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February 6, 1990

TO: Members, Supreme Court Advisory Committee

FROM: William V. Dorsaneo, III

RE: **Texas Rules of Appellate Procedure**

A number of different proposals for amending the Texas Rules of Appellate Procedure have been suggested since our last meeting. The Court itself has made several suggestions. Additionally, particular courts of appeals have made numerous suggestions for changes to existing appellate rules or to proposed changes contained in the draft rules published in the Texas Bar Journal. This report covers these judicial suggestions as well as suggestions made by members of the bar.

Several adjustments to the Appellate Rules apply to more than one of them. First, the Court should adopt the amendments to the Texas Rules of Appellate Procedure adopted by the Court of Criminal Appeals on June 5, 1989. See Order Adopting Amendments, 52 Tex. B.J. 893(1989). Second, all references to "supreme judicial district" [see Tex. R. App. P. 57(a)(1)] should be changed to "district." See proposed Rules 12, 74 and appendix for criminal cases. Third, the word "nonjury" should be used uniformly in Rules 41(a)(1); 41 (comment); 52(d); 52 (comment) 54(a); 54(comment) and wherever else, rather than "non-jury."

The following proposals cover specific appellate rules, regardless of whether they were included in the published draft rules that appeared in the Texas Bar Journal. The following proposals emanate from the Texas Supreme Court.

✓1. TRAP 100(g). Restore following language to rule as adjusted in light of Banales v. Jackson, 610 S.W. 2d 732 (Tex. 1980), because it was deleted by accident when former TRCP 21a was subdivided into separate rule subparts:

"Any order of the court of appeals denying a motion for an extension of time to file a motion for rehearing shall be reviewable by the supreme court."

last sentence of 100g pg. 563

WA.

pg. 583-585 U.A.

2. TRAP 133, 170. Consider clarifying Court's authority to issue per curiam explanations and to decide cases without oral argument. See Court's proposed Amendment to Rules 133 and 170.

3. TRAP 130(c). Consider amending as follows: pg. 570

(c) Successive Applications. If any party files an application within the time specified or as extended by the Supreme Court any other party ~~who was entitled to file an application in which~~ [may do so within forty days after the overruling of the last timely motion for rehearing filed by any party.]

U.A.

4. TRAP 140. Consider wholesale amendment that makes direct appeals discretionary and that specifies a procedure for determining whether the Court has jurisdiction. See Court's proposed amendment to Rule 140.

Repeal & adopt new.

pg. 781-783

The Court has also asked the Committee for guidance concerning amendments to briefing rules to deal with counsel's attempt to avoid page limitations by decreasing margins, misusing appendices, etc. No specific proposal has been made.

consensus leave alone

The following proposals emanate from particular Courts of Appeals. This part of the report includes the current rule subpart, the proposed amendment as published in the Texas Bar Journal, if any, and the suggested revision.

738

Rule 3(b).	Uniform Terminology in Criminal Cases.
Rule 4(c).	Number of Copies.
Rule 4(f).	Manner of Service.
Rule 5(b)(5).	Motion, Notice and Hearing.
Rule 11.	Duties of Court Reporters.
Rule 12.	Work of Court Reporters.
Rule 13(i).	Failure to Make Deposit.
Rule 16.	Court of Appeals Unable To Take Immediate Action.
Rule 20.	Amicus Curiae Briefs
Rule 40(a)(3).	When Party Unable To Give Security.
Rule 40(b).	Appeals in Criminal Cases.

Rule 41(a)(1).	Time to Perfect Appeal.
Rule 41(a)(2).	Extension of Time
Rule 42(a)(3).	Mandatory Acceleration.
Rule 44.	Appeals in Habeas Corpus and Bail; Criminal Cases.
Rule 46(d).	Notice of Filing.
Rule 46(e).	Payment of Court Reporters.
Rule 51(c).	Duty of Clerk.
Rule 53(k).	Duty of Appellant to File.
Rule 54(c).	Extension of Time.
Rule 57(b).	Attorneys' Names.
Rule 59(b).	Voluntary Dismissal (Criminal Cases).
Rule 61.	Disposition of Papers When Appeal Dismissed in Civil Cases
Rule 72.	Motions to Dismiss for Want of Jurisdiction.
Rule 73(i).	Form and Content of Motions for Extension of Time.
Rule 74(a).	Names of All Parties To The Trial Court's Final Judgment.
Rule 74(h).	Length of Briefs.
Rule 75(f).	Argument.
Rule 80(c)	Other Orders.
Rule 86(a)(4).	Issuance of Mandate.
Rule 86(e).	Recall of Mandate.
Rule 87(b)(1).	In Criminal Cases.
Rule 88.	Execution on Failure to Pay Costs in Civil Cases.
Rule 90(c).	Determination to Publish.
Rule 90(h).	Order of the Supreme Court.

