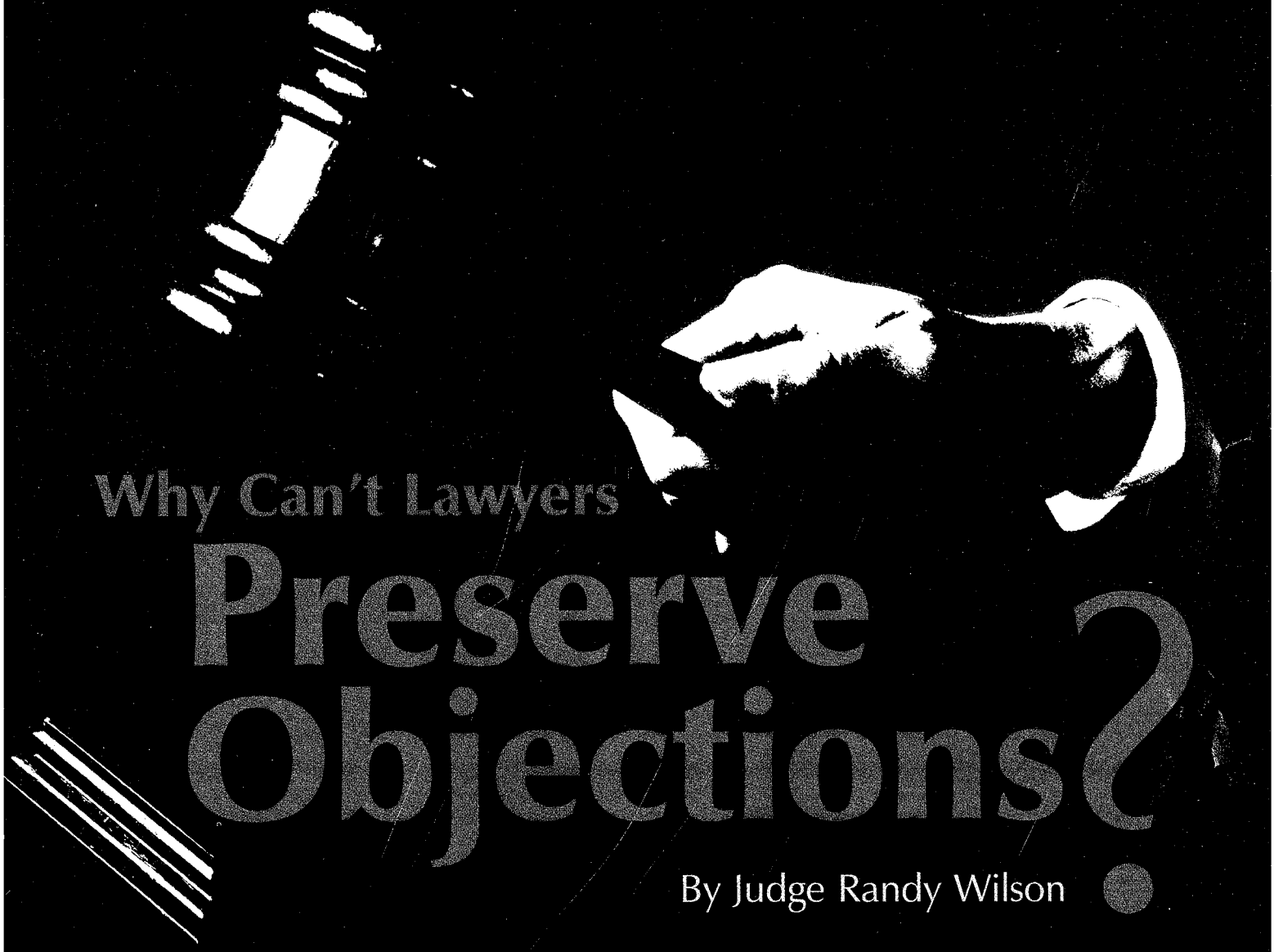

Why Can't Lawyers Preserve Objections?

