SCAC MEETING AGENDA – 2nd Amended
Friday, June 9, 2017
9:00 a.m.

Location: **Texas Associations of Broadcasters**
502 E. 11th Street, #200
Austin, Texas 78701
(512) 322-9944

1. **WELCOME (Babcock)**

2. **STATUS REPORT FROM CHIEF JUSTICE HECHT**

Chief Justice Hecht will report on Supreme Court actions and those of other courts related to the Supreme Court Advisory Committee since the April 28 and 29 meetings.

3. **DISCOVERY RULES**

171-205 Sub-Committee Members:
Robert Meadows - Chair
Hon. Tracy Christopher – Vice
Prof. Alexandra Albright
Hon. Jane Bland
Hon. Harvey Brown
David Jackson
Cristina Rodriguez
Hon. Ana Estevez
Hon. Kent Sullivan

(a) April 24, 2017 Discovery Subcommittee letter of B. Meadows
(b) Discovery Subcommittee Proposed Amendments, Jan. 2017
(c) State Bar of Texas Committee on Court Rules Proposed Spoliation Rules

4. **AMENDMENTS TO THE CODE OF JUDICIAL CONDUCT**

Legislative Mandates Sub-Committee Members:
Jim Perdue, Jr. – Chair
Hon. Jane Bland – Vice Chair
Hon. Robert Pemberton
Prof. Elaine Carlson
Pete Schenkkan
Hon. David L. Evans
Robert Levy
Hon . Brett Busby
Wade Shelton
Richard Orsinger
Kennon Wooten

(d) Proposed Amendment to Code of Judicial Conduct – Constitutional County Court Judges

5. **WHETHER THE DEADLINES PRESCRIBED BY RULE 53.7 OF THE RULES OF APPELLATE PROCEDURE ARE JURISDICTIONAL; PROCEDURE FOR FILING LATE PETITION DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL**

Appellate Sub-Committee Members:

Prof. Bill Dorseano – Chair
Pamela Baron – Vice Chair
Hon. Bill Boyce
Hon. Brett Busry
Prof. Elaine Carlson
Frank Gilstrap
Charles Watson
Evan Young
Scott Stolley

(e) June 8, 2017 Report of the Appellate Rules Subcommittee

Tab A

KING & SPALDING

King & Spalding LLP
1100 Louisiana, Suite 4000
Houston, TX 77002-5213
Tel: +1 713 751 3200
Fax: +1 713 751 3290
www.kslaw.com

Robert Meadows
Partner
Direct Dial: +1 713 276 7370
Direct Fax: +1 713 751 3290
rmeadows@kslaw.com

April 24, 2017

Supreme Court Advisory Committee
c/o Mr. Charles L. "Chip" Babcock
Chair, Supreme Court Advisory Committee
Jackson Walker L.L.P.
cbabcock@jw.com

Re: Discovery Subcommittee Proposed Amendments to Part II, Section 9 of the Rules of Civil Procedure

Dear Advisory Committee Members,

On behalf of the Discovery Subcommittee, we again refer you to our recommended changes to Part II, Section 9 of the Rules of Civil Procedure, incorporating discussion from September's SCAC meeting. This is the same material circulated prior to the January SCAC meeting. As discussed at the last meeting, while perhaps not binding, we seem to have agreement in the SCAC on the changes that now appear in the proposal on the following key matters:

- Increase Level One amount in controversy
- Level Three mandatory conference
- Remove "good cause" requirement for modifying discovery procedures
- Eliminate references to fax, and add e-mail requirements
- Mandatory initial disclosures
- Proportionality and relevancy

The Discovery Subcommittee's recommended changes on the following key topics have not been discussed by the SCAC:

- Requests for production and inspection
- Interrogatories
- Admissions
- Depositions

- Physical and Mental Examinations

With regard to Spoliation, the Discovery Subcommittee is in agreement that the language of Federal Rule of Civil Procedure 37(e)—modified slightly—should be added to our sanctions rule (Rule 215). Our Subcommittee does not recommend the adoption of the proposed rule by the State Bar of Texas Committee on Court Rules (attached), and other recommendations on a Spoliation rule (that deal with duty, notice, the mechanism for seeking redress from the court and punishment) remain under consideration.

Regards,

Robert Meadows

Enclosures

Tab B

Texas Supreme Court Advisory Committee
Discovery Subcommittee Proposed Amendments
January 2017

Key:

Changes approved by SCAC in September 2016 are in yellow highlight in the draft.
Deletions approved by SCAC have been removed from the draft.
Previous suggestions that were rejected by the SCAC have been removed.
Discovery Subcommittee suggested changes are underlined.

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General Rules and Disclosures, Stipulations about Discovery Procedure: Tex. R. Civ. P. 190-194, 205

RULE 190. DISCOVERY LIMITATIONS **190.1 Discovery Control Plan Required.** Every case must be governed by a discovery control plan as provided in this Rule. (a) Initial Pleading. A plaintiff must allege in the first numbered paragraph of the original petition whether discovery is intended to be conducted under Level 1, 2, or 3 of this Rule. (b) Change by Court Order. On motion and showing of good cause by a party, the court may change the level designated by the plaintiff.	Amended to clarify the method for changing the discovery level.
190.2 Discovery Control Plan - Expedited Actions and Divorces Involving $100,000 or Less (Level 1) (a) **Application.** This subdivision applies to: (1) any suit that is governed by the expedited actions process in Rule 169; and (2) unless the parties agree that rule 190.3 should apply or the court orders a discovery control plan under Rule 190.4, any suit for divorce not involving children in which a party pleads that the value of the marital estate is more than zero but not more than $100,000. (b) **Limitations**. Discovery is subject to the limitations provided elsewhere in these rules and to the following additional limitations: (1) **Discovery period**. All discovery must be conducted during the discovery period, which begins when the suit is filed and continues until 180 days after the date the initial disclosures are due.~~the first request for discovery of any kind is served on a party.~~	Amended due to mandatory initial disclosures.
(2) **Total time for oral depositions.** Each party may have	

no more than six hours in total to examine and cross-examine all witnesses in oral depositions. The parties may agree to expand this limit up to ten hours in total, but not more except by court order. If one side designates more than one expert, the opposing side may have an additional two hours of total deposition time for each additional expert designated. The court may modify the deposition hours so that no party is given unfair advantage.

(3) **Interrogatories.** Any party may serve on any other party no more than 15 written interrogatories, excluding interrogatories asking a party only to identify or authenticate specific documents. Each discrete subpart of an interrogatory is considered a separate interrogatory.

(4) **Requests for Production.** Any party may serve on any other party no more than 15 written requests for production. Each discrete subpart of a request for production is considered a separate request for production.

(5) **Requests for Admissions.** Any party may serve on any other party no more than 15 written requests for admissions. Each discrete subpart of a request for admission is considered a separate request for admission.

(c) **Reopening Discovery**. If a suit is removed from the expedited actions process in Rule 169 or, in a divorce, the filing of a pleading renders this subdivision no longer applicable, the discovery period reopens, and discovery must be completed within the limitations provided in Rules 190.3 or 190.4, whichever is applicable. Any person previously deposed may be redeposed. On motion of any party, the court should continue the trial date if necessary to permit completion of discovery.

190.3 Discovery Control Plan – ~~By Rule~~ Level 2

(a) **Application**. ~~Unless a suit is governed by a discovery control plan under Rules 190.2 or 190.4,~~ discovery must be conducted in accordance with this subdivision, for a level 2 suit.

(b) **Limitations.** Discovery is subject to the limitations provided elsewhere in these rules and to the following additional limitations: (1) **Discovery period**. All discovery must be conducted during the discovery period, which begins when suit is filed and continues until: (A) 30 days before the date set for trial, in cases under the Family Code; or (B) in other cases, the earlier of (i) 30 days before the date set for trial, or (ii) nine months after the ~~earlier of the date of the first oral deposition or the due date of the first response to written discovery.~~initital disclosures are due; or (C) a docket control order sets a new date for the end of discovery.	Amended due to discussion about deadlines under Level 2.
(2) **Total time for oral depositions.** Each side may have no more than 50 hours in oral depositions to examine and cross-examine parties on the opposing side, experts designated by those parties, and persons who are subject to those parties' control. "Side" refers to all the litigants with generally common interests in the litigation. If one side designates more than two experts, the opposing side may have an additional six hours of total deposition time for each additional expert designated. The court may modify the deposition hours and must do so when a side or party would be given unfair advantage.	
(3) **Interrogatories.** Any party may serve on any other party no more than 25 written interrogatories, excluding interrogatories asking a party only to identify or authenticate specific documents. Each discrete subpart of an interrogatory is considered a separate interrogatory.	
(4) **Requests for Production.** Any party may serve on any other party no more than 25 written requests for production. Each discrete subpart of a request for production is considered a separate request for	Amended due to discussion about limits on RFPs, particularly due to documents required by mandatory initial disclosures.

production.

190.4 Discovery Control Plan - ~~By Order (~~Level 3~~)~~

(a) **Application.** Discovery under level 3 is governed by this rule. ~~The court must, on a party's motion, and may, on its own initiative, order that discovery be conducted in accordance with a discovery control plan tailored to the circumstances of the specific suit.~~ After a conference required by this rule, t~~T~~he parties ~~may~~ must submit a~~n~~ ~~agreed~~ discovery control plan and proposed order(s) to the court for its consideration. ~~The court should act on a party's motion or agreed order under this subdivision as promptly as reasonably possible.~~

~~(b) **Limitations.** The discovery control plan ordered by the court may address any issue concerning discovery or the matters listed in Rule 166, and may change any limitation on the time for or amount of discovery set forth in these rules. The discovery limitations of Rule 190.2, if applicable, or otherwise of Rule 190.3 apply unless specifically changed in the discovery control plan ordered by the court.~~ The plan must include the items listed in 190.4(c)~~:~~

(b) Conference

(1) **Conference timing.** The parties must confer as soon as practicable.

(2) **Conference content; Parties' responsibilities.** In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 194; discuss any issues about preserving discoverable information; and develop a proposed discovery control plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery control plan, and for submitting to the court within 14 days after the conference a written report outlining the proposed discovery control plan.

Amended to clarify the conference process.

(3) **No discovery before conference. Unless otherwise ordered by the court,** a~~A~~ party may not seek discovery from any ~~source before the~~ party~~ies~~ before the parties have conferred as required by this rule. This does not include initial disclosures. (c~~d~~) **Discovery control plan.** The discovery control plan must state the parties' views and proposals on: (1) a date for trial or for a conference to determine a trial setting; (2) a discovery period during which either all discovery must be conducted or all discovery requests must be sent, for the entire case or an appropriate phase of it; (3) deadlines for joining additional parties, amending or supplementing pleadings, and designating expert witnesses~~.~~; (4) what changes should be made in the timing, or form, of~~r~~ the initial ~~requirement for~~ disclosures under Rule 194, including a statement of when initial disclosures were made or will be made; (5) the subjects on which discovery may be needed, and whether discovery should be conducted in phases or be limited to or focused on particular issues; (6) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced; (7) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Texas Rule of Evidence 511; (8) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; (9) Dispositive Motion deadlines;	Amended due to discussion that having initial disclosures prior to conference could aid the process. Amended due to discussion about not wanting mandatory disclosure requirement to be modified (but allowing form and timing of initial disclosures modifications). TRCP 190.4(c)(9)-(11) are added due to the addition at 190.4(d).

(10) Expert challenges deadlines; and (11) proposed docket control order(s) **(d) Docket Control Order.** Upon receipt of the discovery control plan, the trial court must issue a docket control order. **190.5 Modification of Discovery Control Plan** The court may modify a discovery control plan at any time and must do so when the interest of justice requires. Unless a suit is governed by the expedited actions process in Rule 169, the court must allow additional discovery: (a) related to new, amended or supplemental pleadings, or new information disclosed in a discovery response or in an amended or supplemental response, if: (1) the pleadings or responses were made after the deadline for completion of discovery or so nearly before that deadline that an adverse party does not have an adequate opportunity to conduct discovery related to the new matters, and (2) the adverse party would be unfairly prejudiced without such additional discovery; (b) regarding matters that have changed materially after the discovery cutoff if trial is set or postponed so that the trial date is more than three months after the discovery period ends. **190.6 Certain Types of Discovery Excepted** This rule's limitations on discovery do not apply to or include discovery conducted under Rule 202 ("Depositions Before Suit or to Investigate Claims"), or Rule 621a ("Discovery and Enforcement of Judgment"). But Rule 202 cannot be used to circumvent the limitations of this rule. **RULE 191. MODIFYING DISCOVERY PROCEDURES AND LIMITATIONS; CONFERENCE REQUIREMENT; SIGNING DISCLOSURES; DISCOVERY REQUESTS, RESPONSES, AND**	TRCP 190.4(d) is added due to the removal of 190.4(b) and to comport with FRCP 16(b).

OBJECTIONS; FILING REQUIREMENTS **191.1 Modification of Procedures** Except where specifically prohibited, the procedures and limitations set forth in the rules pertaining to discovery may be modified in any suit by the agreement of the parties or by court order. An agreement of the parties is enforceable if it complies with Rule 11 or, as it affects an oral deposition, if it is made a part of the record of the deposition. **191.2 Conference** Parties and their attorneys are expected to cooperate in discovery and to make any agreements reasonably necessary for the efficient disposition of the case. All discovery motions or requests for hearings relating to discovery must contain a certificate by the party filing the motion or request that a reasonable effort has been made to resolve the dispute without the necessity of court intervention and the effort failed. **191.3 Signing of Disclosures, Discovery Requests, Notices, Responses, and Objections** (a) **Signature required.** Every disclosure, discovery request, notice, response, and objection must be signed: (1) by an attorney, if the party is represented by an attorney, and must show the attorney's State Bar of Texas identification number, address, telephone number, and service e-mail address ~~and fax number, if any~~; or (2) by the party, if the party is not represented by an attorney, and must show the party's address, telephone number, and service email address, if any. (b) **Effect of signature on disclosure.** The signature of an attorney or party on a disclosure constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and	"Good cause" has been removed. Amended to eliminate fax.

correct as of the time it is made. (c) **Effect of signature on discovery request, notice, response, or objection.** The signature of an attorney or party on a discovery request, notice, response, or objection constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, notice, response, or objection: (1) is consistent with the rules of civil procedure and these discovery rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) has a good faith factual basis; (3) is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) is not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.	No consensus on proposed change to TRCP 191.3(c)(1) to track FRCP 26(g)(1) (affects TRCP 13 and maybe various TRAPs).
(d) **Effect of failure to sign.** If a request, notice, response, or objection is not signed, it must be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, notice, response, or objection. A party is not required to take any action with respect to a request or notice that is not signed. (e) **Sanctions.** If the certification is false without substantial justification, the court may, upon motion or its own initiative, impose on the person who made the certification, or the party on whose behalf the request, notice, response, or objection was made, or both, an appropriate sanction as for a frivolous pleading or motion under Chapter 10 of the Civil Practice and Remedies Code. **191.4 Filing of Discovery Materials.** (a) **Discovery materials not to be filed.** The following discovery	Rejected proposed change to TRCP 191.3(d) to track FRCP 26(g)(2).

materials must not be filed: (1) discovery requests, deposition notices, and subpoenas required to be served only on parties; (2) responses and objections to discovery requests and deposition notices, regardless on whom the requests or notices were served; (3) documents and tangible things produced in discovery; and (4) statements prepared in compliance with Rule 193.3(b) or (d). (b) **Discovery materials to be filed.** The following discovery materials must be filed: (1) discovery requests, deposition notices, and subpoenas required to be served on nonparties; (2) motions and responses to motions pertaining to discovery matters; and (3) agreements concerning discovery matters, to the extent necessary to comply with Rule 11. (c) **Exceptions.** Notwithstanding paragraph (a): (1) the court may order discovery materials to be filed; (2) a person may file discovery materials in support of or in opposition to a motion or for other use in a court proceeding; and (3) a person may file discovery materials necessary for a proceeding in an appellate court. (d) **Retention requirement for persons.** Any person required to serve discovery materials not required to be filed must retain the original or exact copy of the materials during the pendency of the case and any related appellate proceedings begun within six months after judgment is signed, unless otherwise provided by the trial court. (e) **Retention requirement for courts.** The clerk of the court shall retain and dispose of deposition transcripts and depositions	

upon written questions as directed by the Supreme Court. **191.5 Service of Discovery Materials.** Every disclosure, discovery request, notice, response, and objection required to be served on a party or person must be served on all parties of record. **RULE 192. PERMISSIBLE DISCOVERY: FORMS AND SCOPE; WORK PRODUCT; PROTECTIVE ORDERS; DEFINITIONS** **192.1 Forms of Discovery.** Permissible forms of discovery are: (a) required disclosures; (b) requests for production and inspection of documents and tangible things; (c) requests and motions for entry upon and examination of real property; (d) interrogatories to a party; (e) requests for admission; (f) oral or written depositions; and (g) motions for mental or physical examinations. **192.2 Timing and Sequence of Discovery.** (a) **Timing.** Unless otherwise agreed to by the parties, or ordered by the court a party may not serve discovery until after the initial disclosures. (b) **Sequence.** The permissible forms of discovery may be combined in the same document and may be taken in any order or sequence.	Amended to clarify discovery cannot be served with a petition, revised proposal in light of comments from 9/16-9/17 meeting.

192.3 Scope of Discovery. (a) **Generally.** Unless otherwise ordered by the court, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to the subject matter of the pending action and proportional to the needs of the case as set forth in 192.4(b). Information within this scope of discovery need not be admissible in evidence to be discoverable. (b) **Documents, information and tangible things.** A party may obtain discovery of the existence, description, nature, custody, condition, location, and contents of documents, information and tangible things (including papers, books, accounts, drawings, graphs, charts, photographs, electronic or videotape recordings, data, and data compilations) that constitute or contain matters relevant to the subject matter of the action. A person is required to produce a document or tangible thing that is within the person's possession, custody, or control. (c) **Contentions.** A party may obtain discovery of any other party's legal contentions and the factual bases for those contentions. **192.4 Limitations on Scope of Discovery.** The discovery methods permitted by these rules should be limited by the court if it determines, on motion or on its own initiative and on reasonable notice, that: (a) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; or (b) the discovery sought is not proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.	Revised in light of discussion about relevancy at 9/16-9/17 meeting (keep "subject matter of the pending action"). Proportionality concept remains a proposed change to 192.3(a) due to mixed discussions at 9/16-9/17 meeting.

192.5 Work Product.

(a) **Work product defined.** Work product comprises:

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.

(b) **Protection of work product.**

(1) **Protection of core work product--attorney mental processes**. Core work product - the work product of an attorney or an attorney's representative that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories - is not discoverable.

(2) **Protection of other work product**. Any other work product is discoverable only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the material by other means.

(3) **Incidental disclosure of attorney mental processes**. It is not a violation of subparagraph (1) if disclosure ordered pursuant to subparagraph (2) incidentally discloses by inference attorney mental processes otherwise protected under subparagraph (1).

(4) **Limiting disclosure of mental processes.** If a court orders discovery of work product pursuant to subparagraph (2), the court must--insofar as possible--protect against disclosure of the mental impressions, opinions, conclusions, or legal theories not otherwise

discoverable. (c) **Exceptions.** Even if made or prepared in anticipation of litigation or for trial, the following is not work product protected from discovery: (1) information discoverable under Rule 194 concerning experts, trial witnesses, witness statements, and contentions; (2) trial exhibits ordered disclosed under Rule 166 or Rule 194; (3) the name, address, and telephone number of any potential party or any person with knowledge of relevant facts; (4) any photograph or electronic image of underlying facts (e.g., a photograph of the accident scene) or a photograph or electronic image of any sort that a party intends to offer into evidence; and (5) any work product created under circumstances within an exception to the attorney-client privilege in Rule 503(d) of the Rules of Evidence. (d) **Privilege.** For purposes of these rules, an assertion that material or information is work product is an assertion of privilege. **192.6 Protective Order.** (a) **Motion.** A person from whom discovery is sought, and any other person affected by the discovery request, may move within the time permitted for response to the discovery request for an order protecting that person from the discovery sought. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. A person should not move for protection when an objection to written discovery or an assertion of privilege is appropriate, but a motion does not waive the objection or assertion of privilege. If	The Discovery Subcommittee recommends including this language in TRCP 192.6(a) from FRCP 26(c)(1) (protective order provision).

a person seeks protection regarding the time or place of discovery, the person must state a reasonable time and place for discovery with which the person will comply. A person must comply with a request to the extent protection is not sought unless it is unreasonable under the circumstances to do so before obtaining a ruling on the motion. (b) **Order.** To protect the movant from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights, the court may make any order in the interest of justice and may - among other things - order that: (1) the requested discovery not be sought in whole or in part; (2) the extent or subject matter of discovery be limited; (3) the discovery not be undertaken at the time or place specified; (4) the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court; (5) the results of discovery be sealed or otherwise protected, subject to the provisions of Rule 76a. **192.7 Definitions.** As used in these rules (a) *Written discovery* means requests for disclosure, requests for production and inspection of documents and tangible things, requests for entry onto property, interrogatories, and requests for admission. (b) *Possession, custody, or control* of an item means that the person either has physical possession of the item or has a right to possession of the item that is equal or superior to the person who has physical possession of the item. (c) A *testifying expert* is an expert who may be called to testify as an expert witness at trial.	

(d) A *consulting expert* is an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert. **RULE 193. WRITTEN DISCOVERY: RESPONSE; OBJECTION; ASSERTION OF PRIVILEGE; SUPPLEMENTATION AND AMENDMENT; FAILURE TO TIMELY RESPOND; PRESUMPTION OF AUTHENTICITY** **193.1 Responding to Written Discovery; Duty to Make Complete Response.** A party must respond to written discovery in writing within the time provided by court order or these rules. When responding to written discovery, a party must make a complete response, based on all information reasonably available to the responding party or its attorney at the time the response is made. The responding party's answers, objections, and other responses must be preceded by the request to which they apply. **193.2 Objecting to Written Discovery** (a) **Form and time for objections.** A party must make any objection to written discovery in writing - either in the response or in a separate document - within the time for response. The party must state specifically the legal or factual basis for the objection and the extent to which the party is refusing to comply with the request. An objection must state whether any responsive materials are being withheld on the basis of that objection. (b) **Duty to respond when partially objecting; objection to time or place of production.** A party must comply with as much of the request to which the party has made no objection unless it is unreasonable under the circumstances to do so before obtaining a ruling on the objection. If the responding party objects to the requested time or place of production, the responding party must state a reasonable time and place for complying with the	The Discovery Subcommittee recommends adding this sentence to TRCP 193.2(a). The language is from FRCP 34(b)(2)(C).

request and must comply at that time and place without further request or order.

(c) **Good faith basis for objection.** A party may object to written discovery only if a good faith factual and legal basis for the objection exists at the time the objection is made.

(d) **Amendment.** An objection or response to written discovery may be amended or supplemented to state an objection or basis that, at the time the objection or response initially was made, either was inapplicable or was unknown after reasonable inquiry.

(e) **Waiver of objection.** An objection that is not made within the time required, or that is obscured by numerous unfounded objections, is waived unless the court excuses the waiver for good cause shown.

(f) **No objection to preserve privilege.** A party should not object to a request for written discovery on the grounds that it calls for production of material or information that is privileged but should instead comply with Rule 193.3. A party who objects to production of privileged material or information does not waive the privilege but must comply with Rule 193.3 when the error is pointed out.

193.3 Asserting a Privilege

A party may preserve a privilege from written discovery in accordance with this subdivision.

(a) **Withholding privileged material or information.** A party who claims that material or information responsive to written discovery is privileged may withhold the privileged material or information from the response. The party must state--in the response (or an amended or supplemental response) or in a separate document--that:

(1) information or material responsive to the request has been withheld,

(2) the request to which the information or material relates, and

(3) the privilege or privileges asserted.

(b) **Description of withheld material or information.** After receiving a response indicating that material or information has been withheld from production, the party seeking discovery may serve a written request that the withholding party identify the information and material withheld. Within 15 days of service of that request, the withholding party must serve a response that:

(1) describes the information or materials withheld that, without revealing the privileged information itself or otherwise waiving the privilege, enables other parties to assess the applicability of the privilege, and

(2) asserts a specific privilege for each item or group of items withheld.

(c) **Exemption.** Without complying with paragraphs (a) and (b), a party may withhold a privileged communication to or from a lawyer or lawyer's representative or a privileged document of a lawyer or lawyer's representative

(1) created or made from the point at which a party consults a lawyer with a view to obtaining professional legal services from the lawyer in the prosecution or defense of a specific claim in the litigation in which discovery is requested, and

(2) concerning the litigation in which the discovery is requested.

(d) **Privilege not waived by production**. A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence if - within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made - the producing party amends the response, identifying the material or information produced and stating the privilege asserted. If the producing party thus amends the response to assert a privilege, the requesting party must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege.

193.4 Hearing and Ruling on Objections and Assertions of Privilege.

(a) **Hearing.** Any party may at any reasonable time request a hearing on an objection or claim of privilege asserted under this rule. The party making the objection or asserting the privilege must present any evidence necessary to support the objection or privilege. The evidence may be testimony presented at the hearing or affidavits served at least seven days before the hearing or at such other reasonable time as the court permits. If the court determines that an *in camera* review of some or all of the requested discovery is necessary, that material or information must be segregated and produced to the court in a sealed wrapper within a reasonable time following the hearing.

(b) **Ruling.** To the extent the court sustains the objection or claim of privilege, the responding party has no further duty to respond to that request. To the extent the court overrules the objection or claim of privilege, the responding party must produce the requested material or information within 30 days after the court's ruling or at such time as the court orders. A party need not request a ruling on that party's own objection or assertion of privilege to preserve the objection or privilege.

(c) **Use of material or information withheld under claim of privilege.** A party may not use--at any hearing or trial--material or information withheld from discovery under a claim of privilege, including a claim sustained by the court, without timely amending or supplementing the party's response to that discovery.

193.5 Amending or Supplementing Responses to Written Discovery.

(a) **Duty to amend or supplement.** If a party learns that the party's response to written discovery was incomplete or incorrect when made, or, although complete and correct when made, is no longer complete and correct, the party must amend or supplement the response:

(1) to the extent that the written discovery sought the identification of persons with knowledge of relevant

facts, trial witnesses, or expert witnesses, and (2) to the extent that the written discovery sought other information, unless the additional or corrective information has been made known to the other parties in writing, on the record at a deposition, or through other discovery responses. (b) **Time and form of amended or supplemental response**. An amended or supplemental response must be made reasonably promptly after the party discovers the necessity for such a response. Except as otherwise provided by these rules, it is presumed that an amended or supplemental response made less than 30 days before trial was not made reasonably promptly. An amended or supplemental response must be in the same form as the initial response and must be verified by the party if the original response was required to be verified by the party, but the failure to comply with this requirement does not make the amended or supplemental response untimely unless the party making the response refuses to correct the defect within a reasonable time after it is pointed out.	
(c) **Use of Material or Information Withheld under other Objection.** A party may not use—at any hearing or trial—material or information withheld from discovery under any objection, including an objection sustained by the court, without timely amending or supplementing the party's response to include that discovery in accordance with these rules. **193.6 Failing to Timely Respond - Effect on Trial** (a) **Exclusion of evidence and exceptions.** A party who fails to make, amend, or supplement a discovery response in a timely manner may not introduce in evidence the material or information that was not timely disclosed, or offer the testimony of a witness (other than a named party) who was not timely identified, unless the court finds that: (1) there was good cause for the failure to timely make, amend, or supplement the discovery response; or	The Discovery Subcommittee recommends adding TRCP 193.5(c) to require parties to disclose information and documents used at hearing or trial.

(2) the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties.

(b) **Burden of establishing exception.** The burden of establishing good cause or the lack of unfair surprise or unfair prejudice is on the party seeking to introduce the evidence or call the witness. A finding of good cause or of the lack of unfair surprise or unfair prejudice must be supported by the record.

(c) **Continuance.** Even if the party seeking to introduce the evidence or call the witness fails to carry the burden under paragraph (b), the court may grant a continuance or temporarily postpone the trial to allow a response to be made, amended, or supplemented, and to allow opposing parties to conduct discovery regarding any new information presented by that response.

193.7 Production of Documents Self-Authenticating

A party's production of a document in response to written discovery authenticates the document for use against that party in any pretrial proceeding or at trial unless - within ten days or a longer or shorter time ordered by the court, after the producing party has actual notice that the document will be used - the party objects to the authenticity of the document, or any part of it, stating the specific basis for objection. An objection must be either on the record or in writing and must have a good faith factual and legal basis. An objection made to the authenticity of only part of a document does not affect the authenticity of the remainder. If objection is made, the party attempting to use the document should be given a reasonable opportunity to establish its authenticity.

RULE 194. DUTY TO DISCLOSE

194.1 Required Disclosures.

(a) **In general**. Except as exempted by this Rule or as otherwise

At the 9/16-9/17 meeting, adopting a mandatory disclosure requirement was approved.

stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties the information or material described in Rule 194.2, 194.3, and 194.4. Unless the court orders otherwise, all disclosures under Rule 194 must be in writing, signed, and served. In ruling on an objection that initial disclosures are not appropriate in this action, the court must determine what disclosures, if any, are to be made and must set the time for disclosure. (b) **Production.** Copies of documents and other tangible items required to be disclosed under this rule ordinarily must be served with the response. But if the responsive documents are voluminous, the response must state a reasonable time and place for the production of documents. The responding party must produce the documents at the time and place stated, unless otherwise agreed by the parties or ordered by the court, and must provide the requesting party a reasonable opportunity to inspect them. **194.2 Initial Disclosures.** (a) **Time for initial disclosures.** Both the plaintiff and the defendant~~A party~~ must make the initial disclosures at or within 30 days after the filing of the defendant's answer unless a different time is set by agreement~~stipulation~~ or court order. A party that is first served or otherwise joined after the filing of the first answer must make the initial disclosures within 30 days after the filing of the party's answer, unless a different time is set by agreement~~stipulation~~ or court order. (b) **Content.** Without awaiting a discovery request, ~~A~~ a party ~~may request disclosure of any or all of~~ must provide the following: (~~a~~1) the correct names of the parties to the lawsuit; (~~b~~2) the name, address, and telephone number of any potential parties; (~~c~~3) the legal theories and, in general, the factual bases of the responding party's claims or defenses (the responding party need not marshal all evidence that may be offered at trial); (~~d~~4) the amount and any method of calculating economic	Revised to address discussion about timing at 9/16-9/17 meeting. The Discovery Subcommittee recommends the following content for initial disclosures. TRCP 194.2(b) maintains the disclosure topics from the current Texas rule, with a few additions. Note many members of the Discovery Subcommittee recommend including FRCP 26(a)(1)(A)(iii)'s damages disclosure requirement at TRCP 194.2(b)(4): "a computation of each category of damages claimed by the disclosing

damages; (~~e~~5) the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case. A person has knowledge of relevant facts when that person has or may have knowledge of any discoverable matter. The person need not have admissible information or personal knowledge of the facts. An expert is "a person with knowledge of relevant facts" only if that knowledge was obtained firsthand or if it was not obtained in preparation for trial or in anticipation of litigation.; (6) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control, and may use to support its claims or defenses, unless the use would be solely for impeachment; ~~(f) for any testifying expert:~~ ~~(1) the expert's name, address, and telephone number;~~ ~~(2) the subject matter on which the expert will testify;~~ ~~(3) the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting such information;~~ ~~(4) if the expert is retained by, employed by, or otherwise subject to the control of the responding party:~~ ~~(A) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in~~	party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered." The addition at TRCP 194.2(b)(5) is from TRCP 192.3(c) to remove the unnecessary cross-reference. The addition at TRCP 194.2(b)(6) is from FRCP 26(a)(1)(A)(ii). The TRCPs did not previously include this requirement. Expert disclosures are now addressed in Rule 195 and Rule 194.3.

~~anticipation of the expert's testimony; and~~ ~~(B) the expert's current resume and bibliography;~~	
(~~g~~7) except as otherwise provided by law, the existence and contents of any indemnity or insurance agreement under which any person may be liable to satisfy part or all of a judgment rendered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the indemnity or insurance agreement is not by reason of disclosure admissible in evidence at trial~~any indemnity and insuring agreements described in Rule 192.3(f);~~	The addition at TRCP 194.2(b)(7) is from TRCP 192.3(f) to remove the unnecessary cross-reference.
(~~h~~8) the existence and contents of any relevant portions of a settlement agreement. Information concerning a settlement agreement is not by reason of disclosure admissible in evidence at trial~~any settlement agreements described in Rule 192.3(g)~~;	The addition at TRCP 194.2(b)(8) is from TRCP 192.3(g) to remove the unnecessary cross-reference.
(~~i~~9) the statement of any person with knowledge of relevant facts--a "witness statement"-regardless of when the statement was made. A witness statement is (1) a written statement signed or otherwise adopted or approved in writing by the person making it, or (2) a stenographic, mechanical, electrical, or other type of recording of a witness's oral statement, or any substantially verbatim transcription of such a recording. Notes taken during a conversation or interview with a witness are not a witness statement. Any person may obtain, upon written request, his or her own statement concerning the lawsuit, which is in the possession, custody or control of any party.~~any witness statements described in Rule 192.3(h)~~;	The addition at TRCP 194.2(b)(9) is from TRCP 192.3(h) to remove the unnecessary cross-reference.
(~~j~~10) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills that are reasonably related to the injuries or damages asserted or, in lieu thereof, an authorization permitting the disclosure of such medical records and bills;	

(~~k~~11) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills obtained by the responding party by virtue of an authorization furnished by the requesting party; (~~l~~12) the name, address, and telephone number of any person who may be designated as a responsible third party. (c) **Proceedings exempt from initial disclosure**. The following proceedings are exempt from initial disclosure, but a court may order that the parties make particular disclosures as appropriate: (1) an action for review on an administrative record; (2) a forfeiture action arising from a state statute; (3) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence; (4) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision; (5) an action to enforce or quash an administrative summons or subpoena; (6) an action by the state to recover benefit payments; (7) an action by the state to collect on a student loan guaranteed by the state; (8) a proceeding ancillary to a proceeding in another court; and (9) an action to enforce an arbitration award. **194.2A Initial Disclosures Under Title I and V of the Texas Family Code** [TBD]. **194.3 Expert Disclosure.** In addition to the disclosures required by Rule 194.2, a party	The addition at TRCP 194.2(c) is from FRCP 26(a)(1)(B), modified to fit state rules and to clarify that all the listed initial disclosure topics are within the scope of discoverable information in all cases. Because the disclosure rule does not fit family law cases, there should be an additional disclosure rule for family law cases in line with the local orders of major counties as discussed by the SCAC on January 12, 2001, and March 30, 2001. TRCP 194.3 is to clarify expert disclosure requirements exist, as

must disclose to the other parties expert information as provided by Rule 195.	described in TRCP 195.
~~**194.4 Production.**~~ ~~Copies of documents and other tangible items ordinarily must be served with the response. But if the responsive documents are voluminous, the response must state a reasonable time and place for the production of documents. The responding party must produce the documents at the time and place stated, unless otherwise agreed by the parties or ordered by the court, and must provide the requesting party a reasonable opportunity to inspect them.~~	Prior TRCP 194.4 is moved to TRCP 194.1(b).
194.4 Pretrial Disclosures. (a) **In General**. In addition to the disclosures required by Rules 194.2 and 194.3, a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment: (1) the name and, if not previously provided, the address and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises; (2) an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises. (b) **Time for Pretrial Disclosures; Objections**. Unless the court orders otherwise, these disclosures must be made at least 30 days before trial.	The addition at TRCP 194.4 is from FRCP 26(a)(3). Note TRCP 166 touches on some of these issues as well and may also need to be amended. TRCP 194.4(a)(1) incorporates the amendment to TRCP 192.3(d) proposed by the State Bar of Texas Committee on Court Rules. Note the following language from FRCP 26(a)(3) is not incorporated into TRCP 194.4(b) at this time: "Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of any objections, together with the grounds for the objections, that may be made to the admissibility of materials identified. An objection not so made—except for one under Texas Rule of Evidence 402 or
~~**194.6**~~**194.5 No Objection or Assertion of Work Product**. No objection or assertion of work product is permitted to a ~~request~~ disclosure under this rule.	
194.~~7~~ 5 Certain Responses Not Admissible. A ~~response to requests~~ disclosure under Rule 194.2(b)(~~c~~3) and	

(~~d~~4) that has been changed by an amended or supplemental response is not admissible and may not be used for impeachment.	403—is waived unless excused by the court for good cause."
RULE 205. DISCOVERY FROM NON-PARTIES	
205.1 Forms of Discovery; Subpoena Requirement. A party may compel discovery from a nonparty--that is, a person who is not a party or subject to a party's control--only by obtaining a court order under Rules 196.7, 202, or 204, or by serving a subpoena compelling: (a) an oral deposition; (b) a deposition on written questions; (c) a request for production of documents or tangible things, pursuant to Rule 199.2(b)(5) or Rule 200.1(b), served with a notice of deposition on oral examination or written questions; and (d) a request for production of documents and tangible things under this rule.	
205.2 Notice. A party seeking discovery by subpoena from a nonparty must serve, on the nonparty and all parties, a copy of the form of notice required under the rules governing the applicable form of discovery. A notice of oral or written deposition must be served before or at the same time that a subpoena compelling attendance or production under the notice is served. A notice to produce documents or tangible things under Rule 205.3 must be served at least 10 days before the subpoena compelling production is served.	
205.3 Production of Documents and Tangible Things Without	

Deposition. (a) **Notice; subpoena.** A party may compel production of documents and tangible things from a nonparty by serving - reasonable time before the response is due but no later than 30 days before the end of any applicable discovery period - the notice required in Rule 205.2 and a subpoena compelling production or inspection of documents or tangible things. (b) **Contents of notice.** The notice must state: (1) the name of the person from whom production or inspection is sought to be compelled; (2) a reasonable time and place for the production or inspection; and (3) the items to be produced or inspected, either by individual item or by category, describing each item and category with reasonable particularity, and, if applicable, describing the desired testing and sampling with sufficient specificity to inform the nonparty of the means, manner, and procedure for testing or sampling. (c) **Requests for production of medical or mental health records of other non-parties.** If a party requests a nonparty to produce medical or mental health records of another nonparty, the requesting party must serve the nonparty whose records are sought with the notice required under this rule. This requirement does not apply under the circumstances set forth in Rule 196.1(c)(2). (d) **Response.** The nonparty must respond to the notice and subpoena in accordance with Rule 176.6. (e) **Custody, inspection and copying.** The party obtaining the production must make all materials produced available for inspection by any other party on reasonable notice, and must furnish copies to any party who requests at that party's expense. (f) **Cost of production.** A party requiring production of documents by a nonparty must reimburse the nonparty's reasonable costs of production.	

