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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

April 17 and 18, 2009

Documents

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09-9 SB 445, Updated version

09-10 Revised Draft of TRCP 265.1

09-11 TAMES, TRAP amendments

09-12 Proposed Amendments to TRCP 556 and 557

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By: Wentworth S.B. No. 445

A BILL TO BE ENTITLED

AN ACT

relating to juror questions and juror note-taking during civil trials.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subtitle B, Title 2, Civil Practice and Remedies Code, is amended by adding Chapter 25 to read as follows:

CHAPTER 25. CIVIL JURY TRIAL PROCEDURES

Sec. 25.001. SUPREME COURT TO MAKE RULES. The supreme court shall promulgate rules relating to jury procedures for civil trials in this state in accordance with the guidelines provided by this chapter.

Sec. 25.002. SUBMISSION OF WRITTEN QUESTIONS. (a) The rules promulgated by the supreme court must require a court to permit jurors in a civil trial to submit to the court written questions directed to a witness or to the court as provided by this section.

(b) The rules must provide that:

(1) juror questions must be submitted anonymously and before jury deliberations begin;

(2) counsel for each party will be given an opportunity, out of the presence of the jury and witnesses, to object to the questions;

(3) juror questions are required to be read by the court verbatim;

(4) juror questions will be answered orally in open court and made part of the record;

(5) counsel for each party will be given an opportunity to cross-examine witnesses after a juror question; and

(6) the court may, for good cause, prohibit or limit the submission of questions to witnesses.

Sec. 25.003. NOTE-TAKING BY JURORS. (a) The rules promulgated by the supreme court must allow jurors in a civil trial to take notes regarding the evidence during trial.

(b) The rules must provide that:

(1) the court is required to provide materials to jurors for note-taking;

(2) a juror is required to turn in the notes to the bailiff at the end of each day of court;

(3) after closing arguments are presented, the bailiff or clerk is required to collect and destroy the notes; and

(4) the notes are confidential and may not be included in the record of the trial.

(c) Notes taken by a juror during trial, as provided by this section, may not be taken by the juror into the jury room.

SECTION 2. Chapter 25, Civil Practice and Remedies Code, as added by this Act, applies to a case in which a jury is sworn on or after the effective date of this Act, without regard to whether the case commenced before, on, or after that date.

SECTION 3. This Act takes effect September 1, 2009.

Draft Date: 4/14/2009

Draft Rule 265.1 Juror Questions

(a) *Discretion of Trial Court.*[1] On its own initiative or on a party's request, the trial court in its discretion may allow jurors to submit written questions to witnesses who have appeared and testified.[2]

(b) *Procedure for Juror Questions.*

(1) Before voir dire or, at the latest, before the presentation of evidence, the trial court must inform the parties if juror questions will be allowed.[3]

(2) If juror questions will be allowed:

a. The trial court must read all of the following instructions to the jury after the jury is seated, and may repeat any or all of these instructions to remind the jury of its role. The trial court may modify these instructions as the circumstances of the particular case may require.[4]

After the parties have asked their own questions of each witness and before each witness is excused,[5] *you may submit in writing any questions you have for that witness. Any questions you submit should be about the testimony the witness has given. Your questions should not give an opinion about the case,*

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Comment [K1]: One subcommittee member suggested removing the reference to voir dire. Another member suggested retaining the reference. A third member was amenable to both options. Perhaps the full committee should vote on these options during the meeting.

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Deleted: *to clarify*

Comment [K2]: The subcommittee is also on the fence about this phrasing. One member suggested that the questions should be "to seek answers which will help you better understand the testimony." Another member suggested that the questions should be "to clarify the testimony the witness has given." A third member initially suggested placing no limit on what the questions should be about, but later indicated approval of the language in the current draft. During the last SCAC meeting, the SCAC voted (20-10) in favor of limiting the scope of the juror questions but did not vote on using the phrase "to clarify" versus the term "about". Perhaps the SCAC should revisit the issue during the next meeting.

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[1] On February 20, 2009, the SCAC voted (38-1) against prohibiting juror questions and (36-2) in favor of giving trial judges discretion to allow juror questions. Seven SCAC members voted in favor of removing everything in the rule except subdivision (a); 32 members voted in favor of including additional guidance regarding the procedure. Several SCAC members indicated support for a mixture of mandatory and discretionary provisions.

Giving the trial court discretion to allow juror questions is inconsistent with SB 445, unless the good-cause provision in SB 445 effectively gives the trial court discretion in determining whether to allow such questions.

[2] The SCAC recommended (without a vote) that the rule specify that jurors should only be allowed to ask questions of live witnesses. Subdivision (a) is revised to reflect the SCAC's recommendation.

[3] During the SCAC meeting on February 20, Stephen Susman described a recent trial in which a judge decided to allow juror questions *after* voir dire. Judge Tracy Christopher indicated she would modify the draft to allow judges to make the decision after voir dire. Nobody objected, so the subcommittee modified the draft accordingly.

[4] This sentence is modeled after similar language in the instructions following Texas Rule of Civil Procedure 226a. The SCAC voted (31-3) to require judges to read certain instructions to the jury. But certain SCAC members expressed concern about not providing any leeway for judges to modify the instructions. Judge Christopher suggested adding this sentence. Nobody objected, so the subcommittee modified the draft accordingly.

[5] Per SCAC discussions, the instructions are revised to clarify that juror questions must be asked of live witnesses.

SB 445 requires the submission of juror questions "before jury deliberations begin." It is unclear whether this means directly before deliberations or at some point before deliberations.

criticize the case, or comment on the case in any way. You may not argue with the witness through a question.

I will review all your questions with the parties privately. Keep in mind that the rules of evidence or other rules of court may prevent me from allowing some questions. I will apply the same rules to your questions that I apply to the parties' questions. Some questions may be changed or rephrased, and others may not be asked at all. If a question you submitted is not asked, do not take it personally, and do not assume it is important that your question is not asked.[6]

Deleted: *I decided not to ask your question*

You must treat the answers to your questions the same way you treat any other testimony.[7] *You must carefully consider all the testimony and other evidence in this case before deciding how much weight to give particular testimony.*

Deleted: *and their answers*

Remember that you are neutral fact finders and not advocates for either party. You must keep an open mind until all the evidence has been presented, the parties have finished their summations, and you have received my instructions on the law. Then, in the privacy of the jury room, you will discuss the case with the other jurors.

Any question you submit should be yours alone and not something you got from another person.[8] *That is because of my overall instruction that you must not discuss the case among yourselves until you have heard my final instructions on the law, and I have instructed you to begin your deliberations.*

Deleted: *juror*

b. The trial court must provide the jurors with the following form and instruct them to write any questions for the witness on this form:

Juror Question Form

You may submit one or more questions about the witness's testimony. Your questions should not give an opinion about the case, criticize the case, or

Comment [K3]: Please refer to the prior comment.

Deleted: *for the witness to help clarify any confusion*

[6] Fourteen SCAC members voted in favor of having the judge ask juror questions, 1 SCAC member voted in favor of having the lawyers ask juror questions, and 22 SCAC members voted in favor of giving the judge discretion to decide who will ask juror questions. This edit is intended to reflect the majority vote.

[7] The subcommittee modified this sentence to clarify that questions are not testimony.

[8] The subcommittee made this change to clarify that jurors should not rely on anyone else to generate questions.

comment on the case in any way. You may not argue with the witness through a question. Your questions should be yours alone, and not something you got from another juror.

Write your questions, if any, on this form. Do not put your name on the form.[9] *After the parties have asked their own questions of each witness, the judge will tell you to pass the form to the bailiff.*[10] *The bailiff will give the form to the judge, who will review all your questions with the parties privately. Remember that the judge will apply the same rules to your questions that the judge applies to the parties' questions. As a result, some questions may be changed or rephrased, and others may not be asked.*

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You must treat the answers to your questions the same way you treat any other testimony. You must carefully consider all the testimony and other evidence in this case before deciding how much weight to give particular testimony. And you must not discuss this case with a fellow juror until the judge has told you to begin your deliberations.

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(3) After the parties have asked their own questions of each witness who appears and testifies, the trial court must ask the jurors to pass the juror-question form to the bailiff with any questions the jurors have for that witness.[11]

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[9] **Consistent with SB 445, this provision is designed to protect anonymity. It is unclear whether SB 445 is intended to prompt additional measures to protect anonymity.**

[10] To further protect anonymity, the SCAC considered requiring each juror to submit a juror-question form, even if the form is blank. The SCAC voted (24-4) against that approach, in part because of the extra burden associated with collecting additional forms. But because the SCAC favored the concept of protecting anonymity, Judge Christopher added the comment following the rule to clarify that judges may take additional measures, such as requiring each juror to submit a juror-question form, in order to protect anonymity as much as possible.

[11] The SCAC considered (but did not vote on) a similar provision: "At the end of each live witness, the judge will ask the jurors to pass the juror-question form to the bailiff with any questions they have for that witness." Judge Christopher suggested adding the provision to clarify when the court will consider juror questions and that juror questions should be directed only to live witnesses. The first clause has been modified to be more consistent with the instructions in subdivision (b)(2)a.

(4) Upon receipt of a written question from the jury, the trial court must allow the parties to read the question and to make objections to the question on the record and to obtain a ruling outside the jury's hearing.[12] On its own initiative or upon a party's request, the trial court may remove the witness from the courtroom before allowing the parties to read or object to the question.[13]

(5) In its discretion, the trial court may re-word the question or decide that the question should not be asked.

If the trial court re-words the question, the trial court must read the re-worded question and allow the parties to make objections to the re-worded question on the record and obtain a ruling outside the jury's hearing.

(6) If the trial court allows a verbatim or re-worded juror question, the trial court may either ask the question or allow a party to ask the question of the witness. The parties will be allowed to ask any follow-up questions.[14]

(7) The trial court must include any submitted juror-question form in the record.[15]

Comment to 2009 Change: To the extent possible, the trial court should take steps to maintain the anonymity of the juror who asks a question. In addition to instructing jurors not to put their names on juror-question forms, the trial court may want to take a break after each witness to allow jurors to write any questions in the privacy of the jury room. Alternatively, the trial court may want each juror to have a juror-question form in the jury box and ask each juror to pass the form to the bailiff, even if the juror did not write a question on the form.

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[12] **SB 445 provides that "counsel for each party will be given an opportunity, *out of the presence of the jury and witnesses*, to object to the questions". (Emphasis added.)** That approach is consistent with two opinions in which courts of appeals concluded that juror questions are permissible with appropriate safeguards, such as excusing the jury and witness while the court determines the admissibility of the question. *See Hudson v. Markum*, 948 S.W.2d 1, 1-3 (Tex. App.—Dallas 1997, pet. denied); *Fazzino v. Guido*, 836 S.W.2d 271, 275 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (emphasis added).

The SCAC felt it would be overly burdensome and time consuming to remove the jury each time objections are made. The requirement to make objections "outside the jury's hearing" gives trial judges the option of keeping the jury in the courtroom as long as the jury is unable to hear the objections.

[13] The SCAC voted narrowly (12-11) to retain the sentence.

[14] **This is consistent with SB 445, which provides that "counsel for each party will be given an opportunity to cross-examine witnesses after a juror question".**

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[15] The SCAC discussed but did not decide whether the forms will be in the clerk's or reporter's record.

TEXAS RULES OF APPELLATE PROCEDURE

DRAFT DATE: APRIL 14, 2009

SECTION ONE: GENERAL PROVISIONS

Rule 1. Scope of Rule; Local Rules of Courts of Appeals

1.1. Scope

These rules govern procedure in appellate courts and before appellate judges and post-trial procedure in trial courts in criminal cases.

1.2. Local Rules

(a) *Promulgation.* A court of appeals may promulgate rules governing its practice that are not inconsistent with these rules. Local rules governing civil cases must first be approved by the Supreme Court. Local rules governing criminal cases must first be approved by the Court of Criminal Appeals.

(b) *Copies.* The clerk must provide a copy of the court's local rules to anyone who requests it.

(c) *Party's Noncompliance.* A court must not dismiss an appeal for noncompliance with a local rule without giving the noncomplying party notice and a reasonable opportunity to cure the noncompliance.

Notes and Comments

Comment to 1997 change: Subdivision 1.1 is simplified without substantive change. Subdivision 1.2 is amended to make clear that any person is entitled to a copy of local rules. Paragraph 1.2(c), restricting dismissal of a case for noncompliance with a local rule, is added.

Rule 2. Suspension of Rule

On a party's motion or on its own initiative an appellate court may — to expedite a decision or for other good cause — suspend a rule's operation in a particular case and order a different procedure; but a court must not construe this rule to suspend any provision in the Code of Criminal Procedure or to alter the time for perfecting an appeal in a civil case.

Notes and Comments

Comment to 1997 change: Former subdivision (a) regarding appellate court jurisdiction is deleted. The power to suspend rules is extended to civil cases. Other nonsubstantive changes are made.

Rule 3. Definitions; Uniform Terminology

3.1. Definitions

(a) *Appellant* means a party taking an appeal to an appellate court.

(b) *Appellate court* means the courts of appeals, the Court of Criminal Appeals, and the Supreme Court.

(c) *Appellee* means a party adverse to an appellant.

(d) *Applicant* means a person seeking relief by a habeas corpus in a criminal case;

(e) *Convenience fee* means a fee charged in connection with electronic filing that is in addition to regular filing fees. [A convenience fee charged by an appellate court will be considered as a court cost.]

***DRAFTING NOTE**: The definition of "convenience fee" is modeled after Rule 2.1(b) in the Statewide Rules Concerning the Electronic Filing and Service of Documents in Participating Justice of the Peace Courts ("JP Rules"), available at http://www.supreme.courts.state.tx.us/MiscDocket/07/07920000.pdf. The brackets reflect the need to determine whether appellate courts are going to charge convenience fees.*

(f) *Digital signature* means a confidential and unique electronic identifier issued to an individual who completes the initial registration procedures that TexasOnline establishes and provides on its website.

(g) *Digitized signature* means a graphic image of a handwritten signature.

***DRAFTING NOTE**: The definition of "digital signature" is a combination of JP Rules 2.1(c) and 4.2(b). The definition of "digitized signature" is in JP Rule 2.1(d).*

(h) *Electronic filing* is a process by which an individual sends a court document to an appellate court by means of an online computer transmission of the document in electronic form. For purposes of these

rules, the process does not include the filing of faxed documents described as the "electronic filing of documents" in Chapter 51 of the Government Code.

***DRAFTING NOTE**: The definition of "electronic filing" is modeled after JP Rule 2.1(f).*

(i) *Electronic filing service provider (EFSP)* means a business entity that provides electronic filing and support services. An attorney or law firm may act as an EFSP.

***DRAFTING NOTE**: The definition of "EFSP" is modeled after JP Rule 2.1(g).*

(~~e~~j) *Petitioner* means a party petitioning the Supreme Court or the Court of Criminal Appeals for review.

(k) *Registered e-mail address* means an e-mail address that an individual registers with TexasOnline for the transmission or receipt of electronically filed documents. For purposes of these rules, the term "e-mail address" encompasses "registered e-mail address"; thus, if these rules require a party to provide an e-mail address and if the party has a registered e-mail address, the party must provide his or her registered e-mail address.

***DRAFTING NOTE**: The first sentence in the definition of "registered e-mail address" is modeled after JP Rule 2.1(r). The second sentence is new and intended to require parties to provide a registered e-mail address, if available.*

(~~f~~l) *Relator* means a person seeking relief in an original proceeding in an appellate court other than by habeas corpus in a criminal case.

(~~g~~m) *Reporter* or *court reporter* means the court reporter or court recorder.

(~~h~~n) *Respondent* means:

(1) a party adverse to a petitioner in the Supreme Court or the Court of Criminal Appeals; or

(2) a party against whom relief is sought in an original proceeding in an appellate court.

(o) *TexasOnline* is a project of the Texas Department of Information Resources (DIR), a state agency charged with establishing a common electronic infrastructure through which state agencies and local governments may electronically send and receive documents and required payments.

***DRAFTING NOTE**: The definition of "TexasOnline" is modeled after JP Rule 4.1(a).*

3.2. Uniform Terminology in Criminal Cases

In documents filed in criminal appeals, the parties are the *State* and the *appellant*. But if the State has appealed under Article 44.01 of the Code of Criminal Procedure, the defendant is the *appellee*. Otherwise, ~~papers~~ documents should use real names for parties, and such labels as *appellee, petitioner, respondent,* and *movant* should be avoided unless necessary for clarity. In habeas corpus proceedings, the person for whose relief the writ is requested is the *applicant*; Code of Criminal Procedure article 11.13.

Notes and Comments

Comment to 1997 change: The definition of *court below* and the reference to "suing out a writ of error to the court of appeals," are deleted as those terms are no longer used in these rules. Other changes are made.

Comment to 2009 change: Definitions of convenience fee, digital signature, digitized signature, EFSP, registered e-mail address, and TexasOnline are included to account for the implementation of e-filing in Texas appellate courts. E-filing procedures are described in other rules. Additional e-filing information — including registration instructions — can be accessed on TexasOnline's website, at http://www.texasonline.com.

Rule 4. Time and Notice Provisions

4.1. Computing Time

(a) *In General.* The day of an act, event, or default after which a designated period begins to run is not included when computing a period prescribed or allowed by these rules, by court order, or by statute. The last day of the period is included, but if that day is a Saturday, Sunday, or legal holiday, the period extends to the end of the next day that is not a Saturday, Sunday, or legal holiday.

(b) *Clerk's Office Closed or Inaccessible.* If the act to be done is filing a document, and if the clerk's office where the document is to be filed is closed or inaccessible during regular hours on the last day for filing the document, the period for filing the document extends to the end of the next day when the clerk's office is open and accessible. The closing or inaccessibility of the clerk's office may be proved by a certificate of the clerk or counsel, by a party's affidavit, or by other satisfactory proof, and may be controverted in the same manner.

4.2. No Notice of Trial Court's Judgment in Civil Case

(a) *Additional Time to File Documents.*

(1) In general. If a party affected by a judgment or other appealable order has not — within 20 days after the judgment or order was signed — either received the notice required by Texas Rule of Civil Procedure 306a.3 or acquired actual knowledge of the signing, then a period that, under these rules, runs from the signing will begin for that party on the earlier of the date when the party receives notice or acquires actual knowledge of the signing. But in no event may the period begin more than 90 days after the judgment or order was signed.

(2) Exception for restricted appeal. Subparagraph (1) does not extend the time for perfecting a restricted appeal.

(b) *Procedure to Gain Additional Time.* The procedure to gain additional time is governed by Texas Rule of Civil Procedure 306a.5.

(c) *The Court's Order.* After hearing the motion, the trial court must sign a written order that finds the date when the party or the party's attorney first either received notice or acquired actual knowledge that the judgment or order was signed.

4.3. Periods Affected by Modified Judgment in Civil Case

(a) *During Plenary-Power Period.* If a judgment is modified in any respect while the trial court retains plenary power, a period that, under these rules, runs from the date when the judgment is signed will run from the date when the modified judgment is signed.

(b) *After Plenary Power Expires.* If the trial court corrects or reforms the judgment under Texas Rule of Civil Procedure 316 after expiration of the trial court's plenary power, all periods provided in these rules that run from the date the judgment is signed run from the date the corrected judgment is signed for complaints that would not apply to the original judgment.

4.4. Periods Affected When Process Served by Publication

If process was served by publication and if a motion for new trial was filed under Texas Rule of Civil Procedure 329 more than 30 days after the judgment was signed, a period that, under these rules, runs from the date when the judgment is signed will be computed as if the judgment were signed on the date when the motion for new trial was filed.

4.5. No Notice of Judgment or Order of Appellate Court; Effect on Time to File Certain Documents.

(a) *Additional Time to File Documents.* A party may move for additional time to file a motion for rehearing or en banc reconsideration in the court of appeals, a petition for review, or a petition for discretionary review, if the party did not — until after the time expired for filing the document — either receive notice of the judgment or order from the clerk or acquire actual knowledge of the rendition of the judgment or order.

(b) *Procedure to Gain Additional Time.* The motion must state the earliest date when the party or the party's attorney received notice or acquired actual knowledge that the judgment or order had been rendered. The motion must be filed within 15 days of that date but in no event more than 90 days after the date of the judgment or order.

(c) *Where to File.*

(1) A motion for additional time to file a motion for rehearing or en banc reconsideration in the court of appeals must be filed in and ruled on by the court of appeals in which the case is pending.

(2) A motion for additional time to file a petition for review must be filed in and ruled on by the Supreme Court.

(3) A motion for additional time to file a petition for discretionary review must be filed in and ruled on by the Court of Criminal Appeals.

(d) *Order of the Court.* If the court finds that the motion for additional time was timely filed and the party did not—within the time for filing the motion for rehearing or en banc reconsideration, petition for review, or petition for discretionary review, as the case may be—receive the notice or have actual knowledge of the judgment or order, the court must grant the motion. The time for filing the document will begin to run on the date when the court grants the motion.

Notes and Comments

Comment to 1997 change: This is former Rule 5. Paragraph 4.1(b) is added. Former paragraph (b)(1) is omitted because it is covered by other provisions of the rules. Former paragraphs (b)(2) and (b)(3) are omitted because they are duplicative of provisions in the Rules of Civil Procedure, which prescribes the applicable procedure. The phrase "modified, corrected or reformed in any respect" in paragraph 4.3(a) is changed to "modified in any respect," but no change in substance is intended. Former subdivision (e) regarding notice of judgment by the court of appeals is moved to Rule 12.6. Subdivision 4.5 is revised and now makes clear that the court must grant the motion for additional time if the court finds that the party did not receive the notice or acquire actual knowledge in time. Other changes are made throughout the rule.

Comment to 2002 change: Subdivision 4.5 is amended to clarify that a party may obtain additional time to file documents when the party fails to receive notice not only of an appellate court judgment, but of an appellate court order - such as one denying a motion for rehearing - that triggers the appeal period.

Comment to 2008 change: Subdivision 4.5 is changed, consistent with other changes in the rules, to specifically address a motion for en banc reconsideration and treat it as a motion for rehearing.

Rule 5. Fees in Civil Cases

A party who is not excused by statute or these rules from paying costs must pay — at the time an item is presented for filing — whatever fees are required by statute or Supreme Court order. The appellate court may enforce this rule by any order that is just.

***DRAFTING NOTE**: Please refer to the Appendix A revisions.*

Notes and Comments

Comment to 1997 change: This is former Rule 13. The rule is simplified. The fees an appellate court may charge in a civil case are now specified by Supreme Court order.

Rule 6. Representation by Counsel

6.1. Lead Counsel

(a) *For ~~Appellant~~ Each Party*. Unless another attorney is designated, lead counsel for ~~an appellant~~ party is the attorney whose ~~signature first appears on the notice of appeal~~ name first appears in the signature block of the first document filed in the appellate court on the party's behalf.

~~(b) *For a Party Other Than Appellant.* Unless another attorney is designated, lead counsel for a party other than an appellant is the attorney whose signature first appears on the first document filed in the appellate court on that party's behalf.~~

***DRAFTING NOTE**: The amendments to 6.1(a)-(b) are modeled after the second sentence in JP Rule 4.2(b).*

(~~c~~b) *How to Designate*. The original or a new lead counsel may be designated by filing a notice stating that attorney's name, mailing address, telephone number, fax number, if any, e-mail address, if any, and State Bar of Texas identification number. If a new lead counsel is being designated, both the new attorney and either the party or the former lead counsel must sign the notice.

6.2. Appearance of Other Attorneys

An attorney other than lead counsel may file a notice stating that the attorney represents a specified party to the proceeding and giving that attorney's name, mailing address, telephone number, fax number, if any, e-mail address, if any, and State Bar of Texas identification number. The clerk will note on the docket the attorney's appearance. When a brief or motion is filed, the clerk will note on the docket the name of each attorney, if not already noted, who appears on the document.

6.3. Sending ~~To Whom~~ Communications ~~Sent~~

Any notice, copies of documents filed in an appellate court, or other communications must be sent to:

(a) each party's lead counsel on appeal;

(b) a party's lead counsel in the trial court if:

(1) that party was represented by counsel in the trial court;

(2) lead counsel on appeal has not yet been designated for that party; and

(3) lead counsel in the trial court has not filed a nonrepresentation notice or been allowed to withdraw;

(c) a party if the party is not represented by counsel.

6.4. Nonrepresentation Notice

(a) *In General*. If, in accordance with paragraph 6.3(b), the lead counsel in the trial court is being sent notices, copies of documents, or other communications, that attorney may file a nonrepresentation notice in the appellate court. The notice must:

(1) state that the attorney is not representing the party on appeal;

(2) state that the court and other counsel should communicate directly with the party in the future;

(3) give the party's name and last known address and telephone number; and

(4) be signed by the party.

(b) *Appointed Counsel*. In a criminal case, an attorney appointed by the trial court to represent an indigent party cannot file a nonrepresentation notice.

6.5. Withdrawal

An appellate court may, on appropriate terms and conditions, permit an attorney to withdraw from representing a party in the appellate court.

(a) *Contents of Motion.* A motion for leave to withdraw must contain the following:

(1) a list of current deadlines and settings in the case;

(2) the party's name and last known address and telephone number;

(3) a statement that a copy of the motion was delivered to the party; and

(4) a statement that the party was notified in writing of the right to object to the motion.

(b) *Delivery to Party.* The motion must be delivered to the party in person or mailed — both by certified and by first-class mail — to the party at the party's last known address.

(c) *If Motion Granted.* If the court grants the motion, the withdrawing attorney must immediately notify the party, in writing, of any deadlines or settings that the attorney knows about at the time of withdrawal but that were not previously disclosed to the party. The withdrawing attorney must file a copy of that notice with the court clerk.

(d) *Exception for Substitution of Counsel.* If an attorney substitutes for a withdrawing attorney, the motion to withdraw need not comply with (a) but must state only the substitute attorney's name, mailing address, telephone number, fax number, if any, e-mail address, if any, and State Bar of Texas identification number. The withdrawing attorney must comply with (b) but not (c).

6.6. Agreements of Parties or Counsel

To be enforceable, an agreement of parties or their counsel concerning an appellate court proceeding must be in writing and signed by the parties or their counsel. Such an agreement is subject to any appellate court order necessary to ensure that the case is properly presented.

Notes and Comments

Comment to 1997 change: Former Rules 7 and 57 are merged and substantially revised. Former Rule 8 regarding agreements of counsel is included here as subdivision 6.6 and the requirement that an agreement be filed and included in the record is deleted.

Comment to 2009 change: Subdivision 6.1(a) is amended to allow the designation of lead counsel on electronically filed documents that do not contain traditional signatures, and to apply more generally to parties. Subdivision 6.1(b) is deleted because it is no longer necessary. Subdivision 6.1(c) is renumbered as 6.1(b) and amended to require an e-mail address, if any, in a lead-counsel notice. Subdivisions 6.2 and 6.5 are also amended to require an e-mail address, if any, in a notice of representation and a motion to withdraw, respectively.

Rule 7. Substituting Parties

7.1. Parties Who Are Not Public Officers

(a) *Death of a Party.*

(1) Civil Cases. If a party to a civil case dies after the trial court renders judgment but before the case has been finally disposed of on appeal, the appeal may be perfected, and the appellate court will proceed to adjudicate the appeal as if all parties were alive. The appellate court's judgment will have the same force and effect as if rendered when all parties were living. The decedent party's name may be used on all ~~papers~~ documents.

(2) Criminal Cases. If the appellant in a criminal case dies after an appeal is perfected but before the appellate court issues the mandate, the appeal will be permanently abated.

(b) *Substitution for Other Reasons.* If substitution of a party in the appellate court is necessary for a reason other than death, the appellate court may order substitution on any party's motion at any time.

7.2. Public Officers

(a) *Automatic Substitution of Officer.* When a public officer is a party in an official capacity to an appeal or original proceeding, and if that person ceases to hold office before the appeal or original proceeding is finally disposed of, the public officer's successor is automatically substituted as a party if appropriate. Proceedings following substitution are to be in the name of the substituted party, but any misnomer that does not affect the substantial rights of the parties may be disregarded. Substitution may be ordered at any time, but failure to order substitution of the successor does not affect the substitution.

(b) *Abatement.* If the case is an original proceeding under Rule 52, the court must abate the proceeding to allow the successor to reconsider the original party's decision. In all other cases, the suit will not abate, and the successor will be bound by the appellate court's judgment or order as if the successor were the original party.

Notes and Comments

Comment to 1997 change: This is former Rule 9. Former subdivision (a) regarding death of a party in a civil case is now subparagraph 7.1(a)(1). Former subdivision (b) regarding death of a party in a criminal case is now subparagraph 7.1(a)(2). Former subdivision (c) regarding separation of office by public officers is now subdivision 7.2. Former paragraph (c)(3) regarding a successor's liability for costs is omitted as unnecessary. Former subdivision (d) regarding substitution for other causes is now paragraph 7.1(b). Subdivision 7.2 is revised to make it applicable to all cases in which a public officer is a party, and to make substitution automatic if appropriate.

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.

Comment to 2008 change: The requirement that the bankruptcy notice contain certain pages of the bankruptcy petition is eliminated, given that electronic filing is now prevalent in bankruptcy courts and bankruptcy petitions are available through the federal PACER system.

8.2. Effect of Bankruptcy

A bankruptcy suspends the appeal and all periods in these rules from the date when the bankruptcy petition is filed until the appellate court reinstates or severs the appeal in accordance with federal law. A period that began to run and had not expired at the time the proceeding was suspended begins anew when the proceeding is reinstated or severed under 8.3. A document filed by a party while the proceeding is suspended will be deemed filed on the same day, but after, the court reinstates or severs the appeal and will not be considered ineffective because it was filed while the proceeding was suspended.

8.3. Motion to Reinstate or Sever Appeal Suspended by Bankruptcy

(a) *Motion to Reinstate.* If a case has been suspended by a bankruptcy filing, a party may move that the appellate court reinstate the appeal if permitted by federal law or the bankruptcy court. If the bankruptcy court has lifted or terminated the stay a certified copy of the order must be attached to the motion.

(b) *Motion to Sever.* A party may move to sever the appeal with respect to the bankrupt party and to reinstate the appeal with respect to the other parties. The motion must show that the case is severable and must comply with applicable federal law regarding severance of a bankrupt party. The court may proceed under this paragraph on its own initiative.

Notes and Comments

Comment to 1997 change: This is a new rule.

