IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 08-9017

ORDER AMENDING TEXAS RULES OF APPELLATE PROCEDURE

ORDERED that:

1. Pursuant to Texas Government Code § 22.004, the Texas Rules of Appellate Procedure are amended as follows.

2. This Order approves changes to rules of appellate procedure in civil cases. The Court of Criminal Appeals is concurrently issuing a separate order approving amendments to rules of appellate procedure in criminal cases. Amendments to rules of appellate procedure that apply to both civil and criminal cases are thus jointly approved by both courts. For convenience, all of the appellate rule amendments are attached to both orders.

3. The comments appended to these rules are intended to inform the construction and application of the rules.

4. Comments on changes to rules in civil cases may be submitted to the Court in writing on or before June 30, 2008 addressed to Jody Hughes, Rules Attorney, P.O. Box 12248, Austin TX 78711, or may be emailed to him at jody.hughes@courts.state.tx.us.

5. These amended rules, with any changes made after public comments are received, take effect September 1, 2008.

6. The Clerk is directed to:

   a. file a copy of this Order with the Secretary of State;

   b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*;

   c. send a copy of this Order to each elected member of the Legislature before December 1; and

   d. submit a copy of this Order for publication in the *Texas Register*.

SIGNED AND ENTERED, this 10th day of March, 2008.

Wallace B. Jefferson, Chief Justice

Nathan L. Hecht, Justice

Harriet O'Neill, Justice

J. Dale Wainwright, Justice

Scott Brister, Justice

David M. Medina, Justice

Paul W. Green, Justice

Phil Johnson, Justice

Don R. Willett, Justice

Rule 8. Bankruptcy in Civil Cases

8.1 Notice of Bankruptcy. Any party may file a notice that a party is in bankruptcy. The notice must contain:

(a) the bankrupt party's name;

(b) the court in which the bankruptcy proceeding is pending;

(c) the bankruptcy proceeding's style and case number; and

(d) the date when the bankruptcy petition was filed.; ~~and~~

~~(e) an authenticated copy of the page or pages of the bankruptcy petition that show when the petition was filed~~.

Comment to 2008 change: The amendment eliminates the former requirement that the bankruptcy notice contain certain pages of the bankruptcy petition, in recognition that electronic filing is now prevalent in bankruptcy courts and access to bankruptcy petitions is widely available through the federal PACER system.

Rule 9. Papers Generally

9.3 Number of Copies

(b) *Supreme Court and Court of Criminal Appeals.* Except as otherwise provided in this rule, a ~~A~~ party must file the original and 11 copies of any document addressed to either the Supreme Court or the Court of Criminal Appeals. In the Supreme Court, only an original and two copies of a motion for extension of time or a response to the motion must be filed. ; ~~except that~~ In the Court of Criminal Appeals, only the original of the following must be filed ~~in the Court of Criminal Appeals~~:

(1) a motion for extension of time or a response to the motion; or

(2) a pleading under Code of Criminal Procedure article 11.07.

9.8 Protection of Minor Child's Identity in Appellate Proceedings Following Parental- Rights Termination Proceedings or Juvenile Court Proceedings

(a) *Redaction of Minors' Names Generally Required in Appellate Briefing and Opinions.*

(1) In an appeal or original proceeding following a trial at which the termination of parental rights was at issue, a minor child shall be identified only by one or more initial letters of the minor's name or by a fictitious name in any papers—except a docketing statement—submitted to an appellate court, or in any opinion issued by an appellate court, unless the court orders otherwise.

(2) In an appeal or original proceeding following trial proceedings under Title 3 of the Family Code, a minor child shall be identified only by one or more initial letters of the minor's name or by a fictitious name in any papers—except a docketing statement—submitted to an appellate court, or in any opinion issued by an appellate court.

(b) *Redaction of Parents' Names.*

(1) In an appeal or original proceeding described in paragraph (a)(1), an appellate court may substitute in an opinion, and may order parties and amici curiae to substitute in any papers submitted to the appellate court, one or more initial letters or a fictitious name for the name of a minor child's parent or other family member if the court determines that such substitution is necessary to protect the minor child's identity.

(2) In an appeal or original proceeding described in paragraph (a)(2), an appellate court must substitute in an opinion, and parties and amici curiae must substitute in any papers submitted to the appellate court, one or more initial letters or a fictitious name for the name of a minor child's parent or other family member.

(c) *Redaction of Children's Names In Copies of Appendix Items.* In an appeal or original proceeding described in paragraph (a)(1) or (a)(2), for any necessary or optional appendix items to be included with a brief, petition, or motion, copies of any appendix items containing the name of a minor child shall be redacted so that the minor is identified only by one or more initial letters of the minor's name or by a fictitious name.

(d) *Redaction of Parents' Names In Copies of Appendix Items.*

(1) In an appeal or original proceeding described in paragraph (a)(1), an appellate court may order the substitution of initials or a fictitious name for the name of a minor child's parents or other family members in any necessary or optional appendix items to be included with a brief, petition, or motion if the court determines that such substitution is necessary to protect the minor child's identity.

(2) In an appeal or original proceeding described in paragraph (a)(2), parties and amici curiae must substitute initials or a fictitious name for the name of a minor child's parents or other family members in any necessary or optional appendix items to be included with a brief, petition, or motion.

