



# A Practical Guide to the Equitable Bill of Review

BY PATRICK J. DYER

Your client calls one afternoon quite rattled by a constable who is attempting to serve a writ of execution on a judgment that is more than a year old. The client says he knows nothing about the judgment. Indeed, he does not even recall that he was ever sued. Is there anything that can be done?

The short answer is the typical answer — maybe. He might have a remedy by bill of review. According to the Texas Supreme Court, “a bill of review is an independent equitable action brought by a party to a former action seeking to set aside a judgment which is no longer appealable or subject to motion for new trial.”<sup>1</sup> Independent means it is filed as a new lawsuit, bears its own cause number, and has its own elements. Equitable means it is subject to the normal rules and defenses of equity. And the rest means that it is your client’s last chance to set aside a judgment because it is too late to move for a new trial and too late to appeal.

If you have not handled a bill of review proceeding before, do not bother looking for assistance in the rules of civil procedure. They provide no illumination other than to say that a bill of review may be granted upon a showing of sufficient cause.<sup>2</sup> Look instead to the case law, and, in particular, a series of well-known Texas Supreme Court cases on bills of review beginning with *Alexander v. Hagedorn*<sup>3</sup> and continuing through the recent decision in *Ross v. National Center for the Employment of the Disabled*.<sup>4</sup> In addition, review *McDaniel v. Hale*,<sup>5</sup> an opinion out of the Amarillo Court of Appeals that represents probably the single most comprehensive analysis of bills of review. These cases provide the background and general legal framework of a bill of review. For the practitioner, the most important thing to realize is that there is no standard bill of review. Different factual circumstances and procedural postures will determine the necessary allegations and evidence for your particular bill of review. This article discusses the different procedural settings, analyzes the applicable elements, and examines the exceptions.

## The General Elements of a Bill of Review

In general, to succeed on a bill of review, a petitioner has to plead and prove: (1) a meritorious defense to the cause of action alleged, or a meritorious ground for new trial or appeal, or a meritorious claim, (2) which he was prevented from making by the fraud, accident, or wrongful act of the opposing party, or by official mistake, (3) unmixed with any fault or negligence on his part.<sup>9</sup> The petitioner must also show that, through no fault of his own, no other legal remedy is available.<sup>10</sup> As is apparent from this disjunctive statement of elements, a bill of review may be appropriate on different grounds and in different situations. Although the typical setting for a bill of review is a default judgment, a bill of review may be filed after any other type of judgment or dismissal, as, for example, a dismissal for want of prosecution or a judgment following a full trial on the merits.<sup>11</sup> The setting will also in part determine the elements which must be established to succeed on the bill of review. Finally, there are a couple of key exceptions that modify the required elements. The grounds upon which a bill of review can be granted are narrow because the procedure conflicts with the fundamental policy favoring the finality of judgments.<sup>12</sup> That policy is sufficiently important and longstanding that, although a bill of review is an equitable proceeding, the fact that an injustice may have occurred is not sufficient in and of itself to justify relief by bill of review.<sup>13</sup>

## Background in the Texas Supreme Court

The general elements, as well as the exceptions, derive from a series of Texas Supreme Court decisions. Although bills of review have existed in Texas in some form at least since the 1850s,<sup>14</sup> *Alexander v. Hagedorn*,<sup>15</sup> decided in 1950, is almost always the case cited for the traditional elements of the Texas bill of review: (1) proof of a meritorious defense (2) which the party was prevented from making by the fraud, accident, or wrongful act of the opposing party, (3) unmixed with any fault or negligence on his part. As is apparent, the traditional formulation was more limited than it is now.

*Hanks v. Rosser*<sup>16</sup> modified the formulation by expressly recognizing official mistake as an alternative second element. In addition, *Hanks* confirmed that a bill of review was available not only to one who had lost the right to file an answer but also to one who had lost the right to file a motion for new trial. Finally, for the particular factual situation presented in the case, namely the loss of the right to file a motion for new trial as the result of official misinformation, it changed the standard by which the party's conduct was measured. *Alexander* required a bill of review to be denied if there were any fault or negligence on the part of the petitioner. *Hanks* reduced that burden to the "conscious indifference or intentional neglect" standard of a motion for new trial.<sup>17</sup> Following *Hanks*, the elements could therefore be stated alternatively as follows: (1) a meritorious defense (2) which the party was prevented from making by the

fraud, accident, or wrongful act of the opposing party, (3) unmixed with any fault or negligence on his part, or (1) a motion for new trial (2) which the party was prevented from making by official misinformation (3) so long as the failure to file an answer was not intentional or the result of conscious indifference, (4) the party has a meritorious defense, and (5) no injury will result to the opposing party.

*Petro-Chemical Transport, Inc. v. Carroll*<sup>18</sup> confirmed the availability of a bill of review to one who had lost the right to pursue a meritorious ground of appeal following a full trial on the merits.<sup>19</sup> It expanded the concept of official mistake to include not only affirmative misinformation but also the failure to provide information. In *Petro-Chemical*, the clerk failed to mail the postcard notice of judgment to the defendant's attorney as required by Rule 306(a).<sup>20</sup> As a result, the defendant did not find out about the judgment until it was too late to move for new trial or appeal. The court of appeals ruled that the failure of the clerk to provide notice was not a basis for a bill of review because it was an act of omission versus commission.<sup>21</sup> Hence, it was not the official mistake contemplated in *Hanks*. The Supreme Court disagreed. It found no material difference between a clerk's providing erroneous information and a clerk's not providing required information. Both were official mistakes and could serve as the basis for a bill of review.<sup>22</sup>

Although *Petro-Chemical* clarified the meaning of official mistake, it muddled the standard by which the petitioner's conduct was measured. After expressly recognizing that *Hanks* permitted a bill of review to be based on official mistake so long as the petitioner also established that the failure to answer was not intentional or the result of conscious indifference "even though such failure was negligent,"<sup>23</sup> the court ruled that the petitioner in the case at bar had to show that its failure to file a motion for new trial or appeal was not due to any fault or negligence of its own.<sup>24</sup> *Hanks* had not required that. The petitioners in *Hanks* and *Petro-Chemical*, however, were both in the same procedural position. Both were denied the right to file a motion for new trial or appeal because of official mistake, and, as the court itself stated, there was no material difference between the types of official mistake involved. The only other difference was that *Hanks* involved a default judgment while *Petro-Chemical* involved a judgment following a full trial on the merits. One would think that their conduct should have been measured by the same standard, but the court did not address the issue.

*Baker v. Goldsmith*,<sup>25</sup> decided five years later, set the general procedure to be followed in a bill of review and settled the issue concerning the quantum of proof required. Procedural matters will be discussed in more detail below, but, in general, a plaintiff in a bill of review must file a sworn petition setting forth the elements and, as a pretrial matter, present prima facie proof of its meritorious defense or claim.<sup>26</sup> A prima facie defense is established if the defense is not barred as a matter of law and

the petitioner would be entitled to judgment on a retrial if there were no evidence to the contrary.<sup>27</sup> The court decides this issue as a matter of law.<sup>28</sup> If the court determines that a meritorious defense has been established, the remaining two issues are to be resolved, either in the same hearing, a separate hearing, or with the merits of the underlying suit.<sup>29</sup> If a meritorious defense is not established, the court enters a final judgment denying the bill of review.

*Baker's* resolution of procedural issues was not accompanied by a resolution of the substantive law. Rather, *Baker* contributed only additional doubt as to the continued viability of *Hanks*. In *Baker*, as in *Hanks*, the petitioner suffered a default judgment as the result of official mistake and did not receive notice of the judgment until the time for filing a motion for new trial had expired.<sup>30</sup> Under *Hanks*, the petitioner would only have been required to show that the failure to answer was not intentional or the result of conscious indifference; the petitioner would not have had to show that its failure to file a motion for new trial or appeal was not due to any fault or negligence of its own. In *Baker*, however, the court stated the petitioner was required to show lack of negligence. Although the *Baker* court cited *Hanks* three times,<sup>31</sup> the court neither expressly reaffirmed nor rejected *Hanks's* less stringent standard, but the court's discussion of the burden of persuasion at trial clearly reiterated the traditional *Alexander* requirement that the party demonstrate that the judgment was rendered "unmixed with any negligence of his own".<sup>32</sup>

The complainant must open and assume the burden of proving that the judgment was rendered as the result of the fraud, accident or wrongful act of the opposite party or official mistake unmixed with any negligence of his own. ... This may be an onerous burden, but it is a major distinguishing factor between a bill of review and a motion for new trial.