Rule 9. ~~Papers~~ Documents Generally

9.1. Signing

(a) *Represented Parties.* If a party is represented by counsel, a document filed on that party's behalf must be signed by at least one of the party's attorneys. For each attorney whose name appears on a document as representing that party, the document must contain that attorney's State Bar of Texas identification number, mailing address, telephone number, ~~and~~ fax number, if any, and e-mail address, if any.

(b) *Unrepresented Parties.* A party not represented by counsel must sign any document that the party files and give the party's mailing address, telephone number, ~~and~~ fax number, if any, and e-mail address, if any.

(c) *Electronically Filed Documents.*

(1) An individual must use his or her digital signature to electronically file a document.

(2) Except when otherwise provided by law or these rules, a digital or digitized signature on an electronically filed document is a signature on the document for purposes of the signature requirements in these rules or any other law. If the document is filed using a digital signature belonging to one person but contains a digitized signature belonging to a different person, the digitized signature controls; otherwise, a digital signature on an electronically filed document is deemed to be the signature of the attorney whose name first appears in the signature block of the document.

(3) A digital signature on an electronically filed document authorizes the payment of whatever fees are required by statute or Supreme Court order, including any convenience fees that [appellate courts,] TexasOnline, and EFSPs charge to electronically file a document.

***DRAFTING NOTE**: The brackets reflect the need to determine whether appellate courts will charge convenience fees.*

(4) An electronically filed document that must be notarized, sworn to, or made under oath must be sent as a scanned image in black and white with a resolution of 300 dots per inch (dpi).

(5) An electronically filed document requiring a signature of an opposing party — such as an agreement described in Rule 6.6 — must be sent as a scanned image in black and white with a resolution of 300 dots per inch (dpi).

***DRAFTING NOTE**: The amendments to 9.1(c) are modeled after several JP Rules:*

TRAP Amendment	*Corresponding JP Rule*
9.1(c)(1)	*4.2(a)*
9.1(c)(2)	*4.2(b) (but the conflict provision is new)*
9.1(c)(3)	*4.1(f)-(g), 4.2(c)*
9.1(c)(4)	*3.2(a)*
9.1(c)(5)	*3.2(b)*

9.2. Filing

(a) *With Whom.* ~~A document is filed in an appellate court by delivering it to:~~

(1) Paper Filing. A document is filed in an appellate court by delivering it to:

(A) the clerk of the court in which the document is to be filed; or

~~(2)~~ (B) a justice or judge of that court who is willing to accept delivery. A justice or judge who accepts delivery must note on the document the date and time of delivery, which will be considered the time of filing, and must promptly send it to the clerk.

(2) Electronic Filing. A document is electronically filed in an appellate court by electronically transmitting the document to an approved EFSP. The EFSP must electronically transmit the document to TexasOnline, which must electronically transmit the document to the appellate court.

***DRAFTING NOTE**: The amendments to 9.2(a) are modeled after JP Rule4.1(c).*

(b) *Filing by Mail.*

(1) Timely Filing. A document received within ten days after the filing deadline is considered timely filed if:

(A) it was sent to the proper clerk by United States Postal Service first-class, express, registered, or certified mail;

(B) it was placed in an envelope or wrapper properly addressed and stamped; and

(C) it was deposited in the mail on or before the last day for filing.

(2) Proof of Mailing. Though it may consider other proof, the appellate court will accept the following as conclusive proof of the date of mailing:

(A) a legible postmark affixed by the United States Postal Service;

(B) a receipt for registered or certified mail if the receipt is endorsed by the United States Postal Service; or

(C) a certificate of mailing by the United States Postal Service.

(c) *Electronic Filing.* ~~A court of appeals may by local rule permit documents to be filed, signed, or verified by electronic means that are consistent with technological standards, if any, that~~ A document may be electronically filed in an appellate court. By electronically filing a document in an appellate court, a party agrees to provide information regarding any change in his or her e-mail address to TexasOnline, the appellate court, and all other parties in the case within 24 hours of the change. The electronically filed document, as maintained by the clerk, will be deemed to be the original document.

(1) A electronically filed document must be sent in a computer format that TexasOnline specifies pursuant to standards approved by the Supreme Court and Court of Criminal Appeals ~~establishes~~.

(2) Only one document may be included in each electronic transmission to TexasOnline. But attachments to an electronically filed document, such as an appendix to a petition or brief, are considered part of the electronically filed document and may be transmitted along with the electronically filed document.

(3) A document may be electronically transmitted through an EFSP to TexasOnline 24 hours per day each day of the year, except during brief periods of state-approved scheduled maintenance which will usually occur in the early hours of Sunday morning.

(4) A document that is electronically transmitted to an EFSP on or before the last day for filing is considered timely filed if it is transmitted to an approved EFSP with instructions to forward it to the proper appellate court. Though it may consider other proof, the appellate court will accept an EFSP's transmission report as conclusive proof of the date and time of transmission.

(5) Upon receiving a document from a party, an EFSP must send the document to TexasOnline in the proper format, along with a transmission report indicating the date and time the document was received and the filing party's payment information.

(6) Upon receiving a document from an EFSP, TexasOnline must electronically transmit to the filing party an acknowledgment form including the date and time that TexasOnline received the document. TexasOnline must also electronically transmit the document to the appellate court. If the document was not properly formatted, Texas Online must transmit a warning to the EFSP.

(7) If an electronically filed document is directed to the proper appellate court and complies with all filing requirements, the appellate court must accept the document. The appellate court must also accept electronically filed documents that are filed in connection with a certificate or affidavit of indigence in the manner required by Rule 20.1.

(8) If the appellate court accepts an electronically filed document, it must promptly record the date of the electronic filing, which, with the exception of circumstances addressed in paragraph (9), must be the date the document was transmitted to the EFSP. The appellate court must notify TexasOnline of its action the same day it takes action. Upon receiving notice from the appellate court, TexasOnline must electronically transmit to the EFSP a confirmation that the appellate court accepted the document. Upon receiving the confirmation from TexasOnline, the EFSP must electronically transmit the confirmation to the filing party. This confirmation will include an electronically file-marked copy of the front page of the document showing the date the appellate court considers the document filed or received.

(9) If the appellate court rejects an electronically filed document, the appellate court must notify TexasOnline of its action and the reason for its action on the same day it takes action. Upon receiving notice from the appellate court, TexasOnline must electronically transmit to the EFSP an "alert" that the appellate court rejected the document and all information the appellate court provided regarding the rejection. Upon receiving the alert and information, the EFSP must electronically transmit the alert and information to the filing party.

***DRAFTING NOTE**: The amendments to 9.2(c) are modeled after several JP Rules:*

TRAP Amendment	*Corresponding JP Rule*
9.2(c)(1)	*4.1(d) (but JCIT becomes SC & CCA)*
9.2(c)(2)	*3.2(c), 4.4(a)*
9.2(c)(3)	*4.3(a)*
9.2(c)(4)	*4.3(b)*
9.2(c)(5)	*4.3(c)*
9.2(c)(6)	*4.3(c)-(d)*
9.2(c)(7)	*4.3(e)*
9.2(c)(8)	*4.3(f)*
9.2(c)(9)	*4.3(g)*

9.3. Number of Copies

(a) *Courts of Appeals and Supreme Court of Texas.*

(1) Paper Filing. A party must file ~~the~~ one bound original and ~~three~~ one unbound copies of all documents in any ~~original~~ proceeding.

~~(B) the original and two copies of all motions in an appellate proceeding; and~~

~~(C) the original and five copies of all other documents.~~

***DRAFTING NOTE**: This revision is consistent with an understanding that there will no longer be a need for multiple paper copies because documents will be scanned into the system upon (or shortly after) receipt. We will need to confer with all appellate-court judges and clerks before finalizing this revision.*

(2) Exception by Local Rule. A court of appeals may by local rule require the filing of more or fewer copies of any document other than a petition for discretionary review.

(b) ~~*Supreme Court and*~~ *Court of Criminal Appeals.*

(1) Paper Filing. A party must file ~~the~~ one bound original, one unbound copy, and 11 bound copies of any document addressed to ~~either the Supreme Court or~~ the Court of Criminal Appeals, except that ~~in the Supreme Court only an original and two copies must be filed of a motion for extension of time or a response to the motion, and in the Court of Criminal Appeals,~~ only the original must be filed of a

motion for extension of time or a response to the motion, or a pleading under Code of Criminal Procedure article 11.07.

(2) Electronic Filing. When a party electronically files the original of any document that is not excepted under (1), the party must hand-deliver or send 11 bound copies to the clerk within one business day after electronically filing the document. A legible postmark affixed by the United States Postal Service is prima facie evidence of the date of mailing.

DRAFTING NOTE: *This revision is based on the understanding that each CCA Judge wants a hard copy of all filed documents.*

(c) *Exception for Record.* Only the original record need be filed in any proceeding. The original record may be filed electronically in accordance with Appendices C and E of these rules and the Uniform Format Manual for Texas Court Reporters.

9.4. Form

Except for the record, a document filed with an appellate court must — unless the court accepts another form in the interest of justice — be in the following form:

(a) *Printing.* A document may be produced by standard typographic printing or by any duplicating process that produces a distinct black image. Printing may be on both sides of the ~~paper~~ page.

(b) *~~Paper~~ Page Type and Size.* The ~~paper~~ page on which the document is produced must be white or nearly white, and opaque. ~~Paper~~ Each page must be 8½ by 11 inches.

(c) *Margins.* ~~Papers~~ Pages must have at least one-inch margins on both sides and at the top and bottom.

(d) *Spacing.* Text must be double-spaced, but footnotes, block quotations, short lists, and issues or points of error may be single-spaced.

(e) *Typeface.* A document must be printed in standard 10-character-per-inch (cpi) nonproportionally spaced Courier typeface or in 13-point or larger proportionally spaced typeface. But if the document is printed in a proportionally spaced typeface, footnotes may be printed in typeface no smaller than 10-point.

(f) *Binding and Covering.* A document must be bound so as to ensure that it will not lose its cover or fall apart in regular use. A document should be stapled once in the top left-hand corner or be bound so that it will lie flat when open. A petition or brief should have durable front and back covers which must not be plastic or be red, black, or dark blue.

(g) *Contents of Cover.* A document's front cover page, if any, must contain the case style, the case number, the title of the document being filed, the name of the party filing the document, and the name, mailing address, telephone number, fax number, if any, e-mail address, if any, and State Bar of Texas identification number of the lead counsel for the filing party. If a party requests oral argument in the court of appeals, the request must appear on the front cover page of that party's first brief.

(h) *Appendix.*

(1) Paper Appendix. An appendix may be bound either with the document to which it is related or separately. If separately bound, the appendix must comply with paragraph (f). An appendix ~~should~~ must be tabbed and indexed. For scanning purposes, each page that has a protruding tab must contain the title of the document immediately following the tabbed page, as well as the content on the protruding tab.

(2) Electronic Appendix. An electronically filed appendix may be transmitted either with the document to which it is related or separately. The appendix must be indexed and include a separator page before each document. The separator page must contain the title of the document immediately following the separator page, as well as the content that would have been on a protruding tab if the appendix had been filed on paper.

(i) *Electronic Filing.* An electronically filed document must comply with the provisions of this rule, except subdivisions (f) and (h)(1). But a bound copy of an electronically filed document, submitted in accordance with Rule 9.3(b), must comply with subdivisions (f) and (h)(1), and must provide in bold font on the cover page that it is a copy of an electronically filed document.

(j) *Nonconforming Documents.* Unless every copy of a document conforms to these rules, the court may strike the document and return all nonconforming copies to the filing party. The court must identify the error to be corrected and state a deadline for the party to resubmit the document in a conforming format. If another nonconforming document is filed, the court may strike the document and prohibit the party from filing further documents of the same kind. The use of footnotes, smaller or condensed typeface, or compacted or compressed printing features to avoid the limits of these rules are grounds for the court to strike a document.

9.5. Service

(a) *Service of All Documents Required.* At or before the time of a document's filing, the filing party must serve a copy on all parties to the proceeding. But a party need not serve a copy of the record.

(b) *Manner of Service.* Service on a party represented by counsel must be made on that party's lead counsel. Service may be personal, by mail, by commercial delivery service, ~~or~~ by fax, or by electronic means in accordance with this rule. Personal service includes delivery to any responsible person at the office of the lead counsel for the party served.

(c) *Electronic Service.*

(1) To be served by electronic means, a party must consent to electronic service by opting into electronic service through TexasOnline. By consenting to electronic service, a party agrees to provide information regarding any change in the party's e-mail address to TexasOnline, the appellate court, and all other parties in the case within 24 hours of the change.

(2) To serve a document by electronic means, a filing party must log on to his or her EFSP's website, identify the party to be served by electronic means, and electronically transmit the document to the filing party's EFSP. Upon receiving the document, the EFSP must electronically transmit the document to TexasOnline, which must first electronically transmit the document to the EFSP for the party served by electronic means and then must electronically transmit proof of service to the EFSP for the filing party and the party served by electronic means. Upon receiving proof of service, the EFSP for the party served by electronic means must notify the party via e-mail that the party has received electronic service, and the EFSP for the filing party must notify the filing party via e-mail that the document has been delivered to the EFSP for the party served by electronic means. The party served by electronic means must log on to his or her EFSP's website to retrieve the document.

***DRAFTING NOTE**: The amendments to 9.5(b) are modeled loosely after the relevant provisions in JP Rule 5.1. BearingPoint provided the details beyond JP Rule 5.1.*

(~~c~~d) *When Service Is Complete.*

(1) Service by mail is complete on mailing.

(2) Service by commercial delivery service is complete when the document is placed in the control of the delivery service.

(3) Service by fax is complete on receipt.

(4) Electronic service is complete when the filing party electronically transmits the document to the filing party's EFSP. When electronic service is complete after 5:00 p.m. (recipient's time), then the date of service is the next day that is not a Saturday, Sunday, or legal holiday.

***DRAFTING NOTE**: The first sentence in 9.5(c)(4) is modeled after the first sentence in JP Rule 5.2(a). The rest of 5.2(a) is excluded because under TRAP 2, appellate courts already have the power to suspend a rule's operation in a particular case for good cause. The second sentence in 9.5(c)(4) is modeled after JP Rule 5.2(c).*

(~~d~~c) *Proof of Service.* A document presented for filing must contain a proof of service in the form of either an acknowledgment of service by the person served or a certificate of service. Proof of service may appear on or be ~~affixed~~ attached to the filed document. The clerk may permit a document to be filed without proof of service, but will require the proof to be filed promptly.

***DRAFTING NOTE**: This edit is intended to convey that parties may attach a scanned certificate of service to an electronically filed document. An appellate-court clerk suggested allowing parties to complete certificates of service, conference, and compliance electronically, as a component of electronically filing the underlying document. We need to determine whether that is possible in the current e-filing system, and whether it is a preferred method of proceeding.*

(~~e~~f) *Certificate Requirements.* A certificate of service must be signed by the person who made the service and must state:

(1) the date and manner of service;

(2) the name and address of each person served; ~~and~~

(3) if the person served is a party's attorney, the name of the party represented by that attorney; and;

(4) if a document is served by electronic means:

(1) the filing party's registered e-mail address;

(2) the recipient party's registered e-mail address; and

(3) a statement either that the document has been served by electronic means, or that the document will be served by electronic means concurrent with the electronic filing of the document.

***DRAFTING NOTE**: 9.5(e)(4) is modeled after the relevant provisions in JP Rule 5.3(b).*

9.6. Communications With the Court

Parties and counsel may communicate with the appellate court about a case only through the clerk.

9.7. Adoption by Reference

Any party may join in or adopt by reference all or any part of a brief, petition, response, motion, or other document filed in an appellate court by another party in the same case.

9.8. Protection of Minor's Identity in Parental-Rights Termination Cases and Juvenile Court Cases

(a) *Alias Defined.* For purposes of this rule, an alias means one or more of a person's initials or a fictitious name, used to refer to the person.

(b) *Parental-Rights Termination Cases.* In an appeal or an original proceeding in an appellate court, arising out of a case in which the termination of parental rights was at issue:

(1) except for a docketing statement, in all documents ~~papers~~ submitted to the court, including all appendix items submitted with a brief, petition, or motion:

(A) a minor must be identified only by an alias unless the court orders otherwise;

(B) the court may order that a minor's parent or other family member be identified only by an alias if necessary to protect a minor's identity; and

(C) all documents must be redacted accordingly;

(2) the court must, in its opinion, use an alias to refer to a minor, and if necessary to protect the minor's identity, to the minor's parent or other family member.

(c) *Juvenile Court Cases.* In an appeal or an original proceeding in an appellate court, arising out of a case under Title 3 of the Family Code:

(1) except for a docketing statement, in all documents ~~papers~~ submitted to the court, including all appendix items submitted with a brief, petition, or motion:

(A) a minor must be identified only by an alias;

(B) a minor's parent or other family member must be identified only by an alias; and

(C) all documents must be redacted accordingly;

(2) the court must, in its opinion, use an alias to refer to a minor and to the minor's parent or other family member.

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

Notes and Comments

Comment to 1997 change: This is former Rule 4. Subdivision 9.4, prescribing the form of documents filed in the appellate courts, is changed and the form to be used is stated in significantly more detail. Former subdivisions (f) and (g), regarding service of documents, are merged into subdivision 9.5. Former Rule 6 is included as subdivision 9.6, but no substantive change is made. Other changes are made throughout the rule. Electronic filing is authorized by §§ 51.801-.807 of the Government Code.

Comment to 2002 change: The change [to Rule 9.5(a)] clarifies that the filing party must serve a copy of the document filed on all other parties, not only in an appeal or review, but in original proceedings as well. The rule applies only to filing *parties*. Thus, when the clerk or court reporter is responsible for filing the record, as in cases on appeal, a copy need not be served on the parties. The rule for original civil proceedings, in which a party is responsible for filing the record, is stated in subdivision 52.7.

Subdivision 9.7 is added to provide express authorization for the practice of adopting by reference all or part of another party's filing.

Comment to 2008 change: Subdivision 9.3 is amended to reduce the number of copies of a motion for extension of time or response filed in the Supreme Court. Subdivision 9.8 is new. To protect the privacy of minors in suits affecting the parent-child relationship (SAPCR), including suits to terminate parental rights, Section 109.002(d) of the Family Code authorizes appellate courts, in their opinions, to identify parties only by fictitious names or by initials. Similarly, Section 56.01(j) of the Family Code prohibits identification of a minor or a minor's family in an appellate opinion related to juvenile court proceedings. But as appellate briefing becomes more widely available through electronic media sources, appellate courts' efforts to protect minors' privacy by disguising their identities in appellate opinions may be defeated if the same children are fully identified in briefs and other court ~~papers~~ documents available to the public. The rule provides protection from such disclosures. Any fictitious name 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. Although appellate courts are authorized to enforce the rule's provisions requiring redaction, parties and amici curiae are responsible for ensuring that briefs and other ~~papers~~ documents submitted to the court fully comply with the rule.

Comment to 2009 change: Rule 9 is amended to replace the term "paper" with the term "document," thereby making the rule applicable to a document filed in paper or electronic form. Subdivisions 9.1-.4 are amended to include procedures for electronically filing a document. Subdivision 9.5 is amended to include procedures for electronic service.

Rule 10. Motions in the Appellate Courts

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:

(1) contain or be accompanied by any matter specifically required by a rule governing such a motion;

(2) state with particularity the grounds on which it is based;

(3) set forth the order or relief sought;

(4) be served and filed with any brief, affidavit, or other paper filed in support of the motion; and

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

***DRAFTING NOTE**: See prior note regarding the appellate-court clerk's suggestion.*

(b) *Response.* A party may file a response to a motion at any time before the court rules on the motion or by any deadline set by the court. The court may determine a motion before a response is filed.

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; and

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

10.3. Determining Motions

(a) *Time for Determination.* A court should not hear or determine a motion until 10 days after the motion was filed, unless:

(1) the motion is to extend time to file a brief, a petition for review, or a petition for discretionary review;

(2) the motion states that the parties have conferred
and that no party opposes the motion; or

(3) the motion is an emergency.

(b) *Reconsideration.* If a motion is determined prematurely, any party adversely affected may request the court to reconsider its order.

10.4. Power of Panel or Single Justice or Judge to Entertain Motions

(a) *Single Justice.* In addition to the authority expressly conferred by these rules or by law, a single justice or judge of an appellate court may grant or deny a request for relief that these rules allow to be sought by motion. But in a civil case, a single justice should not do the following:

(1) act on a petition for an extraordinary writ; or

(2) dismiss or otherwise determine an appeal or a motion for rehearing.

(b) *Panel.* An appellate court may provide, by order or rule, that a panel or the full court must act on any motion or class of motions.

10.5. Particular Motions

(a) *Motions Relating to Informalities in the Record.* A motion relating to informalities in the manner of bringing a case into court must be filed within 30 days after the record is filed in the court of appeals. The objection, if waivable, will otherwise be deemed waived.

(b) *Motions to Extend Time.*

(1) Contents of Motion in General. All motions to extend time, except a motion to extend time for filing a notice of appeal, must state:

(A) the deadline for filing the item in

question;

(B) the length of the extension sought;

(C) the facts relied on to reasonably explain the need for an extension; and

(D) the number of previous extensions granted regarding the item in question.

(2) Contents of Motion to Extend Time to File Notice of Appeal. A motion to extend the time for filing a notice of appeal must:

(A) comply with (1)(A) and (C);

(B) identify the trial court;

(C) state the date of the trial court's judgment or appealable order; and

(D) state the case number and style of the case in the trial court.

(3) Contents of Motion to Extend Time to File Petition for Review or Petition for Discretionary Review. A motion to extend time to file a petition for review or petition for discretionary review must also specify:

(A) the court of appeals;

(B) the date of the court of appeals' judgment;

(C) the case number and style of the case in the court of appeals; and

(D) the date every motion for rehearing or en banc reconsideration was filed, and either the date and nature of the court of appeals' ruling on the motion, or that it remains pending.

(c) *Motions to Postpone Argument.* Unless all parties agree, or unless sufficient cause is apparent to the court, a motion to postpone argument of a case must be supported by sufficient cause.

Notes and Comments

Comment to 1997 change: This is former Rule 19. Under subdivision 10.1, a response may be filed at any time before the court rules on the motion. The provision of former subdivision (b) regarding docketing motions is incorporated in Rule 12.2. The provision of former subdivision (b) for noting attorneys' names on the docket is incorporated in Rule 6.2. Former subdivision (c), requiring the clerk to send notices of the filing of motions is deleted as unnecessary because the parties must serve all motions under Rule 9.5. Subdivision 10.2 is amended to eliminate the requirement of an oath where the facts are within the personal knowledge of the attorney. Subdivision 10.5 is new and incorporates the provisions of other rules concerning motions, as follows: 10.5(a) from former Rule 71; 10.5(b) from former Rules 73, 130(d), and 160; and 10.5(c) from former Rule 70. Other changes are made.

Comment to 2008 change: It happens so infrequently that a non-movant does not oppose a motion for rehearing or en banc reconsideration that such motions are excepted from the certificate-of-conference requirement in Subdivision 10.1(a)(5). Subdivision 10.2 is revised to clarify that facts supporting a motion need not be verified by the filer if supporting evidence is in the record, the facts are known to the court, or the filer has personal knowledge of them. Subdivision 10.5(b)(3)(D) is added.

Rule 11. Amicus Curiae Briefs

An ~~appellate clerk may receive, but not file, an~~ amicus curiae brief may be filed in any case. But the court for good cause may refuse to consider the brief and order that it be returned. An amicus curiae brief must:

(a) comply with the briefing rules for parties;

(b) identify the person or entity on whose behalf the brief is tendered;

(c) disclose the source of any fee paid or to be paid for preparing the brief; and

(d) certify that copies have been served on all parties.

Notes and Comments

Comment to 1997 change: This is former Rule 20. The rule is rewritten and now requires disclosure of the identity of the person or entity on whose behalf the brief is filed, and the source of any fee paid.

Comment to 2002 change: The change expressly recognizes that a court may refuse to consider an amicus curiae brief for good cause.

Comment to 2009 change: Rule 11 is amended to make it clear that amicus briefs, like other documents, may be filed.

Rule 12. Duties of Appellate Clerk

12.1. Docketing the Case

On receiving a copy of the notice of appeal, the petition for review, the petition for discretionary review, the petition in an original proceeding, or a certified question, the appellate clerk must:

(a) endorse on the document the date of receipt, either by hand or electronically if the document is electronically filed;

(b) collect any filing fee;

(c) docket the case;

(d) notify all parties of the receipt of the document and, if the document is electronically filed, notify TexasOnline; and

(e) if the document filed is a petition for review filed in the Supreme Court, notify the court of appeals clerk of the filing of the petition.

12.2. Docket Numbers

The clerk must put the case's docket number on each item received in connection with the case and must put the docket number on the envelope in which the record is stored. If a document is electronically filed, the clerk may electronically put the docket number on the document.

(a) *Numbering System.* Each case filed in a court of appeals must be assigned a docket number consisting of the following four parts, separated by hyphens:

(1) the number of the court of appeals district;

(2) the last two digits of the year in which the case is filed;

(3) the number assigned to the case; and

(4) the designation "CV" for a civil case or "CR" for a criminal case.

(b) *Numbering Order.* Each case must be docketed in the order of its filing.

(c) *Multiple Notices of Appeal.* All notices of appeal filed in the same case must be given the same docket number.

(d) *Appeals Not Yet Filed.* A motion relating to an appeal that has been perfected but not yet filed must be docketed and assigned a docket number that will also be assigned to the appeal when it is filed.

12.3. Custody of ~~Papers~~ Documents

The clerk must safeguard the record and every other item filed in a case. If the record or any part of it or any other item is missing, the court will make an order for the replacement of the record or item that is just under the circumstances.

12.4. Withdrawing ~~Papers~~ Documents

The clerk may permit the record or other filed item to be taken from the clerk's office at any time, on the following conditions:

(a) the clerk must have a receipt for the record or item;

(b) the clerk should make reasonable conditions to ensure that the withdrawn record or item is preserved and returned;

(c) the clerk may demand the return of the record or item at any time;

(d) after the case is submitted to the court and before the court's decision, the record cannot be withdrawn;

(e) after the court's decision, the losing party must be given priority in withdrawing the record;

(f) the clerk may not allow original documents filed under Rule 34.5(f) or original exhibits filed under Rule 34.6(g) to be taken from the clerk's office;

(g) if the court allows an original document or exhibit to be taken by a party and it is not returned, the court may accept the opposing party's statement concerning the document's or exhibit's nature and contents;

(h) withdrawn material must not be removed from the court's jurisdiction; and

(I) the court may, on the motion of any party or its own initiative, modify any of these conditions.

***DRAFTING NOTE**: We should probably either modify 12.4 or draft a new rule to account for electronic access to documents. But the manner of revision will hinge, at least in part, on the content of the Rules of Judicial Administration regarding sensitive data and e-access to court records. As soon as the Court decides the content of those rules, we will revisit this issue.*

12.5. Clerk's Duty to Account

The clerk of an appellate court who receives money due another court must promptly pay the money to the court to whom it is due. This rule is enforceable by the Supreme Court.

12.6. Notices of Court's Judgments and Orders

In any proceeding, the clerk of an appellate court must promptly send a notice of any judgment, mandate or other court order to all parties to the proceeding.

Notes and Comments

Comment to 1997 change: This is former Rule 18. Former subdivision (b), regarding the preparation of the record, is moved to the order concerning the preparation of the appellate record.

Former Rule 14, which is revised and simplified, is relocated here as subdivision 12.5. Subdivision 12.6, requiring the clerk to send a notice of any order or judgment of an appellate court, is added. Other changes are made.

Comment to 2002 change: Subdivision 12.6 is amended to require the clerk to notify the parties of all of the court's rulings, including the mandate.

Comment to 2009 change: Subdivisions 12.1-.2 are amended to address electronic filing in Texas appellate courts.

Rule 13. Court Reporters and Court Recorders

13.1. Duties of Court Reporters and Recorders

The official court reporter or court recorder must:

(a) unless excused by agreement of the parties, attend all court sessions and make a ~~full~~ contemporaneous verbatim record of the proceedings, including all live testimony, any deposition testimony, any audio or audio-visual recordings played in court, and any statements made by the court, a party, counsel, or any other person during the court session;

(b) upon a party's request, attend bench conferences and make a contemporaneous verbatim record of the conferences;

(b~~c~~) ~~take~~ obtain all ~~exhibits offered in evidence~~ nontestimonial evidence presented during a proceeding — including exhibits that have been marked and formally offered in evidence, exhibits that have been marked but not formally offered in evidence, audio and audio-visual recordings played in court, learned treatises, and copies of all demonstrative evidence that has been presented during the proceeding — and ensure that ~~they are~~ evidence is marked;

(c~~d~~) file all nontestimonial evidence, including exhibits, with the trial court clerk after a proceeding ends;

(d~~e~~) perform the duties prescribed by Rules 34.6 and 35 and the Uniform Format Manual For Texas Court Reporters; and

(e~~f~~) perform other acts relating to the reporter's or recorder's official duties, as the trial court directs.

13.2. Additional Duties of Court Reporter and Recorder

(a) The official court recorder must also administer oaths to any language or sign interpreter, requiring the interpreter to provide an accurate interpretation to the best of his or her ability.

(b) The official court recorder must also:

~~(a)~~ (1) ensure that the recording system functions properly throughout the proceeding and that a complete, clear, and transcribable recording is made;

~~(b)~~ (2) make a detailed, legible log of all proceedings being recorded, showing:

~~(1)~~ (A) the number and style of the case before the court;

~~(2)~~ (B) the name of each person speaking;

~~(3)~~ (C) the event being recorded such as the voir dire, the opening statement, direct and cross-examinations, and bench conferences;

~~(4)~~ (D) each exhibit offered, admitted, or excluded;

~~(5)~~ (E) the time of day of each event; and

~~(6)~~ (F) the index number on the recording device showing where each event is recorded;

~~(c)~~ (3) after a proceeding ends, file with the clerk the original log;

~~(d)~~ (4) have the original recording stored to ensure that it is preserved and is accessible; and

~~(e)~~ (5) ensure that no one gains access to the original recording without the court's written order.

13.3. Priorities of Reporters

The trial court must help ensure that the court reporter's work is timely accomplished by setting work priorities. The reporter's duties relating to proceedings before the court take preference over other work.

13.4. Report of Reporters

To aid the trial court in setting priorities under 13.3, each court reporter must give the trial court a monthly written report showing the amount and nature of the business pending in the reporter's office. A copy of this report must be filed with the appellate clerk of each district in which the court sits.