(e) *No Alteration of Appellate Record.* Nothing in this rule authorizes alteration of the original appellate record except as specifically authorized by court order.

Comment to 2008 change: This is a new rule. Family Code §109.002(d) authorizes appellate courts, in their opinions, to identify parties to suits affecting the parent-child relationship (SAPCR) by fictitious names or by initials only. This law allows courts to protect the privacy interests of minor children involved in SAPCR proceedings, including suits to terminate parental rights. Similarly, Family Code §56.01(j) prohibits identification of a minor child or his family in an appellate opinion related to juvenile court proceedings. However, as appellate briefing becomes more widely available through electronic media sources, appellate courts' efforts to protect minor children's privacy by disguising their identities in appellate opinions may be defeated if the same children are fully identified in briefs and other court papers available to the public. The rule provides for the use of initials or fictitious names to protect the identity of a minor child following a parental-rights termination proceeding or juvenile court proceeding. Any fictitious name used for a parent or child should not be pejorative or suggest the person's true identity. The rule does not limit an appellate court's authority to disguise parties' identities in appropriate circumstances in other cases.

Rule 10. Motions in the Appellate Court

10.1 Contents of Motions; Response

(a) *Motion.* Unless these rules prescribe another form, a party must apply by motion for an order or other relief. The motion must:

(5) in civil cases, except for motions for rehearing and motions for en banc reconsideration of panel decisions, contain or be accompanied by a certificate stating that the filing party conferred or made a reasonable attempt to confer with other parties about the merits of the motion and whether those parties oppose the motion.

10.2 Evidence on Motions. A motion need not be verified unless it depends on the following types of facts, in which case the motion must be supported by affidavit or other satisfactory evidence. The types of facts requiring proof are those that are:

(a) not in the record;

(b) not within the court's knowledge in its official capacity; ~~or~~ and

(c) not within the personal knowledge of the attorney signing the motion.

Comment to 2008 change: It is presumed that non-movants will oppose the relief sought in motions for rehearing and motions for en banc reconsideration. To encourage consistent application of the certificate-of-conference requirement, Rule 10.1(a)(5) is amended—and Rule 49.11 is added—to exempt those motions from the certificate requirement.

Rule 19. Plenary Power of the Courts of Appeals and Expiration of Term

19.1 Plenary Power of Courts of Appeals. A court of appeals' plenary power over its judgment expires:

(a) 60 days after judgment if no timely filed ~~motion to extend time or~~ motion for rehearing, timely filed motion for en banc reconsideration, or timely filed motion to extend time to file a motion for rehearing or for en banc reconsideration is then pending.

(b) 30 days after the court overrules all timely filed motions for rehearing, ~~including~~ all timely filed motions for en banc reconsideration of a panel's decision under Rule 49.~~7~~6, and all timely motions to extend time to file a motion for rehearing or a motion for en banc reconsideration.

Comment to 2008 change: The provisions of Rule 19 governing the courts of appeals' plenary power are revised in conjunction with the amendments to Rules 49 and 53.7 concerning motions for en banc reconsideration.

Rule 20. When Party Is Indigent

20.1 Civil Cases

(a) *Establishing indigence.* A party who cannot pay the costs in an appellate court may proceed without advance payment of costs if:

(1) the party files an affidavit of indigence in compliance with this rule;

(2) the claim of indigence is not contested, is not contestable, or if contested, the contest is not sustained by written order; and

(3) the party timely files a notice of appeal.

(b) *Contents of affidavit.* The affidavit of indigence must identify the party filing the affidavit and must state what amount of costs, if any, the party can pay. The affidavit must also contain complete information about:

(12) if applicable, the party's lack of the skill and access to equipment necessary to prepare the appendix, as required by Rule 38.5(d).

(c) *TAJF Certificate.* If the appellant proceeded in the trial court without payment of fees pursuant to an Interest on Lawyers Trust Accounts (IOLTA) or other Texas Access to Justice Foundation (TAJF) certificate, an additional TAJF certificate may be filed in the appellate court confirming that the TAJF-funded program rescreened the party for income eligibility under TAJF income guidelines after entry of the trial court's judgment. A party's affidavit of inability accompanied by an attorney's TAJF certificate may not be contested.

~~(c)~~(d) *When and Where Affidavit Filed.*

(1) *Appeals.* An appellant must file the affidavit of indigence in the trial court with or before the notice of appeal. The prior filing of an affidavit of indigence in the trial court pursuant to Rule 145 does not meet the requirements of this rule, which requires a separate affidavit and proof of current indigence. An appellee who is required to pay part of the cost of preparation of the record under Rule 34.5(b)(3) or 34.6(c)(3) must file an affidavit of indigence in the trial court within 15 days after the date when the appellee becomes responsible for paying that cost.

(3) *Extension of time.* The appellate court may extend the time to file an affidavit if, within 15 days after the deadline for filing the affidavit, the party files in the appellate court a motion complying with Rule 10.5(b). But the appellate court may not dismiss the appeal or affirm the trial court's judgment on the ground that the appellant has failed to file an affidavit or a sufficient affidavit of indigence unless the court has first provided the appellant notice of the deficiency and a reasonable time to remedy it.

~~(d)~~(e) *Duty of Clerk.*

(1) *Trial court clerk.* If the affidavit of indigence is filed with the trial court clerk under (~~c~~d)(1), the clerk must promptly send a copy of the affidavit to the appropriate court reporter.