Experts: Tex. R. Civ. P. 195

RULE 195. DISCOVERY REGARDING TESTIFYING EXPERT WITNESSES	
195.1 Permissible Discovery Tools.	
A party may request another party to designate and disclose information concerning testifying expert witnesses only through ~~a request for disclosure~~disclosure under Rule 194 and through ~~depositions and reports as~~other discovery permitted by this rule.	The Discovery Subcommittee recommends revising TRCP 195.1 to correspond with changes to TRCP 194 (above).
195.2 Schedule for Designating Experts.	
Unless otherwise ordered by the court, a party must designate experts - that is, furnish information ~~requested under Rule 194.2(f)~~described in Rule 195.5(b) - by the ~~later of the~~ following ~~two~~ dates: ~~30 days after the request is served, or~~ (a) with regard to all experts testifying for a party seeking affirmative relief, 90 days before the end of the discovery period; (b) with regard to all other experts, 60 days before the end of the discovery period.	The Discovery Subcommittee recommends revising TRCP 195.2 to correspond with changes to TRCPs 194 and 195.5.
195.3 Scheduling Depositions.	
(a) **Experts for party seeking affirmative relief.** A party seeking affirmative relief must make an expert retained by, employed by, or otherwise in the control of the party available for deposition as follows: (1) **If no report furnished.** If a report of the expert's factual observations, tests, supporting data, calculations, photographs, and opinions is not produced when the expert is designated, then the party must make the expert available for deposition reasonably promptly after the expert is designated. If the deposition cannot--due to the actions of the tendering party--reasonably be concluded more than 15 days before the deadline for	

designating other experts, that deadline must be extended for other experts testifying on the same subject. (2) **If report furnished.** If a report of the expert's factual observations, tests, supporting data, calculations, photographs, and opinions is produced when the expert is designated, then the party need not make the expert available for deposition until reasonably promptly after all other experts have been designated. (b) **Other experts.** A party not seeking affirmative relief must make an expert retained by, employed by, or otherwise in the control of the party available for deposition reasonably promptly after the expert is designated and the experts testifying on the same subject for the party seeking affirmative relief have been deposed.	
195.4 Oral Deposition. In addition to ~~disclosure under Rule 194~~the information disclosed under Rule 195.5, a party may obtain discovery concerning the subject matter on which the expert is expected to testify, the expert's mental impressions and opinions, the facts known to the expert (regardless of when the factual information was acquired) that relate to or form the basis of the testifying expert's mental impressions and opinions, and other discoverable matters, including documents not produced in disclosure, only by oral deposition of the expert and by a report prepared by the expert under this rule.	The Discovery Subcommittee recommends revising TRCP 195.4 to correspond with changes to TRCPs 194 and 195.5.
195.5 ~~Court-Ordered Reports~~Expert Disclosures and Reports. (a) **Disclosures**. Pursuant to Rule 194.3, and without awaiting a discovery request, a party must provide the following for any testifying expert:	A portion of the Discovery Subcommittee recommends revising TRCP 195.5 to incorporate some elements of FRCP 26, including protecting draft reports, expanding expert disclosure requirements, exempting expert communications from disclosure, and expressly incorporating the consulting expert

(1) the expert's name, address, and telephone number; (2) the subject matter on which the expert will testify; and (3) the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting such information; (4) For any expert retained by, employed by, or otherwise subject to the control of the responding party, a party must provide the following: (A) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; (B) the expert's current resume and bibliography; (C) the witness's qualifications, including a list of all publications authored in the previous 10 years; (D) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and (E) a statement of the compensation to be paid for the study and testimony in the case. (b) **Expert reports.** If the discoverable factual observations, tests, supporting data, calculations, photographs, or opinions of an expert have not been recorded and reduced to tangible form, the court may order these matters reduced to tangible form and produced in addition to the deposition. If the trial court orders an expert report for a witness retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony, the report must contain: (1) a complete statement of all opinions the witness will express and the basis and reasons for them; (2) the facts or data considered by the witness in forming them;	exemption. The Discovery Subcommittee does not recommend requiring expert reports. Specific changes are noted below and areas of disagreement among the committee are highlighted. TRCP 195.5(a)(1)-(4) is moved from prior TRCP 194 due to proposed amendments to TRCP 194. The addition of TRCP 195.5(a)(4)(C)-(E) is from FRCP 26(a)(2)(B)'s expert report requirements. The addition to TRCP 195.5(b) is based on FRCP 26(a)(2)(B).

and (3) any exhibits that will be used to summarize or support them.	
(c) **Expert communication exempt from disclosure.** Communications between the party's attorney and any testifying expert witness in the case are exempt from discovery regardless of the form of the communications, except to the extent that the communications: (1) relate to compensation for the expert's study or testimony; (2) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or (3) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.	The addition of TRCP 195.5(c) is based on FRCP 26(b)(4)(C). The Discovery Subcommittee is not unanimous on this revision.
(d) **Draft reports or disclosures.** Any draft of a report by an expert or disclosure required under this rule is protected from disclosure regardless of the form in which the draft is recorded.	The addition of TRCP 195.5(d) is based on FRCP 26(b)(4)(B). The Discovery Subcommittee is not unanimous on this revision.
(e) **Expert employed for trial preparation.** A party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial and whose mental impressions or opinions have not been reviewed by a testifying expert. But a party may do so as provided in Rule 204.2 (Report of Examining Physician or Psychologist) or on showing exceptional circumstances under which it is impracticable for the party to obtain facts on the same subject by other means.	The addition of TRCP 195.5(e) is based on FRCP 26(b)(4)(D), which expressly incorporates the consulting expert exemption referred to in the comments and TRCP 192.3(e) and provides for an exceptional circumstance exception to the exemption. The Discovery Subcommittee recommends one revision to the "exceptional circumstances" exception to remove the ability to discover the *opinions* of consulting experts on a showing of exceptional circumstances.
195.6 Amendment and Supplementation. A party's duty to amend and supplement written discovery regarding a testifying expert is governed by Rule 193.5. If an expert witness is retained by, employed by, or otherwise under the control of a party, that party must also amend or supplement	

any deposition testimony or written report by the expert, but only with regard to the expert's mental impressions or opinions and the basis for them. **195.7 Cost of Expert Witnesses.** When a party takes the oral deposition of an expert witness retained by the opposing party, all reasonable fees charged by the expert for time spent in preparing for, giving, reviewing, and correcting the deposition must be paid by the party that retained the expert.	The Discovery Subcommittee does not recommend adopting FRCP 26(b)(4)(E), which requires the party deposing a testifying expert pay the expert a reasonable fee for time spent responding to discovery. The Discovery Subcommittee takes the position that this would invite abuse and hearings. Additionally, the TRCPs do not require expert reports like the FRCPs do, and the TRCPs impose limitations on depositions.

Production and Inspection: Tex. R. Civ. P. 196

RULE 196. REQUESTS FOR PRODUCTION AND INSPECTION TO PARTIES; REQUESTS AND MOTIONS FOR ENTRY UPON PROPERTY	The Discovery Subcommittee recommends revising the format of TRCP 196.1 to follow FRCP 34's format for clarity.
196.1 Request for Production and Inspection to Parties.	
(a) **Request.** A party may serve on another party ~~no later than 30 days before the end of the discovery period~~ a request for production or for inspection within the scope of discovery, to inspect, sample, test, photograph and copy ~~documents or tangible things within the scope of discovery.~~the following items in the responding party's possession, custody, or control: (1) any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or (2) any designated tangible things.	The Discovery Subcommittee recommends revising TRCP 196.1 based on FRCP 34(a) because the FRCP more specifically covers electronically stored information.
(b) **Timing of request.** The request must be served no later than 30 days before the end of the discovery period.	
(~~b~~c) **Contents of request.** The request (1) must ~~specify the items to be produced or inspected, either by individual item or by category, and~~ describe with reasonable particularity each item ~~and~~ or category of items to be inspected; (2) ~~The request~~ must specify a reasonable time (on or after the date on which the response is due), ~~and~~ place, and manner for the production or inspection and for performing the related acts; and (3) If the requesting party will sample or test the requested items, the means, manner and procedure for testing or sampling must be described with sufficient	The Discovery Subcommittee recommends revising the format of former subsection b (now c) to follow FRCP 34(b)(1) for clarity.

specificity to inform the producing party of the means, manner, and procedure for testing or sampling. (~~c~~d) **Requests for production of medical or mental health records regarding nonparties.** (1) **Service of request on nonparty.** If a party requests another party to produce medical or mental health records regarding a nonparty, the requesting party must serve the nonparty with the request for production under Rule 21a. (2) **Exceptions.** A party is not required to serve the request for production on a nonparty whose medical records are sought if: (A) the nonparty signs a release of the records that is effective as to the requesting party; (B) the identity of the nonparty whose records are sought will not directly or indirectly be disclosed by production of the records; or (C) the court, upon a showing of good cause by the party seeking the records, orders that service is not required. (3) **Confidentiality.** Nothing in this rule excuses compliance with laws concerning the confidentiality of medical or mental health records. **196.2 Response to Request for Production and Inspection.** (a) **Time for response.** The responding party must serve a written response on the requesting party within 30 days after service of the request~~, except that a defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request.~~. (b) **Content of response.** ~~With respect to~~For each item or category of items, the ~~responding party must state objections and assert privileges as required by these rules, and state, as appropriate, that~~response:	The Discovery Subcommittee recommends removing this language from TRCP 196.2(a) so that no discovery can be served prior to the answer. The Discovery Subcommittee also rejected the following language from FRCP 34(b)(2)(A) because another TRCP already permits this: "A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court."

(1) must either state that ~~production, inspection, or other requested action~~ inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request or assert privileges as required by these rules, including the reasons; (2) ~~the requested items are being served on the requesting party with the response~~may state that it will produce copies of documents or electronically stored information instead of permitting inspection; (3) state, as appropriate, that production, inspection, or other requested action will take place at a specified time and place, if the responding party is objecting to the time and place of production; or (4) state, as appropriate, that no items have been identified - after a diligent search - that are responsive to the request.	The Discovery Subcommittee recommends revising TRCP 196.2(b) based on FRCP 34(b)(2)(B).
196.3 Production. (a) **Time and place of production.** Subject to any objections stated in the response, the production must be completed no later than the time for the production or inspection specified in the request or another reasonable time specified in the response. Subject to any objections stated in the response, the responding party must produce the requested documents or tangible things within the person's possession, custody or control at ~~either~~ the ~~time and~~ place requested or the ~~time and~~ place stated in the response, unless otherwise agreed by the parties or ordered by the court, and must provide the requesting party a reasonable opportunity to inspect them. (b) **Copies.** The responding party may produce copies in lieu of originals unless a question is raised as to the authenticity of the original or in the circumstances it would be unfair to produce copies in lieu of originals. If originals are produced, the responding party is entitled to retain the originals while the requesting party inspects and copies them.	The Discovery Subcommittee recommends revising TRCP 196.3(a) to include language in the last sentence of FRCP 34(b)(2)(B).

(c) **Organization.** The responding party must ~~either~~ produce documents and tangible things as they are kept in the usual course of business or organize and label them to correspond with the categories in the request.	The Discovery Subcommittee recommends revising TRCP 196.3(c) to give a party the option of asking the court to order production using the other organizational method.
196.4 ~~Electronic or Magnetic Data~~Electronically Stored Information. (a) **Request.** To obtain discovery of data or information that exists in electronic ~~or magnetic~~ form ("electronically stored information"), the requesting party must ~~specifically request production of electronic or magnetic data and~~ specify the form in which the requesting party wants it produced. (b) **Responses and Objections.** ~~The responding party~~The response: (1) must either state that production of the electronically stored information ~~or magnetic data~~ that is responsive to the request and is reasonably available to the responding party in its ordinary course of business will occur or state with specificity the grounds for objecting to the request or assert privileges as required by these rules, including the reasons; (2) may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form—or if no form was specified in the request—the party must state the form or forms it intends to use; and (3) must object to the production, ~~. I~~if the responding party cannot - through reasonable efforts - retrieve the ~~data or~~electronically stored information requested or produce it in the form requested~~, the responding party must state an objection complying with these rules~~. If the court orders the responding party to comply with the request, the court must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.	The Discovery Subcommittee recommends revising TRCP 196.4 based on FRCP 34(b)(2)(D) and (E).

(c) **Producing the Electronically Stored Information**. Unless otherwise stipulated or ordered by the court, if a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and a party need not produce the same electronically stored information in more than one form. **196.5 Destruction or Alteration.** Testing, sampling or examination of an item may not destroy or materially alter an item unless previously authorized by the court. **196.6 Expenses of Production.** Unless otherwise ordered by the court for good cause, the expense of producing items will be borne by the responding party and the expense of inspecting, sampling, testing, photographing, and copying items produced will be borne by the requesting party. **196.7 Request of Motion for Entry Upon Property.**	*Note there are two cases pending at the Supreme Court of Texas on this topic, set to be argued on March 9. *See In re State Farm Lloyds*, Case No. 15-0903, and *In re State Farm Lloyds*, Case No. 15-0905.
(a) **Request or motion.** ~~A party may gain entry on designated land or other property to inspect, measure, survey, photograph, test, or sample the property or any designated object or operation thereon by serving - no later than 30 days before the end of any applicable discovery period~~A party may serve on any other party a request within the scope of discovery to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it. If ~~-~~ ~~(1) a request on all parties if~~ the land or property belongs to a ~~party~~non-party, ~~or~~ the party seeking entry onto designated land or other property possessed or controlled by the nonparty must file	The Discovery Subcommittee recommends revising TRCP 196.7(a) based on FRCP 34(a)(2).

~~(2)~~ a motion and notice of hearing on all parties and the nonparty ~~if the land or property belongs to a nonparty~~. If the identity or address of the nonparty is unknown and cannot be obtained through reasonable diligence, the court must permit service by means other than those specified in Rule 21a that are reasonably calculated to give the nonparty notice of the motion and hearing.	
(b) **Timing of request.** The request for entry upon a party's property, or the order for entry upon a nonparty's property, must be filed no later than 30 days before the end of any applicable discovery period.	The Discovery Subcommittee recommends setting out TRCP 196.7(b) for clarity.
(~~b~~c) ~~**Time**~~**Requested time, place, and other conditions of inspection.** ~~The request for entry upon a party's property, or the order for entry upon a nonparty's property,~~The request must state the time, place, manner, conditions, and scope of the inspection, and must specifically describe any desired means, manner, and procedure for testing or sampling, and the person or persons by whom the inspection, testing, or sampling is to be made.	The Discovery Subcommittee recommends making these stylistic changes to TRCP 196.7(c) for clarity.
(~~c~~d) **Response to request for entry.**	
(1) **Time to respond.** The responding party must serve a written response on the requesting party within 30 days after service of the request~~, except that a defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request~~.	The Discovery Subcommittee recommends removing this language from TRCP 196.7(d) so that no discovery can be served prior to the answer.
(2) **Content of response.** The responding party must state with specificity the grounds for ~~objections~~ objecting and assert privileges as required by these rules, including the reasons, and state, as appropriate, that:	The Discovery Subcommittee recommends revising TRCP 196.7(d)(2) to correspond with other changes in this Rule.
(A) entry or other requested action will be permitted as requested;	
(B) entry or other requested action will take place at a specified time and place, if the responding party is objecting to the time and	

place of production; or (C) entry or other requested action cannot be permitted for reasons stated in the response. (~~d~~e) **Requirements for order for entry on nonparty's property.** An order for entry on a nonparty's property may issue only for good cause shown and only if the land, property, or object thereon as to which discovery is sought is relevant to the ~~subject matter~~claims or defenses of the action.	The Discovery Subcommittee recommends revising TRCP 196.7(e) to parallel the scope of discovery in FRCP 26.

Interrogatories: Tex. R. Civ. P. 197

RULE 197. INTERROGATORIES TO PARTIES	
197.1 Interrogatories – In General.~~.~~	The Discovery Subcommittee recommends revising the format of TRCP 197.1 to follow FRCP 33's format for clarity.
(a) **Number.** Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 15 written interrogatories in a Level 1 case or 25 written interrogatories in Level 2 or Level 3 cases, including all discrete subparts, but excluding interrogatories asking a party only to identify or authenticate specific documents.	The Discovery Subcommittee recommends adding 197.1(a), based on FRCP 33(a)(1), for convenience.
(b) **Scope.** A written ~~interrogatories~~ interrogatory ~~to~~ may inquire about any matter within the scope of discovery except matters covered by Rule 195. An interrogatory may inquire whether a party makes a specific legal or factual contention and may ask the responding party to state the legal theories and to describe in general the factual bases for the party's claims or defenses, but interrogatories may not be used to require the responding party to marshal all of its available proof or the proof the party intends to offer at trial.	The Discovery Subcommittee rejected the following language from FRCP 33(a)(2) because parties do not need to be invited to do this: "the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time."
(c) **Timing of request.** A party may serve written interrogatories on another party ~~–~~no later than 30 days before the end of the discovery period.	
197.2 Response to Interrogatories.	The Discovery Subcommittee recommends moving the verification requirement to TRCP 197.2(a) from 197.2(d) to track the format of FRCP 33 and to indicate who must respond earlier in the rule. The Discovery Subcommittee also revised the verification requirement to: (1) remove confusing language indicating an agent could not
(a) **Responding parties; verification.** A responding party - not an attorney of record as otherwise permitted by Rule 14 - must sign the answers under oath or a declaration except that: (1) when answers are based on information obtained from other persons, the party may so state, and (2) a party need not sign answers to interrogatories about persons with knowledge of relevant facts, trial witnesses, and legal contentions.	

(b) **Time for response.** The responding party must serve a written response on the requesting party within 30 days after service of the interrogatories~~, except that a defendant served with interrogatories before the defendant's answer is due need not respond until 50 days after service of the interrogatories.~~. (~~b~~c) **Content of response.** A response must include the party's answers to the interrogatories and may include objections and assertions of privilege as required under these rules. (d) **Objections.** The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure. (~~c~~e) **Option to produce records.** If the answer to an interrogatory may be derived or ascertained from public records, from the responding party's business records, or from an examination, auditing, ~~a~~ compilation, abstract or summary of the responding party's business records (including electronically stored information), and the burden of deriving or ascertaining the answer is substantially the same for the requesting party as for the responding party, the responding party may answer the interrogatory by (1) specifying the records that must be reviewed, in sufficient detail to enable the requesting party to locate and identify them as readily as the responding party could; and, (2) if applicable, producing the records or compilation, abstract or summary of the records; and~~. The records from which the answer may be derived or ascertained must be specified in sufficient detail to permit the requesting party to locate and identify them as readily as can the responding party.~~ (3) ~~If the responding party has specified business records, the responding party must state~~stating a reasonable time and place for examination of the documents. The responding party must produce the documents at the time and place stated, unless	respond, and (2) to add declaration language. The Discovery Subcommittee recommends removing this language from TRCP 197.2(b) so that no discovery can be served prior to the answer. The Discovery Subcommittee also rejected the following language from FRCP 33(b)(2) because another TRCP already permits this: "A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court." The Discovery Subcommittee recommends adding TRCP 197.2(d) from FRCP 33(b)(4). The Discovery Subcommittee recommends revising TRCP 197.2(e) to correspond with language in FRCP 33(d).

otherwise agreed by the parties or ordered by the court, and must provide the requesting party a reasonable opportunity to inspect them. **197.3 Use.** Answers to interrogatories may be used only against the responding party. An answer to an interrogatory inquiring about matters described in Rule 194.2(c) and (d) that has been amended or supplemented is not admissible and may not be used for impeachment.	

Admissions: Tex. R. Civ. P. 198

RULE 198. REQUESTS FOR ADMISSIONS	
198.1 Request for Admissions.	The Discovery Subcommittee recommends breaking down TRCP 198.1 into subsections for clarity.
(a) **Request.** A party may serve on another party ~~no later than 30 days before the end of the discovery period~~ written requests that the other party admit, for purposes of the pending action only, the truth of any matter within the scope of discovery, including:	
(1) ~~statements of opinion or of fact or of the application of law to fact~~facts, the application of law to fact, or opinions about either~~, or~~; and	The revisions to TRCP 198.1(a)(1)-(2) are from FRCP 36(a)(1) and 36(b).
(2) the genuineness of any described documents ~~served with the request or otherwise made available for inspection and copying~~.	
(b) **Number**. Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 15 written requests for admissions in a Level 1 case or 25 written requests for admissions in Level 2 or Level 3 cases, including all discrete subparts, but excluding requests asking a party only to identify or authenticate specific documents.	The Discovery Subcommittee recommends limiting the number of requests for admissions in TRCP 198.1(b) to correspond with the limit on interrogatories.
(c) **Timing of request.** The request must be served no later than 30 days before the end of the discovery period.	
(d) **Form; copy of a document**. Each matter for which an admission is requested must be stated separately. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying.	The revisions to TRCP 198.1(d) are from FRCP 36(a)(2).
198.2 Response to Requests for Admissions.	The Discovery Subcommittee recommends removing this language from TRCP 198.2(a) so that no discovery can be served
(a) **Time ~~for response~~to respond; effect of failure to respond.** The responding party must serve a written response on the requesting party within 30 days after service of the request~~,~~	

~~except that a defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request.~~. If a response is not timely served, the request is considered admitted without the necessity of a court order. (b) ~~**Content of response**~~**Answer.** If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny. ~~Unless the responding party states an objection or asserts a privilege, the responding party must specifically admit or deny the request or explain in detail the reasons that the responding party cannot admit or deny the request. A response must fairly meet the substance of the request. The responding party may qualify an answer, or deny a request in part, only when good faith requires. Lack of information or knowledge is not a proper response unless the responding party states that a reasonable inquiry was made but that the information known or easily obtainable is insufficient to enable the responding party to admit or deny. An assertion that the request presents an issue for trial is not a proper response.~~ ~~(c) **Effect of failure to respond.** If a response is not timely served, the request is considered admitted without the necessity of a court order.~~ (c) **Motion regarding the sufficiency of an answer or objection.** The requesting party may move to determine the sufficiency of an answer or objection. Unless the court finds an objection justified, it must order that an answer be served. On finding that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served.	prior to the answer. The Discovery Subcommittee recommends adding this language to TRCP 198.2(a) from TRCP 198.2(c) for clarity. The revisions to TRCP 198.2(b) are from FRCP 36(a)(4). TRCP 198.2(c) is moved to TRCP 198.2(a). The addition of TRCP 198.2(c) is from FRCP 36(a)(6).

198.3 Effect of an Admission~~s~~; Withdrawal or Amendment. An~~y~~ admission made by a party under this rule ~~may be used solely in the pending action~~is not an admission for any other purpose and cannot be used against the party in any other proceeding. A matter admitted under this rule is conclusively established ~~as to the party making the admission~~ unless the court, on motion, permits the party to withdraw or amend the admission. The court may permit the party to withdraw or amend the admission if: (a) the party shows good cause for the withdrawal or amendment; and (b) the court finds that ~~the parties relying upon the responses and deemed admissions will not be unduly prejudiced and that the presentation of the merits of the action will be subserved by permitting the party to amend or withdraw the admission.~~the withdrawal or amendment would promote the presentation of the merits of the action and the court is not persuaded that the withdrawal or amendment would prejudice the requesting party in maintaining or defending the action on the merits.	The revisions to TRCP 198.3 are from FRCP 36(b). It is also stylistically revised for clarity and parallelism.

Depositions, Pre-Suit Depositions, and Depositions Pending Appeal:

Tex. R. Civ. P. 199-203

RULE 199. DEPOSITIONS UPON ORAL EXAMINATION **199.1 Oral Examination; Alternative Methods of Conducting or Recording.** (a) **Generally.** A party may take the testimony of any person or entity by deposition on oral examination before any officer authorized by law to take depositions. The testimony, objections, and any other statements during the deposition must be recorded at the time they are given or made. (b) **Depositions by ~~telephone or other~~ remote ~~electronic~~ means.** ~~A party may take~~The parties may stipulate—or the court may on motion order—an oral deposition by telephone or other remote electronic means~~ if the party gives reasonable prior written notice of intent to do so~~. For the purposes of these rules, an oral deposition taken by telephone or other remote electronic means is considered as having been taken in the district and at the place where the witness is located when answering the questions. The officer taking the deposition may be located with the party noticing the deposition instead of with the witness if the witness is placed under oath by a person who is present with the witness and authorized to administer oaths in that jurisdiction. (c) **Non-stenographic recording.** Any party may cause a deposition upon oral examination to be recorded by other than stenographic means, including videotape recording. The party requesting the non-stenographic recording will be responsible for obtaining a person authorized by law to administer the oath and for assuring that the recording will be intelligible, accurate, and trustworthy. At least five days prior to the deposition, the party must serve on the witness and all parties a notice, either in the notice of deposition or separately, that the deposition will be recorded by other than stenographic means. This notice must state the method of non-stenographic recording to be used and whether the deposition will also be recorded	The Discovery Subcommittee considered revising TRCP 199.1(a) to adopt part of FRCP 30(a)(2) to require a party to obtain leave of court to take more than 10 depositions (change only for oral depositions). However, due to deposition time limits already in the TRCPs, one or two committee members disagree with this change. The Discovery Subcommittee recommends revising TRCP 199.1(b) to be consistent with FRCP 30(b)(4), which requires agreement or leave of court for remote depositions.

stenographically. Any other party may then serve written notice designating another method of recording in addition to the method specified, at the expense of such other party unless the court orders otherwise. **199.2 Procedure for Noticing Oral Depositions.** (a) **Time to notice deposition.** A notice of intent to take an oral deposition must be served on the witness and all parties a reasonable time before the deposition is taken. An oral deposition may be taken outside the discovery period only by agreement of the parties or with leave of court. (b) **Content of notice.** (1) **Identity of witness; organizations.** The notice must state the name of the witness, which may be either an individual or a public or private corporation, partnership, association, governmental agency, or other organization. If an organization is named as the witness, the notice must describe with reasonable particularity the matters on which examination is requested. In response, the organization named in the notice must - a reasonable time before the deposition - designate one or more individuals to testify on its behalf and set forth, for each individual designated, the matters on which the individual will testify. Each individual designated must testify as to matters that are known or reasonably available to the organization. This subdivision does not preclude taking a deposition by any other procedure authorized by these rules. (2) **Time and place.** The notice must state a reasonable time and place for the oral deposition. The place may be in: (A) the county of the witness's residence; (B) the county where the witness is employed or regularly transacts business in person; (C) the county of suit, if the witness is a party or a person designated by a party under Rule	

199.2(b)(1);

(D) the county where the witness was served with the subpoena, or within 150 miles of the place of service, if the witness is not a resident of Texas or is a transient person; or

(E) subject to the foregoing, at any other convenient place directed by the court in which the cause is pending.

(3) **Alternative means of conducting and recording.** The notice must state whether the deposition is to be taken by telephone or other remote electronic means and identify the means. If the deposition is to be recorded by nonstenographic means, the notice may include the notice required by Rule 199.1(c).

(4) **Additional attendees.** The notice may include the notice concerning additional attendees required by Rule 199.5(a)(3).

(5) **Request for production of documents.** A notice may include a request that the witness produce at the deposition documents or tangible things within the scope of discovery and within the witness's possession, custody, or control. If the witness is a nonparty, the request must comply with Rule 205 and the designation of materials required to be identified in the subpoena must be attached to, or included in, the notice. The nonparty's response to the request is governed by Rules 176 and 205. When the witness is a party or subject to the control of a party, document requests under this subdivision are governed by Rules 193 and 196.

199.3 Compelling Witness to Attend.

A party may compel the witness to attend the oral deposition by serving the witness with a subpoena under Rule 176. If the witness is a party or is retained by, employed by, or otherwise subject to the control of a party, however, service of the notice of oral deposition upon the party's attorney has the same effect

as a subpoena served on the witness. **199.4 Objections to Time and Place of Oral Deposition.** A party or witness may object to the time and place designated for an oral deposition by motion for protective order or by motion to quash the notice of deposition. If the motion is filed by the third business day after service of the notice of deposition, an objection to the time and place of a deposition stays the oral deposition until the motion can be determined. **199.5 Examination, Objection, and Conduct During Oral Depositions.** (a) **Attendance.** (1) **Witness.** The witness must remain in attendance from day to day until the deposition is begun and completed. (2) **Attendance by party.** A party may attend an oral deposition in person, even if the deposition is taken by telephone or other remote electronic means. If a deposition is taken by telephone or other remote electronic means, the party noticing the deposition must make arrangements for all persons to attend by the same means. If the party noticing the deposition appears in person, any other party may appear by telephone or other remote electronic means if that party makes the necessary arrangements with the deposition officer and the party noticing the deposition. (3) **Other attendees.** If any party intends to have in attendance any persons other than the witness, parties, spouses of parties, counsel, employees of counsel, and the officer taking the oral deposition, that party must give reasonable notice to all parties, either in the notice of deposition or separately, of the identity of the other persons. (b) **Oath; examination.** Every person whose deposition is taken	The Discovery Subcommittee recommends adopting a

by oral examination must first be placed under oath. The parties may examine and cross-examine the witness. Any party, in lieu of participating in the examination, may serve written questions in a sealed envelope on the party noticing the oral deposition, who must deliver them to the deposition officer, who must open the envelope and propound them to the witness. An objection at the time of the examination to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. The record must state: (1) the officer's name and business address; (2) the date, time, and place of the deposition; (3) the deponent's name; (4) the administration of the oath or affirmation to the deponent; and (5) the identity of all persons present. (c) **Qualifications and Objections to Translator** [Placeholder]	portion of FRCP 30(c)(2) at TRCP 199.5(b) to require objections to officer's qualifications and the manner of taking the deposition be noted on the record. The Discovery Subcommittee also recommends revising TRCP 199.5(b) to adopt FRCP 30(b)(5)(A), amended to require only that the record must state these items. The Discovery Subcommittee does not recommend requiring an officer begin the deposition with an on-the-record statement of these items like the FRCPs. The Discovery Subcommittee recommends adding a rule on qualifications and objections to a translator at TRCP 199.5(c).
(~~c~~d) **Time limitation.** No side may examine or cross-examine an individual witness for more than six hours. Breaks during depositions do not count against this limitation. The court must allow additional time consistent with Rule 192.3 and Rule 192.4 if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination. (~~d~~e) **Conduct during the oral deposition; conferences.** The oral deposition must be conducted in the same manner as if the testimony were being obtained in court during trial. If the deposition is recorded nonstenographically, the deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques. Counsel should cooperate with and be courteous to each other and to the witness. The witness	The Discovery Subcommittee recommends revising TRCP 199.5(d) to adopt language from FRCP 30(d); the Discovery Subcommittee does not recommend adopting the FRCP's limit of "one day of 7 hours" for a deposition. The Discovery Subcommittee recommends revising TRCP 199.5(e) to adopt language in FRCP 30(b)(5)(B).

should not be evasive and should not unduly delay the examination. Private conferences between the witness and the witness's attorney during the actual taking of the deposition are improper except for the purpose of determining whether a privilege should be asserted. Private conferences may be held, however, during agreed recesses and adjournments. If the lawyers and witnesses do not comply with this rule, the court may allow in evidence at trial statements, objections, discussions, and other occurrences during the oral deposition that reflect upon the credibility of the witness or the testimony. (~~e~~f) **Objections.** Objections to questions during the oral deposition are limited to "Objection, leading" and "Objection, form." Objections to testimony during the oral deposition are limited to "Objection, non-responsive." These objections are waived if not stated as phrased during the oral deposition. All other objections need not be made or recorded during the oral deposition to be later raised with the court. The objecting party must give a clear and concise explanation of an objection if requested by the party taking the oral deposition, or the objection is waived. Argumentative or suggestive objections or explanations waive objection and may be grounds for terminating the oral deposition or assessing costs or other sanctions. The officer taking the oral deposition will not rule on objections but must record them for ruling by the court. The officer taking the oral deposition must not fail to record testimony because an objection has been made. (~~f~~g) **Instructions not to answer.** An attorney may instruct a witness not to answer a question during an oral deposition only if necessary to preserve a privilege, comply with a court order or these rules, protect a witness from an abusive question or one for which any answer would be misleading, or secure a ruling pursuant to paragraph (g). The attorney instructing the witness not to answer must give a concise, non-argumentative, non-suggestive explanation of the grounds for the instruction if requested by the party who asked the question. (~~g~~h) **Suspending the deposition.** If the time limitations for the deposition have expired or the deposition is being conducted or defended in violation of these rules, a party or witness may suspend the oral deposition for the time necessary to obtain a	The Discovery Subcommittee recommends considering adopting a portion of FRCP 30(c)(2) for TRCP 199.5(f). FRCP 30(c)(2) provides: "An objection at the time of the examination—whether to evidence, to a party's conduct, . . . or to any other aspect of the deposition—must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion [to terminate or limit the deposition.]"

ruling. (~~h~~i) **Good faith required.** An attorney must not ask a question at an oral deposition solely to harass or mislead the witness, for any other improper purpose, or without a good faith legal basis at the time. An attorney must not object to a question at an oral deposition, instruct the witness not to answer a question, or suspend the deposition unless there is a good faith factual and legal basis for doing so at the time. **199.6 Hearing on Objections.** Any party may, at any reasonable time, request a hearing on an objection or privilege asserted by an instruction not to answer or suspension of the deposition; provided the failure of a party to obtain a ruling prior to trial does not waive any objection or privilege. The party seeking to avoid discovery must present any evidence necessary to support the objection or privilege either by testimony at the hearing or by affidavits served on opposing parties at least seven days before the hearing. If the court determines that an *in camera* review of some or all of the requested discovery is necessary to rule, answers to the deposition questions may be made in camera, to be transcribed and sealed in the event the privilege is sustained, or made in an affidavit produced to the court in a sealed wrapper. **RULE 200. DEPOSITIONS UPON WRITTEN QUESTIONS** **200.1 Procedure for Noticing Deposition Upon Written Questions.** (a) **Who may be noticed; when.** A party may take the testimony of any person or entity by deposition on written questions before any person authorized by law to take depositions on written questions. A notice of intent to take the deposition must be served on the witness and all parties at least 20 days before the deposition is taken. A deposition on written questions may be taken outside the discovery period only by agreement of the parties or with leave of court. The party	Note the Discovery Subcommittee does not recommend adopting FRCP 30(a)'s 10-deposition rule for depositions on written questions.

noticing the deposition must also deliver to the deposition officer a copy of the notice and of all written questions to be asked during the deposition. (b) **Content of notice.** The notice must comply with Rules 199.1(b), 199.2(b), and 199.5(a)(3). If the witness is an organization, the organization must comply with the requirements of that provision. The notice also may include a request for production of documents as permitted by Rule 199.2(b)(5), the provisions of which will govern the request, service, and response. **200.2 Compelling Witness to Attend.** A party may compel the witness to attend the deposition on written questions by serving the witness with a subpoena under Rule 176. If the witness is a party or is retained by, employed by, or otherwise subject to the control of a party, however, service of the deposition notice upon the party's attorney has the same effect as a subpoena served on the witness. **200.3 Questions and Objections.** (a) **Direct questions.** The direct questions to be propounded to the witness must be attached to the notice. (b) **Objections and additional questions.** Within ten days after the notice and direct questions are served, any party may object to the direct questions and serve cross-questions on all other parties. Within five days after cross-questions are served, any party may object to the cross-questions and serve redirect questions on all other parties. Within three days after redirect questions are served, any party may object to the redirect questions and serve re-cross questions on all other parties. Objections to re-cross questions must be served within five days after the earlier of when re-cross questions are served or the time of the deposition on written questions. (c) **Objections to form of questions.** Objections to the form of a question are waived unless asserted in accordance with this	

subdivision. **200.4 Conducting the Deposition Upon Written Questions.** The deposition officer must: take the deposition on written questions at the time and place designated; record the testimony of the witness under oath in response to the questions; and prepare, certify, and deliver the deposition transcript in accordance with Rule 203. The deposition officer has authority when necessary to summon and swear an interpreter to facilitate the taking of the deposition. **RULE 201. DEPOSITIONS IN FOREIGN JURISDICTIONS FOR USE IN TEXAS PROCEEDINGS; DEPOSITIONS IN TEXAS FOR USE IN FOREIGN PROCEEDINGS** **201.1 Depositions in Foreign Jurisdictions for Use in Texas Proceedings.** (a) **Generally.** A party may take a deposition on oral examination or written questions of any person or entity located in another state or a foreign country for use in proceedings in this State. The deposition may be taken by: (1) notice; (2) letter rogatory, letter of request, or other such device; (3) agreement of the parties; or (4) court order. (b) **By notice.** A party may take the deposition by notice in accordance with these rules as if the deposition were taken in this State, except that the deposition officer may be a person authorized to administer oaths in the place where the deposition is taken. (c) **By letter rogatory.** On motion by a party, the court in which an action is pending must issue a letter rogatory on terms that	Note the Discovery Subcommittee does not recommend adopting FRCP 30(a)'s 10-deposition rule in TRCP 201.

are just and appropriate, regardless of whether any other manner of obtaining the deposition is impractical or inconvenient. The letter must: (1) be addressed to the appropriate authority in the jurisdiction in which the deposition is to be taken; (2) request and authorize that authority to summon the witness before the authority at a time and place stated in the letter for examination on oral or written questions; and (3) request and authorize that authority to cause the witness's testimony to be reduced to writing and returned, together with any items marked as exhibits, to the party requesting the letter rogatory. (d) **By letter of request or other such device.** On motion by a party, the court in which an action is pending, or the clerk of that court, must issue a letter of request or other such device in accordance with an applicable treaty or international convention on terms that are just and appropriate. The letter or other device must be issued regardless of whether any other manner of obtaining the deposition is impractical or inconvenient. The letter or other device must: (1) be in the form prescribed by the treaty or convention under which it is issued, as presented by the movant to the court or clerk; and (2) must state the time, place, and manner of the examination of the witness. (e) **Objections to form of letter rogatory, letter of request, or other such device.** In issuing a letter rogatory, letter of request, or other such device, the court must set a time for objecting to the form of the device. A party must make any objection to the form of the device in writing and serve it on all other parties by the time set by the court, or the objection is waived. (f) **Admissibility of evidence.** Evidence obtained in response to a letter rogatory, letter of request, or other such device is not inadmissible merely because it is not a verbatim transcript, or the testimony was not taken under oath, or for any similar	

departure from the requirements for depositions taken within this State under these rules. (g) **Deposition by electronic means.** A deposition in another jurisdiction may be taken by telephone, video conference, teleconference, or other electronic means under the provisions of Rule 199. **201.2 Depositions in Texas for Use in Proceedings in Foreign Jurisdictions.** If a court of record of any other state or foreign jurisdiction issues a mandate, writ, or commission that requires a witness's oral or written deposition testimony in this State, the witness may be compelled to appear and testify in the same manner and by the same process used for taking testimony in a proceeding pending in this State. **RULE 202. DEPOSITIONS BEFORE SUIT OR TO INVESTIGATE CLAIMS** **202.1 Generally.** A person may petition the court for an order authorizing the taking of a deposition on oral examination or written questions either: (a) to perpetuate or obtain the person's own testimony or that of any other person for use in an anticipated suit; or (b) to investigate a potential claim or suit. **202.2 Petition** The petition must: (a) be verified; (b) be filed in a proper court of any county: (1) where venue of the anticipated suit may lie, if suit is	

anticipated; or (2) where the witness resides, if no suit is yet anticipated; (c) be in the name of the petitioner; (d) state either: (1) that the petitioner anticipates the institution of a suit in which the petitioner may be a party; or (2) that the petitioner seeks to investigate a potential claim by or against petitioner; (e) state the subject matter of the anticipated action, if any, and the petitioner's interest therein; (f) if suit is anticipated, either: (1) state the names of the persons petitioner expects to have interests adverse to petitioner's in the anticipated suit, and the addresses and telephone numbers for such persons; or (2) state that the names, addresses, and telephone numbers of persons petitioner expects to have interests adverse to petitioner's in the anticipated suit cannot be ascertained through diligent inquiry, and describe those persons; (g) state the names, addresses and telephone numbers of the persons to be deposed, the substance of the testimony that the petitioner expects to elicit from each, and the petitioner's reasons for desiring to obtain the testimony of each; and (h) request an order authorizing the petitioner to take the depositions of the persons named in the petition. **202.3 Notice and Service.** (a) **Personal service on witnesses and persons named.** At least 15 days before the date of the hearing on the petition, the petitioner must serve the petition and a notice of the hearing – in accordance with Rule 21a - on all persons petitioner seeks to	

depose and, if suit is anticipated, on all persons petitioner expects to have interests adverse to petitioner's in the anticipated suit.