TRAP

RULE 3. Definitions; Uniform Terminology

Existing Rule 3(b):

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(b) Uniform Terminology in Criminal Cases. In briefs and other papers in criminal appeals, the parties should be referred to as "the appellant" and "the State;" procedural labels such as "appellee," "petitioner," "respondent," "movant," etc., should be avoided unless they are necessary to clarify a question of procedural law. In habeas corpus proceedings the person for whose relief the writ is asked should be referred to as "the applicant."

No Proposed Amendment

Suggested Revision:

Rule 3(b). Since appeals are now allowed by the State, the parties should be referred to as the appellant and the appellee, not appellant and the State.

TRAP
RULE 4. SIGNING, FILING AND SERVICE

Existing Rule 4(c):

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(c) Number of Copies.

(1) Each party shall file six copies of briefs, petitions, motions and other papers with the Clerk of the Court of Appeals in which the case is pending. Any court of appeals may by local rule authorize the filing of fewer or more copies.

(2) Each party shall file twelve copies of its application for writ of error with the Clerk of the Court of Appeals. In addition to filing his original petition for discretionary review with the Clerk of the Court of Appeals, the filing party shall deliver eleven copies. The State Prosecuting Attorney may deliver the eleven copies to the Clerk of the Court of Criminal Appeals.

(3) Each party shall file twelve copies of all other papers addressed to the Supreme Court or Court of Criminal Appeals with the clerk of the court to which it is addressed.

Proposed Rule 4(c):

(c) (No change.)

Suggested Revision:

Rule 4(c). **The number of copies should be uniform for the Supreme Court and the Court of Criminal Appeals, that is, an original and 11 copies or no original and 12 copies. (This should be done in parts 2 and 3 of this rule.)**

TRAP
RULE 4. SIGNING, FILING AND SERVICE

Existing Rule 4(f):

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(f) Manner of Service. Service may be personal or by mail. Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel. Service by mail is complete on mailing.

Proposed Rule 4(f):

(f) Manner of Service. Service may be personal[,] ~~or~~ by mail[, or by telephonic document transfer to the party's current telecopier number]. Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel. Service by mail is complete on mailing.

Suggested Revision:

Rule 4(f). This rule does not define service by telephonic document transfer. Is service complete when the document is sent?

TRAP
RULE 5. COMPUTATION OF TIME

Existing Rule 5(b)(5):

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(5) *Motion, Notice and Hearing.* In order to establish the application of subparagraph (b)(4) of this rule, the party adversely affected is required to prove in the trial court, on sworn motion and notice, the date on which the party or his attorney first either received a notice of the judgment or acquired actual knowledge of the signing and that this date was more than twenty days after the judgment was signed.

Proposed Rule 5(b)(5):

(b) (No change.)

Suggested Revision:

Rule 5(b)(5). This rule should specifically state that a finding by the trial judge is required (as to the date on which notice was first required) after proof in the trial court on sworn motion has been made. This would benefit the clerks in checking in the transcript. An order signed by a trial judge stating the date upon which the appellate timetable begins would be most helpful.

TRAP
RULE 11. DUTIES OF COURT REPORTERS

Existing Rule 11:

(a) The duties of official court reporters shall be performed under supervision of the presiding judge of the court and shall include, but not be limited to:

(1) attending all sessions of court and making a full record of the evidence when requested by the judge or any party to a case, together with all objections to the admissibility of the evidence, the rulings and remarks of the court thereon;

(2) making a full record of jury arguments and voir dire examinations when requested to do so by the attorney for any party to a case, together with all objections to such arguments, the rulings and remarks of the court thereon;

(3) filing all exhibits with the clerk;

(4) preparing official transcripts of all such evidence or other proceedings, or any portion thereof, subject to the laws of this state, these rules and the instructions of the presiding judge of the court; and

(5) performing such other duties relating to the reporter's official duties as may be directed by the judge presiding.

