* at 232.

VII. POST-JUDGMENT MOTIONS IN FEDERAL COURT⁵

Once trial in federal court has concluded and judgment has been entered, a litigant seeking relief from that judgment should consider filing one or more of the following post-trial motions:

- (1) renewed motion for judgment as a matter of law under FRCP 50(b)
- (2) motion for new trial under FRCP 59(b)
- (3) motion to alter or amend judgment under FRCP 59(e)
- (4) motion for relief from judgment under FRCP 60

⁵ This section on federal court motions is taken primarily from a paper I wrote for the State Bar of Texas, 15th Annual Advanced Civil Appellate Practice Course (2001) entitled "Federal Post-Verdict Motions and Supersedeas," which has been updated.

- (5) motion to amend trial court's findings of fact under FRCP 52(b).

The timelines for filing these motions are very short -- ten days in most cases; therefore, decisions about whether to file post-trial motions and the drafting of those motions should commence before judgment is entered if at all possible. *See* FED. R. CIV. P. 6 (“[w]hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation”). The time for filing a notice of appeal is extended when the foregoing motions are filed, and is triggered by the entry of an order disposing of the last such remaining motion, with one important caveat and one important addition. FED. R. APP. P. 4(a)(4)(A). In order for a motion for relief from judgment under Rule 60 to extend the time to take an appeal, it must be filed no later than 10 days after the judgment is entered. FED. R. APP. P. 4(a)(4)(A)(vi). Also, a motion for attorney's fees under Rule 54 will extend the time to take an appeal *if* the district court extends the time to appeal under Rule 58. FED. R. APP. P. 4(a)(4)(A)(iii).

In addition to extending appellate deadlines, these motions may preserve error for a point not previously raised in the trial court. *Fiess v. State Farm Lloyds*, 392 F.3d 802, 806 (5th Cir.2004), *citing Instone Travel Tech Marine & Offshore v. International Shipping Partners*, 334 F.3d 423, 431 n.7 (5th Cir. 2003)(issue preserved for appeal when raised in Rule 59(e) motion for rehearing); *New York Life Ins. Co. v. Brown*, 84 F.3d 137, 142 n.4 (5th Cir.1996)(issue preserved for appeal when raised in Rule 60(b) motion to vacate). While it may not be advisable to wait to include an appellate point for the first time in post-judgment motions, these motions may provide a last-chance preservation mechanism for previously-unasserted issues.

A. Renewed Motion for Judgment as a Matter of Law

The 1991 amendments to the Federal Rules of Civil Procedure abandoned the terminology of “directed verdict” and “judgment notwithstanding the verdict” in favor of “motion for judgment as a matter of law” which more correctly reflects the common identity and purpose of the two motions -- with a post-verdict motion being referred to as a “renewed motion for judgment as a matter of law.” FED. R. CIV. P. 50; Advisory Committee Notes to Rule 50(a). Any motions denominated as “directed verdict” or “notwithstanding the verdict” will be treated as a motion or renewed motion for judgment as a matter of law under Rule 50. *Id.*; *see also McCoy v. Hernandez*, 203 F.3d 371, 374 (5th Cir. 2000).

The 1993 amendment to Rule 50 simply made clear that judgment as a matter of law (“JML”) in jury trials may be entered against either a plaintiff or a defendant or with respect to issues or defenses that may not be wholly dispositive of a claim or defense. FED. R. CIV. P. 50 advisory committee note.

1. Pre-Verdict Motion for Judgment Is Prerequisite

Rule 50 is applicable only to jury cases; it does not apply to cases tried to the court or to cases tried to the court with an advisory jury. *Granite State Insurance Co. v. Smart Modular Technologies, Inc.*, 76 F.3d 1023, 1030-31 (9th Cir. 1996); *Morris v. Prefabrication Engineering Co.*, 160 F.2d 779 (5th Cir. 1947); *see also* CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2523 (1995). In addition, a party must have filed a motion for judgment as a matter of law at the close of the evidence which has not been granted in order to file a post-trial motion for judgment as a matter of law. *Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1315 (5th Cir. 1995), *cert. denied*, 516 U.S. 1045 (1996). By requiring a motion before the jury has been released, the Rules seek to avoid having inadvertent omissions determine a trial and allow a party an opportunity to cure any defects in proof should the motion have merit. *Barber v. Nabors Drilling U.S.A., Inc.*, 130 F.3d 702, 710 (5th Cir. 1997); *see also Logal v. United States*, 195 F.3d 229, 231 (5th Cir.

1999) (rationale behind Rules 50a and 50b includes protecting Seventh Amendment right to trial by jury and ensuring opposing party has notice of alleged insufficiencies at stage when might still be remedied); *Guilbeau v. W.W. Henry Co.*, 85 F.3d 1149, 1160-61 (5th Cir. 1996) (Rule 50b “serves two basic purposes: to enable the trial court to re-examine the sufficiency of the evidence as a matter of law if, after the verdict, the court must address a motion for judgment as a matter of law, and to alert the opposing party to the insufficiency of his case before being submitted to the jury”). This pre-verdict motion may be renewed after the entry of judgment by serving and filing a renewed motion for judgment as a matter of law, stating the law and facts upon which the moving party is entitled to judgment. FED. R. CIV. P. 50.

2. Grounds for Motion

The renewed motion for judgment as a matter of law must, as the name implies, state reasons why the moving party is entitled to a judgment in its favor under the law and facts. *See Armstrong v. City of Dallas*, 997 F.2d 62, 66 (5th Cir. 1993) (motion for judgment poses same legal inquiry as summary judgment: whether evidence is so compelling that a particular party must prevail as a matter of law). As indicated in subdivision (a) of Rule 50, one of the primary grounds for a motion for judgment is that there is no legally sufficient evidentiary basis for a reasonable jury to find for non-movant on a particular issue. *Harrington v. Harris*, 118 F.3d 359, 367 (5th Cir.), *cert. denied*, 522 U.S. 1016 (1997); *Omnitech International, Inc. v. Clorox Co.*, 11 F.3d 1316, 1322 (5th Cir.), *cert. denied*, 513 U.S. 815 (1994). As the comments to the 1991 amendments to Rule 50 make clear, the motion must point out specifically why there is insufficient evidence to present the case to the jury:

The second sentence of paragraph (a)(2) does impose a requirement that the moving party articulate the basis on which a judgment as a matter of law might be rendered. The articulation is necessary to achieve the purpose of the requirement that the motion be made before the case is submitted to the jury, so that the responding party may seek to correct any overlooked deficiencies in the proof.

FED. R. CIV. P. 50, advisory committee notes, 1991 Amendment. A plaintiff may also move for judgment as a matter of law and argue that it conclusively proved the elements of its claim. *United States v. Flintco, Inc.*, 143 F.3d 955, 967-68 (5th Cir. 1998).

Other “error of law” reasons why a party is entitled to judgment as a matter of law, such as statute of limitations or res judicata, also serve as grounds for a renewed motion for judgment. *Buford v. Howe*, 10 F.3d 1184, 1187 (5th Cir. 1994) (statute of limitations). However, a post-trial renewed motion for judgment can only be granted on grounds that were also included in the pre-verdict motion for judgment urged at the close of the evidence; any grounds other than those stated in the JML are waived. *See, e.g., Giles v. General Electric Co.*, 245 F.3d 474, 486-87 (5th Cir. 2001) (disparity between GE’s JML and its post-judgment motion did not meet purposes of Rule 50(b); therefore, review for plain error); *Morante v. American General Financial Center*, 157 F.3d 1006, 1010 (5th Cir. 1998); *Bay Colony, Ltd. v. Trendmaker, Inc.*, 121 F.3d 998, 1003 (5th Cir. 1997); *Purcell v. Seguin State Bank & Trust Co.*, 999 F.2d 950, 956-57 (5th Cir. 1993); *see also Taylor Publishing Co. v. Jostens, Inc.*, 216 F.3d 465, 474 (5th Cir. 2000) (court rejects argument of waiver, holding that Appellant’s grounds in initial JML were “sufficiently similar to its post-judgment JML motion to preserve them” because they referred to the same evidence and same legal claims). An appeal based on a ground other than those stated in the JML will be reviewed under the harsh “plain error” standard of review, limited to “whether there was any evidence to support the jury’s verdict, irrespective of its sufficiency” or whether such plain error resulted in a manifest miscarriage of justice. *Giles*, 245 F.3d at 486; *see also Flowers v. Southern Regional Physician Services, Inc.*, 247 F.3d 229, 238 (5th Cir. 2001) (on plain error review, question is not whether there was substantial evidence but rather whether there was *any* evidence to support the jury’s verdict).