The courts of appeals have, understandably, grappled with the issue. The Amarillo Court of Appeals analyzed the issue, found *Hanks* and *Petro-Chemical* inconsistent, and concluded that the Texas Supreme Court had provided two different rules for the two situations; therefore, the court of appeals was duty-bound to apply the more liberalized requirements of *Hanks* in the default judgment situation but the more rigorous requirements of *Petro-Chemical* if judgment followed trial on the merits.<sup>33</sup> The courts of appeals in Austin, Beaumont, Dallas, Fort Worth, Houston (14th District), San Antonio, and Tyler have followed.<sup>34</sup> Only the First Court of Appeals in Houston has declined to follow *Hanks* on the ground that the *Baker* court implicitly abandoned *Hanks*.<sup>35</sup>

In another series of cases, the Texas Supreme Court addressed how the absence of service of process affects a bill of review. In *Texas Industries, Inc. v. Sanchez*,<sup>36</sup> a per curiam decision, the court expressly approved the lower court's ruling that lack of service obviates the necessity of proving the second element, namely that the petitioner was prevented from making

his meritorious defense by the fraud, accident, or wrongful conduct of the opposing party.<sup>37</sup>

Subsequently, in *Peralta v. Heights Medical Center, Inc.*,<sup>38</sup> the Texas Supreme Court had the opportunity to consider whether the lack of service rendered proof of a meritorious defense unnecessary. In *Peralta*, the petitioner claimed that he had never been served and, therefore, did not need to establish any of the traditional elements.<sup>39</sup> The Texas court of appeals disagreed. Although the lack of service excused proof of the second element of a traditional bill of review, it did not excuse proof of a meritorious defense. Accordingly, the court upheld summary judgment against the petitioner. The Texas Supreme Court denied writ of error with the notation "no reversible error."<sup>40</sup> The U.S. Supreme Court reversed: "The Texas court held that the default judgment must stand absent a showing of a meritorious defense to the action in which judgment was entered without proper notice to appellant, a judgment that had substantial adverse consequences to appellant. By reason of the due process clause of the Fourteenth Amendment, that holding is plainly infirm."<sup>41</sup> Hence, lack of service obviates the necessity of proving the first element as well.

In *Caldwell v. Barnes*,<sup>42</sup> the Texas Supreme Court stated, without discussion or citation, that lack of service also established "want of fault or negligence."<sup>43</sup> In a subsequent appeal after remand,<sup>44</sup> the court reiterated the statement with considerably more force: "In *Caldwell*, we said this third and final element is conclusively established if the plaintiff can prove that he or she was never served with process."<sup>45</sup> Hence, lack of service, if established, obviates the necessity of proving any of the traditional elements.

Finally, in *Ross v. National Center for the Employment of the Disabled*,<sup>46</sup> the Texas Supreme Court once again emphasized the significance of service of process and dispelled the notion, espoused in several decisions, that a party who had not been properly served with process might nonetheless have a duty to take action regarding the suit.<sup>47</sup> In no uncertain terms, the court stated that a party who has not been properly served has no duty to act, diligently or otherwise, and, therefore, cannot be negligent in failing to act.<sup>48</sup>

## The Different Settings for a Bill of Review

Based on the foregoing Texas Supreme Court precedents and their progeny, there are at least five different settings for a bill of review, and each of them has different elements.

### Default Judgment With Service of Process — The Typical Case

In the typical case, the defendant has been properly served, fails to file an answer, and suffers a default judgment. The defendant seeks to set aside the judgment so that he or she may have the opportunity to defend against the allegations in the underlying suit. In this situation, the petitioner must plead and prove (1) a prima facie meritorious defense to the claim alleged

in the petition (2) which he was prevented from making by the fraud, accident, or wrongful act of the opposing party, or by official mistake, (3) unmixed with any fault or negligence on his part. The parameters of each of these elements will be discussed in greater detail below, but, as a “general and almost invariable rule,” each of these elements must be proven in the “usual” bill of review case.<sup>49</sup> This type of bill of review requires the petitioner to prove that the reason an answer was not filed was because of the wrongful conduct of the other party, or official mistake, unaccompanied by any negligence of the petitioner. *Alexander v. Hagedorn* was the “usual” bill of review case. There was no question that the defendant had been served. Nor was there any doubt that the defendant had a meritorious defense; he had an absolute defense.<sup>50</sup> Nonetheless, the bill of review was denied because he failed to establish the other two required elements.<sup>51</sup>

The “usual” bill of review is probably the most difficult. Establishing a meritorious defense may not present a problem, because a meritorious defense may consist of nothing more than the outright denial of the plaintiff’s claim. Explaining why an answer was never filed after proper service, however, presents a higher hurdle. Unless your case fits within the narrow exception afforded by *Hanks v. Rosser*, discussed below, the existence of negligence is almost a foregone conclusion. However, because the rules of procedure were changed after *Alexander* to require the clerk to send notice of judgment, the “typical” case will always involve the question of post-judgment notice and whether the petitioner was negligent in allowing the judgment to become final.

#### Default Judgment Without Proper Service of Process

As *Caldwell v. Barnes* and *Ross v. National Center* made clear, a bill of review is substantially different if a default judgment has been taken without proper service of process. Indeed, if the bill of review petitioner proves no service at all, the bill of review is concluded, the judgment must be set aside, and a new trial granted. The lack of service violates constitutional due process and obviates the need to prove any of the traditional elements.<sup>52</sup> “[I]n *Caldwell v. Barnes*, we held that a defendant who is not served with process is entitled to a bill of review without a further showing, because the Constitution discharges the first element, and lack of service establishes the second and third.”<sup>53</sup> A party who is not served with process cannot be at fault or negligent in allowing a default judgment to be taken because there is no duty to respond to the suit at all.<sup>54</sup>

Similarly, if a party proves that service was defective, the result is the same.<sup>55</sup> A default judgment cannot stand in the absence of valid service of process.<sup>56</sup> Because a bill of review is a direct attack on the default judgment, there are no presumptions in favor of valid issuance, service, or return of citation.<sup>57</sup> Nor is there any presumption in favor of compliance with substituted service procedures.<sup>58</sup> Hence, upon proof of defective

service, the petitioner is relieved of having to prove the traditional elements.<sup>59</sup>

Assuming that the facts of your case fit, this type of a bill of review proceeding may be the easiest and least expensive to pursue. The party need not allege or prove a meritorious defense, and the court does not conduct a pretrial hearing regarding meritorious defense.<sup>60</sup> One need only establish the lack of proper service. That issue, like any other, may be determined on summary judgment, but, if the facts regarding service are disputed, the parties are entitled to a jury trial on the issue.<sup>61</sup> The testimony of the petitioner, standing alone and uncorroborated, is not sufficient to overcome the presumption of service.<sup>62</sup>

#### Default Judgment — Loss of Right to File Motion for New Trial

This is the *Hanks v. Rosser* bill of review limited to those situations in which a party suffers a default judgment and fails to file a motion for new trial as the result of official mistake. To succeed in this type of case, the petitioner must allege and prove: (1) a failure to file a motion for new trial (2) as the result of official mistake, (3) the party’s failure to file an answer was not intentional or the result of conscious indifference, (4) the party has a meritorious defense to the allegations made in the underlying suit, and (5) no injury will result to the opposing party. This type of bill of review is still clearly available in eight of the 14 appellate districts.<sup>63</sup>

#### Judgment After Trial — Loss of Right to File Motion for New Trial or Appeal

This is the *Petro-Chemical* bill of review available after a trial on the merits, whether by bench, jury, or summary judgment. As in the *Hanks* bill of review, the petitioner complains of the loss of the right to move for new trial or appeal. Rather than proving a meritorious defense, however, the petitioner must prove a meritorious ground for new trial or appeal.<sup>64</sup> The petitioner must therefore allege and prove: (1) a prima facie meritorious ground for new trial or appeal (2) which the party was prevented from making by accident, fraud or wrongful conduct of the opposing party, or official mistake, (3) unmixed with any fault or negligence of his own. The petition should detail the errors committed in the trial court and set forth the grounds for new trial or appeal.<sup>65</sup>

At the pretrial hearing to determine whether the grounds asserted are meritorious, the petitioner should introduce the relevant pleadings from the underlying suit and any transcripts, if available, of the trial.<sup>66</sup> This can be critical to establishing the meritorious nature of your appellate claim, and it facilitates the trial court’s consideration of the alleged errors.

#### Dismissal of the Plaintiff’s Case

A bill of review is also available to the plaintiff in the underlying suit whose case has been dismissed.<sup>67</sup> Although the typical scenario involves a dismissal for want of prosecution, this bill of

review may be used in other dismissal situations as well.<sup>68</sup> Because a dismissal for want of prosecution is not a disposition on the merits, the first thing to be considered is whether a bill of review is even necessary; if the statute of limitations has not expired on the original cause of action, the suit may simply be re-filed. If a bill of review is necessary, the elements are: (1) a prima facie meritorious cause of action (2) which the party was prevented from making by accident, fraud or wrongful conduct of the opposing party, or official mistake, (3) unmixed with any fault or negligence on his own. In connection with this last element, a party to a suit is generally charged with notice that the suit may be dismissed for want of prosecution if there has been no action in the case for a long time.<sup>69</sup> Nonetheless, Rule 165(a) requires the clerk to send out two notices: notice of intent to dismiss and notice of actual dismissal.

### Procedural Issues

Given this substantive background, it is clear that the attorney's first step is to examine the court file in the underlying case as quickly as possible. Obtain and examine a copy of the petition and the return of service to ascertain if and how the client was served and whether strict compliance was observed with regard to the method of service employed. Ascertain, as well, whether any required notices were properly and timely mailed to the parties. Rule 239(a), for example, requires the clerk to mail notice of a default judgment to the parties. Rule 306(a) requires similar notice to be mailed in the case of any other judgment. Finally, as noted above, Rule 165(a) requires two notices. Because lack of service reduces the burden of proof, and because lack of notice establishes official mistake, these can be critical facts.