(b) **Service by publication on persons not named.**

(1) **Manner.** Unnamed persons described in the petition whom the petitioner expects to have interests adverse to petitioner's in the anticipated suit, if any, may be served by publication with the petition and notice of the hearing. The notice must state the place for the hearing and the time it will be held, which must be more than 14 days after the first publication of the notice. The petition and notice must be published once each week for two consecutive weeks in the newspaper of broadest circulation in the county in which the petition is filed, or if no such newspaper exists, in the newspaper of broadest circulation in the nearest county where a newspaper is published.

(2) **Objection to depositions taken on notice by publication.** Any interested party may move, in the proceeding or by bill of review, to suppress any deposition, in whole or in part, taken on notice by publication, and may also attack or oppose the deposition by any other means available.

(c) **Service in probate cases.** A petition to take a deposition in anticipation of an application for probate of a will, and notice of the hearing on the petition, may be served by posting as prescribed by Section 33(f)(2) of the Probate Code. The notice and petition must be directed to all parties interested in the testator's estate and must comply with the requirements of Section 33(c) of the Probate Code insofar as they may be applicable.

(d) **Modification by order.** As justice or necessity may require, the court may shorten or lengthen the notice periods under this rule and may extend the notice period to permit service on any expected adverse party.

202.4 Order.

(a) **Required findings.** The court must order a deposition to be taken if, but only if, it finds that:

(1) allowing the petitioner to take the requested deposition may prevent a failure or delay of justice in an anticipated suit; or

(2) the likely benefit of allowing the petitioner to take the requested deposition to investigate a potential claim outweighs the burden or expense of the procedure.

(b) **Contents.** The order must state whether a deposition will be taken on oral examination or written questions. The order may also state the time and place at which a deposition will be taken. If the order does not state the time and place at which a deposition will be taken, the petitioner must notice the deposition as required by Rules 199 or 200. The order must contain any protections the court finds necessary or appropriate to protect the witness or any person who may be affected by the procedure.

202.5 Manner of Taking and Use.

Except as otherwise provided in this rule, depositions authorized by this rule are governed by the rules applicable to depositions of non-parties in a pending suit. The scope of discovery in depositions authorized by this rule is the same as if the anticipated suit or potential claim had been filed. A court may restrict or prohibit the use of a deposition taken under this rule in a subsequent suit to protect a person who was not served with notice of the deposition from any unfair prejudice or to prevent abuse of this rule.

RULE 203. SIGNING, CERTIFICATION AND USE OF ORAL

AND WRITTEN DEPOSITIONS

203.1 Signature and Changes.

(a) **Deposition transcript to be provided to witness.** The deposition officer must provide the original deposition transcript to the witness for examination and signature. If the witness is represented by an attorney at the deposition, the deposition officer must provide the transcript to the attorney instead of the witness. (b) **Changes by witness; signature.** The witness may change responses as reflected in the deposition transcript by indicating the desired changes, in writing, on a separate sheet of paper, together with a statement of the reasons for making the changes. No erasures or obliterations of any kind may be made to the original deposition transcript. The witness must then sign the transcript under oath and return it to the deposition officer. If the witness does not return the transcript to the deposition officer within ~~20~~ 30 days of the date the transcript was provided to the witness or the witness's attorney, the witness may be deemed to have waived the right to make the changes. (c) **Exceptions.** The requirements of presentation and signature under this subdivision do not apply: (1) if the witness and all parties waive the signature requirement; (2) to depositions on written questions; or (3) to non-stenographic recordings of oral depositions. **203.2 Certification.** The deposition officer must file with the court, serve on all parties, and attach as part of the deposition transcript or non-stenographic recording of an oral deposition a certificate duly sworn by the officer stating: (a) that the witness was duly sworn by the officer and that the transcript or non-stenographic recording of the oral deposition is a true record of the testimony given by the witness; (b) that the deposition transcript, if any, was submitted to the witness or to the attorney for the witness for examination and	The Discovery Subcommittee recommends revising TRCP 203.1 to conform with FRCP 30(e).

signature, the date on which the transcript was submitted, whether the witness returned the transcript, and if so, the date on which it was returned. (c) that changes, if any, made by the witness are attached to the deposition transcript; (d) that the deposition officer delivered the deposition transcript or nonstenographic recording of an oral deposition in accordance with Rule 203.3; (e) the amount of time used by each party at the deposition; (f) the amount of the deposition officer's charges for preparing the original deposition transcript, which the clerk of the court must tax as costs; and (g) that a copy of the certificate was served on all parties and the date of service. **203.3 Delivery.** (a) **Endorsement; to whom delivered.** The deposition officer must endorse the title of the action and "Deposition of (name of witness)" on the original deposition transcript (or a copy, if the original was not returned) or the original nonstenographic recording of an oral deposition, and must return: (1) the transcript to the party who asked the first question appearing in the transcript, or (2) the recording to the party who requested it. (b) **Notice.** The deposition officer must serve notice of delivery on all other parties. (c) **Inspection and copying; copies.** The party receiving the original deposition transcript or non-stenographic recording must make it available upon reasonable request for inspection and copying by any other party. Any party or the witness is entitled to obtain a copy of the deposition transcript or non-stenographic recording from the deposition officer upon payment of a reasonable fee.	

203.4 Exhibits. At the request of a party, the original documents and things produced for inspection during the examination of the witness must be marked for identification by the deposition officer and annexed to the deposition transcript or non-stenographic recording. The person producing the materials may produce copies instead of originals if the party gives all other parties fair opportunity at the deposition to compare the copies with the originals. If the person offers originals rather than copies, the deposition officer must, after the conclusion of the deposition, make copies to be attached to the original deposition transcript or non-stenographic recording, and then return the originals to the person who produced them. The person who produced the originals must preserve them for hearing or trial and make them available for inspection or copying by any other party upon seven days' notice. Copies annexed to the original deposition transcript or non-stenographic recording may be used for all purposes. **203.5 Motion to Suppress.** A party may object to any errors and irregularities in the manner in which the testimony is transcribed, signed, delivered, or otherwise dealt with by the deposition officer by filing a motion to suppress all or part of the deposition. If the deposition officer complies with Rule 203.3 at least one day before the case is called to trial, with regard to a deposition transcript, or 30 days before the case is called to trial, with regard to a non-stenographic recording, the party must file and serve a motion to suppress before trial commences to preserve the objections. **203.6 Use.** (a) **Non-stenographic recording; transcription.** A non-stenographic recording of an oral deposition, or a written transcription of all or part of such a recording, may be used to	

the same extent as a deposition taken by stenographic means. However, the court, for good cause shown, may require that the party seeking to use a non-stenographic recording or written transcription first obtain a complete transcript of the deposition recording from a certified court reporter. The court reporter's transcription must be made from the original or a certified copy of the deposition recording. The court reporter must, to the extent applicable, comply with the provisions of this rule, except that the court reporter must deliver the original transcript to the attorney requesting the transcript, and the court reporter's certificate must include a statement that the transcript is a true record of the non-stenographic recording. The party to whom the court reporter delivers the original transcript must make the transcript available, upon reasonable request, for inspection and copying by the witness or any party. (b) **Same proceeding.** All or part of a deposition may be used for any purpose in the same proceeding in which it was taken. If the original is not filed, a certified copy may be used. "Same proceeding" includes a proceeding in a different court but involving the same subject matter and the same parties or their representatives or successors in interest. A deposition is admissible against a party joined after the deposition was taken if: (1) the deposition is admissible pursuant to Rule 804(b)(1) of the Rules of Evidence, or (2) that party has had a reasonable opportunity to redepose the witness and has failed to do so. (c) **Different proceeding.** Depositions taken in different proceedings may be used as permitted by the Rules of Evidence.	

Physical and Mental Examinations: Tex. R. Civ. P. 204

RULE 204. PHYSICAL AND MENTAL EXAMINATION **204.1 Motion and Order Required.** (a) **Motion.** A party may - no later than 30 days before the end of any applicable discovery period - move for an order compelling another party to: (1) submit to a physical or mental examination ~~by a qualified physician or a mental examination by a qualified psychologist~~by a suitably licensed or certified examiner; or (2) produce for such examination a person in the other party's custody, conservatorship or legal control. (b) **Service.** The motion and notice of hearing must be served on the person to be examined and all parties. (c) **Requirements for obtaining order.** The court may issue an order for examination only for good cause shown and only in the following circumstances: (1) when the mental or physical condition (including the blood group) of a party, or of a person in the custody, conservatorship or under the legal control of a party, is in controversy; or (2) except as provided in Rule 204.4, an examination by a psychologist may be ordered when the party responding to the motion has designated a psychologist as a testifying expert or has disclosed a psychologist's records for possible use at trial. (d) **Requirements of order.** The order must be in writing and must specify the time, place, manner, conditions, and scope of the examination and the person or persons by who~~m it is to be made~~will perform it.	The Discovery Subcommittee recommends revising TRCP 204.1(a) to adopt language in FRCP 35(a). This would permit vocational examinations and other similar examinations upon satisfaction of the other rule requirements. The Discovery Subcommittee recommends revising TRCP 204.1(d) to match FRCP 35(a)(2)(B) for clarity.

204.2 Examiner's Report ~~of Examining Physician or Psychologist~~. (a) **Right to report by the party or person examined.** Upon request of the person ordered to be examined, the party causing the examination to be made must deliver to the person a copy of a detailed written report of the examining physician or psychologist. The court on motion may limit delivery of a report on such terms as are just. (b) **Contents of report.** The written report must set out in detail ~~setting out~~ the findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. (c) **Request by the moving party.** ~~After delivery of the report, upon request of the party causing the examination, the party against whom the order is made must produce a like report of any examination made before or after the ordered examination of the same condition, unless the person examined is not a party and the party shows that the party is unable to obtain it. The court on motion may limit delivery of a report on such terms as are just.~~After delivering the reports, the party who moved for the examination may request—and is entitled to receive—from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them. The court on motion may limit delivery of a report on such terms as are just. (d) **Waiver of privilege.** By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have—in that action or any other action involving the same controversy—concerning testimony about all examinations of the same condition. (e) **Failure to deliver a report.** If a physician or psychologist fails or refuses to make a report the court may exclude the testimony if offered at the trial. (~~b~~f) **Agreements; relationship to other rules**. This subdivision applies to examinations made by agreement of the parties,	The Discovery Subcommittee recommends breaking up the provisions of TRCP 204.2 into separately numbered paragraphs like FRCP 35(b) for clarity. The Discovery Subcommittee recommends revising TRCP 204.2(b) to add the language "in detail" from FRCP 35(b)(2). The Discovery Subcommittee recommends revising TRCP 204.2(c) to use language from FRCP 35(b)(3) for clarity. The Discovery Subcommittee recommends adding TRCP 204.2(d) based on FRCP 35(b)(4).

unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examining physician or psychologist or the taking of a deposition of the physician or psychologist in accordance with the provisions of any other rule. **204.3 Effect of No Examination.** If no examination is sought either by agreement or under this subdivision, the party whose physical or mental condition is in controversy must not comment to the court or jury concerning the party's willingness to submit to an examination, or on the right or failure of any other party to seek an examination. **204.4 Cases Arising Under Titles II or V, Family Code.** In cases arising under Family Code Titles II or V, the court may - on its own initiative or on motion of a party - appoint: (a) one or more psychologists or psychiatrists to make any and all appropriate mental examinations of the children who are the subject of the suit or of any other parties, and may make such appointment irrespective of whether a psychologist or psychiatrist has been designated by any party as a testifying expert; (b) one or more experts who are qualified in paternity testing to take blood, body fluid, or tissue samples to conduct paternity tests as ordered by the court. **204.5 Definitions.** For the purpose of this rule, a psychologist is a person licensed or certified by a state or the District of Columbia as a psychologist.	

Sanctions, including spoliation: Tex. R. Civ. P. 215

RULE 215. ~~ABUSE OF~~FAILURE TO MAKE DISCLOSURES OR TO COOPERATE IN DISCOVERY; SANCTIONS **215.1 Motion for ~~Sanctions or~~ Order Compelling Disclosure or Discovery.** (a) ***In General***. On notice to other parties and all affected persons, a~~A~~ party~~, upon reasonable notice to other parties and all other persons affected thereby,~~ may ~~apply for sanctions or~~move for an order compelling disclosure or discovery ~~as follows:~~. (~~a~~b) ***Appropriate court***. ~~On matters relating to a deposition, an application~~A motion for an order to a party ~~may~~ must be made ~~to the court in which~~in the court where the action is pending~~, or to any district court in the district where the deposition is being taken. An application~~. A motion for an order to a ~~deponent who is not a party shall~~nonparty must be made to ~~the~~ any district court in the district where the ~~deposition is being~~discovery is or will be taken. ~~As to all other discovery matters, an application for an order will be made to the court in which the action is pending.~~ (~~b~~c) ***Specific Motions***. (1) *To compel disclosure*. If a party fails to make a disclosure required by Rule 194, any other party may move to compel disclosure and for appropriate sanctions. (2) *To compel a discovery response*. A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if: (A) a deponent fails to answer a question asked under Rule 199 or 200; (B) ~~If a party or other deponent which is~~ a corporation or other entity fails to make a designation under Rules 199.2(b)(1) or 200.1(b); ~~or~~	The revisions to TRCP 215.1 are based on FRCP 37(a). The revisions to TRCP 215.1(b) are based on FRCP 37(a)(2). The revisions to TRCP 215.1(c) are based on FRCP 37(a)(3)(A). The language in TRCP 215.1(c)(2) is moved from further below.

(C) a party fails to answer an interrogatory submitted under Rule 197;

(D)a party fails to serve a written response to a request, fails to produce documents, or fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 196; or

(E) a party fails to comply with any person's written request for the person's own statement as provided in Rule 192.3(h).

~~(2) if a party, or other deponent, or a person designated to testify on behalf of a party or other deponent fails:~~

~~(A) to appear before the officer who is to take his deposition, after being served with a proper notice; or~~

~~(B) to answer a question propounded or submitted upon oral examination or upon written questions; or~~

~~(3) if a party fails:~~

~~(A) to serve answers or objections to interrogatories submitted under Rule 197, after proper service of the interrogatories; or~~

~~(B) to answer an interrogatory submitted under Rule 197; or~~

~~(C) to serve a written response to a request for inspection submitted under Rule 196, after proper service of the request; or~~

~~(D) to respond that discovery will be permitted as requested or fails to permit discovery as requested in response to a request for inspection submitted under Rule 196; the discovering party may move for an order compelling a designation, an appearance, an answer or answers, or inspection or production in accordance with the request, or apply to the court in which the action~~

~~is pending for the imposition of any sanction authorized by Rule 215.2(b) without the necessity of first having obtained a court order compelling such discove~~ (3) *Related to a deposition.* When taking an oral deposition ~~on oral examination~~, ~~the proponent of the~~the party asking a question may complete or adjourn the examination before ~~he applies~~moving for an order. ~~If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion pursuant to Rule 192.6.~~ (~~c~~d) ***Evasive or incomplete answer*.** For purposes of this Rule 215.1 ~~subdivision,~~ an evasive or incomplete disclosure, answer, or response must be ~~is to be~~ treated as a failure to disclose, ~~answer~~answer, or respond. (~~d~~e) ~~***Disposition of motion to compel: award of expenses***~~***Payment of expenses; protective orders*.** (1) *If the motion is granted (or disclosure or discovery is provided after filing).* If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court may~~, the court shall~~, after giving an opportunity ~~for hearing~~to be heard, require ~~a~~ the party or deponent whose conduct necessitated the motion, ~~or~~ the party or attorney advising ~~such~~ that conduct, or both, ~~of them~~ to pay, at such time as ordered by the court, the ~~moving party~~movant's ~~the~~ reasonable expenses incurred in ~~obtaining the order~~making the motion, including attorney fees. But the court must not order this payment if: (A) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action; (B) ~~, unless the court finds that the opposition to the motion~~the opposing party's nondisclosure, response, or objection was substantially justified;	This language is moved to below.

or (C) ~~or that~~ other circumstances make an award of expenses unjust. ~~Such an order shall be subject to review on appeal from the final judgment.~~ (2) *If the motion is denied.* If the motion is denied, the court may issue any protective order authorized under Rule 192.6 and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both, to pay to the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust. (3) *If the motion is granted in part and denied in part.* If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 192.6 and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.	
~~If the motion is denied, the court may, after opportunity for hearing, require the moving party or attorney advising such motion to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.~~	This language is moved to above.
~~If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.~~	This language is moved to above.
(4) *Reasonable expenses.* In determining the amount of reasonable expenses, including attorney fees, to be awarded ~~in connection with a motion~~, the ~~trial~~ court ~~shall~~ must award expenses ~~which~~ that are reasonable in relation to the amount of work reasonably expended in ~~obtaining an order compelling compliance~~ making the	

motion or in opposing ~~a motion which is denied~~the denied motion.	
~~(e) **Providing person's own statement.** If a party fails to comply with any person's written request for the person's own statement as provided in Rule 192.3(h), the person who made the request may move for an order compelling compliance. If the motion is granted, the movant may recover the expenses incurred in obtaining the order, including attorney fees, which are reasonable in relation to the amount of work reasonably expended in obtaining the order.~~	This language is moved to above.
215.2 Failure to Comply with ~~Order or with Discovery Request~~a Court Order.	The revisions to TRCP 215.2 are based on FRCP 37(b).
(a) ***Sanctions ~~by court in district where deposition is taken~~sought in the district where the deposition is taken.*** If the court where the discovery is taken orders a deponent ~~fails to appear or~~ to be sworn or to answer a question and the deponent fails to obey, ~~after being directed to do so by a district court in the district in which the deposition is being taken,~~ the failure may be ~~considered~~ treated as a contempt of that court.	The revisions to 215.2(a) are based on FRCP 37(b)(1).
(b) ***Sanctions ~~by court in which action is pending~~sought in the court where the action is pending.***	The revisions to TRCP 215.2(b) are based on FRCP 37(b)(2).
(1) *For not obeying a discovery order.* If a party or a party's~~an~~ officer, director, or managing agent—or a witness ~~of a party or a person~~ designated under Rules 199.2(b)(1) or 200.1(b)—~~to testify on behalf of a party fails to comply with proper discovery requests or~~ fails to obey an order to provide or permit discovery, including an order ~~made~~ under Rules 204 or 215.1, the court ~~in which~~where the action is pending may~~, after notice and hearing, make such orders in regard to the failure as are just, and among others the~~ issue further just orders. They may include the following:	
(~~1~~A) ~~an order~~ disallowing the disobedient party from requesting further discovery~~ any further discovery of any kind or of a particular kind by~~	

~~the disobedient party~~;

~~(2) an order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him;~~

(~~3~~B) ~~an order~~ directing that the matters ~~regarding which~~embraced in the order ~~was made~~ or ~~any~~ other designated facts ~~shall~~ be taken ~~to be~~as established for the purposes of the action ~~in accordance with the claim of the party obtaining the order~~as the prevailing party claims;

(~~4~~C) ~~an order refusing to allow~~prohibiting the disobedient party ~~to~~ from supporting or opposing ~~support or oppose~~ designated claims or defenses, or ~~prohibiting him~~ from introducing designated matters in evidence;

(~~5~~D) ~~an order striking out pleadings or parts thereof, or~~striking pleadings in whole or in part;

(E) staying further proceedings until the order is obeyed~~,~~;

(F) ~~or~~ dismissing with or without prejudice the action or proceedings ~~or any part thereof~~in whole or in part;

(G)~~, or~~ rendering a default judgment ~~by default~~ against the disobedient party; or

(~~6~~H) ~~in lieu of any of the foregoing orders or in addition thereto, an order~~ treating as a contempt of court the failure to obey any order~~s~~ except an order to submit to a physical or mental examination~~;~~.

(2) *For not producing a person for examination.* ~~when~~ If a party ~~has failed~~fails to comply with an order under Rule 204 requiring ~~him~~ it to appear or produce another for examination, the court may issue any of the orders listed in Rule 215.2(b)(1)(A)-(H), ~~such orders as are~~

~~listed in paragraphs (1), (2), (3), (4) or (5) of this subdivision,~~ unless the disobedient party ~~person failing to comply~~ shows that ~~he~~ it ~~is unable to appear or to produce such person for examination~~cannot appear or to produce the other person. (3) *Payment of expenses.* Instead of ~~In lieu of any of the foregoing orders~~ or in addition ~~thereto~~to the orders above, the court ~~shall~~ must require ~~the party failing to obey the order or~~the disobedient party, the attorney advising ~~him~~that party, or both, to pay~~, at such time as ordered by the court,~~ the reasonable expenses, including attorney fees, caused by the failure, unless the ~~court finds that the~~ failure was substantially justified or ~~that~~ other circumstances make an award of expenses unjust. ~~Such an~~The order ~~shall be subject to~~must be ~~-~~reviewed on appeal from the final judgment.	
~~(c) **Sanction against nonparty for violation of Rules 196.7 or 205.3.** If a nonparty fails to comply with an order under Rules 196.7 or 205.3, the court which made the order may treat the failure to obey as contempt of court.~~	This language is moved to above.
215.3 Abuse of Discovery Process in Seeking, Making, or Resisting Discovery. If ~~the court finds~~ a party ~~is abusing~~abuses the discovery process in seeking, making~~,~~ or resisting discovery or if ~~the court finds that any~~the party serves an interrogatory or request for inspection or production that is unreasonably frivolous, oppressive, or harassing, or ~~that~~ serves a response ~~or answer~~that is unreasonably frivolous or made for purposes of delay, ~~then~~ the court ~~in which the action is pending~~ may, after notice and hearing, ~~impose any appropriate sanction authorized by paragraphs (1), (2), (3), (4), (5), and (8) of Rule 215.2(b)~~issue any of the orders listed in Rule 215.2(b)(1)(A)-(H). ~~Such order of sanction shall be subject to review.~~ The order must be reviewed on appeal from the final judgment.	TRCP 215.3 is revised for clarity. This rule is not in the FRCPs.
215.4 Failure to Comply with Rule 198 (a) ***Motion*.** A party who has requested an admission under Rule	The FRCP 37(c) (federal admission rule) is as follows: **(c) Failure to Disclose, to**

198 may move to determine the sufficiency of the answer or objection. For purposes of this subdivision an evasive or incomplete answer may be treated as a failure to answer. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of Rule 198, it may order either that the matter is admitted or that an amended answer be served. The provisions of Rule 215.1(d) apply to the award of expenses incurred in relation to the motion. (b) ***Expenses on failure to admit*.** If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 198 and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 193, or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had a reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.	**Supplement an Earlier Response, or to Admit.** **(1) *Failure to Disclose or Supplement*.** If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard: **(A)** may order payment of the reasonable expenses, including attorney's fees, caused by the failure; **(B)** may inform the jury of the party's failure; and **(C)** may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)—(vi). **(2) *Failure to Admit*.** If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless: **(A)** the request was held

	objectionable under Rule 36(a); **(B)** the admission sought was of no substantial importance; **(C)** the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or **(D)** there was other good reason for the failure to admit.
215.5 ~~Failure of Party or Witness to Attend to or Serve Subpoena; Expenses~~Party's Failure to Attend its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection. (a) ***Motion; grounds for sanctions.*** The court where the action is pending may, on motion, order sanctions if: (1) a party or a party's officer, director, or managing agent—or a person designated under Rule 199.2(b)(1) or Rule 200.1(b)—fails, after being served with proper notice, to appear for that person's deposition; ~~(~~2) ~~**Failure of party giving notice to attend.** If the party giving the notice of the taking of an oral deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney fees.~~a party fails, after serving notice, to attend and proceed with a deposition, or the witness fails to attend and proceed with the deposition through the fault of the party that served notice; or (3) ~~(b) **Failure of witness to attend.** If a party gives notice of the taking of an oral deposition of a witness and the witness does not attend because of the fault of the party giving the notice, if another party attends in person or by attorney because he expects the deposition~~	TRCP 215.5 is based on FRCP 37(d).

~~of that witness to be taken, the court may order the party giving the notice to pay such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney fees.~~a party, after being properly served with interrogatories under Rule XX, fails to serve its answers, objections, or written response.

(b) ***Certification.*** A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

(c) ***Unacceptable excuse for failing to act.*** A failure described in Rule 215.5(a) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 192.6.

(d) ***Types of sanctions.*** Sanctions may include any of the orders listed in Rule 215.2(b)(1)(A)-(G). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both, to pay the reasonable expenses, including attorney fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

215.6 Exhibits to Motions and Responses.

Motions or responses made under this rule may have exhibits attached including affidavits, discovery pleadings, or any other documents.

215.7 Failure to Preserve Electronically Stored Information

If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, and the trial court finds prejudice to another party from loss of the information:

The Discovery Subcommittee recommends the adoption of FRCP 37(e) as TRCP 215.7. The Subcommittee suggests revising subpart (a) to make it clear that in the case of unintentional spoliation of evidence the trial court may not comment on a party's failure to preserve records

(a) the party may present evidence concerning the loss of the evidence; (b) the court may order measures no greater than necessary to cure the prejudice but must not comment on the failure to preserve the evidence or instruct the jury that a duty to preserve the evidence existed or the consequences of the failure to produce the evidence ; and (c) only upon the trial court finding that the party acted with the intent to deprive another party of the information's use in the litigation, the trial court may: (1) presume that the lost information was unfavorable to the party; (2) instruct the jury that it may or must presume the information was unfavorable to the party; or (3) dismiss the action or enter a default judgment.	either by an oral comment or in the jury instructions. Federal trial courts are permitted to comment on the evidence but Texas trial courts are not.

Tab C

STATE BAR OF TEXAS COMMITTEE ON COURT RULES

PROPOSED NEW SPOLIATION RULE OF CIVIL PROCEDURE 215.7

I. Exact language of existing Rule: None.

II. Proposed New Spoliation Rule: RULE 215.7. Spoliation

(a) *Motion for Order Granting Spoliation Remedies.* A party, upon reasonable notice to other parties, may move for an order seeking spoliation remedies if:

(1) another party intentionally or negligently breached a duty to preserve a document or tangible thing—as described by Rule 192.3(b)—that may be material and relevant to a claim or defense;

(2) the document or tangible thing cannot be reproduced, restored, or replaced through additional discovery; and

(3) the movant is unfairly prejudiced as a result.

The motion should be filed reasonably promptly after the discovery of the spoliation.

(b) *Standards.*

(1) The court must consider the spoliation motion outside the presence of the jury, as provided in Texas Rule of Evidence 104. The court must determine the spoliation motion based on the pleadings, any stipulations of the parties, any affidavits, documents or other testimony filed by a party, discovery materials, and any oral testimony. Unless the court orders otherwise, if the movant will be relying on affidavits, the movant must file any affidavits at least fourteen days before the hearing date and if the non-movant will be relying on affidavits, the non-movant must file any controverting affidavits at least seven days before the hearing date.

(2) To find spoliation, the court must find that the allegedly spoliating party had a duty to preserve a document or tangible thing that may be material and relevant to a claim or defense and breached that duty by intentionally or negligently destroying the document or tangible thing or by failing to take reasonable steps to preserve the document or tangible thing.

(3) If the court finds that spoliation occurred, the remedies ordered by the court must be proportionate to the wrongdoing and not excessive. The court should weigh the spoliating party's culpability and the prejudice to the nonspoliating party based on the relevance of the spoliated evidence to key issues in the case, the harmful effect of the evidence on the spoliating party's case, the degree of helpfulness of the evidence to the nonspoliating party's case, and whether the evidence is cumulative of other available evidence.

(4) In the order, the court must specify the conduct that formed the basis or bases for its ruling.

(c) *Spoliation Remedies.* If the court finds that spoliation occurred, the court may make such orders in regard to the spoliation as are just, and among others the following[1] :

(1) If the court finds that a nonspoliating party is prejudiced because of the loss of the document or tangible thing, then the court may order one or more of the following remedies:

(A) awarding the nonspoliating, prejudiced party the reasonable expenses, including attorneys' fees and costs, caused by the spoliation; or
(B) excluding evidence.

(2) If the court finds that the spoliating party acted intentionally or acted negligently and caused the nonspoliating party to be irreparably deprived of any meaningful ability to present a claim or defense, then the court may order an instruction to the jury regarding the spoliation in addition to the remedies in (c)(1). If the court submits a spoliation instruction to the jury, then evidence of the circumstances surrounding the spoliation may be admissible at trial. The admissibility at trial of evidence of the circumstances surrounding the spoliation is governed by the Texas Rules of Evidence.

(3) If the court finds that a party acted with intent to spoliate, then in addition to the remedies set forth in (c)(1) and (c)(2), the court may order one or more of the following remedies:

(A) finding that the lost document or tangible thing was unfavorable to the spoliating party;
(B) striking the spoliating party's pleadings;
(C) dismissing the spoliating party's claims or defenses; or

[1] This language is derived from Tex. R. Civ. P. 215.2(b).

(D) entering a default judgment in part or in full against the spoliating party.

The remedies in this section are in addition to the remedies available under Rules 215.2 and 215.3.

III. Brief statement of reasons for requested changes and advantages to be served by proposed new rule:

A. General Purpose and Reasons

Considering the recent revisions to Federal Rule of Evidence 37(e) pertaining to spoliation of Electronically Stored Information and existing Texas law regarding spoliation,[2] the State Bar Court Rules Committee believes that a rule providing a procedure for litigants and courts to follow when considering allegations of spoliation would be helpful to the bar.

B. The Proposed Rule's 3-Part Structure

The proposed Rule has three parts:

Part (a) pertains to what the non-spoliating party should do when seeking judicial remedies.

Part (b) pertains to the standards the trial court should consider when faced with a spoliation complaint.

Part (c) pertains to the three broad categories of remedies the trial court may order depending on the particular facts and circumstances. Part (c) sets out the different standards and categories: (1) when remedies such as fees or exclusion of evidence may suffice; (2) when a jury instruction is warranted; and (3) when more severe remedies are needed to address the intentional destruction of evidence.

C. The Court's Standards Guiding the Proposed Rule

To submit a spoliation instruction, the trial court must find that "(1) the spoliating party acted with intent to conceal discoverable evidence, or (2) the spoliating party acted negligently and caused the nonspoliating party to be irreparably deprived of any meaningful ability to present a claim or defense." *Wackenhut v. Gutierrez*, 453 S.W.3d 917, 921 (Tex. 2015). Moreover, the court must find that a less severe remedy would be

[2] This includes the clarifications of the law of spoliation in Texas in 2014 and 2015 by the Court. *See Wackenhut v. Gutierrez,* 453 S.W.3d 917, 921 (Tex. 2015); *Brookshire Bros., Ltd. v. Aldridge*, 438 S.W3d 9, 19-29 (Tex. 2014); *Petro. Solutions, Inc. v. Head*, 454 S.W.3d 482, 488-89 (Tex. 2014).

insufficient to reduce the prejudice caused by the spoliation. *Brookshire Bros.*, 438 S.W.3d at 25.

Trial courts have historically had broad discretion in fashioning remedies in the event of actual spoliation. *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 721 (Tex. 2003); *Trevino v. Ortega*, 969 S.W.2d 950, 953 (Tex. 1998). However, as the Texas Supreme Court has recognized, evidence may be unavailable for a number of reasons: it could be lost, altered, or destroyed in bad faith, or for completely innocent reasons with good explanations. *Johnson*, 106 S.W.3d at 721. Texas law disfavors spoliation instructions when evidence is merely lost or missing as opposed to when there is evidence of intentional destruction.

D. The Proposed Rule Diverges on Admissibility of Evidence Surrounding Spoliation

While acknowledging the proposed rule's divergence from the Court's precedent, the majority of the Committee believes that the rule of spoliation should specifically state that evidence of the circumstances surrounding the spoliation ***may*** be admissible at trial. In *Brookshire Bros.*, the Court wrote that evidence of the circumstances surrounding the spoliation ***is generally not*** admissible at trial. *Brookshire Bros.*, 438 S.W.3d at 14, 26 ("Accordingly, evidence bearing directly upon whether a party has spoliated evidence is not to be presented to the jury except insofar as it relates to the substance of the lawsuit." and "However, there is no basis on which to allow the jury to hear evidence that is unrelated to the merits of the case, but serves only to highlight the spoliating party's breach and culpability.").

E. Reference to PJC Instruction

The Texas Pattern Jury Charge has the following commentary on whether "may" or "must" should be used:

> In *Brookshire Bros.*, the majority does not articulate the specific language that should be included in the instruction, particularly whether the jury "must" or "may" consider that the missing evidence would have been unfavorable to the spoliator. The dissent in *Brookshire Bros.* interpreted the majority as requiring the use of the term *must*. *Brookshire Bros.*, 2014 WL 2994435, at *19. The overarching guideline, as with any sanction, remains proportionality. *Brookshire Bros.*, 2014 WL 2994435, at *1 ("Upon a finding of spoliation, the trial court has broad discretion to impose a remedy that, as with any discovery sanction, must be proportionate; that is, it must relate directly to the conduct giving rise to the sanction and may not be excessive.").

Whether *may* or *must* is used should be based on the facts applied to the standards articulated above.

An erroneous spoliation jury instruction can constitute reversible error. *Johnson*, 106 S.W.3d at 724. Unavailable evidence does not necessarily mandate a spoliation instruction, but rather a fact-specific showing of bad conduct and harm should be presented to the trial court by the party requesting a spoliation instruction to evaluate contentions that missing evidence should allow the party to "tilt" or "nudge" the jury.

Respectfully submitted,

Carlos R. Soltero
Chair, State Bar Court Rules Committee
March 7, 2016

Tab D

To: **The Texas Supreme Court Rules Advisory Committee**

From: **Subcommittee on Legislative Mandates**

Re: **Amendment to the Code of Judicial Conduct**

Background

The Texas Supreme Court has referred to the SCAC a proposed amendment to the Code of Judicial Conduct. The proposed amendment excepts County Judges from compliance with Canon 4F, which prohibits active, full- time judges from acting as an arbitrator or mediator for compensation. The proposed amendment would allow County Judges who perform judicial functions to conduct mediations and arbitrations for compensation, unless the court on which the judge serves has jurisdiction over the matter or the parties involved in the mediation or arbitration.

The SCAC voted to reject the proposed amendment. Should the Texas Supreme Court adopt it, the subcommittee proposes that the amendment track the current exception for municipal judges and justices of the peace, who have a similar exception in the current Code.

This memo sets forth the current versions of Canon 4F (prohibiting judges from conducting arbitrations and mediations for compensation), Canon 6 (governing the applicability of the Code to various judicial officers), and proposed language revising Canon 6B to incorporate the amendment.

I. Current Versions: Canon 4F and Canon 6B

Current Canon 4F provides:

> An active full-time judge shall not act as an arbitrator or mediator for compensation outside the judicial system, but a judge may encourage settlement in the performance of official duties.

Canon 4F applies to a County Judge who performs judicial functions under Canon 6B.

The current version of Canon 6B provides:

> A County Judge who performs judicial functions shall comply with all provisions of this Code except the judge is not required to comply:
>
> (1) when engaged in duties which relate to the judge's role in the administration of the county;
>
> (2) with Canons 4D(2), 4D(3) or 4H;*
>
> (3) with Canon 4G, except practicing law in the court on which he or she serves or in any court subject to the appellate jurisdiction of the county court, or acting as a lawyer in a proceeding in which he or she has served as a judge or in any proceeding related thereto.
>
> (4) with Canon (5) (3).

II. Proposed Amendment to Canon 6B

*Canon 4D (2) prohibits a judge from acting as an officer, director, or manager of a publicly owned business. Canon 4D (3) requires a judge "to divest himself or herself of investments and other economic interests that might require frequent disqualification." Canon 4H prohibits a judge from accepting "appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy matters other than improvement of the law, the legal system, or the administration of justice." Canon 4G prohibits the practice of law. Canon 5(3) requires a judge to resign from office upon becoming a candidate in a contested election for a non-judicial office.

The subcommittee proposes that Canon 6B be amended to include a new subsection (3):

> A County Judge who performs judicial functions shall comply with all provisions of this Code except the judge is not required to comply:
>
> (1) when engaged in duties which relate to the judge's role in the administration of the county;
>
> (2) with Canons 4D(2), 4D(3) or 4H;
>
> *(3) with Canon 4F, unless the court on which the judge serves may have jurisdiction of the matter or parties involved in the arbitration or mediation;*
>
> (4) with Canon 4G, except practicing law in the court on which he or she serves or in any court subject to the appellate jurisdiction of the county court, or acting as a lawyer in a proceeding in which he or she has served as a judge or in any proceeding related thereto.
>
> (5) with Canon 5(3).