(2) *Appellate court clerk.* If the affidavit of indigence is filed with the appellate court clerk ~~under (c)(2)~~ and if the filing party is requesting the preparation of a record, the appellate court clerk must:

(A) send a copy of the affidavit to the trial court clerk and the appropriate court reporter; and

(B) send to the trial court clerk, the court reporter, and all parties, a notice stating the deadline for filing a contest to the affidavit of indigence.

~~(e)~~(f) *Contest to affidavit.* The clerk, the court reporter, the court recorder, or any party may challenge ~~the claim of indigence~~ an affidavit that is not accompanied by a TAJF certificate by filing—in the court in which the affidavit was filed—a contest to the affidavit of indigence. The contest must be filed on or before the date set by the clerk if the affidavit was filed in the appellate court, or within 10 days after the date when the affidavit was filed if the affidavit was filed in the trial court. The contest need not be sworn.

~~(f)~~(g) *No contest filed.* [no change to rule text]

~~(g)~~(h) *Burden of proof.* [no change to rule text]

~~(h)~~(i) *Decision in appellate court.* [no change to rule text]

~~(i)~~(j) *Hearing and decision in the trial court.* [no change to rule text]

~~(j)~~(k) *Record to be prepared without payment.* [no change to rule text]

~~(k)~~(l) *Partial payment of costs.* [no change to rule text]

~~(l)~~(m) *Later ability to pay.* [no change to rule text]

~~(m)~~(n) *Costs defined.* [no change to rule text]

Comment to 2008 changes: Rule 20 is revised to clarify that an affidavit of indigence filed during trial is insufficient to establish indigence on appeal; a separate affidavit must be filed with or before the notice of appeal. The amended rule also provides that an appellate court must give an appellant who fails to file a proper appellate indigence affidavit notice of the defect and an opportunity to cure it before dismissing the appeal or affirming the judgment on that basis. *See Higgins v. Randall County Sheriff's Office*, 193 S.W.3d 898 (Tex. 2006). As amended, Rule 20 mirrors Tex. R. Civ. P. 145 by providing that an appellate indigence affidavit accompanied by an IOLTA or other Texas Access to Justice Foundation (TAJF) certificate is not subject to challenge. In Rule 20.1(e)(2) (formerly (d)(2)), the limiting phrase "under (c)(2)" is deleted to clarify that the appellate clerk's duty to forward copies of the affidavit to the trial court clerk and the court reporter, along with a notice setting a deadline to contest the affidavit, applies to affidavits on appeal erroneously filed in the appellate court, not only to affidavits in other appellate proceedings properly filed in the appellate court under 20.1(c)(2).

Rule 24. Suspension of Enforcement of Judgment Pending Appeal in Civil Cases

24.2 Amount of Bond, Deposit or Security

(c) *Determination of Net Worth*

(1) Judgment Debtor's Affidavit Required; Contents; Prima Facie Evidence. A judgment debtor who provides a bond, deposit, or security under (a)(1)(~~a~~A) in an amount based on the debtor's net worth must simultaneously file with the trial court clerk an affidavit that states the debtor's net worth and states complete, detailed information concerning the debtor's assets and liabilities from which net worth can be ascertained. ~~The affidavit is prima facie evidence of the debtor's net worth.~~ A trial court clerk must receive and file a net worth affidavit tendered for filing by a judgment debtor.

(2) Contest; Discovery. A judgment creditor may file a contest to the debtor's claimed ~~affidavit of~~ net worth. A net worth affidavit filed

with the trial court clerk and in compliance with Rule 24.2(c)(1) is prima facie evidence of the debtor's net worth for the purpose of establishing the amount of the bond, deposit, or security required to suspend enforcement of the judgment. The contest need not be sworn. The creditor may conduct reasonable discovery concerning the judgment debtor's net worth.

(3) Hearing; Burden of Proof; Findings; Additional Security. The trial court must hear a judgment creditor's contest of the judgment debtor's claimed net worth promptly after any discovery has been completed. The judgment debtor has the burden of proving net worth. The trial court must issue an order that states the debtor's net worth and states with particularity the factual basis for that determination. If the trial court orders additional or other security to supersede the judgment, the enforcement of the judgment will be suspended for twenty days after the trial court's order. If the judgment debtor does not comply with the order within that period, the judgment may be enforced against the judgment debtor.

24.4 Appellate Review

(a) *Motions; Review.* On a party's motion to the appellate court, that court may review:

(5) the trial court's exercise of discretion under Rule 24.3(a).

(d) *Filing in Appellate Court.* A motion filed under paragraph (a) should be filed in the court of appeals having potential appellate jurisdiction over the underlying judgment. The court of appeals' ruling is subject to review on petition for writ of mandamus to the Texas Supreme Court.

(d)(e) *Action by Appellate Court.* [no change to rule text]

(e)(f) *Effect of Ruling.* [no change to rule text]

Comment to 2008 changes: Rule 24.2(c)(3) is amended to provide procedural guidance when the trial court orders additional security to supercede the judgment. New Rule 24.4(d) is added to clarify that an appellate motion seeking relief from a supersedeas order should be filed in the court of appeals that presumably will have jurisdiction when appeal of the underlying case is perfected. The same provision also specifies that a petition for writ of mandamus is the proper procedural vehicle to seek Supreme Court review of a court of appeals' ruling on a supersedeas motion. *See In re Smith / In re Main Place Custom Homes, Inc.*, 192 S.W.3d 564, 568 (Tex. 2006) (per curiam).