The attorney should also obtain a copy of the judgment and examine the date. In some cases, the attorney will quickly ascertain that there is still time to pursue a motion for new trial or normal appeal. If that is the case, and service was proper, a bill of review is not an available remedy; the party must instead pursue the available legal remedy.<sup>70</sup> In the more typical situation, however, the defendant does not find out about the judgment until it is too late. Quite commonly, the judgment creditor waits six months or more after the judgment before beginning collection efforts. By the time the defendant learns of the judgment, usually from a constable serving a writ of execution, critical time deadlines have expired. Obviously, the 30-day period to file a motion for new trial or to appeal has expired. In addition, the extended 120-day period available under Rule 306(a)(4) has lapsed.<sup>71</sup> Finally, the six-month period for filing a restricted appeal is gone.<sup>72</sup> The only possible remedy at that point is the bill of review.

### The Pleadings

Once the facts have been ascertained, and the decision has been made to pursue the bill of review, a petitioner must file a

sworn petition alleging factually and with particularity the basis for the bill of review.<sup>73</sup> In the typical case, that means the petition must contain sworn allegations of the facts sufficient to constitute a defense, the facts showing that the prior judgment was rendered as the result of fraud, accident or wrongful act of the opposing party, or official mistake, and the facts showing a lack of negligence on the petitioner's part.<sup>74</sup> Other settings require different allegations. As a practical matter, and in the service of the client, the attorney should always examine the potential availability of more than one type of bill of review. In that manner, if one type should fail, as, for example, if the client's contention of lack of service should be disproved, there may still be another avenue to set aside the judgment.

The petition is filed as an independent lawsuit with the judgment defendant as the bill of review plaintiff and the judgment plaintiff as the bill of review defendant. Service on the bill of review defendant is accomplished as in any other case. Venue and jurisdiction, however, are determined by law. A bill of review petition must be filed in the same court that rendered the underlying judgment.<sup>75</sup> As a practical matter, the petition should be entitled "Original Petition for Bill of Review" and, in the early paragraphs, designate the court which rendered the underlying judgment. Copies of relevant documents, such as the judgment in the underlying suit, should also be attached to the petition.

The petitioner should also always consider the availability of injunctive relief. The mere filing of a bill of review does not affect the finality or enforcement of the underlying judgment.<sup>76</sup> Because the typical judgment creditor waits months before attempting collection, the judgment defendant no longer can suspend enforcement of the judgment by filing a supersedeas bond. Injunctive relief, whether by temporary restraining order and/or temporary injunction, is entirely appropriate in the context of a bill of review and is frequently sought to protect the client during the pendency of the litigation.<sup>77</sup>

### The Pretrial Hearing

Once the petition has been filed and served, and the defendant has answered, the parties may conduct discovery, if necessary, to prepare for the pretrial hearing at which the court determines the issue of meritorious defense or claim.<sup>78</sup> The petitioner bears the burden of presenting prima facie proof to support the meritorious defense or claim, and the court decides the issue as a matter of law.<sup>79</sup> The petitioner should introduce the pleadings from the underlying suit and, if available, the transcript from the underlying hearing or trial to establish the nature of the original cause of action and to provide the trial court a basis for determining the existence of a meritorious defense or claim.<sup>80</sup> This should be done through the use of certified or stipulated copies and transcripts. It may also be done through a request for judicial notice.<sup>81</sup> The petitioner then puts on evidence in the normal fashion to establish the basis for the defense or claim.

If, as is frequently the case, the hearing is conducted solely to determine whether the defense or claim is meritorious, the hearing should generally not take as long as a normal contested evidentiary hearing because the burden of proof is different. The petitioner is not required to prove its defense by a preponderance of the evidence.<sup>82</sup> Hence, the court does not consider, and the opposing party need not introduce, any controverting evidence on the issue. The opposing party need offer evidence only if he or she believes it can establish that the claim is barred as matter of law. If the court determines that a meritorious defense or claim has been established, the remaining two issues are to be resolved based on a preponderance of the evidence standard.<sup>83</sup> If a meritorious defense or claim is not established, the court enters a final judgment denying the bill of review.

As in any other case, the parties are free to agree to have the court try some issues and not others.<sup>84</sup> The parties, therefore, have several options to resolve the issues. They can proceed in the normal fashion with a pretrial hearing limited solely to the issue of meritorious defense or claim, followed by a trial on the remaining two bill of review elements combined with the trial on the merits.<sup>85</sup> Alternatively, they can proceed with the pretrial hearing on meritorious defense or claim, followed by a separate hearing on the remaining two bill of review elements, followed by a trial on the merits.<sup>86</sup> Finally, the parties can agree to try to the court all three bill of review elements at the same time, leaving only a trial on the merits.<sup>87</sup> If the issues are tried to the court, the parties may request findings of fact and conclusions of law as in any other case tried to the court.<sup>88</sup> If the issues are tried to a jury, the jury questions submitting the merits of the underlying case are conditioned on affirmative findings to the questions submitting the bill of review.<sup>89</sup>

The procedure is different if the petitioner seeks a bill of review based solely on the absence of proper service. In that case, the trial court does not conduct a pretrial hearing on meritorious defense.<sup>90</sup> Instead, the court conducts a trial at which the petitioner bears the burden of proving that he or she was not served. If the trier of fact finds that there was no service, the bill of review is granted, the judgment set aside, and the parties revert to their original status as plaintiff and defendant with the burden on the original plaintiff to prove his or her case.<sup>91</sup>

## Examination and Examples of the Elements

The following sections discuss the elements in a bill of review case in which proper service is not an issue. Proof of the traditional elements is not required if the petitioner proves that there was no service of process<sup>92</sup> or that service of process was improper.<sup>93</sup>

### The Meritorious Defense or Claim

Depending on the particular type of bill of review the facts present, the petitioner must usually establish a prima facie meritorious defense, claim, or ground for appeal.<sup>94</sup> A prima facie

meritorious defense or claim is a defense or cause of action, respectively, that is not barred as a matter of law and would entitle the petitioner to judgment if the case were retried and no opposing evidence were offered.<sup>95</sup> The trial court therefore does not consider or weigh controverting evidence but rather decides the issue as a matter of law.<sup>96</sup>

Any type of defense, including the denial of the facts forming the basis for the underlying suit, may be raised.<sup>97</sup> If the petitioner adduces prima facie proof that refutes those facts, or at least refutes the facts supporting a key element of the underlying claim, the meritorious defense has been established. Thus, for example, in a claim in which the defendant's ownership of property is a key element, proof of non-ownership establishes a meritorious defense.<sup>98</sup> Similarly, a denial that the plaintiff in the underlying suit was the owner and holder of the promissory note and guaranty at issue constitutes a meritorious defense.<sup>99</sup> Alternatively, the petitioner's defense may go only to a part of the plaintiff's claim.<sup>100</sup>

A meritorious ground of appeal "is one which, had it been presented to the appellate court as designed, might, and probably would have, resulted in the judgment's reversal."<sup>101</sup> Analyzing this statement, the Amarillo Court of Appeals concluded that a meritorious ground of appeal did not require a complete reversal of the underlying judgment but rather only a modification of the judgment: "We therefore hold that a meritorious ground of appeal means a meritorious claim, whether that claim be a meritorious defense to the cause of action alleged to support the judgment or merely a meritorious basis for modification of the judgment in some respect." In determining whether a ground of appeal is meritorious, the trial court is to use appellate standards of review.<sup>103</sup>

### Fraud, Accident, or Wrongful Act of Your Opponent

Although the traditional elements of the bill of review always refer to "fraud, accident, or wrongful act" of the opposing party, most of the reported cases that discuss this element involve fraud.<sup>104</sup> Only "extrinsic" fraud may entitle the petitioner to relief in a bill of review.<sup>105</sup> Extrinsic fraud is "fraud that denies a losing party the opportunity to fully litigate at trial all the rights or defenses that could have been asserted."<sup>106</sup> It generally relates to the manner in which the judgment was procured or involves wrongful conduct that occurs outside of the lawsuit.<sup>107</sup> Intrinsic fraud, on the other hand, relates to the merits of the issues in the underlying case and either was, or should have been, litigated in the suit.<sup>108</sup> Examples of intrinsic fraud include fraudulent instruments, perjury,<sup>109</sup> or any matter that was actually presented to and considered by the trial court in rendering judgment.<sup>110</sup> As the Texas Supreme Court has stated,

An attack upon a judgment based on intrinsic fraud is not allowed because the fraudulent conduct may be properly exposed and rectified within the context of the underlying adversarial process itself. In contrast, a collateral attack on a

judgment on the basis of extrinsic fraud is allowed because such fraud distorts the judicial process to such an extent that confidence in the ability to discover the fraudulent conduct through the regular adversarial process is undermined.<sup>111</sup>

Generally speaking, the courts have defined extrinsic fraud without a great deal of detail as “keeping a party away from court, making false promises of compromise, denying a party knowledge of the suit.”<sup>112</sup> More specific examples include concealing a hearing from a party,<sup>113</sup> failing to notify all opposing parties of a trial setting or hearing,<sup>114</sup> false certification of the last known address of the opposing party,<sup>115</sup> a fiduciary’s concealment of material facts to induce an agreed or uncontested judgment,<sup>116</sup> fraudulent representations made to a party to induce the execution of an affidavit of relinquishment,<sup>117</sup> or false promises of compromise to induce the execution of an affidavit of relinquishment.<sup>118</sup> Fraudulent failure to serve a defendant without personal service in order to obtain a judgment against him without actual notice is also extrinsic fraud.<sup>119</sup>