3. Standard for Granting Motion

The standard for granting a renewed motion for judgment is the same as that for the pre-verdict motion for judgment as a matter of law -- whether the evidence is sufficient to create an issue of fact. *Lubbock Feed Lots, Inc. v. Iowa Beef Processors*, 630 F.2d 250, 269 (5th Cir. 1980). The Fifth Circuit has stated that standard as follows:

If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied.

Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969) (en banc), *overruled on other grounds*, *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997) (en banc); *see also Brown v. Bryan County*, 219 F.3d 450, 456 (5th Cir. 2000). In other words, a motion for judgment should be granted only if no reasonable juror could arrive at a contrary verdict. *See, e.g., Cousin v. Transunion Corp.*, 246 F.3d 359, 366 (5th Cir. 2001); *Seven-Up v. Coca-Cola Co.*, 86 F.3d 1379, 1387 (5th Cir. 1996); *McMillan v. MBank Fort Worth, N.A.*, 4 F.3d 362, 367 (5th Cir. 1993). Appellate review of the grant or denial of a renewed motion for judgment is *de novo*, utilizing the same standard as the trial court -- whether there is a legally sufficient evidentiary basis for a reasonable jury to find for the party on that issue. *Portis v. First National Bank of New Albany, Miss.*, 34 F.3d 325, 327 (5th Cir. 1994); *Omnitech International, Inc. v. Clorox Co.*, 11 F.3d at 1322; *RTC v. Cramer*, 6 F.3d 1102, 1109 (5th Cir. 1993); *see also In re Letterman Brothers Energy Securities Litigation*, 799 F.2d 967, 972 (5th Cir. 1986) (judge's decision to grant or deny a JML is not a matter of discretion, but rather is a conclusion of law based upon a finding that there is insufficient evidence to create a fact issue). The evidence is reviewed in the light most favorable to the non-movant with all reasonable inferences made and all credibility determinations resolved in favor of the party opposing the motion. *Brown*, 219 F.3d at 456; *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 188 F.3d 278, 285 (5th Cir. 1999).

4. Standard of Appellate Review

Appellate review of the grant or denial of a JML utilizes the same *Boeing* standard as the district court used in ruling on the motion. *Thomas v. Texas Department of Criminal Justice*, 220 F.3d 389, 392 (5th Cir. 2000). However, the U.S. Supreme Court's opinion in *Weisgram v. Marley Co.*, 528 U.S. 440 (2000), changed the way federal appellate courts review Rule 50(b) motions on appeal. The Fifth Circuit, prior to the *Weisgram* decision, held that when reviewing a Rule 50(b) motion, the court had to look at all the evidence admitted at trial, including evidence that was admitted in error before reversing on the basis of a JML denied by the trial court. *See Sumitomo Bank v. Product Promotions, Inc.*, 717 F.2d 215, 218 (5th Cir. 1983). *Weisgram* held that federal appellate courts have the power first to exclude inadmissible evidence and then examine the record to see if the verdict can be supported based only on the remaining admissible evidence. 528 U.S. at 456. If the court concludes that the remaining evidence is insufficient to support the verdict, it may do one of three things: (1) enter judgment as a matter of law, reversing the verdict; (2) remand the case for a new trial; or (3) remand the case to the district court to allow it to decide which remedy is appropriate. *Id.* at 456-57. *See Wyvill v. United Companies Life Ins. Co.*, 212 F.3d 296, 306 (5th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001). The *Weisgram* opinion is particularly significant in cases challenging the admissibility of expert testimony under *Daubert*.

If no JML is urged at the close of the evidence, the standard of review is “plain error.” *See also Gaia Technologies, Inc. v. Recycled Products Corp.*, 175 F.3d 365 (5th Cir. 1999) (standard of review changes from *de novo* to “plain error” if appellant fails to contest sufficiency of the evidence through timely Rule 50 motions).

5. Timeline for Filing Renewed Motion

As provided in Rule 50(b), the renewed motion must be filed no later than 10 days after the entry of judgment. “Entry of judgment” occurs when the judgment is set forth on a separate document as provided in Rule 58 and entered by the clerk on the civil docket as provided in Rule 79(a). *Ellison v. Conoco, Inc.*, 950 F.2d 1196, 1200 (5th Cir. 1992); *see also Tijerina v. Plentl*, 984 F.2d 148 (5th Cir. 1993) (“entry” of judgment distinguished from signing or filing judgment). Under Rule 6(a), computation of the 10 days does not include the day of the entry of the judgment nor intermediate Saturdays, Sundays, or legal holidays enumerated in the rule. If the last day so computed falls on a Saturday, Sunday, or legal holiday or when weather or conditions have made the district clerk’s office inaccessible, the motion is due on the next day which is not one of these described days. *See U.S. Leather, Inc. v. H&W Partnership*, 60 F.3d 222, 225-26 (5th Cir. 1995) (motion deemed timely filed because severe ice storm rendered court inaccessible). Rule 6(b) specifically forbids a court from enlarging the time for filing a Rule 50(b) motion; nor may either the parties or the district court waive the deadline for filing because it is jurisdictional. *Id.* at 225.

6. Potential Traps to Avoid

a. Reurge motion for judgment at close of evidence

If your motion for judgment is urged when plaintiff rests, be sure to reurge it at the close of the evidence. Rule 50(b) predicates a renewed motion on a “close of the evidence” motion for judgment. Therefore, if a party fails to reurge his motion for judgment at the close of the evidence, he may face the serious consequences of having: (1) waived the right to complain on appeal of sufficiency of the evidence; (2) waived the right to file a post-verdict motion for judgment; (3) waived the right to rendition of judgment and instead is limited to a new trial; and (4) limited the appellate standard of review to the harsher “plain error” standard.⁶ *Delano-Pyle v. Victoria County, Tex.*, 302 F.3d 567, 572 (5th Cir. 2002), *cert. denied*, 540 U.S. 810 (2003) (a party that fails to renew his motion for judgment as a matter of law at the conclusion of all the evidence waives its right to challenge the sufficiency of the evidence on appeal); *United States v. Flintco, Inc.*, 143 F.3d 955, 961-64 (5th Cir. 1998) (because counsel made no Rule 50(a) motion, purposes of rule not met and non-compliance cannot be excused); *Purcell v. Seguin State Bank & Trust Co.*, 999 F.2d 950, 956 (5th Cir. 1993) (holding that motion for judgment originally argued when plaintiff rested and not reurged at the close of the evidence did not preserve right to file post-trial renewed motion for judgment); *Allied Bank-West, N.A. v. Stein*, 996 F.2d 111, 115 (5th Cir. 1993) (failure to request judgment as a matter of law at the close of all evidence waives judgment as a matter of law after the jury verdict); *McCann v. Texas City Refining, Inc.*, 984 F.2d 667, 673 (5th Cir. 1993) (failure to renew motion for judgment on sufficiency of plaintiff’s evidence at close of evidence results in issue being raised for first time on appeal and thus subject to review under “plain error” standard); *Bunch v. Walter*, 673 F.2d 127, 130 n.4 (5th Cir. 1982) (absence of a motion challenging the evidence prior to submission to the jury precludes appellate court from evaluating and weighing the sufficiency of the evidence).

⁶ Also note that failure to file written objections within 10 days after being served with a copy of a magistrate judge’s proposed findings of fact, conclusions of law, and recommendation under FRCP 72 will “bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court.” *Douglass v. United Services Automobile Assn.*, 79 F.3d 1415, 1428-29 (5th Cir.1996)(en banc).