By Judge Randy Wilson

In the three years I've been on the bench, I've seen many amazing things. While I am certain I make mistakes and rule incorrectly on an almost daily basis, I am astonished at the number of occasions I see lawyers fail to preserve any objection to my rulings. Although this inability to preserve objections may help a trial judge maintain a good win/loss record on appeal, the clients are disserved. This article will highlight some of the most glaring instances of lack of preservation I see. CONTINUED ON PAGE 318 ▶

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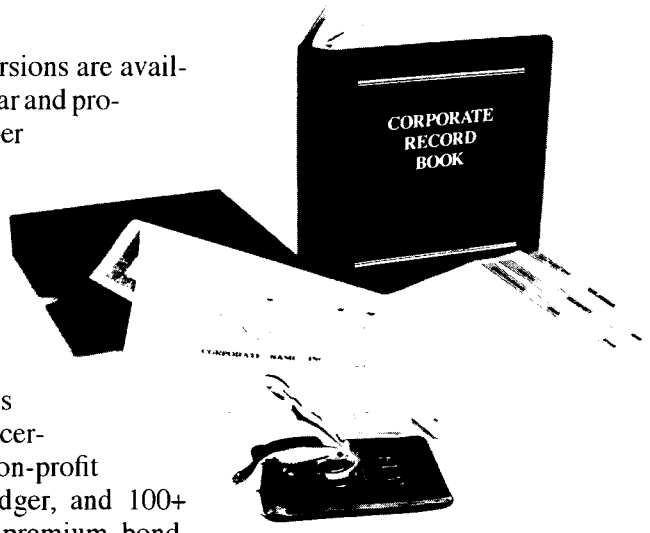

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Voir Dire

Although every jury trial I have presided over has contained at least one motion I have denied to strike a veniremember for cause, I have only seen one lawyer preserve the objection. Only one.[1]

If a trial court denies a motion to strike an objectionable veniremember, the moving party must take certain specific steps; failure to perform each step could well result in waiver of any objection. The two leading decisions on preservation of voir dire objections are *Hallett v. Houston Northwest Medical Center*[2] and *Cortez v. HCCI-San Antonio, Inc.*[3] To preserve error when a challenge for cause is denied, a party must:

1. Use a preemptory challenge against the veniremember involved;
2. Exhaust its remaining challenges; and
3. Notify the trial court that a specific objectionable veniremember will remain on the jury list.[4]

The rule is similar in criminal cases.[5]

Thus, to preserve the error, you must use your preemptory challenges on the veniremembers previously challenged for cause.[6] If your challenge for cause for a particular juror is denied, and you fail to use a preemptory strike on that person, you have waived error.

Additionally, you must inform the trial court of the specific veniremember that remained who you were unable to strike peremptorily because you exhausted all your other strikes. The good news is that *Cortez* held that you are not required to state why the remaining veniremember is objectionable. Indeed, in *Cortez*, the Supreme Court observed that the next "objectionable" juror could be picked at random.[7] However, "the objecting party must do so before knowing who the opposing party will strike or who the actual jurors will be. If it 'guesses' wrong, any error is harmless."[8] If the opposing party or the court agrees to remove this "objectionable" veniremember, the objecting party does not get to object again to another veniremember who will be seated instead.[9]

Thus, when a trial court denies a motion to strike for cause, a party must strike the veniremember involved, use all six preemptory strikes, and then, prior to the jury being empanelled, make a record to the trial court, as, for example:

> Your Honor, plaintiff again moves that veniremember #6 be struck for cause, or, alternatively, that plaintiff be given an additional preemptory strike. Plaintiff was forced to use a preemptory strike on veniremember #6, thereby exhausting plaintiff's preemptory strikes. If the court had stricken veniremember #6, or, alternatively, given plaintiff an additional preemptory strike, plaintiff would have struck veniremember #7, who is objectionable to plaintiff.

This should preserve the error.