The proposed language tracks the language in Canon 6C that excepts justices of the peace and municipal court judges from compliance with Canon 4F. The subcommittee recommends adding it as the third exception to correspond to the Canons in the order they are set forth in the Code.

Tab E

To: Supreme Court Advisory Committee

From: Appellate Rules Subcommittee

Re: Appointed Counsel's Failure to Timely File Petition for Review in Parental-Termination Cases

Date: June 8, 2017

The Texas Supreme Court has referred the following matter to our subcommittee:

> Whether the Deadlines Prescribed by Rule 53.7 of the Rules of Appellate Procedure Are Jurisdictional; Procedure for Filing Late Petition Due to Ineffective Assistance of Counsel. The Court has held that an indigent parent's right to appointed counsel under Section 107.013(a) of the Family Code extends to proceedings in the Court, including the filing of a petition for review. *In the Interest of P.M.*, No. 15-0171, 2016 WL 1274748, at *1 (Tex. Apr. 1, 2016). The Court occasionally receives a late petition for review or motion for extension of time to file a petition for review from a parent, filing pro se, who claims that the ineffective assistance of appointed counsel caused the parent to miss the deadline. The Court asks the Committee (1) to consider whether the deadline for filing a petition for review in Rule of Appellate Procedure 53.7 is jurisdictional; and (2) assuming that the deadline is not jurisdictional, to recommend a procedure for adjudicating a parent's claim that the ineffective assistance of counsel resulted in the parent's missing the deadline to file a petition for review. The Committee should draft any rule amendments that it deems necessary. Judicial decisions that may inform the Committee's work include *Bowles v. Russell*, 551 U.S. 205 (2007); *Glidden Co. v. Aetna Cas. & Sur. Co.*, 291 S.W.2d 315 (Tex. 1956); *Ex parte Wilson*, 956 S.W.2d 25 (Tex. Crim. App. 1997); and *Olivo v. State*, 918 S.W.2d 519 (Tex. Crim. App. 1996).

Brief summary of cases cited in the referral letter:

> *In the Interest of P.M.*, No. 15-0171, 2016 WL 1274748, at *1 (Tex. Apr. 1, 2016). The right to appointed counsel in parental termination cases under Tex. Fam. Code. § 107.013(a) extends to proceedings in the Texas Supreme Court, including the filing of a petition for review. The Court further recognized that appointed counsel's obligations can be satisfied by filing a petition for review that satisfies the standards set forth in Anders v. California, 386 U.S. 738 (1967). The Court abates the case and directs the trial court to appoint counsel within 30 days. An appellate court may refer matters to the trial court for evidence and a hearing.
>
> *Bowles v. Russell*, 551 U.S. 205 (2007). The filing of a notice of appeal within the time period provided by statute is mandatory and jurisdictional, a late filing deprives the appellate court of jurisdiction, and the court may not extend the time on equitable grounds. The Court distinguishes between time limits set forth in statutes, which limit a court's jurisdiction, and those set out in a court rule, which do not.

Glidden Co. v. Aetna Cas. & Sur. Co., 291 S.W.2d 315 (Tex. 1956). Filing of an appeal bond after the time designated by court rules, even though clerk had closed office early and counsel exercised diligence in attempting to file timely, is fatal to jurisdiction. "It is well settled … that the requirement that the bond be filed within thirty days is mandatory and jurisdictional." The opinion cites to *Long v. Martin*, 247 S.W. 827 (Tex, 1923), where Court held that the late filing of a petition for writ of error was fatal to jurisdiction despite counsel's due diligence.

Ex parte Wilson, 956 S.W.2d 25 (Tex. Crim. App. 1997)(per curiam)(en banc). There is no right to counsel on discretionary review, and appellate counsel has no duty to inform a defendant of details pertinent to further review. But, if appellate counsel's action or inaction denies a defendant the opportunity to prepare and file a petition for discretionary review, that constitutes a denial of the Sixth Amendment right to effective assistance of counsel. Here, the defendant filed a post-conviction habeas. After a hearing, the trial court found to be true counsel's affidavit stating that he mailed to the defendant a copy of the opinion and a conclusion that further appeal would have no merit. This was held sufficient to protect the defendant's right to file for discretionary review.

Olivo v. State, 918 S.W.2d 519 (Tex. Crim. App. 1996). The late filing of a notice of appeal, without a motion for extension of time within the time provided by rule, deprived the court of appeals of jurisdiction. The rules of appellate procedure do not establish jurisdiction, they define the procedures to invoke the court's jurisdiction. Nonetheless, when the notice of appeal is late, the appellate court lacks jurisdiction because it has never been invoked. The court may not use Tex. R. App. P. 2(c) or 83 to create jurisdiction where none exists. The claimed deprivation of a constitutional right to effective assistance of counsel cannot confer jurisdiction where none exists.

Other relevant authorities:

TEX. CONST. art. V, § 3. JURISDICTION OF SUPREME COURT; WRITS; CLERK.
(a) The Supreme Court shall exercise the judicial power of the state except as otherwise provided in this Constitution. Its jurisdiction shall be co-extensive with the limits of the State and its determinations shall be final except in criminal law matters. Its appellate jurisdiction shall be final and shall extend to all cases except in criminal law matters and as otherwise provided in this Constitution or by law. The Supreme Court and the Justices thereof shall have power to issue writs of habeas corpus, as may be prescribed by law, and under such regulations as may be prescribed by law, the said courts and the Justices thereof may issue the writs of mandamus, procedendo, certiorari and such other writs, as may be necessary to enforce its jurisdiction. The Legislature may confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the Governor of the State.
(b) The Supreme Court shall also have power, upon affidavit or otherwise as by the court may be determined, to ascertain such matters of fact as may be necessary to the proper exercise of its jurisdiction.

TEX. GOV'T CODE 22.001(a) (amended 2017). (a) The supreme court has appellate jurisdiction, except in criminal law matters, of an appealable order or judgment of the trial courts if the court determines that the appeal presents a question of law that is important to the jurisprudence of the state. The supreme court's jurisdiction does not include cases in which the jurisdiction of the court of appeals is made final by statute.

Numerous orders/cases. For much of its existence, the Texas Supreme Court has dismissed cases for want of jurisdiction when the application for writ of error or petition for review was not timely filed.

In re USAA, 307 S.W.3d 299 (Tex. 2010). Court holds that the two-year period for filing suit in the TCHRA is not jurisdictional, only mandatory, overruling prior precedent. Citing *Kontrick v. Ryan*, 540 U.S. 443 (2004), the Court recognized that it had sometimes used the word jurisdiction inexactly and, in more recent cases, the Court has been "'reluctant to conclude that a provision is jurisdictional, absent clear legislative intent to that effect.'" Nonetheless, the Court stated that: "And some requirements, such as a timely notice of appeal, remain jurisdictional." In support of this last statement, the Court cites *Bowles*, discussed above, which involved a statutory deadline, but also cited *In the Interest of K.A.F.*, 160 S.W.3d 923 (Tex.2005), where the Court affirmed the court of appeals' dismissal of an interlocutory appeal for want of jurisdiction when it was not filed within the 20-day deadline in the TRAPs.

In re M.S., 115 S.W.3d 534 (Tex. 2003). The Court held that the statutory right to appointed counsel embodied the right to effective assistance of counsel.

Issues for discussion:

Is the deadline for filing a petition for review jurisdictional? Nothing in the Texas Constitution or jurisdictional statutes specifies the time for filing a petition for review. The deadline is set only be procedural rule, Tex. R. App. P. 53.7. The United States Supreme Court held in *Bowles* that a rule deadline, unlike a statutory deadline, is not jurisdictional. The Court of Criminal Appeals has also held that a procedural rule deadline is not jurisdictional, but de facto gave it jurisdictional effect by holding that the failure to timely invoke the jurisdiction of the appellate court deprives it of jurisdiction. The Texas Supreme Court has long held that the time for filing a petition for review or application for writ of error is jurisdictional. There is a good argument that the time limit is not jurisdictional, but as discussed below, whether or not the time limit is jurisdictional, the Court has the power to amend its rules to change the time limit.

What policies are implicated? Finality versus fairness. If the deadline is non-jurisdictional, a petition may be filed days, months, or years after the deadline has passed, after the court of appeals' mandate has issued, after supersedeas bonds have been released, and judgments satisfied. Court of appeals' judgments would be of questionable finality, injecting uncertainty. On the other hand, the late filing of a petition for review in cases involving parental termination can deprive a parent of a child through no fault of the parent but because of ineffective assistance of counsel. This, too, though, is tempered by finality

questions, as a child's placement will be affected if a parent can challenge a decision at any time without limit.

Does it matter in deciding whether the Court can create a mechanism for late filings in situations involving ineffective assistance of counsel? If the deadline for filing a petition for review is jurisdictional, it is a jurisdictional limitation made by the Court itself through procedural rule. A rule made by the Court can be amended by the Court. Because the constitution and statutes do not impose a deadline, the Court has the ability to provide for a different deadline and procedure in parental-termination cases.

What procedures would most efficiently determine whether a petitioner should be able to make a late filing based on ineffective assistance of counsel? The subcommittee recommends that the Court adopt a special rule allowing a parent to seek leave to file a late petition for review based on ineffective assistance of counsel. Blake Hawthorne, working with the subcommittee, indicated that TRAP 4.5 provides for an analogous procedure when a party receives late notice of a court of appeals' judgment and misses the deadline for filing a petition for review. The Court has experience with this procedure and it seems to be working well. The subcommittee thus proposes new TRAP 4.6 which parallels the procedures of TRAP 4.5 in the circumstance where a petition for review is filed late in a parental-termination suit because of ineffective assistance of counsel.

How broad or narrow should the proposed rule be? The referral letter is limited to indigent parents in parental-termination cases who are entitled to appointed counsel by statute. The right to effective counsel as found by the court in *In re M.S.*, 115 S.W.3d 534 (Tex. 2003), is derived from the statutory right to appointed counsel for indigent parents in government-initiated proceedings. The right of indigent parents to counsel for petitions for review announced in *In the Interest of P.M.* is also purely statutory. The subcommittee accordingly limited proposed TRAP 4.6 to situations where an indigent parent has a statutory right to appointed counsel in parental-termination suits. The statute does not extend that right in private termination suits nor does it extend to a non-indigent parent. The subcommittee also notes that Tex. Fam. Code § 107.013(a) also provides for appointed counsel for an indigent parent in proceedings where a governmental entity seeks the appointment of a conservator for a child. The Texas Supreme Court has not specifically addressed whether appointed counsel must be made available in such proceedings at the petition for review stage. The draft rule could be broadened to parallel the statute.

In our discussions, some committee members were concerned about writing a rule granting special treatment for one limited class of petitioners. Other potential petitioners may have similar claims to an extended time to file a petition for review based on statutory or constitutional rights, ineffective counsel, or other purely equitable grounds. The Court may want to consider whether Tex. Fam. Code § 107.013 supports a stand-alone rule for a particular class of petitioners or whether TRAP 4.6 would be a prelude to recognizing later that other situations present a similarly compelling reason to alter the filing time.

What should be the time limit? The subcommittee agreed there should be an ultimate time limit on that process. TRAP 4.5 currently provides for a maximum of 90 days for a party

to ask for permission to make a late filing when there is late notice of the court of appeals' judgment. The subcommittee adopted the same time limit for new TRAP 4.6. Ninety days more than doubles the time for the indigent parent to invoke the court's jurisdiction. Some indigent parents have communication issues with counsel and the courts because they are incarcerated or for other reasons. The rule provides extra time but also places a cut off to balance the concerns that delay and uncertainty will adversely impact placement of the child.

What should the standard be? The subcommittee determined that ineffective assistance of counsel was too broad a standard and, because it is fact-based, could require the Supreme Court to refer the matter to the trial court for evidentiary hearing, further slowing the process. The proposed rule provides a more objective test: whether appointed counsel failed to timely file a petition for review. The indigent parent would also have to state that the parent either requested that a petition be filed or that counsel failed to inform the parent of the right to file. This would eliminate situations where the parent affirmatively told counsel not to proceed.

What is the effect of filing an *Anders* brief? The Court recognized in *In the Interest of P.M.* that appointed counsel's obligations can be satisfied by filing a petition for review that satisfies the standards set forth in *Anders v. California*, 386 U.S. 738 (1967). The rule treats the filing of an *Anders* brief, even one not technically styled as a petition for review, as the filing of a petition for review. That is the clerk's office current procedure as well. The subcommittee was reluctant to cite case law in the proposed rule so opted to include the discussion in a comment.

4.6. Effect of Appointed Counsel's Failure to Timely File a Petition for Review in a Parental-Termination Case.

(a) Additional Time to File Petition for Review. An indigent parent with a statutory[1] right to appointed counsel in a parental-termination suit[2] may move for additional time to file a petition for review if the parent's appointed counsel failed to file the petition timely.

(b) Contents of Motion. The motion for additional time must state that appointed counsel failed to timely file a petition for review and that either (1) the indigent parent instructed the appointed counsel to file a petition for review or (2) the appointed counsel failed to inform the indigent parent of the right to file a petition for review.

(c) Where and When to File. A motion for additional time to file a petition for review must be filed in and ruled on by the Supreme Court. The motion must be filed within 90 days[3] 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.[4]

(d) Order of the Court. The court must grant the motion if the motion for additional time was timely filed, appointed counsel for the indigent parent did not timely file a petition for review, and either (1) the indigent parent instructed the appointed counsel to file a petition for review or (2) the appointed

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[1] Texas Supreme Court decisions have recognized a statutory right to appointed Supreme Court counsel in a parental-termination suit under TEX. FAM. CODE § 107.013(a), which restricts the right to suit initiated by a governmental entity. *In the Interest of P.M.*, 2016 WL 1274748 (Tex. Apr. 1, 2016). The Court has not addressed whether there is a constitutional or statutory right in private parental-termination suits or whether such a right is afforded a non-indigent parent.

[2] TEX. FAM. CODE § 107.013(a) also provides for appointed counsel for an indigent parent in proceedings where a governmental entity seeks the appointment of a conservator for a child. The Texas Supreme Court has not specifically addressed whether appointed counsel must be made available in such proceedings at the petition for review stage. The draft rule could be broadened to parallel the statute.

[3] This time period is taken from TRAP 4.5 providing for a similar procedure when a litigant receives late notice of judgment.

[4] The dates are taken verbatim from TRAP 53.7(a)(1) and (2).

counsel failed to inform the indigent parent of the right to file a petition for review. The time for filing the petition for review will begin to run on the date when the court grants the motion.

Comment.

The Texas Supreme Court held in *In the Interest of P.M.*, 2016 WL 1274748 (Tex. Apr. 1, 2016), that the statutory right to appointed counsel in parental-termination cases extends to proceedings in the Texas Supreme Court and held in *In re M.S.*, 115 S.W.3d 534 (Tex. 2003), that the statutory right to appointed counsel embodied the right to effective assistance of counsel. The Court further recognized in *In the Interest of P.M.* that appointed counsel's obligations can be satisfied by filing a petition for review that satisfies the standards set forth in *Anders v. California*, 386 U.S. 738 (1967). The rule treats the filing of an *Anders* brief as the filing of a petition for review.

2016 WL 1274748

Supreme Court of Texas.

In the Interest of P.M., a Child

NO. 15–0171

|

Opinion delivered: April 1, 2016

Synopsis

Background: The Department of Family and Protective Services sued to terminate mother's parental rights. The 362nd District Court, Denton County, Robert Bruce McFarling, J., terminated parental rights. Mother appealed. The Court of Appeals, 2013 WL 5967037, reversed and remanded. On remand the District Court terminated parental rights. Mother appealed. The Court of Appeals, 2014 WL 8097064, affirmed. Counsel for mother sought to withdraw.

[Holding:] The Supreme Court held that as a matter of first impression, indigent mother's right to counsel included the right to counsel to bring a petition for review in the Supreme Court.

Ordered accordingly.

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS

Attorneys and Law Firms

Andrew Monty Lloyd, Lloyd & DuPuy, PLLC, Denton TX, for Other interested party.

Elizabeth Ann Bell Nielsen, Nielsen Family Law, Denton TX, for Petitioner.

Lillian Adams, Denton TX, pro se.

Matthew Jeffrey Whitten, Denton County District, Denton TX, for Respondent.

Opinion

PER CURIAM

***1** Section 107.013(a) of the Texas Family Code [1] provides that "[i]n a suit filed by a governmental entity ... in which termination of the parent-child relationship ... is requested, the court shall appoint an attorney ad litem to represent the interests of ... an indigent parent...." The issue before us is whether this right to appointed counsel extends to proceedings in this Court, including the filing of a petition for review. We hold that it does and direct the trial court to appoint counsel for petitioner (hereinafter, "mother").

1 All statutory references are to the Texas Family Code unless otherwise noted.

The proceedings in this case have been extensive. There have been two trials and two appeals, the clerk's record is over 1,100 pages, and the reporter's record is thirty-six volumes. To fully explain the circumstances and issues involved in the case, we attach the court of appeals' memorandum opinions. For present purposes, we briefly describe the procedural background of the case and then focus on the involvement and withdrawal of counsel.

The case began in 2011, when the Department of Family and Protective Services sued to terminate mother's relationship with her then five-year-old daughter because of mother's alleged use of methamphetamine and abuse by the child's father. After a bench trial, the court ordered termination, finding that mother had endangered her daughter and that termination was in the child's best interest. [2] The court of appeals concluded that mother had been improperly denied a jury and reversed and remanded for a new trial. [3] In the second trial, the jury found, as the court had before, that mother had endangered her daughter and that termination of the parental relationship was in the child's best interest. On a second appeal, the court of appeals affirmed. [4]

2 *See* TEX. FAM. CODE § 161.001(1)(D), (E), (2).

3 *In re P.L.G.M.,* No. 02–13–00181–CV, 2013 WL 5967037, at *5 (Tex.App.—Fort Worth Nov. 7, 2013, no pet.) (mem.op.) [Appendix A].

4 *In re P.M.,* No. 02–14–00205–CV, 2014 WL 8097064, at *34 (Tex.App.—Fort Worth Dec. 31, 2014) (mem. op.) [Appendix B].

Attorneys appointed by the trial court represented mother through both trials and appeals, before the attorney in the second appeal moved to withdraw. The court of appeals abated the case and referred the motion to the trial court for a hearing to determine whether there was good cause for withdrawal and whether new counsel should be appointed. Mother and the lawyer both told the trial court that they did not want their relationship to continue. Without giving a reason, the trial court recommended that the lawyer be allowed to withdraw. The trial court's only findings were that mother remained indigent and still wished to pursue her appeal. Based on the trial court's recommendation and the record of the hearing, the court of appeals granted the motion to withdraw with an opinion explaining that the lawyer "expressed displeasure with her continued representation" of mother. Neither the trial court nor the court of appeals appears to have considered whether new counsel should be appointed. Mother moved the court of appeals for appointment of counsel, but the court of appeals simply transferred that motion to this Court.

***2** In this Court, mother's counsel moved for an extension of time to file a petition for review but reasserted her motion to withdraw, stating that she was "unable to effectively communicate with [mother] to such a degree that further representation ... is not possible," and adding that mother had "expressed on the record her desire" that the representation not continue. Mother reasserted her motion for appointment of new counsel. We abated the case to consider the issue of mother's right to counsel.

[1] Section 107.013(a)(1) states:

> In a suit filed by a governmental entity ... in which termination of the parent-child relationship or the appointment of a conservator for a child is requested, the court shall appoint an attorney ad litem to represent the interests of ... an indigent parent of the child who responds in opposition to the termination or appointment....

Section 107.013(e) adds that "[a] parent who the court has determined is indigent for purposes of this section is presumed to remain indigent for the duration of the suit and any subsequent appeal" absent changed circumstances. Section 107.016(2) provides that appointed counsel

> continues to serve in that capacity until the earliest of:
>
> (A) the date the suit affecting the parent-child relationship is dismissed;

(B) the date all appeals in relation to any final order terminating parental rights are exhausted or waived; or

(C) the date the attorney is relieved of the attorney's duties or replaced by another attorney after a finding of good cause is rendered by the court on the record.

Together, these provisions establish the right of an indigent parent to appointed counsel in the trial court and court of appeals.

We have not addressed whether a right to counsel on appeal includes a right to counsel to bring a petition for review in this Court. But we have indicated generally, in other contexts, that exhaustion of appeals includes review sought in this Court. [5] A few statutes appear to take the same view. [6] We see no reason to depart from that view here. To the contrary, the right to counsel is as important in petitioning this Court for review, and in our considering the issues, as in appealing to the court of appeals.

5 *E.g., Tex. Beef Cattle Co. v. Green,* 921 S.W.2d 203, 208 (Tex.1996) (holding that "an underlying civil suit has not terminated in favor of a malicious prosecution plaintiff until the appeals *process* for that underlying suit has been exhausted" (emphasis added), and citing RESTATEMENT (SECOND) OF TORTS § 674 cmt. j (1977) ("If an appeal is taken, the proceedings are not terminated until the final disposition of the appeal and of any further proceedings that it may entail.")); *Apex Towing Co. v. Tolin,* 41 S.W.3d 118, 119 (Tex.2001) ("When an attorney commits malpractice in the prosecution or defense of a claim that results in litigation, the statute of limitations on a malpractice claim against that attorney is tolled until all appeals on the underlying claim are exhausted or the litigation is otherwise finally concluded."); *Underkofler v. Vanasek,* 53 S.W.3d 343, 345–46 (Tex.2001) (citing *Apex Towing,* 41 S.W.3d at 121); *In re Long,* 984 S.W.2d 623, 626 (Tex.1999) (per curiam) (an injunction superseded by the district clerk automatically, by filing a notice of appeal, was not enforceable by contempt until all appeals related to the judgment were exhausted, including the denial of an application for writ of error brought by the party seeking contempt sanctions).

6 *E.g.,* TEX. BUS. ORG. CODE § 8.102(c) ("A governing person, former governing person, or delegate is considered to have been found liable in relation to a claim, issue, or matter only if the liability is established by an order, including a judgment or decree of a court, and all appeals of the order are exhausted or foreclosed by law."); TEX. FAM. CODE § 51.095(c) ("An electronic recording of a child's statement ... shall be preserved until all juvenile or criminal matters relating to any conduct referred to in the statement are final, including the exhaustion of all appeals, or barred from prosecution."); *see also* TEX. CIV. PRAC. & REM. CODE § 34.074(c) ("[A prevailing party's action against a surety] must be brought on or before 180 days after the date all appeals are exhausted in the underlying action."); TEX. EDUC. CODE § 51.909(b) ("In this section, a person is finally convicted if the conviction has not been reversed on appeal and all appeals, if any, have been exhausted."). *But see* TEX. CODE CRIM. PROC. art. 1.051(d)(2) ("An eligible indigent defendant is entitled to have the trial court appoint an attorney to represent him in the following appellate and postconviction habeas corpus matters: ... (2) an appeal to the Court of Criminal Appeals if the appeal is made directly from the trial court or if a petition for discretionary review has been granted....").

***3 [2] [3] [4] [5] [6]** Accordingly, we hold that the right to counsel under Section 107.013(a)(1) through the exhaustion of appeals under Section 107.016(2)(B) includes all proceedings in this Court, including the filing of a petition for review. Once appointed by the trial court, counsel should be permitted to withdraw only for good cause [7] and on appropriate terms and conditions. [8] Mere dissatisfaction of counsel or client with each other is not good cause. Nor is counsel's belief that the client has no grounds to seek further review from the court of appeals' decision. Counsel's obligation to the client may still be satisfied by filing an appellate brief meeting the standards set in *Anders v. California,* [9] and its progeny. [10] In light of our holding, however, an *Anders* motion to withdraw brought in the court of appeals, in the absence of additional grounds for withdrawal, may be premature. [11] Courts have a duty to see that withdrawal of counsel will not result in foreseeable prejudice to the client. [12] If a court of appeals allows an attorney to withdraw, it must provide for the appointment of new counsel to pursue a petition for review. [13] In this Court, appointed counsel's obligations can be satisfied by filing a petition for review that satisfies the standards for an *Anders* brief. [14]

7 *See* TEX. R. CIV. P. 10.

8 TEX. R. APP. P. 6.5.

9 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

10 *In re D.A.S.,* 973 S.W.2d 296, 297, 299 (Tex.1998); *see also Kelly v. State,* 436 S.W.3d 313, 318–20 (Tex.Crim.App.2014) (setting forth duties of counsel); *In re Schulman,* 252 S.W.3d 403, 406 n. 9 (Tex. Crim. App. 2008); *Stafford v. State,* 813 S.W.2d 503, 510 n. 3 (Tex. Crim. App. 1991). In *D.A.S.,* the Court concluded that *Anders* procedures protect juveniles' statutory right to counsel on appeal in delinquency cases and so held that those procedures apply in juvenile cases. "*Anders* strikes an important balance between the criminal defendant's constitutional right to counsel on appeal and counsel's obligation not to prosecute frivolous appeals." *In re D.A.S.,* 973 S.W.2d at 297. The same is true for indigent parents in parental rights termination cases.

11 In criminal appeals in Texas, there are two possible outcomes when an *Anders* brief is filed, both of which involve eventually granting the original appointed counsel's motion to withdraw. "Either the appellate court confirms that there are no non-frivolous grounds for appeal, thus extinguishing the appellant's constitutional right to appellate counsel, and grants the motion to withdraw, or the appellate court finds that there are plausible grounds for appeal, in which case the appellate court still grants the motion to withdraw, but remands the cause to the trial court for appointment of new appellate counsel." *Kelly,* 436 S.W.3d at 318 n. 16 (citing *Meza v. State,* 206 S.W.3d 684, 689 (Tex. Crim. App. 2006)).

12 *See Villegas v. Carter,* 711 S.W.2d 624, 626 (Tex.1986) (trial court allowed an attorney to withdraw two days before trial and refused to allow a continuance).

13 A court may abate the appeal to refer the case to the trial court for appointment of new counsel, a procedure that parallels the procedure required in criminal cases when new counsel is necessary. *See Kelly,* 436 S.W.3d at 318 n.16; *Stafford,* 813 S.W.2d at 511 ("the Court of Appeals then must abate the appeal and remand the case to the trial court with orders to appoint other counsel" to present ground for appeal).

14 *Anders,* 386 U.S. at 744–45, 87 S.Ct. 1396; *see High v. State,* 573 S.W.2d 807, 812–13 (Tex. Crim. App. 1978). In criminal appeals, the reviewing court must conduct an independent evaluation of the record to determine whether counsel is correct in determining that the appeal is frivolous. *See Stafford,* 813 S.W.2d at 511. Petitions for review ordinarily come to this Court without the underlying record, but often with an appendix incorporating numerous exhibits from the record. *See* TEX. R. APP. P. 53.2(k). Counsel should provide record citations, and, in a proper case, may choose to ask that the record be forwarded from the court of appeals. *See* TEX. R. APP. P. 54.1 ("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.").

***4 [7]** While an appellate court may be equipped to rule on a motion to withdraw in many instances, it may decide instead, as the court of appeals did in this case with a motion unrelated to any *Anders* claim, to refer the motion to the trial court for evidence and a hearing. An appellate court must ordinarily refer the matter of appointment of replacement counsel to the trial court. [15]

15 In criminal cases, when new counsel is required, courts of appeals would abate the appeal and direct the trial court to appoint new counsel. *See Meza,* 206 S.W.3d at 688 (discussing the appropriateness of an abatement in a case involving both a motion to withdraw and a motion to substitute new counsel, "especially given [the Code of Criminal Procedure's] elaborate mechanism for making court appointments for indigent criminal defendants").

Here, the record indicates that counsel's motion to withdraw, and mother's motion for new counsel, were not based on mere dissatisfaction with each other. We conclude that the trial court in making its recommendation, and the court of appeals in accepting that recommendation, did not abuse their discretion by allowing counsel to withdraw. Accordingly, we grant counsel's motion to withdraw and mother's motion for appointment of counsel. We direct the trial court to appoint counsel to represent mother in this Court and to report the appointment to the Court within thirty days. The case remains abated until further order.

59 Tex. Sup. Ct. J. 582

All Citations

--- S.W.3d ----, 2016 WL 1274748, 59 Tex. Sup. Ct. J. 582

End of Document

Vernon's Texas Statutes and Codes Annotated
Family Code (Refs & Annos)
Title 5. The Parent-Child Relationship and the Suit Affecting the Parent-Child Relationship (Refs & Annos)
Subtitle A. General Provisions
Chapter 107. Special Appointments, Child Custody Evaluations, and Adoption Evaluations (Refs & Annos)
Subchapter B. Appointments in Certain Suits (Refs & Annos)
Part 1. Appointments in Suits by Governmental Entity

V.T.C.A., Family Code § 107.013

§ 107.013. Mandatory Appointment of Attorney ad Litem for Parent

Effective: September 1, 2015
Currentness

(a) In a suit filed by a governmental entity under Subtitle E [1] in which termination of the parent-child relationship or the appointment of a conservator for a child is requested, the court shall appoint an attorney ad litem to represent the interests of:

(1) an indigent parent of the child who responds in opposition to the termination or appointment;

(2) a parent served by citation by publication;

(3) an alleged father who failed to register with the registry under Chapter 160 and whose identity or location is unknown; and

(4) an alleged father who registered with the paternity registry under Chapter 160, but the petitioner's attempt to personally serve citation at the address provided to the registry and at any other address for the alleged father known by the petitioner has been unsuccessful.

(a-1) In a suit described by Subsection (a), if a parent is not represented by an attorney at the parent's first appearance in court, the court shall inform the parent of:

(1) the right to be represented by an attorney; and

(2) if the parent is indigent and appears in opposition to the suit, the right to an attorney ad litem appointed by the court.

(b) If both parents of the child are entitled to the appointment of an attorney ad litem under this section and the court finds that the interests of the parents are not in conflict and that there is no history or pattern of past or present family

violence by one parent directed against the other parent, a spouse, or a child of the parties, the court may appoint an attorney ad litem to represent the interests of both parents.

(c) Repealed by Acts 2013, 83rd Leg., ch. 810 (S.B. 1759), § 11.

(d) The court shall require a parent who claims indigence under Subsection (a) to file an affidavit of indigence in accordance with Rule 145(b) of the Texas Rules of Civil Procedure before the court may conduct a hearing to determine the parent's indigence under this section. The court may consider additional evidence at that hearing, including evidence relating to the parent's income, source of income, assets, property ownership, benefits paid in accordance with a federal, state, or local public assistance program, outstanding obligations, and necessary expenses and the number and ages of the parent's dependents. If the court determines the parent is indigent, the court shall appoint an attorney ad litem to represent the parent.

(e) A parent who the court has determined is indigent for purposes of this section is presumed to remain indigent for the duration of the suit and any subsequent appeal unless the court, after reconsideration on the motion of the parent, the attorney ad litem for the parent, or the attorney representing the governmental entity, determines that the parent is no longer indigent due to a material and substantial change in the parent's financial circumstances.

Credits

Added by Acts 1995, 74th Leg., ch. 751, § 15, eff. Sept. 1, 1995. Amended by Acts 1997, 75th Leg., ch. 561, § 3, eff. Sept. 1, 1997; Acts 2001, 77th Leg., ch. 821, § 2.11, eff. June 14, 2001; Acts 2003, 78th Leg., ch. 262, § 1, eff. Sept. 1, 2003; Acts 2005, 79th Leg., ch. 268, § 1.06, eff. Sept. 1, 2005; Acts 2007, 80th Leg., ch. 526, § 1, eff. June 16, 2007; Acts 2011, 82nd Leg., ch. 75 (H.B. 906), § 1, eff. Sept. 1, 2011; Acts 2013, 83rd Leg., ch. 810 (S.B. 1759), §§ 2, 11, eff. Sept. 1, 2013; Acts 2015, 84th Leg., ch. 128 (S.B. 1931), § 1, eff. Sept. 1, 2015.

Footnotes

1 V.T.C.A., Family Code § 261.001 et seq.

V. T. C. A., Family Code § 107.013, TX FAMILY § 107.013

Current through Chapters effective immediately through Chapter 34 of the 2017 Regular Session of the 85th Legislature

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127 S.Ct. 2360
Supreme Court of the United States

Keith BOWLES, Petitioner,
v.
Harry RUSSELL, Warden.

No. 06–5306.
|
Argued March 26, 2007.
|
Decided June 14, 2007.

Synopsis
Background: State prisoner whose petition for habeas corpus, and subsequent motion for new trial or to amend judgment, had been denied moved to reopen appeal period. The United States District Court for the Northern District of Ohio, Donald C. Nugent, J., granted motion, and prisoner appealed. After initially issuing show-cause order questioning timeliness of appeal, the Court of Appeals granted in part and denied in part a certificate of appealability (COA). The United States Court of Appeals for the Sixth Circuit, 432 F.3d 668, dismissed. Petition for certiorari was granted.

Holdings: The Supreme Court, Justice Thomas, held that:

[1] Court of Appeals lacked jurisdiction over appeal, and

[2] Court would no longer recognize the unique circumstances exception to excuse an untimely filing of a notice of appeal, overruling *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.,* 371 U.S. 215, 83 S.Ct. 283, 9 L.Ed.2d 261, and *Thompson v. INS,* 375 U.S. 384, 84 S.Ct. 397, 11 L.Ed.2d 404.

Affirmed.

Justice Souter, filed dissenting opinion, with which Justices Stevens, Ginsburg, and Breyer joined.

****2361 *205** *Syllabus* *

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Having failed to file a timely notice of appeal from the Federal District Court's denial of habeas relief, petitioner Bowles moved to reopen the filing period pursuant to Federal Rule of Appellate Procedure 4(a)(6), which allows a district court to grant a 14–day extension under certain conditions, see 28 U.S.C. § 2107(c). The District Court granted Bowles' motion but inexplicably gave him 17 days to file his notice of appeal. He filed within the 17 days allowed by the District Court, but after the 14–day period allowed by Rule 4(a)(6) and § 2107(c). The Sixth Circuit held that the notice was untimely and that it therefore lacked jurisdiction to hear the case under this Court's precedent.

Held: Bowles' untimely notice of appeal—though filed in reliance upon the District Court's order—deprived the Sixth Circuit of jurisdiction. Pp. 2362 – 2367.

(a) The taking of an appeal in a civil case within the time prescribed by statute is "mandatory and jurisdictional." *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56, 61, 103 S.Ct. 400, 74 L.Ed.2d 225 *(per curiam)*. There is a significant distinction between time limitations set forth in a statute such as § 2107, which limit a court's jurisdiction, see, *e.g., Kontrick v. Ryan,* 540 U.S. 443, 453, 124 S.Ct. 906, 157 L.Ed.2d 867, and those based on court rules, which do not, see, *e.g., id.,* at 454, 124 S.Ct. 906. *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 505, 126 S.Ct. 1235, 163 L.Ed.2d 1097, and *Scarborough v. Principi,* 541 U.S. 401, 413, 124 S.Ct. 1856, 158 L.Ed.2d 674, distinguished. Because Congress decides, within constitutional bounds, whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them. See *United States v. Curry,* 6 How. 106, 113, 12 L.Ed. 363. And when an "appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction." *Ibid.* The resolution of this case follows naturally from this reasoning. Because Congress specifically limited the amount of time by which district courts can extend the notice-of-appeal period in § 2107(c), Bowles' failure to file in accordance with the statute deprived the Court of Appeals of jurisdiction. And because Bowles' error is one of jurisdictional magnitude, he cannot rely on forfeiture or waiver to excuse his lack of compliance. Pp. 2363 – 2366.

(b) Bowles' reliance on the "unique circumstances" doctrine, rooted in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.,* 371 U.S. 215, 83 S.Ct. 283, 9 L.Ed.2d 261 ***206** *(per curiam)*, and applied in *Thompson v. INS,* 375 U.S. 384, 84 S.Ct. 397, 11 L.Ed.2d 404 *(per curiam),* is rejected. Because this Court has no authority to create equitable exceptions to jurisdictional requirements, use of the doctrine is illegitimate. *Harris Truck Lines* and *Thompson* are overruled to the extent they purport to authorize an exception to a jurisdictional rule. Pp. 2366 – 2367.

432 F.3d 668, affirmed.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and ALITO, JJ., joined. SOUTER, J., filed a dissenting ****2362** opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined, *post*, p. 2367.

Attorneys and Law Firms

Paul Mancino, Jr., Cleveland, Ohio, for Petitioner.

William P. Marshall, Chapel Hill, NC, for Respondent.

Malcolm L. Stewart, for United States as amicus curiae, by special leave of the Court, supporting the Respondent.

William P. Marshall, Chapel Hill, NC, Marc Dann, Attorney General of Ohio, Elise W. Porter, Acting Solicitor General, Stephen P. Carney, Robert J. Krummen, Elizabeth T. Scavo, Columbus, OH, for Respondent Harry Russell, Warden.

Paul Mancino, Jr., Paul Mancino, III, Brett Mancino, Cleveland, Ohio, for Petitioner.

Opinion

Justice THOMAS delivered the opinion of the Court.

In this case, a District Court purported to extend a party's time for filing an appeal beyond the period allowed by statute. We must decide whether the Court of Appeals had jurisdiction to entertain an appeal filed after the statutory period but within the period allowed by the District Court's order. We have long and repeatedly held that the time limits for filing a notice of appeal are jurisdictional in nature. Accordingly, we hold that petitioner's untimely notice—even ***207** though filed in reliance upon a District Court's order—deprived the Court of Appeals of jurisdiction.

I

In 1999, an Ohio jury convicted petitioner Keith Bowles of murder for his involvement in the beating death of Ollie Gipson. The jury sentenced Bowles to 15-years-to-life imprisonment. Bowles unsuccessfully challenged his conviction and sentence on direct appeal.

Bowles then filed a federal habeas corpus application on September 5, 2002. On September 9, 2003, the District Court denied Bowles habeas relief. After the entry of final judgment, Bowles had 30 days to file a notice of appeal. Fed. Rule App. Proc. 4(a)(1)(A); 28 U.S.C. § 2107(a). He failed to do so. On December 12, 2003, Bowles moved to reopen the period during which he could file his notice of appeal pursuant to Rule 4(a)(6), which allows district courts to extend the filing period for 14 days from the day the district court grants the order to reopen, provided certain conditions are met. See § 2107(c).

On February 10, 2004, the District Court granted Bowles' motion. But rather than extending the time period by 14 days, as Rule 4(a)(6) and § 2107(c) allow, the District Court inexplicably gave Bowles 17 days—until February 27—to file his notice of appeal. Bowles filed his notice on February 26—within the 17 days allowed by the District Court's order, but after the 14–day period allowed by Rule 4(a)(6) and § 2107(c).