However, the Fifth Circuit has allowed technical non-compliance with Rule 50(b) when it is *de minimis* such that the purposes of the rule have been satisfied. *Taylor Publishing Co. v. Jostens, Inc.*, 216 F.3d at 471-74; *Alcatel USA, Inc. v. DGI Technologies, Inc.*, 166 F.3d 772, 780-81 (5th Cir. 1999); *Scottish Heritable Trust, PLC and SHT Holdings v. Peat Marwick Main & Co.*, 81 F.3d 606, 610-11 (5th Cir.), *cert. denied*, 519 U.S. 869 (1996); *Polanco v. City of Austin*, 78 F.3d 968, 973-75 (5th Cir. 1996); *MacArthur v. University of Texas Health Center*, 45 F.3d 890, 896-97 (5th Cir. 1995).

In *Alcatel*, the Fifth Circuit listed circumstances that support a finding of “de minimus,” including: (1) the trial court’s having reserved a ruling on an earlier JML; (2) defendant’s calling no more than two witnesses before closing; (3) lapse of only a small amount of time between the JML and the conclusion of all evidence; (4) plaintiff’s introducing no rebuttal evidence. *Alcatel USA, Inc. v. DGI Technologies, Inc.*, 166 F.3d at 781.

The Fifth Circuit will thus excuse failing to reurge the motion for judgment at the close of all evidence if: (1) the defendant has made a motion for judgment at the close of plaintiff’s case and the district court either refused to rule or took it under advisement; and (2) the motion sufficiently alerted the court and the opposing party to the sufficiency issue. Compare *Polanco*, 78 F.3d at 975 (motion at close of plaintiff’s evidence taken under advisement) with *McCann*, 984 F.2d 673 (judge clearly denied motion at close of plaintiff’s case). Technical precision in stating JML grounds is not required, provided that the court and opposing party are fairly apprised of the claims. See, e.g., *Battle ex rel. Battle v. Memorial Hospital at Gulfport*, 228 F.3d 544, 550 n.1 (5th Cir. 2000) (oral motion sufficient); *Snyder v. Trepagnier*, 142 F.3d 791, 795 n.4 (5th Cir. 1998) (raising specific objections and moving for judgment on the pleadings was sufficient for JML); *Guilbeau*, 85 F.3d at 1161 (while JML could (and should) have been more specific, plaintiffs were not prejudiced or sandbagged by defendant’s failure to articulate grounds with more precision).

In a recent case where the circumstances did not fit within the *de minimus* exception to renewing a motion for judgment at the close of the evidence, the Fifth Circuit held that a request by counsel to the district court to reconsider the legal issues after the verdict served the purposes of Rule 50(b) and adequately informed the plaintiffs and the court that the defendant was raising immunity issues after the verdict. *Tamez v. City of San Marcos*, 118 F.3d 1085, 1090-91 (5th Cir. 1997). The court found that given counsel’s discussion of the legal issues with the judge, the judge’s agreement to revisit those legal issues after the verdict, and plaintiff’s lack of objection, the defendant’s failure to explicitly move for judgment as a matter of law at the close of all the evidence was a “technical, formalistic defect,” not a substantive one. *Id.* at 1090. The Fifth Circuit has also allowed a pleading styled “motion for new trial” but which included an argument reurging its motion for judgment as a matter of law to serve as a Rule 50(b) motion. *Satcher v. Honda Motor Co.*, 52 F.3d at 1315 (where appellant moved for judgment as a matter of law at the close of the plaintiff’s case and at the close of all the evidence, court treated what the party had denominated a “new trial motion” as one for judgment as a matter of law); *but see Whitehead v. Food Max of Mississippi, Inc.*, 163 F.3d 265, 271 (5th Cir. 1998) (distinguishing *Satcher*, court noted party had not merely failed to style its motion correctly; instead, it argued only for a new trial and totally failed to request judgment as a matter of law).

In another recent case allowing an exception to the Rule 50 requirement of a JML at the close of the evidence, the Fifth Circuit, exercising what it termed “a liberal spirit,” allowed a JML made after the jury had been charged and had begun deliberations to preserve error. *Serna v. City of San Antonio*, 244 F.3d 479, 481 (5th Cir. 2001). Reasoning that the facts were analogous to *Quinn v. Southwest Wood Products, Inc.*, 597 F.2d 1018, 1026 (5th Cir. 1979), the court held that although the motion was untimely, “there was nothing in the record to suggest that the moving party intended to gamble on the verdict” because it was

still possible to recall the jury and put on more evidence. *Serna*, 244 F.3d at 482. In addition, plaintiff had not argued that he could have offered more evidence had the motion been timely urged. More importantly to the court, what made this situation “unique” was that the district court had accepted the motion, overruled an untimely objection, and ruled on its merits. Noting that it would be a different case had the trial court ruled the motion untimely, the Fifth Circuit held that the motion had preserved the City’s objections to the sufficiency of the evidence. *Id.* at 482.

b. Raise failure to file Rule 50(a) motion at trial court or waived on appeal

The Fifth Circuit in *Thompson & Wallace of Memphis, Inc. v. Falconwood Corp.*, 100 F.3d 429, 435 (5th Cir. 1996), further relaxed this once harsh rule by joining four sister circuits⁷ and holding that a party cannot raise the waiver argument of no pre-verdict Rule 50(a) motion for the first time on appeal. Thus, a party responding to a Rule 50(b) motion must now oppose the motion on the grounds of waiver or forfeit that argument on appeal. *See also Arsement v. Spinnaker Exploration Co., LLC*, 400 F.3d 238, 247 (5th Cir. 2005) (failure to raise forfeiture claim in opposition to Rule 50(b) motion “precludes raising the forfeiture claim on appeal”); *Vogler v. Blackmore*, 352 F.3d 150, 154, n. 3 (5th Cir. 2003) (where plaintiff did not object to Rule 50(b) motion as failing to follow a Rule 50(a) motion, plaintiff precluded from arguing waiver on appeal); *Deffenbaugh-Williams*, 188 F.3d at 286 n.5 (new grounds may be considered when nonmovant has failed to object at trial court level). However, if the ground was never raised at any time prior to the verdict, then the appellee’s waiver claim may not be barred on appeal by virtue of a failure to object to the lack of a Rule 50(a) motion. *Scribner v. Dillard*, 141 Fed. Appx. 240, 243 (5th Cir. 2005).

Practice Tip: If you find yourself in a circumstance where your Rule 50(a) motion was not renewed at the close of all evidence, try preserving your complaints in objections to the jury charge. There are instances in which the Fifth Circuit has held that objections to the jury charge on the grounds of insufficiency of the evidence will satisfy the Rule 50(a) requisites. *See C.P. Interests, Inc. v. California Pools, Inc.*, 238 F.3d 690, 693 (5th Cir. 2001) (“because California Pools addressed the same business disparagement issue in its written objection to the district court’s proposed jury instructions, we find that the purposes of the Rule 50(b) requirement are met.”); *Streber v. Hunter*, 221 F.3d 701, 721 (5th Cir. 2000) (summary judgment motion and objections to jury charge on same grounds meet purposes of Rule 50(b)); *Bay Colony, Ltd. v. Trendmaker, Inc.*, 121 F.3d at 1003-04 (“objections to the jury charge were a sufficient approximation of its motion for directed verdict to support its later motion for judgment as a matter of law following the jury’s verdict”); *Greenwood v. Societe Francaise De*, 111 F.3d 1239, 1245 (5th Cir.) (same), *cert. denied*, 522 U.S. 995 (1997); *Scottish Heritable Trust*, 81 F.3d at 610-11 (objection to jury charge adequately addressed sufficiency of evidence issues it seeks to appeal to satisfy the rule’s purposes); *see also United States v. Flintco, Inc.*, 143 F.3d at 961, 962 (noting lack of objections to charge such that JML waived where not renewed at close of all evidence); *Hinojosa v. City of Terrell*, 834 F.2d 1223, 1228 (5th Cir. 1988)(same). However, if you intend to use the charge objections to argue evidentiary insufficiency on appeal, the objections must be to the *insufficiency of the evidence to support submission* to the jury in order to approximate a motion for judgment as a matter of law.