Summary Judgment Objections

One of the most common preservation mistakes I see occurs at the summary judgment stage. On more occasions than I can remember, lawyers have merely objected to their opponents' summary judgment evidence and blithely assumed that the objection is preserved so long as they've filed formal objections. Nothing could be further from the truth. Failure to get a ruling on the objections is often fatal.

If your opponent files an affidavit in opposition to your motion for summary judgment, you of course must object.[10] In general, you must:

1. File objections in writing;[11] and
2. Be specific so as to enable the opposing party to remedy the defect, if possible.[12]

Merely filing the objection, however, is not enough. As a general rule, the trial court must overrule the objection in order for the objection to be preserved on appeal.[13] An order must be reduced to writing, signed, and entered of record; a docket sheet entry is insufficient.[14] Indeed, even if the summary judgment hearing is transcribed, an oral ruling on the evi-

dence objections is insufficient.[15]

Not all objections are waived by the failure to object or failure to obtain a ruling on the objections. Defects in the *form* of summary judgment affidavits or attachments must be objected to and ruled upon. In contrast, however, *substantive* defects cannot be waived by failing to object or obtain a written order in the trial court.[16]

Form defects, which must be objected to and ruled upon, are:

- Affidavit contains hearsay;[17]
- Affiant not competent to testify to matters set out in the affidavit;[18]
- Documents attached to the motion for summary judgment not verified, certified, or otherwise authenticated;[19]
- Attachments to affidavits not certified or authenticated;[20]
- Evidence attached to brief in support rather than summary judgment motion itself;[21] and
- Affidavit not based on personal knowledge of affiant.[22]

Substance objections, however, are not waived, either by lack of objection or ruling. Those defects are:

- Affidavit is unsworn or lacks properly notarized signature;[23]
- Affidavit is not signed by affiant;[24]
- Affidavit contains conclusions and unsubstantiated opinions;[25] and
- Verified pleadings relied on as summary judgment proof.[26]

Substance defects are said to go to the very heart of the summary judgment proof and, therefore, neither an objection nor a ruling is required.

Since form objections must be both raised and ruled upon, it is imperative that the trial lawyer obtain a ruling from the court. As one court put it, "without something in the summary judgment order or the record to indicate that the trial court ruled on the objections, we cannot conclude that the trial court implicitly sustained the ... objections to appellant's summary judgment evidence. Therefore, we hold that the evidence remains a part of the summary judgment record."[27]

The only narrow exception to this requirement to obtain a ruling is an "implicit" ruling. Effective Sept. 1, 1997, the Texas Rules of Appellate Procedure were amended to permit a trial court's ruling to be either express or implicit.[28] A ruling is implicit if it is unexpressed but capable of being understood from something else.[29] There is a split in the courts of appeals concerning an implicit ruling. Some courts hold that the existence of objections and a recitation in the summary judgment order that the trial court reviewed all competent evidence creates an inference that the trial court implicitly sustained objections to the summary judgment evidence.[30] The majority of decisions, however, hold that

the mere fact that summary judgment was granted is insufficient to create an inference that the trial court ruled on the objections to the summary judgment evidence.[31] The bottom line is that you should get a ruling on your summary judgment evidence objections and not take a chance trying to argue that the objection is one of substance or there was an implicit ruling.

Offers of Proof

How many times have we all seen this exchange?

Q: What did he say to you?

Opponent: Objection — calls for hearsay.

Court: Sustained.

The questioner then moves on to another subject and assumes that he has a potential point of error on appeal. In fact, he has preserved nothing. Unfortunately, most lawyers don't even know that they are required to make an offer of proof if their evidence is excluded, much less know how to do one.