Rule 26. Time to Perfect Appeal

26.2. Criminal Cases

(b) *By the State.* The notice of appeal must be filed within ~~15~~ 20 days after the day the trial court enters the order, ruling, or sentence to be appealed.

Rule 28. Accelerated Appeals in Civil Cases

28.1 Civil Cases—Appeal As of Right

(a) *Types of Accelerated Appeals.* Appeals from interlocutory orders (when allowed as of right by statute), appeals in quo warranto proceedings, appeals required by statute to be accelerated or expedited, and appeals required by law to be filed or perfected within less than 30 days after the date of the order or judgment being appealed are accelerated appeals.

(b) *Perfection of Accelerated Appeal.* Unless a statute expressly prohibits modification or extension of any statutory appellate deadlines, an accelerated appeal is perfected by filing a notice of appeal in compliance with Rule 25 within the time allowed by Rule 26.1(b) or as extended by Rule 26.3, regardless of any statutory deadlines. Filing a motion for new trial, any other post-trial motion, or a request for findings of fact will not extend the time to perfect an accelerated appeal.

(c) *Appeals of Interlocutory Orders.* The trial court need not, but may—within 30 days after the order is signed—file findings of fact and conclusions of law.

(d) *Quo Warranto Appeals.* The trial court may grant a motion for new trial timely filed under Texas Rule of Civil Procedure Rule 329b (a) – (b) until 50 days after the trial court's final judgment is signed. If not determined by signed written order within that period, the motion will be deemed overruled by operation of law on expiration of that period.

(e) *Record and Briefs.* In lieu of the clerk's record, the appellate court may hear an accelerated appeal on the original papers forwarded by the trial court or on sworn and uncontroverted copies of those papers. The appellate court may allow the case to be submitted without briefs. The deadlines and procedures for filing the record and briefs in an accelerated appeal are provided in Rules 35.1 and 38.6.

28.2 Agreed Interlocutory Appeals in Civil Cases

(a) *Perfecting appeal.* To perfect an appeal of an interlocutory order under Civil Practice and Remedies Code §51.014(d), a party to the trial court proceeding must:

(1) file a notice of accelerated appeal with the trial court clerk not later than the 20th day after the date the trial court signs a written order granting permission to appeal, unless the court of appeals extends the time for filing pursuant to Rule 26.3;

(2) file with the clerk of the appellate court a copy of the notice of accelerated appeal, as specified in Rule 25.1, and a docketing statement, as specified in Rule 32.1;

(3) pay to the clerk of the appellate court all required fees authorized to be collected by the clerk; and

(4) serve a copy of the notice of accelerated appeal on all parties to the trial court proceeding.

(b) *Contents of Notice.* The notice of accelerated appeal must contain, in addition to the items required by Rule 25.1(d), the following:

(1) a list of the names of all parties to the trial court proceeding and the names, addresses and telefax numbers of all trial and appellate counsel;

(2) a copy of the trial court's order granting permission to appeal;

(3) a copy of the trial court order appealed from;

(4) a statement that all parties to the trial court proceeding agreed to the trial court's order granting permission to appeal;

(5) a statement that all parties to the trial court proceeding agreed that the order granting permission to appeal involves a controlling question of law as to which there is a substantial ground for difference of opinion;

(6) a brief statement of the issues or points presented; and

(7) a concise explanation of how an immediate appeal may materially advance the ultimate termination of the litigation.

(c) *Jurisdiction.* If the court of appeals determines that a notice of appeal filed under this section does not demonstrate the court's jurisdiction, it

may order the appellant to file an amended notice of appeal. The court of appeals may also, on a party's motion or its own motion, order the appellant or any other party to file briefing addressing whether the appeal satisfies the criteria specified in Civil Practice and Remedies Code §51.014(d), and may require the parties to file supporting evidence. If, after providing an opportunity to file an amended notice of appeal or briefing addressing potential jurisdictional defects, the court of appeals concludes that jurisdictional defects exist, it may dismiss the appeal for want of jurisdiction at any stage of the appeal.

(d) *Record; briefs.* The rules governing the filing of the appellate record and briefs in accelerated appeals apply. A party may address in its brief any issues related to the court of appeals' jurisdiction, including whether the appeal satisfies the criteria specified in Civil Practice and Remedies Code §51.014(d).

(e) *No automatic stay of proceedings in trial court.* An appeal under Civil Practice and Remedies Code §51.014(d) does not stay proceedings in the trial court unless the parties agree to—and the trial court, the court of appeals, or a justice of the court of appeals orders—a stay of the proceedings.

Comment to 2008 changes: The provisions of prior Rule 28 are amended and reorganized as new Rule 28.1 to more clearly define accelerated appeals and provide a uniform appellate timetable. Many statutes provide for accelerated or expedited appellate timetables, including, among others, appeals of final judgments in a suit in which termination of the parent-child relationship is in issue as provided in Family Code §109.002. Unless a statute expressly prohibits rulemaking that would alter a statutory appellate deadline, Rule 28 is made expressly applicable to all such appeals.