Please note that the Supreme Court of the United States recently granted a petition for writ of certiorari in *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 125 S.Ct. 1396 (2005), *cert. denied*, 125 S.Ct. 1399 (2005), limited to the following question: whether, and to what extent, a court of appeals may review the sufficiency of evidence supporting a civil jury verdict where the party requesting review made a motion for judgment as a matter of law under Rule 50(a) of the Federal Rules of Civil Procedure before submission of

⁷ At the time *Thompson* was decided, there were four other circuits so holding. Now there are eight. *See Garcia v. Aerotherm Corp.*, 202 F.3d 281 (10th Cir.1999); *Williams v. Runyon*, 130 F.3d 568, 572 (3d Cir.1997) (listing cases from the six circuits).

the case to the jury, but neither renewed that motion under Rule 50(b) after the jury's verdict, nor moved for a new trial under Rule 59. This case will be one to watch.

B. Motion for New Trial

As with any motion, the grounds must be stated with particularity. FED. R. CIV. P. 7(b). Moreover, Rule 59(a) motions cannot be used to raise new arguments. Any grounds for relief sought by a party in a new trial motion must have been raised in the pleadings, pretrial orders, or trial by consent in order to put the opposing party and the court on notice of that issue. *Mongrue v. Monsanto Co.*, 249 F.3d 422, 427 (5th Cir. 2001).

Although Rule 59(a) does not enumerate the grounds for a new trial, some common grounds for new trial when trial was to a jury are listed below:

- a. **verdict against the great weight and preponderance of the evidence** -- *Carter v. Fenner*, 136 F.3d 1000, 1009-10 (5th Cir.), *cert. denied*, 525 U.S. 1041 (1998); *Dawson v. Wal-Mart Stores, Inc.*, 978 F.2d 205, 208 (5th Cir. 1992); *Eyre v. McDonough Power Equipment, Inc.*, 755 F.2d 416, 420-21 (5th Cir. 1985).
- b. **erroneous evidentiary rulings** -- *Genmoora Corp. v. Moore Business Forms, Inc.*, 939 F.2d 1149, 1156 (5th Cir. 1991); *Johnson v. Michelin Tire Corp.*, 812 F.2d 200, 210 n.8 (5th Cir. 1987).
- c. **errors in the jury charge** -- *Banc One Capital Partners Corp. v. Kneipper*, 67 F.3d 1187 (5th Cir. 1995); *Bender v. Brumley*, 1 F.3d 271, 276 (5th Cir. 1993); *Crist v. Dickson Welding, Inc.*, 957 F.2d 1281, 1286-88 (5th Cir.), *cert. denied*, 506 U.S. 864 (1992).
- d. **damages excessive or inadequate** -- *Polanco*, 78 F.3d at 981 (grant new trial if damages award results from passion or prejudice; remittitur if damages merely excessive) ; *Brunnemann v. Terra International, Inc.*, 975 F.2d 175, 177-78 (5th Cir. 1992); *Evans v. H.C. Watkins Memorial Hospital*, 778 F.2d 1021, 1022 (5th Cir. 1985).
- e. **inconsistent jury findings** -- *Ellis v. Weasler Engineering, Inc.*, 258 F.3d 326, 343 (5th Cir. 2001) (district court's denial of new trial affirmed because apparent inconsistencies in jury answers could be reconciled, as required by the Seventh Amendment); *Snyder v. Trepagnier*, 142 F.3d 791, 800 (5th Cir. 1998) (only if there is no view of the case that will make the jury's answers consistent may the verdict be set aside).
- f. **improper or inflammatory jury argument by counsel** -- *Lloyd v. Georgia Gulf Corp.*, 961 F.2d 1190, 1196 (5th Cir. 1992); *Brownlee v. United Fidelity Life Insurance Co.*, 117 F.R.D. 383 (S.D. Miss. 1987) (multiple improper and inflammatory statements in closing argument concerning interest of insurance industry warranted new trial), *aff'd*, 854 F.2d 1319 (5th Cir. 1988).
- g. **conduct by counsel or the court tainted the verdict** -- *Advanced Display Systems, Inc. v. Kent State University*, 212 F.3d 1272, 1288-89 (5th Cir. 2000) (flagrant suppression and concealment of evidence during discovery amounted to misconduct warranting a new trial); *Bufford v. Rowan Companies, Inc.*, 994 F.2d 155, 157-59 (5th Cir. 1993) (trial judge's threat to jail plaintiff's counsel and judge's failure to prevent plaintiff's counsel from countering defendant's aspersions warranted new trial); *O'Rear v. Fruehauf Corp.*, 554 F.2d

1304, 1308 (5th Cir. 1977) (defendant's repeated references to parallel state court action in disobedience of order forbidding such prevented fair trial).

- h. jury misconduct** -- *Yarbrough v. Sturm, Ruger & Co.*, 964 F.2d 376, 378-80 (5th Cir. 1992); *Box v. Ferrellgas, Inc.*, 942 F.2d 942, 944-45 (5th Cir. 1991); *Wilkerson v. Amco Corp.*, 703 F.2d 184, 185 & n.1 (5th Cir. 1983) (require some showing of jury misconduct before allowing parties to interview jurors post judgment).
- i. newly discovered evidence** -- *Advanced Display Systems*, 212 F.3d at 1284-85 (three-prong analysis of whether evidence would have changed outcome of trial, whether could have been discovered earlier through due diligence, and whether evidence is merely cumulative or impeaching); *Farm Credit Bank of Texas v. Guidry*, 110 F.3d 1147, 1154 (5th Cir. 1997), *overruled on other grounds*, 283 F.3d 686, 696 (5th Cir. 2002); *Diaz v. Methodist Hospital*, 46 F.3d 492, 495 (5th Cir. 1995).
- j. unfair surprise** -- *Genmoora Corp. v. Moore Business Forms, Inc.*, 939 F.2d at 1156.
- k. any error of law that is prejudicial** -- *Pagan v. Shoney's, Inc.*, 931 F.2d 334, 340 (5th Cir. 1991).
- l. to prevent an injustice** -- *United States v. Flores*, 981 F.2d 231, 237 (5th Cir. 1993).

The grounds for granting a new trial in a bench trial under Rule 59(a) include manifest error of law, manifest error of fact, and newly discovered evidence. *Brown v. Wright*, 588 F.2d 708, 710 (9th Cir. 1978); *see also Trowel Trades Employees Health & Welfare Trust Fund of Dade County v. Edward L. Nezelek, Inc.*, 645 F.2d 322, 325 n.3 (5th Cir. 1981) (citing *Brown*).

It should also be noted that under Rule 59(d), the trial court may on its own initiative within 10 days after entry of judgment grant a new trial for any reason it might have granted a new trial on a motion by a party. The court may also grant a motion for new trial for a reason not stated in a timely served motion so long as it gives the parties notice and an opportunity to be heard. In both instances, the court must specify its grounds in the order granting the new trial.

Keep in mind, however, that Rule 61 directs courts to “disregard any error or defect in proceeding which does not affect the substantial rights of the parties.” Thus, only errors which have caused substantial harm justify a new trial. 11 CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2805, at 41 (1973).

1. Standard for Granting Motion

The standard for granting a new trial is less onerous than that for granting a motion for judgment as a matter of law -- *i.e.*, a judge may set aside a verdict and grant a new trial even though there is substantial evidence to support the verdict. *Peterson v. Wilson*, 141 F.3d 573, 577 (5th Cir. 1998); *United States v. Bucon Constr. Co.*, 430 F.2d 420, 423 (5th Cir. 1970). In deciding whether to grant a new trial, the district court exercises its discretion in weighing the evidence to determine whether it points strongly and overwhelmingly in favor of one party such that the jury's verdict is against the great weight of the evidence. *Carter v. Fenner*, 136 F.3d at 1010 (verdict must be against the great weight of the evidence, not merely against the preponderance of the evidence); *Dawson v. Wal-Mart Stores, Inc.*, 978 F.2d at 208 (fact there is conflicting testimony is not grounds for granting a new trial); *Smith v. Transworld Drilling Co.*,

773 F.2d 610, 613 (5th Cir. 1985) (court need not view evidence in light most favorable to non-movant; however, court must respect jury's collective wisdom and not simply substitute own opinion for jury's).