The rules are very simple. If your evidence is excluded, to preserve any error you must:

- Attempt during the evidentiary portion of the trial to introduce the evidence;
- If an objection is lodged, specify the purpose for which it is offered along with reasons why the evidence is admissible;
- Obtain a ruling from the court; and
- If the judge rules the evidence inadmissible, make a record, through an offer of proof, of the precise evidence you seek to have admitted.[32]

The Rules of Evidence require that the excluded evidence affects a substantial right of the party and "the substance of the [excluded] evidence was made known to the court by offer, or was apparent from the context within which questions were asked."[33]

The party offering the evidence must state the purpose of the offer and the reasons why the evidence is admissible.[34] The arguments for admissibility asserted at trial must be the same as the arguments on appeal; otherwise, the issue is not properly preserved.[35]

Most important, if the trial judge refuses to admit the evidence, there must be an offer of proof describing in some detail the nature of the evidence you wish admitted.[36] The primary purpose of the offer of proof is to enable an appellate court to determine whether the exclusion was erroneous and harmful.[37] A secondary purpose is to permit the trial judge to reconsider the ruling in light of the actual evidence.[38] But, when the trial court excludes evidence, failure to make an offer of proof waives any complaint about the exclusion on appeal.[39]

This offer of proof can be either formal or informal, and can be made by the lawyer in the form of a summary. Thus, bench conferences[40] or fragmentary testimony[41] might preserve any objection if there is enough substance to appraise the court of the nature of the testimony sought to be admitted.

Ideally, the offer of proof should state, for example:

> Your Honor, outside the presence of the jury, plaintiff would make the following offer of proof. Mr. Jones, had he been allowed to testify, would have stated that he was told by defendant that the light was red. This is admissible as an admission against interest by a party opponent, and is offered to demonstrate negligence by the defendant. Plaintiff renews his request that Mr. Jones be allowed to give this testimony.

This will preserve your objection.

Motions in Limine

Everyone knows that a ruling on a motion in limine doesn't preserve any argument on appeal. Yet, I cannot tell you how many times I hear motions in limine arguments for hours, I grant the motion in limine and rule that the evi-

dence cannot be admitted without approaching the bench first, and I never hear about it again.

A complaint of improperly excluded evidence cannot be predicated on a trial court's ruling in limine.[42] An in limine ruling is not a ruling on the admissibility of evidence and does not preserve error.[43] Rather, the in limine ruling merely prohibits references to certain issues without first obtaining a ruling outside the presence of the jury.[44]

If a motion in limine has been granted, to preserve error, the party wishing to introduce evidence must (1) approach the bench and ask for a ruling; (2) formally introduce the evidence; and (3) obtain a ruling.[45] If the court rules that the evidence is inadmissible, then the proponent must make an offer of proof.

Running Objections

I often see lawyers timely object to the introduction of certain evidence, and after they're overruled, give up and quit making any additional objections, either to that witness or any other witness. This again constitutes a waiver.

Any error in admitting evidence is cured if the same evidence comes in elsewhere without objection.[46] There are two exceptions to the "contemporaneous objection" rule: (1) the "running" or "continuing" objection rule; and (2) an objection outside the presence of the jury under evidence rule 103(a)(1).[47] The latter rule provides:

> When the court hears objections to offered evidence out of the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections.[48]

If the evidence is offered outside the presence of the jury, the objecting party can rely on Rule 103(a)(1). However, if the evidence is offered before the jury, then the opposing party must either object each time it is offered, or obtain a running or continuing objection.

Running objections, however, can be tricky. If the court permits a running objection to a particular witness's testimony on a specific issue, the objecting party is entitled to "assume that the judge will make a similar ruling as to other offers of similar evidence and is not required to repeat the objections."[49] However, running objections are usually limited to similar evidence from the same witness.[50] A running objection ordinarily "does not preserve error when another witness testifies to the same matter without objection"[51] although some courts have held that in limited circumstances a running objection can preserve error for different witnesses.[52] Given these conflicting rulings, one court has held that the determination of whether a prior objection is sufficient to cover a subsequent offer of similar evidence requires a case-by-case analysis, based on the following considerations: the proximity of the objection to the subsequent testimony; the nature and similarity of the subsequent testimony as compared to the prior testimony and objection; whether the subsequent testimony was elicited from the same or a different witness; whether a running objection was requested or granted; and any other circumstances which might suggest why the objection should or should not have to be reurged.[53]

Rather than rely on these various factors, the better practice is to request a specific running objection from each witness. For example, after the initial objection is overruled, state:

> Your Honor, I request that you grant a running objection as to all testimony from Mr. Smith concerning what was said at the April 1 meeting (and repeat that request with each subsequent witness).