On appeal, respondent Russell argued that Bowles' notice was untimely and that the Court of Appeals therefore lacked jurisdiction to hear the case. The Court of Appeals agreed. It first recognized that this Court has consistently held the requirement of filing a timely notice of appeal is "mandatory and jurisdictional." 432 F.3d 668, 673 (C.A.6 2005) (citing *Browder v. Director, Dept. of Corrections of Ill.,* 434 U.S. 257, 264, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978)). The court also noted that Courts of Appeals ***208** have uniformly held that Rule 4(a)(6)'s 180–day period for ****2363** filing a motion to reopen is also mandatory and not susceptible to equitable modification. 432 F.3d, at 673 (collecting cases). Concluding that "the fourteen-day period in Rule 4(a)(6) should be treated as strictly as the 180–day period in that same Rule," *id.,* at 676, the Court of Appeals held that it was without jurisdiction. We granted certiorari, 549 U.S. 1092, 127 S.Ct. 763, 166 L.Ed.2d 590 (2006), and now affirm.

II

[1] According to 28 U.S.C. § 2107(a), parties must file notices of appeal within 30 days of the entry of the judgment being appealed. District courts have limited authority to grant an extension of the 30–day time period. Relevant to this case, if certain conditions are met, district courts have the statutory authority to grant motions to reopen the time for filing an appeal for 14 additional days. § 2107(c). Rule 4 of the Federal Rules of Appellate Procedure carries § 2107 into practice. In accord with § 2107(c), Rule 4(a)(6) describes the district court's authority to reopen and extend the time for filing a notice of appeal after the lapse of the usual 30 days:

"(6) **Reopening the Time to File an Appeal.**

"The district court may reopen the time to file an appeal *for a period of 14 days after the date when its order to reopen is entered,* but only if all the following conditions are satisfied:

"(A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier;

"(B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and

***209** "(C) the court finds that no party would be prejudiced." (Emphasis added.) [1]

1 The Rule was amended, effective December 1, 2005, to require that notice be pursuant to Fed. Rule Civ. Proc. 77(d). The substance is otherwise unchanged.

It is undisputed that the District Court's order in this case purported to reopen the filing period for more than 14 days. Thus, the question before us is whether the Court of Appeals lacked jurisdiction to entertain an appeal filed outside the 14–day window allowed by § 2107(c) but within the longer period granted by the District Court.

A

This Court has long held that the taking of an appeal within the prescribed time is "mandatory and jurisdictional." *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56, 61, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982) *(per curiam)* (internal quotation marks omitted); [2] accord, *Hohn v. United* ****2364** *States,* 524 U.S. 236, 247, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998); *Torres* ***210** *v. Oakland Scavenger Co.,* 487 U.S. 312, 314–315, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988); *Browder,* 434 U.S., at 264, 98 S.Ct. 556. Indeed, even prior to the creation of the circuit courts of appeals, this Court regarded statutory limitations on the timing of appeals as limitations on its own jurisdiction. See *Scarborough v. Pargoud,* 108 U.S. 567, 568, 2 S.Ct. 877, 27 L.Ed. 824 (1883) ("[T]he writ of error in this case was not brought within the time limited by law, and we have consequently no jurisdiction"); *United States v. Curry,* 6 How. 106, 113, 12 L.Ed. 363 (1848) ("[A]s this appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction"). Reflecting the consistency of this Court's holdings, the courts of appeals routinely and uniformly dismiss untimely appeals for lack of jurisdiction. See, *e.g., Atkins v. Medical Dept. of Augusta Cty. Jail,* No. 06–7792, 2007 WL 1048810 (C.A.4, Apr.4, 2007) *(per curiam)* (unpublished); see also 15A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3901, p. 6 (2d ed. 1992) ("The rule is well settled that failure to file a timely notice of appeal defeats the jurisdiction of a court of appeals"). In fact, the author of today's dissent recently reiterated that "[t]he accepted fact is that some time limits are jurisdictional even though expressed in a separate statutory section from jurisdictional grants, see, *e.g.,* ... § 2107 (providing that notice of appeal in civil cases must be filed 'within thirty days after the entry of such judgment')." *Barnhart v. Peabody Coal Co.,* 537 U.S. 149, 160, n. 6, 123 S.Ct. 748, 154 L.Ed.2d 653 (2003) (majority opinion of SOUTER, J., joined by STEVENS, GINSBURG, and BREYER, JJ., *inter alios*).

2 *Griggs* and several other of this Court's decisions ultimately rely on *United States v. Robinson,* 361 U.S. 220, 229, 80 S.Ct. 282, 4 L.Ed.2d 259 (1960), for the proposition that the timely filing of a notice of appeal is jurisdictional. As the dissent notes, we have recently questioned *Robinson's* use of the term "jurisdictional." *Post,* at 2367 (opinion of SOUTER, J.). Even in our cases criticizing *Robinson,* however, we have noted the jurisdictional significance of the fact that a time limit is set forth in a statute, see *infra,* at 2364 – 2365, and have even pointed to § 2107 as a statute deserving of jurisdictional treatment, *infra,* at 2364 – 2365. Additionally, because we rely on those cases in reaching today's holding, the dissent's rhetoric claiming that we are ignoring their reasoning is unfounded.

Regardless of this Court's past careless use of terminology, it is indisputable that time limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century. Consequently, the dissent's approach would require the repudiation of a century's worth of precedent and practice in American courts. Given the choice between calling into question some dicta in our recent opinions and effectively overruling a century's worth of practice, we think the former option is the only prudent course.

Although several of our recent decisions have undertaken to clarify the distinction between claims-processing rules and jurisdictional rules, none of them calls into question our longstanding treatment of statutory time limits for taking an appeal as jurisdictional. Indeed, those decisions have also recognized the jurisdictional significance of the fact that a time limitation is set forth in a statute. In *Kontrick v. Ryan,* 540 U.S. 443, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004), we held that failure to comply with the time ***211** requirement in Federal Rule of Bankruptcy Procedure 4004 did not affect a court's subject-matter jurisdiction. Critical to our analysis was the fact that "[n]o statute ... specifies a time limit for

filing a complaint objecting to the debtor's discharge." 540 U.S., at 448, 124 S.Ct. 906. Rather, the filing deadlines in the Bankruptcy Rules are " 'procedural rules adopted by the Court for the orderly transaction of its business' " that are " 'not jurisdictional.' " *Id.,* at 454, 124 S.Ct. 906 (quoting *Schacht v. United States,* 398 U.S. 58, 64, 90 S.Ct. 1555, 26 L.Ed.2d 44 (1970)). Because "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction," 540 U.S., at 452, 124 S.Ct. 906 (citing U.S. Const., Art. III, § 1), it was improper for courts to use "the term 'jurisdictional' to describe emphatic time prescriptions in rules of court," 540 U.S., at 454, 124 S.Ct. 906. See also *Eberhart v. United States,* 546 U.S. 12, 126 S.Ct. 403, 163 L.Ed.2d 14 (2005) *(per curiam)*. As a point of contrast, ****2365** we noted that § 2107 contains the type of statutory time constraints that would limit a court's jurisdiction. 540 U.S., at 453, and n. 8, 124 S.Ct. 906. [3] Nor do *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006), or *Scarborough v. Principi,* 541 U.S. 401, 124 S.Ct. 1856, 158 L.Ed.2d 674 (2004), aid petitioner. In *Arbaugh,* the statutory limitation was an employee-numerosity requirement, not a time limit. 546 U.S., at 505, 126 S.Ct. 1235. *Scarborough,* which addressed the availability of attorney's fees under the Equal Access to Justice Act, concerned "a mode of relief ... ancillary to the judgment of a court" that already had plenary jurisdiction. 541 U.S., at 413, 124 S.Ct. 1856.

3 At least one Federal Court of Appeals has noted that *Kontrick* and *Eberhart* "called ... into question" the "longstanding assumption" that the timely filing of a notice of appeal is a jurisdictional requirement. *United States v. Sadler,* 480 F.3d 932, 935 (C.A.9 2007). That court nonetheless found that "[t]he distinction between jurisdictional rules and inflexible but not jurisdictional timeliness rules drawn by *Eberhart* and *Kontrick* turns largely on whether the timeliness requirement is or is not grounded in a statute." *Id.*, at 936.

This Court's treatment of its certiorari jurisdiction also demonstrates the jurisdictional distinction between court-promulgated ***212** rules and limits enacted by Congress. According to our Rules, a petition for a writ of certiorari must be filed within 90 days of the entry of the judgment sought to be reviewed. See this Court's Rule 13.1. That 90–day period applies to both civil and criminal cases. But the 90–day period for civil cases derives from both this Court's Rule 13.1 and 28 U.S.C. § 2101(c). We have repeatedly held that this statute-based filing period for civil cases is jurisdictional. See, *e.g., Federal Election Comm'n v. NRA Political Victory Fund,* 513 U.S. 88, 90, 115 S.Ct. 537, 130 L.Ed.2d 439 (1994). Indeed, this Court's Rule 13.2 cites § 2101(c) in directing the Clerk not to file any petition "that is *jurisdictionally* out of time." (Emphasis added.) On the other hand, we have treated the rule-based time limit for criminal cases differently, stating that it may be waived because "[t]he procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion ... ." *Schacht, supra,* at 64, 90 S.Ct. 1555. [4]

4 The dissent minimizes this argument, stating that the Court understood § 2101(c) as jurisdictional "in the days when we used the term imprecisely." *Post,* at 2369, n. 4. The dissent's apathy is surprising because if our treatment of our own jurisdiction is simply a relic of the old days, it is a relic with severe consequences. Just a few months ago, the Clerk, pursuant to this Court's Rule 13.2, refused to accept a petition for certiorari submitted by Ryan Heath Dickson because it had been filed one day late. In the letter sent to Dickson's counsel, the Clerk explained that "[w]hen the time to file a petition for a writ of certiorari in a civil case ... has expired, the Court no longer has the power to review the petition." Letter from William K. Suter, Clerk of Court, to Ronald T. Spriggs (Dec. 28, 2006). Dickson was executed on April 26, 2007, without any Member of this Court having even seen his petition for certiorari. The rejected certiorari petition was Dickson's first in this Court, and one can only speculate as to whether denial of that petition would have been a foregone conclusion.

[2] Jurisdictional treatment of statutory time limits makes good sense. Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider. Because Congress decides whether federal courts can hear ***213** cases at all, it can also determine when, and under what conditions, federal courts can hear them. See *Curry,* 6 How., at 113, 12 L.Ed. 363. Put another way, the notion of " 'subject-matter' " jurisdiction obviously extends to " 'classes of cases ... falling within a court's adjudicatory authority,' " ****2366** *Eberhart, supra,* at 16, 126 S.Ct. 403 (quoting *Kontrick, supra,* at 455, 124 S.Ct. 906), but it is no less "jurisdictional" when Congress prohibits federal courts from adjudicating an otherwise legitimate "class of cases" after a certain period has elapsed from final judgment.

[3] **[4]** The resolution of this case follows naturally from this reasoning. Like the initial 30–day period for filing a notice of appeal, the limit on how long a district court may reopen that period is set forth in a statute, 28 U.S.C. § 2107(c). Because Congress specifically limited the amount of time by which district courts can extend the notice-of-appeal period in § 2107(c), that limitation is more than a simple "claim-processing rule." As we have long held, when an "appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction." *Curry, supra,* at 113. Bowles' failure to file his notice of appeal in accordance with the statute therefore deprived the Court of Appeals of jurisdiction. And because Bowles' error is one of jurisdictional magnitude, he cannot rely on forfeiture or waiver to excuse his lack of compliance with the statute's time limitations. See *Arbaugh, supra,* at 513–514, 126 S.Ct. 1235.

B

[5] Bowles contends that we should excuse his untimely filing because he satisfies the "unique circumstances" doctrine, which has its roots in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.,* 371 U.S. 215, 83 S.Ct. 283, 9 L.Ed.2d 261 (1962) *(per curiam)*. There, pursuant to then-Rule 73(a) of the Federal Rules of Civil Procedure, a District Court entertained a timely motion to extend the time for filing a notice of appeal. The District Court found the moving party had established a showing of "excusable neglect," as required by the Rule, and ***214** granted the motion. The Court of Appeals reversed the finding of excusable neglect and, accordingly, held that the District Court lacked jurisdiction to grant the extension. *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.,* 303 F.2d 609, 611–612 (C.A.7 1962). This Court reversed, noting "the obvious great hardship to a party who relies upon the trial judge's finding of 'excusable neglect.' " 371 U.S., at 217, 83 S.Ct. 283.

[6] **[7]** Today we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement. Because this Court has no authority to create equitable exceptions to jurisdictional requirements, use of the "unique circumstances" doctrine is illegitimate. Given that this Court has applied *Harris Truck Lines* only once in the last half century, *Thompson v. INS,* 375 U.S. 384, 84 S.Ct. 397, 11 L.Ed.2d 404 (1964) *(per curiam),* several courts have rightly questioned its continuing validity. See, *e.g., Panhorst v. United States,* 241 F.3d 367, 371 (C.A.4 2001) (doubting "the continued viability of the unique circumstances doctrine"). See also *Houston v. Lack,* 487 U.S. 266, 282, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988) (SCALIA, J., dissenting) ("Our later cases ... effectively repudiate the *Harris Truck Lines* approach ..."); *Osterneck v. Ernst & Whinney,* 489 U.S. 169, 170, 109 S.Ct. 987, 103 L.Ed.2d 146 (1989) (referring to "the so-called 'unique circumstances' exception" to the timely appeal requirement). We see no compelling reason to resurrect the doctrine from its 40–year slumber. Accordingly, we reject Bowles' reliance on the doctrine, and we overrule *Harris Truck Lines* and *Thompson* to the extent they purport to authorize an exception to a jurisdictional rule.

****2367** C

If rigorous rules like the one applied today are thought to be inequitable, Congress may authorize courts to promulgate rules that excuse compliance with the statutory time limits. Even narrow rules to this effect would give rise to litigation testing their reach and would no doubt detract from the clarity of the rule. However, congressionally authorized rulemaking ***215** would likely lead to less litigation than court-created exceptions without authorization. And in all events, for the reasons discussed above, we lack present authority to make the exception petitioner seeks.

III

The Court of Appeals correctly held that it lacked jurisdiction to consider Bowles' appeal. The judgment of the Court of Appeals is affirmed.

It is so ordered.

Justice SOUTER, with whom Justice STEVENS, Justice GINSBURG, and Justice BREYER join, dissenting.
The District Court told petitioner Keith Bowles that his notice of appeal was due on February 27, 2004. He filed a notice of appeal on February 26, only to be told that he was too late because his deadline had actually been February 24. It is intolerable for the judicial system to treat people this way, and there is not even a technical justification for condoning this bait and switch. I respectfully dissent.

I

" 'Jurisdiction,' " we have warned several times in the last decade, " 'is a word of many, too many, meanings.' " *Steel Co. v. Citizens for Better Environment,* 523 U.S. 83, 90, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (quoting *United States v. Vanness,* 85 F.3d 661, 663, n. 2 (C.A.D.C.1996)); *Kontrick v. Ryan,* 540 U.S. 443, 454, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004) (quoting *Steel Co.*); *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 510, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006) (same); *Rockwell Int'l Corp. v. United States,* 549 U.S. 457, 467, 127 S.Ct. 1397, 1405, 167 L.Ed.2d 190 (2007) (same). This variety of meaning has insidiously tempted courts, this one included, to engage in "less than meticulous," *Kontrick, supra,* at 454, 124 S.Ct. 906, sometimes even "profligate ... use of the term," *Arbaugh, supra,* at 510, 126 S.Ct. 1235.

In recent years, however, we have tried to clean up our language, and until today we have been avoiding the erroneous ***216** jurisdictional conclusions that flow from indiscriminate use of the ambiguous word. Thus, although we used to call the sort of time limit at issue here "mandatory and jurisdictional," *United States v. Robinson,* 361 U.S. 220, 229, 80 S.Ct. 282, 4 L.Ed.2d 259 (1960), we have recently and repeatedly corrected that designation as a misuse of the "jurisdiction" label, *Arbaugh, supra,* at 510, 126 S.Ct. 1235 (citing *Robinson* as an example of improper use of the term "jurisdiction"); *Eberhart v. United States,* 546 U.S. 12, 17–18, 126 S.Ct. 403, 163 L.Ed.2d 14 (2005) *(per curiam)* (same); *Kontrick, supra,* at 454, 124 S.Ct. 906 (same).

But one would never guess this from reading the Court's opinion in this case, which suddenly restores *Robinson's* indiscriminate use of the "mandatory and jurisdictional" label to good law in the face of three unanimous repudiations of *Robinson's* error. See *ante,* at 2363 – 2364. This is puzzling, the more so because our recent (and, I repeat, unanimous) efforts to confine jurisdictional rulings to jurisdiction proper were obviously sound, and the majority makes no attempt to show they were not. [1]

1 The Court thinks my fellow dissenters and I are forgetful of an opinion I wrote and the others joined in 2003, which referred to the 30–day rule of 28 U.S.C. § 2107(a) as a jurisdictional time limit. See *ante,* at 2364 (quoting *Barnhart v. Peabody Coal Co.,* 537 U.S. 149, 160, n. 6, 123 S.Ct. 748, 154 L.Ed.2d 653 (2003)). But that reference in *Barnhart* was a perfect example of the confusion of the mandatory and the jurisdictional that the entire Court has spent the past four years repudiating in *Arbaugh, Eberhart,* and *Kontrick*. My fellow dissenters and I believe that the Court was right to correct its course; the majority, however, will not even admit that we deliberately changed course, let alone explain why it is now changing course again.

****2368** The stakes are high in treating time limits as jurisdictional. While a mandatory but nonjurisdictional limit is enforceable at the insistence of a party claiming its benefit or by a judge concerned with moving the docket, it may be waived or mitigated in exercising reasonable equitable discretion. But if a limit is taken to be jurisdictional, waiver becomes impossible, meritorious excuse irrelevant (unless the statute so provides), and *sua sponte* consideration in the ***217** courts of appeals mandatory, see *Arbaugh, supra,* at 514, 126 S.Ct. 1235. [2] As the Court recognizes, *ante,* at 2364 – 2365, this is no way to regard time limits set out in a court rule rather than a statute, see *Kontrick, supra,* at 452, 124 S.Ct. 906 ("Only Congress may determine a lower federal court's subject-matter jurisdiction"). But neither is jurisdictional

treatment automatic when a time limit is statutory, as it is in this case. Generally speaking, limits on the reach of federal statutes, even nontemporal ones, are only jurisdictional if Congress says so: "when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Arbaugh,* 546 U.S., at 516, 126 S.Ct. 1235. Thus, we have held "that time prescriptions, however emphatic, 'are not properly typed "jurisdictional," ' " *id.,* at 510, 126 S.Ct. 1235 (quoting *Scarborough v. Principi,* 541 U.S. 401, 414, 124 S.Ct. 1856, 158 L.Ed.2d 674 (2004)), absent some jurisdictional designation by Congress. Congress put no jurisdictional tag on the time limit here. [3]

2 The requirement that courts of appeals raise jurisdictional issues *sua sponte* reveals further ill effects of today's decision. Under § 2107(c), "[t]he district court may ... extend the time for appeal upon a showing of excusable neglect or good cause." By the Court's logic, if a district court grants such an extension, the extension's propriety is subject to mandatory *sua sponte* review in the court of appeals, even if the extension was unopposed throughout, and upon finding error the court of appeals must dismiss the appeal. I see no more justification for such a rule than reason to suspect Congress meant to create it.

3 The majority answers that a footnote of our unanimous opinion in *Kontrick v. Ryan,* 540 U.S. 443, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004), used § 2107(a) as an illustration of a jurisdictional time limit. *Ante,* at 2364 – 2365 ("[W]e noted that § 2107 contains the type of statutory time constraints that would limit a court's jurisdiction. 540 U.S., at 453, and n. 8, 124 S.Ct. 906"). What the majority overlooks, however, are the post-*Kontrick* cases showing that § 2107(a) can no longer be seen as an example of a jurisdictional time limit. The jurisdictional character of the 30–(or 60)-day time limit for filing notices of appeal under the present § 2107(a) was first pronounced by this Court in *Browder v. Director, Dept. of Corrections of Ill.,* 434 U.S. 257, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978). But in that respect *Browder* was undercut by *Eberhart v. United States,* 546 U.S. 12, 126 S.Ct. 403, 163 L.Ed.2d 14 (2005) *(per curiam),* decided after *Kontrick*. *Eberhart* cited *Browder* (along with several of the other cases on which the Court now relies) as an example of the basic error of confusing mandatory time limits with jurisdictional limitations, a confusion for which *United States v. Robinson,* 361 U.S. 220, 80 S.Ct. 282, 4 L.Ed.2d 259 (1960), was responsible. Compare *ante,* at 2363 – 2364 (citing *Browder, Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982) *(per curiam),* and *Hohn v. United States,* 524 U.S. 236, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998)), with *Eberhart, supra,* at 17–18, 126 S.Ct. 403 (citing those cases as examples of the confusion caused by *Robinson's* imprecise language). *Eberhart* was followed four months later by *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006), which summarized the body of recent decisions in which the Court "clarified that time prescriptions, however emphatic, are not properly typed jurisdictional," *id.,* at 510, 126 S.Ct. 1235 (internal quotation marks omitted). This unanimous statement of all Members of the Court participating in the case eliminated the option of continuing to accept § 2107(a) as jurisdictional and it precludes treating the 14–day period of § 2107(c) as a limit on jurisdiction.

****2369** ***218** The doctrinal underpinning of this recently repeated view was set out in *Kontrick:* "the label 'jurisdictional' [is appropriate] not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." 540 U.S., at 455, 124 S.Ct. 906. A filing deadline is the paradigm of a claim-processing rule, not of a delineation of cases that federal courts may hear, and so it falls outside the class of limitations on subject–matter jurisdiction unless Congress says otherwise. [4]

4 The Court points out that we have affixed a "jurisdiction" label to the time limit contained in § 2101(c) for petitions for writ of certiorari in civil cases. *Ante,* at 2364 – 2366 (citing *Federal Election Comm'n v. NRA Political Victory Fund,* 513 U.S. 88, 90, 115 S.Ct. 537, 130 L.Ed.2d 439 (1994); this Court's Rule 13.2). Of course, we initially did so in the days when we used the term imprecisely. The status of § 2101(c) is not before the Court in this case, so I express no opinion on whether there are sufficient reasons to treat it as jurisdictional. The Court's observation that jurisdictional treatment has had severe consequences in that context, *ante,* at 2365, n. 4, does nothing to support an argument that jurisdictional treatment is sound, but instead merely shows that the certiorari rule, too, should be reconsidered in light of our recent clarifications of what sorts of rules should be treated as jurisdictional.

The time limit at issue here, far from defining the set of cases that may be adjudicated, is much more like a statute of limitations, which provides an affirmative defense, see Fed. Rule Civ. Proc. 8(c), and is not jurisdictional, *Day v.* ***219** *McDonough,* 547 U.S. 198, 205, 126 S.Ct. 1675, 164 L.Ed.2d 376 (2006). Statutes of limitations may thus be waived, *id.,*

at 207–208, 126 S.Ct. 1675, or excused by rules, such as equitable tolling, that alleviate hardship and unfairness, see *Irwin v. Department of Veterans Affairs,* 498 U.S. 89, 95–96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990).

Consistent with the traditional view of statutes of limitations, and the carefully limited concept of jurisdiction explained in *Arbaugh, Eberhart,* and *Kontrick,* an exception to the time limit in 28 U.S.C. § 2107(c) should be available when there is a good justification for one, for reasons we recognized years ago. In *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.,* 371 U.S. 215, 217, 83 S.Ct. 283, 9 L.Ed.2d 261 (1962) *(per curiam),* and *Thompson v. INS,* 375 U.S. 384, 387, 84 S.Ct. 397, 11 L.Ed.2d 404 (1964) *(per curiam),* we found that "unique circumstances" excused failures to comply with the time limit. In fact, much like this case, *Harris* and *Thompson* involved District Court errors that misled litigants into believing they had more time to file notices of appeal than a statute actually provided. Thus, even back when we thoughtlessly called time limits jurisdictional, we did not actually treat them as beyond exemption to the point of shrugging at the inequity of penalizing a party for relying on what a federal judge had said to him. Since we did not dishonor reasonable reliance on a judge's official word back in the days when we ****2370** uncritically had a jurisdictional reason to be unfair, it is unsupportable to dishonor it now, after repeatedly disavowing any such jurisdictional justification that would apply to the 14–day time limit of § 2107(c).

The majority avoids clashing with *Harris* and *Thompson* by overruling them on the ground of their "slumber," *ante,* at 2366, and inconsistency with a time-limit-as-jurisdictional rule. [5] But eliminating those precedents underscores what ***220** has become the principal question of this case: why does today's majority refuse to come to terms with the steady stream of unanimous statements from this Court in the past four years, culminating in *Arbaugh* 's summary a year ago? The majority begs this question by refusing to confront what we have said: "in recent decisions, we have clarified that time prescriptions, however emphatic, 'are not properly typed "jurisdictional." ' " *Arbaugh,* 546 U.S., at 510, 126 S.Ct. 1235 (quoting *Scarborough,* 541 U.S., at 414, 124 S.Ct. 1856). This statement of the Court, and those preceding it for which it stands as a summation, cannot be dismissed as "some dicta," *ante,* at 2363 – 2364, n. 2, and cannot be ignored on the ground that some of them were made in cases where the challenged restriction was not a time limit, see *ante,* at 2364 – 2365. By its refusal to come to grips with our considered statements of law the majority leaves the Court incoherent.

5 With no apparent sense of irony, the Court finds that " '[o]ur later cases ... effectively repudiate the *Harris Truck Lines* approach.' " *Ante,* at 2366 (quoting *Houston v. Lack,* 487 U.S. 266, 282, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988) (SCALIA, J., dissenting); omission in original). Of course, those "later cases" were *Browder* and *Griggs,* see *Houston,supra,* at 282, 108 S.Ct. 2379, which have themselves been repudiated, not just "effectively" but explicitly, in *Eberhart*. See n. 3, *supra*.

In ruling that Bowles cannot depend on the word of a District Court Judge, the Court demonstrates that no one may depend on the recent, repeated, and unanimous statements of all participating Justices of this Court. Yet more incongruously, all of these pronouncements by the Court, along with two of our cases, [6] are jettisoned in a ruling for which the leading justification is *stare decisis,* see *ante,* at 2363 – 2364 ("This Court has long held ...").

6 Three, if we include *Wolfsohn v. Hankin,* 376 U.S. 203, 84 S.Ct. 699, 11 L.Ed.2d 636 (1964) *(per curiam)*.

II

We have the authority to recognize an equitable exception to the 14–day limit, and we should do that here, as it certainly seems reasonable to rely on an order from a federal judge. [7] ***221** Bowles, though, does not have to convince us as a matter of first impression that his reliance was justified, for we only have to look as far as *Thompson* to know that he ought to prevail. There, the would-be appellant, Thompson, had filed post-trial motions 12 days after the District Court's final order. Although the rules said they should have been filed within 10, Fed. Rules Civ. Proc. 52(b) and 59(b) (1964 ed.), the trial court nonetheless had "specifically declared that the 'motion for a new trial' was made 'in ample time.' " *Thompson, supra*, at 385, 84 S.Ct. 397. Thompson relied on that statement in filing a notice of appeal within 60

days of the denial of the post-trial motions but not within 60 days of entry of the original judgment. Only timely post-trial motions affected the 60–day time limit for filing a ****2371** notice of appeal, Rule 73(a) (1964 ed.), so the Court of Appeals held the appeal untimely. We vacated because Thompson "relied on the statement of the District Court and filed the appeal within the assumedly new deadline but beyond the old deadline." 375 U.S., at 387, 84 S.Ct. 397.

7 As a member of the Federal Judiciary, I cannot help but think that reliance on our orders is reasonable. See O. Holmes, Natural Law, in Collected Legal Papers 311 (1920). I would also rest better knowing that my innocent errors will not jeopardize anyone's rights unless absolutely necessary.

Thompson should control. In that case, and this one, the untimely filing of a notice of appeal resulted from reliance on an error by a District Court, an error that caused no evident prejudice to the other party. Actually, there is one difference between *Thompson* and this case: Thompson filed his post-trial motions late, and the District Court was mistaken when it said they were timely; here, the District Court made the error out of the blue, not on top of any mistake by Bowles, who then filed his notice of appeal by the specific date the District Court had declared timely. If anything, this distinction ought to work in Bowles's favor. Why should we have rewarded Thompson, who introduced the error, but now punish Bowles, who merely trusted the District Court's statement? [8]

8 Nothing in *Osterneck v. Ernst & Whinney,* 489 U.S. 169, 109 S.Ct. 987, 103 L.Ed.2d 146 (1989), requires such a strange rule. In *Osterneck,* we described the "unique circumstances" doctrine as applicable "only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done." *Id.,* at 179, 109 S.Ct. 987. But the point we were making was that *Thompson* could not excuse a lawyer's original mistake in a case in which a judge had not assured him that his act had been timely; the Court of Appeals in *Osterneck* had found that no court provided a specific assurance, and we agreed. I see no reason to take *Osterneck's* language out of context to buttress a fundamentally unfair resolution of an issue the *Osterneck* Court did not have in front of it. Cf. *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 515, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993) ("[W]e think it generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code").

***222** Under *Thompson,* it would be no answer to say that Bowles's trust was unreasonable because the 14–day limit was clear and counsel should have checked the judge's arithmetic. The 10–day limit on post-trial motions was no less pellucid in *Thompson,* which came out the other way. And what is more, counsel here could not have uncovered the court's error simply by counting off the days on a calendar. Federal Rule of Appellate Procedure 4(a)(6) allows a party to file a notice of appeal within 14 days of "the date when [the district court's] order to reopen is entered." See also 28 U.S.C. § 2107(c)(2) (allowing reopening for "14 days from the date of entry"). The District Court's order was dated February 10, 2004, which reveals the date the judge signed it but not necessarily the date on which the order was entered. Bowles's lawyer therefore could not tell from reading the order, which he received by mail, whether it was entered the day it was signed. Nor is the possibility of delayed entry merely theoretical: the District Court's original judgment in this case, dated July 10, 2003, was not entered until July 28. See App. 11 (District Court docket). According to Bowles's lawyer, electronic access to the docket was unavailable at the time, so to learn when the order was actually entered he would have had to call or go to the courthouse and check. See Tr. of Oral Arg. 56–57. Surely this is more than equity demands, and unless every statement by a federal court is to be tagged with the warning "Beware of the Judge," Bowles's ***223** lawyer had no obligation to go behind the terms of the order he received.

I have to admit that Bowles's counsel probably did not think the order might have been entered on a different day from ****2372** the day it was signed. He probably just trusted that the date given was correct, and there was nothing unreasonable in so trusting. The other side let the order pass without objection, either not caring enough to make a fuss or not even noticing the discrepancy; the mistake of a few days was probably not enough to ring the alarm bell to send either lawyer to his copy of the Federal Rules and then off to the courthouse to check the docket. [9] This would be a different case if the year were wrong on the District Court's order, or if opposing counsel had flagged the error. But on the actual facts, it was reasonable to rely on a facially plausible date provided by a federal judge.

9 At first glance it may seem unreasonable for counsel to wait until the penultimate day under the judge's order, filing a notice of appeal being so easy that counsel should not have needed the extra time. But as Bowles's lawyer pointed out at oral argument, filing the notice of appeal starts the clock for filing the record, see Fed. Rules App. Proc. 6(b)(2)(B), 10(b), and 11, which in turn starts the clock for filing a brief, see Rule 31(a)(1), for which counsel might reasonably want as much time as possible. See Tr. of Oral Arg. 6. A good lawyer plans ahead, and Bowles had a good lawyer.

I would vacate the decision of the Court of Appeals and remand for consideration of the merits.

All Citations

551 U.S. 205, 127 S.Ct. 2360, 168 L.Ed.2d 96, 75 USLW 4428, 68 Fed.R.Serv.3d 190, 07 Cal. Daily Op. Serv. 6807, 2007 Daily Journal D.A.R. 8736, 20 Fla. L. Weekly Fed. S 352

155 Tex. 591
Supreme Court of Texas.

The GLIDDEN COMPANY et al., Petitioners,
v.
The AETNA CASUALTY and SURETY COMPANY, Respondent.

No. A-5632.
|
June 6, 1956.

Action by materialmen against surety on bond furnished by contractor who contracted for construction of a housing project for a city housing authority. The District Court, Taylor County, J. R. Black, J., rendered judgment for materialmen and surety appealed and materialmen cross appealed. The Eastland Court of Civil Appeals, Eleventh Supreme Judicial District, 283 S.W.2d 440, reformed and remanded the District Court judgment and materialmen brought error. The Supreme Court, Walker, J., held that where surety's appeal bond was not filed within 30 days after entry of judgment by trial court, its appeal from an adverse judgment should have been dismissed on materialmens' motion even though a diligent effort to file it on the thirtieth day was made, but was unsuccessful because clerk's office closed earlier that day than usual.

Judgment reversed and cause remanded with instructions to dismiss appeal.

Attorneys and Law Firms

***592** ****316** Spafford, Spafford, Freedman, Hamlin, Gay & Russell, Dallas, for glidden co.

Gibson, Ochsner, Harlan, Kinney & Morris, Amarillo, for Crowe-Gulde Cement Co.

McMahon, Springer, Smart & Walter, Abilene R. T. Bailey and Wm. L. Richards, Dallas, for respondent.

Opinion

WALKER, Justice.

Petitioners, who supplied materials to the contractor for the construction of a housing project for the Housing Authority of the City of Borger, recovered judgment in the trial court against respondent, the surety on the contractor's performance and payment ****317** bond, for the value of all materials furnished by them. The Court of Civil Appeals concluded that the rights of ***593** the parties are governed by the provisions of Art. 5160, Tex.Rev.Civ.Stat.1925, as amended, Vernon's Ann.Civ.St. art. 5160, and reformed the judgment to allow petitioners to recover only for materials which were furnished within ninety days of the filing of their verified claims with the county clerk. 283 S.W.2d 440. Since respondent's appeal bond was not filed within the period of thirty days prescribed by Rule 356, Texas Rules of Civil Procedure, it is our opinion that the Court of Civil Appeals should have sustained petitioners' motion to dismiss the appeal.

The judgment of the trial court was rendered and entered on September 29th, and no motion for new trial was filed. Local counsel for respondent received the appeal bond by registered mail during the morning of October 29th, which was the last day for filing same. About four o'clock that afternoon, Dallas counsel telephoned to inquire whether the bond had been received and filed. Upon termination of that conversation, the local attorney telephoned the district clerk's office, but received no answer. He then drove to the courthouse, which was some fifteen blocks from his office, for the purpose of filing the bond. Although he reached the clerk's office before five o'clock, which was the usual closing time, the office was locked and neither the clerk nor any of the deputies could be found in the courthouse.

Counsel attempted to reach the clerk by telephone at the latter's residence some five times during the late afternoon and evening, but no one answered. He did not try to contact the district judge, who was recovering from an operation and was not in condition to transact business. Nor was any effort made to reach one of the several deputy clerks, because counsel did not know how to locate them.

Shortly after eight o'clock the following morning, counsel returned to the clerk's office and delivered the bond to a deputy clerk, who stamped the same with a file mark showing October 30th as the date of filing. Counsel explained that he had attempted to file the bond before the usual closing time the previous afternoon and had found the office locked. He was informed that the clerk had left town the day before and had instructed the deputies to close early if they desired, and that they had closed the office and gone home a few minutes after four o'clock. Counsel then suggested that under the circumstances the bond should be filed as of October 29th, and the file mark which had been stamped on the bond was thereupon changed in ink, under direction of the clerk, to show that date.

***594** Petitioners filed motions in the trial court to correct the record with respect to the date of filing of the appeal bond, and after a hearing an order was entered by that court finding that while the bond shows a filing date of October 29th, the same was in fact delivered to the clerk the following day. Petitioners then filed in the Court of Civil Appeals motions to dismiss the appeal, which were overruled without a written opinion. In response to requests for findings of fact with reference to the filing of the bond, the appellate court simply found that the facts set forth in an affidavit of the local attorney filed in that court are true. The essential facts stated in such affidavit are set out above.

[1] **[2]** Respondent argues that the Court of Civil Appeals determined that it had jurisdiction of the appeal, and that such ruling is final and cannot be questioned in this Court. Courts of Civil Appeals undoubtedly have the power, upon affidavit or otherwise, to ascertain such facts as may be necessary to the proper exercise of their jurisdiction. Art. 1822, Tex.Rev.Civ.Stat.1925. Whether an appeal bond was filed on or before thirty days after the date of rendition of judgment or order overruling the motion for new trial, is a question of fact properly determinable by such courts. Woodrum Truck Lines v. Bailey, Tex.Com.App., 57 S.W.2d 92. A finding by the Court of Civil Appeals in the present case, supported by some evidence, that the appeal bond was filed on or before October ****318** 29th, would not be subject to review in this Court.

[3] But no such finding has been made. As the case comes to us, the intermediate appellate court has found, in effect, that respondent attempted to file the bond on October 29th and would have done so if the clerk's office had remained open until the usual closing hour, and that the bond was actually delivered to the clerk the following day. We think it is also proper to supply by implication, in support of the court's action in overruling the motions to dismiss the appeal, a finding that respondent used reasonable diligence to file the bond on October 29th. Whether these facts are sufficient to confer jurisdiction upon the Courts of Civil Appeals is a question of law which may be determined by this Court.

[4] Rule 356 requires that the appeal bond be filed within thirty days after the date of rendition of judgment or order overruling the motion for new trial. A paper is deemed to have been filed when it is delivered into the custody of the proper official, to be kept by him among the papers in his office subject to such ***595** inspection by interested parties as may be permitted by law. Beal's Adm'r v. Alexander, 6 Tex. 531; Holman v. Chevaillier's Adm'r, 14 Tex. 337; Rowney v. Rauch, Tex.Civ.App., 258 S.W.2d 371 (writ ref.). Respondent cites Gonzalez v. Vaello, Tex.Civ.App., 91 S.W.2d 904 (writ dis.), where a petition forwarded by mail was held to have been filed on the day it was placed in the box in the clerk's office designated for the reception of his mail, although the clerk was not in his office that day and did not go to the office until two days later. That decision may well be sound, because the petition was subject to the custody and control of the clerk as soon as it was placed in his mail box. In the present case, however, the bond remained in the custody and subject to the control of counsel for respondent until it was delivered to the clerk on the morning of October 30th. If respondent had countermanded previous instructions at any time prior to such delivery, the bond would not have been filed. We are unable to find any rational basis for saying that the bond was filed before it was delivered to the clerk.

