

**If You're Going to the Courthouse, Please File this for Me:
Ten Documents Which Must be Filed in the
Trial Court to Preserve Error for Appeal**

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- Experience** The Ruback Law Firm
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- Education** Southern Methodist University School of Law
Juris Doctor 1997
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- Publications** Dallas Business Journal
Meet the Judicial Candidates (October 13, 2006 issue)
- Texas Lawyer
High Court Halts Double-Dipping Recovery Claims (August 29, 2005 issue)
- The Dicta
Preservation of Error: It's More Than Shouting "Objection!" (October 2003 issue)
- Leadership** Dallas Association of Young Lawyers
president 2006
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¹ July 2009 issue (1 of 8 lawyers selected in the "appellate" category)

1.

Special appearance

A. If your client is not a resident of Texas and has not had “minimum contacts” with Texas, but is nevertheless sued in Texas, you must file a special appearance to contest the court exercising personal jurisdiction over your client. *See* TEX. R. CIV. P. 120a(1); *Petrie v. Widby*, 194 S.W.3d 168, 174 (Tex. App.—Dallas 2006, no pet.).

B. You must file the special appearance before filing an answer, motion, or any other pleading. *See* TEX. R. CIV. P. 120a(1); *Exito Elec. Co., Ltd.*, 142 S.W.3d 302, 305 (Tex. 2004).

C. A special appearance must be verified. *See* TEX. R. CIV. P. 120a(1); *Siemens AG v. Houston Cas. Co.*, 127 S.W.3d 436, 439 (Tex. App.—Dallas 2004, pet. dismiss’d).

2.

Motion to transfer venue

A. If your client is sued in an improper county, you must file a motion to transfer venue. *See* TEX. R. CIV. P. 86(1); *Accelerated Christian Educ. v. Oracle Corp.*, 925 S.W.2d 66, 70 (Tex. App.—Dallas 1996, no writ).

B. You must file the motion to transfer venue before or concurrently with the filing of answers, motions, or any other pleading except a special appearance. *See* TEX. R. CIV. P. 86(1); TEX. CIV. PRAC. & REM. CODE ANN. §15.063 (Vernon 2002); *Accelerated Christian Educ. v. Oracle Corp.*, 925 S.W.2d 66, 70 (Tex. App.—Dallas 1996, no writ).

3.

Motion asserting forum non conveniens

A. If your client is sued in Texas, but a court outside of Texas has jurisdiction over the case and is a more appropriate forum, you must file a motion asserting forum non conveniens. *See Morrill v. Cisek*, 2006 WL 3751501, at *4 (Tex. App.—Houston [1st Dist.] Dec. 21, 2006, no pet.).

B. Texas Civil Practice and Remedies Code section 71.051 codifies the common law principle of forum non conveniens, but does so only for personal injury and wrongful death cases. *See Tullis v. Georgia-Pacific Corp.*, 45 S.W.3d 118, 122 (Tex. App.—Fort Worth 2000, no pet.). Pursuant to section 71.051, in personal injury or wrongful death cases, you must file the motion no later than 180 days after the deadline to file a motion to transfer venue. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(d) (Vernon Supp. 2006). For all other types of cases, the common law still applies, and the motion is timely as long as it is filed before trial. *See Direct Color Servs., Inc. v. Eastman Kodak Co.*, 929 S.W.2d 558, 567 (Tex. App.—Tyler 1996, writ denied).

4.

Motion for continuance

A. If your trial setting is on a date before you will have been able to complete discovery, you must file a motion for continuance supported by an affidavit. *See* TEX. R. CIV. P. 251; *Taherzadeh v. Ghaleh-Assadi*, 108 S.W.3d 927, 928 (Tex. App.—Dallas 2003, pet. denied).

B. Among other things, the affidavit must show that the discovery is material and that the movant was diligent in seeking the discovery. *See* Tex. R. Civ. P. 252; *Verkin v. Southwest Ctr. One, Ltd.*, 784 S.W.2d 92, 94 (Tex. App.—Houston [1st Dist.] 1989, writ denied).