Conclusion

Objections must be preserved or they are waived. While exceptions have grown up over the years to give some leniency to this requirement, the far safer practice is to follow these guidelines and make sure your objections are preserved. You will sleep better.

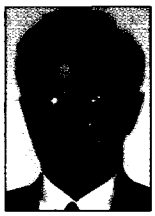
Notes

1. Ironically, the article initially stated, "not a single lawyer has preserved the objection." During the drafting stage of this article, however, one lawyer finally did it right.
2. 689 S.W.2d 888 (Tex. 1985).
3. 159 S.W. 3d 87 (Tex. 2005).
4. *Id.* at 90-91.
5. *Escamilla v. State*, 143 S.W.3d 814, 821 (Tex.Crim.App. 2004).
6. *McMillin v. State Farm Lloyds,* 180 S.W.3d 183 (Tex. App. — Austin 2005, no pet. h.).
7. 159 S.W.3d at 91; *see also Silsbee Hosp. v. George*, 163 S.W.3d 284, 294 (Tex. App. — Beaumont, 2005, pet. denied)("there is no requirement that a party identify the reasons the remaining venire members that it would have stricken were objectionable").
8. *Id.*
9. *Id.*; *see also Escamilla*, 143 S.W.3d at 821.
10. TEX. R. CIV. P. 166a(f).
11. *Id.; see also El Paso Assoc., Ltd. v. J.R. Thurman & Co.,* 786 S.W.2d 17, 19 (Tex. App. — El Paso 1990, no writ).
12. *Womco, Inc. v. Navistar Intern. Corp.*, 84 S.W.3d 272, 281 n.6 (Tex. App. — Tyler 2002, no pet.). "A specific objection is one that enables the trial court to understand the precise grounds so as to make an informed ruling and affords the offering party an opportunity to remedy the defect, if possible." *Id.*
13. Tex. R. App. P. 33.1(a). *See McConnell v. Southside School Dist.*, 858 S.W.2d 337, 343 n.7 (Tex. 1993)("finally, a party asserting exceptions must obtain a ruling at or prior to the hearing of the motion for summary judgment"); *Lection v. Dyll*, 65 S.W.3d 696, 703 (Tex. App. — Dallas 2001, pet. denied) (although appellant "filed objections with the trial court, he did not obtain a ruling from the trial court and, thus, he waived the objections").
14. *Eads v. American Bank, N.A.*, 843 S.W.2d 208, 211 (Tex. App. — Waco 1992).
15. *Manoogian v. Lake Forest Corp.*, 652 S.W.2d 816, 819 (Tex. App. — Austin 1983, writ ref'd n.r.e.).
16. *Scripps Texas Newspapers v. Balalcazar,* 99 S.W.3d 829, 834 (Tex. App. — Corpus Christi 2003, pet. denied).
17. *Einhorn v. LaChance,* 823 S.W.2d 405, 410 (Tex. App. — Houston [1st Dist.] 1992, pet. dis'd w.o.j.).
18. *Youngstown Sheet & Tube Co. v. Penn*, 363 S.W.2d 230, 234 (Tex. 1962*); Atchley v. NCNB Tex. Nat'l Bank*, 795 S.W.2d 336, 337 (Tex. App. — Beaumont 1990, writ denied).
19. *Denison v. Haeber Roofing Co.*, 767 S.W.2d 862, 865 (Tex. App. — Corpus Christi 1989, no writ); *Ellen v. Brazos County Bail Bd.*, 127 S.W.3d 42, 46 (Tex. App. — Houston [14th Dist.] 2003, no pet. h.).
20. *Neeley v. Turner*, 873 S.W.2d 113, 114 (Tex. App. — Tyler 1994, no writ).
21. *Cluett v. Medical Protective Co.*, 829 S.W.2d 822, 825 (Tex. App. — Dallas 1992, writ denied).
22. *Bauer v. Jasso,* 946 S.W.2d 552, 557 (Tex. App.—Corpus Christi 1997, no writ); *Rizkallah v. Conner,* 952 S.W.2d 580, 585 (Tex. App. — Houston [1st Dist.] 1997, no writ). In *Dailey v. Albertson's, Inc.*, 83 S.W.3d 222, 226 (Tex. App. — El Paso 2002, no pet.), the court observed that the Supreme Court has issued conflicting opinions on the question of whether an objection of lack of personal knowledge is form or substance.
23. *Hall v. Rutherford*, 911 S.W.2d 422, 425 (Tex. App.—San Antonio 1995, writ denied); *Tucker*