[5] **[6]** The use of diligence to file the bond within the prescribed period, and the reasons for failure to do so, would be material considerations if compliance with the rule could be waived or excused or if the time of filing might be extended. It is well settled, however, that the requirement that the bond be filed within thirty days is mandatory and jurisdictional, and that the time prescribed cannot be dispensed with or enlarged by the courts for any reason. Bruce v. San Antonio Music Co., Tex.Civ.App., 165 S.W.2d 243 (writ ref.); El Paso & N. E. R. Co. v. Whatley, 99 Tex. 128, 87 S.W. 819. Since no discretion is lodged in any court to excuse delay, even of one day in filing the bond, the reasons for the delay, even though sufficient to justify the exercise of discretion in aid of the appeal, are not material. See Labansat v. Cameron County, Tex.Civ.App., 143 S.W.2d 94 (no writ); Long v. Martin, 112 Tex. 365, 247 S.W. 827. The case last cited holds that delay in filing the petition for writ of error is fatal to the jurisdiction of this Court although counsel used the utmost diligence to file the petition in time.

[7] The application of these established principles to the facts of this case as determined by the Court of Civil Appeals compels the conclusion that the appeal bond was not filed in time, and that the Court of Civil Appeals did not acquire jurisdiction of the appeal.

The judgment of the Court of Civil Appeals is reversed and ***596** the cause is remanded to that court with instructions to dismiss the appeal.

All Citations

155 Tex. 591, 291 S.W.2d 315

End of Document

956 S.W.2d 25
Court of Criminal Appeals of Texas,
En Banc.

Ex parte David Wayne WILSON.

No. 72759.
|
Nov. 5, 1997.

On petition for habeas corpus relief from the Harris County District Court, Jan Krocker, J., the Court of Criminal Appeals held that: (1) appellate counsel is not required to advise defendant as to merits of discretionary review, and (2) appellate counsel's conduct adequately protected defendant's right to file petition for discretionary review.

Petition denied.

Baird, J., dissented with opinion in which Overstreet, J., joined.

Attorneys and Law Firms

***26** Sandra K. Foreman, Huntsville, (State Counsel for Offenders), for appellant.

Lynn P. Hardaway, Assistant District Attorney, Baldwin Chin, Assistant District Attorney, Houston, Matthew Paul, State's Attorney, Austin, for State.

Before the court en banc.

OPINION

PER CURIAM.

After a trial before the court, Applicant was convicted of aggravated assault. The court found one of the enhancement allegations to be true and assessed punishment at confinement for twenty years. The Court of Appeals affirmed the conviction. *Wilson v. State*, No. 01–92–01224–CR, 1993 WL 542176 (Tex.App.—Houston [1st], delivered December 30, 1993). In August, 1995, Applicant filed this application for a post-conviction writ of habeas corpus in accord with Article 11.07, V.A.C.C.P. Applicant claims that under *Ex parte Jarrett*, 891 S.W.2d 935 (Tex.Cr.App.1995), his appellate attorney deprived him of the opportunity to file a petition for discretionary review.

FACTS

Applicant alleges that his attorney did not inform him that the Court of Appeals had affirmed his conviction. He also claims counsel failed to advise him about the merits and possible advantages and disadvantages of pursuing discretionary review as required by *Jarrett.* In response, appellate counsel filed an affidavit that he had mailed a copy of the Court of Appeals' opinion to Applicant after the conviction was affirmed. Counsel stated he told Applicant he would not represent him any further because Applicant had filed a grievance against him and because counsel did not believe a petition for discretionary review would have any merit. Counsel asserted that he "did not have the type of correspondence or conversations contemplated by Ex parte Jarrett," but that *Jarrett* was decided almost ten months after Applicant's

conviction was affirmed. The trial court found the facts asserted in counsel's affidavit to be true. Counsel's affidavit raises the issue of retroactivity of *Jarrett.*

EX PARTE JARRETT

[1] **[2]** We begin our retroactivity analysis with *Jarrett.* In *Jarrett* this Court held that an appellate attorney has a duty to explain the meaning and effect of an appellate court decision, to express professional judgment about possible grounds for review, and to discuss advantages and disadvantages of further review. *Jarrett,* 891 S.W.2d at 940, 944. Despite attaching these duties to appellate counsel, this Court reaffirmed its decision in *Ayala v. State*, 633 S.W.2d 526 (Tex.Cr.App.1982), that a defendant has no constitutional right to counsel for pursuing discretionary review, even though a defendant has a right to prepare and file a petition for discretionary review. *Jarrett,* 891 S.W.2d at 939. Closer analysis of *Jarrett* shows the duties imposed on appellate counsel overstep the bounds of the right to counsel on direct appeal because no such right exists for pursuing discretionary review. However, the ultimate holding in *Jarrett* is still correct. If appellate counsel's action or inaction denies a defendant his opportunity to prepare and file a petition for discretionary review, that defendant has been denied his sixth amendment right to effective assistance of counsel. *Jarrett,* 891 S.W.2d at 939.

Counsel's duty as set out in *Jarrett* originates from two related sources: Article 26.04, V.A.C.C.P., as amended in 1987, and *Ex parte Axel*, 757 S.W.2d 369 (Tex.Cr.App.1988). We relied on Art. 26.04 by deciding that the point at which a defendant should be informed of the disposition of the appeal and what step comes next is part of the direct appeal process. However, we then extended ***27** the direct appeal process into the discretionary review area by requiring counsel to give advice pertaining to the merits of discretionary review as if appellate counsel's duties were analogous to those in *Axel.*

[3] **[4]** This Court's reliance on Art. 26.04 and *Axel* is misplaced because these concern an appeal one has of right. Attendant to an appeal of right is a right to counsel. *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). Texas accords defendants an appeal of right. See Article 44.02, V.A.C.C.P. However, the scope of the right to counsel is governed by the right to which it attaches. It makes sense that counsel on direct appeal must inform a defendant of the result of the appeal. However, since a defendant has no further right to counsel, it makes no sense to require counsel to discuss the merits of what the defendant would include in a petition for discretionary review. A defendant given an appeal of right is entitled to counsel who must inform the defendant, in accord with *Axel,* of the right to appeal, including expressing professional judgment as to possible grounds for appeal and their merit, and delineating advantages and disadvantages of appeal. *Axel,* 757 S.W.2d at 374. Counsel must advise a defendant of rights pertaining to direct appeal. That is why in *Axel* this Court found the attorney to have been ineffective *on appeal.* In contrast, because a defendant has no right to counsel for pursuing discretionary review, appellate counsel has no constitutional or statutory duty to give advice to a defendant pertaining to the merits of discretionary review. Counsel may not deny a defendant the right or opportunity to avail himself of discretionary review, but counsel need not discuss the merits of such review because a defendant has no right to counsel for discretionary review.

The scope of the duty attached to counsel is governed by the right to which that duty attaches. The right to counsel on an appeal of right, under Art. 26.04, ends with the conclusion of the direct appeal. That means counsel on appeal must inform a defendant of the result of the direct appeal and the availability of discretionary review. But, because there is no right to counsel on discretionary review, the duty of counsel ends there. While it may be wiser to give more complete information to a defendant, it is neither constitutionally nor statutorily required.

In *Jarrett* this Court erroneously analogized the duties of appellate counsel after the court of appeals has decided a case, to that of the trial attorney in *Axel* after the defendant has been sentenced. In *Axel* this Court explained that the trial attorney continues as counsel for appellate purposes, unless he affirmatively withdraws, *because* the defendant has a right

to counsel on appeal. This Court decided that trial counsel has a duty to protect a defendant so that he can exercise that right to appeal. In contrast, according to *Ayala,* a defendant has no right to counsel for pursuing discretionary review. Thus, *Jarrett* was based on the incorrect premise that the duties imposed by *Axel* on a trial attorney turned appellate attorney, because a defendant has a right to counsel on appeal, were analogous to those of an appellate attorney for a process for which a defendant has no right to counsel. Those duties set out in *Axel* stem from the interdependent rights to counsel and appeal. Because there is no right to counsel on discretionary review, the appellate attorney has no duty to inform a defendant of details pertinent to further review.

We overrule *Jarrett* to the extent it held that an appellate attorney has an obligation to inform a defendant of anything other than the fact that his conviction has been affirmed and he can pursue discretionary review on his own. This information sufficiently protects a defendant's right to file a petition for discretionary review. Counsel has no other constitutional obligations because a defendant has no right to counsel for purposes of discretionary review.

[5] In the instant case the trial court found appellate counsel's affidavit to be true. In that affidavit counsel stated that he mailed Applicant a copy of the Court of Appeals' opinion and informed Applicant that he did not believe a petition for discretionary review would have any merit. This is sufficient to protect Appellant's right, if he desired, ***28** to file a petition for discretionary review. Accordingly, relief is denied.

MEYERS, J., not participating.

BAIRD, Judge, dissenting.

This habeas corpus petition presents a single question: whether the rule announced in *Ex parte Jarrett,* 891 S.W.2d 935 (Tex.Cr.App.1994), is retroactive. However, the majority avoids the retroactivity issue by overruling *Jarrett* "to the extent it held that an appellate attorney has an obligation to inform a defendant of anything other than the fact that his conviction has been affirmed and he can pursue discretionary review on his own." *Ante* at 27. Because the majority does not resolve the issue presented and fails to recognize the true holding of *Jarrett,* I dissent. [1]

1 As noted in the dissents in *Ex parte McJunkins,* 926 S.W.2d 296, 298 (Tex.Cr.App.1996), and *Anson v. State,* 1997 WL 621305, 959S.W.2d 203 (Tex.Cr.App. No. 741–96, delivered October 8, 1997), a majority of this Court, with an ever increasing frequency, decides cases by resolving issues that are not properly before the Court. By doing so, the parties are misled into believing the Court will resolve the issue it agreed to hear and deprived the opportunity to brief the issue which is ultimately decided. Today, a majority of the Court continues this disturbing trend.

I.

In *Jarrett, supra,* the applicant contended counsel's failure to advise an appellant of the court of appeals' decision, the right to petition this Court for discretionary review and the plausible grounds and possible merit of such a petition constituted ineffective assistance of counsel. In *Jarrett,* we set forth the duties of appellate counsel following the decision of the court of appeals:

> Pursuant to Rule 91 *appellate counsel* has a duty to notify the appellant of the actions of the appellate court and to *consult with and fully advise* the appellant of the *meaning and effect of the opinion of the appellate court.* Finally, although appellate counsel has *no duty to file a petition for discretionary review, Ayala,* 633 S.W.2d. at 528, *appellate counsel* does have the duty, under art. 26.04, to *advise the appellant of the possibility of review by this Court as well as expressing his*

> *professional judgment as to possible grounds for review and their merit, and delineating the advantages and disadvantages of any further review.* [2]

2 All emphasis supplied unless otherwise indicated.

Id., 891 S.W.2d at 940.

The majority purports to agree with *Jarrett* to the extent appointed appellate counsel has the duty to inform his indigent client of the intermediate court's decision and of the defendant's right to file a petition for discretionary review *pro se.* This, says the majority, is the "ultimate holding of *Jarrett* " which, they hold is still correct. *Ante* at 26. However, the majority argues *Jarrett* 's requirement that appellate counsel render advice regarding possible grounds for review goes beyond what is statutorily or constitutionally required of appellate counsel. *Ante* at 26. *Their rationale is grounded exclusively in their position that there is no "right" of discretionary review by this Court* and, therefore, appellant has no right to the assistance of counsel for the purpose of discretionary review. *Ante* at 26.

The argument erroneously assumes that *Jarrett* recognized a "right" of discretionary review by this Court. Nothing could be further from the truth. It is axiomatic that there is no "right" of discretionary review by this Court. In *Ayala v. State,* 633 S.W.2d 526, 528 (Tex.Cr.App.1982), this Court held "*Discretionary review by the Court of Criminal Appeals is not a matter of right,* but of sound judicial discretion." *See also,* Texas Constitution, art. V, § 5; and, Tex.R.App. P. 66.2. Furthermore, in *Jarrett* we specifically stated: "Though *there is no right to have discretionary review granted* by this Court, we have held that due to the very fact that the provision exists *there is a right to make a request* to this Court." *Id.,* 891 S.W.2d at 940.

The right secured by *Jarrett* is the *right to petition* this Court for review, not the actual right of review itself. Counsel's duty to advise appellant of the possibility of review by this Court as well as his duty to express ***29** professional judgment as to possible grounds for review and their merit, and the advantages and disadvantages of further review, are more firmly rooted in law than the majority recognizes.

II.

Our holding in *Jarrett* was based upon our decisions of *Ayala,* 633 S.W.2d 526, and *Ex parte Axel,* 757 S.W.2d 369 (Tex.Cr.App.1988). In *Ayala,* this Court recognized there is no right to either discretionary review itself, or counsel for the purpose of such review, but that as long as the procedure existed, there is an affirmative right to request review by this Court.

The issue in *Axel* is analogous to the issue presented in *Jarrett,* except that *Axel* dealt with trial counsel's duty to advise his client of the merit of seeking a direct appeal. Additionally, we relied on the Legislature's intent, manifest in the unambiguous language and plain meaning of Tex.Code Crim. Proc. Ann. art. 26.04, which requires appointed appellate counsel to represent his client until *appeals* are exhausted, and former Tex.R.App. P. 91 (1986, repealed 1997), [3] which provides for post-appeal notification of appellant of the appellate proceedings. In *Axel,* we carefully explained:

3 Current version of former Tex.R.App. P. 91 (1986, repealed 1997) found in Tex.R.App. P. 48.1, eff. Sept. 1, 1997.

> Representation by trial counsel does not terminate at end of trial—if that means when a jury has returned its final verdict on punishment. The sentencing proceeding is a critical part of trial, requiring assistance from trial counsel, and similarly thereafter the determination to give notice of appeal. Informing a defendant of his right to appeal is part

> and parcel of also further advising him along lines of the [ABA] Standards ... in order to make a decision whether to take an appeal.
>
> *Id.,* 757 S.W.2d at 373.

Just as trial counsel is responsible for representing a defendant during the procedural gap between sentencing and the decision to appeal, appellate counsel has a duty to represent a defendant until an informed decision whether to file a petition for discretionary review is made. On rehearing in *Jarrett,* Judge Meyers discussed the minimal advice an objectively reasonable appellate attorney must provide a defendant whose only remaining concern is whether to seek review by this Court. Judge Meyers explained:

> we do not mean to hold, of course, that appellate attorney must continue as advocates for their clients through the discretionary review process itself, but it is after all, a critical part of an attorney's job to help his client make decisions of substantial legal significance.
>
> As we held on original submission, it is the *professional duty of an appellate lawyer* to explain the meaning and effect of an appellate court decision in his client's case, to acquaint his client with available options for further review of the case, and to assist his client with the decision whether to seek such review.

Id., 891 S.W.2d at 944 (Op. on Reh'g). This is so because the judgment of an intermediate appellate court in a criminal case does not become final at once. Tex.Code Crim. Proc. Ann. arts. 42.045, 44.45(a); and former Tex.R.App. P. 86(a) (1986, repealed 1997). [4] Therefore,

4 Current version of former Tex.R.App. P. 86 (1986, repealed 1997) found in Tex.R.App. P. 18, eff. Sept. 1, 1997.

> the rendition of a judgment does not immediately exhaust the appellate process. During the entire period of time between the rendition of an opinion by the appellate court and the date upon which it becomes final, therefore, the *appellate lawyer still represents his client and remains under a duty to provide him with satisfactory legal counsel.*
>
> *Jarrett,* 891 S.W.2d at 944 (Op. on Reh'g). This comports with the requirements of art. 26.04 that appointed appellate counsel continue his representation of appellant until appeals are exhausted.

Specifically, the majority attacks *Jarrett* 's reliance on art. 26.04 and *Axel* as "... misplaced because [they] concern *an appeal one has of right.*" *Ante* at 26. This contention ***30** mischaracterizes the issue before us because as discussed earlier, the "right" protected in *Jarrett* is the "right" to petition this Court for review, *NOT* a "right" of discretionary review itself. In *Jarrett,* we properly relied on the language of art. 26.04(a), which provides:

> Whenever the court determines that a defendant charged with a felony or a misdemeanor punishable by imprisonment is indigent or that the interests of justice require representation of a defendant in a criminal proceeding, the court shall appoint one or more practicing attorneys to defend him. An attorney appointed under this subsection *shall represent the defendant until charges are dismissed, the defendant is acquitted, appeals are exhausted, or the attorney is relieved of his duties by the court or replaced by other counsel.*

Even though this Court has construed limitations to counsel's duty as prescribed by art. 26.04, particularly that counsel has no duty to file a petition for discretionary review, there is nothing within the plain meaning of art. 26.04(a) to indicate the Legislature intended to discharge appellate counsel of all duties to his client with regard to appellant filing a petition for discretionary review *pro se.* In fact, art. 26.04(a) by its own language charges appointed appellate counsel with an expansive duty to his indigent client that is not limited to his client's first appeal of right. Of particular significance to both *Jarrett* and the present case is art. 26.04's mandate that an appointed attorney represent his client "*until ... appeals [plural] are exhausted. ...*" [5]

5 On the issue of what stage "appeals" are effectively exhausted, Judge Teague's concurrence and dissent in *Ayala v. State,* 633 S.W.2d at 532 is particularly insightful:

> ... the State of Texas, through its Legislature, has indicated a State policy to provide legal assistance throughout the course of *a criminal "appeal," which I believe includes the filing of a petition for discretionary review.*

In *White v. State,* 543 S.W.2d 366, 368 (Tex.Cr.App.1976), Roberts, J., who wrote the plurality opinion for the Court, stated in part:

> Our research reveals that the word "appeal" has not been construed in Texas by an appellate court having criminal jurisdiction since 1840. In that year, in *Republic v. Smith,* Dallam 407, the Supreme Court of the Republic of Texas defined an appeal (quoting Blackstone) as "a complaint to a superior court of injustice done by an inferior one." Mr. Black gives a similar definition. Black's Law Dictionary, *supra,* at 124 (citations and footnote omitted).
>
> Following these definitional guidelines, it seems clear that a petition for certiorari, like a writ of error in Texas practice, *is an "appeal," albeit a discretionary one* (citations omitted). To say that review by certiorari does not constitute an appeal is to make a distinction without substance, since such a review necessarily involves an attempt to persuade a superior court to correct the error of a lower court.

Likewise, to hold discretionary review by this Court does not constitute an "appeal," is to make a distinction without substance. Although this Court held in *Ayala,* 633 S.W.2d at 527, "... the Fourteenth Amendment does not require a state to provide indigents with the services of counsel in seeking discretionary review beyond the first step of appeal," it is unrealistic to argue that discretionary review, when granted, is not an "appeal." In his dissent in *Wainwright v. Torna,* 455 U.S. 586, 102 S.Ct. 1300, 71 L.Ed.2d 475 (1982), Justice Marshall correctly points out the importance of the last level of appeal:

> Particularly where a criminal conviction is challenged on constitutional grounds, *permissive review in the highest state court may be the most meaningful review a conviction will receive.* Moreover, where a defendant seeks discretionary review, the assistance of an attorney is vital.

III.

The majority's decision to overrule *Jarrett* is disturbing because not only is *Jarrett* well-grounded in Texas law, but it is helpful and beneficial to all parties. When granted, discretionary review by this Court is the ultimate appeal which oftentimes serves as the only and final lynchpin of justice in a criminal case. *See,* Tex. Const. art. V, § 5.[6] To believe otherwise would obviate the discretionary review function of this Court and render meaningless not only petitions for discretionary review, but the very work we do as Judges for this Court. In order to preserve the significance of discretionary review, appellants must be afforded meaningful access ***31** to this important procedure. This meaningful access requires not only that appellant know of his right to petition this Court for review, but understand the significance of discretionary review and be aware of all possible grounds for review and their potential merit.

6 Art. V, § 5, in relevant part, provides:

> The Court of Criminal Appeals shall have *final appellate jurisdiction* coextensive with the limits of the state, and its determinations shall be final, in all criminal cases of whatsoever grade, with such exceptions and under such regulations as may be provided in this Constitution or as prescribed by law. (Emphasis supplied.)

Under *Jarrett,* the appellant has meaningful access to his right to seek discretionary review by this Court; appointed appellate counsel discharges his legal, professional and ethical duties to zealously represent his client until his client's appeals are exhausted; the number of frivolous and faulty petitions for discretionary review to this Court are reduced; the State does not waste time answering frivolous petitions; and, the limited resources of this Court are spent focused on meritorious petitions.

Pro se appellants should not be expected to possess the legal knowledge necessary to prepare thoughtful and meritorious petitions for discretionary review when our case law is replete with examples of petitions which were refused because appellate *attorneys* failed to comply with the rules of appellate procedure. *See, Degrate v. State,* 712 S.W.2d 755 (Tex.Cr.App.1986) (any petition which fails to set forth adequate reasons for this Court to exercise its discretion to review a court of appeals' opinion is subject to summary refusal); *Pumphrey v. State,* 689 S.W.2d 466 (Tex.Cr.App.1985) (petition not prepared in conformity with the rules will by summarily refused); *Delgado v. State,* 687 S.W.2d 769 (Tex.Cr.App.1985) (failure of counsel to comply with rules will cause this Court to summarily refuse petition for discretionary review that has been filed on behalf of appellant).

The problems facing *pro se* appellants seeking discretionary review are the same as those faced by unrepresented appellants on direct appeal. The Supreme Court in *Evitts v. Lucey,* 469 U.S. 387, 395–96, 105 S.Ct. 830, 836, 83 L.Ed.2d 821 (1985), explained the unrepresented appellant on direct appeal faces a disadvantage in perfecting his appeal of right because it is "... an adversary proceeding that—like a trial—is governed by *intricate rules that to a layperson would be hopelessly forbidding." Id.,* 469 U.S. at 396, 105 S.Ct. at 836. Likewise, in his dissent in *Peterson v. Jones,* 894 S.W.2d 370, 378 (Tex.Cr.App.1995), Judge Maloney expressed concern that an indigent appellant is not automatically entitled to assistance of court-appointed counsel to file a petition for discretionary review, and the court therefore has no ministerial statutory duty to authorize payment for the services appellate counsel performed in filing petitions for discretionary review:

> This Court granted approximately eleven percent of the petitions for discretionary review disposed in 1994. *The chances that a petition will be granted are reduced when an indigent defendant, unfamiliar with the procedural requirements and substantive law, files a petition without the assistance of counsel.* Texas Rule of Appellate Procedure 200 lists the "character of reasons" for which this Court may grant review. Each requires a firm grasp of the legal and factual aspects of the case for which review is sought, a knowledge of relevant procedural and substantive law, and access to current Court of Criminal Appeals and courts of appeals decisions. In the unlikely event that this Court grants review of a pro se petition, only then would the trial court appoint an attorney to represent the indigent. (Internal citation omitted.)

Further, Judge Meyers, in his opinion on rehearing in *Jarrett,* explained:

> it is, after all, a *critical part of an attorney's job to help his client make decisions of substantial legal significance. And, at the moment a client learns his criminal conviction has been affirmed, there can be no decision of greater legal significance or of more pressing importance than whether to seek further review. It is not enough just to know that such review may be available.* Before making a decision whether to follow this course one must also know the mechanics of discretionary review, appreciate the legal issues involved, and possess an ability to assess the likelihood of success. These skills are the professional tools of lawyers, and it is entirely appropriate that a person who is actually represented by legal counsel look to his ***32** attorney for professional advice on this subject.

Id., 891 S.W.2d at 944 (Op. on Reh'g). As such, *Jarrett* 's requirement that appellate counsel render advice to his client regarding the possible merit or lack of merit of filing a petition for discretionary review serves to preserve the integrity of appellant's right to file a petition.

Perversely, the majority admits while "the right to counsel on an appeal of right, under 26.04, ends with the conclusion of the direct appeal ... *it may be wiser to give more complete information to a defendant,* [although] it is not constitutionally or statutorily required." *Ante* at 27. This statement is evidence the majority recognizes the disadvantage an uninformed *pro se* petitioner faces. Yet, they are willing to disregard his plight.

The majority suggests there was no authority for this Court to require appellate counsel advise the appellant regarding the possible merit or lack of merit of filing a petition for discretionary review. This is simply not true. It is well established that federal law provides only the *minimum* standards and States are free to require more from appointed counsel.

In *Ross v. Moffitt,* 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974), which held counsel has no duty to file a petition for discretionary review, Chief Justice Rehnquist explained: "We do not mean by this opinion to in any way discourage those States which have, as a matter of legislative choice, made counsel available to convicted defendants at all stages of judicial review." In fact, absent any law to the contrary, this Court has specific authority to promulgate its own rules regarding its discretionary powers of review. Tex.Code Crim. Proc. Ann. art. 44.33(a), in pertinent part, provides: "The

Court of Criminal Appeals shall make rules of posttrial and appellate procedure as to the hearing of criminal actions not inconsistent with the Code." Additionally, Tex.Code Crim. Proc. Ann. art. 44.45(c), concerning review by the Court of Criminal Appeals provides: "The Court of Criminal Appeals may promulgate rules pursuant to this article." [7] Thus, not only are states free to require more from appointed appellate counsel than federal laws require, the authority to do so is vested in this Court.

7 In *Davis v. State,* 721 S.W.2d 857, 858 (Tex.Cr.App.1986), this Court explained:

> Articles 44.33(a) and 44.45(c) authorize this Court to make rules of posttrial and appellate procedure for hearing criminal actions not inconsistent with remaining provisions of the Code of Criminal Procedure, *including promulgating rules to implement its discretionary review jurisdiction, power and authority.* In 1981 this Court did indeed adopt and promulgate Rules of Post Trial and Appellate Procedure in Criminal Cases. (Internal citation omitted.)

See also, Herrin v. State, 668 S.W.2d 896, 897 (Tex.App.—Dallas 1984) (holding Court of Criminal Appeals has rule-making authority to enlarge the time for filing a petition for discretionary review).

IV.

There is nothing wrong with our decision in *Jarrett.* To the contrary, as the majority concedes, *Jarrett* mandated the "wiser [practice] to give more complete information to a defendant." *Ante* at 27. Nevertheless, rather than follow the established precedent of this Court which they, themselves regard as sound, the majority chooses to overrule *Jarrett* in order to deny *pro se* appellant's meaningful access to this Court, a result which is beneficial to the State.

Judges are charged with a duty to follow and uphold laws which they recognize as sound and "wise," and attorneys have legal, professional and ethical duties, exclusive of constitutional requirements, to see that their clients are sufficiently informed about the status of their cases so as to make decisions of substantial legal significance. For an appellant there can be no decision more critical than whether to seek review of their case by the State's highest court. Because the majority fails in its duty to uphold law and encourages indifferent representation of indigent criminal defendants in Texas, I dissent.

OVERSTREET, J., joins this opinion.

All Citations

956 S.W.2d 25

918 S.W.2d 519
Court of Criminal Appeals of Texas,
En Banc.

Jesus OLIVO, Appellant,
v.
The STATE of Texas, Appellee.

No. 0442–95.
|
March 27, 1996.

Defendant was convicted in the Criminal District Court, No. 3, Dallas County, Mark Tolle, J., of murder, and he appealed. The Court of Appeals, 894 S.W.2d 58, dismissed appeal due to defendant's failure to file timely notice of appeal and failure to file motion for extension of time to appeal. Defendant petitioned for discretionary review. The Court of Criminal Appeals, Meyers, J., held that timely filing of motion for extension of time to appeal was jurisdictional requirement.

Affirmed.

Clinton and Overstreet, JJ., concurred in the result.

***520** Appeal from Criminal District Court No. 3, Dallas County; Mark Tolle, Judge.
Petition for Discretionary review from Court of Appeals, 4th Supreme Judicial District.

Attorneys and Law Firms

John H. Hagler, Dallas, for appellant.

Lori L. Ordiway, Assist. Dist. Atty., Dallas, Robert A. Huttash, State's Atty., Austin, for the State.

Before the court en banc.

OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

MEYERS, Judge.

[1] Appellant was convicted of murder, and the jury assessed punishment at forty years of confinement. Appellant's notice of appeal was due to be filed on June 27, 1994. Appellant filed his notice of appeal on July 12, 1994, the fifteenth day after it was due. Appellant's motion for extension of time, styled a "Motion for Leave to File Late Notice of Appeal," was filed on September 27, 1994. The Court of Appeals dismissed the appeal for lack of jurisdiction. *Olivo v. State,* 894 S.W.2d 58 (Tex.App.—San Antonio 1994). We granted Appellant's petition for discretionary review to address the following ground:

> The Court of Appeals erred in holding that the court lacked jurisdiction to entertain this appeal when the notice of appeal was filed within the fifteen day grace period but the motion for leave to file the late notice of appeal was filed after the expiration of the fifteen day grace period.

The Court of Appeals held that a late notice of appeal may be considered timely filed, and thus invokes the appellate court's jurisdiction, if (1) it is filed within fifteen days of the last day allowed for filing, (2) a motion for extension of time is filed within fifteen days of the last day allowed for filing the notice of appeal, and (3) the motion for extension of time is granted by the appellate court. Id. at 59 (citing Tex.R.App.Pro. 41(b)(2); [1] and Charles v. State, 809 S.W.2d 574 (Tex.App.—San Antonio 1991, no pet.)). The court noted it had previously held that compliance with the first two requirements is jurisdictional. citing Charles, 809 S.W.2d at 576

1 In criminal cases Rule 41(b) provides:

> (1) Appeal is perfected when notice of appeal is filed within thirty (fifteen by the state) days after the day sentence is imposed or suspended in open court or the day an appealable order is signed by the trial judge; except, if a motion for new trial is timely filed, notice of appeal shall be filed within ninety days after the sentence is imposed or suspended in open court.
>
> (2) An extension of time for filing notice of appeal may be granted by the court of appeals if such notice is filed within fifteen days after the last day allowed and within the same period a motion is filed in the court of appeals reasonably explaining the need for such extension.

Appellant observes that other courts of appeals have held that a notice of appeal filed within the fifteen-day grace period invokes ***521** jurisdiction even without an accompanying motion for extension of time. See *Sanchez v. State,* 885 S.W.2d 444 (Tex.App.—Corpus Christi 1994, no pet.); *Boulos v. State,* 775 S.W.2d 8 (Tex.App.—Houston [1st] 1989, pet. ref'd). Appellant urges this Court to adopt the reasoning set out in those opinions, specifically, that jurisdiction is authorized by Tex.R.App.Pro. 2(b) [2] and 83 [3] . Appellant points out that the Texas Supreme Court has adopted a liberal policy in allowing appellants to amend appeal bonds and cash deposits in lieu of bonds. See *Linwood v. NCNB Texas,* 885 S.W.2d 102 (Tex.1994); *Grand Prairie Indep. Sch. Dist. v. Southern Parts,* 813 S.W.2d 499 (Tex.1991). Appellant maintains that a similarly liberal policy should be adopted by this Court to protect a defendant's right to appeal and right to effective assistance of counsel. See Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985).

2 Rule 2(b) provides:

> Except as otherwise provided in these rules, in the interest of expediting a decision or for other good cause shown, a court of appeals or the Court of Criminal Appeals may suspend requirements and provisions of any rule in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction. Provided, however, that nothing in this rule shall be construed to allow any court to suspend requirements or provisions of the Code of Criminal Procedure.

3 Rule 83 provides:

> A judgment shall not be affirmed or reversed or an appeal dismissed for defects or irregularities, in appellate procedure, either of form or substance, without allowing a reasonable time to correct or amend such defects or irregularities provided the court may make no enlargement of the time for filing the transcript and statement of facts except pursuant to paragraph (c) of Rule 54 and except that in criminal cases late filing of the transcript or statement of facts may be permitted on a showing that otherwise the appellant may be deprived of effective assistance of counsel.

The State counters that the San Antonio Court of Appeals correctly applied the clear language of Rule 41(b)(2). The State maintains that *Sanchez* and *Boulos* erroneously relied on Rules 2(b) and 83 to suspend the requirements of Rule 41(b)(2). The State notes that another court of appeals has rejected the holdings of *Sanchez* and *Boulos.* See *Jones v. State,* 900 S.W.2d 421 (Tex.App.—Texarkana 1995, no pet.). The State seeks to distinguish the Texas Supreme Court cases relied on by Appellant because they involve amendments to timely filed defective appellate instruments. Finally, the State argues that Evitts v. Lucey is distinguishable because the present case involves appellate jurisdiction.

In *Boulos* the court was faced with a situation similar to the present case. The court observed it had options other than dismissal for lack of jurisdiction, which it may deem appropriate in a particular case. *Boulos,* 775 S.W.2d at 9. The court held the exercise of its jurisdiction was authorized by Rules 2(b) and 83. *Ibid.* (citing *Jiles v. State,* 751 S.W.2d 620, 621 (Tex.App.—Houston [1st] 1988, pet. ref'd)).

In *Jiles* there was no written notice of appeal. The court in *Jiles* recognized that this Court had held in *Shute v. State,* 744 S.W.2d 96 (Tex.Cr.App.1988), that a court of appeals does not err in dismissing an appeal for lack of jurisdiction when there is no written notice of appeal. However, the Court of Appeals sought to distinguish *Shute* because this Court in *Shute* did not discuss whether a court of appeals could follow some other course of action. *Jiles,* 751 S.W.2d at 621. The Court of Appeals held it was authorized to accept jurisdiction under Rules 2(b) and 83. *Ibid.*

The court in *Sanchez,* like those in *Boulos* and the present case, was faced with a notice of appeal filed within the fifteen-day grace period but an untimely motion for extension of time. The Court of Appeals stated that the filing of the notice of appeal within the fifteen-day period necessarily implied a proper request for extension of time under Rule 41(b)(2). *Sanchez,* 885 S.W.2d at 445. The Corpus Christi Court of Appeals observed:

> The rules of appellate procedure, as embodied by rule 83 and rule 2(b), favor a policy of having the Texas courts of appeals address cases on their merits, rather than allowing the courts to close their doors to appellants who, through no fault ***522** of their own, fail to find their way successfully through the labyrinth of procedure.

Id. at 446.
The court held that the filing of the notice of appeal within the fifteen-day grace period vested that court with jurisdiction and that the lack of a timely filed motion for extension of time was curable under Rule 83, as the lack of a timely motion for extension of time was a procedural irregularity. *Ibid.*

We disagree with the Corpus Christi Court of Appeals' characterization of the lack of a timely filed motion for extension of time to file notice of appeal. It is not a mere procedural irregularity; it is a jurisdictional defect.

[2] **[3]** A timely notice of appeal is necessary to invoke a court of appeals' jurisdiction. *Rodarte v. State,* 860 S.W.2d 108 (Tex.Cr.App.1993); *Shute,* 744 S.W.2d 96. A defendant's notice of appeal is timely if filed within thirty days after the day sentence is imposed or suspended in open court, or within ninety days after sentencing if the defendant timely files a motion for new trial. Rule 41(b)(1). Rule 41(b)(2) allows for an exception: A court of appeals may grant an extension of time to file notice of appeal if the notice is filed within fifteen days after the last day allowed and, within the same period, a motion is filed in the court of appeals reasonably explaining the need for the extension of time.

Therefore, we agree with the San Antonio and El Paso Courts of Appeals that a late notice of appeal may be considered timely so as to invoke a court of appeals' jurisdiction if (1) it is filed within fifteen days of the last day allowed for filing, (2) a motion for extension of time is filed in the court of appeals within fifteen days of the last day allowed for filing the notice of appeal, and (3) the court of appeals grants the motion for extension of time. *Jones,* 900 S.W.2d at 422; *Olivo,* 894 S.W.2d at 59; *Charles,* 809 S.W.2d at 576. When a notice of appeal is filed within the fifteen-day period but no timely motion for extension of time is filed, the appellate court lacks jurisdiction. *Charles,* 809 S.W.2d at 576.

In considering Appellant's argument urging reliance on Rule 2(b), we first observe that the Texarkana Court of Appeals rejected the contention that Rule 2(b) allows a court faced with a situation similar to the present case to acquire jurisdiction. In doing so, the court cited Rule 2(a), which provides:

> These rules shall not be construed to extend or limit the jurisdiction of the courts of appeals, the Court of Criminal Appeals or the Supreme Court as established by law.

Jones, 900 S.W.2d at 423.

In *Shute* and *Rodarte,* we held that a court of appeals has no jurisdiction without a timely, written notice of appeal pursuant to Rules 40(b)(1) and 41(b)(1). In *Garza v. State,* 896 S.W.2d 192 (Tex.Cr.App.1995), we held that a court of

appeals has no authority to summarily reconsider and correct or modify its opinion or judgment beyond the fifteen-day period provided in Tex.R.App.Pro. 101 after a petition for discretionary review is filed, because at that point exclusive jurisdiction rests with this Court. If the Court of Appeals in *Jones* was correct in suggesting that Rule 2(a) prevents a court from using Rule 2(b) to suspend an appellate rule time limit as that would improperly extend the court's jurisdiction, then Rule 2(a) would also prevent Rules 40(b)(1), 41(b)(1), and 101 from *limiting* a court of appeals' jurisdiction. Moreover, under this interpretation, Rule 2(a) would prevent Rule 41(b)(2) from *extending* a court of appeals' jurisdiction even if a notice of appeal and motion for extension of time were filed in compliance with Rule 41(b)(2).

[4] **[5]** Jurisdiction concerns the power of a court to hear and determine a case. *Ex parte Watson,* 601 S.W.2d 350, 351 (Tex.Cr.App.1980). Jurisdiction is the right of a court to adjudicate the subject matter in a given case. *Garcia v. Dial,* 596 S.W.2d 524, 527 (Tex.Cr.App.1980). A court of appeals' jurisdiction is comprised of subject matter jurisdiction and personal jurisdiction, that is, jurisdiction over a specific appeal involving specific litigants. Cf. *Id.* (discussing jurisdiction of the subject matter and jurisdiction over the person in the trial context). Establishment ***523** of jurisdiction by law and invocation or attachment of jurisdiction in accordance with procedural rules are two distinct concepts.

Examples of laws that establish jurisdiction of courts of appeals are Tex. Const. Art. V, § 1 (courts in which judicial power is vested), Tex. Const. Art. V, § 6 (courts of appeals); V.T.C.A. Gov't Code §§ 21.001 (inherent power and duty of courts), 22.220 (civil jurisdiction), 22.201 (courts of appeals districts), 22.221 (writ power), 73.001–73.002 and 22.202(i) (transfer of courts of appeals' cases); and Articles 4.01 (courts with criminal jurisdiction) and 4.03 (courts of appeals), V.A.C.C.P.