New Rule 28.2 is added to provide procedures governing an appeal of an interlocutory order under Civil Practice and Remedies Code §51.014(d). The Legislature deleted former subsection (f) of §51.014 in 2005, eliminating the provision that gave the court of appeals discretion as to whether to permit an agreed appeal. New Rule 28.2 reflects the statutory procedure as modified by the 2005 amendment.

Rule 29. Orders Pending Interlocutory Appeal in Civil Cases

29.5. Further Proceedings in Trial Court. While appeal from an interlocutory order is pending, the trial court retains jurisdiction of the case and unless prohibited by statute may make further orders, including one dissolving the order complained of on appeal. ~~appealed from, and i~~If permitted by law, the trial court may proceed with a trial on the merits. But the court must not make an order that:

(a) is inconsistent with any appellate court temporary order; or

(b) interferes or impairs the jurisdiction of the appellate court or effectiveness of any relief sought or that may be granted on appeal.

Comment to 2008 changes: Rule 29.5 is amended to correspond with Civil Practice and Remedies Code §51.014(b), as amended in 2003, staying all proceedings in the trial court pending resolution of interlocutory appeals of class certification orders, denials of summary judgments based on assertions of immunity by governmental officers or employees, and orders granting or denying a governmental unit's plea to the jurisdiction.

Rule 38. Requisites of Briefs

38.1 Appellant's Brief. The appellant's brief must, under appropriate headings and in the order here indicated, contain the following:

(a) ***Identity of parties and counsel.*** The brief must give a complete list of all parties to the trial court's judgment or order appealed from, and the names and addresses of all trial and appellate counsel, except as otherwise provided in Rule 9.8.

(e) *Statement Regarding Oral Argument.* The brief may include a statement explaining why oral argument should, or should not, be permitted. Any such statement must not exceed one page and should address how the court's decisional process would, or would not, be aided by oral argument. As required by Rule 39.7, any party requesting oral argument must note that request on the front cover of its brief.

(e)(f) *Issues Presented.* [no change to rule text]

(f)(g) *Statement of Facts.* [no change to rule text]

(g)(h) *Summary of the Argument.* [no change to rule text]

(h)(i) *Argument.* [no change to rule text]

(i)(j) *Prayer.* [no change to rule text]

(j)(k) *Appendix in Civil Cases.* [no change to rule text]

38.4 Length of Briefs. An appellant's brief or appellee's brief must be no longer than 50 pages, exclusive of the pages containing the identity of parties and counsel, any statement regarding oral argument, the table of contents, the index of authorities, the statement of the case, the issues presented, the signature, the proof of service, and the appendix.

Comment to 2008 changes: Rule 38 is amended to provide for an optional statement regarding oral argument in an appellant's or appellee's brief. The optional statement is limited to one page, which does not count toward the briefing page limit.

Rule 39. Oral Argument; Decision Without Argument

39.1 Right to Oral Argument. ~~Except as provided in 39.8, a~~ Any party who has filed a brief and who has timely requested oral argument may argue the case ~~to the court when the case is called for argument.~~ before a panel of three justices unless the court, after examining the briefs, decides that oral argument is unnecessary for any of the following reasons:

(1) the appeal is frivolous;

(2) the dispositive issue or issues have been authoritatively decided;

(3) the facts and legal arguments are adequately presented in the briefs and record; or

(4) the decisional process would not be significantly aided by oral argument.

~~**39.8 Cases Advanced Without Oral Argument.** In its discretion, the court of appeals may decide a case without oral argument if argument would not significantly aid the court in determining the legal and factual issues presented in the appeal.~~

39.9~~8~~ Clerk's Notice. [no change to rule text]

Comment to 2008 changes: Rule 39 is amended to modify the procedures for determining whether oral argument will be heard in a particular case. The amended rule provides for oral argument unless the court determines it to be unnecessary. The rule lists four reasons for denying oral argument, modeled on Federal Rule of Appellate Procedure 34(a)(2); however, the members of the court need not agree on, and generally should not announce, a specific reason or reasons for declining oral argument.

Rule 41. Panel and En Banc Decision

41.1 Decision by Panel

(b) *When Panel Cannot Agree on Judgment.* After argument, if for any reason a member of the panel cannot participate in deciding a case, the case may be decided by the two remaining justices. If they cannot agree on a judgment, the chief justice of the court of appeals must designate another justice of the court to sit on the panel to consider the case, request the temporary assignment by the Chief Justice of the Supreme Court of a court

of appeals justice from another court of appeals, a retired or former appellate justice or appellate judge who is qualified for appointment by law, or an active district court judge to sit on the panel to consider the case, or convene the court en banc to consider the case. The reconstituted panel or the en banc court may order the case reargued.

(c) *When Court Cannot Agree on Judgment.* After argument, if for any reason a member of a court consisting of only three justices cannot participate in deciding a case, the case may be decided by the two remaining justices. If they cannot agree on a judgment, that fact must be certified to the Chief Justice of the Supreme Court. The Chief Justice may then temporarily assign a justice of another court of appeals, ~~or~~ a ~~qualified~~ retired or former appellate justice or appellate judge who is qualified for appointment by law, or an active district court judge to sit with the court of appeals to consider the case. The reconstituted court may order the case reargued.