(b) Exhibits and materials used in the trial of a case and all of the record in a case are subject to such orders as the court may enter thereon.

(c) In case of illness, press of official work, or unavoidable absence or disability of the official court reporter to perform the duties in (a) above, the presiding judge of the court may, in his discretion, authorize a deputy reporter to act in place of and perform the duties of the official reporter.

(d) When a defendant is convicted and sentenced to a term of more than two years and no appeal is taken, the court reporter shall file the nontranscribed notes of the proceeding with the district clerk within 20 days following the expiration of the time for perfecting appeal. The district clerk shall not be required to retain the notes beyond 15 years from the date of their filing.

No Proposed Amendment

Suggested Revision:

Rule 11. Often we receive questions about whose duty it is to prepare the exhibits for transmission to the appellant court -- the court reporter or the trial court clerk. This would be cleared up by a specific rule.

TRAP
RULE 12. WORK OF COURT REPORTERS

Existing Rule 12:

(a) It shall be the joint responsibility of the trial and appellate courts to insure that the work of the court reporter is accomplished timely.

(b) The presiding judge of the trial court shall insure that the work of the court reporter is timely accomplished by setting priorities on the various elements of the reporter's workload to be observed by the reporter in the conduct of the business of the court reporter's office. Duties relating to proceedings before the court shall take preference over other work.

(c) To aid the judge in setting the priorities in (b) above, each court reporter shall report in writing to the judge on a monthly basis the amount and nature of the business pending in the court reporter's office. A copy of this report shall be filed with the Clerk of the Court of Appeals of each Supreme Judicial District in which the court sits.

Proposed Rule 12:

(a) (No change.)

(b) (No change.)

(c) To aid the judge in setting the priorities in (b) above, each court reporter shall report in writing to the judge on a monthly basis the amount and nature of the business pending in the court reporter's office. A copy of this report shall be filed with the Clerk of the Court of Appeals of each ~~Supreme Judicial~~ [d]istrict in which the court sits.

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

Suggested Revision:

Rule 12. References in this rule should be to the district not Supreme Judicial District.

TRAP
RULE 13. DEPOSIT FOR COSTS IN CIVIL CASES

Existing Rule 13(i):

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(i) **Failure to Make Deposit.** If the required deposit for costs is not tendered, the clerk may decline to file the record, motion, or petition, or the court may dismiss the proceeding.

No Proposed Amendment

Suggested Revision:

Rule 13(i). The clerk should be able to decline to file the record, etc. AND (not or) the Court should be able to dismiss.

TRAP
RULE 16. COURT OF APPEALS UNABLE TO TAKE IMMEDIATE ACTION

Existing Rule 16:

The inability of any court of appeals having jurisdiction of a cause, matter, or controversy requiring immediate action to take such immediate action by reason of the illness or absence or unavailability of at least two of the justices thereof may be established either by the certificate of the clerk or any justice of such court of appeals, or by the affidavit of counsel for any party to such proceeding establishing the facts to the satisfaction of the court of appeals from which immediate action is sought. In determining the nearest court of appeals within the meaning of section 22.220(b) of the Government Code its straight-line distance from the courthouse of the county where such cause, matter, or controversy is or was last pending in the trial court shall govern. A court of appeals is available to take immediate action under the provisions of said Article when two or more justices thereof, not disqualified, are present for duty or can readily become present for duty within the time when such action must be taken. If the inability of the nearest court of appeals to take such immediate action is also established in the manner hereinabove provided, such action may be taken by the court of appeals next nearest to such courthouse.

No Proposed Amendment

Suggested Revision:

Rule 16. This rule allows for a cause requiring immediate action to be taken to the nearest court of appeals. However, once a cause is taken to the nearest court, does that court have any power to issue a writ to a judge outside its district?

Is the nearest court of appeals acting as itself or as the original court of appeals?

The only appendix attached to the rules pursuant to R51(c) and 53(h) governs criminal cases only. More and more, we are receiving requests about the proper way to prepare a transcript and statement of facts in a civil case. When the Supreme Court repealed the predecessor rules to 51(c) and 53(h), it was unclear whether the orders issued pursuant to those rules were also repealed. Upon inquiry to the Supreme Court about the situation, we were told new orders would issue. As of yet, we have not been informed as to the decision by the Supreme Court.