[6] This Court's rulemaking authority is found in Tex. Const. Art. V, § 31(c)[4], V.T.C.A. Gov't Code 22.108[5], and Article 44.33(a), V.A.C.C.P.[6] The Rules of Appellate Procedure do not establish courts of appeals' jurisdiction; they provide procedures which must be followed by litigants to invoke the jurisdiction of the courts of appeals so a particular appeal may be heard. Consequently, Rule 2(a) does not prohibit a court of appeals from using Rule 2(b) to suspend the time limits imposed by Rule 41(b).[7] However, that does not end our examination of the role of Rule 2(b).

4 Article V, § 31(c), provides, "The legislature may delegate to the Supreme Court or Court of Criminal Appeals the power to promulgate such other rules as may be prescribed by law or this Constitution, subject to such limitations and procedures as may be provided by law."

5 Section 22.108 provides in part:

> (a) The court of criminal appeals is granted rulemaking power to promulgate rules of posttrial, appellate, and review procedure in criminal cases except that its rules may not abridge, enlarge, or modify the substantive rights of a litigant.
> (b) The court of criminal appeals may promulgate a comprehensive body of rules of posttrial, appellate, and review procedure in criminal cases and from time to time may promulgate a specific rule or rules of posttrial, appellate, or review procedure in criminal cases or an amendment or amendments to a specific rule or rules.

6 Article 44.33 provides in part, "The Court of Criminal Appeals shall make rules of posttrial and appellate procedure as to the hearing of criminal actions not inconsistent with this Code."

7 In *Garza* one of the defendant's arguments was that Rule 2(b) permits an appellate court to suspend the operation of Rule 101 and take additional time to render its opinion. We observed that the Court of Appeals did not purport to invoke Rule 2(b), so the defendant's argument was inapplicable. *Garza,* 896 S.W.2d at 194. We also stated, "However, Rule 2(a) specifically states that the Rules 'shall not be construed as to *extend* or limit the jurisdiction of the courts of appeal....' (emphasis added)." *Ibid.* Our mention of Rule 2(a) was dicta, because we concluded that the defendant's argument was inapplicable. Moreover, in *Garza* this Court did not explain how Rule 2(a) affected the defendant's argument.

[7] **[8]** A court has jurisdiction to determine whether it has jurisdiction. *Ex parte Paprskar,* 573 S.W.2d 525, 527 (Tex.Cr.App.1978), *overruled on other grounds, Weiner v. Dial,* 653 S.W.2d 786, 787 n. 1 (Tex.Cr.App.1983). "Jurisdiction of a court must be legally invoked, and when not legally invoked, the power of the court to act is as absent as if it did not exist." *Ex parte Caldwell,* 383 S.W.2d 587, 589 (Tex.Cr.App.1964). When a notice of appeal, but no motion for extension

of time, is filed within the fifteen-day period, the court of appeals lacks jurisdiction to dispose of the purported appeal in any manner other than by dismissing it for lack of jurisdiction. In that instance, a court of appeals lacks jurisdiction over the purported appeal and, therefore, lacks the power to invoke Rule 2(b) or Rule 83 in an effort to obtain jurisdiction of the case. Consequently, a court of appeals may not utilize Rule 2(b) or Rule 83 to create jurisdiction where none exists. *Garza,* 896 S.W.2d at 194; *Charles,* 809 S.W.2d at 576; see *Jones v. State,* 796 S.W.2d 183, 187 (Tex.Cr.App.1990) (Rule 83 does not cure a notice of appeal that is not in compliance with Rule 40(b)(1)).

[9] We next turn to Appellant's reliance on Texas Supreme Court cases dealing with appeal bonds and cash deposits in lieu thereof. The Texas Supreme Court has held, pursuant to Rule 83:

> [A] court of appeals may not dismiss an appeal when the appellant filed the wrong instrument required to perfect the appeal without giving the appellant an opportunity ***524** to correct the error. *If the appellant timely files a document* in a bona fide attempt to invoke the appellate court's jurisdiction, the court of appeals, on appellant's motion, must allow the appellant an opportunity to amend or refile the instrument required by law or our Rules to perfect the appeal.

Grand Prairie Indep. Sch. Dist., 813 S.W.2d at 500 (emphasis added). In *Linwood* the appellant filed a notice of appeal, however he should have filed a cost bond. The appellant eventually filed a cost bond, although it was late. The Supreme Court held that the appellant should have been given an opportunity to correct the error by substituting the correct instrument, which the appellant did by filing the cost bond. *Linwood,* 885 S.W.2d at 103. The Supreme Court observed that the notice of appeal was timely filed. *Ibid.*

The liberal policy of the Supreme Court that Appellant would have this Court follow concerns the substitution of a correct instrument for an incorrect instrument, *which has been timely filed.* The civil courts have distinguished a timely filed defective instrument from the failure to timely file an instrument, such as a motion for extension of time. See *Ludwig v. Enserch Corp.,* 845 S.W.2d 338 (Tex.App.—Houston [1st] 1992, no writ) (a court of appeals lacks jurisdiction when the cost bond is not timely filed and a motion to extend the filing period for the cost bond has not been filed within the fifteen-day grace period); see also *B.D. Click Co. v. Safari Drilling Corp.,* 638 S.W.2d 860 (Tex.1982) (court of appeals has no authority to consider a motion for extension of time to file the record if the motion is not filed within the fifteen-day period); *Ballard v. Portnoy,* 886 S.W.2d 445 (Tex.App.—Houston [1st] 1994, no writ) (Rule 46f permits a court of appeals to allow an appellant to amend defects in a bond, but it does not authorize a court of appeals to permit the filing of an out-of-time bond); *El Paso Sharky's Billiard Parlor, Inc. v. Amparan,* 831 S.W.2d 3 (Tex.App.—El Paso 1992, writ denied) (cost bond filed thirteen days after it was due, without a corresponding motion for extension of time filed within the fifteen-day period, did not invoke the court of appeals' jurisdiction).

In the present case, Appellant's notice of appeal was late. Appellant did not timely file a motion for extension of time to file the notice of appeal. Consequently, even if this Court were to adopt the policy espoused in civil appeals, Appellant still failed to invoke the jurisdiction of the Court of Appeals.

In any event, we have previously rejected the approach suggested by Appellant. In *Jones,* 796 S.W.2d 183, the defendant pleaded guilty and was sentenced pursuant to a plea agreement. He filed a notice of appeal that did not comply with Rule 40(b)(1). *Id.* at 185. After the time expired to file a notice of appeal, the defendant filed an amended notice of appeal in compliance with Rule 40(b)(1), by specifying the matters raised in his pretrial motion and stating the court granted permission to appeal. *Id.* at 185–86. The court of appeals relied on Rule 83 and held that the appeal was properly before that court. *Id.* at 186. This Court disagreed and reasoned that Rule 40(b)(1) is a restrictive rule, regulating the extent of the grounds upon which a defendant can appeal. *Ibid.* The method of regulation is the nature of the notice of appeal filed by an appellant. *Ibid.* The notice of appeal invokes a court of appeals' jurisdiction. *Ibid.* If an appellant wishes to appeal a matter restricted by Rule 40(b)(1), then the notice of appeal must comply with that rule. *Ibid.* In *Jones* the defendant did not file a notice of appeal that would have permitted him to appeal the matter he sought to raise. *Id.* at 187. We further held that Rule 83 did not cure the defect. *Ibid.*

[10] We have recognized differences between civil and criminal cases in attachment of jurisdiction in the trial context.

> Unlike in civil cases where personal jurisdiction over a party may be had merely by that party's appearance before the court, Rule 120, Vernon's Texas Rules of Civil Procedure, criminal jurisdiction over the person cannot be conferred upon the district court solely by the accused's appearance, but requires the due return of a felony indictment, or the accused's *personal* affirmative waiver thereof and the return ***525** of a valid felony information upon complaint.

Garcia v. Dial, 596 S.W.2d at 527. In criminal cases, "[j]urisdiction cannot be 'substantially' invoked; it either attaches or it does not." *Drew v. State,* 743 S.W.2d 207, 223 (Tex.Cr.App.1987). Therefore, we decline to adopt the civil appellate approach urged by Appellant.

[11] Finally, we turn to *Evitts v. Lucey,* relied on by Appellant. In *Evitts v. Lucey* the defendant's counsel timely filed a notice of appeal, but counsel neglected to file a statement of appeal, containing information about the appeal, as required by the Kentucky Rules of Appellate Procedure. The appellate court dismissed the appeal due to the lack of a statement of appeal. The defendant, Lucey, then sought federal habeas corpus relief, which was granted by the United States District Court and upheld by the Sixth Circuit Court of Appeals. The United States Supreme Court agreed Lucey was entitled to relief because he was deprived of effective assistance of counsel on appeal and was therefore denied due process. *Evitts v. Lucey,* 469 U.S. at 397, 105 S.Ct. at 837, 83 L.Ed.2d at 831.

In conjunction with its discussion of *Evitts v. Lucey,* the Court of Appeals in *Jiles* reasoned:

> When a procedural rule setting jurisdictional time limits conflicts with sixth amendment rights, the Court of Criminal Appeals has held that "the procedural rule must yield to the superior constitutional right." *Whitmore v. State,* 570 S.W.2d 889, 898 (Tex.Crim.App.1978). Thus, in *Whitmore,* the trial court had a duty to grant a motion for new trial that was filed after the trial court had lost jurisdiction because a vital sixth amendment right would otherwise have been lost. Rules 83 and 2(b) expressly allow the same result for the appellate courts that *Whitmore* requires of the trial courts.

Jiles, 751 S.W.2d at 622.

In this Court's *Jones* case, the defendant argued that *Evitts v. Lucey* authorized the court of appeals to waive the Rule 40(b)(1) defect in the notice of appeal, but we concluded *Evitts v. Lucey* was distinguishable. *Jones,* 796 S.W.2d at 187. We stated that the appellate rule involved in *Evitts v. Lucey* was not jurisdictional, but compliance with Rule 40(b)(1) is necessary for an appellant to avoid statutory restrictions on the right to appeal. *Id.* (citing *Evitts v. Lucey,* 469 U.S. at 389, 105 S.Ct. at 832, 83 L.Ed.2d at 825).

[12] Additionally, this Court revisited *Whitmore* in *Drew.* First, we observed that the Court in *Whitmore* was badly split. *Drew,* 743 S.W.2d at 224. Second, we pointed out that at the time of *Whitmore* the trial court retained jurisdiction until the appellate record was filed in this Court and, under the statute in effect at the time, the trial court could extend the time to file a motion for new trial on a showing of good cause. *Ibid.* Finally, we stated, "Further, and most important, the claimed deprivation of constitutional rights, federal or state, cannot confer jurisdiction upon a court where none exists anymore than parties can by agreement confer jurisdiction upon a court." *Id.* at 225. Therefore, *Evitts v. Lucey* does not lead to the conclusion that the Court of Appeals in the case at hand had jurisdiction. [8]

8 The San Antonio Court of Appeals has also held it could not rely on *Evitts v. Lucey* to allow the defendant to proceed with an appeal when the notice of appeal was filed within the fifteen-day grace period without a timely motion for extension of time. *Charles,* 809 S.W.2d at 576. In doing so, the Court of Appeals commented:

> The concerns expressed by the Supreme Court in *Evitts* are adequately addressed through safeguards contained in our Rules of Appellate Procedure. An indigent appellant may obtain a free statement of facts. Rule 53(j). Appellate courts may inquire into the absence of a statement of facts, rule 53(m), and the absence of an appellant's brief, rule 74(*l*). An appellate court may allow the late filing of a transcript or statement of facts on a showing that otherwise the appellant may be deprived of effective assistance of counsel. Rule 83. In order to provide for any unforeseen non-jurisdictional situation, an appellate court may suspend requirements and provisions of any rule in a particular case in the interest of expediting a decision or for other good cause shown, except as otherwise provided by the rules. Rule 2(b). Indeed, the rules provide for the late filing of a notice of appeal, up to a point. Rule 41(b)(2).
>
> *Id.* at 576 n. 3.
>
> We further point out that the denial of a meaningful appeal due to ineffective assistance of counsel is a proper ground for habeas corpus relief. See, e.g., *Ex parte Axel,* 757 S.W.2d 369 (Tex.Cr.App.1988). The courts of appeals in *Sanchez, Boulos,* and *Jiles* expressed concerns about delay and judicial economy, and those courts sought to avoid post-conviction relief claims. *Sanchez,* 885 S.W.2d at 445; *Boulos,* 775 S.W.2d at 9; *Jiles,* 751 S.W.2d at 622. Additionally, the El Paso Court of Appeals in *Jones,* although holding it lacked jurisdiction, stated, "Were we writing on a clean slate, we would grant an out-of-time appeal under these facts and consider the case on the merits." *Jones,* 900 S.W.2d at 423. We agree with the observation of the San Antonio Court of Appeals: "Acting in the interest of judicial economy is worthwhile. However, the exclusive post-conviction remedy in final felony convictions in Texas courts is through a writ of habeas corpus pursuant to TEX.CODE CRIM.PROC. art. 11.07. *Ater v. Eighth Court of Appeals,* 802 S.W.2d 241 (Tex.Crim.App.1991)." *Charles,* 809 S.W.2d at 576.

***526** In the present case, because no motion for extension of time was filed within the time set out in Rule 41(b)(2), in conjunction with the notice of appeal, the Court of Appeals correctly concluded it lacked jurisdiction over the appeal. Accordingly, the judgment of the Court of Appeals is affirmed.

CLINTON and OVERSTREET, JJ., concur in the result.

All Citations

918 S.W.2d 519

112 Tex. 365
Supreme Court of Texas.

LONG et al.
v.
MARTIN.

No. 3715 *

* Rehearing denied March 7, 1923.

|
Jan. 31, 1923.

Error to Court of Civil Appeals of Seventh Supreme Judicial District.

Suit by M. E. Martin against H. A. Long and others. Judgment for plaintiff was affirmed by Court of Civil Appeals (234 S. W. 91), and defendants bring writ of error. Writ and petition dismissed.

Attorneys and Law Firms

****828** ***365** Bullington, Boone, Humphrey & Hoffman, of Wichita Falls, and W. L. Eason, of Waco, for plaintiffs in error.

***367** Fitzgerald & Hatchett, of Wichita Falls, for defendant in error.

Opinion

GREENWOOD, J.

The Court of Civil Appeals affirmed the judgment of the trial court in this case on the 25th day of May, 1921. and overruled a motion for rehearing on October 12, 1921. On the thirty-first day thereafter, on November 12, 1921, the petition for writ of error was filed by the clerk of the Court of Civil Appeals.

***368** Plaintiffs in error seek to sustain this court's jurisdiction to review the judgment of the Court of Civil Appeals, on a petition filed after the lapse of more than 30 days from the overruling of the motion for rehearing, on the following grounds:

First. That the order overruling the motion for rehearing was not actually entered in the minutes of the Court of Civil Appeals until less than 30 days before November 12, 1921.

Second. That the Governor of Texas, having designated November 11, 1921, as a holiday by a proclamation issued November 8, 1921, it ought to be excluded in computing the 30 days allowed for the filing of the petition for writ of error.

Third. That plaintiffs in error and their counsel used due diligence to file the petition for writ of error within 30 days from the date on which the motion for rehearing was overruled.

Notwithstanding the facts disclose that the order overruling the motion for rehearing was not entered until two or three days after its rendition, and that the Governor designated as a holiday the last day allowed for the filing of the petition

for writ of error, and that counsel for plaintiffs in error used the utmost diligence to file the petition in time, yet we have no jurisdiction to review the judgment of the Court of Civil Appeals.

[1] As repeatedly announced, a judgment of the Court of Civil Appeals is not subject to review through the exercise of the appellate jurisdiction of the Supreme Court, whenever 30 days elapse subsequent to the rendition of such judgment without the actual lodgment of a petition for writ of error with the clerk of the Court of Civil Appeals. Schleicher v. Runge, 90 Tex. 456, 39 S. W. 279; Vinson v. Carter & Bro., 106 Tex. 273, 166 S. W. 363; Henningsmeyer v. Bank, 109 Tex. 116, 195 S. W. 1137, 201 S. W. 662; Flattery v. Miller (Tex. Sup.) 212 S. W. 932.

In the case of Schleicher v. Runge, supra, the parties expressly stipulated in writing that the delay in filing the petition for writ of error was without fault on the part of the applicant, and the defendant in error consented that the petition might be treated as having been filed in due time. It was never-theless determined that the delay was fatal to the exercise of jurisdiction by the Supreme Court.

[2] **[3]** **[4]** The failure of the clerk of the Court of Civil Appeals to enter the order overruling the motion for rehearing for a few days is of no avail to extend the time for presenting the petition for writ of error. That order was rightly entered as of the day when it was pronounced. Rule 65 (142 S. W. xvi) for the Courts of Civil Appeals makes it the clerk's duty to give immediate notice by postal card upon the rendition of a judgment overruling a motion for rehearing, and further provides that even failure to receive the notice shall be no excuse for failure ***369** to take such future action as may be desired in reference to the case 'within the time prescribed by the statutes and rules.'

[5] The holiday cannot be excluded in computing the 30 days for filing the petition. Hanover Fire Ins. Co. v. Shrader, 89 Tex. 35, 32 S. W. 872, 33 S. W. 112, 30 L. R. A. 498, 59 Am. St. Rep. 25.

It is therefore ordered that the writ of error and the petition therefor be dismissed for want of jurisdiction.

All Citations

112 Tex. 365, 247 S.W. 827

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307 S.W.3d 299
Supreme Court of Texas.

In re UNITED SERVICES AUTOMOBILE ASSOCIATION, Relator.

No. 07–0871.
|
Argued Dec. 9, 2008.
|
Decided March 26, 2010.
|
Rehearing Denied May 7, 2010.

Synopsis

Background: Former employee brought action against employer under Texas Commission on Human Rights Act (TCHRA) alleging illegal discrimination based on his age. The County Court at Law No. 7, Bexar County, Timothy F. Johnson, J., denied employer's plea to the jurisdiction, and later entered judgment on jury's verdict awarding employee $188,406 in back pay, $350,000 in front pay, $300,000 in punitive damages, $129,387 in attorney fees, and prejudgment interest. Employer appealed. The San Antonio Court of Appeals, 161 S.W.3d 566, affirmed. Review was granted. The Supreme Court, 215 S.W.3d 400, reversed, concluding that the amount in controversy exceeded limit for jurisdiction in county court at law. After employee refiled his claim in the 150th Judicial District Court, Bexar County, Janet Littlejohn, J., employer filed a plea to the jurisdiction and a motion for summary judgment. The District Court, Bexar County, Gloria Saldana, J., denied the plea and the motion. Employer petitioned for writ of mandamus. The San Antonio Court of Appeals, 2007 WL 3003131, denied the petition. Employer petitioned for writ of mandamus.

Holdings: The Supreme Court, Jefferson, C.J., held that:

[1] two-year period in Texas Commission on Human Rights Act for filing suit is mandatory but not jurisdictional, overruling *Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483;

[2] TCHRA's two-year statute of limitations is tolled for those cases falling within the tolling statute's savings provision for refiling of actions originally filed in the wrong court;

[3] as a matter of first impression, once an adverse party has moved for relief under the "intentional disregard" provision of the tolling statute, the nonmovant has the burden of producing information showing that he did not intentionally disregard proper jurisdiction when filing the case;

[4] former employee acted with intentional disregard of proper jurisdiction in filing the action in a county court at law; and

[5] extraordinary circumstances warranted mandamus relief.

Writ conditionally granted.

Attorneys and Law Firms

***302** Lacey L. Gourley, Bracewell & Giuliani, L.L.P., Pamela Stanton Baron, Thomas R. Phillips, Baker Botts L.L.P., Austin, TX, Mario A. Barrera, Bracewell & Giuliani LLP, San Antonio, TX, William H. Ford, Ford & Massey, P.C., San Antonio, TX, for Relator.

Jeffrey D. Small, Law Office of Jeff Small, Jeffrey Alan Goldberg, Cynthia A. Cano, Law Offices of Jeffrey A. Goldberg, San Antonio, TX, for Real Party in Interest.

Charles C. High Jr., Kemp Smith P.C., El Paso, TX, for Amicus Curiae Texas Association of Business.

Vanetta Loraine Christ, Vinson & Elkins LLP, Houston, TX, for Amicus Curiae Texas Employment Law Council.

Daniel L. Geyser, Asst. Solicitor General, James C. Ho, Solicitor General of Texas, David S. Morales, Office of the Attorney General of Texas, Clarence Andrew Weber, First Assistant Attorney General, Greg W. Abbott, Attorney General of Texas, Austin, TX, for Amicus Curiae State of Texas.

Opinion

Chief Justice JEFFERSON delivered the opinion of the Court.

[1] **[2]** **[3]** Texas has some 3,241 trial courts [1] within its 268,580 square miles. [2] Jurisdiction is limited in many of the courts; it is general in others. *Compare* TEX. GOV'T CODE § 25.0021 (describing jurisdiction of statutory probate court), *with* ***303** *id.* § 24.007–.008 (outlining district court jurisdiction); *Thomas v. Long,* 207 S.W.3d 334, 340 (Tex.2006) (noting that Texas district courts are courts of general jurisdiction). We have at least nine different types of trial courts, [3] although that number does not even hint at the complexities of the constitutional provisions and statutes that delineate jurisdiction of those courts. *See* OFFICE OF COURT ADMINISTRATION, 2008 ANNUAL REPORT, TEXAS JUDICIAL SYSTEM, SUBJECT–MATTER JURISDICTION OF THE COURTS *passim* (2008), *available at http://www.courts.state.tx.us/pubs/AR2008/jud branch/2a-subject-matter-jurisdiction-of-courts.pdf*; [4] GEORGE D. BRADEN ET AL., THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 367 (1977). Statutory county courts (of which county courts at law are one type) [5] usually have jurisdictional limits of $100,000, *see* TEX. GOV'T CODE § 25.0003(c)(1), unless, of course, they do not, *see, e.g.,* TEX. GOV'T CODE §§ 25.0732(a) (El Paso County), 25.0862(a) (Galveston County), 25.0942(a) (Gregg County), 25.1322(a) (Kendall County), 25.1802(a) (Nueces County), 25.2142(a) (Smith County); *see also Sultan v. Mathew,* 178 S.W.3d 747, 756 (Tex.2005) (Hecht, J., dissenting) (observing that "[m]onetary jurisdictional limits on statutory county courts are generally from $500 to $100,000, but they vary widely from county to county, and many such courts have no monetary limits"). Appellate rights can vary depending on which court a case is filed in, even among trial courts with concurrent jurisdiction, and even when the same judge in the same courtroom presides over two distinct courts. *See, e.g., Sultan,* 178 S.W.3d at 752 (holding that there was no right of appeal to courts of appeals from cases originating in small claims courts, but recognizing that justice court judgment would be appealable); *see also id.* at 754–55 (Hecht, J., dissenting) (noting that the same justice of the peace hears small claims cases and justice court cases). [6] Consider the five-step process involved in determining the jurisdiction of any particular trial court:

1 Texas Courts Online Home Page, *http://www.courts.state.tx.us/* (all Internet materials as visited March 24, 2010 and copy available in Clerk of Court's file). This figure includes municipal courts, whose jurisdiction is generally limited to criminal matters, although they may also hear certain civil cases involving dangerous dogs. *See* TEX. HEALTH & SAFETY CODE § 822.0421. It also includes statutory probate courts.

2 TEXAS ALMANAC 2010–1160 (Elizabeth Cruce Alvarez ed., Texas State Historical Association 65th ed. 2010), *available at http://www. texasalmanac.com/environment/*.

3 Those courts include district courts, criminal district courts, constitutional county courts, statutory county courts, justice of the peace courts, small claims courts, statutory probate courts, and municipal courts. They also include family district courts which, although they are district courts of general jurisdiction, have primary responsibility for handling family law matters. OFFICE OF COURT ADMINISTRATION, 2008 ANNUAL REPORT, TEXAS JUDICIAL SYSTEM, SUBJECT–MATTER JURISDICTION OF THE COURTS 1, 3–18 (2008), *available at http://www.courts.state.tx.us/pubs/AR2008/jud branch/2a-subject-matter-jurisdiction-of-courts.pdf*.

4 In a page-and-a-half, this report explains the subject matter jurisdiction of our appellate courts. OFFICE OF COURT ADMINISTRATION, SUBJECT–MATTER JURISDICTION OF THE COURTS at 1–2. The remainder of the eighteen-page, dual column, single-spaced document identifies, in painstaking detail, the various jurisdictional schemes governing our trial courts. *Id.* at 3–18.

5 TEX. GOV'T CODE § 21.009(2) (" 'Statutory county court' means a county court created by the legislature under Article V, Section 1, of the Texas Constitution, including county courts at law, county criminal courts, county criminal courts of appeals, and county civil courts at law, but does not include statutory probate courts as defined by Section 3, Texas Probate Code.").

6 Section 28.053 of the Government Code, at issue in *Sultan,* was recently amended to allow appeals to the court of appeals from de novo trials in county court on claims originating in small claims court. *See* Act of June 19, 2009, 81st Leg., R.S., ch. 1351, section 8, 2009 Tex. Gen. Laws 4274, 4274.

> [R]ecourse must be had first to the Constitution, second to the general statutes establishing jurisdiction for that level of court, third to the specific statute authorizing the establishment of the particular ***304** court in question, fourth to statutes creating other courts in the same county (whose jurisdictional provisions may affect the court in question), and fifth to statutes dealing with specific subject matters (such as the Family Code, which requires, for example, that judges who are lawyers hear appeals from actions by non-lawyer judges in juvenile cases).
>
> OFFICE OF COURT ADMINISTRATION, SUBJECT–MATTER JURISDICTION OF THE COURTS at 1.

Our court system has been described as "one of the most complex in the United States, if not the world." BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS, at 367; *see also Continental Coffee Prods. Co. v. Cazarez,* 937 S.W.2d 444, 449 (Tex.1996) (voicing "concern[ ] over the difficulties created for the bench, the bar, and the public by the patchwork organization of Texas' several trial courts"); *Sultan,* 178 S.W.3d at 753 (Hecht, J., dissenting) (noting that Texas courts' "jurisdictional scheme ... has gone from elaborate ... to Byzantine"); *Camacho v. Samaniego,* 831 S.W.2d 804, 807 n. 4, 811 (Tex.1992) (stating that "confusion and inefficiency are endemic to a judicial structure with different courts of distinct but overlapping jurisdiction" and observing that "there are still more than fifty different jurisdictional schemes for the statutory county courts"); TEXAS JUDICIAL COUNCIL, ASSESSING JUDICIAL WORKLOAD IN TEXAS' DISTRICT COURTS 2 (2001), *available at http://www. courts.state.tx.us/tjc/TJC Reports/Final Report.pdf* (observing that " 'the Texas trial court system, complex from its inception, has become ever more confusing as ad hoc responses are devised to meet the needs of an urban, industrialized society' " (quoting CITIZENS' COMMISSION ON THE TEXAS JUDICIAL SYSTEM, REPORT AND RECOMMENDATIONS—INTO THE TWENTY–FIRST CENTURY 17 (1993))).

Proposals to modernize this antiquated jurisdictional patchwork have failed,[7] but the Legislature has attempted to address one of its most worrisome aspects. In 1931, the Legislature passed "[a]n act to extend the period of limitation of any action in the wrong court." Act approved Apr. 27, 1931, 42d Leg., R.S., ch. 81, 1931 Tex. Gen. Laws 124, 124, current version at TEX. CIV. PRAC. & REM.CODE § 16.064. This statute tolls limitations for those cases filed in a trial court that lacks jurisdiction, provided the case is refiled in a proper court within sixty days of dismissal. TEX. CIV. PRAC. & REM.CODE § 16.064(a). The tolling provision does not apply, however, to those cases in which the first filing was made with "intentional disregard of proper jurisdiction." *Id.* § 16.064(b). We must decide today whether the plaintiff intentionally disregarded the jurisdictional limits applicable to county courts at law in Bexar County. Because we conclude that he did, in a way that cannot be cured by ordinary appellate review, we conditionally grant relief.

7 *See, e.g.,* Tex. S.B. 1204, 80th Leg., R.S. (2007) ("AN ACT relating to the reorganization and administration of, and procedures relating to, courts in this state, including procedures for appeals."); Tex. H.B. 2906, 80th Leg., R.S. (2007) (same).

I. Background

James Steven Brite sued USAA, his former employer, alleging that it had illegally discriminated against him based on his age, violating the Texas Commission on Human Rights Act (TCHRA). *See generally United Servs. Auto. Ass'n v. Brite,* 215 S.W.3d 400 (Tex.2007) ("*Brite I* "). He filed suit in the Bexar County Court at Law No. 7, which has jurisdiction concurrent with that of the district court in "civil cases in which the matter in controversy exceeds $500 but does not exceed $100,000, excluding interest, statutory or punitive ***305** damages and penalties, and attorney's fees and costs, as alleged on the face of the petition...." TEX. GOV'T CODE § 25.0003(c)(1). Brite asserted in his original petition that his damages exceeded the $500 statutory minimum, but he did not plead that his damages were below the $100,000 maximum. *Brite I,* 215 S.W.3d at 401. He pleaded that "[i]n all reasonable probability, [his] loss of income and benefits will continue into the future, if not for the balance of [his] natural life" and sought "compensation due Plaintiff that accrued at the time of filing this Petition" (back pay), "the present value of unaccrued wage payments" (front pay), punitive damages, and attorney's fees. *Id.*

Before limitations expired, USAA filed a plea to the jurisdiction, contending that Brite's damage claims exceeded the $100,000 jurisdictional limit of the statutory county court, excluding interest, statutory or punitive damages, and attorney's fees and costs. USAA argued that because Brite's annual salary was almost $74,000 when he was terminated, his front pay and back pay allegations alone exceeded the county court's jurisdictional maximum. Brite opposed, and the trial court twice denied, USAA's jurisdictional plea. Shortly thereafter, Brite amended his petition to seek damages of $1.6 million, and subsequently claimed in discovery responses that " 'his lost wages and benefits in the future, until age 65, total approximately $1,000,000.00.' " *Brite I,* 215 S.W.3d at 401 (quoting discovery responses). After a jury trial, the trial court awarded Brite $188,406 in back pay, $350,000 in front pay, $300,000 in punitive damages, $129,387 in attorney's fees, and prejudgment interest. *Id.*

A divided court of appeals affirmed the trial court's judgment. *See United Servs. Auto. Ass'n v. Brite,* 161 S.W.3d 566, 579 (Tex.App.-San Antonio 2005, pet. granted). We reversed, concluding that the amount in controversy at the time Brite filed suit exceeded $100,000, depriving the county court at law of jurisdiction over the matter. *Brite I,* 215 S.W.3d at 402. We dismissed the underlying suit for want of jurisdiction. *Id.* at 403.

Within sixty days of our judgment dismissing the county court case, Brite refiled his claim in Bexar County district court. USAA filed a plea to the jurisdiction and moved for summary judgment asserting, among other things, that the trial court lacked subject matter jurisdiction because Brite failed to file suit within TCHRA's two-year time limit; that the tolling provision in section 16.064 of the Civil Practice and Remedies Code did not apply to TCHRA claims; and that even if it did, Brite's original suit was filed with "intentional disregard of proper jurisdiction," depriving him of that provision's protection. The trial court denied the plea and motion. The court of appeals denied relief, concluding that USAA had not established that its appellate remedy was inadequate. 2007 WL 3003131, at *1, 2007 Tex.App. LEXIS 8206, at *1–*2. USAA now petitions this Court for mandamus relief.

II. Is TCHRA's two-year period for filing suit jurisdictional?

USAA argues that TCHRA's two year deadline for filing suit is jurisdictional, precluding application of the tolling statute. But " '[j]urisdiction,' " as the United States Supreme Court has observed, " 'is a word of many, too many, meanings.' " *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 90, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (quoting *United States v. Vanness,* 85 F.3d 661, 663 n. 2 (D.C.Cir.1996)). Nineteen years ago, in a footnote, we observed that the time period for filing a TCHRA lawsuit was "mandatory and jurisdictional." *Schroeder v. Texas Iron* ***306** *Works, Inc.,* 813 S.W.2d 483, 487 n. 10 (1991). [8] In support, we cited *Green v. Aluminum Co. of America,* 760 S.W.2d 378, 380 (Tex.App.-Austin 1988, no writ), which in turn relied on our decision in *Mingus v. Wadley,* 115 Tex. 551, 285 S.W.

1084 (1926). *Mingus* held that the requirements of the Workmen's Compensation Act were jurisdictional, and that "[t]he general rule is that where the cause of action and remedy for its enforcement are derived not from the common law but from the statute, the statutory provisions are mandatory and exclusive, and must be complied with in all respects or the action is not maintainable." *Mingus,* 285 S.W. at 1087.

8 In 1993, the limitations period was changed from one to two years. Act of May 14, 1993, 73rd Leg. R.S., ch. 276, § 7, 1993 Tex. Gen. Laws 1285, 1291 (amending TEX.REV.CIV. STAT. art. 5221k, § 7.01(a)) (now codified at TEX. LAB.CODE § 21.256).

[4] **[5]** But we, like the U.S. Supreme Court,[9] have recognized that our sometimes intemperate use of the term "jurisdictional" has caused problems. Characterizing a statutory requirement as jurisdictional means that the trial court does not have-and never had-power to decide the case. *See Univ. of Tex. Sw. Med. Ctr. v. Loutzenhiser,* 140 S.W.3d 351, 359 (Tex.2004) ("The failure of a jurisdictional requirement deprives the court of the power to act (other than to determine that it has no jurisdiction), and ever to have acted, as a matter of law."). Thus, "[n]ot only *may* an issue of subject matter jurisdiction 'be raised for the first time on appeal by the parties or by the court', a court is *obliged* to ascertain that subject matter jurisdiction exists regardless of whether the parties questioned it." *Id.* at 358 (footnote omitted).

9 *See, e.g., Arbaugh v. Y & H Corp.,* 546 U.S. 500, 510, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006) (noting that "[t]his Court, no less than other courts, has sometimes been profligate in its use of the term"); *Kontrick v. Ryan,* 540 U.S. 443, 454, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004) (observing that "[c]ourts, including this Court, it is true, have been less than meticulous" in their use of the term).

[6] In *Dubai Petroleum Co. v. Kazi,* 12 S.W.3d 71, 76 (Tex.2000) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 12 cmt. b. at 118 (1982)), we observed that " '[t]he classification of a matter as one of jurisdiction ... opens the way to making judgments vulnerable to delayed attack for a variety of irregularities that perhaps better ought to be sealed in a judgment.' " Thus, "[a]lthough *Mingus* represented the dominant approach when it was decided, 'the modern direction of policy is to reduce the vulnerability of final judgments to attack on the ground that the tribunal lacked subject matter jurisdiction.' " *Dubai,* 12 S.W.3d at 76 (quoting RESTATEMENT (SECOND) OF JUDGMENTSS § 11 cmt. e. at 113). We overruled *Mingus* "to the extent that it characterized the plaintiff's failure to establish a statutory prerequisite as jurisdictional." *Id.* Instead, we held that " '[t]he right of a plaintiff to maintain a suit, while frequently treated as going to the question of jurisdiction, has been said to go in reality to the right of the plaintiff to relief rather than to the jurisdiction of the court to afford it.' " *Id.* at 76–77 (quoting 21 C.J.S. *Courts* § 16, at 23 (1990)).

Since *Dubai,* we have been "reluctant to conclude that a provision is jurisdictional, absent clear legislative intent to that effect." *City of DeSoto v. White,* 288 S.W.3d 389, 393 (Tex.2009). We have held that the Payday Law's 180–day period for filing a wage claim, though "a mandatory condition to pursuing the administrative cause ***307** of action," was "not ... a bar to ... [the] exercise of jurisdiction"; that the Tort Claims Act's notice provision was "a complete defense to suit but [did] not deprive the court of subject matter jurisdiction"; that the failure to comply with dismissal dates in parental rights termination cases did not deprive trial courts of jurisdiction; that the noncompliance with a mandatory notice requirement in the Fire Fighter and Police Officer Civil Service Act did not divest a hearing examiner of jurisdiction over an appeal; and that the statutory requirement that a condemnor and a property owner be "unable to agree" on damages was not jurisdictional but that a failure to satisfy the requirement would result in abatement. *City of DeSoto,* 288 S.W.3d at 398; *In re Dep't of Family & Protective Servs.,* 273 S.W.3d 637, 644 (Tex.2009); *Igal v. Brightstar Info. Tech. Group, Inc.,* 250 S.W.3d 78, 86 (Tex.2008); *Loutzenhiser,* 140 S.W.3d at 354; *Hubenak v. San Jacinto Gas Transmission Co.,* 141 S.W.3d 172, 191 (Tex.2004).

[7] **[8]** **[9]** We have been careful to emphasize, however, that a statutory requirement commanding action, even if not jurisdictional, remains mandatory. *Loutzenhiser,* 140 S.W.3d at 359 ("The failure of a non-jurisdictional requirement mandated by statute may result in the loss of a claim, but that failure must be timely asserted and compliance can be waived."). And some requirements, such as a timely notice of appeal, remain jurisdictional. *See In the Interest of K.A.F.,* 160 S.W.3d 923, 928 (Tex.2005); *accord Bowles v. Russell,* 551 U.S. 205, 213, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007)

(concluding that party's "failure to file his notice of appeal in accordance with the statute therefore deprived the Court of Appeals of jurisdiction"). Moreover, when elements of a statutory claim involve "the jurisdictional inquiry of sovereign immunity from suit," those elements can be relevant to both jurisdiction and liability. *State v. Lueck,* 290 S.W.3d 876, 883 (Tex.2009).

But we have never revisited our statement in *Schroeder,* even though courts have questioned whether *Schroeder* remains the law after *Dubai. See, e.g., Ramirez v. DRC Distribs., Ltd.,* 216 S.W.3d 917, 921 n. 8 (Tex.App.-Corpus Christi 2007, pet. denied) (noting that "[a]lthough the Texas Supreme Court held in *Schroeder v. Texas Iron Works* ... that exhaustion of the TCHRA's administrative remedies is mandatory and jurisdictional, several courts of appeals have questioned whether its decision in *Dubai Petroleum Co. v. Kazi* indicated a retreat from this position") (collecting cases). Most recently, although we observed that "in the past we have described a statutory time limitation in the Commission on Human Rights Act as 'mandatory and jurisdictional,' " we stated only that "those cases predate *Dubai* and dealt with a different statutory scheme than presented here." *Igal,* 250 S.W.3d at 83 n. 5 (quoting *Schroeder,* 813 S.W.2d at 486).