41.2 Decision by En Banc Court

(b) *When En Banc Court Cannot Agree on Judgment.* If a majority of an en banc court cannot agree on a judgment, that fact must be certified to the Chief Justice of the Supreme Court. The Chief Justice may then temporarily assign a justice of another court of appeals, ~~or~~ a ~~qualified~~ retired or former appellate justice or appellate judge who is qualified for appointment by law, or an active district court judge to sit with the court of appeals to consider the case. The reconstituted court may order the case reargued.

41.3 Precedent in Transferred Cases. In cases transferred by the Supreme Court from one court of appeals to another, the court of appeals to which the case is transferred must decide the case in accordance with the precedent of the transferor court under principles of stare decisis if the transferee court's decision otherwise would have been inconsistent with the precedent of the transferor court. The court's opinion may state whether the outcome would have been different had the transferee court not been required to decide the case in accordance with the transferor court's precedent.

Comment to 2008 changes: Rules 41.1 and 41.2 are amended to reflect the 2003 legislative amendment adding subsection (h) to Government Code §74.003, which authorizes the Chief Justice of the Supreme Court to temporarily assign an active district court judge to hear a matter pending in an appellate court. The statutory provisions governing the assignment of judges to appellate courts are located in chapters 74 and 75 of the Government Code. Other minor changes are made for consistency.

New Rule 41.3 is added to require, in appellate cases transferred by the Supreme Court under Government Code §73.001 for docket equalization or other purposes, that the transferee court must generally resolve any conflict between the precedent of the transferor court and the precedent of the transferee court (or that of any other intermediate appellate court the transferee court otherwise would have followed) by following the precedent of the transferor court, unless it

appears that the transferor court itself would not be bound by that precedent. The rule requires the transferee court to "stand in the shoes" of the transferor court so that an appellate transfer will not produce a different outcome, based on application of substantive law, than would have resulted had the case not been transferred. However, the transferee court is not expected to follow the local rules of the transferor court or otherwise supplant its own local procedures with those of the transferor court.

Rule 47. Opinions, Publication, and Citation

47.2 Designation and Signing of Opinions; Participating Justices.

(a) *Civil and Criminal Cases.* A majority of the justices who participate in considering the case must determine whether the opinion will be signed by a justice or will be per curiam and whether it will be designated an opinion or memorandum opinion. The names of the participating justices must be noted on all written opinions or orders of the court or a panel of the court.

(b) *Criminal Cases.* In addition, each opinion and memorandum opinion in a criminal case must bear the notation "publish" or "do not publish" as determined—before the opinion is handed down—by a majority of the justices who participate in considering the case. Any party may move the appellate court to change the notation, but the court of appeals must not change the notation after the Court of Criminal Appeals has acted on any party's petition for discretionary review or other requests for relief. The Court of Criminal Appeals may, at any time, order that a "do not publish" notation be changed to "publish."

(c) *Civil Cases.* Opinions and memorandum opinions in civil cases issued on or after January 1, 2003 shall not be designated "do not publish."

47.7 Citation of Unpublished Opinions.

(a) *Criminal Cases.* Opinions and memorandum opinions not designated for publication by the court of appeals under these or prior rules have no precedential value but may be cited with the notation, "(not designated for publication)."

(b) *Civil Cases.* Opinions and memorandum opinions designated "do not publish" under these rules by the court of appeals prior to January 1, 2003 have no precedential value but may be cited with the notation, "(not designated for publication)." If an opinion or memorandum opinion issued on or after that date is erroneously designated "do not publish," the erroneous designation will not affect the precedential value of the decision.

Comment to 2008 changes: Effective January 1, 2003, Rule 47 was amended to discontinue in civil cases, on a prospective basis, the practice of allowing courts of appeals to designate opinions as either "published" or "unpublished." Rule 47.7 was amended to eliminate the prior prohibition against citing unpublished opinions and to clarify that, in civil cases, only unpublished opinions issued prior to the 2003 amendment would lack precedential value, because following the 2003 amendment such cases were not to be designated either as published or unpublished. But the phrase "opinions not designated for publication," which was intended to apply only to opinions affirmatively designated "do not publish," could be misread as suggesting that all opinions in civil cases published after 2002—none of which should be affirmatively designated for publication—lack precedential value. The 2008 amendments clarify that, with respect to civil cases, only opinions issued prior to the 2003 amendment and affirmatively designated "do not publish" should be considered "unpublished" cases lacking precedential value. The provisions governing citation of unpublished opinions in criminal cases are substantively unchanged; Rules 47.2 and 47.7. are amended to clarify that memorandum opinions are subject to those rules.

Rule 49. Motion ~~and Further Motion~~ for Rehearing and En Banc Reconsideration

49.1 Motion for Rehearing. A motion for rehearing may be filed within 15 days after the court of appeals' judgment or order is rendered. The motion must clearly state the points relied on for the rehearing. After a motion for rehearing is decided, another motion for rehearing may be filed within 15 days of the court's action only if the court:

(a) modifies its judgment;

(b) vacates its judgment and renders a new judgment; or

(c) issues an opinion in overruling a motion for rehearing.

~~**49.5 Further Motion for Rehearing.** After a motion for rehearing is decided, a further motion for rehearing may be filed within 15 days of the court's action if the court:~~

~~(a) modifies its judgment;~~

~~(b) vacates its judgment and renders a new judgment; or~~

~~(c) issues an opinion in overruling a motion for rehearing.~~

49.6 Amendments. A motion for rehearing or a motion for en banc reconsideration may be amended as a matter of right anytime before the 15-day period allowed for filing the motion expires, and with leave of the court, anytime before the court of appeals decides the motion.