C. Although there is no state-wide deadline to file a motion for continuance, such a deadline may be imposed by local rules. For example, Bexar County civil district court Local Rule 3.18(C) provides that the motion must be filed fourteen days before the trial setting or at the pre-trial conference, whichever comes first.

5.

Motion seeking judge's recusal

A. If the judge should be recused, you must file a motion for recusal. Texas Rule of Civil Procedure 18b(2) lists situations in which a judge should be recused. *See* *McCullough v. Kitzman*, 50 S.W.3d 87, 88 (Tex. App.—Waco 2001, pet. denied).

B. You must file the motion at least ten days before the hearing or trial from which you would like the judge to be disqualified or recused. TEX. R. CIV. P. 18a(a); *Carmody v. State Farm Lloyds*, 184 S.W.3d 419, 421 (Tex. App.—Dallas 2006, no pet.). When the judge is assigned to the case less than ten days before the date of the hearing or trial which he is scheduled to conduct, you must file the motion ASAP. *See* TEX. R. CIV. P. 18a(e); *Carmody v. State Farm Lloyds*, 184 S.W.3d 419, 421 (Tex. App.—Dallas 2006, no pet.). Similarly, when the basis of recusal is not known until less than ten days before the date of the hearing or trial, you must file the motion ASAP. *See* *Hudson v. Texas Children's Hosp.*, 177 S.W.3d 232, 235-36 (Tex. App.—Houston [1st Dist.] 2005, no pet.); *Keene Corp. v. Rogers*, 863 S.W.2d 168, 171-72 (Tex. App.—Texarkana 1993, no writ).

C. The motion must be verified. *See* TEX. R. CIV. P. 18a(a); *Hudson v. Texas Children's Hosp.*, 177 S.W.3d 232, 237 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

6.

Motion to remove attorney

A. If your opposing counsel has a conflict of interest, you must file a motion to have him or her disqualified. *See* *In re George*, 28 S.W.3d 511, 513 (Tex. 2000).

B. You must file the motion without much delay. *See* *In re George*, 28 S.W.3d 511, 513 (Tex. 2000). However, there is no bright-line test for determining how much delay is too much delay.

7.

Plea in abatement

A. If your client is sued by a plaintiff who does not have the capacity to sue, you must file a plea in abatement. See *Lighthouse Church v. Texas Bank*, 889 S.W.2d 595, 600 (Tex. App.—Houston [14th Dist.] 1994, writ denied); *Mtrust Corp., N.A. v. LJH Corp.*, 837 S.W.2d 250, 255 (Tex. App.—Fort Worth 1992, writ denied). Similarly, if your client is sued but does not have the capacity to be sued, you must file a plea in abatement. See *Trailways, Inc. v. Clark*, 794 S.W.2d 479, 489 (Tex. App.—Corpus Christi 1990, writ denied); *Butler v. Joseph's Wine Shop, Inc.*, 633 S.W.2d 926, 929 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.). If your client is sued while a substantially identical case is already pending between your client and the plaintiff, you must file a plea in abatement. See *Qualls v. Angelina County*, 98 S.W.3d 369, 372 (Tex. App.—Beaumont 2003, no pet.); *Starnes v. Holloway*, 779 S.W.2d 86, 95 (Tex. App.—Dallas 1989, writ denied). Finally, if your client has been sued, but other necessary parties have not been sued, you must file a plea in abatement. See *Spruill v. Spruill*, 624 S.W.2d 694, 697 (Tex. App.—El Paso 1981, writ dismissed).

B. You must file the plea without much delay. *Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 248 (Tex. 1988). However, there is no bright-line test for determining how much delay is too much delay. See *In re Louisiana-Pacific Corp.*, 112 S.W.3d 185, 189 (Tex. App.—Beaumont 2003, orig. proceeding); *In re Luby's Cafeterias*, 979 S.W.2d 813, 817 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding). In any case, you must file the plea before your case goes to trial. See *Long v. Tascosa Nat'l Bank*, 678 S.W.2d 699, 702 (Tex. App.—Amarillo 1984, no writ); *Pullen v. Swanson*, 667 S.W.2d 359, 363 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

C. A plea in abatement must be verified. See TEX. R. CIV. P. 93(1), (3), and (4); *Southern County Mut. Ins. Co. v. Ochoa*, 19 S.W.3d 452, 461 (Tex. App.—Corpus Christi 2000, no pet.).