13.5. Appointing Deputy Reporter

When the official court reporter is unable to perform the duties in 13.1 or 13.2 because of illness, press of official work, or unavoidable absence or disability, the trial court may designate a deputy reporter. If the court appoints a deputy reporter, that person must file with the trial court clerk a document stating:

(a) the date the deputy worked;

(b) the court in which the deputy worked; ~~and~~

(c) the number and style of the case on which the deputy worked; and

(d) the deputy's name, certified-shorthand-reporter number, certification expiration date, firm-registration number, mailing address, phone number, fax number, if any, and e-mail address, if any.

13.6. Filing of Notes in a Criminal Case

When a defendant is convicted and sentenced, or is granted deferred adjudication for a felony other that a state jail felony, and does not appeal, the court reporter must — within 20 days after the time to perfect the appeal has expired — file the untranscribed notes or the original recording of the proceeding with the trial court clerk. The trial court clerk need not retain the notes beyond 15 years of their filing date.

Notes and Comments

Comment to 1997 change: Former Rules 11 and 12 are merged. Former Rules 11(a), (c) and (d) now appear as subdivisions 13.1, 13.5 and 13.6. Former Rule 11(b) is omitted as unnecessary. The provisions of former Rule 12(a) are moved to Rule 35.3. Former Rules 12(b) and (c) now appear as subdivisions 13.3 and 13.4. The rule is made to apply to court recorders as well as court reporters. Paragraph 13.1(a) merges paragraphs (a)(1) and (2) of former Rule 11, and now requires the reporter to make a record of voir dire and closing argument unless excused by agreement of the parties. Paragraph 13.1(b) is new, but codifies current practice. Subdivision 13.2 is new and specifies rules for electronic recording of proceedings. A provision requiring a deputy court reporter to file with the trial court clerk a document identifying the proceedings in which the reporter worked is included in paragraph 13.5. Other changes are made.

Comment to 2002 change: Subdivision 13.1(a) is amended merely for clarification.

Comment to 2009 change: Subdivisions 13.1(a)-(c) are amended to provide additional guidance regarding the materials the court reporter and court recorder must include in the reporter's record. Subdivision 13.1(d) is amended to clarify that court reporters and court recorders must comply with the Uniform Format Manual for Texas Court Reporters. Subdivision 13.2(a) is added to require court reporters to administer oaths to interpreters. Prior subdivision 13.2 is renumbered to reflect this change. Subdivision 13.5 is amended to require deputy reporters to provide the same information that they have had to provide pursuant to the Uniform Format Manual for Court Reporters.

Rule 14. Recording and Broadcasting Court Proceedings

14.1. Recording and Broadcasting Permitted

An appellate court may permit courtroom proceedings to be broadcast, televised, recorded, or photographed in accordance with this rule.

14.2. Procedure

(a) *Request to Cover Court Proceeding.*

(1) A person wishing to broadcast, televise, record, or photograph a court proceeding must file with the court clerk a request to cover the proceeding. The request must state:

(A) the case style and number;

(B) the date and time when the proceeding is to begin;

(C) the name of the requesting person or organization;

(D) the type of coverage requested (for example, televising or photographing); and

(E) the type and extent of equipment to be used.

(2) A request to cover argument of a case must be filed no later than five days before the date the case is set for argument and must be served on all parties to the case. A request to cover any other proceeding must be filed no later than two days before the date when the proceeding is to begin.

(b) *Response.* Any party may file a response to the request. If the request is to cover argument, the response must be filed no later than two days before the date set for argument. If a party objects to coverage of the argument, the response should state the injury that will allegedly result from coverage.

(c) *Court May Shorten Time.* The court may, in the interest of justice, shorten the time for filing a document under this rule if no party or interested person would be unduly prejudiced.

(d) *Decision of Court.* In deciding whether to allow coverage, the court may consider information known *ex parte* to the court. The court may allow, deny, limit, or terminate coverage for any reason the court considers necessary or appropriate, such as protecting the parties' rights or the dignity of the court and ensuring the orderly conduct of the proceedings.

14.3. Equipment and Personnel

The court may, among other things:

(a) require that a person seeking to cover a proceeding demonstrate or display the equipment that will be used;

(b) prohibit equipment that produces distracting sound or light;

(c) prohibit signal lights or devices showing when equipment is operating, or require their concealment;

(d) prohibit moving lights, flash attachments, or sudden lighting changes;

(e) require the use of the courtroom's existing video, audio, and lighting systems, if any;

(f) specify the placement of personnel and equipment;

(g) determine the number of cameras to be allowed in the courtroom; and

(h) require pooling of equipment if more than one person wishes to cover a proceeding.

14.4. Enforcement

The court may sanction a violation of this rule by measures that include barring a person or organization from access to future coverage of proceedings in that court for a defined period.

Notes and Comments

Comment to 1997 change: This is former Rule 21. The rule is rewritten and now allows recording and broadcasting of court proceedings at the discretion of the court and subject to the stated guidelines.

Rule 15. Issuance of Writ or Process by Appellate Court

15.1. In General

(a) *Signature Under Seal.* A writ or process issuing from an appellate court must bear the court's seal and be signed by the clerk.

(b) *To Whom Directed; by Whom Served.* Unless a rule or statute provides otherwise, the writ or process must be directed to the person or court to be served. The writ or process may be served by the sheriff, constable, or other peace officer whose jurisdiction includes the county in which the person or court to be served may be found.

(c) *Return; Lack of Execution; Simultaneous Writs.* The writ or process must be returned to the issuing court according to the writ's direction. If the writ or process is not executed, the clerk may issue another writ or process if requested by the party who requested the former writ or process. At a party's request, the clerk may issue two or more writs simultaneously.

15.2. Appearance Without Service; Actual Knowledge

A party who appears in person or by attorney in an appellate court proceeding — or who has actual knowledge of the court's opinion, judgment, or order related to a writ or process — is bound by the opinion, judgment, or order to the same extent as if personally served under 15.1.

Notes and Comments

Comment to 1997 change: This is former Rule 17. Nonsubstantive changes are made.

Rule 16. Disqualification or Recusal of Appellate Judges

16.1. Grounds for Disqualification

The grounds for disqualification of an appellate court justice or judge are determined by the Constitution and laws of Texas.

16.2. Grounds for Recusal

The grounds for recusal of an appellate court justice or judge are the same as those provided in the Rules of Civil Procedure. In addition, a justice or judge must recuse in a proceeding if it presents a material issue which the justice or judge participated in deciding while serving on another court in which the proceeding was pending.

16.3. Procedure for Recusal

(a) *Motion.* A party may file a motion to recuse a justice or judge before whom the case is pending. The motion must be filed promptly after the party has reason to believe that the justice or judge should not participate in deciding the case.

(b) *Decision.* Before any further proceeding in the case, the challenged justice or judge must either remove himself or herself from all participation in the case or certify the matter to the entire court, which will decide the motion by a majority of the remaining judges sitting en banc. The challenged justice or judge must not sit with the remainder of the court to consider the motion as to him or her.

(c) *Appeal.* An order of recusal is not reviewable, but the denial of a recusal motion is reviewable.

Notes and Comments

Comment to 1997 change: Former Rules 15 and 15a are merged. Former Rule 15a appears as subdivision 16.2. For grounds for disqualification, reference is made to the Constitution and statutes rather than the Rules of Civil Procedure. The procedure for disqualification is not specified. The nature of prior participation in a proceeding that requires recusal is clarified. Former subdivision (b) of Rule 15, requiring service of the motion, is omitted as unnecessary. The remaining subdivisions of former Rule 15 are contained in subdivision 16.3. Other changes are made.

Rule 17. Court of Appeals Unable to Take Immediate Action

17.1. Inability to Act

A court of appeals is unable to take immediate action if it cannot — within the time when action must be taken — assemble a panel because members of the court are ill, absent, or unavailable. A justice who is disqualified or recused is unavailable. A court of appeals' inability to act immediately may be established by certificate of the clerk, a member of the court, or a party's counsel, or by affidavit of a party.

17.2. Nearest Available Court of Appeals

If a court of appeals is unable to take immediate action, the nearest court of appeals that is able to take immediate action may do so with the same effect as the other court. The nearest court of appeals is the one whose courthouse is nearest — measured by a straight line — the courthouse of the trial court.

17.3. Further Proceedings

After acting or refusing to act, the nearest court of appeals must promptly send a copy of its order, and the original or a copy of any document presented to it, to the other court, which will conduct any further proceedings in the matter.

Notes and Comments

Comment to 1997 change: This is former Rule 16. The rule is rewritten and simplified.

Rule 18. Mandate

18.1. Issuance

The clerk of the appellate court that rendered the judgment must issue a mandate in accordance with the judgment and send it to the clerk of the court to which it is directed and to all parties to the proceeding when one of the following periods expires:

(a) *In the Court of Appeals.*

(1) Ten days after the time has expired for filing a motion to extend time to file a petition for review or a petition for discretionary review if:

(A) no timely petition for review or petition for discretionary review has been filed;

(B) no timely filed motion to extend time to file a petition for review or petition for discretionary review is pending; and

(C) in a criminal case, the Court of Criminal Appeals has not granted review on its own initiative.

(2) Ten days after the time has expired for filing a motion to extend time to file a motion for rehearing of a denial, refusal, or dismissal of a petition for review, or a refusal or dismissal of a petition for discretionary review, if no timely filed motion for rehearing or motion to extend time is pending.

(b) *In the Supreme Court and the Court of Criminal Appeals.* Ten days after the time has expired for filing a motion to extend time to file a motion for rehearing if no timely filed motion for rehearing or motion to extend time is pending.

(c) *Agreement to Issue.* The mandate may be issued earlier if the parties so agree, or for good cause on the motion of a party.

18.2. Stay of Mandate

A party may move to stay issuance of the mandate pending the United States Supreme Court's disposition of a petition for writ of certiorari. The motion must state the grounds for the petition and the circumstances requiring the stay. The appellate court authorized to issue the mandate may grant a stay if it finds that the grounds are substantial and that the petitioner or others would incur serious hardship from the mandate's issuance if the United States Supreme Court were later to reverse the judgment. In a criminal case, the stay will last for no more than 90 days, to permit the timely filing of a petition for writ of certiorari. After that period and others mentioned in this rule expire, the mandate will issue.

18.3. Trial Court Case Number

The mandate must state the trial court case number.

18.4. Filing of Mandate

The clerk receiving the mandate will file it with the case's other papers and note it on the docket.

18.5. Costs

The mandate will be issued without waiting for costs to be paid. If the Supreme Court declines to grant review, Supreme Court costs must be included in the court of appeals' mandate.

18.6. Mandate in Accelerated Appeals

The appellate court's judgment on an appeal from an interlocutory order takes effect when the mandate is issued. The court may issue the mandate with its judgment or delay the mandate until the appeal is finally disposed of. If the mandate is issued, any further proceeding in the trial court must conform to the mandate.

18.7. Recall of Mandate

If an appellate court vacates or modifies its judgment or order after issuing its mandate, the appellate clerk must promptly notify the clerk of the court to which the mandate was directed and all parties. The mandate will have no effect and a new mandate may be issued.

Notes and Comments

Comment to 1997 change: This is a new rule that combines the provisions of former Rules 43(g), 86, 186, 231, and 232.

Comment to 2002 change: Subdivision 18.1 is amended consistent with the change in subdivision 12.6.

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 for rehearing or en banc reconsideration, or timely filed motion to extend time to file such a motion, is then pending; or

(b) 30 days after the court overrules all timely filed motions for rehearing or en banc reconsideration, and all timely filed motions to extend time to file such a motion.

19.2. Plenary Power Continues After Petition Filed

In a civil case, the court of appeals retains plenary power to vacate or modify its judgment during the periods prescribed in 19.1 even if a party has filed a petition for review in the Supreme Court.

19.3. Proceedings After Plenary Power Expires

After its plenary power expires, the court cannot vacate or modify its judgment. But the court may:

(a) correct a clerical error in its judgment or opinion;

(b) issue and recall its mandate as these rules provide;

(c) enforce or suspend enforcement of its judgment as these rules or applicable law provide;

(d) order or modify the amount and type of security required to suspend a judgment, and decide the sufficiency of the sureties, under Rule 24; and

(e) order its opinion published in accordance with Rule 47.

19.4. Expiration of Term

The expiration of the appellate court's term does not affect the court's plenary power or its jurisdiction over a case that is pending when the court's term expires.

Notes and Comments

Comment to 1997 change: This is a new rule except the provisions of former Rule 234 are incorporated in subdivision 19.4.

Comment to 2002 change: Subdivision 19.1 is amended to clarify that a motion for en banc reconsideration extends the court of appeals' plenary power in the same manner as a motion for rehearing addressed to the panel of justices who rendered the judgment or under consideration.

Comment to 2008 change: Subdivision 19.1 is changed, consistent with other changes in the rules, to specifically address a motion for en banc reconsideration and treat it as a motion for rehearing.

Rule 20. When Party is Indigent

20.1. Civil Cases

(a) *Establishing Indigence.*

(1) By Certificate. If the appellant proceeded in the trial court without advance payment of costs pursuant to a certificate under Texas Rule of Civil Procedure 145(c) confirming that the appellant was screened for eligibility to receive free legal services under income guidelines used by a program funded by Interest on Lawyers Trust Accounts or the Texas Access to Justice Foundation, an additional certificate may be filed in the appellate court confirming that the appellant was rescreened after rendition of the trial court's judgment and again

found eligible under program guidelines. A party's affidavit of inability accompanied by the certificate may not be contested.

(2) By Affidavit. A party who cannot pay the costs in an appellate court may proceed without advance payment of costs if:

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

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

(C) 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:

(1) the nature and amount of the party's current employment income, government-entitlement income, and other income;

(2) the income of the party's spouse and whether that income is available to the party;

(3) real and personal property the party owns;

(4) cash the party holds and amounts on deposit that the party may withdraw;

(5) the party's other assets;

(6) the number and relationship to the party of any dependents;

(7) the nature and amount of the party's debts;

(8) the nature and amount of the party's monthly expenses;

(9) the party's ability to obtain a loan for court costs;

(10) whether an attorney is providing free legal services to the party without a contingent fee;

(11) whether an attorney has agreed to pay or advance court costs; and

(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) *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 Texas Rule of Civil Procedure 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.

(2) Other Proceedings. In any other appellate court proceeding, a petitioner must file the affidavit of indigence in the court in which the proceeding is filed, with or before the document seeking relief. A respondent who requests preparation of a record in connection with an appellate court proceeding must file an affidavit of indigence in the appellate court within 15 days after the date when the respondent requests preparation of the record.

(3) Extension of Time. The appellate court may extend the time to file an affidavit of indigence 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 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) *Duty of Clerk.*

(1) Trial Court Clerk. If the affidavit of indigence is filed with the trial court clerk under (c)(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 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) *Contest to Affidavit.* The clerk, the court reporter, the court recorder, or any party may challenge 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. 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) *No Contest Filed.* Unless a contest is timely filed, no hearing will be conducted, the affidavit's allegations will be deemed true, and the party will be allowed to proceed without advance payment of costs.

(g) *Burden of Proof.* If a contest is filed, the party who filed the affidavit of indigence must prove the affidavit's allegations. If the indigent party is incarcerated at the time the hearing on a contest is held, the affidavit must be considered as evidence and is sufficient to meet the indigent party's burden to present evidence without the indigent party's attending the hearing.

(h) *Decision in Appellate Court.* If the affidavit of indigence is filed in an appellate court and a contest is filed, the court may:

(1) conduct a hearing and decide the contest;

(2) decide the contest based on the affidavit and any other timely filed documents;

(3) request the written submission of additional evidence and, without conducting a hearing, decide the contest based on the evidence; or

(4) refer the matter to the trial court with instructions to hear evidence and grant the appropriate relief.

(i) *Hearing and Decision in the Trial Court.*

(1) Notice Required. If the affidavit of indigence is filed in the trial court and a contest is filed, or if the appellate court refers a contest to the trial court, the trial court must set a hearing and notify the parties and the appropriate court reporter of the setting.

(2) Time for Hearing. The trial court must either conduct a hearing or sign an order extending the time to conduct a hearing:

(A) within 10 days after the contest was filed, if initially filed in the trial court; or

(B) within 10 days after the trial court received a contest referred from the appellate court.

(3) Extension of Time for Hearing. The time for conducting a hearing on the contest must not be extended for more than 20 days from the date the order is signed.

(4) Time for Written Decision; Effect. Unless — within the period set for the hearing — the trial court signs an order sustaining the contest, the affidavit's allegations will be deemed true, and the party will be allowed to proceed without advance payment of costs.

(j) *Record to be Prepared Without Prepayment.* If a party establishes indigence, the trial court clerk and the court reporter must prepare the appellate record without prepayment.

(k) *Partial Payment of Costs.* If the party can pay or give security for some of the costs, the court must order the party, in writing, to pay or give security, or both, to the extent of the party's ability. The court will allocate the payment among the officials to whom payment is due.

(l) *Later Ability to Pay.* If a party who has proceeded in the appellate court without having to pay all the costs is later able to pay some or all of the costs, the appellate court may order the party to pay costs to the extent of the party's ability.

(m) *Costs Defined.* As used in this rule, *costs* means:

(1) a filing fee relating to the case in which the affidavit of inability is filed; and

(2) the charges for preparing the appellate record in that case.

20.2. Criminal Cases

Within the time for perfecting the appeal, an appellant who is unable to pay for the appellate record may, by motion and affidavit, ask the trial court to have the appellate record furnished without charge. If after hearing the motion the court finds that the appellant cannot pay or give security for the appellate record, the court must order the reporter to transcribe the proceedings. When the court certifies that the appellate record has been furnished to the appellant, the reporter must be paid from the general funds of the county in which the offense was committed, in the amount set by the trial court.

Notes and Comments

Comment to 1997 change: The rule is new and combines the provisions of former Rules 13(k), 40(a)(3), and 53(j). The procedure for proceeding in civil cases in an appellate court

without advance payment of costs, in both appeals and original proceedings, is stated. The information that must be given in the affidavit is prescribed. An extension of time to file the affidavit is now available. The indigent party is no longer required to serve the court reporter, but must file the affidavit with the appropriate clerk who is to notify the court reporter. A contest need not be under oath. Provision is made for later ability to pay the costs. Nonsubstantive changes are made to the rule for criminal cases.

Comment to 2008 change: Subdivision 20.1(a) is added to provide, as in Texas Rule of Civil Procedure 145, that an affidavit of indigence accompanied by an IOLTA or other Texas Access to Justice Foundation certificate cannot be challenged. Subdivision 20.1(c)(1) is revised to clarify that an affidavit of indigence filed to proceed in the trial court without advance payment of costs is insufficient to establish indigence on appeal; a separate affidavit must be filed with or before the notice of appeal. Subdivision 20.1(c)(3) is revised to provide 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). The limiting phrase "under (c)(2)" in Subdivision 20.1(d)(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 subdivision 20.1(c)(2). Although Subdivision 3.1(g) defines "court reporter" to include court recorder, subdivision 20.1(e) is amended to make clear that a court recorder can contest an affidavit.

Reference

See also Civil Practice and Remedies Code §13.003.

SECTION TWO: APPEALS FROM TRIAL COURT JUDGMENTS AND ORDERS

Rule 21. New Trials in Criminal Cases

21.1. Definition

(a) *New trial* means the rehearing of a criminal action after the trial court has, on the defendant's motion, set aside a finding or verdict of guilt.

(b) *New trial on punishment* means a new hearing of the punishment state of a criminal action after the trial court has, on the defendant's motion, set aside an assessment of punishment without setting aside a finding or verdict of guilt.

21.2. When Motion for New Trial Required

A motion for new trial is a prerequisite to presenting a point of error on appeal only when necessary to adduce facts not in the record.

21.3. Grounds

The defendant must be granted a new trial, or a new trial on punishment, for any of the following reasons:

(a) except in a misdemeanor case in which the maximum possible punishment is a fine, when the defendant has been unlawfully tried in absentia or has been denied counsel;

(b) when the court has misdirected the jury about the law or has committed some other material error likely to injure the defendant's rights;

(c) when the verdict has been decided by lot or in any manner other than a fair expression of the jurors' opinion;

(d) when a juror has been bribed to convict or has been guilty of any other corrupt conduct;

(e) when a material defense witness has been kept from court by force, threats, or fraud, or when evidence tending to establish the defendant's innocence has been intentionally destroyed or withheld, thus preventing its production at trial;

(f) when, after retiring to deliberate, the jury has received other evidence; when a juror has talked with anyone about the case; or when a juror became so intoxicated that his or her vote was probably influenced as a result;

(g) when the jury has engaged in such misconduct that the defendant did not receive a fair and impartial trial; or

(h) when the verdict is contrary to the law and the evidence.

21.4. Time to File and Amend Motion

(a) *To File.* The defendant may file a motion for new trial before, but no later than 30 days after, the date when the trial court imposes or suspends sentence in open court.

(b) *To Amend.* Within 30 days after the date when the trial court imposes or suspends sentence in open court but before the court overrules any preceding motion for new trial, a defendant may, without leave of court, file one or more amended motions for new trial.

21.5. State May Controvert; Effect

The State may oppose in writing any reason the defendant sets forth in the motion for new trial. The State's having opposed a motion for new trial does not affect a defendant's responsibilities under 21.6.

21.6. Time to Present

The defendant must present the motion for new trial to the trial court within 10 days of filing it, unless the trial court in its discretion permits it to be presented and heard within 75 days from the date when the court imposes or suspends sentence in open court.

21.7. Types of Evidence Allowed at Hearing

The court may receive evidence by affidavit or otherwise.

21.8. Court's Ruling

(a) *Time to Rule*. The court must rule on a motion for new trial within 75 days after imposing or suspending sentence in open court.

(b) *Ruling*. In ruling on a motion for new trial, the court may make oral or written findings of fact. The granting of a motion for new trial must be accomplished by written order. A docket entry does not constitute a written order.

(c) *Failure to Rule*. A motion not timely ruled on by written order will be deemed denied when the period prescribed in (a) expires.

21.9. Granting a New Trial

(a) A court must grant a new trial when it has found a meritorious ground for new trial, but a court must grant only a new trial on punishment when it has found a ground that affected only the assessment of punishment.

(b) Granting a new trial restores the case to its position before the former trial, including, at any party's option, arraignment or pretrial proceedings initiated by that party.

(c) Granting a new trial on punishment restores the case to its position after the defendant was found guilty. Unless the defendant, State, and trial court all agree to a change, punishment in a new trial shall be assessed in accordance with the defendant's original election under article 37.07, § 2(b) of the Code of Criminal Procedure.

(d) A finding or verdict of guilt in the former trial must not be regarded as a presumption of guilt, nor may it be alluded to in the presence of the jury that hears the case on retrial of guilt. A finding of fact or an assessment of punishment in the former trial may not be alluded to in the presence of the jury that hears the case on retrial of punishment.

Notes and Comments

Comment to 1997 change: Former Rules 30, 31, and 32 are merged. Paragraph (b)(6) of former Rule 30 is deleted because the rule-making authority of the Court of Criminal Appeals was withdrawn. *See* Code of Criminal Procedure article 40.001. Other nonsubstantive changes are made.

Rule 22. Arrest of Judgment in Criminal Cases

22.1. Definition

Motion in arrest of judgment means a defendant's oral or written suggestion that, for reasons stated in the motion, the judgment rendered against the defendant was contrary to law. Such a motion is made in the trial court.

22.2. Grounds

The motion may be based on any of the following grounds:

(a) that the indictment or information is subject to an exception on substantive grounds;

(b) that in relation to the indictment or information a verdict is substantively defective; or

(c) that the judgment is invalid for some other reason.

22.3. Time to File Motion

A defendant may file a motion in arrest of judgment before, but no later than 30 days after, the date when the trial court imposes or suspends sentence in open court.

22.4. Court's Ruling

(a) *Time to Rule; Form of Ruling*. The court must rule on a motion in arrest of judgment within 75 days after imposing or suspending sentence in open court. The ruling may be oral or in writing.

(b) *Failure to Rule*. A motion not timely ruled on will be deemed denied when the period prescribed in (a) expires.

22.5. Effect of Denying

For purposes of the defendant's giving notice of appeal, an order denying a motion in arrest of judgment will be considered an order denying a motion for new trial.

22.6. Effect of Granting

(a) *Defendant Restored.* If judgment is arrested, the defendant is restored to the position that he or she had before the indictment or information was presented.

(b) *Defendant Discharged or Remanded.* If the judgment is arrested, the defendant will be discharged. But the trial court may remand the defendant to custody or fix bail if the court determines, from the evidence adduced at trial, that the defendant may be convicted on a proper indictment or information, or on a proper verdict in relation to the indictment or information.

Notes and Comments

Comment to 1997 change: Former Rules 33, 34, and 35 are merged without substantive change.

Rule 23. Nunc Pro Tunc Proceedings in Criminal Cases

23.1. Judgment and Sentence

Unless the trial court has granted a new trial or arrested the judgment, or unless the defendant has appealed, a failure to render judgment and pronounce sentence may be corrected at any time by the court's doing so.

23.2. Credit on Sentence

When sentence is pronounced, the trial court must give the defendant credit on that sentence for:

(a) all time the defendant has been confined since the time when judgment and sentence should have been entered and pronounced; and

(b) all time between the defendant's arrest and confinement to the time when judgment and sentence should have been entered and pronounced.

Notes and Comments

Comment to 1997 change: This is former Rule 36. The rule is amended without substantive change.

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

24.1. Suspension of Enforcement

(a) *Methods.* Unless the law or these rules provide otherwise, a judgment debtor may supersede the judgment by:

(1) filing with the trial court clerk a written agreement with the judgment creditor for suspending enforcement of the judgment;

(2) filing with the trial court clerk a good and sufficient bond;

(3) making a deposit with the trial court clerk in lieu of a bond; or

(4) providing alternate security ordered by the court.

(b) *Bonds.*

(1) A bond must be:

(A) in the amount required by 24.2;

(B) payable to the judgment creditor;

(C) signed by the judgment debtor or the debtor's agent;

(D) signed by a sufficient surety or sureties as obligors; and

(E) conditioned as required by (d).

(2) To be effective a bond must be approved by the trial court clerk. On motion of any party, the trial court will review the bond.

(c) *Deposit in Lieu of Bond.*

(1) Types of Deposits. Instead of filing a surety bond, a party may deposit with the trial court clerk:

(A) cash;

(B) a cashier's check payable to the clerk, drawn on any federally insured and federally or state-chartered bank or savings-and-loan association; or

(C) with leave of court, a negotiable obligation of the federal government or of any federally insured and federally or state-chartered bank or savings-and-loan association.

(2) Amount of Deposit. The deposit must be in the amount required by 24.2.

(3) Clerk's Duties; Interest. The clerk must promptly deposit any cash or a cashier's check in accordance with law. The clerk must hold the deposit until the conditions of liability in (d) are extinguished. The clerk must then

release any remaining funds in the deposit to the judgment debtor.

(d) *Conditions of Liability.* The surety or sureties on a bond, any deposit in lieu of a bond, or any alternate security ordered by the court is subject to liability for all damages and costs that may be awarded against the debtor — up to the amount of the bond, deposit, or security — if:

(1) the debtor does not perfect an appeal or the debtor's appeal is dismissed, and the debtor does not perform the trial court's judgment;

(2) the debtor does not perform an adverse judgment final on appeal; or

(3) the judgment is for the recovery of an interest in real or personal property, and the debtor does not pay the creditor the value of the property interest's rent or revenue during the pendency of the appeal.

(e) *Orders of Trial Court.* The trial court may make any order necessary to adequately protect the judgment creditor against loss or damage that the appeal might cause.

(f) *Effect of Supersedeas.* Enforcement of a judgment must be suspended if the judgment is superseded. Enforcement begun before the judgment is superseded must cease when the judgment is superseded. If execution has been issued, the clerk will promptly issue a writ of supersedeas.

24.2. Amount of Bond, Deposit, or Security

(a) *Type of Judgment.*

(1) For Recovery of Money. When the judgment is for money, the amount of the bond, deposit, or security must equal the sum of compensatory damages awarded in the judgment, interest for the estimated duration of the appeal, and costs awarded in the judgment. But the amount must not exceed the lesser of:

(A) 50 percent of the judgment debtor's current net worth; or

(B) 25 million dollars.

(2) For Recovery of Property. When the judgment is for the recovery of an interest in real or personal property, the trial court will determine the type of security that the judgment debtor must post. The amount of that security must be at least:

(A) the value of the property interest's rent or revenue, if the property interest is real; or

(B) the value of the property interest on the date when the court rendered judgment, if the property interest is personal.

(3) Other Judgment. When the judgment is for something other than money or an interest in property, the trial court must set the amount and type of security that the judgment debtor must post. The security must adequately protect the judgment creditor against loss or damage that the appeal might cause. But the trial court may decline to permit the judgment to be superseded if the judgment creditor posts security ordered by the trial court in an amount and type that will secure the judgment debtor against any loss or damage caused by the relief granted the judgment creditor if an appellate court determines, on final disposition, that that relief was improper.

(4) Conservatorship or Custody. When the judgment involves the conservatorship or custody of a minor or other person under legal disability, enforcement of the judgment will not be suspended, with or without security, unless ordered by the trial court. But upon a proper showing, the appellate court may suspend enforcement of the judgment with or without security.

(5) For a Governmental Entity. When a judgment in favor of a governmental entity in its governmental capacity is one in which the entity has no pecuniary interest, the trial court must determine whether to suspend enforcement, with or without security, taking into account the harm that is likely to result to the judgment debtor if enforcement is not suspended, and the harm that is likely to result to others if enforcement is suspended. The appellate court may review the trial court's determination and suspend enforcement of the judgment, with or without security, or refuse to suspend the judgment. If security is required, recovery is limited to the governmental entity's actual damages resulting from suspension of the judgment.

(b) *Lesser Amount.* The trial court must lower the amount of security required by (a) to an amount that will not cause the judgment debtor substantial economic harm if, after notice to all parties and a hearing, the court finds that posting a bond, deposit, or security in the amount required by (a) is likely to cause the judgment debtor substantial economic harm.

(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) 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. An affidavit that meets these requirements 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. 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 net worth. 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.

(d) *Injunction.* The trial court may enjoin the judgment debtor from dissipating or transferring assets to avoid satisfaction of the judgment, but the trial court may not make any order that interferes with the judgment debtor's use, transfer, conveyance, or dissipation of assets in the normal course of business.