TRAP
RULE 20. AMICUS BRIEFS

Existing Rule 20:

The clerk of the appellate court may receive but not file amicus curiae briefs. An amicus curiae shall comply with the briefing rules for the parties, and shall show in the brief that copies have been furnished to all attorneys of record in the case.

Proposed Rule 20:

TRAP 20. Amicus [Curiae] Briefs

The clerk of the appellate court may receive but not file amicus curiae briefs. An amicus curiae shall comply with the briefing rules for the parties,a nd shall show in the brief that copies have been furnished to all attorneys of record in the case. [In civil cases, an amicus curiae brief shall not exceed 50 pages in length, exclusive of pages containing list of names and addresses of parties, the table of contents, index of authorities, points of error, and any addendum containing statutes, rules, regulations, etc. The court may, upon motion and order, permit a longer brief.]

[COMMENT TO 1990 CHANGE: To provide for a maximum length for amicus curiae briefs in civil cases to conform with Rules 74(h) and 136(e).]

Suggested Revision:

Rule 20. Please note typographical error "a nd" should be "and." Also, the added portion is unnecessary since the rule already requires that the amicus curiae brief comply with the briefing rules for the parties.

TRAP
RULE 40. ORDINARY APPEAL -- HOW PERFECTED

Existing Rule 40(a)(3)(B) and (F)

(3) *When Party is Unable to Give Security.*

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(B) The appellant or his attorney shall give notice of the filing of the affidavit to the opposing party or his attorney and to the court reporter of the court where the case was tried within two days after the filing; otherwise, he shall not be entitled to prosecute the appeal without paying the costs or giving security therefor.

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(F) If the appellant is able to pay or give security for a part of the costs of appeal, he shall be required to make such payment or give such security (one or both) to the extent of his ability.

Proposed Amended Rule 40(a)(3)(B) and (F):

(3) When Party is Unable to Give Security. (No change.)

Suggested Revision:

Rule 40(a)(3)(B). This rule should clarify the time for paying costs when improper notice has been given. I.e., otherwise, he shall not be entitled to prosecute the appeal without paying the costs or giving security therefor within the time limit allowed by rule 41.

Rule 40(a)(3)(F). This rule should read: ". . . he shall be required to make such payment or give such security (one or both) to the extent of his ability within the time limit provided by rule 41(a)."

TRAP
RULE 40. ORDINARY APPEAL -- HOW PERFECTED

Existing Rule 40(b)(1):

(b) Appeals in Criminal Cases.

(1) Appeal is perfected in a criminal case by giving timely notice of appeal; except, it is unnecessary to give notice of appeal in death penalty cases. Notice of appeal shall be given in writing filed with the clerk of the trial court. Such notice shall be sufficient if it shows the desire of the defendant to appeal from the judgment or other appealable order; but if the judgment was rendered upon his plea of guilty or nolo contendere pursuant to Article 1.15, Code of Criminal Procedure, and the punishment assessed does not exceed the punishment recommended by the prosecutor and agreed to by the defendant and his attorney, in order to prosecute an appeal for a nonjurisdictional defect or error that occurred prior to entry of the plea the notice shall state that the trial court granted permission to appeal or shall specify that those matters were raised by written motion and ruled on before trial. The clerk of the trial court shall note on copies of the notice of appeal the number of the cause and the day that notice was filed, and shall immediately send one copy to the clerk of the appropriate court of appeals and one copy to the attorney for the State.

Proposed Rule 40(b)(1):

(b) Appeals in Criminal Cases.

(1) (No change.)

Suggested Revision:

Rule 40(b)(1). Was this rule meant to change 44.02 proviso? Rule 40(b)(1) not consistent with art. 26.13(a)(3). Should 40(b)(1) apply only to felonies? If 40(b)(1) applies only to felonies, is 26.13 in conflict with non-proviso 44.02?

TRAP
RULE 41. ORDINARY APPEAL -- WHEN PERFECTED

Existing Rule 41(a)(1):

(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. If a deposit of cash is made in lieu of bond, the same shall be made within the same period.

NO

Proposed Rule 41(a)(1):

(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 nonjury case]. If a deposit of cash is made in lieu of bond, the same shall be made within the same period.

Suggested Revision:

Rule 41(a)(1). We suggest you cite the rule governing the timely filing of a request for findings of fact and conclusions of law. Also, rule could be changed to delete the last line of rule 41(a)(1) and in the first sentence simply add the word "deposit." For example, "When security for costs on appeal is required the bond, the deposit or the affidavit in lieu thereof . . ."