8.

Special exceptions

A. If your client is sued and the plaintiff's petition is so general as to fail to give you "fair notice" of the facts and the legal theories under which the plaintiff seeks to recover, you must file special exceptions to this defect. See TEX. R. CIV. P. 45(b), 47(a), and 90; *Emerson Elec. Co. v. American Permanent Ware Co.*, 201 S.W.3d 301, 309 (Tex. App.—Dallas 2006, no pet.).

B. You must file the special exceptions before the jury charge is given. In a non-jury case, you must file the special exceptions before the court signs its judgment. See TEX. R. CIV. P. 90; *Hays v. Old*, 385 S.W.2d 464, 465 (Tex. Civ. App.—Texarkana 1964, writ ref'd n.r.e.).

9.

Request for findings of fact and conclusions of law

A. In a situation in which a judge has served as finder of fact, and has ruled against you, you should request findings of fact and conclusions of law. Your request must be filed within twenty days of the date the judgment was signed. *See* TEX. R. CIV. P. 296. If you do not timely file a request, the court of appeals will infer all findings against you. *See Niskar v. Niskar*, 136 S.W.3d 749, 753 (Tex. App.—Dallas 2004, no pet.).

B. The trial court should file its findings and conclusions within twenty days of your request. *See* TEX. R. CIV. P. 297. If the trial court fails to do so, you must file a notice of past due findings and conclusions within thirty days of the date you filed your initial request. *See* TEX. R. CIV. P. 297.

C. If the trial court files findings and conclusions, but they do not address all of the issues you believe necessary, you must, within ten days of the court's entering the initial findings and conclusions, file a request for additional findings and conclusions. *See* TEX. R. CIV. P. 298.

10.

Motion for new trial

A. If you lose at trial, and there was factually insufficient evidence to support the jury's finding of liability or award of damages, you must file a motion for new trial.² *See* TEX. R. CIV. P. 324(b); *Cecil v. Smith*, 804 S.W.2d 509, 510 (Tex. 1991).

B. You must file the motion within thirty days of the date the judgment was signed. *See* TEX. R. CIV. P. 329b(a); *Compass Bank v. MFP Fin. Servs., Inc.*, 152 S.W.3d 844, 850 (Tex. App.—Dallas 2005, pet. denied).

C. When you file the motion, you must pay a \$15 fee. *See* TEX. GOV'T CODE ANN. § 51.317(b)(2) (Vernon Supp. 2006); *Garza v. Garcia*, 137 S.W.3d 36, 37 n.5 and 38 (Tex. 2004).

² If you lose at trial, and there was legally insufficient evidence to support the jury's finding of liability or award of damages, making this complaint in a motion for new trial will preserve this error for appeal. *See Cecil v. Smith*, 804 S.W.2d 509, 510-12 (Tex. 1991). However, making this complaint solely in a motion for new trial carries significant risk. Specifically, if you make this complaint in a motion for new trial, the court of appeals will be able to remand your case for a new trial, but will not be able to render the judgment in your favor. *See Werner v. Colwell*, 909 S.W.2d 866, 870 n.1 (Tex. 1995); *Horrocks v. Texas Dep't of Transp.*, 852 S.W.2d 498, 499 (Tex. 1993). For the court of appeals to render judgment in your favor, you must have filed a motion for directed verdict (a/k/a instructed verdict), objection to the court's charge, motion for JNOV, or motion to disregard a certain jury finding. *See BYC Water Supply Corp.*, 170 S.W.3d 596, 604 (Tex. App.—Tyler 2005, pet. denied); *Ana, Inc. v. Lowry*, 31 S.W.3d 765, 772 (Tex. App.—Houston [1st Dist.] 2000, no pet.).