24.3. Continuing Trial Court Jurisdiction; Duties of Judgment Debtor

(a) *Continuing Jurisdiction.* Even after the trial court's plenary power expires, the trial court has continuing jurisdiction to do the following:

(1) order the amount and type of security and decide the sufficiency of sureties; and

(2) if circumstances change, modify the amount or type of security required to continue the suspension of a judgment's execution.

(b) *Duties of Judgment Debtor.* If, after jurisdiction attaches in an appellate court, the trial court orders or modifies the security or decides the sufficiency of sureties, the judgment debtor must notify the appellate court of the trial court's action.

24.4. Appellate Review

(a) *Motions; Review.* A party may seek review of the trial court's ruling by motion filed in the court of appeals with jurisdiction or potential jurisdiction over the appeal from the judgment in the case. A party may seek review of the court of appeals' ruling on the motion by petition for writ of mandamus in the Supreme Court. The appellate court may review:

(1) the sufficiency or excessiveness of the amount of security, but when the judgment is for money, the appellate court must not modify the amount of security to exceed the limits imposed by Rule 24.2(a)(1);

(2) the sureties on any bond;

(3) the type of security;

(4) the determination whether to permit suspension of enforcement; and

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

(b) *Grounds of Review.* Review may be based both on conditions as they existed at the time the trial court signed an order and on changes in those conditions afterward.

(c) *Temporary Orders.* The appellate court may issue any temporary orders necessary to preserve the parties' rights.

(d) *Action by Appellate Court.* The motion must be heard at the earliest practicable time. The appellate court may require that the amount of a bond, deposit, or other security be increased or decreased, and that another bond, deposit, or security be provided and approved by the trial court clerk. The appellate court may require other changes in the trial court order. The appellate court may remand to the trial court for entry of findings of fact or for the taking of evidence.

(e) *Effect of Ruling.* If the appellate court orders additional or other security to supersede the judgment, enforcement will be suspended for 20 days after the appellate court's order. If the judgment debtor does not comply with the order

within that period, the judgment may be enforced. When any additional bond, deposit, or security has been filed, the trial court clerk must notify the appellate court. The posting of additional security will not release the previously posted security or affect any alternative security arrangements that the judgment debtor previously made unless specifically ordered by the appellate court.

Notes and Comments

Comment to 1997 change: Former Rules 47, 48, and 49 are merged. The rule is substantially revised. Paragraph 24.1(a) now provides for superseding the judgment by agreement. Paragraph 24.1(c) is taken from former Rule 48 and provides for a deposit in lieu of the bond, including specific provisions for the release of the deposit. Paragraph 24.1(d) provides the conditions for the surety to honor the bond and for the deposit to be paid to the judgment creditor. In subdivision 24.2, the provisions for determining the amount of the bond or deposit are simplified. All provisions regarding superseding a judgment for an interest in property are merged into subparagraph 24.2(a)(2) The procedure for allowing security in a lesser amount is moved to paragraph 24.2(b) and is made applicable to all judgments. Subdivision 24.4 is taken from former Rule 49. The procedure for appellate review is more precisely stated.

Comment to 2008 change: Subdivision 24.2(c) is amended to clarify the procedure in determining net worth. A debtor's affidavit of net worth must be detailed, but the clerk must file what is tendered without determining whether it complies with the rule. If the trial court orders that additional or other security be given, the debtor is afforded time to comply. Subdivision 24.4(a) is revised to clarify that a party seeking relief from a supersedeas ruling should file a motion in the court of appeals that has or presumably will have jurisdiction of the appeal. After the court of appeals has ruled, a party may seek review by filing a petition for writ of mandamus in the Supreme Court. *See In re Smith / In re Main Place Custom Homes, Inc.*, 192 S.W.3d 564, 568 (Tex. 2006) (per curiam).

Rule 25. Perfecting Appeal

25.1. Civil Cases

(a) *Notice of Appeal.* An appeal is perfected when a written notice of appeal is filed with the trial court clerk. If a notice of appeal is mistakenly filed with the appellate court, the notice is deemed to have been filed the same day with the trial court clerk, and the appellate clerk must immediately send the trial court clerk a copy of the notice.

(b) *Jurisdiction of Appellate Court.* The filing of a notice of appeal by any party invokes the appellate court's jurisdiction over all parties to the trial court's judgment or order appealed from. Any party's failure to take any other step required by these rules, including the failure of another party to perfect an appeal under (c), does not deprive the appellate court of jurisdiction but is ground only for the appellate court to act appropriately, including dismissing the appeal.

(c) *Who Must File Notice.* A party who seeks to alter the trial court's judgment or other appealable order must file a notice of appeal. Parties whose interests are aligned may file a joint notice of appeal. The appellate court may not grant a party who does not file a notice of appeal more favorable relief than did the trial court except for just cause.

(d) *Contents of Notice.* The notice of appeal must:

(1) identify the trial court and state the case's trial court number and style;

(2) state the date of the judgment or order appealed from;

(3) state that the party desires to appeal;

(4) state the court to which the appeal is taken unless the appeal is to either the First or Fourteenth Court of Appeals, in which case the notice must state that the appeal is to either of those courts;

(5) state the name of each party filing the notice;

(6) in an accelerated appeal, state that the appeal is accelerated; and

(7) in a restricted appeal:

(A) state that the appellant is a party affected by the trial court's judgment but did not participate — either in person or through counsel — in the hearing that resulted in the judgment complained of;

(B) state that the appellant did not timely file either a postjudgment motion, request for findings of fact and conclusions of law, or notice of appeal; and

(C) be verified by the appellant if the appellant does not have counsel.

(e) *Service of Notice; Copy Filed With Appellate Court.* The notice of appeal must be served on all parties to the trial court's final judgment or, in an interlocutory appeal, on all parties to the trial court proceeding. A copy of the notice of appeal must be filed with the appellate court clerk.

(f) *Amending the Notice.* An amended notice of appeal correcting a defect or omission in an earlier filed notice may be filed in the appellate court at any time before the appellant's brief is filed. The amended

notice is subject to being struck for cause on the motion of any party affected by the amended notice. After the appellant's brief is filed, the notice may be amended only on leave of the appellate court and on such terms as the court may prescribe.

(g) *Enforcement of Judgment Not Suspended by Appeal.* The filing of a notice of appeal does not suspend enforcement of the judgment. Enforcement of the judgment may proceed unless:

(1) the judgment is superseded in accordance with Rule 24, or

(2) the appellant is entitled to supersede the judgment without security by filing a notice of appeal.

25.2. Criminal Cases

(a) *Rights to Appeal.*

(1) Of the State. The State is entitled to appeal a court's order in a criminal case as provided by Code of Criminal Procedure article 44.01

(2) Of the Defendant. A defendant in a criminal case has the right of appeal under Code of Criminal Procedure article 44.02 and these rules. The trial court shall enter a certification of the defendant's right of appeal each time it enters a judgment of guilt or other appealable order. In a plea bargain case - that is, a case in which a defendant's plea was guilty or nolo contendere and the punishment did not exceed the punishment recommended by the prosecutor and agreed to by the defendant - a defendant may appeal only:

(A) those matters that were raised by a written motion filed and ruled on before trial, or

(B) after getting the trial court's permission to appeal.

(b) *Perfection of Appeal.* In a criminal case, appeal is perfected by timely filing a sufficient notice of appeal. In a death-penalty case it is unnecessary to file a notice of appeal, but, in every death-penalty case, the clerk of the trial court shall file a notice of conviction with the Court of Criminal Appeals within thirty days after the defendant is sentenced to death.

(c) *Form and Sufficiency of Notice.*

(1) Notice must be given in writing and filed with the trial court clerk. If the notice of appeal is received in the court of appeals, the clerk of that court shall immediately record on the notice the date that it was received and send the notice to the trial court clerk.

(2) Notice is sufficient if it shows the party's desire to appeal from the judgment or other appealable order, and, if the State is the appellant, the notice complies with Code of Criminal Procedure article 44.01.

(d) *Certification of Defendant's Right of Appeal.* If the defendant is the appellant, the record must include the trial court's certification of the defendant's right of appeal under Rule 25.2(a)(2). The certification shall include a notice that the defendant has been informed of his rights concerning an appeal, as well as any right to file a *pro se* petition for discretionary review. This notification shall be signed by the defendant, with a copy given to him. The certification should be part of the record when notice is filed, but may be added by timely amendment or supplementation under this rule or Rule 34.5(c)(1) or Rule 37.1 or by order of the appellate court under Rule 34.5(c)(2). The appeal must be dismissed if a certification that shows the defendant has the right of appeal has not been made part of the record under these rules.

(e) *Clerk's Duties.* The trial court clerk must note on the copies of the notice of appeal and the trial court's certification of the defendant's right of appeal the case number and the date when each was filed. The clerk must then immediately send one copy of each to the clerk of the appropriate court of appeals and, if the defendant is the appellant, one copy of each to the State's attorney.

(f) *Amending the Notice or Certification.* An amended notice of appeal or trial court's certification of the defendant's right of appeal correcting a defect or omission in an earlier filed notice or certification, including a defect in the notification of the defendant's appellate rights, may be filed in the appellate court in accordance with Rule 37.1, or at any time before the appealing party's brief is filed if the court of appeals has not used Rule 37.1. The amended notice or certification is subject to being struck for cause on the motion of any party affected by the amended notice or certification. After the appealing party's brief is filed, the notice or certification may be amended only on leave of the appellate court and on such terms as the court may prescribe.

(g) *Effect of Appeal.* Once the record has been filed in the appellate court, all further proceedings in the trial court - except as provided otherwise by law or by these rules - will be suspended until the trial court receives the appellate-court mandate.

(h) (h) *Advice of Right of Appeal.* When a court enters a judgment or other appealable order and the defendant has a right of appeal, the court (orally or in writing) shall advise the defendant of his right of appeal and of the requirements for timely filing a sufficient notice of appeal.

Notes and Comments

Comment on 1997 change: This is former Rule 40. In civil cases, the requirement of an appeal bond is repealed. Appeal is perfected by filing a notice of appeal. A notice must be filed by any party seeking to alter the trial court's judgment. The restricted appeal — formerly the appeal by writ of error — is perfected by filing a notice of appeal in the trial court as in other appeals. The contents of the notice of appeal is prescribed. The notice of limitation of appeal is repealed. In criminal cases, the rule is amended to apply to notices by the State, and to refer to additional statutory requirements for the State's notice. In felony cases in which the defendant waived trial by jury, pleaded guilty or nolo contendere, and received a punishment that did not exceed what the defendant agreed to in a plea bargain, the rule is amended to make clear that regardless of when the alleged error occurred, an appeal must be based on a jurisdictional defect or a written motion ruled on before trial, or be with the permission of the trial court.

Comment to 2002 change: Rule 25.2, for criminal cases, is amended. Subdivision 25.2(a) states the parties' rights of appeal that are established by Code of Criminal Procedure article 44.01 and by article 44.02, the proviso of which was repealed when rulemaking power was given to the Court of Criminal Appeals. Subdivision 25.2(b) is given the requirement that a notice of appeal be in "sufficient" form, which codifies the decisional law. The requirement in former subdivision 25.2(b)(3) that a plea-bargaining appellant's notice of appeal specify the right of appeal is replaced by a requirement in subdivision 25.2(d) that the trial court certify the defendant's right of appeal in every case in which a judgment or other appealable order is entered. The certificate should be signed at the time the judgment or other appealable order is pronounced. The form of certification of the defendant's right of appeal is provided in an appendix to these rules. If the record does not include the trial court's certification that the defendant has the right of appeal, the appeal must be dismissed. If a sufficient notice of appeal or certification is not filed after the appellate court deals with the defect (see Rules 34.5(c) and 37.1), preparation of an appellate record and representation by an appointed attorney may cease.

Rule 26. Time to Perfect Appeal

26.1. Civil Cases

The notice of appeal must be filed within 30 days after the judgment is signed, except as follows:

(a) the notice of appeal must be filed within 90 days after the judgment is signed if any party timely files:

(1) a motion for new trial;

(2) a motion to modify the judgment;

(3) a motion to reinstate under Texas Rule of Civil Procedure 165a; or

(4) a request for findings of fact and conclusions of law if findings and conclusions either are required by the Rules of Civil Procedure or, if not required, could properly be considered by the appellate court;

(b) in an accelerated appeal, the notice of appeal must be filed within 20 days after the judgment or order is signed;

(c) in a restricted appeal, the notice of appeal must be filed within six months after the judgment or order is signed; and

(d) if any party timely files a notice of appeal, another party may file a notice of appeal within the applicable period stated above or 14 days after the first filed notice of appeal, whichever is later.

26.2. Criminal Cases

(a) *By the Defendant.* The notice of appeal must be filed:

(1) within 30 days after the day sentence is imposed or suspended in open court, or after the day the trial court enters an appealable order; or

(2) within 90 days after the day sentence is imposed or suspended in open court if the defendant timely files a motion for new trial.

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

26.3. Extension of Time

The appellate court may extend the time to file the notice of appeal if, within 15 days after the deadline for filing the notice of appeal, the party:

(a) files in the trial court the notice of appeal; and

(b) files in the appellate court a motion complying with Rule 10.5(b).

Notes and Comments

Comment to 1997 change: This is former Rule 41. All times for perfecting appeal in civil cases — including the time for perfecting a restricted appeal — are stated. An extension of

time is available for all appeals. The provisions of former Rule 41(c) regarding prematurely filed documents are moved to Rule 27. Nonsubstantive changes are made in the rule for criminal cases.

Rule 27. Premature Filings

27.1. Prematurely Filed Notice of Appeal

(a) *Civil Cases.* In a civil case, a prematurely filed notice of appeal is effective and deemed filed on the day of, but after, the event that begins the period for perfecting the appeal.

(b) *Criminal Cases.* In a criminal case, a prematurely filed notice of appeal is effective and deemed filed on the same day, but after, sentence is imposed or suspended in open court, or the appealable order is signed by the trial court. But a notice of appeal is not effective if filed before the trial court makes a finding of guilt or receives a jury verdict.

27.2. Other Premature Actions

The appellate court may treat actions taken before an appealable order is signed as relating to an appeal of that order and give them effect as if they had been taken after the order was signed. The appellate court may allow an appealed order that is not final to be modified so as to be made final and may allow the modified order and all proceedings relating to it to be included in a supplemental record.

27.3. If Appealed Order Modified or Vacated

After an order or judgment in a civil case has been appealed, if the trial court modifies the order or judgment, or if the trial court vacates the order or judgment and replaces it with another appealable order or judgment, the appellate court must treat the appeal as from the subsequent order or judgment and may treat actions relating to the appeal of the first order or judgment as relating to the appeal of the subsequent order or judgment. The subsequent order or judgment and actions relating to it may be included in the original or supplemental record. Any party may nonetheless appeal from the subsequent order or judgment.

Notes and Comments

Comment to 1997 change: This rule is new and combines the provisions of former Rules 41(c) and 58.

Rule 28. Accelerated Appeals in Civil Cases

28.1. Accelerated Appeals

(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 otherwise provided by statute, an accelerated appeal is perfected by filing a notice of appeal in compliance with Rule 25.1 within the time allowed by Rule 26.1(b) or as extended by Rule 26.3. 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 file findings of fact and conclusions of law but may do so within 30 days after the order is signed.

(d) *Quo Warranto Appeals.* The trial court may grant a motion for new trial timely filed under Texas Rule of Civil Procedure 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.* An agreed appeal of an interlocutory order permitted by statute must be perfected as provided in Rule 25.1. The notice of appeal must be filed no 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.

(b) *Other Requirements.* In addition to perfecting appeal, the appellant must file with the clerk of the appellate court a docketing statement as provided in Rule 32.1 and pay to the clerk of the appellate court all required fees authorized to be collected by the clerk.

(c) *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, mailing addresses, ~~and telefax~~ numbers, if any, and e-mail addresses, if any, 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.

(d) *Determination of Jurisdiction.* If the court of appeals determines that a notice of appeal filed under this rule does not demonstrate the court's jurisdiction, it may order the appellant to file an amended notice of appeal. On a party's motion or its own initiative, the court of appeals may also order the appellant or any other party to file briefing addressing whether the appeal meets the statutory requirements, and may direct 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 a jurisdictional defect exists, it may dismiss the appeal for want of jurisdiction at any stage of the appeal.

(e) *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 meets the statutory requirements.

(f) *No Automatic Stay of Proceedings in Trial Court.* An agreed appeal of an interlocutory order permitted by statute does not stay proceedings in the trial court except as agreed by the parties and ordered by the trial court or the court of appeals.

Notes and Comments

Comment to 1997 change: This is former Rule 42. A motion for new trial is now permitted in an appeal from an interlocutory order, but it does not extend the time to perfect appeal. The deadlines for filing items in an accelerated appeal are moved to other rules. *See* Rules 26.1, 35.1 and 38.6. Former Rule 42(b), regarding discretionary acceleration, is omitted as unnecessary. *See* Rule 40.1. The provision in former Rule 42(c) allowing the court to shorten the time to file briefs is omitted as unnecessary. *See* Rule 38.6.

Comment to 2008 change: Rule 28 is rewritten. Subdivision 28.1 more clearly defines accelerated appeals and provides a uniform appellate timetable. But many statutes that provide for accelerated or expedited appeals also set appellate timetables, and statutory deadlines govern over deadlines provided in the rule. Subdivision 28.2 provides procedures for an agreed appeal of an interlocutory order permitted by statute. Such appeals are now permitted under Section 51.014(d) of the Civil Practice and Remedies Code. The requirements for perfecting appeal are generally set out in Rule 25.1, and as provided there, only the notice of appeal is jurisdictional.

Comment to 2009 change: Rule 28 is amended to require an e-mail address, if any, on the notice of accelerated appeal.

Rule 29. Orders Pending Interlocutory Appeal in Civil Cases

29.1. Effect of Appeal

Perfecting an appeal from an order granting interlocutory relief does not suspend the order appealed from unless:

(a) the order is superseded in accordance with 29.2; or

(b) the appellant is entitled to supersede the order without security by filing a notice of appeal.

29.2. Security

The trial court may permit an order granting interlocutory relief to be superseded pending an appeal from the order, in which event the appellant may supersede the order in accordance with Rule 24. If the trial court refuses to permit the appellant to supersede the order, the appellant may move the appellate court to review that decision for abuse of discretion.

29.3. Temporary Orders of Appellate Court

When an appeal from an interlocutory order is perfected, the appellate court may make any temporary orders necessary to preserve the parties' rights until disposition of the appeal and may require appropriate security. But the appellate court must not suspend the trial court's order if the appellant's rights would be adequately protected by supersedeas or another order made under Rule 24.

29.4. Enforcement of Temporary Orders

While an appeal from an interlocutory order is pending, only the appellate court in which the appeal is pending may

enforce the order. But the appellate court may refer any enforcement proceeding to the trial court with instructions to:

(a) hear evidence and grant appropriate relief; or

(b) make findings and recommendations and report them to the appellate court.

29.5. Further Proceedings in Trial Court

While an 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. 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 with or impairs the jurisdiction of the appellate court or effectiveness of any relief sought or that may be granted on appeal.

29.6. Review of Further Orders

(a) *Motion to Review Further Orders.* While an appeal from an interlocutory order is pending, on a party's motion or on the appellate court's own initiative, the appellate court may review the following:

(1) a further appealable interlocutory order concerning the same subject matter; and

(2) any interlocutory order that interferes with or impairs the effectiveness of the relief sought or that may be granted on appeal.

(b) *Record.* The party filing the motion may rely on the original record or may file a supplemental record with the motion.

Notes and Comments

Comment to 1997 change: This is former Rule 43. The provision in the former rule that an appeal from an order certifying a class suspends the order is repealed. The provision in the former rule that an order denying interlocutory relief cannot be suspended is omitted as unnecessary because the rule provides for superseding only orders granting relief. No substantive change is intended. The provision in former Rule 43(d) prohibiting the trial court from making an order granting substantially the same relief as the order appealed is repealed as being too broad. The provisions of former Rule 43(g) regarding the mandate are moved to Rule 18.6 and 18.7. The provision of former Rule 43(h) regarding rehearings is moved to Rule 49.4.

Comment to 2002 change: Rule 29.5 is amended to acknowledge that a trial court may be prohibited by law from proceeding to trial during the pendency of an interlocutory appeal, as for example by section 51.014(b) of the Texas Civil Practice and Remedies Code.

Comment to 2008 change: Rule 29.5 is amended to be consistent with Section 51.014(b) of the Civil Practice and Remedies Code, 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 30. Restricted Appeals to Court of Appeals in Civil Cases

A party who did not participate—either in person or through counsel—in the hearing that resulted in the judgment complained of and who did not timely file a postjudgment motion or request for findings of fact and conclusions of law, or a notice of appeal within the time permitted by Rule 26.1(a), may file a notice of appeal within the time permitted by Rule 26.1(c). Restricted appeals replace writ of error appeals to the court of appeals. Statutes pertaining to writ of error appeals to the court of appeals apply equally to restricted appeals.

Notes and Comments

Comment to 1997 change: This is former Rule 45. The appeal by writ of error procedure is repealed. A procedure for an appeal filed within 6 months — called a restricted appeal — is substituted. This rule sets out who may take a restricted appeal. Rules 25.1 and 26.1 set out the method of perfection and the time for perfecting the appeal.

Rule 31. Appeals in Habeas Corpus, Bail, and Extradition Proceedings in Criminal Cases

31.1. Filing the Record; Submission

When written notice of appeal from a judgment or order in a habeas corpus or bail proceeding is filed, the trial court clerk must prepare and certify the clerk's record and, if the appellant requests, the court reporter must prepare and certify a reporter's record. The clerk must send the clerk's record and the court reporter must send the reporter's record to the appellate court within 15 days after the notice of appeal is filed. On reasonable explanation, the appellate court may shorten or extend the time to file the record. When the appellate court receives the record, the court will — if it desires briefs — set the time for filing briefs, and will set the appeal for submission.

31.2. Hearing

An appeal in a habeas corpus or bail proceeding will be heard at the earliest practicable time. The applicant need not personally appear, and the appeal will be heard and determined

upon the law and the facts shown by the record. The appellate court will not review any incidental question that might have arisen on the hearing of the application before the trial court. The sole purpose of the appeal is to do substantial justice to the parties.

31.3. Orders on Appeal

The appellate court will render whatever judgment and make whatever orders the law and the nature of the case require. The court may make an appropriate order relating to costs, whether allowing costs and fixing the amount, or allowing no costs.

31.4. Stay of Mandate

(a) *When Motion for Stay Required.* Despite Rule 18 or any other of these rules, in the following circumstances a party who in good faith intends to seek discretionary review must — within 15 days after the court of appeals renders judgment — file with the court of appeals clerk a motion for stay of mandate, to which is appended the party's petition for discretionary review showing reasons why the Court of Criminal Appeals should review the appellate court judgment:

(1) when a court of appeals affirms the judgment of the trial court in an extradition matter and thereby sanctions a defendant's extradition; or

(2) when a court of appeals reverses the trial court's judgment in a bail matter — including bail pending appeal under Code of Criminal Procedure article 44.04(g) — and thereby grants or reduces the amount of bail.

(b) *Determination of the Motion.* The clerk must promptly submit the motion and appendix to the court of appeals, or to one or more judges as the court deems appropriate, for immediate consideration and determination.

(1) If the motion for stay is granted, the clerk will file the petition for discretionary review and process the case in accordance with Rule 68.7.

(2) If the motion is denied, the clerk will issue a mandate in accordance with the court of appeals' judgment.

(c) *Denial of Stay.* If the motion for stay is denied under 31.4(b)(2), the losing party may then present the motion and appendix to the clerk of the Court of Criminal Appeals, who will promptly submit them to the Court, or to one or more judges as the Court deems appropriate, for immediate consideration and determination. The Court of Criminal Appeals may deny the motion or stay or recall the mandate. If the mandate is stayed or recalled, the court of appeals clerk will file the petition for discretionary review and process the case in accordance with Rule 68.7.

31.5. Judgment Conclusive

The court of appeals' judgment is final and conclusive if the Court of Criminal Appeals does not grant discretionary review. If the Court of Criminal Appeals grants discretionary review, that court's judgment is final and conclusive. In either case, no further application in the same case can be made for the writ unless the law provides otherwise.

31.6. Defendant Detained by Other Than Officer

If the defendant is held by a person other than an officer, the sheriff receiving the appellate court mandate so ordering must immediately cause the defendant to be discharged, for which discharge the mandate is sufficient authority.

31.7. Judgment to Be Certified

The appellate court clerk will certify the court's judgment to the officer holding the defendant in custody or, if the defendant is held by a person other than an officer, to the appropriate sheriff.

Notes and Comments

Comment to 1997 change: This is former Rule 44. Since the purpose of the appeal is to do substantial justice, it is extended to both parties in recognition that both parties now have the right to appeal. Other nonsubstantive changes are made.

Rule 32. Docketing Statement

32.1. Civil Cases

Upon perfecting the appeal in a civil case, the appellant must file in the appellate court a docketing statement that includes the following information:

(a) (1) if the appellant filing the statement has counsel, the name of that appellant and the name, mailing address, telephone number, fax number, if any, e-mail address, if any, and State Bar of Texas identification number of the appellant's lead counsel; or

(2) if the appellant filing the statement is not represented by an attorney, that party's name, address, telephone number, ~~and~~ fax number, if any, and e-mail address, if any;

(b) the date the notice of appeal was filed in the trial court and, if mailed to the trial court clerk, the date of mailing;

(c) the trial court's name and county, the name of the judge who tried the case, and the date the judgment or order appealed from was signed;

(d) the date of filing of any motion for new trial, motion to modify the judgment, request for findings of fact, motion to reinstate, or other filing that affects the time for perfecting the appeal;

(e) the names of all other parties to the trial court's judgment or the order appealed from, and:

(1) if represented by counsel, their lead counsel's names, mailing addresses, telephone numbers, ~~and~~ fax numbers, if any, and e-mail addresses, if any,; or

(2) if not represented by counsel, the name, address, and telephone number of the party, or a statement that the appellant diligently inquired but could not discover that information;

(f) the general nature of the case — for example, personal injury, breach of contract, or temporary injunction;

(g) whether the appeal's submission should be given priority or whether the appeal is an accelerated one under Rule 28 or another rule or statute;

(h) whether the appellant has requested or will request a reporter's record, and whether the trial was electronically recorded;

(I) the name of the court reporter;

(j) whether the appellant intends to seek temporary or ancillary relief while the appeal is pending;

(k) (1) the date of filing of any affidavit of indigence;

(2) the date of filing of any contest;

(3) the date of any order on the contest; and

(4) whether the contest was sustained or overruled;

(l) whether the appellant has filed or will file a supersedeas bond; and

(m) any other information the appellate court requires.

32.2. Criminal Cases

Upon perfecting the appeal in a criminal case, the appellant must file in the appellate court a docketing statement that includes the following information:

(a) (1) if the appellant has counsel, the name of the appellant and the name, mailing address, telephone number, fax number, if any, e-mail address, if any, and State Bar of Texas identification number of the appellant's counsel, and whether the counsel is appointed or retained; or

(2) if the appellant is not represented by an attorney, that party's name, address, telephone number, ~~and~~ fax number, if any, and e-mail address, if any;

(b) the date the notice of appeal was filed in the trial court and, if mailed to the trial court clerk, the date of mailing;

(c) the trial court's name and county, and the name of the judge who tried the case;

(d) the date the trial court imposed or suspended sentence in open court, or the date the judgment or order appealed from was signed;

(e) the date of filing any motion for new trial, motion in arrest of judgment, or any other filing that affects the time for perfecting the appeal;

(f) the offense charged and the date of the offense;

(g) the defendant's plea;

(h) whether the trial was jury or nonjury;

(i) the punishment assessed;

(j) whether the appeal is from a pretrial order;

(k) whether the appeal involves the validity of a statute, ordinance, or rule;

(l) whether a reporter's record has been or will be requested, and whether the trial was electronically recorded;

(m) the name of the court reporter;

(n) (1) the dates of filing of any motion and affidavit of indigence;

(2) the date of any hearing;

(3) the date of any order; and

(4) whether the motion was granted or denied; and

(o) any other information the appellate court requires.

32.3. Supplemental Statements

Any party may file a statement supplementing or correcting the docketing statement.

32.4. Purpose of Statement

The docketing statement is for administrative purposes and does not affect the appellate court's jurisdiction.

Notes and Comments

Comment to 1997 change: The rule is new.

Comment to 2009 change: Rule 32 is amended to require e-mail addresses, if any, on docketing statements.

Rule 33. Preservation of Appellate Complaints

33.1. Preservation; How Shown

(a) *In General.* As a prerequisite to presenting a complaint for appellate review, the record must show that:

(1) the complaint was made to the trial court by a timely request, objection, or motion that:

(A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and

(B) complied with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Civil or Appellate Procedure; and

(2) the trial court:

(A) ruled on the request, objection, or motion, either expressly or implicitly; or

(B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal.

(b) *Ruling by Operation of Law.* In a civil case, the overruling by operation of law of a motion for new trial or a motion to modify the judgment preserves for appellate review a complaint properly made in the motion, unless taking evidence was necessary to properly present the complaint in the trial court.

(c) *Formal Exception and Separate Order Not Required.* Neither a formal exception to a trial court ruling or order nor a signed, separate order is required to preserve a complaint for appeal.

(d) *Sufficiency of Evidence Complaints in Nonjury Cases.* In a nonjury case, a complaint regarding the legal or factual insufficiency of the evidence - including a complaint that the damages found by the court are excessive or inadequate, as distinguished from a complaint that the trial court erred in refusing to amend a fact finding or to make an additional finding of fact - may be made for the first time on appeal in the complaining party's brief.

33.2. Formal Bills of Exception

To complain on appeal about a matter that would not otherwise appear in the record, a party must file a formal bill of exception.

(a) *Form.* No particular form of words is required in a bill of exception. But the objection to the court's ruling or action, and the ruling complained of, must be stated with sufficient specificity to make the trial court aware of the complaint.

(b) *Evidence.* When the appellate record contains the evidence needed to explain a bill of exception, the bill itself need not repeat the evidence, and a party may attach and incorporate a transcription of the evidence certified by the court reporter.

(c) *Procedure.*

(1) The complaining party must first present a formal bill of exception to the trial court.

(2) If the parties agree on the contents of the bill of exception, the judge must sign the bill and file it with the trial court clerk. If the parties do not agree on the contents of the bill, the trial judge must — after notice and hearing — do one of the following things:

(A) sign the bill of exception and file it with the trial court clerk if the judge finds that it is correct;

(B) suggest to the complaining party those corrections to the bill that the judge believes are necessary to make it accurately reflect the proceedings in the trial court, and if the party agrees to the corrections, have the corrections made, sign the bill, and file it with the trial court clerk; or

(C) if the complaining party will not agree to the corrections suggested by the judge, return the bill to the complaining party with the judge's refusal written on it, and

prepare, sign, and file with the trial court clerk such bill as will, in the judge's opinion, accurately reflect the proceedings in the trial court.