The conduct of one’s own attorney cannot satisfy this element of a bill of review because the focus of this element is the conduct of the opposing party, and, the actions of the attorney are usually imputed to the client.<sup>120</sup> In the past, there had been a limited exception if the party’s own attorney “betrayed” the client, for example by dismissing or compromising the underlying suit without the party’s knowledge or consent,<sup>121</sup> but the exception was eliminated.<sup>122</sup>

## Official Mistake

“Official mistake” must involve a duty imposed by law on a judicial official.<sup>123</sup> In most instances, official mistake involves the failure of judicial personnel to send out required notices, such as the notice of default judgment required by Rule 239(a),<sup>124</sup> the notice of judgment required by Rule 306(a),<sup>125</sup> or the two notices under Rule 165(a) regarding dismissal for want of prosecution.<sup>126</sup> The reason for the failure to send the notice is irrelevant. Thus, for example, if the failure of the clerk to send notice of judgment was attributable to the failure of plaintiff’s counsel to certify the last known address, the lack of notice still constitutes official mistake.<sup>127</sup> The notices must also contain the information required by the rules and must be sent to the appropriate persons at the correct addresses.<sup>128</sup> This can be an important factor in a bill of review. One court has ruled that Rules 306(a) and 165(a) require that notice be sent to each attorney of record, not just lead counsel.<sup>129</sup> Furthermore, Rule 165(a)’s requirement that notice be sent to the address “shown on the docket or in the papers on file” has been interpreted to mean that the clerk must use the address that appears on the pleadings in the file, not the address that may appear in a central registry or database of attorneys.<sup>130</sup>

Official mistake may also be proven by showing the clerk provided erroneous information to the party, such as, that no default judgment has been entered when in fact one has

been.<sup>131</sup> Official mistake is also demonstrated by the entry of default judgment when an answer is already on file.<sup>132</sup>

Official mistake is not established by proving that an official failed to perform a promise to do something outside the scope of their official duties. For example, in *Alexander v. Hagedorn*, the district clerk allegedly informed Alexander there would be no court that week, but that he would advise him when court next convened so he could make his appearance.<sup>133</sup> The clerk failed to follow through, and Alexander suffered a default judgment.<sup>134</sup> The court ruled there was no official mistake because the clerk promised to do something that was not within the scope of his official duties.<sup>135</sup> Finally, official mistake does not include the actions of one’s own attorney.<sup>136</sup> To the contrary, the negligence of the attorney is attributable to the client and hence cannot form the basis for a bill of review.<sup>137</sup>

## Lack of Fault or Negligence

The negligence component actually comprises two separate inquiries. Was the petitioner negligent in allowing the judgment to be taken in the first place, or was the petitioner negligent in allowing it to become final? The first inquiry often arises in the context of a default judgment and implicates service of process. If service of process was not accomplished or was defective, there is no duty to file an answer, and, hence, there can be no negligence in failing to file an answer.<sup>138</sup> This is true even if the petitioner knew about the lawsuit and allowed the default to be taken.<sup>139</sup> If, on the other hand, service was proper, it is difficult to demonstrate a lack of negligence in failing to file an answer. The negligence standard is more difficult to satisfy than the traditional motion for new trial standard.<sup>140</sup> For that reason, there are not too many cases in which the petitioner successfully established a lack of negligence.<sup>141</sup> In most cases, the petitioner is found negligent for doing nothing at all or for failing to do that which would have apprised him of the suit.<sup>142</sup>

Once a party has made an appearance, the inquiry shifts to the manner in which the party or attorney kept apprised of case developments. The case law in this area is inconsistent. Some courts have applied a rigorous standard of constructive notice, holding that the party and its counsel are chargeable, as a matter of law, with notice of actions taken in the case up to and including judgment even though the party has no actual notice.<sup>143</sup> Under this standard, it is difficult to conceive of many instances in which the attorney or party would not be negligent in failing to prevent rendition, or discover the existence, of a judgment. Other courts, usually in more recent decisions, have applied a standard more consistent with the concept of negligence: “whether the litigant and his counsel used such care as prudent and careful men would ordinarily use in their own cases of equal importance.”<sup>144</sup> Under this standard, the focus is almost always on the activity, or, better stated, inactivity of the attorney and the imputation of that inaction to the client. An attorney’s failure to make reasonable inquiries regarding his pending liti-

gation constitutes the failure to exercise diligence<sup>145</sup> and, because of the law of agency, that failure is imputed to the client.<sup>146</sup>

In some cases, the existence of negligence is clear, for example, failing to move to retain a case when the attorney has received proper notice of intent to dismiss, or failing to appear at trial although properly notified, or neglecting a case for three years prior to judgment and two years after.<sup>147</sup> Other cases are not as clear. In one case, for example, a jury found negligence in failing to make any inquiry of the court over a three-month period;<sup>148</sup> yet in another, the jury found no negligence where there was no inquiry over a 10-month period.<sup>149</sup> Some inquiry at least transforms the issue into a question for the fact-finder.<sup>150</sup>

Moreover, the courts seem to relax the standard in the absence of required notice. For example, in *Gold v. Gold*, the case was dismissed for want of prosecution but no notices were sent.<sup>151</sup> In part, the trial court had denied the bill of review because the attorney failed to exercise diligence in discovering that the case had been dismissed. Reversing and remanding, the Supreme Court stated that the “attorney had no duty to find out more about the status of the case until she had some reason to suspect it had been dismissed.”<sup>152</sup> In *Coker v. Blevins*, the court went even further; because the party proved it did not receive notice of the summary judgment hearing, proof of non-service conclusively established a lack of fault or negligence.<sup>153</sup>

The second inquiry, whether the petitioner was negligent in allowing the judgment to become final, focuses on what the attorney or client did after the judgment. It includes showing due diligence in pursuing available legal remedies.<sup>154</sup> As a general rule, the failure to seek a new trial, appeal, or reinstatement, if the attorney can timely do so, is negligence.<sup>155</sup> So, too, is filing a timely motion for new trial and then abandoning it.<sup>156</sup> Finally, failing to pursue an appeal following the denial of a motion for new trial will also bar a bill of review.<sup>157</sup>

A petitioner is not, however, required to pursue a restricted appeal, formerly known as a writ of error, as a prerequisite to a bill of review.<sup>158</sup> A party may pursue the restricted appeal if the party believes it can satisfy the elements, but, frequently, the bill of review procedure proffers some advantages. First, it allows the trial court an opportunity to correct the judgment without having to engage in an appeal.<sup>159</sup> Second, in a bill of review, the court may consider all of the facts, not just those that appear on the face of the record.<sup>160</sup> Third, discovery is available in a bill of review, but not in a restricted appeal.<sup>161</sup> Finally, a bill of review petitioner may more readily obtain an injunction from the trial court rather than an appellate court to stop collection efforts.

## Defenses

A bill of review falls within the residual statute of limitations and, therefore, must be filed within four years of the date of the judgment.<sup>162</sup> The only exception to this is if the petitioner shows extrinsic fraud, essentially establishing that the suit or

judgment was fraudulently concealed.<sup>163</sup> In that case, the statute of limitations does not commence to run until the party discovered, or should have discovered, the fraud.<sup>164</sup> Because a bill of review is an equitable remedy, equitable defenses also apply, at least theoretically, but they present some unusual issues. Unclean hands, evidenced by discovery abuse in the underlying lawsuit, for example, has been applied to deny a party relief by bill of review, but the basis for the application is questionable.<sup>165</sup> Laches is also available but would not bar a bill of review so long as it was filed within four-year statute of limitations.<sup>166</sup>

## Appeal

Only one final judgment is entered in a bill of review proceeding.<sup>167</sup> If the bill of review is denied, the court enters a final judgment denying the bill of review, and that judgment can be appealed. If the court grants the bill of review, however, that order is unappealable because it is interlocutory.<sup>168</sup> It can be appealed only with a final judgment on the merits of the underlying case and is reviewed under an abuse of discretion standard.<sup>169</sup> If the appeal of the bill of review part of the judgment concerns questions of law, such as whether the petitioner presented prima facie proof of a meritorious defense, the review standard is de novo.<sup>170</sup> As in any other case, to the extent the bill of review elements are tried without a jury, a party may request findings of fact and conclusions of law.<sup>171</sup>

## Conclusion

Many lawyers may never encounter a bill of review, but that should not be because they did not recognize its potential application. It remains the last possible avenue for relief for sometimes desperate clients in a number of different situations.