2. Standard of Appellate Review

Based on the foregoing standards, a trial court's decision to grant or deny a Rule 59(a) motion will generally be reviewed for abuse of discretion. *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 258 (1989) (a trial court's ruling on a motion for new trial must be given deference and will only be reversed if the trial court abused its discretion). However, depending on the ground for new trial, certain other considerations may factor into the "abuse of discretion" review. See, e.g., *Ellis*, 258 F.3d at 344 (court must be careful in reviewing sufficiency of the evidence where the party seeking a new trial is the party with the burden of proof); *Advanced Display Systems*, 212 F.3d at 1284 (newly discovered evidence and misconduct of counsel); *Polanco*, 78 F.3d at 980-81 (insufficiency of evidence and excessiveness of damages); *Banc One Capital Partners*, 67 F.3d at 1196 n.16 (in reviewing erroneous jury charge, determine whether charge accurately stated law and whether misled, prejudiced or confused jury); *Government Financial Services One Ltd. Partnership v. Peyton Place, Inc.*, 62 F.3d 767, 774 (5th Cir. 1995); *Fontenot v. Cormier*, 56 F.3d 669, 676 (5th Cir. 1995) (order granting new trial will be reversed only when it is not supported by the reasons given and the jury's findings are supported by the evidence in the record).

3. Timeline for Filing Motion

Rule 59(b) requires that a motion for new trial shall be filed no later than 10 days after the entry of the judgment. If the motion is based upon affidavits, those affidavits must be filed with the motion. An opposing party has 10 days after service to file any opposing affidavits. The same computation of time under Rule 6(a) previously discussed applies, including the inability of the court to enlarge the 10 days as mandated by Rule 6(b). *Tarlton v. Exxon*, 688 F.2d 973, 977 (5th Cir. 1982), *cert. denied*, 463 U.S. 1206 (1983).

Practice Tip: In the event your motion for new trial is not timely filed, determine whether there is any part of the motion that could properly be viewed as a Rule 60(b) motion, which has a longer time to file. See *Halicki v. Louisiana Casino Cruises, Inc.*, 151 F.3d 465, 470 (5th Cir. 1998), *cert. denied*, 526 U.S. 1005 (1999).

4. Potential Traps to Avoid

- a. **File motion for new trial after entry of judgment.** Avoid filing a motion for new trial prior to entry of the judgment because at least one federal appellate court has viewed the subsequent entry of judgment as an implied overruling of the motion for new trial, thus starting one's 30-day timetable for filing a notice of appeal running. *Dunn v. Truck World, Inc.*, 929 F.2d 311, 313 (7th Cir. 1991); *but see Havird Oil Co. v. Marathon Oil Co.*, 149 F.3d 283, 289 (4th Cir. 1998) (rejecting rationale of *Dunn*).
- b. **Obtain ruling on alternative motion for new trial even if motion for judgment granted.** Rule 50(b) allows a litigant to join a motion for new trial under Rule 59 with his renewed motion for judgment as a matter of law. However, if such an alternative motion for new trial is filed and the renewed motion for judgment is granted, movant must also obtain a conditional ruling on his alternative motion pursuant to Rule 50(c). Otherwise, he may risk waiving his remand remedy on appeal in the event the appellate court reverses the district court's granting of his

motion for judgment. *Johnstone v. American Oil Co.*, 7 F.3d 1217, 1223-24 (5th Cir. 1993). As the Fifth Circuit has termed it, it's a "use-it-or-lose-it" system under the rules. *Arenson v. Southern University Law Center*, 43 F.3d 194, 198 (5th Cir.), *clarified*, 53 F.3d 80 (5th Cir. 1995). In *Arenson*, movant failed to "use" their right to seek a new trial by failing to obtain a conditional ruling from the district court and failing to note it on appeal. Therefore, he "lost" his right to seek a new trial after the judgment as a matter of law was reversed by the appellate court.

Practice Tip: A motion for new trial may help you with regard to other traps. For instance, if you failed to move for judgment as a matter of law pre-verdict and are thus prevented from filing a renewed motion for judgment, a motion for new trial may be a means of preserving some error. It will not entitle an appellant to a rendition on appeal, but it is worth the attempt to avoid waiver of all grounds on appeal. See *Bueno v. City of Donna*, 714 F.2d 484, 493-94 (5th Cir. 1983). The Fifth Circuit, however, has rejected attempts to allow the motion for new trial to substitute for a JML as to sufficiency of the evidence supporting the jury's verdict. See *Illinois Central Gulf Railroad Co. v. International Paper Co.*, 889 F.2d 536, 541 (5th Cir. 1989) ("The rule in this circuit is that absent a motion for directed verdict, the sufficiency of the evidence supporting the jury's findings is not reviewable on appeal.").

C. Motion to Alter or Amend Judgment

FRCP 59(e) provides that "any motion to alter or amend the judgment shall be filed no later than 10 days after entry of the judgment." Note that prior to the 1995 amendments, Rule 59(e) motions had to be "served" within 10 days and filed with the court within a reasonable time after service. See *Harcon Barge Co. v. D & G Boat Rentals, Inc.*, 746 F.2d 278, 285 n.5, 289 (5th Cir. 1984), *reh. en banc granted on other grounds*, 760 F.2d 86 (5th Cir. 1985), *cert. denied*, 479 U.S. 930 (1986). So do not be confused by cases prior to 1995 that speak in terms of "served" rather than "filed."

Examples of common grounds for a motion to alter or amend the judgment include the following:

- a. **motion for reconsideration, rehearing or clarification** -- *In re Fellows*, 19 F.3d 245, 246 (5th Cir. 1994) (motion for reconsideration of res judicata argument); *Lavespere v. Niagra Machine & Tool Works, Inc.*, 910 F.2d 167, 174 (5th Cir. 1990) (motion to reconsider summary judgment on basis of additional evidence), *abrogated on other grounds*, *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 n.14 (5th Cir. 1994) (en banc); *but see Anderson v. Pasadena Independent School District*, 184 F.3d 439 (5th Cir. 1999) (motion to reconsider collateral issue such as monetary sanctions is not a Rule 59(e)).
- b. **motion to vacate judgment** -- *Edward H. Bohlin Co., Inc. v. Banning Co., Inc.*, 6 F.3d 350, 355 (5th Cir. 1993) (in exercising discretion to reopen case, court must strike balance between competing interests of finality of judgments and need to render just decision on basis of facts).
- c. **motion seeking leave to amend complaint** -- *Ford v. Elsbury*, 32 F.3d 931, 937 (5th Cir. 1994) (motion to reurge plaintiffs' prior motion for leave to file second amending and supplemental complaint and motion to remand because of newly discovered evidence, which was filed within ten days of judgment, could be treated as a motion to alter or amend judgment); *Bodin v. Gulf Oil Corp.*, 877 F.2d 438, 440 (5th Cir. 1989).
- d. **motion to set aside default judgment** -- *United States v. One 1988 Dodge Pickup*, 959 F.2d 37, 39 (5th Cir. 1992).

- e. **motion for prejudgment interest** -- *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 175-76 (1989); *Zapata Gulf Marine v. P.R. Maritime Shipping Authority*, 925 F.2d 812, 814 (5th Cir.), *cert. denied*, 501 U.S. 1262 (1991).
- f. **failure of court to give relief in judgment that it had found party was entitled to** -- *Hicks v. Town of Hudson*, 390 F.2d 84, 88 (10th Cir. 1967).