v. Atlantic Richfield Co., 787 S.W.2d 555, 557 (Tex. App. — Corpus Christi 1990, writ denied); *Trimble v. Gulf Paint & Battery, Inc.*, 728 S.W.2d 887, 889 (Tex. App. — Houston [1st Dist.] 1987, no writ).

24. *De Los Santos v. Southwest Tex. Methodist Hosp.*, 802 S.W.2d 749, 755 (Tex. App. — San Antonio 1990, no writ).
25. *Branton v. Wood*, 100 S.W.3d 645, 648 (Tex. App. — Corpus Christi 2003, no pet.); *Dailey v. Albertson's, Inc.*, 83 S.W.3d 222, 225 (Tex. App. — El Paso 2002, no pet.).
26. *Feldman v. Manufacturers Hanover Mortgage Corp.*, 704 S.W.2d 422, 425 (Tex. App. — Houston [14th Dist.] 1986, writ ref'd n.r.e.).
27. *In re Estate of Schiwetz*, 102 S.W.3d 355, 360-61 (Tex. App. — Corpus Christi 2003, pet. denied).
28. Tex. R. App. P. 33.1(a)(2)(A).
29. *Well Solutions, Inc. v. Stafford*, 32 S.W.3d 313, 316 (Tex. App. — San Antonio 2000, no pet.).
30. *See Blum v. Julian*, 977 S.W.2d 819, 823-24 (Tex. App. — Ft. Worth 1998, no pet); *Columbia Rio Grande Regional Hosp. v. Stover*, 17 S.W.3d 387, 395-96 (Tex. App. — Corpus Christi 2000, no pet.).
31. *Dolcefino v. Randolph*, 19 S.W.3d 906, 926 (Tex. App. — Houston [14th Dist.] 2000, no pet. h.); *Well Solutions, Inc. v. Stafford*, 32 S.W.3d 313 (Tex. App. — San Antonio 2000, no pet.); *Watson v. Dallas Ind. School Dist.*, 135 S.W.3d 208, 229 (Tex. App. — Waco 2004, no pet. h.); *In re Estate of Loveless*, 64 S.W.3d 564, 573 (Tex. App. — Texarkana 2000, no pet. h.); *Nelson v. Dykeman*, 2002 WL 538811 (Tex. App. — Beaumont 2002)
32. *Richards v. Commission for Lawyer Discipline*, 35 S.W.3d 243, 252 (Tex. App. — Houston [14th Dist.] 2000); *Estate of Veale v. Teledyne Indus.*, 899 S.W.2d 239 (Tex. App. — Houston [1st Dist.] 1995).
33. Tex. R. Evid. 103(a)(2).
34. *Continental Coffee Prod. Co. v. Cazarez*, 903 S.W.2d 70, 80 (Tex. App. — Houston [14th Dist.] 1995), *rev'd in part on other grounds*, 937 S.W.2d 444 (Tex. 1996); *Vandever v. Goettee*, 678 S.W.2d 630, 635 (Tex. App. — Houston [14th Dist.] 1984, writ ref'd n.r.e.).
35. *In re C.Q.T.M.*, 25 S.W.3d 730, 738 (Tex. App. — Waco 2000, pet. denied); *Holland v. Hayden*, 901 S.W.2d 763, 765 (Tex. App. — Houston [14th Dist.] 1995, writ denied); *Schwartz v. Forest Pharmaceuticals, Inc.*, 127 S.W.3d 118, 125 (Tex. App. — Houston [1st Dist.] 2003, pet. denied).