TRAP
RULE 41. ORDINARY APPEAL -- WHEN PERFECTED

Existing Rule 41(a)(2):

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(2) *Extension of Time.* An extension of time may be granted by the appellate court for late filing of a cost bond or notice of appeal or making the deposit required by paragraph (a)(1) or for filing the affidavit, if such bond or notice of appeal is filed, deposit is made, or affidavit is filed not later than fifteen days after the last day allowed and, within the same period, a motion is filed in the appellate court reasonably explaining the need for such extension. If a contest to an affidavit in lieu of bond is sustained, the time for filing the bond is extended until ten days after the contest is sustained unless the trial court finds and recites that the affidavit is not filed in good faith.

Proposed Rule 41(a)(2):

(2) Extension of Time. (No change.)

Suggested Revision:

Rule 41(a)(2). This rule should read: "If a timely contest to an affidavit in lieu of bond is timely sustained . . . ." Also, the rule should provide what the consequences are, if the trial court finds and recites that the affidavit is not filed in good faith.

TRAP
RULE 42. ACCELERATED APPEALS IN CIVIL CASES

Existing Rule 42(a)(3):

(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. The record shall be filed in the appellate court within thirty days after the judgment or order is signed. The appellant's brief shall be filed within twenty days after the record is filed, and appellee's brief shall be filed within twenty days after appellant's brief is filed. Failure to file either the record or appellant's brief within the time specified, unless reasonably explained, shall be ground for dismissal or affirmance under Rule 60, but shall not affect the court's jurisdiction or its authority to consider material filed late.

No Proposed Amendment

Suggested Revision:

Rule 42(a)(3). This rule should specifically state whether the time limit required in ordinary appeals to file a motion for extension of time to file a perfecting instrument or the record is required to be followed in this rule.

TRAP
RULE 44. APPEALS IN HABEAS CORPUS AND BAIL: CRIMINAL CASES

Existing Rule 44:

(a) **The Record.** In habeas corpus or bail proceedings when written notice of appeal from a judgment or an order is filed, the transcript and, if requested by the applicant, a statement of facts, shall be prepared and certified by the clerk of the trial court and, within fifteen days after the notice of appeal is filed, sent to the appellate court for review. The appellate court may shorten or extend the time for filing the record if there is a reasonable explanation for the need for such action. When the record is received by the appellate court, the court shall set the time for the filing of briefs, if briefs are desired, and shall set the appeal for submission.

(b) **Hearing.** Such cases, taken to the court of appeals by appeal, shall be heard at the earliest practicable time. The appellant need not be personally present, and such appeal shall be heard and determined upon the law and the facts arising upon record. No incidental question which may have arisen on the hearing of the application before the court below shall be reviewed. The only design of the appeal is to do substantial justice to the party appealing.

(c) **Orders on Appeal.** In such cases, the appellate court shall render such judgment and make such orders as the law and the nature of the case may require, and may make such orders relative to the costs in the case as may seem right, allowing costs and fixing the amount, or allowing no cost at all.

(d) **Stay of Mandate.** Notwithstanding Rule 86 and other provisions of these rules, when an appellate court affirms the judgment of the court below in an extradition matter, thereby sanctioning extradition of appellant, or reverses the judgment of the court below in a bail matter, including bail pending appeal pursuant to Article 44.04(g), CCP, thereby granting or reducing the amount of bail, within fifteen days after the appellate court has rendered judgment a party who in good faith intends to seek discretionary review shall file with the clerk of the appellate court a motion for stay of mandate, appending thereto his petition for discretionary review showing reasons for review of the judgment of the appellate court by the Court of Criminal Appeals. The clerk shall promptly submit the motion with appendix to the appellate court or one or more judges as the court deems appropriate for immediate consideration and determination. If the motion for stay is granted, the clerk shall file the petition for discretionary review and process the cause in accordance with Rule 202(f). If the motion is denied, the clerk shall issue a mandate in accordance with the judgment of the appellate court, and the losing party may present the motion with appendix to the Clerk of the Court of Criminal Appeals who will promptly submit them to the Court or one or more judges as the Court deems appropriate for immediate consideration and determination. The Court of Criminal Appeals may deny the motion or stay or recall the mandate. If mandate is stayed or recalled, the clerk of the appellate court shall file the petition for discretionary review and process the cause in accordance with Rule 202(f).