49.7 En Banc Reconsideration. A party may file a motion for en banc reconsideration, as a separate motion, with or without filing a motion for

rehearing, within 15 days after the court of appeals' judgment or order is rendered. Alternatively, a motion for en banc reconsideration may be filed by a party no later than 15 days after the overruling of the same party's last timely filed motion for rehearing. While the court has plenary power, as provided in Rule 19, a majority of the en banc court may, with or without a motion, order en banc reconsideration of a panel's decision. If a majority orders reconsideration, the panel's judgment or order does not become final, and the case will be resubmitted to the court for en banc review and disposition.

49.87 Extension of Time. A court of appeals may extend the time for filing a motion for rehearing or a ~~further motion for rehearing~~ motion for en banc reconsideration if a party files a motion complying with Rule 10.5(b) no later than 15 days after the last date for filing the motion.

49.9~~8~~ Not Required for Review. A motion for rehearing is not required to preserve error and is not a prerequisite to filing:

(a) a motion for en banc reconsideration as provided by Rule 49.6;

(b) a petition for review in the Supreme Court; or

(c) a petition for discretionary review ~~in~~ to the Court of Criminal Appeals ~~nor is it required to preserve error~~.

49.~~10~~9 Length of Motion and Response. A motion or response must be no longer than 15 pages.

49.10 Relationship to Petition for Review. A party may not file a motion for rehearing in the court of appeals after that party has filed a petition for review in the Supreme Court unless the court of appeals modifies its opinion or judgment after the petition for review is filed. The filing of a petition for review does not preclude another party from filing a motion for rehearing or the court of appeals from ruling on the motion. If a motion for rehearing is timely filed after a petition for review is filed, the petitioner must immediately notify the Supreme Court clerk of the filing of the motion, and must notify the clerk when the last timely filed motion is overruled by the court of appeals.

49.11 Certificate of Conference Not Required. A certificate of conference is not required for a motion for rehearing or for a motion for en banc reconsideration of a panel's decision.

Comment to 2008 changes: Rule 49 is revised in several respects. Former Rule 49.5 is relocated to Rule 49.1, which omits the former rule's "further" motion language but retains its provisions limiting the circumstances in which another rehearing motion can be filed. Former Rule 49.7, now Rule 49.6, is amended to include procedures governing the filing a motion for en banc reconsideration. New Rule 49.10 consists of those provisions of former Rule 53.7(b) that address motions for rehearing; the provisions of Rule 53.7(b) that address petitions for review are

retained. New Rule 49.11 mirrors Rule 10.1(a)(5)'s new provision exempting motions for rehearing and motions for en banc reconsideration from the certificate-of-conference requirement.

Rule 50. Reconsideration on Petition for Discretionary Review

Within 60 ~~30~~ days after a petition for discretionary review is ~~has been~~ filed with the clerk of the court of appeals that delivered the decision, ~~a majority of~~ the justices who participated in the decision may, as provided by subsection (a), ~~summarily~~ reconsider and correct or modify the court's opinion or judgment. Within the same period of time, any of the justices who participated in the decision may issue a concurring or dissenting opinion.

(a) If the court's original opinion or judgment is corrected or modified, that ~~the original~~ opinion or judgment is ~~must be~~ withdrawn and the modified or corrected opinion or judgment is ~~must be~~ substituted as the opinion or judgment of the court. No further opinions may be issued by the court of appeals. The original petition for discretionary review is not dismissed by operation of law, unless the filing party files a new petition in the court of appeals. In the alternative, the petitioning party shall submit to the court of appeals copies of the corrected or modified opinion or judgment as an amendment to the original petition.

(b) Any party may then file with the court of appeals a new petition for discretionary review seeking review of the corrected or modified opinion or judgment, including any dissents or concurrences, under Rule 68.2.

Rule 52. Original Proceedings

52.3 Form and Contents of Petition. ~~All factual statements in the petition must be verified by affidavit made on personal knowledge by an affiant competent to testify to the matters stated.~~ The petition must, under appropriate headings and in the order here indicated, contain the following:

(d) *Statement of the Case.* The petition must contain a statement of the case that should seldom exceed one page and should not discuss the facts. The statement must contain the following:

(5) if the petition is filed in the Supreme Court after a petition requesting the same relief was filed in the court of appeals:

(D) the citation of the court's opinion~~, if available, or a statement that the opinion was unpublished~~;

(g) *Statement of Facts.* The petition must state concisely and without argument the facts pertinent to the issues or points presented. Every statement of fact in the petition must be supported by citation to competent

evidence included in ~~The statement must be supported by references to~~ the appendix or record.

(j) *Certification.* The person filing the petition must certify that he or she has reviewed the petition and concluded that every factual statement in the petition is supported by competent evidence included in the appendix or record.

~~(j)~~(k) *Appendix.* (no change to rule text)

52.6 Length of Petition, Response, and Reply. Excluding those pages containing the identity of parties and counsel, the table of contents, the index of authorities, the statement of the case, the statement of jurisdiction, the issues presented, the signature, the proof of service, the certification, and the appendix, the petition and response must not exceed 50 pages each if filed in the court of appeals, or 15 pages each if filed in the Supreme Court. A reply may be no longer than 25 pages if filed in the court of appeals or 8 pages if filed in the Supreme Court, exclusive of the items stated above. The court may, on motion, permit a longer petition, response, or reply.