(3) If the complaining party is dissatisfied with the bill of exception filed by the judge under (2)(C), the party may file with the trial court clerk the bill that was rejected by the judge. That party must also file the affidavits of at least three people who observed the matter to which the bill of exception is addressed. The affidavits must attest to the correctness of the bill as presented by the party. The matters contained in that bill of exception may be controverted and maintained by additional affidavits filed by any party within ten days after the filing of that bill. The truth of the bill of exception will be determined by the appellate court.

(d) *Conflict.* If a formal bill of exception conflicts with the reporter's record, the bill controls.

(e) *Time to file.*

(1) Civil Cases. In a civil case, a formal bill of exception must be filed no later than 30 days after the filing party's notice of appeal is filed.

(2) Criminal Cases. In a criminal case, a formal bill of exception must be filed:

(A) no later than 60 days after the trial court pronounces or suspends sentence in open court; or

(B) if a motion for new trial has been timely filed, no later than 90 days after the trial court pronounces or suspends sentence in open court.

(3) Extension of Time. The appellate court may extend the time to file a formal bill of exception if, within 15 days after the deadline for filing the bill, the party files in the appellate court a motion complying with Rule 10.5(b).

(f) *Inclusion in Clerk's Record.* When filed, a formal bill of exception should be included in the appellate record.

Notes and Comments

Comment to 1997 change: This is former Rule 52. Subdivision 33.1 is rewritten. Former Rule 52(b), regarding offers of proof, is omitted as unnecessary. *See* TEX. R. CIV. EVID. 103; TEX. R. CRIM. EVID. 103. Subdivision 33.2 is also rewritten and the procedure is more definitely stated. Former Rule 52(d), regarding motions for new trial, is omitted as unnecessary. *See* TEX. R. CIV. P. 324(a) & (b).

Comment to 2002 change: The last sentence of former Rule 52(d) of the Rules of Appellate Procedure has been reinstated in substance.

Rule 34. Appellate Record

34.1. Contents

The appellate record consists of the clerk's record and, if necessary to the appeal, the reporter's record. Even if more than one notice of appeal is filed, there should be only one appellate record in a case.

34.2. Agreed Record

By written stipulation filed with the trial court clerk, the parties may agree on the contents of the appellate record. An agreed record will be presumed to contain all evidence and filings relevant to the appeal. To request matter to be included in the agreed record, the parties must comply with the procedures in Rules 34.5 and 34.6.

34.3. Agreed Statement of the Case

In lieu of a reporter's record, the parties may agree on a brief statement of the case. The statement must be filed with the trial court clerk and included in the appellate record.

34.4. Form.

In Appendices C and E of these rules, ~~T~~the Supreme Court and Court of Criminal Appeals ~~will~~ prescribe the form of the paper and electronic appellate record. Court reporters and court recorders must follow the additional requirements in the Uniform Format Manual for Court Reporters.

34.5. Clerk's Record

(a) *Contents.* Unless the parties designate the filings in the appellate record by agreement under Rule 34.2, the record must include copies of the following:

(1) in civil cases, all pleadings on which the trial was held;

(2) in criminal cases, the indictment or information, any special plea or defense motion that was presented to the court and overruled, any written waiver, any written stipulation, and, in cases in which a plea of guilty or nolo contendere has been entered, any documents executed for the plea;

(3) the court's docket sheet;

(4) the court's charge and the jury's verdict, or the court's findings of fact and conclusions of law;

(5) the court's judgment or other order that is being appealed;

(6) any request for findings of fact and conclusions of law, any post-judgment motion, and the court's order on the motion;

(7) the notice of appeal;

(8) any formal bill of exception;

(9) any request for a reporter's record, including any statement of points or issues under Rule 34.6(c);

(10) any request for preparation of the clerk's record;

(11) in civil cases, a certified bill of costs, including the cost of preparing the clerk's record, showing credits for payments made;

(12) in criminal cases, the trial court's certification of the defendant's right of appeal under Rule 25.2; and

(13) subject to (b), any filing that a party designates to have included in the record.

(b) *Request for Additional Items.*

(1) Time for Request. At any time before the clerk's record is prepared, any party may file with the trial court clerk a written designation specifying items to be included in the record.

(2) Request Must be Specific. A party requesting that an item be included in the clerk's record must specifically describe the item so that the clerk can readily identify it. The clerk will disregard a general designation, such as one for "all papers filed in the case."

(3) Requesting Unnecessary Items. In a civil case, if a party requests that more items than necessary be included in the clerk's record or any supplement, the appellate court may — regardless of the appeal's outcome — require that party to pay the costs for the preparation of the unnecessary portion.

(4) Failure to Timely Request. An appellate court must not refuse to file the clerk's record or a supplemental clerk's record because of a failure to timely request items to be included in the clerk's record.

(c) *Supplementation.*

(1) If a relevant item has been omitted from the clerk's record, the trial court, the appellate court, or any party may by letter direct the trial court clerk to prepare, certify, and file in the appellate court a supplement containing the omitted item.

(2) If the appellate court in a criminal case orders the trial court to prepare and file findings of fact and conclusions of law as required by law, or certification of the defendant's right of appeal as required by these rules, the trial court clerk must prepare, certify, and file in the appellate court a supplemental clerk's record containing those findings and conclusions.

(3) Any supplemental clerk's record will be part of the appellate record.

(d) *Defects or Inaccuracies.* If the clerk's record is defective or inaccurate, the appellate clerk must inform the trial court clerk of the defect or inaccuracy and instruct the clerk to make the correction.

(e) *Clerk's Record Lost or Destroyed.* If a filing designated for inclusion in the clerk's record has been lost or destroyed, the parties may, by written stipulation, deliver a copy of that item to the trial court clerk for inclusion in the clerk's record or a supplement. If the parties cannot agree, the trial court must — on any party's motion or at the appellate court's request — determine what constitutes an accurate copy of the missing item and order it to be included in the clerk's record or a supplement.

(f) *Original Documents.* If the trial court determines that original documents filed with the trial court clerk should be inspected by the appellate court or sent to that court in lieu of copies, the trial court must make an order for the safekeeping, transportation, and return of those original documents. The order must list the original documents and briefly describe them. All the documents must be arranged in their listed sequence and bound firmly together. On any party's motion or its own initiative, the appellate court may direct the trial court clerk to send it any original document.

(g) *Additional Copies of Clerk's Record in Criminal Cases.* In a criminal case, the clerk's record must be made in duplicate, and in a case in which the death penalty was assessed, in triplicate. The trial court clerk must retain the copy or copies for the parties to use with the court's permission.

***DRAFTING NOTE**: The CCA will decide whether and how to revise subdivision (g).*

(h) *Clerk May Consult With Parties.* The clerk may consult with the parties concerning the contents of the clerk's record.

34.6. Reporter's Record

(a) *Contents.*

(1) Stenographic Recording. If the proceedings were stenographically recorded, the reporter's record consists of the court reporter's transcription of so much of the proceedings, and any of the ~~exhibits~~ nontestimonial evidence, that the parties to the appeal designate.

(2) Electronic Recording. If the proceedings were electronically recorded, the reporter's record consists of certified copies of all tapes or other audio-storage devices on which the proceedings were recorded, any of the ~~exhibits~~ nontestimonial evidence that the parties to the appeal designate, and certified copies of the logs prepared by the court recorder under Rule 13.2.

(b) *Request for preparation.*

(1) Request to Court Reporter. At or before the time for perfecting the appeal, the appellant must request in writing that the official reporter prepare the reporter's record. The request must designate the ~~exhibits~~ nontestimonial evidence to be included. A request to the court reporter — but not the court recorder — must also designate the portions of the proceedings to be included.

(2) Filing. The appellant must file a copy of the request with the trial court clerk.

(3) Failure to Timely Request. An appellate court must not refuse to file a reporter's record or a supplemental reporter's record because of a failure to timely request it.

(c) *Partial Reporter's Record.*

(1) Effect on Appellate Points or Issues. If the appellant requests a partial reporter's record, the appellant must include in the request a statement of the points or issues to be presented on appeal and will then be limited to those points or issues.

(2) Other Parties May Designate Additions. Any other party may designate additional ~~exhibits~~ nontestimonial evidence and portions of the testimony to be included in the reporter's record.

(3) Costs; Requesting Unnecessary Matter. Additions requested by another party must be included in the reporter's record at the appellant's cost. But if the trial court finds that all or part of the designated additions are unnecessary to the appeal, the trial court may order the other party to pay the costs for the preparation of the unnecessary additions. This paragraph does not affect the appellate court's power to tax costs differently.

(4) Presumptions. The appellate court must presume that the partial reporter's record designated by the parties constitutes the entire record for purposes of reviewing the stated points or issues. This presumption applies even if the statement includes a point or issue complaining of the legal or factual insufficiency of the evidence to support a specific factual finding identified in that point or issue.

(5) Criminal Cases. In a criminal case, if the statement contains a point complaining that the evidence is insufficient to support a finding of guilt, the record must include all the evidence admitted at the trial on the issue of guilt or innocence and punishment.

(d) *Supplementation.* If anything relevant is omitted from the reporter's record, the trial court, the appellate court, or any party may by letter direct the official court reporter to prepare, certify, and file in the appellate court a supplemental reporter's record containing the omitted items. Any supplemental reporter's record is part of the appellate record.

(e) *Inaccuracies in the Reporter's Record.*

(1) Correction of Inaccuracies by Agreement. The parties may agree to correct an inaccuracy in the reporter's record, including an exhibit, without the court reporter's recertification.

(2) Correction of Inaccuracies by Trial Court. If the parties cannot agree on whether or how to correct the reporter's record so that the text accurately discloses what occurred in the trial court and the exhibits are accurate, the trial court must — after notice and hearing — settle the dispute. If the court finds any inaccuracy, it must order the court reporter to conform the reporter's record (including text and any exhibits) to what occurred in the trial court, and to file certified corrections in the appellate court.

(3) Correction After Filing in Appellate Court. If the dispute arises after the reporter's record has been filed in the appellate court, that court may submit the dispute to the trial court for resolution. The trial court must then proceed as under subparagraph (e)(2).

(f) *Reporter's Record Lost or Destroyed.* An appellant is entitled to a new trial under the following circumstances:

(1) if the appellant has timely requested a reporter's record;

(2) if, without the appellant's fault, a significant exhibit or a significant portion of the court reporter's notes and records has been lost or destroyed or — if the proceedings were electronically recorded — a significant portion of the recording has been lost or destroyed or is inaudible;

(3) if the lost, destroyed, or inaudible portion of the reporter's record, or the lost or destroyed exhibit, is necessary to the appeal's resolution; and

(4) if the lost, destroyed or inaudible portion of the reporter's record cannot be replaced by agreement of the parties, or the lost or destroyed exhibit cannot be replaced either by agreement of the parties of with a copy determined by the trial court to accurately duplicate with reasonable certainty the original exhibit.

(g) *Original Exhibits.*

(1) Reporter May Use in Preparing Reporter's Record. At the court reporter's request, the trial court clerk must give all original exhibits to the reporter for use in preparing the reporter's record. Unless ordered to include original exhibits in the reporter's record, the court reporter must return the original exhibits to the clerk after copying them for inclusion in the reporter's record. If someone other than the trial court clerk possesses an original exhibit, either the trial court or the appellate court may order that person to deliver the exhibit to the trial court clerk.

(2) Use of Original Exhibits by Appellate Court. If the trial court determines that original exhibits should be inspected by the appellate court or sent to that court in lieu of copies, the trial court must make an order for the safekeeping, transportation, and return of those exhibits. The order must list the exhibits and briefly describe them. To the extent practicable, all the exhibits must be arranged in their listed order and, if filed in paper format, bound firmly together before being sent to the appellate clerk. On any party's motion or its own initiative, the appellate court may direct the trial court clerk to send it any original exhibit.

(h) *Additional Copies of Reporter's Record in Criminal Cases.* In a criminal case in which a party requests a reporter's record, the court reporter must prepare a paper duplicate of the reporter's record and file it with the trial court clerk. In a case where the death penalty was assessed, the court reporter must prepare two paper duplicates of the reporter's record.

***DRAFTING NOTE**: The CCA will decide whether to make additional/different revisions to subdivision (h).*

(i) *Supreme Court and Court of Criminal Appeals May Set Fee.* From time to time, the Supreme Court and the Court of Criminal Appeals may set the fee that the court reporters and recorders may charge for preparing the reporter's record.

Notes and Comments

Comment to 1997 change: Former Rules 50, 51 and 53 are merged. *Clerk's record* is substituted for *transcript*, and *reporter's record* is substituted for *statement of facts* throughout the rules. In subdivision 34.2, the requisites of an agreed record are more clearly stated. Former Rule 50(d), regarding the burden to file a complete record, is repealed. Subdivision 34.4 is from former Rules 51(c) and 53(h). Former Rule 50(f), regarding a violation of the rules, is repealed. Subparagraph 34.5(b)(3) allows the appellate court to tax costs against a party for requiring unnecessary items to be included in the clerk's record. Paragraph 34.5(c) is new and provides for supplementation of the clerk's record. The provisions of paragraph 34.5(d) are from former Rule 55(b). The provisions of paragraph 34.5(e) are from former Rule 50(e). Paragraph 34.5(h) specifically allows the clerk to consult with the parties to determine the contents of the clerk's record. Paragraph 34.6(a), defining the reporter's record, is new. Former Rules 53(b) (Other Requests), (d) (Partial Statement), and (e) (Unnecessary Portions) are merged into paragraph 34.6(c). Paragraph 34.6(d) is new. Paragraph 34.6(e) is from former Rule 55. Paragraph 34.6(f) is from former Rule 50(d). The provisions of former Rules 53(f) (Certification by Court Reporter) and (h) (Form) are moved to the Order of the Supreme Court and the Court of Criminal Appeals on the preparation of the record. Former Rule 53(l) (Narrative Statement) is repealed. The provisions of former Rule 53(j) (Free Statement of Facts) are moved to Rule 20. Former Rule 53(k) (Duty of Appellant to File) is repealed; it is now the duty of the court reporter to file the reporter's record. Paragraph 34.6(g) is from former Rule 51(d). Former Rule 53(g) is now paragraph 34.6(I). Former Rule 53(l) is now paragraph 34.6(h). The need for two duplicate records in a death penalty case was created by the habeas corpus provision in Code of Criminal Procedure article 11.071.

Comment to 2002 change: Rule 34.5(a) is amended to require that the record in a criminal case include the certification of defendant's right of appeal; see Rule 25.2(d). Rule 34.5(c) is amended to make clear that an appellate court may order the trial court to make such a certification for inclusion in a supplemental clerk's record. Subparagraphs 34.6(e) and (f) are amended to clarify the application to exhibits. The language in subparagraph (e)(2) referring to the text of the record is simplified without substantive change. Subparagraph (e)(3) incorporates the procedures specified in (e)(2). The language in subparagraph (f) is clarified to require agreement only as to the portion of the text at issue, and to provide that the trial court may determine that a copy of an exhibit should be used even if the parties cannot agree.

Comment to 2009 change: Rule 34 is amended to be consistent with the changes to Rule 13 and to account for the filing of electronic appellate records.

Rule 35. Time to File Record; Responsibility for Filing Record

35.1. Civil Cases

The appellate record must be filed in the appellate court within 60 days after the judgment is signed, except as follows:

(a) if Rule 26.1(a) applies, within 120 days after the judgment is signed;

(b) if Rule 26.1(b) applies, within 10 days after the notice of appeal is filed; or

(c) if Rule 26.1(c) applies, within 30 days after the notice of appeal is filed.

35.2. Criminal Cases

The appellate record must be filed in the appellate court:

(a) if a motion for new trial is not filed, within 60 days after the date the sentence is imposed or suspended in open court or the order appealed from is signed;

(b) if a timely motion for new trial is filed and denied, within 120 days after the date the sentence is imposed or suspended in open court; or

(c) if a motion for new trial is granted, within 60 days after the order granting the motion is signed.

35.3. Responsibility for Filing Record

(a) *Clerk's Record.* The trial court clerk is responsible for preparing, certifying, and timely filing the clerk's record if:

(1) a notice of appeal has been filed, and in criminal proceedings, the trial court has certified the defendant's right of appeal, as required by Rule 25.2(d); and

(2) the party responsible for paying for the preparation of the clerk's record has paid the clerk's fee, has made satisfactory arrangements with the clerk to pay the fee, or is entitled to appeal without paying the fee.

(b) *Reporter's Record.* The official or deputy reporter is responsible for preparing, certifying, and timely filing the reporter's record if:

(1) a notice of appeal has been filed;

(2) the appellant has requested that the reporter's record be prepared; and

(3) the party responsible for paying for the preparation of the reporter's record has paid the reporter's fee, or has made satisfactory arrangements with the reporter to pay the fee, or is entitled to appeal without paying the fee.

(c) *Courts to Ensure Record Timely Filed.* The trial and appellate courts are jointly responsible for ensuring that the appellate record is timely filed. The appellate court must allow the record to be filed late when the delay is not the appellant's fault, and may do so when the delay is the appellant's fault. The appellate court may enter any order necessary to ensure the timely filing of the appellate record.

Notes and Comments

Comment to 1997 change: This is former Rule 54. In subdivision 35.1, the time to file the record in civil cases is based on the date the judgment is signed except in accelerated and restricted appeals, in which the time to file the record is based on the date the notice of appeal is filed. Subdivision 35.3 is new and makes it the responsibility of the trial court clerk and court reporter to file the record. Former Rule 54(c), providing for an extension of time to file the record, is repealed as unnecessary. The trial court clerk and court reporter should make arrangements with the court of appeals if additional time is required to file the record, as suggested in Rule 37.3

Rule 36. Agency Record in Administrative Appeals

36.1. Scope

This rule applies only to cases involving judicial review of state agency decisions in contested cases under the Administrative Procedure Act.

36.2. Inclusion in Appellate Record

The record of an agency proceeding filed in the trial court may be included in either the clerk's record or the reporter's record.

36.3. Correcting the Record

(a) *Correction by Agreement.* At any stage of the proceeding, the parties may agree to correct an agency record filed under Section 2001.175(b) of the Government Code to ensure that the agency record accurately reflects the contested case proceedings before the agency. The court reporter need not recertify the agency record.

(b) *Correction by Trial Court.* If the parties cannot agree to a correction to the agency record, the appellate court must — on any party's motion or its own incentive — send the question to the trial court. After notice and hearing, the trial court must determine what constitutes an accurate copy of the agency record and order the agency to send an accurate copy to the clerk of the court in which the case is pending.

Notes and Comments

Comment to 1997 change: The rule is new.

Rule 37. Duties of the Appellate Clerk on Receiving the Notice of Appeal and Record

37.1. On Receiving the Notice of Appeal

If the appellate clerk determines that the notice of appeal or certification of defendant's right of appeal in a criminal case is defective, the clerk must notify the parties of the defect so that it can be remedied, if possible. If a proper notice of appeal or certification of a criminal defendant's right of appeal is not filed in the trial court within 30 days of the date of the clerk's notice, the clerk must refer the matter to the appellate court, which will make an appropriate order under this rule or Rule 34.5(c)(2).

37.2. On Receiving the Record

On receiving the clerk's record from the trial court clerk or the reporter's record from the reporter, the appellate clerk must determine whether each complies with the Supreme Court's and Court of Criminal Appeals' order on preparation of the record. If so, the clerk must endorse on each the date of receipt, file it, and notify the parties of the filing and the date. If not, the clerk must endorse on the clerk's record or reporter's record — whichever is defective — the date of receipt and return it to the official responsible for filing it. The appellate court clerk must specify the defects and instruct the official to correct the defects and return the record to the appellate court by a specified date.

37.3. If No Record Filed

(a) *Notice of Late Record.*

(1) Civil Cases. If the clerk's record or reporter's record has not been timely filed, the appellate clerk must send notice to the official responsible for filing it, stating that the record is late and requesting that the record be filed within 30 days if an ordinary or restricted appeal, or 10 days if an accelerated appeal. The appellate clerk must send a copy of this notice to the parties and the trial court. If the clerk does not receive the record within the stated period, the clerk must refer the matter to the appellate court. The court must make whatever order is appropriate to avoid further delay and to preserve the parties' rights.

(2) Criminal Cases. If the clerk's record or reporter's record has not been timely filed, the appellate court clerk must refer the matter to the appellate court. The court must make whatever order is appropriate to avoid further delay and to preserve the parties' rights.

(b) *If No Clerk's Record Filed Due to Appellant's Fault.* If the trial court clerk failed to file the clerk's record because the appellant failed to pay or make arrangements to pay the clerk's fee for preparing the clerk's record, the appellate court may — on a party's motion or its own initiative — dismiss the appeal for want of prosecution unless the appellant was entitled to proceed without payment of costs. The court must give the appellant a reasonable opportunity to cure before dismissal.

(c) *If No Reporter's Record Filed Due to Appellant's Fault.* Under the following circumstances, and if the clerk's record has been filed, the appellate court may — after first giving the appellant notice and a reasonable opportunity to cure — consider and decide those issues or points that do not require a reporter's record for a decision. The court may do this if no reporter's record has been filed because:

(1) the appellant failed to request a reporter's record; or

(2) (A) appellant failed to pay or make arrangements to pay the reporter's fee to prepare the reporter's record; and

(B) the appellant is not entitled to proceed without payment of costs.

Notes and Comments

Comment to 1997 change: Former Rules 56 and 57(a) are merged. Subdivisions 37.2 and 37.3 are new.

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.

(b) *Table of Contents.* The brief must have a table of contents with references to the pages of the brief. The table of contents must indicate the subject matter of each issue or point, or group of issues or points.

(c) *Index of Authorities.* The brief must have an index of authorities arranged alphabetically and indicating the pages of the brief where the authorities are cited.

(d) *Statement of the Case.* The brief must state concisely the nature of the case (e.g., whether it is a suit for damages, on a note, or involving a murder prosecution), the course of proceedings, and the trial court's disposition of the case. The statement should be supported by record references, should seldom exceed one-half page, and should not discuss the facts.

(e) *Any 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 the party's brief.

(f) *Issues Presented.* The brief must state concisely all issues or points presented for review. The statement of an issue or point will be treated as covering every subsidiary question that is fairly included.

(g) *Statement of Facts.* The brief must state concisely and without argument the facts pertinent to the issues or points presented. In a civil case, the court will accept as true the facts stated unless another party contradicts them. The statement must be supported by record references.

(h) *Summary of the Argument.* The brief must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief. This summary must not merely repeat the issues or points presented for review.

(I) *Argument.* The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record.

(j) *Prayer.* The brief must contain a short conclusion that clearly states the nature of the relief sought.

(k) *Appendix in Civil Cases.*

(1) Necessary Contents. Unless voluminous or impracticable, the appendix must contain a copy of:

(A) the trial court's judgment or other appealable order from which relief is sought;

(B) the jury charge and verdict, if any, or the trial court's findings of fact and conclusions of law, if any; and

(C) the text of any rule, regulation, ordinance, statute, constitutional provision, or other law (excluding case law) on which the argument is based, and the text of any contract or other document that is central to the argument.

(2) Optional Contents. The appendix may contain any other item pertinent to the issues or points presented for review, including copies or excerpts of relevant court opinions, laws, documents on which the suit was based, pleadings, excerpts from the reporter's record, and similar material. Items should not be included in the appendix to attempt to avoid the page limits for the brief.

38.2. Appellee's Brief

(a) *Form of Brief.*

(1) An appellee's brief must conform to the requirements of Rule 38.1, except that:

(A) the list of parties and counsel is not required unless necessary to supplement or correct the appellant's list;

(B) the appellee's brief need not include a statement of the case, a statement of the issues presented, or a statement of facts, unless the appellee is dissatisfied with that portion of the appellant's brief; and

(C) the appendix to the appellee's brief need not contain any item already contained in an appendix filed by the appellant.

(2) When practicable, the appellee's brief should respond to the appellant's issues or points in the order the appellant presented those issues or points.

(b) *Cross-Points.*

(1) Judgment Notwithstanding the Verdict. When the trial court renders judgment notwithstanding the verdict on one or more questions, the appellee must bring forward by cross-point any issue or point that would have vitiated the verdict or that would have prevented an affirmance of the judgment if the trial court had rendered judgment on the verdict. Failure to bring forward by cross-point an issue or point that would vitiate the verdict or prevent an affirmance of the judgment waives that complaint. Included in this requirement is a point that:

(A) the verdict or one or more jury findings have insufficient evidentiary support or are against the overwhelming preponderance of the evidence as a matter of fact; or

(B) the verdict should be set aside because of improper argument of counsel.

(2) When Evidentiary Hearing Needed. The appellate court must remand a case to the trial court to take evidence if:

(A) the appellate court has sustained a point raised by the appellant; and

(B) the appellee raised a cross-point that requires the taking of additional evidence.

38.3. Reply Brief

The appellant may file a reply brief addressing any matter in the appellee's brief. However, the appellate court may consider and decide the case before a reply brief is filed.

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. A reply brief must be no longer than 25 pages, exclusive of the items stated above. But in a civil case, the aggregate number of pages of all briefs filed by a party must not exceed 90, exclusive of the items stated above. The court may, on motion, permit a longer brief.

38.5. Appendix for Cases Recorded Electronically

In cases where the proceedings were electronically recorded, the following rules apply:

(a) *Appendix.*

(1) In General. At or before the time a party's brief is due, the party must file one copy of an appendix containing a transcription of all portions of the recording that the party considers relevant to the appellate issues or points. Unless another party objects, the transcription will be presumed accurate.

(2) Repetition Not Required. A party's appendix need not repeat evidence included in any previously filed appendix.

(3) Form. The form of the appendix and transcription must conform to any specifications of the Supreme Court and Court of Criminal Appeals concerning the form of the reporter's record except that it need not have the reporter's certificate.

(4) Notice. At the time the appendix is filed, the party must give written notice of the filing to all parties to the trial court's judgment or order. The notice must specify, by referring to the index numbers in the court recorder's logs, those parts of the recording that are included in the appendix. The filing party need not serve a copy of the appendix but must make a copy available to all parties for inspection and copying.

(b) *Presumptions.* The same presumptions that apply to a partial reporter's record under Rule 34.6(c)(4) apply to the parties' appendixes. The appellate court need not review any part of the electronic recording.

(c) *Supplemental Appendix.* The appellate court may direct or allow a party to file a supplemental appendix containing a transcription of additional portions of the recording.

(d) *Inability to Pay.* A party who cannot pay the cost of an appendix must file the affidavit provided for by Rule 20. The party must also state in the affidavit or a supplemental affidavit that the party has neither the access to the equipment necessary nor the skill necessary to prepare the appendix. If a contest to the affidavit is not sustained by written order, the court recorder must transcribe or have transcribed those portions of the recording that the party designates and must file the transcription as that party's appendix, along with all exhibits.

(e) *Inaccuracies.*

(1) Correction by Agreement. The parties may agree to correct an inaccuracy in the transcription of the recording.

(2) Correction by Appellate or Trial Court. If the parties dispute whether an electronic recording or transcription accurately discloses what occurred in the trial court but cannot agree on corrections, the appellate court may:

(A) settle the dispute by reviewing the recording; or

(B) submit the dispute to the trial court, which must — after notice and hearing — settle the dispute and ensure that the recording or transcription is made to conform to what occurred in the trial court.

(f) *Costs.* The actual expense of preparing the appendixes or the amount prescribed for official reporters, whichever is less, is taxed as costs. The appellate court may disallow the cost of any portion of the appendixes that it considers surplusage or that does not conform to any specifications prescribed by the Supreme Court or Court of Criminal Appeals.

38.6. Time to File Briefs

(a) *Appellant's Filing Date.* Except in a habeas corpus or bail appeal, which is governed by Rule 31, an appellant must file a brief within 30 days — 20 days in an accelerated appeal — after the later of:

(1) the date the clerk's record was filed; or

(2) the date the reporter's record was filed.

(b) *Appellee's Filing Date.* The appellee's brief must be filed within 30 days — 20 days in an accelerated appeal — after the date the appellant's brief was filed. In a civil case, if the appellant has not filed a brief as provided in this rule, an appellee may file a brief within 30 days — 20 days in an accelerated appeal — after the date the appellant's brief was due.

(c) *Filing Date for Reply Brief.* A reply brief, if any, must be filed within 20 days after the date the appellee's brief was filed.

(d) *Modifications of Filing Time.* On motion complying with Rule 10.5(b), the appellate court may extend the time for filing a brief and may postpone submission of the case. A motion to extend the time to file a brief may be filed before or after the date a brief is due. The court may also, in the interests of justice, shorten the time for filing briefs and for submission of the case.

38.7. Amendment or Supplementation

A brief may be amended or supplemented whenever justice requires, on whatever reasonable terms the court may prescribe.

38.8. Failure of Appellant to File Brief

(a) *Civil Cases.* If an appellant fails to timely file a brief, the appellate court may:

(1) dismiss the appeal for want of prosecution, unless the appellant reasonably explains the failure and the appellee is not significantly injured by the appellant's failure to timely file a brief;

(2) decline to dismiss the appeal and give further direction to the case as it considers proper; or

(3) if an appellee's brief is filed, the court may regard that brief as correctly presenting the case and may affirm the trial court's judgment upon that brief without examining the record.

(b) *Criminal Cases.*

(1) Effect. An appellant's failure to timely file a brief does not authorize either dismissal of the appeal or, except as provided in (4), consideration of the appeal without briefs.

(2) Notice. If the appellant's brief is not timely filed, the appellate clerk must notify counsel for the parties and the trial court of that fact. If the appellate court does not receive a satisfactory response within ten days, the court must order the trial court to immediately conduct a hearing to determine whether the appellant desires to prosecute his appeal, whether the appellant is indigent, or, if not indigent, whether retained counsel has abandoned the appeal, and to make appropriate findings and recommendations.

(3) Hearing. In accordance with (2), the trial court must conduct any necessary hearings, make appropriate findings and recommendations, and have a record of the proceedings prepared, which record — including any order and findings — must be sent to the appellate court.

(4) Appellate Court Action. Based on the trial court's record, the appellate court may act appropriately to ensure that the appellant's rights are protected, including initiating contempt proceedings against appellant's counsel. If the trial court has found that the appellant no longer desires to prosecute the appeal, or that the appellant is not indigent but

has not made the necessary arrangements for filing a brief, the appellate court may consider the appeal without briefs, as justice may require.