A Rule 59(e) motion “calls into question the correctness of a judgment.” *Templet v. HydroChem*, 367 F.3d 473, 478 (5th Cir.), *cert. denied*, 125 S. Ct. 411 (2004). It “serve[s] the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence.” *Id.* at 479. It also provides relief to a party when there has been an intervening change in the controlling law. *Schiller v. Physicians Res. Group, Inc.*, 342 F.3d 563, 567-68 (5th Cir. 2003). However, relief under Rule 59(e) is an extraordinary remedy that should be used sparingly. *Templet*, 367 F.3d at 479.

Note that requests for affirmative relief are not to be included in a motion to alter or amend. *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988) (motion for attorneys’ fees); *Buchanan v. Stanships, Inc.*, 485 U.S. 265 (1988) (application for recovery of defendants’ costs); *Samaad v. City of Dallas*, 922 F.2d 216, 217-18 (5th Cir. 1991) (motion to allocate costs). Moreover, a Rule 59(e) motion must clearly establish manifest error of law or fact or newly discovered evidence; it cannot be used to argue the case under a new legal theory or to make arguments that could or should have been made before the entry of judgment. *Simon v. United States*, 891 F.2d 1154, 1158-59 (5th Cir. 1990); *see also Weber v. Roadway Express, Inc.*, 199 F.3d 270, 275-76 (5th Cir. 2000) (rejecting party’s “newly discovered evidence” argument). Even though there is no motion for “reconsideration” under the Federal Rules of Civil Procedure, the Fifth Circuit has construed a motion denominated as such a Rule 59(e) motion so long as it is filed within ten days of the entry of judgment. *Bass v. U.S. Department of Agriculture*, 211 F.3d 959, 962 (5th Cir. 2000); *Fletcher v. Apfel*, 210 F.3d 510, 511-12 (5th Cir. 2000). However, a motion labeled a Rule 59(e) motion, which is substantively something else -- such as a collateral motion for costs under Rule 54(d) -- will be treated accordingly and may be insufficient to toll the time for filing an appeal. *Moody Nat’l Bank of Galveston v. GE Life & Annuity Assurance Co.*, 383 F.3d 249, 251-53 (5th Cir. 2004), *cert. denied*, 125 S. Ct. 918 (2005).

1. Timeline

The 10-day deadline for filing a motion to alter or amend the judgment is jurisdictional and cannot be extended either by the court or the parties. *Flores v. Proconier*, 745 F.2d 338, 339 (5th Cir. 1984), *cert. denied*, 470 U.S. 1086 (1985); *see also Vincent v. Consolidated Operating Co.*, 17 F.3d 782, 785 (5th Cir. 1994) (untimely filed Rule 59(e) motion will not toll running of 30-day clock for appeal). The computation is governed by Rule 6(a) and (b), previously discussed at section II.A.5 of this paper, and thus three days cannot be added to the 10-day period for service by mail. *Halicki v. Louisiana Casino Cruises, Inc.*, 151 F.3d 465, 467-68 (5th Cir. 1998); *Richardson v. Oldham*, 12 F.3d 1373, 1377 n.9 (5th Cir. 1994).

2. Standard for Granting Motion

While a district court has considerable discretion in granting a Rule 59(e) motion, “[t]hat discretion is not limitless.” *Lavespere*, 910 F.2d at 174. (the task of the district court in deciding a Rule 59(e) motion is to strike a balance between the competing interests of the need to bring litigation to an end and the need to render just decisions on the basis of all facts). Please note that if a notice of appeal is filed before the district court rules on a Rule 59(e) motion, the notice will be deemed ineffective and the case remanded to

the district court for an expeditious ruling on the motion. *Simmons v. Reliance Standard Life Ins. Co. of Texas*, 310 F.3d 865, 868 (5th Cir. 2002).

3. Standard of Appellate Review

Since it is within the district court's discretion whether to reopen a case under a Rule 59(e) motion, a grant or denial of such is reviewed under an abuse of discretion standard. *Bass v. U.S. Department of Agriculture*, 211 F.3d at 962; *Weber v. Roadway Express, Inc.*, 199 F.3d at 276.

4. Potential Traps to Avoid

The main trap of Rule 59(e) was resolved by the 1993 amendments to Federal Rule of Appellate Procedure 4. *Burt v. Ware*, 14 F.3d 256, 260 (5th Cir. 1994). Prior to that amendment, Rule 59(e) motions extended the time for filing a notice of appeal, but Rule 60 motions did not. However, Rule 59(e) motions could be used to correct the type errors listed in Rule 60 so there was often difficulty in deciding when to file a notice of appeal based on whether your motion would be viewed as a Rule 59(e) or Rule 60 motion. The Fifth Circuit developed a "brightline" test for such determination: if the motion is served within 10 days, seeks other than correction of a purely clerical error, and "draws into question the correctness of the judgment," it was to be treated as a Rule 59(e) motion. *Burt v. Ware*, 14 F.3d at 259-60, quoting *Harcon Barge Co. v. D & G Boat Rentals, Inc.*, 784 F.2d 665, 667, 669 (5th Cir.), *cert. denied*, 479 U.S. 930 (1986). Fortunately, the 1993 amendments to FRAP 4 have alleviated that trap, but a careful practitioner should still be aware of what type relief he is seeking and thus what type motion needs to be filed. *See Anderson v. Pasadena Independent School District*, 184 F.3d 439, 446 (5th Cir. 1999) (court refuses to construe motion as a Rule 59(e) motion because the sanctions ground raised is collateral to the merits of the case and therefore does not amount to a Rule 59(e) motion triggering FRAP 4(a)(4); appeal dismissed because no timely notice of appeal).

D. Motion for Relief from Judgment

1. Grounds for Motion

a. Rule 60(a) motions

A Rule 60(a) motion is appropriate in instances where from the record it is apparent that the court intended one thing but by clerical oversight or mistake did another. The mistake cannot be one of judgment, it must be a mistake of recitation, of the sort a clerk might commit, and purely mechanical in error. Thus a Rule 60(a) motion cannot seek to correct an error of "substantive judgment" or an error affecting the substantial rights of parties. *Compare Britt v. Whitmire*, 956 F.2d 509, 512-15 (5th Cir. 1992) (holding motion not Rule 60(a) motion because not apparent from record that district court intended to grant summary judgment on all claims but failed to do so because of typographical error) *with Dura-Wood Treating Co. v. Century Forest Industries, Inc.*, 694 F.2d 112, 114 (5th Cir. 1982) (mis-recitation in judgment of parties' stipulation on attorneys' fees was proper Rule 60(a) motion).

The mistake need not be committed by the clerk or court; Rule 60(a) can be utilized to correct mistakes by parties. *In re West Texas Marketing Corp.*, 12 F.3d 497, 504 (5th Cir. 1994) (remand for consideration of miscalculation of interest under Rule 60(a)). Practically speaking, although there is no "brightline" test, Rule 60(a) allows the court to "employ the judicial eraser to obliterate a mechanical or mathematical mistake" in order to reflect the actual intentions of the court and parties. *Id.* at 504-05 (good overview of Fifth Circuit cases construing Rule 60(a)); *see also Semtner v. Group Health Services of Oklahoma, Inc.*, 129 F.3d 1390, 1392 (10th Cir. 1997) (court's omission of specific amount of damages owed to beneficiary

was clerical error that could be corrected where amount of damages is readily ascertainable and undisputed); *Warner v. City of Bay St. Louis*, 526 F.2d 1211, 1212 (5th Cir. 1976) (motion involving attempt to alter amount of interest awarded in a judgment demonstrates difference between Rule 60(a) motion and Rule 60(b) motion), *aff'd*, 552 F.2d 583 (5th Cir. 1977). The district court may also on its own without a motion from the parties utilize Rule 60(a) to correct a procedural mistake. *Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1117 (5th Cir. 1998).

b. Rule 60(b) motions

The grounds for Rule 60(b) motions are spelled out with specificity in the Rule quoted above; and a litigant must show its entitlement under one of these particular grounds. *Edward H. Bohlin Co., Inc. v. Banning Co., Inc.*, 6 F.3d at 356; *see Williams v. Brooks*, 996 F.2d 728, 730-31 (5th Cir. 1993) (reversing district court's denial of Rule 60(b)(4) lack of jurisdiction motion). "The purpose of Rule 60(b) is to balance the principle of finality of a judgment with the interest of the court in seeing that justice is done in light of all the facts." *Hesling v. CSX Transp. Inc.*, 396 F.3d 632, 638 (5th Cir. 2005). Carelessness by counsel or ignorance of the law or the rules are insufficient bases for Rule 60(b)(1) "inadvertent mistake" relief. *Edward H. Bohlin Co., Inc. v. Banning Co., Inc.*, 6 F.3d at 356-57; *Pryor v. United States Postal Service*, 769 F.2d 281, 287-89 (5th Cir. 1985).