Comment to 2008 changes: Rule 47 was amended effective January 1, 2003 to eliminate in civil cases, on a prospective basis, the former distinction between "published" and "unpublished" decisions. Rule 52.3(d)(5)(D) is now amended to recognize that an opinion in a civil appeal decided after 2002 should not be described as "unpublished" in the statement of the case even if the opinion was not published in the South Western Reporter, because Rule 47 no longer authorizes the courts of appeals to designate an opinion in a civil appeal either as "published" or "unpublished." If no South Western Reporter citation is available, a LEXIS or Westlaw citation may be provided.

Rule 52.3 is further amended to delete the requirement of verifying all factual statements by affidavit. Instead, the filer must certify that all factual statements are supported by citation to competent evidence in the appendix or record.

Rule 53. Petition for Review

53.2 Contents of Petition

(d) *Statement of the Case.* The petition must contain a statement of the case that should seldom exceed one page and should not discuss the facts. The statement must contain the following:

(8) the citation for the court of appeals' opinion~~, if available, or a statement that the opinion was unpublished~~; and

(9) the disposition of the case by the court of appeals, including the court's disposition of any motions for rehearing or motions for en banc reconsideration. If any motions for rehearing or motions for

en banc reconsideration are pending in the court of appeals at the time the petition for review is filed, that information also must be included in the statement of the case.

53.7 Time and Place of Filing

(a) *Petition.* Unless the Supreme Court for good cause orders an earlier filing deadline, ~~T~~the petition must be filed with the Supreme Court within 45 days after the following:

(1) the date the court of appeals rendered judgment, if no motion for rehearing or motion for en banc reconsideration is timely filed; or

(2) the date of the court of appeals' last ruling on all timely filed motions for rehearing and all timely filed motions for en banc reconsideration.

(b) *Premature filing.* ~~A party may not file a motion for rehearing in the court of appeals after that party has filed a petition for review in the Supreme Court unless the court of appeals modifies its opinion or judgment after the petition for review is filed. The filing of a petition for review does not preclude another party from filing a motion for rehearing or the court of appeals from ruling on the motion. If a motion for rehearing is timely filed after a petition for review is filed, the petitioner must immediately notify the Supreme Court clerk of the filing of the motion, and must notify the clerk when the last timely filed motion is overruled by the court of appeals.~~ A petition filed before the last ruling on all timely filed motions for rehearing and motions for en banc reconsideration is treated as having been filed on the date of, but after, the last ruling on any such motion. If a party files a petition for review while a motion for rehearing or motion for en banc reconsideration is pending in the court of appeals, the party must include that information in its petition for review, as required by Rule 53.2(d)(9).

Comment to 2008 change: Rule 53.7(a) is amended to clarify that (1) the Supreme Court may shorten the time for filing a petition for review, and (2) the timely filing of a motion for en banc reconsideration tolls the commencement of the 45-day period for filing a petition for review until the motion is overruled. Rule 53.2(d)(9) is amended to require a party that prematurely files a petition for review to notify the Supreme Court of any panel rehearing or en banc reconsideration motions still pending in the court of appeals. Rule 53.7(b) is revised to reference this new requirement and to relocate to new Rule 49.10 those provisions governing motions for rehearing. Rule 53.2(d)(8) is amended to delete the outdated reference to unpublished opinions in civil cases, similar to the change made to Rule 52.3(d)(5)(D).

Rule 68. Discretionary Review With Petition

68.7. Court of Appeals Clerk's Duties

(b) *Reply.* The opposing party has 30 days after the timely filing of the petition in the court of appeals to file a reply to the petition with the clerk of the court of appeals. Upon receiving a reply to the petition, the clerk for the court of appeals must file the reply and note the filing on the docket.

(c)~~(b)~~ *Sending Petition and Reply to Court of Criminal Appeals.* Unless a petition for discretionary review is dismissed under Rule 50, the clerk of the court of appeals must, within 60 ~~30~~ days after the petition is filed, send to the clerk of the Court of Criminal Appeals the petition and any copies furnished by counsel, the reply, if any, and any copies furnished by counsel, together with the record, copies of the motions filed in the case, and copies of any judgments, opinions, and orders of the court of appeals. The clerk need not forward any nondocumentary exhibits unless ordered to do so by the Court of Criminal Appeals.

~~**68.9 Reply**~~

~~The opposing party has 30 days after the timely filing of the petition in the Court of Criminal Appeals--unless additional time is allowed--to file a reply to the petition with the Clerk of the Court of Criminal Appeals. When a reply is filed or the time for filing a reply has expired, the petition will be treated as submitted to the Court and ready for disposition.~~

Rule 70. Brief on the Merits

70.3 Brief Contents and Form. Briefs must comply with the requirements of Rule 38, except that they need not contain the appendix (Rule 38.1(jk)). Copies must be served as required by Rule 68.11.

71.3 Briefs. Briefs in a direct appeal should be prepared and filed in accordance with Rule 38, except that the brief need not contain an appendix (Rule 38.1(jk)), and the brief in a case in which the death penalty has been assessed may not exceed 125 pages. All briefs must be filed in the Court of Criminal Appeals. The brief must include a short statement of why oral argument would be helpful, or a statement that oral argument is waived.