## Notes

1. *Baker v. Goldsmith*, 582 S.W.2d 404, 406 (Tex. 1979).
2. *McEwen v. Harrison*, 162 Tex. 125, 345 S.W.2d 706, 709 (Tex. 1961).
3. *Baker*, 582 S.W.2d at 407-08.
4. *Petro-Chemical Transport, Inc. v. Carroll*, 514 S.W.2d 240, 246 (Tex. 1974).
5. The Texas Rules of Civil Procedure provide only the following in Rule 329(b): On expiration of the time within which the trial court has plenary power, a judgment cannot be set aside by the trial court except by a bill of review for sufficient cause, filed within the time allowed by law.”
6. *Alexander v. Hagedorn*, 148 Tex. 565, 226 S.W.2d 996 (1950).
7. *Ross v. National Center for the Employment of the Disabled*, 49 Tex. S.Ct. J. 760, 2006 Tex. LEXIS 551 at \*3-4 (June 16, 2006)(per curiam)(publication status pending).
8. *McDaniel v. Hale*, 893 S.W.2d 652 (Tex. App.—Amarillo 1994, writ denied).
9. This particular statement of the elements is not found in the cases, but represents a combination of the holdings from the cases cited in this article.
10. *Caldwell v. Barnes*, 975 S.W.2d 535, 537-38 (Tex. 1998); *Wembley Investment Co. v. Herrera*, 11 S.W.3d 924, 927 (Tex. 1999).
11. *Petro-Chemical Transport, Inc. v. Carroll*, 514 S.W.2d 240, 245-46 (Tex. 1974)(judgment after trial on the merits); *Gonzales v. Mann*, 584 S.W.2d 928, 931 (Tex. App.—Houston [14th Dist.] 1979, writ ref’d n.r.e.)(dis-

- missal for failure to answer interrogatories); *Wolfe v. Grant Prideco, Inc.*, 53 S.W.3d 771, 773-74 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) (dismissal for want of prosecution).
12. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003).
  13. *Alexander v. Hagedorn*, 148 Tex. 565, 226 S.W.2d 996, 998 (Tex. 1950).
  14. See *Hanks v. Rosser*, 378 S.W.2d 31, 38 (Tex. 1964) (Griffin, J., dissenting) (“These three requisites were first mentioned in the jurisprudence of this State in the case of *Goss v. McClaren*, 17 Tex. 107 (1856)”).
  15. *Alexander v. Hagedorn*, 148 Tex. 565, 226 S.W.2d 996 (Tex. 1950).
  16. *Hanks v. Rosser*, 378 S.W.2d 31 (Tex. 1964).
  17. In “*Equitable Bill of Review: Unraveling the Cause of Action that Confounds Texas Courts*,” 48 *Baylor Law Review* 623, 648-51 (Brauch, Roger Jr. and Paul Sewell) (Summer 1996) (hereafter *Unraveling*), the authors make a compelling argument that *Hanks* did not actually change or intend to change the standard but rather only appeared to do so because the opinion was poorly written and has since been repeatedly misinterpreted. The courts, however, have continued to treat *Hanks* as having changed the law, perhaps because, at the time of the decision, the dissent clearly suggested that a change in the law had indeed been the topic of debate: “The law with regard to bills of review as it has existed since the beginning of Texas jurisprudence has been changed by the majority opinion here.” *Hanks*, 378 S.W.3d at 36 (Griffin, J. dissenting).
  18. *Petro-Chemical Transport, Inc. v. Carroll*, 514 S.W.2d 240, 245-46 (Tex. 1974).
  19. *Petro-Chemical* was not the first Texas Supreme Court decision to recognize that a bill of review would be an appropriate remedy in such a situation. See *Overton v. Blum*, 50 Tex. 417, 425-26 (1878).
  20. At the time of *Petro-Chemical*, the rule was designated Rule 306(d). It has since been changed to Rule 306(a).
  21. *Carroll v. Petro-Chemical Transport, Inc.*, 502 S.W.2d 871, 879 (Tex. Civ. App.—Beaumont 1973), modified, and as modified, affirmed, 514 S.W.2d 240 (Tex. 1974).
  22. *Petro-Chemical*, 514 S.W.2d at 244.
  23. *Id.*
  24. *Id.* at 246.
  25. *Baker v. Goldsmith*, 582 S.W.2d 404 (Tex. 1979).
  26. *Id.* at 408.
  27. *Id.* at 408-09.
  28. *Id.*
  29. *Id.* at 409.
  30. *Id.* at 406.
  31. *Id.* at 407 (two indirect citations) and 408 (direct citation).
  32. *Id.*
  33. *McDaniel v. Hale*, 893 S.W.2d 652, 660, 662 (Tex. App.—Amarillo 1994, writ denied).
  34. *Alford v. Cary*, No. 12-04-00314-CV, 2005 Tex. App. LEXIS 8638 at \*9-10 (Tex. App.—Tyler Oct. 19, 2005, pet. filed) (memorandum opinion); *Optimum Asset Management, Inc. v. Cito International, Inc.*, No. 05-96-00078-CV, 1998 Tex. App. LEXIS 3110 at \*10-11 (Tex. App.—Dallas May 26, 1998, no pet.) (not designated for publication); *Pope v. Moore*, 729 S.W.2d 125, 127 (Tex. Civ. App.—Dallas 1987, writ ref’d n.r.e.); *City of Laredo v. Threadgill*, 686 S.W.2d 734, 735 (Tex. Civ. App.—San Antonio 1985, no writ); *Vaughan v. American Indemnity Co.*, 592 S.W.2d 22, 23 Tex. Civ. App.—Beaumont 1997, writ ref’d n.r.e.); *Continental Casualty Co. v. Davilla*, 129 S.W.3d 374, 384 (Tex. App.—Fort Worth 2004, no pet.); *Seacoast, Inc. v. LaCouture*, No. 03 00-00178-CV, 2000 Tex. App. LEXIS 8486 at \*8 (Tex. App.—Austin Dec. 21 2000, pet. denied) (not designated for publication); *Crabbe v. Hord*, 536 S.W.2d 409, 412 (Tex. App.—Fort Worth 1976, writ ref’d n.r.e.).
  35. *Hernandez v. Koch Machinery Co.*, 16 S.W.3d 48, 58 n.7 (Tex. App.—Houston [1st Dist.] 2000, pet. denied); *State of Texas v. Sowell*, 01-94 00577-CV, 1995 Tex. App. LEXIS 1945 at \*5 (Tex. App.—Houston [1st Dist.] Aug. 17, 1995, no pet.) (not designated for publication). In a footnote, the *Hernandez* court distinguished, without comment, two previous First Court opinions to the contrary. See *Rund v. Trans East, Inc.*, 824 S.W.2d 713 (Tex. App.—Houston [1st Dist.] 1992, writ denied) and *Buckler v. Tate*, 572 S.W.2d 562 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ). The most recent decision out of the First Court of Appeals adopts the position espoused in *Unraveling*, referenced in note 17 above. See *Clarendon National Insurance Co. v. Thompson*, No. 01-05-01071-CV, 2006 Tex. App. LEXIS 6420 at \*8-10 (Tex. App.—Houston [1st Dist.] July 20, 2006, orig. proceeding).
  36. *Texas Industries, Inc. v. Sanchez*, 525 S.W.2d 870 (Tex. 1975) (per curiam).
  37. *Id.* Because official mistake is an alternative second element, lack of service would similarly relieve a petitioner from proving this element. See *Caldwell v. Barnes*, 154 S.W.3d 93 (Tex. 2004).
  38. *Peralta v. Heights Medical Center, Inc.*, 715 S.W.2d 721 (Tex. App.—Houston [1st Dist.] 1986, writ ref’d n.r.e., rev’d, 485 U.S. 80 (1988)).
  39. *Id.* at 722.
  40. 485 U.S. 80, 83-84.
  41. *Id.* at 87.
  42. *Caldwell v. Barnes*, 975 S.W.2d 535 (Tex. 1998).
  43. *Id.* at 537.
  44. *Caldwell v. Barnes*, 154 S.W.3d 93 (Tex. 2004).
  45. *Id.* at 97.
  46. *Ross v. National Center for the Employment of the Disabled*, 49 Tex. S.Ct. J. 760, 2006 Tex. LEXIS 551 (June 16, 2006) (per curiam) (publication status pending).
  47. *Id.* at \*3-5. In light of *Ross*, cases which have imposed a duty of diligence to pursue a new trial or appeal based upon acquiring notice after judgment but without service of process are no longer good precedent. See, e.g., *Dispensa v. University State Bank*, 987 S.W.2d 923, 925-26 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *Layton v. NationsBanc Mortgage Corp.*, 141 S.W.3d 760, 763 (Tex. App.—Corpus Christi 2004, no pet.).
  48. *Ross*, 2006 Tex. LEXIS 551 at \*5; See also *Wilson v. Dunn*, 800 S.W.2d 8333, 836 (Tex. 1990) (“A party who becomes aware of the proceedings without proper service of process has no duty to participate in them.”).
  49. *Petro-Chemical Transport, Inc. v. Carroll*, 514 S.W.2d 240, 243 (Tex. 1974).
  50. *Hagedorn* had been sued for negligently having allowed his alleged cow to wander in the road. His defense was that it was not his cow. *Alexander*, 226 S.W.2d at 997.
  51. *Alexander v. Hagedorn*, 148 Tex. 565, 226 S.W.2d 996, 1002 (Tex. 1950). “Official mistake” was not a part of the bill of review formulation at the time of *Alexander*. Nonetheless, the court, in examining whether the defendant had been negligent, extensively discussed whether the court officer’s conduct was within or without the scope of official duties, and determined that the clerk’s statements to *Hagedorn* were outside the scope of her official duties and, thus, could not furnish a basis for setting aside the judgment. Ultimately, in *Hanks v. Rosser*, “official mistake” became, not an alternative to proving lack of negligence, but an alternative to proving fraud, accident, or wrongful conduct of the other party.
  52. *Caldwell v. Barnes*, 154 S.W.3d 93, 96-97 (Tex. 2004) (per curiam).
  53. *Ross v. National Center*, 2006 Tex. LEXIS 551 at \*3-4 (citing *Caldwell v. Barnes*).
  54. *Caldwell*, 154 S.W.3d at 97; *Ross v. National Center*, 2006 Tex. LEXIS 551 at \*3-4.
  55. Previous authorities have opined that, if service were defective instead of non-existent, the petitioner still had to show a meritorious defense and due diligence in pursuing other legal remedies such as a motion for new trial or appeal. See, e.g., William R. Trail and Julia A. Beck, *Peralta v. Heights Medical Center, Inc.: A Void Judgment Is a Void Judgment—Bill of Review and Procedural Due Process in Texas*, 40 *Baylor Law Review* 367, 380 (1988); *McDaniel v. Hale*, 893 S.W.2d 652, 663 (Tex. App.—Amarillo 1994, writ denied). The Texas Supreme Court decision in *Ross*, *supra*, clearly eliminated such a distinction.
  56. *American Universal Ins. Co. v. D.B. & B., Inc.*, 725 S.W.2d 764, 766 (Tex. App.—Corpus Christi 1987, writ ref’d n.r.e.).