In order to obtain relief under Rule 60(b)(1), the movant must demonstrate that a mistake is attributable to special circumstances and not simply an erroneous legal ruling because a Rule 60(b) motion cannot be used as a substitute for the ordinary method of addressing judicial error, which is an appeal. *Travelers Insurance Co. v. Liljeberg Enterprises, Inc.*, 38 F.3d 1404, 1408 (5th Cir. 1994); *McMillan v. MBank Fort Worth, N.A.*, 4 F.3d 362, 367 (5th Cir. 1993). The Fifth Circuit has specifically rejected what it termed an "end run to effect an appeal outside the specified time limits" where a party filed a Rule 60(b) motion which was virtually identical to a previously filed post-trial motion, upon which his time for appeal had expired. The court commented that this "procedural ploy" of using the Rule 60(b) motion to try to resurrect the expired period for an appeal would not be allowed to succeed. *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199, 1203 (5th Cir. 1993).

(1) Rule 60(b) Subdivisions

Under subdivision (1), the "mistake" in question can apply to the court's own error. *Santa Fe Snyder Corp. v. Norton*, 385 F.3d 884, 887 (5th Cir. 2004). Also, "excusable neglect" has been defined by the U.S. Supreme Court as being equitable in nature and thus needing to take into account all relevant circumstances. *Pioneer Investment Services Co. v. Brunswick Associates*, 507 U.S. 380, 395 (1993). However, the Fifth Circuit has accorded district courts broad discretion in determining excusable neglect in that such a finding is reviewed under a clearly erroneous standard of review. *American Totalisator Co. v. Fair Grounds Corp.*, 3 F.3d 810, 815 (5th Cir. 1993).

In subdivision (2), newly discovered evidence must be evidence that was not discoverable in time to move for a new trial under Rule 59(b) and material and controlling, such that a different verdict would have been reached had it been introduced at trial. *New Hampshire Insurance Co. v. Martech USA, Inc.*, 993 F.2d 1195, 1200-01 (5th Cir. 1993); *Longden v. Sunderman*, 979 F.2d 1095, 1102-03 (5th Cir. 1992).

Under subdivision (3), a party must establish by clear and convincing evidence that the adverse party engaged in fraud which prevented the moving party from fully and fairly presenting his case. *Washington v. Patlis*, 916 F.2d 1036, 1039 (5th Cir. 1990); *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338-39 (5th Cir. 1978). However, unlike Rule 60(b)(2), Rule 60(b)(3) does not require that the information withheld be such that it may alter the outcome of the case. *Hesling*, 396 F.3d at 641. That is because Rule 60(b)(3) "is

aimed at judgments which were unfairly obtained, not at those which are factually incorrect.” *Id.* As such, the rule is remedial and is to be liberally construed. *Id.*

Under subdivision (4), a judgment is void if the court lacked jurisdiction or acted in a manner inconsistent with due process of law. *New York Life Insurance Co. v. Brown*, 84 F.3d 137, 143 (5th Cir. 1996); *United States v. 119.67 Acres of Land*, 663 F.2d 1328, 1331 (5th Cir. 1981); *see also Carter v. Fenner*, 136 F.3d 1000, 1005 (5th Cir.) (“[a] judgment is void for purposes of Rule 60(b)(4) if the court that rendered it entered an order outside its legal powers”).

The grounds for relief under subdivision (5) are specifically set forth in the Rule. *See Michigan Surety Co. v. Service Machinery Corp.*, 277 F.2d 531, 533 (5th Cir. 1960).

Subdivision (6) is a “catch-all provision to cover unforeseen contingencies -- a means to accomplish justice under exceptional circumstances.” *Edward H. Bohlin Co., Inc. v. Banning Co., Inc.*, 6 F.3d at 357 (must show initial judgment to have been manifestly unjust). It has been characterized as “a grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding clauses.” *Hesling*, 396 F.3d at 642. However, relief is granted only if extraordinary circumstances are present. *Hesling*, 396 F.3d at 642; *see also Cooper v. Noble*, 33 F.3d 540, 543 (5th Cir. 1994) (party seeking relief from final judgment in institutional reform litigation may meet burden by establishing significant change in circumstances warrants revision of consent decree); *American Totalisator v. Fair Grounds Corp.*, 3 F.3d at 815-16 (judgment not manifestly unjust; therefore, not exceptional circumstances as required by Rule 60(b)(6)). Moreover, Rule 60(b)(6) does not exist to relieve a party from the clear, calculated, and deliberate choices he has made. *In re Pettle*, 410 F.3d 189, 192 (5th Cir. 2005). In fact, overall, Rule 60(b) relief is granted only in “unique circumstances.” *Edward H. Bohlin Co., Inc. v. Banning Co., Inc.*, 6 F.3d at 357. A subsequent change in the law after entry of judgment is not a “unique circumstance” warranting relief under Rule 60(b). *Batts v. Tow Motor Forklift Co.*, 66 F.3d 743, 747-48 (5th Cir. 1995), *cert. denied*, 517 U.S. 1221 (1996).

The Fifth Circuit has articulated several factors that a district court should consider when deciding a Rule 60(b) motion:

- (1) That final judgments should not lightly be disturbed;
- (2) that the Rule 60(b) motion is not to be used as a substitute for appeal;
- (3) that the rule should be liberally construed in order to do substantial justice;
- (4) whether the motion was made within a reasonable time;
- (5) whether -- if the judgment was a default or a dismissal in which there was no consideration of the merits -- the interest in deciding cases on the merits outweighs, in the particular case, the interest in the finality of judgments, and there is merit in the movant’s claim or defense;
- (6) whether there are any intervening equities that would make it inequitable to grant relief; and
- (7) any other factors relevant to the justice of the judgment under attack.

Edward H. Bohlin Co., Inc. v. Banning Co., Inc., 6 F.3d at 356.

(2) Practical Uses of Rule 60(b) Motion

(a) Attack default judgment

A Rule 60(b) motion may be the most useful in an attack on a default judgment. *See Halicki v. Louisiana Casino Cruises, Inc.*, 151 F.3d at 471 (“caselaw allows for more leniency in opening up default judgments”); *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981) (where denial of relief under

Rule 60(b) “precludes examination of the full merits of the cause, even a slight abuse may justify reversal”)

(b) Vacate unfavorable opinion after settlement

Under *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 29 (1994), an appellate court’s authority to vacate a lower court’s opinion as part of the parties’ settlement was severely restricted. Since the vacation of a particularly onerous opinion is often the goal of a settling party, Rule 60(b) may provide the avenue for accomplishing that goal since it is now rare that an appellate court will do so -- as is common in state appellate courts. But it is a narrow avenue and one that must be undertaken with great attention to the procedure. See 11 C. Wright, A. Miller & M. Kane, *FEDERAL PRACTICE AND PROCEDURE* § 2873 at 432 & n.6 (1995) (crediting *Ferrell v. Trailmobile, Inc.*, 223 F.2d 697 (5th Cir. 1955) with developing this procedure); Scott B. Smith, *Settling Federal Cases on Appeal: A Trap for the Unwary*, *CERTWORTHY* 8 (Summer 2000) (describing in detail the procedure to follow, citing supporting authorities).