38.9. Briefing Rules to be Construed Liberally

Because briefs are meant to acquaint the court with the issues in a case and to present argument that will enable the court to decide the case, substantial compliance with this rule is sufficient, subject to the following.

(a) *Formal Defects.* If the court determines that this rule has been flagrantly violated, it may require a brief to be amended, supplemented, or redrawn. If another brief that does not comply with this rule is filed, the court may strike the brief, prohibit the party from filing another, and proceed as if the party had failed to file a brief.

(b) *Substantive Defects.* If the court determines, either before or after submission, that the case has not been properly presented in the briefs, or that the law and authorities have not been properly cited in the briefs, the court may postpone submission, require additional briefing, and make any other order necessary for a satisfactory submission of the case.

Notes and Comments

Comment to 1997 change: This is former Rule 74. The rule is substantially rewritten. Paragraph 38.1(e) now specifically allows a party to either present issues or points of error. Paragraphs 38.1(f) and (g) are new and require a brief to include a statement of facts and summary of the argument. Paragraph 38.2(b) is new and gives specific requirements for cross-points. *See also* TEX. R. CIV. P. 324(c). Subdivision 38.3 is new and provides for a reply brief. Subdivision 38.4 imposes a total brief limit of 90 pages on each party. Thus, if more than one party has filed a notice of appeal, there will be multiple appellant's, appellee's, and reply briefs, but each party is limited to a total of 90 pages. Subdivision 38.5 is new and provides for an appendix in cases recorded electronically in the trial court. Paragraph 38.6(b) now provides that the appellee has 30 — rather than 25 — days to file a brief. The provisions of former Rules 74(l) (Number of Copies), (j) (Briefs Typewritten or Printed), and (q) (Service of Briefs) are omitted as unnecessary. *See* Rule 9.

Comment to 2002 change: Rule 38.6(d) is amended to clarify that an appellate court may postpone the filing of any brief, not just the appellant's brief.

Comment to 2008 change: A party may choose to include a statement in the brief regarding oral argument. The optional statement does not count toward the briefing page limit.

Rule 39. Oral Argument; Decision Without Argument

39.1. Right to Oral Argument

A party who has filed a brief and who has timely requested oral argument may argue the case to the court unless the court, after examining the briefs, decides that oral argument is unnecessary for any of the following reasons:

(a) the appeal is frivolous;

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

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

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

39.2. Purpose of Argument

Oral argument should emphasize and clarify the written arguments in the briefs. Counsel should not merely read from prepared text. Counsel should assume that all members of the court have read the briefs before oral argument and counsel should be prepared to respond to questions. A party should not refer to or comment on matters not involved in or pertaining to what is in the record.

39.3. Time Allowed

The court will set the time that will be allowed for argument. Counsel must complete argument in the time allotted and may continue after the expiration of the allotted time only with permission of the court. Counsel is not required to use all the allotted time. The appellant must be allowed to conclude the argument.

39.4. Number of Counsel

Generally, only one counsel should argue for each side. Except on leave of court, no more than two counsel on each side may argue. Only one counsel may argue in rebuttal.

39.5. Argument by Amicus

With leave of court obtained before the argument and with a party's consent, an amicus curiae may share allotted time with that party. Otherwise, counsel for amicus may not argue.

39.6. When Only One Party Files a Brief

If counsel for only one party has filed a brief, the court may allow that party to argue.

39.7. Request and Waiver

A party desiring oral argument must note that request on the front cover of the party's brief. A party's failure to request oral argument waives the party's right to argue. But even if a

party has waived oral argument, the court may direct the party to appear and argue.

39.8. Clerk's Notice

The clerk must send to the parties—at least 21 days before the date the case is set for argument or submission without argument—a notice telling the parties:

(a) whether the court will allow oral argument or will submit the case without argument;

(b) the date of argument or submission without argument;

(c) if argument is allowed, the time allotted for argument; and

(d) the names of the members of the panel to which the case will be argued or submitted, subject to change by the court.

A party's failure to receive the notice does not prevent a case's argument or submission on the scheduled date.

Notes and Comments

Comment to 1997 change: This is former Rule 75. Technical and nonsubstantive changes are made.

Comment to 2008 change: Subdivision 39.1 is amended to provide for oral argument unless the court determines it is unnecessary and to set out the reasons why argument may be unnecessary. The appellate court must evaluate these reasons in view of the traditional importance of oral argument. The court need not agree on, and generally should not announce, a specific reason or reasons for declining oral argument.

Rule 40. Order of Decision

40.1. Civil Cases

The court of appeals may determine the order in which civil cases will be decided. But the following types of cases have precedence over all others:

(a) a case given precedence by law;

(b) an accelerated appeal; and

(c) a case that the court determines should be given precedence in the interest of justice.

40.2. Criminal Cases

In cases not otherwise given precedence by law, the court of appeals must hear and determine a criminal appeal at the earliest possible time, having due regard for the parties' rights and for the proper administration of justice.

Reference

See Code of Criminal Procedure article 44.01(f).

Notes and Comments

Comment on 1997 change: The provisions of former Rules 76, 77 and 78 are merged. Civil cases involving the Railroad Commission, the State, and "cases submitted on oral argument for all parties" are no longer given preference unless given preference by law.

Rule 41. Panel and En Banc Decision

41.1. Decision by Panel

(a) *Constitution of Panel.* Unless a court of appeals with more than three justices votes to decide a case en banc, a case must be assigned for decision to a panel of the court consisting of three justices, although not every member of the panel must be present for argument. If the case is decided without argument, three justices must participate in the decision. A majority of the panel, which constitutes a quorum, must agree on the judgment. Except as otherwise provided in these rules, a panel's opinion constitutes the court's opinion, and the court must render a judgment in accordance with the panel opinion.

(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:

(1) designate another justice of the court to sit on the panel to consider the case;

(2) request the Chief Justice of the Supreme Court to temporarily assign an eligible justice or judge to sit on the panel to consider the case; or

(3) 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 an eligible justice or 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

(a) *Constitution of En Banc Court.* An en banc court consists of all members of the court who are not disqualified or recused and — if the case was originally argued before or decided by a panel — any members of the panel who are not members of the court but remain eligible for assignment to the court. A majority of the en banc court constitute a quorum. A majority of the en banc court must agree on a judgment.

(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 an eligible justice or judge to sit with the court of appeals to consider the case. The reconstituted court may order the case reargued.

(c) *En Banc Consideration Disfavored.* En banc consideration of a case is not favored and should not be ordered unless necessary to secure or maintain uniformity of the court's decisions or unless extraordinary circumstances require en banc consideration. A vote to determine whether a case will be heard or reheard en banc need not be taken unless a justice of the court requests a vote. If a vote is requested and a majority of the court's members vote to hear or rehear the case en banc, the en banc court will hear or rehear the case. Otherwise, a panel of the court will consider the case.

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.

Notes and Comments

Comment to 1997 change: This is former Rule 79. The rule is reorganized. Paragraphs 41.1(b) and (c) are amended to make clear that a three judge panel must hear the case. Therefore, only if a member of a panel is lost after argument do the provisions for appointment of another justice to break a deadlock come into play. Paragraph 41.2(a) is amended to define an en banc court.

Comment to 2008 change: Subdivisions 41.1 and 41.2 are amended to acknowledge the full authority of the Chief Justice of the Supreme Court to temporarily assign a justice or 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. Subdivision 41.3 is added to require, in appellate cases transferred by the Supreme Court under Section 73.001 of the Government Code 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. The transferee court is not expected to follow the transferor court's local rules or otherwise supplant its own local procedures with those of the transferor court.

Rule 42. Dismissal

42.1. Voluntary Dismissal and Settlement in Civil Cases

(a) *On Motion or by Agreement.* The appellate court may dispose of an appeal as follows:

(1) On Motion of Appellant. In accordance with a motion of appellant, the court may dismiss the appeal or affirm the appealed judgment or order unless such disposition would prevent a party from seeking relief to which it would otherwise be entitled.

(2) By Agreement. In accordance with an agreement signed by the parties or their attorneys and filed with the clerk, the court may

(A) render judgment effectuating the parties' agreement;

(B) set aside the trial court's judgment without regard to the merits and remand the case to the trial court for rendition of judgment in accordance with the agreement; or

(C) abate the appeal and permit proceedings in the trial court to effectuate the agreement.

(b) *Partial Disposition.* A severable portion of the proceeding may be disposed of under (a) if it will not prejudice the remaining parties.

(c) *Effect on Court's Opinion.* In dismissing a proceeding, the appellate court will determine whether to withdraw any opinion it has already issued. An agreement or motion for dismissal cannot be conditioned on withdrawal of the opinion.

(d) *Costs.* Absent agreement of the parties, the court will tax costs against the appellant.

42.2. Voluntary Dismissal in Criminal Cases

(a) At any time before the appellate court's decision, the appellate court may dismiss the appeal upon the appellant's motion. The appellant and his or her attorney must sign the written motion to dismiss and file it in duplicate with the appellate clerk, who must immediately send the duplicate copy to the trial court clerk.

(b) After the court of appeals hands down its opinion, it may not grant an appellant's motion to dismiss the appeal unless the other parties consent. If the other parties consent and the court of appeals grants the appellant's motion to dismiss the appeal, the appellate opinion must be withdrawn and the appeal dismissed. The appellate clerk must send notice of the dismissal to the trial court clerk.

42.3. Involuntary Dismissal in Civil Cases

Under the following circumstances, on any party's motion — or on its own initiative after giving ten days' notice to all parties — the appellate court may dismiss the appeal or affirm the appealed judgment or order. Dismissal or affirmance may occur if the appeal is subject to dismissal:

(a) for want of jurisdiction;

(b) for want of prosecution; or

(c) because the appellant has failed to comply with a requirement of these rules, a court order, or a notice from the clerk requiring a response or other action within a specified time.

42.4. Involuntary Dismissal in Criminal Cases

The appellate court must dismiss an appeal on the State's motion, supported by affidavit, showing that the appellant has escaped from custody pending the appeal and that to the affiant's knowledge, the appellant has not, within ten days after escaping, voluntarily returned to lawful custody within the state.

(a) *Timely Return to Custody; Reinstatement.* The appeal may not be dismissed — or, if dismissed, must be reinstated — if an affidavit of an officer or other credible person is filed showing that the appellant, within ten days after escaping, voluntarily returned to lawful custody within the state.

(b) *Life Sentence.* The appellate court may overrule the motion to dismiss — or, if the motion was granted, may reinstate the appeal — if:

(1) the appellant received a life sentence; and

(2) the appellant is recaptured or voluntarily surrenders within 30 days after escaping.

Notes and Comments

Comment to 1997 change: Former Rules 59 and 60 are merged. Paragraph 42.1(c), allowing a court of appeals to withdraw its opinion, is new. Provision is made in paragraph 42.3(c) for dismissal of an appeal for failure to comply with a notice from the clerk. Other changes are made.

Comment to 2002 change: Rule 42.1 is amended to clarify the procedures for implementing settlements on appeal and to expressly give courts flexibility in effectuating settlements. The rule is also clarified to expressly permit the dismissal of an appeal without dismissal of the action itself. The rule does not permit an appellate court to order a new trial merely on the agreement of the parties absent reversible error, or to vacate a trial court's judgment absent reversible error or a settlement.

Rule 43. Judgment of the Court of Appeals

43.1. Time

The court of appeals should render its judgment promptly after submission of a case.

43.2. Types of Judgment

The court of appeals may:

(a) affirm the trial court's judgment in whole or in part;

(b) modify the trial court's judgment and affirm it as modified;

(c) reverse the trial court's judgment in whole or in part and render the judgment that the trial court should have rendered;

(d) reverse the trial court's judgment and remand the case for further proceedings;

(e) vacate the trial court's judgment and dismiss the case; or

(f) dismiss the appeal.

43.3. Rendition Appropriate Unless Remand Necessary

When reversing a trial court's judgment, the court must render the judgment that the trial court should have rendered, except when:

(a) a remand is necessary for further proceedings; or

(b) the interests of justice require a remand for another trial.

43.4. Judgment for Costs in Civil Cases

In a civil case, the court of appeals' judgment should award to the prevailing party the appellate costs — including preparation costs for the clerk's record and the reporter's record — that were incurred by that party. But the court of appeals may tax costs otherwise as required by law or for good cause.

43.5. Judgment Against Sureties in Civil Cases

When a court of appeals affirms the trial court judgment, or modifies that judgment and renders judgment against the appellant, the court of appeals must render judgment against the sureties on the appellant's supersedeas bond, if any, for the performance of the judgment and for any costs taxed against the appellant.

43.6. Other Orders

The court of appeals may make any other appropriate order that the law and the nature of the case require.

Notes and Comments

Comment to 1997 changes: Former Rules 80(a) - (c) and 82 are merged. Paragraph 43.2(e) allows the court of appeals to vacate the trial court's judgment and dismiss the case; paragraph 43.2(f) allows the court of appeals to dismiss the appeal. Both provisions are new but codify current practice. Paragraph 43.3(a) is moved here from former Rule 81(c). Paragraph 43.3(b), allowing a remand in the interest of justice, is new. Subdivisions 43.4 and 43.5 are from former Rule 82.

Rule 44. Reversible Error

44.1. Reversible Error in Civil Cases

(a) *Standard for Reversible Error.* No judgment may be reversed on appeal on the ground that the trial court made an error of law unless the court of appeals concludes that the error complained of:

(1) probably caused the rendition of an improper judgment; or

(2) probably prevented the appellant from properly presenting the case to the court of appeals.

(b) *Error Affecting Only Part of Case.* If the error affects part of, but not all, the matter in controversy and that part is separable without unfairness to the parties, the judgment must be reversed and a new trial ordered only as to the part affected by the error. The court may not order a separate trial solely on unliquidated damages if liability is contested.

44.2. Reversible Error in Criminal Cases

(a) *Constitutional Error.* If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment.

(b) *Other Errors.* Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(c) *Presumptions.* Unless the following matters were disputed in the trial court, or unless the record affirmatively shows the contrary, the court of appeals must presume:

(1) that venue was proved in the trial court;

(2) that the jury was properly impaneled and sworn;

(3) that the defendant was arraigned;

(4) that the defendant pleaded to the indictment or other charging instrument; and

(5) that the court's charge was certified by the trial court and filed by the clerk before it was read to the jury.

44.3. Defects in Procedure

A court of appeals must not affirm or reverse a judgment or dismiss an appeal for formal defects or irregularities in appellate procedure without allowing a reasonable time to correct or amend the defects or irregularities.

44.4. Remediable Error of the Trial Court

(a) *Generally.* A court of appeals must not affirm or reverse a judgment or dismiss an appeal if:

(1) the trial court's erroneous action or failure or refusal to act prevents the proper presentation of a case to the court of appeals; and

(2) the trial court can correct its action or failure to act.

(b) *Court of Appeals Direction if Error Remediable.* If the circumstances described in (a) exist, the court of appeals must direct the trial court to correct the error. The court of appeals will then proceed as if the erroneous action or failure to act had not occurred.

Notes and Comments

Comment to 1997 change: Former Rules 80(d), 81 and 83 are merged. The reversible error standard in subdivision 44.1 is amended to omit the reference to an action "reasonably calculated to cause" an improper judgment, but no substantive change is intended. Paragraph 44.2(a) is amended to limit its standard of review to constitutional errors that are subject to harmless error review. Paragraph 44.2(b) is new and is taken from Federal Rule of Criminal Procedure 52(a) without substantive change. Paragraph 44.2(c) is former Rule 80(d) without substantive change. Subdivision 44.3 is amended to delete the reference to defects of "substance" and to delete the provisions regarding the late filing of the record.

Rule 45. Damages for Frivolous Appeals in Civil Cases

If the court of appeals determines that an appeal is frivolous, it may — on motion of any party or on its own initiative, after notice and a reasonable opportunity for response — award each prevailing party just damages. In determining whether to award damages, the court must not consider any matter that does not appear in the record, briefs, or other papers filed in the court of appeals.

Notes and Comments

Comment to 1997 change: This is former Rule 84. The limit on the amount of the sanction that may be imposed is repealed. A requirement of notice and opportunity to respond is added.

Rule 46. Remittitur in Civil Cases

46.1. Remittitur After Appeal Perfected

If the trial court suggests a remittitur but the case is appealed before the remittitur is filed, the party who would make the remittitur may do so in the court of appeals in the same manner as in the trial court. The court of appeals must then render the judgment that the trial court should have rendered if the remittitur had been made in the trial court.

46.2. Appeal on Remittitur

If a party makes the remittitur at the trial judge's suggestion and the party benefitting from the remittitur appeals, the remitting party is not barred from contending in the court of appeals that all or part of the remittitur should not have been required, but the remitting party must perfect an appeal to raise that point. If the court of appeals sustains the remitting party's contention that remittitur should not have been required, the court must render the judgment that the trial court should have rendered.

46.3. Suggestion of Remittitur by Court of Appeals

The court of appeals may suggest a remittitur. If the remittitur is timely filed, the court must reform and affirm the trial court's judgment in accordance with the remittitur. If the remittitur is not timely filed, the court must reverse the trial court's judgment.

46.4. Refusal to Remit Must Not Be Mentioned in Later Trial

If the court of appeals suggests a remittitur but no remittitur is filed, evidence of the court's determination regarding remittitur is inadmissible in a later trial of the case.

46.5. Voluntary Remittitur

If a court of appeals reverses the trial court's judgment because of a legal error that affects only part of the damages awarded by the judgment, the affected party may - within 15 days after the court of appeals' judgment - voluntarily remit the amount that the affected party believes will cure the reversible error. A party may include in a motion for rehearing - without waiving any complaint that the court of appeals erred - a conditional request that the court accept the remittitur and affirm the trial court's judgment as reduced. If the court of appeals determines that the voluntary remittitur is not sufficient to cure the reversible error, but that remittitur is appropriate, the court must suggest a remittitur in accordance with Rule 46.3. If the remittitur is timely filed and the court of appeals determines that the voluntary remittitur cures the reversible error, the court must accept the remittitur and reform and affirm the trial court judgment in accordance with the remittitur.

Notes and Comments

Comment to 1997 change: This is former Rule 85. The rule is revised without substantive change.

Comment to 2002 change: Subdivision 46.5 is amended to clarify the procedure for offering a voluntary remittitur. The offer may be made in a motion for rehearing without waiving any complaint that the court of appeals erred, thereby extending the deadlines for further appeal.

Rule 47. Opinions, Publication, and Citation

47.1. Written Opinions

The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal.

47.2. Designation and Signing of Opinions; Participating Justices

(a) *Civil and Criminal Cases.* Each opinion of the court must be designated either an "Opinion" or a "Memorandum Opinion." 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 request 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."

47.3. Distribution of Opinions

All opinions of the courts of appeals are open to the public and must be made available to public reporting services, print or electronic.

47.4. Memorandum Opinions

If the issues are settled, the court should write a brief memorandum opinion no longer than necessary to advise the parties of the court's decision and the basic reasons for it. An opinion may not be designated a memorandum opinion if the author of a concurrence or dissent opposes that designation. An opinion must be designated a memorandum opinion unless it does any of the following:

(a) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases;

(b) involves issues of constitutional law or other legal issues important to the jurisprudence of Texas;

(c) criticizes existing law; or

(d) resolves an apparent conflict of authority.

47.5. Concurring and Dissenting Opinions

Only a justice who participated in the decision of a case may file or join in an opinion concurring in or dissenting from the judgment of the court of appeals. Any justice on the court may file an opinion in connection with a denial of a hearing or rehearing en banc.

47.6. Change in Designation by En Banc Court

A court en banc may change a panel's designation of an opinion.

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 courts 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.

Notes and Comments

Comment to 1997 change: This is former Rule 90. Subdivision 47.1 makes clear that a memorandum opinion should not be any longer than necessary. Subdivision 47.5 is amended to make clear that only justices who participated in the decision may file an opinion in the case. Judges who are not on a panel may file an opinion only in respect to a hearing or rehearing en banc. Former Rule 90(h), regarding publication of opinions after the Supreme Court grants review, is repealed.

Comment to 2002 change: The rule is substantively changed to discontinue the use of the "do not publish" designation in civil cases, to require that all opinions of the court of appeals be made available to public reporting services, and to remove prospectively any prohibition against the citation of opinions as authority in civil cases. The rule favors the use of "memorandum opinions" designated as such except in certain types of cases but does not change other requirements, such as those in *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635-636 (Tex. 1986). An opinion previously designated "do not publish" has no precedential value but may be cited. The citation must include the notation, "(not designated for publication)." Of course, whenever an opinion not readily available is cited, copies should be furnished to the court and opposing counsel.

Comment to 2008 change: Effective January 1, 2003, Rule 47 was amended to prospectively discontinue designating opinions in civil cases as either "published" or "unpublished." Subdivision 47.7 is revised to 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. All opinions and memorandum opinions in civil cases issued after the 2003 amendment have precedential value. The provisions governing citation of unpublished opinions in criminal cases are substantively unchanged. Subdivisions 47.2 and 47.7 are amended to clarify that memorandum opinions are subject to those rules.

Rule 48. Copy of Opinion and Judgment to Interested Parties and Other Courts

48.1. ~~Mailing~~ Sending Opinion and Judgment in All Cases

On the date when an appellate court's opinion is handed down, the appellate clerk must ~~mail or deliver~~ send copies of the opinion and judgment to the following persons:

(a) the trial judge;

(b) the trial court clerk;

(c) the regional administrative judge; and

(d) all parties to the appeal.

48.2. Additional Recipients in Criminal Cases

In criminal cases, copies of the opinion and judgment will also be mailed or delivered to the State Prosecuting Attorney.

48.3. Filing Opinion and Judgment

The trial court clerk must file a copy of the opinion and judgment among the papers of the case in that court.

48.4. Opinion Sent to Criminal Defendant

In criminal cases, the attorney representing the defendant on appeal shall, within five days after the opinion is handed down, send his client a copy of the opinion and judgment, along with notification of the defendant's right to file a pro se petition for discretionary review under Rule 68. This notification shall be sent certified mail, return receipt requested, to the defendant at his last known address. The attorney shall also send the court of appeals a letter certifying his compliance with this rule and attaching a copy of the return receipt within the time for filing a motion for rehearing. The court of appeals shall file this letter in its record of the appeal.

Notes and Comments

Comment to 1997 change: This is former Rule 91 with changes.

Rule 49. Motion and Further Motion for Rehearing

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.

49.2. Response

No response to a motion for rehearing need be filed unless the court so requests. A motion will not be granted unless a response has been filed or requested by the court.

49.3. Decision on Motion

A motion for rehearing may be granted by a majority of the justices who participated in the decision of the case. Otherwise, it must be denied. If rehearing is granted, the court or panel may dispose of the case with or without rebriefing and oral argument.

49.4. Accelerated Appeals

In an accelerated appeal, the appellate court may deny the right to file a motion for rehearing or shorten the time to file such a motion.

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 a different opinion.

49.6. Amendments

A motion for rehearing or 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. The motion must be filed within 15 days after the court of appeals' judgment or order, or when permitted, within 15 days after the court of appeals' denial of the party's last timely filed motion for rehearing or en banc reconsideration. While the court has plenary power, 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.

49.8. Extensions of Time

A court of appeals may extend the time for filing a motion for rehearing or 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. Not Required for Review

A motion for rehearing is not a prerequisite to filing a petition for review in the Supreme Court or a petition for discretionary review in the Court of Criminal Appeals nor is it required to preserve error.

49.10. Length of Motion and Response

A motion or response must be no longer than 15 pages.

49.11. Relationship to Petition for Review

A party may not file a motion for rehearing or en banc reconsideration 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 en banc reconsideration or preclude the court of appeals from ruling on the motion. If a motion for rehearing or en banc reconsideration 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.

49.12. Certificate of Conference Not Required

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

Notes and Comments

Comment to 1997 change: This is former Rule 100. Subdivision 49.4 is moved here from former Rule 43(h). Subdivisions 49.9 and 49.10 are added.

Comment to 2008 change: Rule 49 is revised to treat a motion for en banc reconsideration as a motion for rehearing and to include procedures governing the filing of a motion for en banc reconsideration. Subdivision 49.5(c) is amended to clarify that a further motion for rehearing may be filed if the court issues a different opinion, irrespective of whether the opinion is issued in connection with the overruling of a prior motion for rehearing. Issuance of a new opinion that is not substantially different should not occasion a further motion for rehearing, but a motion's lack of merit does not affect appellate deadlines. The provisions of former Rule 53.7(b) that address motions for rehearing are moved to new subdivision 49.11 without change, leaving the provisions of Rule 53.7(b) that address petitions for review undisturbed. Subdivision 49.12 mirrors Rule 10.1(a)(5) in excepting 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 days after a petition for discretionary review is filed with the clerk of the court of appeals that delivered the decision, the justices who participated in the decision may, as provided by subsection (a), 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 opinion or judgment is withdrawn and the modified or corrected opinion or judgment is 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.

Notes and Comments

Comment to 1997 change: This is former Rule 101. The rule is amended to allow 30 days for the court of appeals to review the petition for discretionary review and to require the withdrawal of the prior opinion and judgment if the court of appeals renders a new judgment or hands down a new opinion.

Rule 51. Enforcement of Judgments after Mandate

51.1. Civil Cases

(a) *Statement of Costs.* The appellate clerk must prepare, and send to the trial court clerk with the mandate, a statement of costs showing:

(1) the preparation costs for the appellate record, and any court of appeals filing fees, with a notation of those items that have been paid and those that are owing; and

(2) the party or parties against whom costs have been adjudged.

(b) *Enforcement of Judgment.* When the trial court clerk receives the mandate, the appellate court's judgment must be enforced. Appellate court costs must be included with the trial court costs in any process to enforce the judgment. If all or part of the costs are collected, the trial court clerk must immediately remit to the appellate court clerk any amount due to that clerk. The trial court need not make any further order in the case, and the appellate court's judgment may be enforced as in other cases, when the appellate judgment:

(1) affirms the trial court's judgment;

(2) modifies the trial court's judgment and, as so modified, affirms that judgment; or

(3) renders the judgment the trial court should have rendered.

51.2. Criminal Cases

When the trial court clerk receives the mandate, the appellate court's judgment must be enforced as follows:

(a) *Clerk's Duties.* The trial court clerk must:

(1) send an acknowledgment to the appellate clerk of the mandate's receipt; and

(2) immediately file the mandate.

(b) *Judgment of Affirmance; Defendant Not in Custody.*

(1) Capias to Be Issued. If the judgment contains a sentence of confinement or imprisonment that has not been suspended, the trial court must promptly issue a capias for the defendant's arrest so that the court's sentence can be executed.

(2) Contents of Capias. The capias may issue to any county of this state and must be executed and returned as in felony cases, except that no bail may be taken. The capias must:

(A) recite the fact of conviction;

(B) set forth the offense and the court's judgment and sentence;

(C) state that the judgment was appealed from and affirmed, and that the mandate has been filed; and

(D) command the sheriff to arrest and take the defendant into his custody, and to place and keep the defendant in custody until delivered to the proper authorities as directed by the sentence.

(3) Sheriff's Duties. The sheriff must promptly execute the capias as directed. The sheriff must notify the trial court clerk and the appellate clerk when the mandate has been carried out and executed.

(c) *Judgment of Reversal.*

(1) When New Trial Ordered. When the appellate court reverses the trial court's judgment and grants the defendant a new trial, the procedure is governed by Code of Criminal Procedure article 44.29. If the defendant is in custody and entitled to bail, the defendant must be released upon giving bail.

(2) When Case Dismissed. When the appellate court reverses the trial court's judgment and orders the case to be dismissed, the defendant — if in custody — must be discharged.

(d) *Judgment of Acquittal.* When the appellate court reverses a judgment and orders the defendant's acquittal, the defendant — if in custody — must be discharged, and no further order or judgment of the trial court is necessary.

Notes and Comments

Comment to 1997 change: Former Rules 87 and 88 are merged. The reference to costs in tax suits is deleted.

SECTION THREE: ORIGINAL PROCEEDINGS IN THE SUPREME COURT AND THE COURTS OF APPEALS

Rule 52. Original Proceedings

52.1. Commencement

An original appellate proceeding seeking extraordinary relief — such as a writ of habeas corpus, mandamus, prohibition, injunction, or quo warranto — is commenced by filing a petition with the clerk of the appropriate appellate court. The petition must be captioned "*In re* [name of relator]."

52.2. Designation of Parties

The party seeking the relief is the relator. In original proceedings other than habeas corpus, the person against whom relief is sought — whether a judge, court, tribunal, officer, or other person — is the respondent. A person whose interest

would be directly affected by the relief sought is a real party in interest and a party to the case.

52.3. Form and Contents of Petition

The petition must, under appropriate headings and in the order here indicated, contain the following:

(a) *Identity of Parties and Counsel.* The petition must give a complete list of all parties, and the names and addresses of all counsel.

(b) *Table of Contents.* The petition must include a table of contents with references to the pages of the petition. The table of contents must indicate the subject matter of each issue or point, or group of issues or points.

(c) *Index of Authorities.* The petition must include an index of authorities arranged alphabetically and indicating the pages of the petition where the authorities are cited.

(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:

(1) a concise description of the nature of any underlying proceeding (e.g., a suit for damages, a contempt proceeding for failure to pay child support, or the certification of a candidate for inclusion on an election ballot);

(2) if the respondent is a judge, the name of the judge, the designation of the court in which the judge was sitting, and the county in which the court is located; and if the respondent is an official other than a judge, the designation and location of the office held by the respondent;

(3) a concise description of the respondent's action from which the relator seeks relief;

(4) if the relator seeks a writ of habeas corpus, a statement describing how and where the relator is being deprived of liberty;

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

(A) the date the petition was filed in the court of appeals;

(B) the district of the court of appeals and the names of the justices who participated in the decision;

(C) the author of any opinion for the court of appeals and the author of any separate opinion;

(D) the citation of the court's opinion;

(E) the disposition of the case by the court of appeals, and the date of the court of appeals' order.

(e) *Statement of Jurisdiction.* The petition must state, without argument, the basis of the court's jurisdiction. If the Supreme Court and the court of appeals have concurrent jurisdiction, the petition must be presented first to the court of appeals unless there is a compelling reason not to do so. If the petition is filed in the Supreme Court without first being presented to the court of appeals, the petition must state the compelling reason why the petition was not first presented to the court of appeals.

