

Thompson & Knight

ATTORNEYS AND COUNSELORS

Impact



Adventures in Error Preservation

Scott Stolley

214.969.1678

scott.stolley@tklaw.com

Rich Phillips

214.969.1148

rich.phillips@tklaw.com

Scenario

- You file a no-evidence summary-judgment motion.
- Your opponent's response does not have any evidence attached, but refers to exhibits that your opponent attached to a different motion.
- Has your opponent preserved error?

Suggestion

- Reference to evidence already on file is sufficient, even if it is not physically attached to the response.
- Summary-judgment evidence includes discovery responses “referenced or set forth” in the response and any “affidavits . . . on file at the time of the hearing.” Tex. R. Civ. P. 166a(c).
- See *Shaw v. Trinity Highway Prods., Inc.*, 329 S.W.3d 914 (Tex. App.—Dallas 2010, no pet.).

Scenario

You're the plaintiff's lawyer trying a case in a small town where everyone knows everyone. A panel member says he: (1) knows the defendant's parents; (2) has known the defendant since birth; (3) knows the defendant is a God-fearing man who will never lie; and (4) will believe what the defendant says no matter what the plaintiff's lawyer says.

Suggestion:

- **Move to strike the entire panel, move for a mistrial, or both.**
- **Object to the statement and ask for an instruction to disregard.**
- **Challenge the panel member for cause (preexisting bias or prejudice).**

Scenario

The court says it will seat four alternate jurors, but will not give the parties any additional peremptory strikes.

Suggestion:

- **Object and request additional peremptory strikes under Gov't Code § 62.020.**
 - Each “side” gets one extra peremptory if there are one or two alternates.
 - Each “side” gets two extra peremptories if there are three or four alternates.
 - The additional strikes must be used against alternate jurors.

Scenario

After several days of trial, the jury comes into the courtroom, all wearing sunglasses and black-and-white clothing.

Suggestion:

- **Ask that the record reflect the jury's appearance.**
- **Interview the jurors after the verdict.**
- **Obtain juror affidavits about the purpose for their behavior.**
- **If juror misconduct is apparent, file a timely motion for new trial.**

Scenario

- **During closing argument, plaintiff's counsel asks the jury to send a message.**
- **You object: "Judge I object to any testimony about the propriety of other trials and the other verdicts reached by other juries in Lubbock."**
- **The Court: "This is his argument, and it is not testimony."**

Suggestion

- **Restate your objection because it appears that the court did not understand the objection.**
- ***Phillips v. Bramlett*, 288 S.W.3d 876 (Tex. 2009)**