57. *McGraw-Hill, Inc. v. Futrell*, 823 S.W.2d 414, 417 (Tex. App.—Houston [1st Dist.] 1992, writ denied); *Ashley Forest Apartments v. Almy*, 762 S.W.2d 293, 294-95 (Tex. App.—Houston [14th Dist.] 1988, no writ).
58. *Id.*
59. See, e.g., *Gunnerman v. Basic Capital Management, Inc.*, 100 S.W.3d 821, 826 (Tex. App.—Dallas 2003, pet. denied)(without proper service, defendant did not have to prove traditional elements); *Granderson v. Ross*, No. 14-03 00296-CV, 2004 Tex. App. Lexis 2633 at \*3-5 (Tex. App.—Houston [14th Dist.] March 25, 2004, no pet.)(memorandum opinion)(Defendant served with incomplete copy of petition was not required to prove meritorious defense or fraud, accident or wrongful mistake of opponent); *Rodriguez v. Uvalde Care Center, L.L.C.*, No. 04-04-00269-CV, 2004 Tex. App. Lexis 9007 at \*5 (Tex. App.—San Antonio Oct. 13, 2004, no pet.)(released for publication Feb. 9, 2005)(because of defective return, service was defective, and petitioner did not need to establish traditional elements). *Gunnerman* and *Granderson* nonetheless still implied that the petitioner had to show due diligence in pursuing other legal remedies, but, after *Ross*, it is clear that no such duty exists for one who has not been properly served.
60. *Caldwell*, 154 S.W.3d at 97-98.
61. *Id.* at 96-97. The case is worth reading just to see how interesting a fact question the issue of service can present.
62. *Id.* at 98 n.3. See *Min v. Avila*, 991 S.W.2d 495 (Tex. App.—Houston [1st Dist.] 1999, no pet.) for a discussion of the types of corroborating evidence considered.
63. See notes 33 and 34, *supra*.
64. *Petro-Chemical Transport, Inc. v. Carroll*, 514 S.W.2d 240, 245 (Tex. 1974).
65. *Id.* at 246.
66. *Id.*; *Thomason v. Freberg*, 588 S.W.2d 821, 826 (Tex. Civ. App.—Corpus Christi 1979, no writ); *Wadkins v. Diversified Contractors, Inc.*, 734 S.W.2d 142, 143 (Tex. App.—Houston [1st Dist.] 1987, no writ).
67. See, e.g., *Canon v. ICO Tubular Services, Inc.*, 905 S.W.2d 380 (Tex. App.—Houston [1st Dist.] 1995, no writ); *Wolfe v. Grant Prideco, Inc.*, 53 S.W.3d 771, 773-74 (Tex. App.—Houston [1st Dist.] 2001, pet. denied);
68. See, e.g., *Gonzales v. Mann*, 584 S.W.2d 928, 931 (Tex. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.)(dismissal for failure to answer interrogatories).
69. *Lowe v. U.S. Shoe Corp.*, 849 S.W.2d 888, 891 (Tex. App.—Houston [14th Dist.] 1993, writ denied).
70. *Rizk v. Mayad*, 603 S.W.2d 773, 775 (Tex. 1980).
71. Rule 306(a)(4) provides that, in certain circumstances when notice of judgment is not received, post-judgment deadlines do not begin to run for a period of up to 90 days.
72. The six-month period to file a restricted appeal, formerly known as a writ of error, is set forth in Tex. Civ. Prac. & Rem. Code §51.013; Tex. R. App. Pro.26.1(c). As will be discussed later, one need not pursue a restricted appeal before filing a bill of review.
73. *Baker v. Goldsmith*, 582 S.W.2d 404, 408 (Tex. 1979).
74. *Id.*
75. *Rodriguez v. EMC Mortgage Corp.*, 94 S.W.3d 795, 797 (Tex. App.—San Antonio 2002, no pet.)
76. *Schwartz v. Jefferson*, 520 S.W.2d 881, 889 (Tex. 1975); *City of Houston, Texas v. Hill*, 792 S.W.2d 176, 179 (Tex. App.—Houston [1st Dist.] 1990, writ dismd by agr.); *Spears v. Haas*, 718 S.W.2d 756, 758 (Tex. App.—Corpus Christi 1986, orig. proceeding)
77. See, e.g., *Petro-Chemical*, 514 S.W.2d 240, 242; *City of Houston, Texas v. Hill*, 792 S.W.2d 176, 179 (Tex. App.—Houston [1st Dist.] 1990, writ dismd by agr.); *American Fidelity Fire Insurance Co. v. Pixley*, 687 S.W.2d 50 (Tex. App.—Houston [14th Dist.] 1985, no writ).
78. *Gold v. Gold*, 145 S.W.3d 212, 214 (Tex. 2004); *Baker v. Goldsmith*, 582 S.W.2d 404, 408-09 (Tex. 1979)(“The proof may be presented, as in any other case, through discovery products, and the opposing party may present similar proof that the claim is barred as a matter of law.”). See also *State of Texas v. Sowell*, 01-94-00577-CV, 1995 Tex. App. LEXIS 1945 at \*11-13 (Tex. App.—Houston [1st Dist.] Aug. 17, 1995, no pet.)(not designated for publication)(court rejected contention that discovery was not allowed in a bill of review).
79. *Baker*, 582 S.W.2d at 408-09.
80. *Petro-Chemical*, 514 S.W.2d at 246; *McDaniel v. Hale*, 893 S.W.2d 652, 674 (Tex. App.—Amarillo 1994, writ denied); *Mackay v. Charles Sexton Co.*, 469 S.W.2d 441, 444 (Tex. Civ. App.—Dallas 1971, no writ)(failure to introduce pleadings from underlying suit does not present anything for the court to review; conclusory statements of meritorious defense are not sufficient).
81. *McDaniel v. Hale*, 893 S.W.2d 652, 673 (Tex. App.—Amarillo 1994, writ denied) concluded that introduction of the transcript is not required, and that, if the judge trying the bill of review case is the same judge who tried the underlying case, he may take judicial notice of the underlying trial for purposes of determining the meritorious element.
82. *Baker v. Goldsmith*, 582 S.W.2d 408-09.
83. *Id.* at 409
84. Rule 174 confers broad discretion on trial courts to order a separate trial on any separate issue. See *Warren v. Walter*, 414 S.W.2d 423, 424 (Tex. 1967).
85. This is the procedure outlined in *Baker*.
86. See, e.g., *Baker*, 582 S.W.2d at 409; *Martin v. Martin*, 840 S.W.2d 586, 591 (Tex. App.—Tyler 1992, writ denied); *Conrad v. Orellana*, 661 S.W.2d 309, 311 (Tex. App.—Corpus Christi 1983, no writ) (after meritorious defense established, trial court conducted jury trial on remaining two elements). See also *Caldwell v. Barnes*, 154 S.W.3d at 97-98 (implying parties could assent to non-jury determination regarding service of process).
87. See, e.g., *The Commission of Contracts of the General Executive Committee of the Petroleum Workers Union of the Republic of Mexico v. Arriba, Ltd.*, 882 S.W.2d 576, 580 (Tex. App.—Houston [1st Dist.] 1994, no writ)(parties tried bill of review elements to bench).
88. Rule 296 permits findings of fact and conclusions of law in any case tried to the court without a jury. Findings of fact and conclusions of law are frequently requested and issued in bill of review proceedings. See, e.g., *Alexander v. Hagedorn*, 226 S.W.2d at 997; *Hanks v. Rosser*, 378 S.W.2d at 35; *West Columbia National Bank v. Griffith*, 902 S.W.2d 201, 205 (Tex. App.—Houston [1st Dist.] 1995, writ denied).
89. *Baker*, 567 S.W.2d at 594 (Shannon, J., concurring).
90. *Caldwell v. Barnes*, 154 S.W.3d at 97-98.
91. *Id.* at 97.
92. *Id.*; *Texas Industries, Inc. v. Sanchez*, 521 S.W.2d 133, 135 (Tex. Civ. App.—Dallas 1975), writ ref'd n.r.e. per curiam, 525 S.W.2d 870 (Tex. 1975)(service not accomplished when sheriff left petition and citation in unsealed envelope next to person sought to be served and did not inform person of contents).
93. See note 59. One case has extended the effect of “non-service” to the situation in which a party was not provided notice of a summary judgment hearing. See *Coker Equipment, Inc. v. Blevins*, No. 04-04-00776-CV, 2005 Tex. App. LEXIS 8582, \*2 (Tex. App.—San Antonio Oct. 19, 2005, no pet.)(memorandum opinion).
94. The meritorious defense is excused in certain instances. See *Lopez v. Lopez*, 757 S.W.2d 721, 722-23 (Tex. 1988)(defendant who did not receive notice of trial not required to prove meritorious defense to obtain new trial); *State of Texas v. Sowell*, *supra*, (clerk’s failure to provide notice of intent to dismiss for want of prosecution and notice of actual dismissal excused necessity to prove meritorious defense).
95. *Baker v. Goldsmith*, 582 S.W.2d 404, 408-09 (Tex. 1979).
96. *Id.*
97. See, e.g., *Mabon Limited v. Afri-Carib Enterprises, Inc.*, 2005 Tex. App. LEXIS 3605 at \*8 (Tex. App.—Houston [1st Dist.] 2005, no pet.)(memorandum opinion)(bill of review petitioner established prima facie case that statute of limitations had expired prior to suit. Petitioner also alleged defect of parties, illegal contract, and release as meritorious defenses); *Baker v. Goldsmith*, 582 S.W.2d 404, 406 (Tex. 1979)(examples of defenses alleged in bill of review petition).