(f) *Issues Presented.* The petition must state concisely all issues or points presented for relief. The statement of an issue or point will be treated as covering every subsidiary question that is fairly included.

(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 appendix or record.

(h) *Argument.* The petition must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the appendix or record.

(I) *Prayer.* The petition must contain a short conclusion that clearly states the nature of the relief sought.

(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.

(k) *Appendix.*

(1) Necessary Contents. The appendix must contain:

(A) a certified or sworn copy of any order complained of, or any other document showing the matter complained of;

(B) any order or opinion of the court of appeals, if the petition is filed in the Supreme Court;

(C) unless voluminous or impracticable, the text of any rule, regulation, ordinance, statute, constitutional provision, or other law (excluding case law) on which the argument is based; and

(D) if a writ of habeas corpus is sought, proof that the relator is being restrained.

(2) Optional Contents. The appendix may contain any other item pertinent to the issues or points presented for review, including copies or excerpts of relevant court opinions, statutes, constitutional provisions, documents on which the suit was based, pleadings, and similar material. Items should not be included in the appendix to attempt to avoid the page limits for the petition. The appendix should not contain any evidence or other item that is not necessary for a decision.

52.4. Response

Any party may file a response to the petition, but it is not mandatory. The court must not grant relief — other than temporary relief — before a response has been filed or requested by the court. The response must conform to the requirements of 52.3, except that:

(a) the list of parties and counsel is not required unless necessary to supplement or correct the list contained in the petition;

(b) the response need not include a statement of the case, a statement of the issues presented, or a statement of the facts unless the responding party is dissatisfied with that portion of the petition;

(c) a statement of jurisdiction should be omitted unless the petition fails to assert valid grounds for jurisdiction, in which case the reasons why the court lacks jurisdiction must be concisely stated;

(d) the argument must be confined to the issues or points presented in the petition; and

(e) the appendix to the response need not contain any item already contained in an appendix filed by the relator.

52.5. Relator's Reply to Response

The relator may file a reply addressing any matter in the response. However, the court may consider and decide the case before a reply brief is filed.

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.

52.7. Record

(a) *Filing by Relator Required.* Relator must file with the petition:

(1) a certified or sworn copy of every document that is material to the relator's claim for relief and that was filed in any underlying proceeding; and

(2) a properly authenticated transcript of any relevant testimony from any underlying proceeding, including any exhibits offered in evidence, or a statement that no testimony was adduced in connection with the matter complained.

(b) *Supplementation Permitted.* After the record is filed, relator or any other party to the proceeding may file additional materials for inclusion in the record.

(c) *Service of Record on All Parties.* Relator and any party who files materials for inclusion in the record must - at the same time - serve on each party:

(1) those materials not previously served on that party as part of the record in another original appellate proceeding in the same or another court; and

(2) an index listing the materials filed and describing them in sufficient detail to identify them.

52.8. Action on Petition

(a) *Relief Denied.* If the court determines from the petition and any response and reply that the relator is not entitled to the relief sought, the court must deny the petition. If the relator in a habeas corpus proceeding has been released on bond, the court must remand the relator to custody and issue an order of commitment. If the relator is not returned to custody, the court may declare the bond to be forfeited and render judgment against the surety.

(b) *Interim Action.* If the court is of the tentative opinion that relator is entitled to the relief sought or that a

serious question concerning the relief requires further consideration:

(1) the court must request a response if one has not been filed;

(2) the Supreme Court may request full briefing under Rule 55;

(3) in a habeas corpus proceeding, the court may order that relator be discharged on execution and filing of a bond in an amount set by the court; and

(4) the court may set the case for oral argument.

(c) *Relief Granted.* If the court determines that relator is entitled to relief, it must make an appropriate order. The court may grant relief without hearing oral argument.

(d) *Opinion.* When denying relief, the court may hand down an opinion but is not required to do so. When granting relief, the court must hand down an opinion as in any other case. Rule 47 is applicable to an order or opinion by a court of appeals except that the court of appeals may not order an unpublished opinion published after the Supreme Court or Court of Criminal Appeals has acted on any party's petition for extraordinary relief addressing the same issues.

52.9. Motion for Rehearing

Any party may file a motion for rehearing within 15 days after the final order is rendered. The motion must clearly state the points relied on for the rehearing. No response to a motion for rehearing need be filed unless the court so requests. The court will not grant a motion for rehearing unless a response has been filed or requested. A motion or response must be no longer than 15 pages.

52.10. Temporary Relief

(a) *Motion for Temporary Relief; Certificate of Compliance.* The relator may file a motion to stay any underlying proceedings or for any other temporary relief pending the court's action on the petition. The relator must notify or make a diligent effort to notify all parties by expedited means (such as by telephone, ~~or~~ fax, or e-mail) that a motion for temporary relief has been or will be filed and must certify to the court that the relator has complied with this paragraph before temporary relief will be granted.

(b) *Grant of Temporary Relief.* The court — on motion of any party or on its own initiative — may without notice grant any just relief pending the court's action on the petition. As a condition of granting temporary relief, the court may require a bond to protect the parties who will be affected by the relief. Unless vacated or modified, an order granting temporary relief is effective until the case is finally decided.

(c) *Motion to Reconsider.* Any party may move the court at any time to reconsider a grant of temporary relief.

52.11. Groundless Petition or Misleading Statement or Record

On motion of any party or on its own initiative, the court may — after notice and a reasonable opportunity to respond — impose just sanctions on a party or attorney who is not acting in good faith as indicated by any of the following:

(a) filing a petition that is clearly groundless;

(b) bringing the petition solely for delay of an underlying proceeding;

(c) grossly misstating or omitting an obviously important and material fact in the petition or response; or

(d) filing an appendix or record that is clearly misleading because of the omission of obviously important and material evidence or documents.

Notes and Comments

Comment to 1997 change: Former Rules 120, 121, and 122 are merged into this rule. The requirement of a motion for leave in original proceedings is repealed. The form of the petition and response, contents of the appendix and record, page limits, and relief that may be granted are specifically stated. Specific provision is now made for a motion for rehearing. A provision for sanctions is added.

Comment to 2002 change: Subdivision 52.7(c) is added to specify how record materials in original proceedings are to be served. Ordinarily, a party must serve record materials and an index of those materials on all other parties. But when materials have already been served in related original proceedings, they need not be served again. Examples are when original proceedings raising the same issues are brought in both the court of appeals and the Supreme Court, or when separate original proceedings are filed arising out of the same underlying lawsuit. The purpose of this procedure is to ensure that all parties have record materials readily available without requiring unnecessary duplication.

Comment to 2008 change: The reference to "unpublished" opinions in Subdivision 52.3(d)(5)(D) is deleted. The filer should provide the best cite available for the court of appeals' opinion, which may be a LEXIS, Westlaw, or other citation to an electronic medium. Subdivision 52.3 is further amended to delete the requirement that all factual statements be verified by

affidavit. Instead, the filer — in the usual case of a party with legal representation, the lead counsel — must include a statement certifying that all factual statements are supported by competent evidence in the appendix or record to which the petition has cited. The certification required by subdivision 52.3(j) does not count against the page limitations.

SECTION FOUR: PROCEEDINGS IN THE SUPREME COURT

Rule 53. Petition for Review

53.1. Method of Review

The Supreme Court may review a court of appeals' final judgment on a petition for review addressed to "The Supreme Court of Texas." A party who seeks to alter the court of appeals' judgment must file a petition for review. The petition for review procedure replaces the writ of error procedure. Statutes pertaining to the writ of error in the Supreme Court apply equally to the petition for review.

53.2. Contents of Petition

The petition for review must, under appropriate headings and in the order here indicated, contain the following items:

(a) *Identity of Parties and Counsel.* The petition must give a complete list of all parties to the trial court's final judgment, and the names and addresses of all trial and appellate counsel.

(b) *Table of Contents.* The petition must have a table of contents with references to the pages of the petition. The table of contents must indicate the subject matter of each issue or point, or group of issues or points.

(c) *Index of Authorities.* The petition must have an index of authorities arranged alphabetically and indicating the pages of the petition where the authorities are cited.

(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:

(1) a concise description of the nature of the case (e.g., whether it is a suit for damages, on a note, or in trespass to try title);

(2) the name of the judge who signed the order or judgment appealed from;

(3) the designation of the trial court and the county in which it is located;

(4) the disposition of the case by the trial court;

(5) the parties in the court of appeals;

(6) the district of the court of appeals;

(7) the names of the justices who participated in the decision in the court of appeals, the author of the opinion for the court, and the author of any separate opinion;

(8) the citation for the court of appeals' opinion; and

(9) the disposition of the case by the court of appeals, including the disposition of any motions for rehearing or en banc reconsideration, and whether any motions for rehearing or en banc reconsideration are pending in the court of appeals at the time the petition for review is filed.

(e) *Statement of Jurisdiction.* The petition must state, without argument, the basis of the Court's jurisdiction.

(f) *Issues Presented.* The petition must state concisely all issues or points presented for review. The statement of an issue or point will be treated as covering every subsidiary question that is fairly included. If the matter complained of originated in the trial court, it should have been preserved for appellate review in the trial court and assigned as error in the court of appeals.

(g) *Statement of Facts.* The petition must affirm that the court of appeals correctly stated the nature of the case, except in any particulars pointed out. The petition must state concisely and without argument the facts and procedural background pertinent to the issues or points presented. The statement must be supported by record references.

(h) *Summary of the Argument.* The petition must contain a succinct, clear, and accurate statement of the arguments made in the body of the petition. This summary must not merely repeat the issues or points presented for review.

(I) *Argument.* The petition must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record. The argument need not address every issue or point included in the statement of issues or points. Any issue or point not addressed may be addressed in the brief on the merits if one is requested by the Court. The argument should state the reasons why the Supreme Court should exercise jurisdiction to hear the case with specific reference to the factors listed in Rule 56.1(a). The petition need not quote at

length from a matter included in the appendix; a reference to the appendix is sufficient. The Court will consider the court of appeals' opinion along with the petition, so statements in that opinion need not be repeated.

(j) *Prayer.* The petition must contain a short conclusion that clearly states the nature of the relief sought.

(k) *Appendix.*

(1) Necessary Contents. Unless voluminous or impracticable, the appendix must contain a copy of:

(A) the judgment or other appealable order of the trial court from which relief in the court of appeals was sought;

(B) the jury charge and verdict, if any, or the trial court's findings of fact and conclusions of law, if any;

(C) the opinion and judgment of the court of appeals; and

(D) the text of any rule, regulation, ordinance, statute, constitutional provision, or other law on which the argument is based (excluding case law), and the text of any contract or other document that is central to the argument.

(2) Optional Contents. The appendix may contain any other item pertinent to the issues or points presented for review, including copies or excerpts of relevant court opinions, statutes, constitutional provisions, documents on which the suit was based, pleadings, and similar material. Items should not be included in the appendix to attempt to avoid the page limits for the petition.

53.3. Response to Petition for Review

Any other party to the appeal may file a response to the petition for review, but it is not mandatory. If no response is timely filed, or if a party files a waiver of response, the Court will consider the petition without a response. A petition will not be granted before a response has been filed or requested by the Court. The response must conform to the requirements of 53.2, except that:

(a) the list of parties and counsel is not required unless necessary to supplement or correct the list contained in the petition;

(b) a statement of the case and a statement of the facts need not be made unless the respondent is dissatisfied with that portion of the petition;

(c) a statement of the issues presented need not be made unless:

(1) the respondent is dissatisfied with the statement made in the petition;

(2) the respondent is asserting independent grounds for affirmance of the court of appeals' judgment; or

(3) the respondent is asserting grounds that establish the respondent's right to a judgment that is less favorable to the respondent than the judgment rendered by the court of appeals but more favorable to the respondent than the judgment that might be awarded to the petitioner (e.g., a remand for a new trial rather than a rendition of judgment in favor of the petitioner);

(d) a statement of jurisdiction should be omitted unless the petition fails to assert valid grounds for jurisdiction, in which case the reasons why the Supreme Court lacks jurisdiction must be concisely stated;

(e) the respondent's argument must be confined to the issues or points presented in the petition or asserted by the respondent in the respondent's statement of issues; and

(f) the appendix to the response need not contain any item already contained in an appendix filed by the petitioner.

53.4. Points Not Considered in Court of Appeals

To obtain a remand to the court of appeals for consideration of issues or points briefed in that court but not decided by that court, or to request that the Supreme Court consider such issues or points, a party may raise those issues or points in the petition, the response, the reply, any brief, or a motion for rehearing.

53.5. Petitioner's Reply to Response

The petitioner may file a reply addressing any matter in the response. However, the Court may consider and decide the case before a reply brief is filed.

53.6. Length of Petition, Response, and Reply

The petition and any response must be no longer than 15 pages each, exclusive of 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, and the appendix. A reply may be no longer than 8 pages, exclusive of the items stated above. The Court may, on motion, permit a longer petition, response, or reply.

53.7. Time and Place of Filing

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

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

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

(b) *Premature Filing.* A petition filed before the last ruling on all timely filed motions for rehearing and 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 en banc reconsideration is pending in the court of appeals, the party must include that information in its petition for review.

(c) *Petitions Filed by Other Parties.* If a party files a petition for review within the time specified in 53.7(a) — or within the time specified by the Supreme Court in an order granting an extension of time to file a petition — any other party required to file a petition may do so within 45 days after the last timely motion for rehearing is overruled or within 30 days after any preceding petition is filed, whichever date is later.

(d) *Response.* Any response must be filed with the Supreme Court clerk within 30 days after the petition is filed.

(e) *Reply.* Any reply must be filed with the Supreme Court clerk within 15 days after the response is filed.

(f) *Extension of Time.* The Supreme Court may extend the time to file a petition for review if a party files a motion complying with Rule 10.5(b) no later than 15 days after the last day for filing the petition. The Supreme Court may extend the time to file a response or reply if a party files a motion complying with Rule 10.5(b) either before or after the response or reply is due.

(g) *Petition Filed in Court of Appeals.* If a petition is mistakenly filed in the court of appeals, the petition is deemed to have been filed the same day with the Supreme Court clerk, and the court of appeals clerk must immediately send the petition to the Supreme Court clerk.

53.8. Amendment

On motion showing good cause, the Court may allow the petition, response, or reply to be amended on such reasonable terms as the Court may prescribe.

53.9. Court May Require Revision

If a petition, response, or reply does not conform with these rules, the Supreme Court may require the document to be revised or may return the document to the party who filed it and consider the case without allowing the document to be revised.

Notes and Comments

Comment to 1997 change: Former Rules 130 and 131 are merged. The 50-page application for writ of error is replaced by a 15-page petition for review, which is filed in the Supreme Court and should concentrate on the reasons the Court should exercise jurisdiction to hear the case. The contents of the petition and response, the length of the documents, the time for filing are all specifically stated.

Comment to 2008 change: Subdivision 53.7(a) is amended to clarify that the Supreme Court may shorten the time for filing a petition for review and that 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. Subdivision 53.2(d)(8) is amended to delete the reference to unpublished opinions in civil cases. Subdivision 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. Subdivision 53.7(b) is revised to reference this new requirement and to relocate to new Rule 49.11 those provisions governing motions for rehearing.

Rule 54. Filing the Record

54.1. Request for Record

With or without granting the petition for review, the Supreme Court may request that the record from the court of appeals be filed with the clerk of the Supreme Court.

54.2. Duty of Court of Appeals Clerk

(a) *Request for Record.* The court of appeals clerk must not send the record to the Supreme Court unless it is requested. Upon receiving the Supreme Court clerk's request for the record, the court of appeals clerk must promptly send to the Supreme Court clerk all of the following:

(1) the original record;

(2) any motion filed in the court of appeals;

(3) copies of all orders of the court of appeals; and

(4) copies of all opinions and the judgment of the court of appeals.

(b) *Nondocumentary Exhibits.* The clerk should not send any nondocumentary exhibits unless the Supreme Court specifically requests.

54.3. Expenses

The petitioner must pay to the court of appeals clerk a sum sufficient to pay the cost of mailing or shipping the record to and from the Supreme Court clerk.

54.4. Duty of Supreme Court Clerk

Upon receiving the record, the Supreme Court clerk must file it and enter the filing on the docket. The clerk may refuse the record if the charges for mailing or shipping have not been paid.

Notes and Comments

Comment to 1997 change: This is former Rule 132. Subdivision 54.1 is new and provides for the Supreme Court to request the filing of the record. Other changes are made.

Rule 55. Brief on the Merits

55.1. Request by Court

A brief on the merits must not be filed unless requested by the Court. With or without granting the petition for review, the Court may request the parties to file briefs on the merits. In appropriate cases, the Court may realign parties and direct that parties file consolidated briefs.

55.2. Petitioner's Brief on the Merits

The petitioner's brief on the merits must be confined to the issues or points stated in the petition for review and must, under appropriate headings and in the order here indicated, contain the following items:

(a) *Identity of Parties and Counsel.* The brief must give a complete list of all parties to the trial court's final judgment, and the names and addresses of all trial and appellate counsel.

(b) *Table of Contents.* The brief must have a table of contents with references to the pages of the brief. The table of contents must indicate the subject matter of each issue or point, or group of issues or points.

(c) *Index of Authorities.* The brief must have an index of authorities arranged alphabetically and indicating the pages of the brief where the authorities are cited.

(d) *Statement of the Case.* The brief 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:

(1) a concise description of the nature of the case (e.g., whether it is a suit for damages, on a note, or in trespass to try title);

(2) the name of the judge who signed the order or judgment appealed from;

(3) the designation of the trial court and the county in which it is located;

(4) the disposition of the case by the trial court;

(5) the parties in the court of appeals;

(6) the district of the court of appeals;

(7) the names of the justices who participated in the decision in the court of appeals, the author of the opinion for the court, and the author of any separate opinion;

(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.

(e) *Statement of Jurisdiction.* The brief must state, without argument, the basis of the Court's jurisdiction.

(f) *Issues Presented.* The brief must state concisely all issues or points presented for review. The statement of an issue or point will be treated as covering every subsidiary question that is fairly included. The phrasing of the issues or points need not be identical to the statement of issues or points in the petition for review, but the brief may not raise additional issues or points or change the substance of the issues or points presented in the petition.

(g) *Statement of Facts.* The brief must affirm that the court of appeals correctly stated the nature of the case, except in any particulars pointed out. The brief must state concisely and without argument the facts and procedural background pertinent to the issues or points presented. The statement must be supported by record references.

(h) *Summary of the Argument.* The brief must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief. This summary must not merely repeat the issues or points presented for review.

(l) *Argument.* The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record.

(j) *Prayer.* The brief must contain a short conclusion that clearly states the nature of the relief sought.

55.3. Respondent's Brief

If the petitioner files a brief on the merits, any other party to the appeal may file a brief in response, which must conform to 55.2, except that:

(a) the list of parties and counsel is not required unless necessary to supplement or correct the list contained in the petitioner's brief;

(b) a statement of the case and a statement of the facts need not be made unless the respondent is dissatisfied with that portion of the petitioner's brief; and

(c) a statement of the issues presented need not be made unless:

(1) the respondent is dissatisfied with the statement made in the petitioner's brief;

(2) the respondent is asserting independent grounds for affirmance of the court of appeals' judgment; or

(3) the respondent is asserting grounds that establish the respondent's right to a judgment that is less favorable to the respondent than the judgment rendered by the court of appeals but more favorable to the respondent than the judgment that might be awarded to the petitioner (e.g., a remand for a new trial rather than a rendition of judgment in favor of the petitioner);

(d) a statement of jurisdiction should be omitted unless the petition fails to assert valid grounds for jurisdiction; and

(e) the respondent's argument must be confined to the issues or points presented in the petitioner's brief or asserted by the respondent in the respondent's statement of issues.

55.4. Petitioner's Brief in Reply

The petitioner may file a reply brief addressing any matter in the brief in response. However, the Court may consider and decide the case before a reply brief is filed.

55.5. Reliance on Prior Brief

As a brief on the merits or a brief in response, a party may file the brief that the party filed in the court of appeals.

55.6. Length of Briefs

A brief on the merits or brief in response must not exceed 50 pages, exclusive of 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, and the proof of service. A brief in reply may be no longer than 25 pages, exclusive of the items stated above. The Court may, on motion, permit a longer brief.

55.7. Time and Place of Filing; Extension of Time

Briefs must be filed with the Supreme Court clerk in accordance with the schedule stated in the clerk's notice that the Court has requested briefs on the merits. If no schedule is stated in the notice, petitioner must file a brief on the merits within 30 days after the date of the notice, respondent must file a brief in response within 20 days after receiving petitioner's brief, and petitioner must file any reply brief within 15 days after receiving respondent's brief. On motion complying with Rule 10.5(b) either before or after the brief is due, the Supreme Court may extend the time to file a brief.

55.8. Amendment

On motion showing good cause, the Court may allow a party to amend a brief on such reasonable terms as the Court may prescribe.

55.9. Court May Require Revision

If a brief does not conform with these rules, the Supreme Court may require the brief to be revised or may return it to the party who filed it and consider the case without further briefing by that party.

Notes and Comments

Comment to 1997 change: The rule is new and provides for a 50 page brief on the merits if requested by the Supreme Court.

Comment to 2002 change: Subdivision 55.1 is clarified to provide that the Court may realign parties to require consolidated briefing for a clearer and more efficient presentation of the case.

Rule 56. Order on Petition for Review

56.1. Orders on Petition for Review

(a) *Considerations in Granting Review.* Whether to grant review is a matter of judicial discretion. Among the factors the Supreme Court considers in deciding whether to grant a petition for review are the following:

(1) whether the justices of the court of appeals disagree on an important point of law;

(2) whether there is a conflict between the courts of appeals on an important point of law;

(3) whether a case involves the construction or validity of a statute;

(4) whether a case involves constitutional issues;

(5) whether the court of appeals appears to have committed an error of law of such importance to the state's jurisprudence that it should be corrected; and

(6) whether the court of appeals has decided an important question of state law that should be, but has not been, resolved by the Supreme Court.

(b) *Petition Denied or Dismissed.* When the petition has been on file in the Supreme Court for 30 days, the Court may deny or dismiss the petition — whether or not a response has been filed — with one of the following notations:

(1) "Denied." If the Supreme Court is not satisfied that the opinion of the court of appeals has correctly declared the law in all respects, but determines that the petition presents no error that requires reversal or that is of such importance to the jurisprudence of the state as to require correction, the Court will deny the petition with the notation "Denied."

(2) "Dismissed w.o.j." If the Supreme Court lacks jurisdiction, the Court will dismiss the petition with the notation "Dismissed for Want of Jurisdiction."

(c) *Petition Refused.* If the Supreme Court determines — after a response has been filed or requested — that the court of appeals' judgment is correct and that the legal principles announced in the opinion are likewise correct, the Court will refuse the petition with the notation "Refused." The court of appeals' opinion in the case has the same precedential value as an opinion of the Supreme Court.

(d) *Improvident Grant.* If the Court has granted review but later decides that review should not have been granted, the Court may, without opinion, set aside the order granting review and dismiss the petition or deny or refuse review as though review had never been granted.

56.2. Moot Cases

If a case is moot, the Supreme Court may, after notice to the parties, grant the petition and, without hearing argument, dismiss the case or the appealable portion of it without addressing the merits of the appeal.

56.3. Settled Cases

If a case is settled by agreement of the parties and the parties so move, the Supreme Court may grant the petition if it has not already been granted and, without hearing argument or considering the merits, render a judgment to effectuate the agreement. The Supreme Court's action may include setting aside the judgment of the court of appeals or the trial court without regard to the merits and remanding the case to the trial court for rendition of a judgment in accordance with the agreement. The Supreme Court may abate the case until the lower court's proceedings to effectuate the agreement are complete. A severable portion of the proceeding may be disposed of if it will not prejudice the remaining parties. In any event, the Supreme Court's order does not vacate the court of appeals' opinion unless the order specifically provides otherwise. An agreement or motion cannot be conditioned on vacating the court of appeals' opinion.

56.4. Notice to Parties

When the Supreme Court grants, denies, refuses, or dismisses a petition for review, the Supreme Court clerk must send a written notice of the disposition to the court of appeals, the trial court, and all parties to the appeal.

56.5. Return of Documents to Court of Appeals

When the Supreme Court denies, refuses, or dismisses a petition for review, the clerk will retain the petition, together with the record and accompanying papers, for 30 days after the order is rendered. If no motion for rehearing has been filed by the end of that period or when any motion for rehearing of the order has been overruled, the clerk must send a certified copy of its order to the court of appeals and return the record and all papers (except for documents filed in the Supreme Court) to the court of appeals clerk.

Notes and Comments

Comment to 1997 change: The rule is from former Rule 133. Subdivision 56.3 regarding settled cases is added.

Comment to 2002 change: Subdivision 56.3 is clarified to provide for partial settlements.

Rule 57. Direct Appeals to the Supreme Court

57.1. Application

This rule governs direct appeals to the Supreme Court that are authorized by the Constitution and by statute. Except when

inconsistent with a statute or this rule, the rules governing appeals to courts of appeals also apply to direct appeals to the Supreme Court.

57.2. Jurisdiction

The Supreme Court may not take jurisdiction over a direct appeal from the decision of any court other than a district court or county court, or over any question of fact. The Supreme Court may decline to exercise jurisdiction over a direct appeal of an interlocutory order if the record is not adequately developed, or if its decision would be advisory, or if the case is not of such importance to the jurisprudence of the state that a direct appeal should be allowed.

57.3. Statement of Jurisdiction

Appellant must file with the record a statement fully but plainly setting out the basis asserted for exercise of the Supreme Court's jurisdiction. Appellee may file a response to appellant's statement of jurisdiction within ten days after the statement is filed.

57.4. Preliminary Ruling on Jurisdiction

If the Supreme Court notes probable jurisdiction over a direct appeal, the parties must file briefs under Rule 38 as in any other case. If the Supreme Court does not note probable jurisdiction over a direct appeal, the appeal will be dismissed.

57.5. Direct Appeal Exclusive While Pending.

If a direct appeal to the Supreme Court is filed, the parties to the appeal must not, while that appeal is pending, pursue an appeal to the court of appeals. But if the direct appeal is dismissed, any party may pursue any other appeal available at the time when the direct appeal was filed. The other appeal must be perfected within ten days after dismissal of the direct appeal.

Notes and Comments

Comment to 1997 change: This is former Rule 140. The rule is amended without substantive change except subdivision 57.5 is amended to make clear that no party to the direct appeal may pursue the appeal in the court of appeals while the direct appeal is pending, but allowing 10 days to perfect a subsequent appeal.

Rule 58. Certification of Questions of Law by United State Courts

58.1. Certification

The Supreme Court of Texas may answer questions of law certified to it by any federal appellate court if the certifying court is presented with determinative questions of Texas law having no controlling Supreme Court precedent. The Supreme Court may decline to answer the questions certified to it.

58.2. Contents of the Certification Order

An order from the certifying court must set forth:

(a) the questions of law to be answered; and

(b) a stipulated statement of all facts relevant to the questions certified, showing fully the nature of the controversy in which the questions arose.

58.3. Transmission of Certification Order

The clerk of the certifying court must send to the clerk of the Supreme Court of Texas the following:

(a) the certification order under the certifying court's official seal;

(b) a list of the names of all parties to the pending case, giving the address and telephone number, if known, of any party not represented by counsel; and

(c) a list of the names, addresses, and telephone numbers of counsel for each party.

58.4. Transmission of Record

The certifying court should not send the Supreme Court of Texas the record in the pending case with the certification order. The Supreme Court may later require the original or copies of all or part of the record before the certifying court to be filed with the Supreme Court clerk.

58.5. Fees and Costs

Unless the certifying court orders otherwise in its certification order, the parties must bear equally the fees under Rule 5.

58.6. Notice

If the Supreme Court agrees to answer the questions certified to it, the Court will notify all parties and the certifying court. The Supreme Court clerk must also send a notice to the Attorney General of Texas if:

(a) the constitutionality of a Texas statute is the subject of a certified question that the Supreme Court has agreed to answer; and

(b) the State of Texas or an officer, agency, or employee of the state is not a party to the proceeding in the certifying court.

58.7. Briefs and Oral Argument

(a) *Briefs*. The appealing party in the certifying court must file a brief with the Supreme Court clerk within 30 days after the date of the notice. Opposing parties must file an answering brief within 20 days after receiving the opening brief. Briefs must comply with Rule 55 to the extent its provisions apply. On motion complying with Rule 10.5(b), either before or after the brief is due, the Supreme Court may extend the time to file a brief.

(b) *Oral Argument*. Oral argument may be granted either on a party's request or on the Court's own initiative. Argument is governed by Rule 59.

58.8. Intervention by the State

If the constitutionality of a Texas statute is the subject of a certified question that the Supreme Court has agreed to answer the State of Texas may intervene at any reasonable time for briefing and oral argument (if argument is allowed), on the question of constitutionality.

58.9. Opinion on Certified Questions

If the Supreme Court has agreed to answer a certified question, it will hand down an opinion as in any other case.

58.10. Answering Certified Questions

After all motions for rehearing have been overruled, the Supreme Court clerk must send to the certifying court the written opinion on the certified questions. The opinion must be under the Supreme Court's seal.

Notes and Comments

Comment to 1997 change: This is former Rule 114. The rule is substantially revised, but no substantive change in procedure is intended, except subdivision 58.10 now allows a motion for rehearing.

Rule 59. Submission and Argument

59.1. Submission Without Argument

If at least six members of the Court so vote, a petition may be granted and an opinion handed down without oral argument.

59.2. Submission With Argument

If the Supreme Court decides that oral argument would aid the Court, the Court will set the case for argument. The clerk will notify all parties of the submission date.

59.3. Purpose of Argument

Oral argument should emphasize and clarify the written arguments in the briefs. Counsel should not merely read from a prepared text. Counsel should assume that all Justices have read the briefs before oral argument and should be prepared to respond to the Justices' questions.

59.4. Time for Argument

Each side is allowed only as much time as the Court orders. Counsel is not required to use all the allotted time. On motion filed before the day of argument, the Court may extend the time for argument. The Court may also align the parties for purposes of presenting argument.

59.5. Number of Counsel

Generally, only one counsel should argue for each side. Except on leave of court, no more than two counsel on each side may argue. Only one counsel may argue in rebuttal.

59.6. Argument by Amicus Curiae

With leave of court obtained before the argument and with a party's consent, an amicus may share allotted time with that party. Otherwise, counsel for amicus curiae may not argue.

Notes and Comments

Comment to 1997 change: Former Rules 170, 171, and 172 are merged. Subdivisions 59.2 and 59.3 are new. Other changes are made.