The general procedure is that counsel for appellant (or all parties if they agree to vacatur) should file a Rule 60(b) motion with the district court, requesting that the court vacate the judgment on appeal to further the tentative settlement. Note that you cannot finalize the settlement while on appeal, or that invokes *U.S. Bancorp*, moots the appeal, and no vacatur is possible. There is no need to obtain leave of the court of appeals to file the Rule 60(b) motion. *Stone v. I.N.S.*, 514 U.S. 386, 401 (1995); *Lairsey v. Advance Abrasives Co.*, 542 F.2d 928, 932 n.3 (5th Cir. 1976). The district court is not bound by *U.S. Bancorp* with regard to vacatur, which applies only to appellate courts. See *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 115-16 (4th Cir. 2000). Then counsel should file a stay in the court of appeals to notify the court of the pending Rule 60(b) motion and ask that no action be taken on the appeal while the motion is pending. See *Lairsey v. Advance Abrasives*, 542 F.2d at 932. If the district court grants the Rule 60(b) motion, counsel then should file a motion with the court of appeals asking for a limited remand to obtain the vacatur. See generally 12 MOORE’S *FEDERAL PRACTICE* § 60.67[2][b] (3d ed. 2000) (collecting cases from every federal circuit).

2. Timelines

There is no time bar in Rule 60(a), but there is a “reasonable time” requirement in Rule 60(b). See *Travelers Insurance Co. v. Liljeberg Enterprises, Inc.*, 38 F.3d at 1410-11 (motions for relief from judgment, based on claim that judge should be disqualified were not timely where facts which formed primary basis for the motions were discovered in July 1993, but the motions were not made until October 1993 in two of three cases and where the movant delayed in the third case until after judgment was entered to make its motion). There is a specific time limit of one year after entry of judgment for motions brought on the grounds of Rule 60(b)(1), (2), and (3), which include mistake and inadvertence, newly discovered evidence, or fraud. FED. R. CIV. P. 60(a) & (b); *In re West Texas Marketing Corp.*, 12 F.3d at 503. But there is no time limit on an attack on a judgment as void under Rule 60(b)(4). *New York Life Insurance Co. v. Brown*, 84 F.3d at 142-43; *Briley v. Hidalgo*, 981 F.2d 246, 249 (5th Cir. 1993). However, if a notice of appeal has been filed, the district court lacks jurisdiction and therefore may not act on a Rule 60(b) motion without permission from the court of appeals. *Echols v. Parker*, 909 F.2d 795, 801 (5th Cir. 1990); see *Lairsey v. Advance Abrasives Co.*, 542 F.2d 928, 932 (5th Cir. 1976) (steps to follow in this instance).

E. Motion for Judgment on Partial Findings -- Rule 52(c)

1. Rule 52(c) is in Effect a JML for Trials to the Bench

As mentioned in the discussion of Rule 50, there is no motion for judgment as a matter of law filed in trials to the bench. Instead, if a party desires, he may move for judgment after the other party has been fully heard on an issue. Rule 52(c) authorizes the district court during a trial to the bench to enter judgment “at any time that it can appropriately make a dispositive finding of fact on the evidence.” FED. R. CIV. P. 52(c), advisory committee notes. In granting a Rule 52(c) motion, the district court is not as limited as it is in deciding a JML. The court is not required to draw any special inferences in the nonmovant’s favor; rather, the court must weigh the evidence, resolve any conflicts, and decide where the preponderance lies. 9A C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 2573.1 (1995); *see also Rego v. ARC Water Treatment Co.*, 181 F.3d 396, 400 (3d Cir. 1999) (district court can resolve disputed fact issues under Rule 52(c) motion).

Unlike state court, there is no requirement to request findings of fact and conclusions of law in order to preserve error for appellate review. The rule places that burden on the district court. *See Triad Electric & Controls, Inc. v. Power Systems Engineering, Inc.*, 117 F.3d 180, 187 (5th Cir. 1997) (while critical of a district court’s verbatim adoption of winning party’s findings and conclusions, court will not alter standard of review). However, a party may make a motion for the court to amend its findings under Rule 52(b), discussed below, but the failure to make such a motion does not affect the standard of review on appeal.

2. Standard of Review

The standard of review for a district court’s findings of fact is clear error as to whether the evidence supports the district court’s findings; while the court’s conclusions of law are judged under a *de novo* standard of review. *See Anderson v. City of Besemer City, North Carolina*, 470 U.S. 564 (1985) (conclusions of law); *United States v. Zapata-Ibarra*, 212 F.3d 877, 880 (5th Cir.) (findings of fact), *cert. denied*, 531 U.S. 972 (2000); *Colonial Penn Insurance v. Market Planners Insurance Agency, Inc.*, 157 F.3d 1032, 1036 (5th Cir. 1998) (findings of fact and conclusions of law); *Southern Travel Club, Inc. v. Carnival Air Lines, Inc.*, 986 F.2d 125, 128-29 (5th Cir. 1993) (will not set aside district court’s finding unless based upon entire record, the court is “left with the definite and firm conviction that a mistake has been committed.”).

F. Motion to Amend Findings by the Court -- Rule 52(b)

1. Rule 52(b) Governs a Motion to Amend Findings by the Court

Rule 52(b), in pertinent part, provides as follows:

(b) Amendment. On a party’s motion filed no later than 10 days after entry of judgment, the court may amend its findings -- or make additional findings -- and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59. When findings of fact are made in actions tried without a jury, the sufficiency of the evidence supporting the findings may be later questioned whether or not in the district court the party raising the question objected to the findings, moved to amend them, or moved for partial findings.

2. Grounds for Motion to Amend

The purpose of Rule 52(b) is to correct manifest errors of law or fact or, in limited situations, to present newly discovered evidence. However, Rule 52(b) cannot be used to relitigate old issues or advance new theories of law. *Fontenot v. Mesa Petroleum Co.*, 791 F.2d 1207, 1219 (5th Cir. 1986). Wright and Miller would add to that purpose a need to enable the appellate court to obtain a correct understanding of factual issues which are a basis for the trial court's conclusions of law and judgment. 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2582, at 722 (1971). Except in the instance of bona fide newly discovered evidence, the district court, however, is limited to amending its findings based on evidence contained in the record; to do otherwise would defeat the compelling interest in finality of judgments. *Fontenot v. Mesa Petroleum Co.*, 791 F.2d at 1219.

A Rule 52(b) motion seeks to correct findings or seeks additional findings without an amendment of the judgment. 12 James Wm. Moore, et al., MOORE'S FEDERAL PRACTICE § 59.05[6] (3d ed. 1999). By contrast, a motion under Rule 59(e) challenges the correctness of the judgment and seeks an alteration or amendment of that judgment. *Id.*

As made clear in the last sentence of the Rule, there is no real consequence to failing to file a Rule 52(b) motion except for not extending the deadline for notice for appeal if no other FRAP 4(a)(4) motion is filed. *Gilbert v. Sterrett*, 509 F.2d 1389, 1393 (5th Cir.), *cert. denied*, 423 U.S. 951 (1975). The district court's failure to make findings in accordance with a Rule 52(b) motion is not jurisdictional with regard to the appeal. *Armstrong v. Collier*, 536 F.2d 72, 77 (5th Cir. 1976). In such a circumstance, the appellate court will usually abate the appeal and remand to the district court to make the findings. *In re Texas Extrusion Corp.*, 836 F.2d 217, 221 (5th Cir.), *cert. denied*, 488 U.S. 926 (1988).

3. Timelines

As provided in Rule 52(b), a motion to amend the findings of the trial court must be made within 10 days after entry of judgment. Like the other post-trial motions, this 10-day period in which to file a motion to amend the court's findings is jurisdictional and cannot be enlarged by the court or the parties. *In re Texas Extrusion Corp.*, 836 F.2d at 220; *Gribble v. Harris*, 625 F.2d 1173, 1174 (5th Cir. 1980).

4. Potential Trap to Avoid

While a Rule 52(b) motion is not required for purposes of appeal, there must be some type of objection made to the district court's findings of fact or conclusions of law in order to preserve complaint for appeal. As Wright and Miller caution, there needs to be some objection to the form of the findings or the insufficiency of the evidence. Absent some objection -- although not required to be in a formal Rule 52(b) motion -- a party cannot challenge the specificity of the district court's findings on appeal. 9A C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 2581 (1995) & § 2582 (Supp. 2000).