98. *Alexander v. Hagedorn*, 148 Tex. 565, 226 S.W.2d 996 (1950).
99. *Petro Express, Ltd. v. Horkey Oil Co.*, No. 07-03-0313-CV, 2004 Tex. App. LEXIS 11528 at \*7 (Tex. App.—Amarillo Dec. 21, 2004, no pet.) (memorandum opinion).
100. *McDaniel v. Hale*, 893 S.W.2d 652, 666-67 (Tex. App.—Amarillo 1994, writ denied). See also *Talley v. Talley*, No. 05-02-00753-CV, 2002 Tex. App. LEXIS 8355 at \*11-12 (Tex. App.—Dallas Nov. 25, 2002, no pet.) (not designated for publication) (unequal division of property in divorce constituted meritorious defense).
101. *McDaniel v. Hale*, 893 S.W.2d 652, 667 (Tex. App.—Amarillo 1994, writ denied).
102. *Id.*
103. *Id.*
104. The author has found no recent cases in which “accident” has satisfied the second element of a bill of review. For older cases, see *Unraveling*, 48 *Baylor Law Review* at 634-35.
105. *Alexander v. Hagedorn*, 148 Tex. 565, 226 S.W.2d 996, 1001-02 (1950).
106. *Browning v. Prostok*, 165 S.W.3d 336, 347 (Tex. 2005).
107. *Id.*; *Lambert v. Coachmen Industries of Texas, Inc.*, 761 S.W.2d 82, 88 (Tex. App.—Houston [14th Dist.] 1988, writ denied) (failure to notify opposing counsel of hearing).
108. *Id.*
109. *Wise v. Fryar*, 49 S.W.3d 450, 455 (Tex. App.—Eastland 2001, pet. denied) (alleged lying about parentage in a divorce and custody proceeding is intrinsic fraud).
110. *E.g. Browning v. Prostok*, 165 S.W.3d 336, 349 (Tex. 2005) (alleged fraud involving misrepresentation of company value was intrinsic fraud because the issue of value had been presented and considered by bankruptcy court over two years before state court suit was filed).
111. *Id.* at 348.
112. See, e.g., *Temple v. Archambo*, 161 S.W.3d 217, 224 (Tex. App.—Corpus Christi 2005, no pet. h.); *Ince v. Ince*, 58 S.W.3d 187, 190 (Tex. App. Waco 2001, no pet.).
113. *Stinnette v. Mauldin*, 251 S.W.2d 186, 217 (Tex. Civ. App.—Eastland 1952, writ ref’d n.r.e.).
114. *Phillips v. Hopwood*, 329 S.W.2d 452, 454 (Tex. Civ. App.—Houston 1959, writ ref’d n.r.e.). Whether the failure to provide notice was intentional or accidental, it would meet the requirement that there be “fraud, accident or wrongful conduct of the opposing party.” *Lambert v. Coachmen Industries of Texas, Inc.*, 761 S.W.2d 82, 88 (Tex. App.—Houston [14th Dist.] 1988, writ denied) (failure to notify opposing counsel of hearing). Although an attorney may be under a duty to advise an opponent of a hearing, an attorney is under no duty to advise an opponent of the entry of judgment. See *Carroll v. Petro-Chemical Transport, Inc.*, 502 S.W.2d 871, 878 (Tex. Civ. App.—Beaumont 1973), rev’d o.g., 514 S.W.2d 240 (Tex. 1974).
115. *Lee v. Thomas*, 534 S.W.2d 422, 427 (Tex. App.—Waco 1976, writ ref’d, n.r.e.).
116. *Browning v. Prostok*, 165 S.W.3d 336, 348 (Tex. 2005). As the Court recognized, while concealment of a material fact by a fiduciary generally is extrinsic fraud, where “the alleged specific fraudulent acts were known and in issue in the prior suit, the fraud is intrinsic.” *Id.* See also *Vickery v. Vickery*, No. 01-94-01004-CV, 1997 Tex. App. LEXIS 6275 at \*72 (Tex. App.—Houston [1st Dist.] Dec. 4, 1997, pet. denied) (not designated for publication) (false representations made to induce agreement to uncontested divorce constituted extrinsic fraud).
117. *Rogers v. Searle*, 544 S.W.2d 114, 115 (Tex. 1976).
118. *In the Interest of S.A.B.*, No. 04-01-00795-CV, 2002 Tex. App. LEXIS 5053 at \*9 (Tex. App.—San Antonio July 17, 2002, no pet.) (not designated for publication).
119. *Forney v. Jorrie*, 511 S.W.2d 379, 384-84 (Tex. Civ. App.—San Antonio 1974, writ ref’d n.r.e.).
120. *Gracey v. West*, 422 S.W.2d 913, 917-18 (Tex. 1968).
121. See *Alexander v. Hagedorn*, 148 Tex. 565, 574, 226 S.W.2d 996, 1001 (1950); *Pierce v. Terra Mar Consultants, Inc.*, 566 S.W.2d 49, 52 (Tex. Civ. App.—Texarkana 1978, writ dismissed w.o.j.) (nonsuit of plaintiff’s case without consent was not only a betrayal of the client but a fraud on the court); *Gracey v. West*, 422 S.W.2d at 917 (distinguishing betrayal from negligence).
122. See *Transworld Financial Services Corp. v. Briscoe*, 722 S.W.2d 407, 408 (Tex. 1987); *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 752 (Tex. 2003).
123. See *Mowbray v. Avery*, 76 S.W.3d 663, 685 (Tex. App.—Corpus Christi 2002, pet. denied) (Declining to find a district attorney an “official” for purposes of a bill of review, the court stated, “Common to all of these descriptions [of official] when examined in the context of the bill of review cases in which they appeared is that the official was always under the direct supervision of the court that rendered the judgment or charged with duties that were directly imposed by that court (or by way of appropriate statutes or regulations) for the proper administration of that court’s functions and, in those matters, acting on the court’s behalf.”) See also *Remington Investments, Inc. v. Connell*, 971 S.W.2d 140, 143 (Waco 1998, no pet.) (refusing to treat a postal employee as an official).
124. *Alford v. Cary*, No. 12-04-00314-CV, 2005 Tex. App. LEXIS 8638 at \*9-10 (Tex. App.—Tyler Oct. 19, 2005, pet. filed) (memorandum opinion); *Buckler v. Tate*, 572 S.W.2d 562, 564 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ) (failure to send notice of default judgment under Rule 239(a); no difference between 239(a) and 306(d) for bill of review purposes).
125. *Petro-Chemical Transport, Inc. v. Carroll*, 514 S.W.2d 240, 245-46 (Tex. 1974).
126. *Cannon v. ICO Tubulars, Inc.*, 905 S.W.2d 380, 387 (Tex. App.—Houston [1st Dist.] 1995, no writ).
127. *City of Laredo v. Threadgill*, 686 S.W.2d 734, 735 (Tex. App.—San Antonio 1985, no writ). The opposing attorney’s failure to certify correctly the last known address is, in itself, wrongful conduct which would satisfy the second element. See *Lee v. Thomas*, 534 S.W.2d 422, 427 (Tex. App.—Waco 1976, writ ref’d n.r.e.).
128. *Cannon v. ICO Tubulars, Inc.*, 905 S.W.2d 380, 388 (Tex. App.—Houston [1st Dist.] 1995, no writ) (failure of Rule 165(a) notice to state the date and place of dismissal hearing constituted official mistake).
129. *Id.* The ruling certainly expands the duty of court clerks. Rule 8 provides only that “All communications from the court or other counsel with respect to a suit shall be sent to the attorney in charge.”
130. *Wolfe v. Grant Prideco, Inc.*, 53 S.W.3d 771, 773-74 (Tex. App.—Houston [1st Dist.] 2001, pet. denied); *Osterloh v. Ohio Decorative Products, Inc.*, 881 S.W.2d 580, 582 (Tex. App.—Houston [1st Dist.] 1994, no writ).
131. *Hanks v. Rosser*, 378 S.W.2d 31 (Tex. 1964). See also *Rund v. Trans East, Inc.*, 824 S.W.2d 713, 717-18 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (actions of trial court induced petitioner to believe case had been reinstated and therefore deprived petitioner of opportunity to file a motion to reinstate).
132. *Baker v. Goldsmith*, 582 S.W.2d 404, 407 (Tex. 1979) (orig. proceeding).
133. *Alexander v. Hagedorn*, 148 Tex. 565, 226 S.W.2d 996, 997 (1950).
134. *Id.*
135. *Id.* at 998-99.
136. *Transworld Financial Services Corp. v. Briscoe*, 722 S.W.2d 407, 408 (Tex. 1987).
137. *Hanks v. Rosser*, 378 S.W.2d 31 (Tex. 1964); *Mackay v. Charles Sexton Co.*, 469 S.W.2d 441, 445 (Tex. Civ. App.—Dallas 1971, no writ) (“Appellant cannot excuse himself because of the negligence or oversight of his own attorney or employees.”)
138. *Caldwell v. Barnes*, 154 S.W.3d 93, 96-97 (Tex. 2004); *Ross v. National Center for the Employment of the Disabled*, 49 Tex. S.Ct. J. 760, 2006 Tex. LEXIS 551 at \*3-4 (June 16, 2006) (per curiam) (publication status pending).
139. *Ross*, 2006 Tex. LEXIS 551 at \*4-5.
140. This does not mean, however, that such a bill of review cannot succeed. The petitioner may still be able to demonstrate that he or she lost the right to file a motion for new trial or appeal as the result of official mis-