36. *Bohatch v. Butler & Binion*, 905 S.W.2d 597, 607 (Tex. App. — Houston [14th Dist.] 1995), *aff'd* 977 S.W.2d 543 (Tex. 1998).
37. *In re Canales*, 113 S.W.3d 56, 68 (Tex. Rev. Trib. 1994, no appeal); *see also* Goode, Wellborn & Sharlot, Guide to the Texas Rules of Evidence, §103.3 at 21 (2d ed. 1993).
38. *Id.*
39. *Ludlow v. DeBerry*, 959 S.W.2d 265, 270 (Tex. App. — Houston [14th Dist.] 1997, no writ).
40. *Sims v. Brackett*, 885 S.W.2d 450, 453 (Tex. App. — Corpus Christi 1994, writ denied).
41. *Coleman v. Coleman*, 170 S.W.3d 231, 239 (Tex. App. — Dallas 2005, no pet. h.).
42. *Southwest Country Ent. V. Lucky Lady Oil*, 991 S.W.2d 490, 493 (Tex. App. — Ft. Worth 1999, pet. denied).
43. *Waldon v. City of Longview*, 855 S.W.2d 875, 880 (Tex. App. — Tyler 1993, no writ).
44. *Southwest County*, 991 S.W.2d at 493.
45. *Id.*; *see also Johnson v. Garza*, 884 S.W.2d 831, 834 (Tex. App. — Austin 1994, writ denied).
46. *Richardson v. Green*, 677 S.W.2d 497, 501 (Tex. 1984); *Schwartz v. Forest Pharmaceuticals*, 127 S.W.3d at 124; *Henry v. Low*, 132 S.W.3d 180, 196 (Tex. App. — Corpus Christi 2004); *Atkinson Gas Co. v. Albrecht*, 878 S.W.2d 236, 242-43 (Tex. App. — Corpus Christi 1994, writ denied).
47. *Rawlings v. State*, 874 S.W.2d 740, 742 (Tex. App. — Ft. Worth 1994, no writ).
48. Tex. R. Evid. 103(a)(1).
49. *Leaird's, Inc. v. Wrangler, Inc.* 31 S.W.3d 688, 690-91 (Tex. App. — Waco 2000, pet. denied); *Commerce, Crowdus & Canton, Ltd. v. DKS Constr., Inc.*, 776 S.W.2d 615, 620 (Tex. App. — Dallas 1989, no writ); *City of Fort Worth v. Holland*, 748 S.W.2d 112, 113 (Tex. App. — Ft. Worth 1988, writ denied).
50. *Leaird's Inc. v. Wrangler, Inc.*, 31 S.W.3d at 691; *Atkinson Gas Co. v. Albrecht*, 878 S.W.2d at 243.
51. *Davis v. Fisk Elec. Co.*, 2006 WL 54423 (Tex. App. — Houston [14th Dist.] 2006).
52. *Volkswagen of America v. Ramirez*, 159 S.W.3d 897, 907 (Tex. 2004).
53. *Atkinson Gas Co. v. Albrecht*, 878 S.W.2d at 243; see also *Sauceda v. Kerlin*, 164 S.W.3d 892, 920 (Tex. App. — Corpus Christi 2005, no pet. h.); *Henry v. Low*, 132 S.W.3d at 196.

RANDY WILSON



was appointed judge of the 157th District Court in Harris County in April 2003. After graduating first in his class from the University of Houston in 1977, Wilson was a partner in Susman Godfrey, L.L.P. from 1980 to 2003. He is currently the statewide MDL judge for Texas Vioxx cases.