[10] **[11]** Today we reexamine whether section 21.256's time limit is jurisdictional. We begin with the statutory language, presuming "that the Legislature did not intend to make the [provision] jurisdictional; a presumption overcome only by clear legislative intent to the contrary." *City of DeSoto,* 288 S.W.3d at 394. The statute provides that an action "may not be brought ... later than the second anniversary of the date the complaint relating to the action is filed." TEX. LAB. CODE § 21.256. The Legislature titled the provision "Statute of Limitations," *id.,* and while such a heading cannot limit or expand the statute's meaning, TEX. GOV'T CODE § 311.024, the heading "gives some indication of the Legislature's intent," ***308** *Loutzenhiser,* 140 S.W.3d at 361; *see also Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385, 394, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982) (noting that legislative history indicated that Title VII filing deadline was intended to operate as a statute of limitations rather than jurisdictional requirement). We too have characterized the deadline as a statute of limitations, calling it a "limitation period" and noting that "[t]he statute of limitations for such action runs from the date of filing the complaint with the Commission." *Schroeder,* 813 S.W.2d at 487 n. 10. In *Schroeder,* a case that dealt primarily with "whether exhaustion of administrative remedies is a prerequisite to bringing a civil action for age discrimination in employment," the legal character of the section 21.256 deadline was not at issue. *Schroeder,* 813 S.W.2d at 484; *accord Zipes,* 455 U.S. at 395, 102 S.Ct. 1127 (stating that "[a]lthough our cases contain scattered references to the timely-filing requirement as jurisdictional, the legal character of the requirement was not at issue in those cases, and as or more often in the same or other cases, we have referred to the provision as a limitations statute"). While the phrase "may not be brought" makes the provision mandatory, *see* TEX. GOV'T CODE § 311.016(5), the statute does not indicate that the provision is jurisdictional or that the consequence of noncompliance is dismissal. *City of DeSoto,* 288 S.W.3d at 396 (observing that statute did not contain explicit language indicating that requirement was jurisdictional nor did it provide a consequence for noncompliance); *accord Igal,* 250 S.W.3d at 84 (noting that statutory language did not indicate that statute was intended to address jurisdiction, as it merely "establish[ed] a procedural bar similar to a statute of limitations and does not prescribe the boundaries of jurisdiction"); *see also Zipes,* 455 U.S. at 394, 102 S.Ct. 1127 (noting that statutory time period for filing EEOC claim under Title VII "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts").

[12] **[13]** Our procedural rules, which have the force and effect of statutes, and our cases classify limitations as an affirmative defense. TEX.R. CIV. P. 94; *In re City of Georgetown,* 53 S.W.3d 328, 332 (Tex.2001); *see also Day v. McDonough,* 547 U.S. 198, 205, 126 S.Ct. 1675, 164 L.Ed.2d 376 (2006) ("A statute of limitations defense ... is not 'jurisdictional,' hence courts are under no obligation to raise the time bar sua sponte."). While the Legislature could make the Labor Code filing deadlines jurisdictional, as it has in cases involving statutory requirements relating to governmental entities, *see* TEX. GOV'T CODE § 311.034 (providing that "statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity"), it has not done so here.

[14] We also consider the statute's purpose. *See Loutzenhiser,* 140 S.W.3d at 360; *Helena Chem. Co. v. Wilkins,* 47 S.W.3d 486, 494 (Tex.2001). The TCHRA was enacted to "provide for the execution of the policies of Title VII of the

Civil Rights Act of 1964." TEX. LAB. CODE § 21.001(1). It is "modeled after federal civil rights law," *NME Hosps., Inc. v. Rennels,* 994 S.W.2d 142, 144 (Tex.1999), and "[o]ne of the primary goals of the statute is to coordinate state law with federal law in the area of employment discrimination," *Vielma v. Eureka Co.,* 218 F.3d 458, 462 (5th Cir.2000). Thus, "analogous federal statutes and the cases interpreting them guide our reading of the TCHRA." *Quantum Chem. Corp. v. Toennies,* 47 S.W.3d 473, 476 (Tex.2001)

The United States Supreme Court has consistently construed Title VII's requirements as mandatory but not jurisdictional. ***309** *See Arbaugh v. Y & H Corp.,* 546 U.S. 500, 516, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006); *Zipes,* 455 U.S. at 393, 102 S.Ct. 1127; *see also Irwin v. Dep't of Veterans Affairs,* 498 U.S. 89, 95–96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990) (holding that equitable tolling applied to Title VII suit against federal employer); *Crown, Cork & Seal Co., Inc. v. Parker,* 462 U.S. 345, 349 n. 3, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983) (rejecting argument that time period was jurisdictional and holding that filing of class action tolled limitations under Title VII). In *Zipes,* 455 U.S. at 393, 102 S.Ct. 1127, the Court held that the timely filing of an employment discrimination complaint with the Equal Employment Opportunity Commission was not a jurisdictional prerequisite to suit under Title VII, a conclusion compelled by "[t]he structure of Title VII, the congressional policy underlying it, and the reasoning of [the Court's] cases." In a later case, the Court decided that Title VII's 15–employee minimum was an element of the claim, rather than a jurisdictional prerequisite. *Arbaugh,* 546 U.S. at 516, 126 S.Ct. 1235. In reaching that conclusion, the Court adopted a "readily administrable bright line" rule:

> If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue.... But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.

Id. at 515–16, 126 S.Ct. 1235 (footnote omitted). This is not unlike our own post-Dubai approach: we have been "reluctant to conclude that a provision is jurisdictional, absent clear legislative intent to that effect." City of DeSoto, 288 S.W.3d at 393.

Although the Supreme Court has not addressed whether the time period for filing suit under Title VII is jurisdictional, every federal circuit that has considered the issue has held that it is not. *See Seitzinger v. Reading Hosp. & Med. Ctr.,* 165 F.3d 236, 239–40 (3d Cir.1999); *Smith–Haynie v. D.C.,* 155 F.3d 575, 579 (D.C.Cir.1998); *Truitt v. County of Wayne,* 148 F.3d 644, 646 (6th Cir.1998) ("Although *Zipes* dealt only with the time limit for filing charges of discrimination with the EEOC, its logic has been extended to the ninety-day time limit for filing suit in the district court after receipt of a right-to-sue letter.") (citations omitted); *Goldsmith v. City of Atmore,* 996 F.2d 1155, 1161 (11th Cir.1993); *Scheerer v. Rose State Coll.,* 950 F.2d 661, 665 (10th Cir.1991); *Hill v. John Chezik Imps.,* 869 F.2d 1122, 1124 (8th Cir.1989); *Valenzuela v. Kraft, Inc.,* 801 F.2d 1170, 1174 (9th Cir.1986) (concluding that Supreme Court precedent "firmly establish[es] that the 90–day filing period is a statute of limitations subject to equitable tolling in appropriate circumstances"); *Espinoza v. Mo. Pac. R.R. Co.,* 754 F.2d 1247, 1248 n. 1 (5th Cir.1985); *Brown v. J.I. Case Co.,* 756 F.2d 48, 50 (7th Cir.1985); *Johnson v. Al Tech Specialties Steel Corp.,* 731 F.2d 143, 146 (2d Cir.1984) (noting that "[t]he Supreme Court ... has evinced a policy of treating Title VII time limits not as jurisdictional predicates, but as limitations periods subject to equitable tolling"); *see also Baldwin County Welcome Ctr. v. Brown,* 466 U.S. 147, 151–52, 104 S.Ct. 1723, 80 L.Ed.2d 196 (1984) (holding that plaintiff had not shown herself entitled to equitable tolling of filing deadline, but not rejecting equitable tolling as inapplicable to that deadline).

[15] We also consider the consequences that result from each interpretation. *Helena Chem.,* 47 S.W.3d at 495. A judgment is void if rendered by a court without subject matter jurisdiction. *Mapco,* ***310** *Inc. v. Forrest,* 795 S.W.2d 700, 703 (Tex.1990). If TCHRA's limitations period were jurisdictional, trial courts that have denied summary judgment motions based on the failure to satisfy that requirement would forever have their judgments open to reconsideration. Conversely, those courts that granted such motions would have had no power to do so, nor would appellate courts have had the power to affirm the judgments. *See, e.g., Vu v. ExxonMobil Corp.,* 98 S.W.3d 318, 321 (Tex.App.–Houston [1st

Dist.] 2003, pet. denied) (affirming summary judgment because TCHRA suit not filed until more than two years after charge of discrimination); *see also Zipes,* 455 U.S. at 397, 102 S.Ct. 1127 (observing that, if the timely filing requirement were jurisdictional, "the District Courts in *Franks* [*v. Bowman Transp. Co.,* 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976),] and *Albemarle Paper Co. v. Moody,* 422 U.S. 405 [95 S.Ct. 2362, 45 L.Ed.2d 280] (1975), would have been without jurisdiction to adjudicate the claims of those who had not filed as well as without jurisdiction to award them seniority," but "[w]e did not so hold"). It is preferable to "avoid a result that leaves the decisions and judgments of [a tribunal] in limbo and subject to future attack, unless that was the Legislature's clear intent." *City of DeSoto,* 288 S.W.3d at 394.

[16] In keeping with the statute's language, *Dubai* and subsequent cases, as well as the purposes behind TCHRA and federal interpretations of Title VII, we conclude that the two-year period for filing suit is mandatory but not jurisdictional, and we overrule *Schroeder* to the extent it held otherwise.

II. Does the tolling statute, Tex. Civ. Prac. & Rem.Code § 16.064, apply to a TCHRA claim?

In pertinent part, section 16.064 provides:

> The period between the date of filing an action in a trial court and the date of a second filing of the same action in a different court suspends the running of the applicable statute of limitations for the period if:
>
> (1) because of lack of jurisdiction in the trial court where the action was first filed, the action is dismissed or the judgment is set aside or annulled in a direct proceeding; and
>
> (2) not later than the 60th day after the date the dismissal or other disposition becomes final, the action is commenced in a court of proper jurisdiction.

TEX. CIV. PRAC. & REM.CODE § 16.064(a).

USAA contends that, even if the limitations period is not jurisdictional, the tolling statute does not apply, citing a string of cases holding generally that section 16.064 does not apply to special statutory proceedings. *See, e.g., Heart Hosp. IV, L.P. v. King,* 116 S.W.3d 831, 836 (Tex.App.-Austin 2003, pet. denied); *Argonaut Sw. Ins. Co. v. Walker,* 64 S.W.3d 654, 657 (Tex.App.-Texarkana 2001, pet. denied); *Gutierrez v. Lee,* 812 S.W.2d 388, 392 (Tex.App.-Austin 1991, writ denied); *Castillo v. Allied Ins. Co.,* 537 S.W.2d 486, 487 (Tex.Civ.App.-Amarillo 1976, writ ref'd n.r.e.); *Pan Am. Fire & Cas. Co. v. Rowlett,* 479 S.W.2d 782, 783 (Tex.Civ.App.-Eastland 1972, writ ref'd n.r.e.); *Braden v. Transp. Ins. Co.,* 307 S.W.2d 655, 656 (Tex.Civ.App.-Dallas 1957, no writ); *Leadon v. Truck Ins. Exch.,* 253 S.W.2d 903, 905 (Tex.Civ.App.-Galveston 1952, no writ); *Bear v. Donna Indep. School Dist.,* 85 S.W.2d 797, 799 (Tex.Civ.App.-San Antonio 1935, writ dism'd w.o.j.).

But there are at least three problems with this approach. First, we have never ***311** endorsed the theory that section 16.064 is inapplicable to causes of action created by statute. All of those decisions were from our courts of appeals, and most predate *Dubai.* Second, those cases are based on the *Mingus* rationale, overruled in *Dubai,* that a "dichotomy [exists] between common-law and statutory actions," with mandatory statutory provisions also being jurisdictional. *Dubai,* 12 S.W.3d at 76. Post-*Dubai,* we have rejected such a distinction, adopting instead "an approach to jurisdictional questions designed to strengthen finality and reduce the possibility of delayed attacks on judgments, *regardless of whether the claim was anchored in common law or was a specially-created statutory action." City of DeSoto,* 288 S.W.3d at 394 (emphasis added).

[17] **[18]** Third, the argument conflates equitable tolling with statutory tolling. The former is a court-created doctrine, *see e.g., Taliani v. Chrans,* 189 F.3d 597, 597 (7th Cir.1999) (noting that "equitable tolling [is] the judge-made doctrine ... that excuses a timely filing when the plaintiff could not, despite the exercise of reasonable diligence, have discovered all the information he needed in order to be able to file his claim on time"), that may not apply if a statutory requirement is deemed jurisdictional, *see Zipes,* 455 U.S. at 393, 102 S.Ct. 1127 (holding that "filing a timely charge of discrimination

with the EEOC is not a jurisdictional prerequisite to suit, ... but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling"). The latter is a legislative dictate that limitations be tolled for "*any* action" filed in the wrong court. *See* Act approved Apr. 27, 1931, 42d Leg., R.S., ch. 81, 1931 Tex. Gen. Laws 124, 124, current version at TEX. CIV. PRAC. & REM.CODE § 16.064 (emphasis added).

[19] Here we must construe two statutes—one that creates a limitations period and a second that tolls it. There is no reason, absent clear legislative intent, that we should not harmonize the two. *See La Sara Grain Co. v. First Nat'l Bank,* 673 S.W.2d 558, 565 (Tex.1984) ("Generally, courts are to construe statutes so as to harmonize with other relevant laws, if possible."). Had the Legislature wanted to prohibit statutory tolling, it could have done so, but TCHRA is devoid of any such indication. *Cf.* TEX. CIV. PRAC. & REM.CODE § 74.251(a) (creating limitations period that applies "[n]otwithstanding any other law"); *Liggett v. Blocher,* 849 S.W.2d 846, 850 (Tex.App.-Houston [1st Dist.] 1993, no writ) (holding that "notwithstanding any other law" meant that statutory tolling provision did not apply to health care liability claims). Thus, absent language indicating that section 16.064 was not intended to apply to TCHRA claims, the statute of limitations is tolled for those cases falling within section 16.064's savings provision.

IV. Was Brite's first suit filed with "intentional disregard of proper jurisdiction"?

Section 16.064 will not save a later-filed claim if the first action was filed "with intentional disregard of proper jurisdiction." TEX. CIV. PRAC. & REM.CODE § 16.064(b). USAA contends that is what happened here, while Brite asserts that a jury must decide whether he intended to evade jurisdiction, given that he vigorously denies doing so. We agree with USAA.

Noting "[t]he importance of simplifying Court procedure," the Texas Judicial Council in 1930 drafted the tolling statute. *See* SECOND ANNUAL REPORT OF THE TEXAS CIVIL JUDICIAL COUNCIL TO THE GOVERNOR AND SUPREME COURT, Bill No. 6, at 10–12 (1930). The Legislature made a single change—extending the refiling period from thirty to sixty days—and passed the bill. *See* Act approved Apr. 27, 1931, 42d ***312** Leg., R.S., ch. 81, 1931 Tex. Gen. Laws 124, 124, current version at TEX. CIV. PRAC. & REM. CODE § 16.064; *see also Burford v. Sun Oil Co.,* 186 S.W.2d 306, 310 (Tex.Civ.App.-Austin 1944, writ ref'd w.o.m.). In its recommendation accompanying the bill, the Council noted

> [t]hat the wrong court is frequently and in good faith chosen by capable lawyers, [as] evidenced by the hundreds of cases cited in the annotations upon the subject given in Vernon's Annotated Texas Statutes,—9 pages upon Justice Court, 17 pages upon county court and 29 pages upon district court jurisdiction.

SECOND ANNUAL REPORT, at 11. The Council explained that the Texas bill was based on a Kentucky statute that tolled limitations for actions "commenced in due time and in good faith" in a court that lacked jurisdiction. *Id.* (citing CARROLL'S KY. STAT. § 2545 (1922)). The Council stated that its bill was "like that of Kentucky in substance, but ... a definition of 'good faith' [is] supplied." *Id.* at 11–12. It is that definition that is at issue here.

[20] As we noted in *Brite I,* "[t]he jurisdictional statute for county courts at law values the matter in controversy on the amount of damages 'alleged' by the plaintiff...." *Brite I,* 215 S.W.3d at 402–03 (quoting TEX. GOV'T CODE § 25.0003(c)(1)). Here, Brite's petition omitted the statement required by our rules—that the "damages sought are within the jurisdictional limits of the court," TEX.R. CIV. P. 47(b)—and instead pleaded only that his damages exceeded $500. Brite has never contended that he was unaware of or confused about the county court's jurisdictional limitation. *See, e.g., Clary Corp. v. Smith,* 949 S.W.2d 452, 461 (Tex.App.-Fort Worth 1997, pet. denied) (noting that 16.064 did not apply because "there [was] no evidence of mistake here," as plaintiffs "have neither alleged nor presented evidence that they were unaware of the trial court's amount in controversy limits"). While such confusion would be understandable, as other statutory county courts (even those in one county adjacent to Bexar County) [10] have no such restriction, he instead argued that "the amount in controversy should not be calculated by the damages originally sued for, but instead

by the amount of damages that, more likely than not, the plaintiff would recover." *Brite I,* 215 S.W.3d at 402. We rejected that argument, concluding that "[t]he amount in controversy in this case exceeded $100,000 at the time Brite filed suit." *Id.* at 403.

10 *See* TEX. GOV'T CODE § 25.1322(a) (providing that county courts at law in Kendall County have concurrent jurisdiction with the district court); *see also* TEXAS ALMANAC 2010–11, at 221, 306.

The parties disagree about the proper standard for intentional disregard under the tolling statute, which requires that USAA "show[ ] in abatement that the first filing was made with intentional disregard of proper jurisdiction." TEX. CIV. PRAC. & REM.CODE § 16.064(b). Brite contends that intent is always a fact issue, inappropriate for resolution on summary judgment, while USAA asserts it has met its burden through circumstantial evidence of Brite's intent and that Brite is charged with knowledge of the law. We have never before addressed this issue.

[21] We agree, in part, with USAA. Once an adverse party has moved for relief under the "intentional disregard" provision, the nonmovant must show that he did not intentionally disregard proper jurisdiction when filing the case. As it is the nonmovant who has this information, he should bear the burden of producing it. *Cf.* ***313** *Brown v. Shores,* 77 S.W.3d 884, 889 (Tex.App.-Houston [14th Dist.] 2002, no pet.) (Brister, J., concurring) (noting that, because "diligent-service question focuses almost entirely on the efforts and thoughts of plaintiff's counsel, so the initial burden of presenting evidence should rest there, too"; "[o]therwise, every one of these numerous cases will begin with the defendant sending a notice to depose plaintiff's counsel and a subpoena for all files").

[22] We disagree, however, that a plaintiff's mistake about the court's jurisdiction would never satisfy the requirement. Section 16.064's intent standard is similar to that required for setting aside a default judgment, *see Craddock v. Sunshine Bus Lines, Inc.,* 134 Tex. 388, 133 S.W.2d 124, 126 (1939) (requiring new trial if defendant proves three elements, the first of which is that default was neither intentional nor due to conscious indifference), and we have held that a mistake of law may be a sufficient excuse, *Bank One, Tex., N.A. v. Moody,* 830 S.W.2d 81, 84 (Tex.1992). Moreover, section 16.064 was drafted precisely because "capable lawyers" often make "good faith" mistakes about the jurisdiction of Texas courts. *See* SECOND ANNUAL REPORT, at 11; *see also* CITIZENS' COMMISSION ON THE TEXAS JUDICIAL SYSTEM, REPORT AND RECOMMENDATIONS–INTO THE TWENTY–FIRST CENTURY, at 17 (1993) ("No one person understands or can hope to understand all the nuances and intricacies of Texas' thousands of trial courts.").

[23] But while the tolling statute protects plaintiffs who mistakenly file suit in a forum that lacks jurisdiction, it does not apply to a strategic decision to seek relief from such a court—which is what happened here. *Hotvedt v. Schlumberger, Ltd. (N.V.),* 942 F.2d 294, 297 (5th Cir.1991) (refusing to apply section 16.064 because "[i]t is clear ... that errors in [an attorney's] tactical decisions were not meant to be remedied by the savings statute"); *Clary,* 949 S.W.2d at 461 (holding that "[s]ection 16.064 was not intended to remedy ... tactical decisions"); *see also Brite I,* 161 S.W.3d at 586 (Duncan, J., dissenting) (noting that "the record, taken as a whole, establishes that Brite's trial attorney filed the Original Petition with full knowledge that Brite sought far more than $100,000 in actual damages and purposefully drafted the Original Petition to conceal that fact by omitting the statement required by Rule 47(b)"). Because Brite unquestionably sought damages in excess of the county court at law's jurisdiction, it matters not that he subjectively anticipated a verdict within the jurisdictional limits. For that reason, limitations was not tolled. His second suit, filed long after the expiration of the two year statute, is therefore barred.

V. Is USAA entitled to mandamus relief?

[24] Finally, we must decide whether mandamus relief is appropriate. Deciding whether the benefits of mandamus outweigh the detriments requires us to weigh public and private interests, recognizing that—rather than categorical determinations—"the adequacy of an appeal depends on the facts involved in each case." *In re McAllen Med. Ctr., Inc.,* 275 S.W.3d 458, 469 (Tex.2008); *In re The Prudential Ins. Co. of Am.,* 148 S.W.3d 124, 136–37 (Tex.2004).

In *CSR Ltd. v. Link,* 925 S.W.2d 591, 596–97 (Tex.1996), we conditionally granted mandamus relief ordering the trial court to grant CSR's special appearance in a toxic tort case. We held that "extraordinary circumstances" (namely the enormous number of potential claimants and the most efficient use of the state's judicial resources) warranted extraordinary relief, even though it was typically unavailable for the denial of a special appearance. ***314** *CSR,* 925 S.W.2d at 596; *see also Canadian Helicopters Ltd. v. Wittig,* 876 S.W.2d 304, 308–09 (Tex.1994).

[25] **[26]** And although "mandamus is generally unavailable when a trial court denies summary judgment, no matter how meritorious the motion," that rule is based in part on the fact that "trying a case in which summary judgment would have been appropriate does not mean the case will have to be tried twice"—a justification not applicable here. *In re McAllen Med. Ctr.,* 275 S.W.3d at 465–66. USAA has already endured one trial in a forum that lacked jurisdiction (and then a subsequent appeal to the court of appeals and this Court) and is facing a second trial on a claim that we have just held to be barred by limitations. Two wasted trials are not "[t]he most efficient use of the state's judicial resources." *CSR,* 925 S.W.2d at 596; *cf. In re McAllen Med. Ctr.,* 275 S.W.3d at 466. Denying mandamus relief here would thwart the legislative intent that non-tolled TCHRA claims be brought within two years (as well as the tolling provision's inapplicability to suits filed with intentional disregard of proper jurisdiction), and we should not "frustrate th[at] purpose[ ] by a too-strict application of our own procedural devices." *In re McAllen Med. Ctr.,* 275 S.W.3d at 467.

Because the extraordinary circumstances presented here merit extraordinary relief, we conditionally grant the writ and direct the trial court to grant USAA's motion for summary judgment. We are confident the trial court will comply, and our writ will issue only if it does not.

Justice JOHNSON did not participate in the decision.

All Citations

307 S.W.3d 299, 108 Fair Empl.Prac.Cas. (BNA) 1626, 53 Tex. Sup. Ct. J. 485

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160 S.W.3d 923
Supreme Court of Texas.

In the Interest of K.A.F., a child.

No. 04–0493.
|
Argued Feb. 16, 2005.
|
Decided April 8, 2005.
|
Rehearing Denied May 13, 2005.

Synopsis

Background: Father petitioned for involuntary termination of mother's parental rights. The 279th District Court, Jefferson County, Tom Mulvaney, J., granted petition. Following denial of her motion for new trial or to modify judgment, mother appealed. The Beaumont Court of Appeals dismissed appeal for want of jurisdiction, and mother petitioned for review.

Holdings: The Supreme Court, O'Neill, J., granted petition and held that:

[1] mother's timely filed motion to modify judgment did not extend deadline for filing notice of appeal;

[2] mother's motion for new trial did not amount to bona fide attempt to invoke jurisdiction of appellate court; and

[3] mother waived its consideration of her constitutional claims.

Affirmed.

Attorneys and Law Firms

***923** Clinard J. Hanby, Robert B. Kalish, Laura Kalish, The Woodlands, Bruce K. Thomas, Law Office of Bruce K. Thomas, Dallas, for petitioner Susan Carroll Capps.

***924** Ronnie Jo Cohee, Richard J. Clarkson, Beaumont, for respondent Louis Faucheaux.

Rod J. Paasch, Nederland, for other interested party K.A.F.

Opinion

Justice O'NEILL delivered the opinion of the Court.

In this case, we must decide whether the rules of appellate procedure permit post-judgment motions to extend the appellate deadline for filing an accelerated appeal. We hold that they do not. We further hold that filing a motion for new trial may not be considered a bona fide attempt to invoke the appellate court's jurisdiction. Accordingly, we affirm the court of appeals' judgment.

I

Louis Faucheaux petitioned the trial court to involuntarily terminate Susan Carroll's [1] parental rights to their daughter, K.A.F. The jury found that Carroll's rights should be terminated, and the trial court signed a final order of termination on November 3, 2003. On November 10, 2003, Carroll filed a "Motion for New Trial: Alternatively, Motion to Modify the Judgment," which the trial court denied a week later. Carroll filed a notice of appeal on January 16, 2004, seventy-four days after the trial court signed its final order.

1 In the trial court and court of appeals, Ms. Carroll was referred to as Susan Carroll Capps. In her filings in this Court, she states that she is now known as Susan Carroll; we will refer to her accordingly.

The court of appeals dismissed the appeal for want of jurisdiction, holding that, because Carroll's notice of appeal was filed more than twenty days after the judgment was signed, the notice was untimely under Texas Rule of Appellate Procedure 26.1(b), which governs accelerated appeals and applies to parental rights termination cases. 221 S.W.3d 78, ——, 2004 WL 527024, *1. We granted Carroll's petition for review to determine whether the court of appeals' dismissal was proper.

II

Texas Rule of Appellate Procedure 26.1 sets out the time to perfect an appeal in civil cases:

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.

Tex.R.App. P. 26.1. With this rule in place, the Legislature enacted ***925** section 109.002 of the Family Code, which provides in pertinent part:

> An appeal in a suit in which termination of the parent-child relationship is in issue shall be given precedence over other civil cases and shall be accelerated by the appellate courts. The procedures

> for an accelerated appeal under the Texas Rules of Appellate Procedure apply to an appeal in which the termination of the parent-child relationship is in issue.

Tex. Fam.Code § 109.002(a). Thus, rule 26.1(b) applies to an appeal in a parental rights termination case and requires that the notice of appeal be filed within twenty days after a judgment or order is signed. Tex.R.App. P. 26.1(b).

Carroll argues, however, that although rule 26.1(b) governs accelerated appeals and sets a twenty-day deadline, rule 26.1(a) should operate to extend the filing deadline to ninety days, even in an accelerated appeal, when a timely motion to modify the judgment is filed. To support her interpretation, Carroll cites rules 28.1 and 28.2, which provide that appeals from interlocutory orders and quo warranto proceedings are accelerated and that "[f]iling a motion for new trial will not extend the time to perfect the appeal." Tex.R.App. P. 28.1, 28.2. From this language, Carroll infers that filing one of the other post-judgment motions listed in rule 26.1(a), like a motion to modify the judgment, *will* extend the time to perfect an appeal from those two types of judgments. Carroll then argues that a similar rule should apply to other types of accelerated appeals and that her timely filed motion to modify the judgment thus extended the appellate deadline to ninety days.

[1] We find this argument unpersuasive for several reasons. First, the language of rule 26.1(b) is clear and contains no exceptions to the twenty-day deadline. Second, rules 28.1 and 28.2 specifically apply only to interlocutory orders and quo warranto proceedings, respectively. Finally, as discussed below, before the procedural rules were amended in 1997, it was clear that there was no exception to the accelerated-appeal deadline, and we find no indication that such a major change was intended.

Prior to 1997, the deadlines for perfecting ordinary and accelerated appeals were governed by different rules. Rule 41, governing ordinary appeals, provided:

RULE 41. ORDINARY APPEAL—WHEN PERFECTED

(a) Appeals in Civil Cases.

(1) *Time to Perfect Appeal.* When security for costs on appeal is required, the bond or affidavit in lieu thereof shall be filed with the clerk within thirty days after the judgment is signed, or, within ninety days after the judgment is signed if a timely motion for new trial has been filed by any party or if any party has timely filed a request for findings of fact and conclusions of law in a case tried without a jury. If a deposit of cash is made in lieu of bond, the same shall be made within the same period.

Former Tex.R.App. P. 41(a)(1) (1986, amended 1997). Despite the rule's specific reference to motions for new trial and requests for findings of fact and conclusions of law, the courts of appeals were almost entirely uniform in holding that *any* motion requesting a substantive change in the judgment would operate to extend the appellate timetable. *Ramirez v. Williams Bros. Constr. Co.,* 870 S.W.2d 551, 552 (Tex.App.-Houston [1st Dist.] 1993, no writ) (per curiam) (citing *U.S. Fire Ins. Co. v. State,* 843 S.W.2d 283, 284 (Tex.App.-Austin 1992, writ denied), *Miller Brewing Co. v. Villarreal,* 822 S.W.2d 177, 179 (Tex.App.-San Antonio 1991), *rev'd on other grounds,* 829 S.W.2d 770 (Tex.1992), *Home Owners Funding Corp. v. Scheppler,* 815 S.W.2d 884, 887 (Tex.App.-Corpus Christi 1991, no writ), and *Brazos* ***926** *Elec. Power Coop., Inc. v. Callejo,* 734 S.W.2d 126, 129 (Tex.App.-Dallas 1987, no writ)). *Contra First Freeport Nat'l Bank v. Brazoswood Nat'l Bank,* 712 S.W.2d 168, 170 (Tex.App.-Houston [14th Dist.] 1986, no writ).

Rule 42, which governed accelerated appeals, provided:

RULE 42. ACCELERATED APPEALS IN CIVIL CASES

(a) Mandatory Acceleration.

> (1) Appeals from interlocutory orders (when allowed by law) shall be accelerated. In appeals from interlocutory orders, no motion for new trial shall be filed....
>
> (2) Appeals in quo warranto proceedings shall be accelerated. In quo warranto, the filing of a motion for new trial shall not extend the time for perfecting the appeal....
>
> (3) In all accelerated appeals from interlocutory orders and in quo warranto proceedings, the bond, or the notice or affidavit in lieu thereof, shall be filed, or the deposit in lieu of bond shall be made, within twenty days after the judgment or order is signed....

Former Tex.R.App. P. 42(a) (1986, amended 1997). The pre–1997 rules thus provided that, while certain post-judgment motions would extend the appellate deadlines in ordinary appeals, such motions, to the extent they were permitted to be filed at all, did not affect the twenty-day deadline for accelerated appeals.

In 1997, the rules were amended. Former rule 41 is now rule 26, and former rule 42, with the exception of the deadlines to perfect the appeals, is now rule 28. The comments to the amended rules help clarify what substantive changes were intended. The rule 26 (appellate deadlines) comment notes simply:

> 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.

Tex.R.App. P. 26 cmt. The rule 28 (accelerated appeals) comment states:

> 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 [appellate record] and 38.6 [appellate briefs]. 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.

Tex.R.App. P. 28 cmt. Thus, the key changes with regard to the deadline for perfecting appeals were: (1) all deadlines for perfecting appeals in civil cases were moved to a single rule (rule 26); (2) an extension of time was made available for all appeals on proper motion to the court of appeals, *see* Tex.R.App. P. 26.3; and (3) motions for new trial could now be filed in interlocutory appeals, but, as was already the case in quo warranto proceedings, such motions would not extend the appellate deadlines.

[2] We find nothing in either the language of the amended rules or the comments thereto that would support Carroll's interpretation, which would have constituted a major change from the pre–1997 version. Significantly, the fact that former rule 42 specifically provided that filing a motion for new trial would not extend the deadline in quo warranto proceedings did *not* imply that filing other post-judgment motions would extend the deadline. Former ***927** Tex.R.App. P. 41, 42. We see no reason to read such an implication into the same language in the amended rules. In an ordinary civil appeal in which the deadline to file the notice of appeal is otherwise thirty days after the judgment or order is signed, filing one of the post-judgment motions identified in rule 26.1(a) extends the deadline to ninety days. But we hold that in an accelerated appeal, absent a rule 26.3 motion, the deadline for filing a notice of appeal is strictly set at twenty days after the judgment is signed, with no exceptions, and filing a rule 26.1(a) motion for new trial, motion to modify the judgment, motion to reinstate, or request for findings of fact and conclusions of law will not extend that deadline. Allowing such post-order motions to automatically delay the appellate deadline is simply inconsistent with the idea of accelerating the appeal in the first place. Because Carroll did not file a motion for extension of time under rule 26.3 and

her notice of appeal was not filed within twenty days after the trial court signed the final order terminating her parental rights, her notice of appeal was untimely and failed to invoke the jurisdiction of the court of appeals.

III

[3] We turn to Carroll's alternative argument that, even if her notice of appeal was untimely, her motion for new trial, which was filed within twenty days after the judgment was signed, was sufficient in itself to perfect an appeal. The court of appeals did not address this argument.

[4] Carroll relies on the well-settled proposition that a court of appeals has jurisdiction over an appeal if the appellant timely files an instrument in a bona fide attempt to invoke the appellate court's jurisdiction. *E.g., Grand Prairie Indep. Sch. Dist. v. S. Parts Imps., Inc.,* 813 S.W.2d 499, 500 (Tex.1991); *see also Verburgt v. Dorner,* 959 S.W.2d 615, 616 (Tex.1997) (reaffirming the principle that "appellate courts should not dismiss an appeal for a procedural defect whenever any arguable interpretation of the Rules of Appellate Procedure would preserve the appeal"). In support of her specific contention that a motion for new trial can operate to perfect an appeal, Carroll cites *In re M.A.H.,* 104 S.W.3d 568, 570 (Tex.App.-Waco 2002, no pet.). There, the court held, as we do today, that the mother's motion for new trial did not extend the due date for her notice of appeal. *Id.* at 569. But a divided court held that the appellant's motion for new trial could be treated as an instrument that was filed in a "bona fide attempt" to invoke the court's jurisdiction. *Id.* That holding has been criticized by a number of other appellate courts, with whom we agree. *C. Chambers Enters. v. 6250 Westpark, LP,* 97 S.W.3d 333, 334 (Tex.App.-Houston [14th Dist.] 2003, pet. denied); *In re J.N.W.,* 2003 WL 21255637 (Tex.App.-Tyler 2003, no pet.); *Lane v. Burkett,* No. 13–04–290–CV, 2004 WL 1687913 at *1 (Tex.App.-Corpus Christi July 29, 2004, no pet.).

In *Grand Prairie,* we held that a court of appeals may not dismiss an appeal in which the appellant filed the wrong instrument required to perfect the appeal without giving the appellant an opportunity to correct the error, as long as the instrument was timely filed in a bona fide attempt to invoke the appellate court's jurisdiction. 813 S.W.2d at 500. Filing a motion for new trial, however, simply does not qualify as such an attempt. As the dissent noted in *In re M.A.H.,*

> [S]eldom, if ever, could a motion for new trial be intended to invoke [the court of appeals'] jurisdiction, because the express purpose of a motion for new trial is just that, to have the trial court order a new trial, not to obtain appellate review of the judgment. Even if ... a motion for new trial was a necessary predicate to bring an issue on appeal, the motion for new trial would have ***928** been properly characterized as a prerequisite to an appeal, not an effort to invoke appellate jurisdiction.

104 S.W.3d at 571 (Gray, J., dissenting); *see also Besing v. Moffitt,* 882 S.W.2d 79, 82 (Tex.App.-Amarillo 1994, no writ) (filing a request for findings of fact and conclusions of law insufficient to perfect an appeal under *Grand Prairie*). Though there are myriad reasons why a party might file a motion for new trial, we fail to see how invoking the court of appeals' jurisdiction could reasonably be considered one of them. Indeed, because filing a motion for new trial *extends* the deadline to file a notice of appeal in most civil cases, Tex.R.App. P. 26.1(a), a motion for new trial logically cannot also serve as a *substitute* for a notice of appeal.

[5] We conclude that a motion for new trial is not an instrument that may be considered a bona fide attempt to invoke the appellate court's jurisdiction under the *Grand Prairie* and *Verburgt* line of cases. We therefore hold that, although Carroll's motion for new trial was timely filed and preserved her request for a second chance in the trial court, it did not operate to timely perfect her appeal.

IV

[6] Finally, Carroll raises two constitutional issues should we hold, as we have, that her appeal was untimely. First, Carroll contends she received ineffective assistance of counsel and should be allowed to pursue an out-of-time appeal. Second, she argues section 109.002 of the Family Code, which provides that appeals in parental rights termination cases shall be accelerated and governed by the rules of appellate procedure for accelerated appeals, is unconstitutional as applied. However, Carroll waived these arguments by failing to raise them in the court of appeals.

After the court of appeals informed Carroll that her appeal was untimely, she filed a "Brief on the Issue of Jurisdiction" in the court of appeals. She also filed a motion for rehearing after the court dismissed her appeal. In none of her filings with the court of appeals did Carroll raise any constitutional arguments. We have held that the rules governing error preservation must be followed in cases involving termination of parental rights, as in other cases in which a complaint is based on constitutional error. *In re B.L.D.,* 113 S.W.3d 340, 350–51 (Tex.2003) (fundamental-error doctrine does not apply to procedural preservation rules, nor does due process require appellate review of unpreserved complaints in parental rights termination cases); *Tex. Dep't of Protective & Regulatory Servs. v. Sherry,* 46 S.W.3d 857, 861 (Tex.2001) (failure to assert constitutional claim in trial court bars appellate review of claim). While Carroll's constitutional complaints relate to her appeal and therefore could not have been asserted in the trial court, she was required to raise them in the court of appeals in order to preserve error. Because she did not, her constitutional complaints are waived.

* * * * * *

We hold that, when an appeal is accelerated, the deadline for filing a notice of appeal under Texas Rule of Appellate Procedure 26.1(b) is twenty days after the judgment or order is signed, and the post-judgment motions listed in Texas Rule of Appellate Procedure 26.1(a) will not operate to extend the appellate deadline. We also hold that filing a motion for new trial does not constitute a bona fide attempt to invoke the court of appeals' jurisdiction for purposes of perfecting an appeal. Accordingly, we affirm the court of appeals' judgment dismissing the appeal for want of jurisdiction.

All Citations

160 S.W.3d 923, 74 USLW 3132, 48 Tex. Sup. Ct. J. 565

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