- take, and, thus, come within the *Hanks v. Rosser* scenario. The availability of relief by this type of bill of review, however, depends upon which court of appeals decides the appeal.
141. See, e.g., *Kelly Moore Paint Co. v. Northeast National Bank of Fort Worth*, 426 S.W.2d 591 (Tex. Civ. App.—Fort Worth 1968, no writ).
  142. E.g., *Campus Investments, Inc. v. Cullever*, 144 S.W.3d 464, 466 (Tex. 2004)(failure to update registered agent information was negligent); *Interaction, Inc. v. State*, 17 S.W.3d 775, 779-80 (Tex. App.—Austin 2000, pet. denied)(same statement)
  143. *Mackay v. Sexton*, 469 S.W.2d 441, 444 (Tex. Civ. App.—Dallas 1971, no writ); *Chapa v. Wirth*, 343 S.W.2d 936, 938 (Tex. Civ. App.—Eastland 1961, no writ).
  144. *Thomason v. Freberg*, 588 S.W.2d 821, 826 (Tex. Civ. App.—Corpus Christi 1979, no writ).
  145. *Conrad v. Orellana*, 661 S.W.2d 309, 313 (Tex. App.—Corpus Christi 1983) (failure to make inquiry for three-month period was negligent)
  146. *Dow Chemical Co. v. Benton*, 163 Tex. 477, 357 S.W.2d 565, 567-68 (1962)(“[A]s long as the attorney-client relationship endures, with its corresponding legal effect of principal and agent, the acts of one must necessarily bind the other as a general rule.”) As with most issues involving a bill of review, however, there are exceptions. If the attorney has been suspended, disbarred, or for some other reason is not permitted to practice law, notice to, or service upon, the attorney is not imputed to the client. *Langdale v. Villamil*, 813 S.W.2d 187, 190 (Tex. App.—Houston [14th Dist.] 1991, no writ)(notice acquired after termination of attorney-client relationship is not imputed to client); *J.J.T.B., Inc. v. Guerrero*, 975 S.W.2d 737, 739 (Tex. App.—Corpus Christi 1998, pet. denied)(service of request for admissions and summary judgment motion on suspended attorney was not effective upon client); *Cannon v. ICO Tubular Services, Inc.*, 905 S.W.2d 380, 387 (Tex. App.—Houston [1st Dist.] 1995, no writ)(service on attorney who had recently become a judge was not service upon client because a judge, upon becoming a judge, is automatically prohibited from practicing law); *Sebastian v. Braeburn Homeowner’s Ass’n*, 872 S.W.2d 40, 41 (Tex. App.—Houston [1st Dist.] 1994, no writ)(relinquishment of law license terminated attorney-client relationship upon which imputation could be based).
  147. *Gracey v. West*, 422 S.W.2d 913, 916 (Tex. 1968).
  148. *Conrad v. Orellana*, 661 S.W.2d at 313.
  149. *Cannon v. ICO Tubular Services, Inc.*, 905 S.W.2d 380, 386, 388 (Tex. App.—Houston [1st Dist.] 1995, no writ).
  150. See, e.g., *Petro-Chemical*, 514 S.W.2d at 246; *Thomason v. Freberg*, 588 S.W.2d 821, 826 (Tex. Civ. App.—Corpus Christi 1979, no writ).
  151. *Gold v. Gold*, 145 S.W.3d 212, 214 (Tex. 2004)
  152. *Id.* at 215.
  153. *Coker Equipment, Inc. v. Blevins*, No. 04-04-00776-CV, 2005 Tex. App. LEXIS 8582 at \*2-6 (Tex. App.—San Antonio Oct. 19, 2005, no pet.)(memorandum opinion).
  154. *Caldwell v. Barnes*, 975 S.W.2d 535, 537-38 (Tex. 1998); *Wembley Investment Co. v. Herrera*, 11 S.W.3d 924, 927 (Tex. 1999). A party is not, however, required to pursue or exhaust remedies in another state. *Caldwell*, 975 S.W.2d at 538-39.
  155. *Gold v. Gold*, 145 S.W.3d 212, 214 (Tex. 2004).
  156. *Mackay v. Charles Sexton Co.*, 469 S.W.2d 441, 445 (Tex. Civ. App.—Dallas 1971, no writ).
  157. *French v. Brown*, 424 S.W.2d 893, 894-95 (Tex. 1967).
  158. *Gold v. Gold*, 145 S.W.3d 212, 213 (Tex. 2004). Previous decisions of the courts of appeals had included the writ of error within the remedies which had to be pursued before a bill of review could be filed. See, e.g., *Jordan v. Jordan*, 890 S.W.2d 555, 560 (Tex. Civ. App.—Beaumont 1994), rev’d and dism’d w.o.j., 907 S.W.2d 471, 472 (Tex. 1995).
  159. *Gold*, 145 S.W.2d at 214.
  160. *Id.*
  161. *Id.*
  162. Tex. Civ. Prac. & Rem. Code §16.051; *Caldwell v. Barnes*, 975 S.W.2d 535, 538 (Tex. 1998).
  163. *Law v. Law*, 792 S.W.2d 150, 153 (Tex. App.—Houston [1st Dist.] 1990, writ denied).
  164. *Defee v. Defee*, 966 S.W.2d 719, 722 (Tex.App.—San Antonio 1998, no pet.).
  165. *Flores v. Flores*, 116 S.W.3d 870, 876-77 (Tex. App.—Corpus Christi 2003, no pet.). In *Ross v. National Center for the Employment of the Disabled*, 49 Tex. S.Ct. J. 760, 2006 Tex. LEXIS 551 at \*7 (June 16, 2006)(per curiam)(publication status pending), the Texas Supreme Court threw out a similar unclean hands finding in part because there had been no basis provided for the trial court to sanction a party in one proceeding for misconduct in a different proceeding.
  166. *Caldwell*, 975 S.W.2d at 538-39.
  167. *Baker v. Goldsmith*, 582 S.W.2d 404, 409 (Tex. 1979).
  168. *Warren v. Walter*, 414 S.W.2d 423 (Tex. 1967); *Hartford Underwriters Insurance v. Mills*, 110 S.W.3d 588, 591 (Tex. App.—Fort Worth 2003, no pet.).
  169. *Nguyen v. Intertex, Inc.*, 93 S.W.3d 288, 293 (Tex. App.—Houston [14th Dist.] 2002, no pet.).
  170. *Jones v. Texas Dept. of Protective and Regulatory Services*, 85 S.W.3d 483, 490 (Tex. App.—Austin 2002, pet. denied).
  171. E.g., *West Columbia Nat’l Bank v. Griffith*, 902 S.W.2d 201, 204-05 (Tex. App.—Houston [1st Dist.] 1995, writ denied)(holding that the request for findings and conclusions need not be made until there is a final appealable judgment disposing of all parties and claims).



#### PATRICK J. DYER,

is a member in the Houston firm of Wilshire Scott & Dyer, P.C., is certified in civil trial law by the Texas Board of Legal Specialization. A graduate of Rice University and the University of Texas School of Law, he has focused on business litigation for the past 24 years.