Rule 60. Judgments in the Supreme Court

60.1. Announcement of Judgments

The Court's judgments will be announced by the clerk.

60.2. Types of Judgment

The Supreme Court may:

(a) affirm the lower court's judgment in whole or in part;

(b) modify the lower court's judgment and affirm it as modified;

(c) reverse the lower court's judgment in whole or in part and render the judgment that the lower court should have rendered;

(d) reverse the lower court's judgment and remand the case for further proceedings;

(e) vacate the judgments of the lower courts and dismiss the case; or

(f) vacate the lower court's judgment and remand the case for further proceedings in light of changes in the law.

60.3. Remand in the Interest of Justice

When reversing the court of appeals' judgment, the Supreme Court may, in the interest of justice, remand the case to the trial court even if a rendition of judgment is otherwise appropriate.

60.4. Judgment for Costs

The Supreme Court's judgment will award to the prevailing party the costs incurred by that party in the Supreme Court. If appropriate, the judgment may also award the prevailing party the costs — including preparation costs for the record — incurred by that party in the court of appeals and in the trial court. But the Court may tax costs otherwise as required by law or for good cause.

60.5. Judgment Against Sureties

When affirming, modifying, or rendering a judgment against the party who was the appellant in the court of appeals, the Supreme Court must render judgment against the sureties on that party's supersedeas bond, if any, for the performance of the judgment. If the Supreme Court taxes costs against the party who was the appellant in the court of appeals, the Court must render judgment for those costs against the sureties on that party's supersedeas bond, if any.

60.6. Other Orders

The Supreme Court may make any other appropriate order required by the law and the nature of the case.

Notes and Comments

Comment to 1997 change: Former Rules 180 and 182(a) are merged. Subdivision 60.1 is from former Rule 181. Paragraphs 60.2(b), (e), and (f) are new but codify current practice. Subdivision 60.6 is new. Other changes are made.

Rule 61. Reversible Error

61.1. Standard for Reversible Error

No judgment may be reversed on appeal on the ground that the trial court made an error of law unless the Supreme Court concludes that the error complained of:

(a) probably caused the rendition of an improper judgment; or

(b) probably prevented the petitioner from properly presenting the case to the appellate courts.

61.2. Error Affecting Only Part of the Case

If the error affects a part, but not all, of the matter in controversy, and that part is separable without unfairness to the parties, the judgment must be reversed and a new trial ordered only as to the part affected by the error. The Court may not order a separate trial solely on unliquidated damages if liability is contested.

61.3. Defects in Procedure

The Supreme Court will not affirm or reverse a judgment or dismiss a petition for review for formal defects or irregularities in appellate procedure without allowing a reasonable time to correct or amend the defects or irregularities.

61.4. Remediable Error of the Trial Court or Court of Appeals

(a) *Generally.* The Supreme Court will not affirm or reverse a judgment or dismiss a petition for review if:

(1) the trial court's or court of appeals' erroneous action or failure or refusal to act prevents the proper presentation of a case to the Supreme Court; and

(2) the trial court or court of appeals can correct its action or failure to act.

(b) *Supreme Court Direction if Error Remediable.* If the circumstances described in (a) exist, the Supreme Court will direct the trial court or court of appeals to correct the error. The Supreme Court will then proceed as if the error had not occurred.

Notes and Comments

Comment to 1997 change: Former Rules 184 and 185 are merged. The reversible error standard is amended to omit the reference to an action "reasonably calculated to cause" an improper judgment, but no substantive change is intended. Subdivision 61.3 is amended to delete the reference to defects of "substance."

Rule 62. Damages for Frivolous Appeals

If the Supreme Court determines that a direct appeal or a petition for review is frivolous, it may — on motion of any party or on its own initiative, after notice and a reasonable opportunity for response — award to each prevailing party just damages. In determining whether to award damages, the Court must not consider any matter that does not appear in the record, briefs, or other papers filed in the court of appeals or the Supreme Court.

Notes and Comments

Comment to 1997 change: This is former Rule 182(b). The rule is changed from allowing a sanction when an appeal "filed for delay and without sufficient cause" to allowing a sanction when the appeal is "frivolous." A requirement for notice and an opportunity to respond is included.

Rule 63. Opinions; Copy of Opinion and Judgment to Interested Parties and Other Courts

The Supreme Court will hand down a written opinion in all cases in which it renders a judgment. The clerk will send a copy of the opinion and judgment to the court of appeals clerk, the trial court clerk, the regional administrative judge, and all parties to the appeal.

Notes and Comments

Comment to 1997 change: This is former Rule 181 with changes.

Rule 64. Motion for Rehearing

64.1. Time for Filing

A motion for rehearing may be filed with the Supreme Court clerk within 15 days from the date when the Court renders judgment or makes an order disposing of a petition for review. In exceptional cases, if justice requires, the Court may shorten the time within which the motion may be filed or even deny the right to file it altogether.

64.2. Contents

The motion must specify the points relied on for the rehearing.

64.3. Response and Decision

No response to a motion for rehearing need be filed unless the Court so requests. A motion will not be granted unless a response has been filed or requested by the Court. But in exceptional cases, if justice so requires, the Court may deny the right to file a response and act on a motion any time after it is filed.

64.4. Second Motion

The Court will not consider a second motion for rehearing unless the Court modifies its judgment, vacates its judgment and renders a new judgment, or issues a different opinion.

64.5. Extensions of Time

The Court may extend the time to file a motion for rehearing in the Supreme Court, if a motion complying with Rule 10.5(b) is filed with the Court no later than 15 days after the last date for filing a motion for rehearing.

64.6. Length of Motion and Response

A motion or response must be no longer than 15 pages.

Notes and Comments

Comment to 1997 change: This is former Rule 190. The service and notice provisions of former subdivisions (b) and (c) are deleted. *See* Rule 9.5. Other changes are made.

Comment to 2008 change: Subdivision 64.4 is amended to reflect the Court's practice of considering a second motion for rehearing after modifying its judgment or opinion in response to a prior motion for rehearing. When the Court modifies its opinion without modifying its judgment, the Court will ordinarily deny a second motion for rehearing unless the new opinion is substantially different from the original opinion.

Rule 65. Enforcement of Judgment after Mandate

65.1. Statement of Costs

The Supreme Court clerk will prepare, and send to the clerk to whom the mandate is directed, a statement of costs showing:

(a) the costs that were incurred in the Supreme Court, with a notation of those items that have been paid and those that are owing; and

(b) the party or parties against whom costs have been adjudged.

65.2. Enforcement of Judgment

If the Supreme Court renders judgment, the trial court need not make any further order. Upon receiving the Supreme Court's mandate, the trial court clerk must proceed to enforce the judgment of the Supreme Court's as in any other case. Appellate court costs must be included with the trial court costs in any process to enforce the judgment. If all or part of the costs are collected, the trial court clerk must immediately remit to the appellate court clerk any amount due to that clerk.

Notes and Comments

Comment to 1997 change: Subdivision 65.1 is new. Subdivision 65.2 is from former Rule 183.

SECTION FIVE: PROCEEDINGS IN THE

COURT OF CRIMINAL APPEALS

Rule 66. Discretionary Review in General

66.1. With or Without Petition

The Court of Criminal Appeals may review a court of appeals' decision in a criminal case on its own initiative under Rule 67 or on the petition of a party under Rule 68.

66.2. Not a Matter of Right

Discretionary review by the Court of Criminal Appeals is not a matter of right, but of the Court's discretion.

66.3. Reasons for Granting Review

While neither controlling nor fully measuring the Court of Criminal Appeals' discretion, the following will be considered by the Court in deciding whether to grant discretionary review:

(a) whether a court of appeals' decision conflicts with another court of appeals' decision on the same issue;

(b) whether a court of appeals has decided an important question of state or federal law that has not been, but should be, settled by the Court of Criminal Appeals;

(c) whether a court of appeals has decided an important question of state or federal law in a way that conflicts with the applicable decisions of the Court of Criminal Appeals or the Supreme Court of the United States;

(d) whether a court of appeals has declared a statute, rule, regulation, or ordinance unconstitutional, or appears to have misconstrued a statute, rule, regulation, or ordinance;

(e) whether the justices of a court of appeals have disagreed on a material question of law necessary to the court's decision; and

(f) whether a court of appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the Court of Criminal Appeals' power of supervision.

66.4. Documents to Aid Decision

(a) *Acquiring Documents.* The Court of Criminal Appeals — or any judge of the Court — may order the court of appeals clerk to promptly send the following items to the Court in order to aid it in deciding whether to grant discretionary review:

(1) the appellate record;

(2) a copy of the opinions of the court of appeals;

(3) a copy of the motions filed in the court of appeals; and

(4) certified copies of any judgment or order of the court of appeals.

(b) *Return of Documents.* If discretionary review is not granted, the clerk of the Court of Criminal Appeals will return the appellate record to the court of appeals clerk.

Notes and Comments

Comment to 1997 change: This is former Rule 200. The former rule's reference to motions for rehearing now appears in Rule 49.9. The rule is otherwise amended without substantive change.

Rule 67. Discretionary Review Without Petition

67.1. Four Judges' Vote

By a vote of at least four judges, the Court of Criminal Appeals may grant review of a court of appeals' decision in a criminal case at any time before the mandate of the court of appeals issues. An order granting review will be filed with the clerk of the Court of Criminal Appeals, who must send a copy to the court of appeals clerk.

67.2. Order Staying Mandate

To provide enough time for the Court of Criminal Appeals to decide whether to grant discretionary review under 67.1, the Court — or any judge of the Court — may file with the clerk of the court of appeals an order staying the court of appeals' mandate. The order must be signed by a judge of the Court of Criminal Appeals. The clerk of the Court of Criminal Appeals must immediately send a copy of the order to the court of appeals clerk.

67.3. Time to Issue Mandate Extended

Unless otherwise limited in the order itself, an order staying the court of appeals' mandate under 67.2 will extend for an additional 45 days the time before issuance of the court of appeals' mandate. An order granting review prevents the issuance of the court of appeals' mandate pending the further order of the Court of Criminal Appeals. If four judges do not agree to grant review within that time the court of appeals clerk must issue the mandate.

Notes and Comments

Comment to 1997 change: This is former Rule 201. The rule is amended without substantive change.

Comment to 2000 change: Language which was in the catchline of former Rule 201 has been deleted from Rule 67.1, to restore the substance of the rule, and to remove any implication that the court may not grant review on its own motion when a petition for discretionary review has been filed.

Rule 68. Discretionary Review With Petition

68.1. Generally

On petition by any party, the Court of Criminal Appeals may review a court of appeals' decision in a criminal case.

68.2. Time to File Petition

(a) *First Petition.* The petition must be filed within 30 days after either the day the court of appeals' judgment was rendered or the day the last timely motion for rehearing was overruled by the court of appeals.

(b) *Subsequent Petition.* Even if the time specified in (a) has expired, a party who otherwise may file a petition may do so within 10 days after the timely filing of another party's petition.

(c) *Extension of Time.* The Court of Criminal Appeals may extend the time to file a petition for discretionary review if a party files a motion complying with Rule 10.5(b) no later than 15 days after the last day for filing the petition. The Court of Criminal Appeals may extend the time to file a response or reply if a party files a motion complying with Rule 10.5(b) either before or after the response or reply is due.

68.3. Where to File Petition

The petition and all copies of the petition must be filed with the clerk of the court of appeals, but if the State's Prosecuting Attorney files a petition, the State's Prosecuting Attorney may file the copies of the petition — but not the original — with the clerk of the Court of Criminal Appeals instead of with the court of appeals clerk.

68.4. Contents of Petition

A petition for discretionary review must be as brief as possible. It must be addressed to the "Court of Criminal Appeals of Texas" and must state the name of the party or parties applying for review. The petition must contain the following items:

(a) *Table of Contents.* The petition must include a table of contents with references to the pages of the petition. The table of contents must indicate the subject matter of each ground or question presented for review.

(b) *Index of Authorities.* The petition must include an index of authorities arranged alphabetically and indicating the pages of the petition where the authorities are cited.

(c) *Statement Regarding Oral Argument.* The petition must include a short statement of why oral argument would be helpful, or a statement that oral argument is waived. If a reply or cross-petition is filed, it likewise must include a statement of why oral argument should or should not be heard.

(d) *Statement of the Case.* The petition must state briefly the nature of the case. This statement should seldom exceed half a page. The details of the case should be reserved and stated with the pertinent grounds or questions.

(e) *Statement of Procedural History.* The petition must state:

(1) the date any opinion of the court of appeals was handed down, or the date of any order of the court of appeals disposing of the case without an opinion;

(2) the date any motion for rehearing was filed (or a statement that none was filed); and

(3) the date the motion for rehearing was overruled or otherwise disposed of.

(f) *Grounds for Review.* The petition must state briefly, without argument, the grounds on which the petition is based. The grounds must be separately numbered. If the petitioner has access to the record, the petitioner must (after each ground) refer to the page of the record where the matter complained of is found. Instead of listing grounds for review, the petition may contain the questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of questions should be short and concise, not argumentative or repetitious.

(g) *Argument.* The petition must contain a direct and concise argument, with supporting authorities, amplifying the reasons for granting review. *See* Rule 66.3. The court of appeals' opinions will be considered with the petition, and statements in those opinions need not be repeated if counsel accepts them as correct.

(h) *Prayer for Relief.* The petition must state clearly the nature of the relief sought.

(l) *Appendix.* The petition must contain a copy of any opinion of the court of appeals.

68.5. Length of Petition and Reply

The petition must be no longer than 15 pages, exclusive of pages containing the table of contents, the index of authorities, the statement regarding oral argument, the statement of the case, the statement of procedural history, and the appendix. A reply may be no longer than 8 pages, exclusive of the items stated above. The Court may, on motion, permit a longer petition or reply.

68.6. Nonconforming Petition

The Court may strike, order redrawn, or summarily refuse a petition for discretionary review that is unnecessarily lengthy or that does not conform to these rules.

68.7. Court of Appeals Clerk's Duties

(a) *On Filing of the Petition.* Upon receiving the petition, the court of appeals clerk must file the original petition and note the filing on the docket.

(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) *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 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.

68.8. Court of Criminal Appeals Clerk's Duties on Receipt of Petition

The clerk of the Court of Criminal Appeals will receive a petition for discretionary review, file the petition and the accompanying record from the court of appeals, note the filing of the petition and record on the docket, and notify the parties by U.S. Mail of the filing. The Court may dispense with notice and grant or refuse the petition immediately upon its filing.

68.9 Reply. [deleted]

68.10. Amendment

The petition or a reply may be amended or supplemented within 30 days after the original petition was filed in the court of appeals or at any time when justice requires. The record may be amended in the Court of Criminal Appeals under the same circumstances and in the same manner as in the court of appeals.

68.11. Service on State Prosecuting Attorney

In addition to the service required by Rule 9.5, service of the petition, the reply, and any amendment or supplementation of a petition or reply must be made on the State Prosecuting Attorney, P.O. Box 12405, Austin, Texas 78711.

Notes and Comments

Comment to 1997 change: This is former Rule 202. Subdivisions (k) and (l) of the former rule have been relocated to Rule 69. The new rule limits the length of a petition and reply. The time for amendment of a petition or reply is increased to conform with the amendment in Rule 50. The rule is otherwise amended without substantive change.

Comment to 2002 change: The original catchline of subdivision 68.4(g) was "Reasons for Review," which caused confusion because of its similarity to the catchline in subdivision 66.3 ("Reasons for Granting Review"). It is changed to "Argument."

Rule 69. Action of Court on Petition for Discretionary Review and After Granting Review

69.1. Granting or Refusal

If four judges do not vote to grant a petition for discretionary review, the Court will enter a docket notation that the petition is *refused.* If four judges vote to grant a petition, the Court will enter a docket notation that discretionary review is *granted.*

69.2. Setting Case for Submission

If discretionary review is granted, either on the petition of a party or by the Court on its own initiative, the case will be set for submission.

69.3. Improvident Grant of Review

If, after granting discretionary review, five judges are of the opinion that discretionary review should not have been granted, the case will be dismissed.

69.4. Clerk's Duties

(a) *On Refusal or Dismissal.* When the Court refuses or dismisses a petition, the clerk will send to the parties and the State Prosecuting Attorney a notice informing them that the petition was refused or

dismissed. The clerk will retain the petition and all other items filed in the case for at least 15 days from the date of the refusal or dismissal. At the end of that time, if no motion for rehearing has been timely filed, or upon the overruling or dismissal of such a motion, the clerk will send to the court of appeals clerk a certified copy of the order refusing or dismissing the petition (as well as any order overruling a motion for rehearing). The clerk of the Court of Criminal Appeals will return the appellate record to the court of appeals clerk but will retain the petition, and other documents filed in the Court of Criminal Appeals.

(b) *On Granting Review.* If the Court grants discretionary review, the clerk will send to the parties and the State Prosecuting Attorney a notice informing them that discretionary review was granted.

Notes and Comments

Comment to 1997 change: This is former subdivisions (k) and (l) of Rule 202. Internal procedures of the Court are deleted. Provisions are added in 69.4(a) and (b) for the clerk to send notice of the granting, refusal, or dismissal of a petition for discretionary review. Other nonsubstantive changes are made.

Rule 70. Brief on the Merits

70.1. Initial Brief

If review is granted, the petitioner — or, if there was no petition, the party who lost in the court of appeals — must file a brief within 30 days after review is granted.

70.2. Reply Brief

The opposing party must file a brief within 30 days after the petitioner's brief is filed.

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(k)). Copies must be served as required by Rule 68.11.

70.4. Other Briefs

The Court of Criminal Appeals may direct that a party file a brief, or an additional brief, in a particular case.

Notes and Comments

Comment to 1997 change: This is former Rule 203. The rule is amended without substantive change.

Rule 71. Direct Appeals

71.1. Direct Appeal

Cases in which the death penalty has been assessed under Code of Criminal Procedure article 37.071, and cases in which bail has been denied in non-capital cases under Article I, Section 11a of the Constitution, are appealed directly to the Court of Criminal Appeals.

71.2. Record

The appellate record should be prepared and filed in accordance with Rules 31, 32, 34, 35 and 37, except that the record must be filed in the Court of Criminal Appeals. After disposition of the appeal, the Court may discard copies of juror information cards or other portions of the clerk's record that are not relevant to an issue on appeal.

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(k)), 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.

Notes and Comments

Comment to 1997 change: This is former Rule 210. The rule is extended to all direct appeals. A page limit is added for death penalty cases. Other nonsubstantive changes are made.

Comment to 2002 change: A requirement that briefs include a statement regarding oral argument is added.

Rule 72. Extraordinary Matters

72.1. Leave to File

A motion for leave to file must accompany an original petition for writ of habeas corpus, mandamus, procedendo, prohibition, certiorari, or other extraordinary writ, or any other motion not otherwise provided for in these rules.

72.2. Disposition

If five judges tentatively believe that the case should be filed and set for submission, the motion for leave will be granted and the case will then be handled and disposed of in accordance with Rule 52.7. If the motion for leave is denied, no motions for rehearing or reconsideration will be entertained. But the Court may, on its own initiative, reconsider a denial of a motion for leave.

Notes and Comments

Comment to 1997 change: This is former Rule 211. The rule is amended to include all the Court's jurisdiction of

extraordinary matters. Internal procedures of the Court are deleted. Other nonsubstantive changes are made.

Rule 73. Postconviction Applications for Writs of Habeas Corpus

73.1. Form of Application in Felony Case (other than Capital)

(a) *Prescribed Form.* An application for post conviction habeas corpus relief in a felony case without a death penalty, under Code of Criminal Procedure article 11.07, must be made in the form prescribed by the Court of Criminal Appeals in an order entered for that purpose.

(b) *Availability of Form.* The clerk of the convicting court will make the forms available to applicants on request, without charge.

(c) *Contents.* The person making the application must provide all information required by the form. The application must specify all grounds for relief, and must set forth in summary fashion the facts supporting each ground. The application must not cite cases or other law. Legal citations and arguments may be made in a separate memorandum. The application must be typewritten or handwritten legibly.

(d) *Verification.* The application must be verified by either:

(1) oath made before a notary public or other officer authorized to administer oaths; or

(2) if the person making the application is an inmate in the Institutional Division of the Department of Criminal Justice or in a county jail, an unsworn declaration in substantially the form required in Civil Practices and Remedies Code chapter 132.

73.2. Noncompliance

The clerk of the convicting court will not file an application that is not on the form prescribed by the Court of Criminal Appeals, and will return the application to the person who filed it, with a copy of the official form. The clerk of the Court of Criminal Appeals may, without filing an application that does not comply with this rule, return it to the clerk of the convicting court, with a notation of the defect, and the clerk of the convicting court will return the application to the person who filed it, with a copy of the official form.

73.3. Summary Sheet

When a district clerk transmits the record in a postconviction application for habeas corpus under Code of Criminal Procedure articles 11.07 or 11.071, the district clerk must prepare and transmit a summary sheet that includes the following information:

(a) the convicting court's name and county, and the name of the judge who tried the case;

(b) the applicant's name, the offense, the plea, the cause number, the sentence, and the date of sentence, as shown in the judgment of conviction;

(c) the cause number of any appeal from the conviction and the citation to any published report;

(d) whether a hearing was held on the application, whether findings of fact were made, any recommendation of the convicting court, and the name of the judge who presided over the application.

The Court of Criminal Appeals may by order adopt a form of summary sheet that the district clerks must use.

73.4. Action on Application

The Court may deny relief based upon its own review of the application or may issue such other instructions or orders as may be appropriate.

Notes and Comments

Comment to 1997 change: This is former Rule 4 of the Appendix for Criminal Cases. The rule is amended without substantive change.

Comment to 2000 change: Rules 73.1 and 73.2 are added, and a form is added in an appendix.

Rule 74. Review of Certified State Criminal-Law Questions

74.1. Certification

The Court of Criminal Appeals may answer questions of Texas criminal law certified to it by any federal appellate court if the certifying court is presented with determinative questions of Texas criminal law having no controlling Court of Criminal Appeals precedent. The Court may decline to answer the questions certified to it.

74.2. Contents of the Certification Order

An order from the certifying court must set forth:

(a) the questions of law to be answered; and

(b) a stipulated statement of all facts relevant to the questions certified, showing fully the nature of the controversy in which the questions arose.

74.3. Transmission of Certification Order

The clerk of the certifying court must send to the clerk of the Court of Criminal Appeals the following:

(a) the certification order under the certifying court's official seal;

(b) a list of the names of each party to the pending case, giving the address and telephone number, if known, of any party not represented by counsel; and

(c) a list of the names and addresses of counsel for each party.

74.4. Transmission of Record

The certifying court should not send to the Court of Criminal Appeals the record in the pending case with the certification order. The Court of Criminal Appeals may later require the original or copies of all or part of the record before the certifying court to be filed with the Court of Criminal Appeals clerk.

74.5. Notice

If the Court of Criminal Appeals agrees to answer the questions certified to it, the Court will notify all parties and the certifying court. The Court of Criminal Appeals clerk must also send a notice to the Attorney General of Texas if:

(a) the constitutionality of a Texas statute is the subject of a certified question that the Court of Criminal Appeals has agreed to answer; and

(b) the State of Texas or an officer, agency, or employee of the State is not a party to the proceeding in the certifying court.

74.6. Briefs and Oral Argument

(a) *Briefs*. The appealing party in the certifying court must file a brief with the clerk of the Court of Criminal Appeals within 30 days after the date of the notice. Opposing parties must file an answering brief within 15 days of receiving the opening brief. Briefs must comply with Rule 38 to the extent that its provisions apply.

(b) *Oral Argument*. Oral argument may be granted either on a party's request or on the Court's own initiative. Argument is governed by Rule 39.

74.7. Intervention by the State

If the constitutionality of a Texas statute is the subject of a certified question that the Court of Criminal Appeals has agreed to answer, the State of Texas may intervene at any reasonable time for briefing and oral argument (if argument is allowed) on the question of constitutionality.

74.8. Opinion on Certified Question

If the Court of Criminal Appeals has agreed to answer a certified question, it will hand down an opinion as in any other case.

74.9. Motion for Rehearing

Any party may file a motion for rehearing within 15 days after the opinion is handed down. The motion must clearly state the points relied on for the rehearing. No reply to a motion for rehearing need be filed unless the Court so requests. The Court will not grant a motion for rehearing unless a response has been filed or requested.

74.10. Answering Certified Questions

After all motions for rehearing have been overruled, the clerk of the Court of Criminal Appeals must send to the certifying court the written opinion on the certified questions. The opinion must be under the Court of Criminal Appeals' seal.

Notes and Comments

Comment to 1997 change: This is former Rule 214. The rule is amended without substantive change.

Rule 75. Notification; Oral Argument

75.1. Notification of Argument or Submission

Oral argument will be permitted only in cases designated by the Court of Criminal Appeals. If the Court permits argument in a case, the clerk will notify the parties of the date set for argument. If a case will be submitted without argument, the clerk will notify the parties of the date of submission. The clerk must use all reasonable diligence to notify counsel of settings, but counsel's failure to receive notice will not necessarily prevent argument or submission of the case on the day it is set.

75.2. Request for Argument

If a case is not designated for oral argument but counsel desires oral argument, counsel may — within 30 days of the date of the clerk's notice — petition the Court to allow oral argument. This petition must contain specific reasons why oral argument is desired.

75.3. Oral Argument

Unless extended in a special case, the total maximum time for oral argument is 20 minutes per side. Counsel for the appellant or petitioner is entitled to open and conclude the

argument. Counsel should not read at length from the briefs, records, or authorities. Counsel may orally correct a brief, but multiple additional citations should not be given orally; instead, these citations should be filed in writing with the clerk.

Notes and Comments

Comment to 1997 change: This is former Rule 220. The rule is amended without substantive change.

Rule 76. Submissions En Banc

The Court will sit en banc to consider the following types of cases:

(a) direct appeals;

(b) cases of discretionary review;

(c) cases in which leave to file was granted under Rule 72;

(d) cases that were docketed under Code of Criminal Procedure articles 11.07 or 11.071;

(e) certified questions; and

(f) rehearings under Rule 79.

Notes and Comments

Comment to 1997 change: This is former rule 222. The rule is expanded to include other kinds of cases. Internal procedures of the Court are deleted. Other nonsubstantive changes are made.

Rule 77. Opinions

77.1. Generally

In each case that is argued or submitted without argument to the Court of Criminal Appeals, the Court will hand down a written opinion setting forth the reasons for its decision and any germane precedent. Any judge may file an opinion dissenting from or concurring in the Court's judgment.

77.2. Signing; Publication

A majority of the judges will determine whether an opinion will be signed by a judge or issued per curiam, and whether the opinion (or a portion of the opinion) will be published.

77.3. Unpublished Opinions

Unpublished opinions have no precedential value and must not be cited as authority by counsel or by a court.

77.4. Copies

On the date when an opinion is handed down or an order rendered, the clerk of the Court of Criminal Appeals must mail copies of the opinion or order to:

(a) the parties;

(b) the State Prosecuting Attorney;

(c) the trial court clerk; and

(d) if the case is of discretionary review, the court of appeals clerk.

Notes and Comments

Comment to 1997 change: This is former Rule 223. The rule is amended without substantive change.

Rule 78. Judgments in the Court of Criminal Appeals

78.1. Types of Judgment

The Court of Criminal Appeals may:

(a) affirm the lower court's judgment in whole or in part;

(b) modify the lower court's judgment and affirm it as modified;

(c) reverse the court's judgment in whole or in part and render the judgment that the lower court should have rendered;

(d) reverse the lower court's judgment and remand the case for further proceedings;

(e) vacate the judgments of the lower courts and dismiss the case;

(f) vacate the lower court's judgment and remand the case for further proceedings in light of changes in the law; or

(g) dismiss the appeal.

78.2. Remand in the Interests of Justice

When reversing the court of appeals' judgment, the Court of Criminal Appeals may, in the interests of justice, remand the case to the trial court even if a rendition of judgment is otherwise appropriate.

78.3. Other Orders

The Court of Criminal Appeals may make any other appropriate order required by the law and the nature of the case.

Notes and Comments

Comment to 1997 change: The rule is new.

Rule 79. Rehearings

79.1. Motion for Rehearing

A motion for rehearing may be filed with the Court of Criminal Appeals clerk within 15 days from the date of the judgment or order. In exceptional cases, if justice requires, the Court may shorten the time within which the motion may be filed or even deny the right to file it altogether.

79.2. Contents

(a) The motion must briefly and distinctly state the grounds and arguments relied on for rehearing.

(b) A motion for rehearing an order that grants discretionary review may not be filed.

(c) A motion for rehearing an order that refuses or dismisses a petition for discretionary review may be grounded only on substantial intervening circumstances which are specified in the motion. Counsel must certify that the motion is so grounded and that the motion is made in good faith and not for delay.

(d) A motion for rehearing an order that denies habeas corpus relief under Code of Criminal Procedure, articles 11.07 or 11.071, may not be filed. The Court may on its own initiative reconsider the case.

79.3. Amendments

A motion for rehearing may be amended anytime before the period allowed for filing the motion expires, and with leave of the court, anytime before the Court decides the motion.

79.4. Decision

If the Court grants rehearing, the case will be set for submission. Oral argument may, but normally will not, be permitted.

79.5. Further Motion for Rehearing

The Court will not consider a second motion for rehearing after rehearing is denied. If rehearing is granted and the Court delivers an opinion on rehearing, a party may file a further motion for rehearing.

79.6. Extension of Time

The Court may extend the time for filing a motion or a further motion for rehearing if a party files a motion complying with Rule 10.5(b) within the time for filing a motion or further motion for rehearing.

79.7. Service

The requirements of Rule 68.11 apply.

Notes and Comments

Comment to 1997 change: This is former Rule 230, and the portion of former Rule 213 that prohibited motions for rehearing. The Court may now permit oral argument after granting rehearing, although it is disfavored. A further motion for rehearing may now be filed by any party, rather than only the losing party. Other nonsubstantive changes are made.

TRCP Rule 556. Judgment Upon Verdict

Where the case has been tried by a jury and a verdict has been rendered by them, the justice shall announce the same in open court and note it in his docket, and shall proceed to render judgment thereon.

TRCP Rule 557. Case Tried by Justice

When the case has been tried by the justice without a jury, ~~he~~ and the justice renders a decision immediately, the justice shall announce his decision in open court and note the same in ~~his~~ the court's docket ~~and render judgment thereon~~. If the justice takes the case under advisement then the justice shall render a decision as promptly as practicable and note the same in the court's docket, and immediately notify all parties when the decision is rendered.