(e) **Judgment Conclusive.** The judgment of the court of appeals in appeals in such cases shall be final and conclusive if discretionary review is not granted by the Court of Criminal Appeals. If discretionary review is granted, the judgment of the Court of Criminal Appeals shall be final and conclusive. In either case, no further application in the same case can be made for the writ, except in cases specially provided for by law.

(f) **Appellant Detained by Other Than Officer.** If the appellant in such a case is detained by any person other than an officer, the sheriff receiving the mandate of the appellate court shall immediately cause the person so held to be discharged; and the mandate shall be sufficient authority therefor.

(g) **Judgment to be Certified.** In such cases, the judgment of the appellate court shall be certified by the clerk thereof to the officer holding the defendant in custody or, when he is held by any person other than an officer, to the sheriff of the proper county.

No Proposed Amendment

Suggested Revision:

Rule 44. This rule does not provide a time limit as to when a notice of appeal is due to be filed. In addition, the rule states that the deadline for filing the record runs from the date the notice of appeal is filed. The rule could be amended to conform with the time limits set forth in civil accelerated appeals. That is, the notice of appeal could be due 20 days from the date of the signed order, the record due 30 days from the date of the signed order, the appellant's brief due 20 days after the record, and the appellee's brief due 20 days after the filing of the appellant's brief. Of course, the rule should continue to provide the court with broad flexibility as does rule 42 in civil cases. Here, as in rule 42, it should be clarified if the extensions of time are governed as in ordinary appeals.

TRAP
RULE 46. BOND FOR COSTS ON APPEAL IN CIVIL CASES

Existing Rule 46(d) and (e):

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(d) Notice of Filing. Notification of the filing of the bond or certificate of deposit shall promptly be given by counsel for appellant by mailing a copy thereof to counsel of record or each party other than the appellant or, if a party is not represented by counsel, to the party at his last known address. Counsel shall note on each copy served the date on which the appeal bond or certificate was filed. Failure to serve a copy shall be ground for dismissal of the appeal or other appropriate action if appellee is prejudiced by such failure.

(e) Payment of Court Reporters. Even if a bond is filed or deposit in lieu of bond is made, appellant shall either pay or make arrangements to pay the court reporter upon completion and delivery of the statement of facts.

Proposed Amended Rule 46(d) and (e):

(d) Notice of Filing. Notification of the filing of the bond or certificate of deposit shall promptly be given [each] appellant by [mailing] [serving] a copy thereof to [each] [of] [record] [on all parties in the trial court together with notice of] [of] [each] [party] [other] [than] [the] [appellant] [or] [if] [a] [party] [is] [not] [represented] [by] [counsel] [to] [the] [party] [at] [his] [last] [known] [address] [Counsel] [shall] [note] [on] [each] [copy] [served] the date on which the appeal bond or certificate was filed. Failure to [so] serve a [copy] [all other parties] shall be ground for dismissal of the [appellant's] appeal or other appropriate action if [an] appellee is prejudiced by such failure.

(e) Payment of Court Reporters. (No change.)

Suggested Revision:

Rule 46(d). It is not clear who must give notification of the filing of the bond.

Rule 46(e). This rule should also include making arrangements for payments to the trial clerks.

TRAP
RULE 51. THE TRANSCRIPT ON APPEAL

Existing Rule 51(c):

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(c) Duty of Clerk. Upon perfection of the appeal, the clerk of the trial court shall prepare under his hand and seal of the court and immediately transmit the transcript to the appellate court designated by the appellant. The pages of the transcript shall be numbered consecutively and there shall be an index prepared by the clerk showing the location of each document in the transcript. The transcript shall be prepared in the form directed by the Supreme Court and the Court of Criminal Appeals which will make an order or orders in such respect for the guidance of trial clerks. In criminal cases, the transcript shall be made in duplicate and one copy shall be retained by the clerk for use by the parties with permission of the court.

Proposed Amended Rule 51(c):

(c) Duty of Clerk. (No change.)

Suggested Revision:

Rule 51(c). In criminal cases, the clerk is required to retain a duplicate of the transcript for use by the parties with permission of the court. The rule should specify which court. I.e. trial court or appellate court.

TRAP
RULE 53. THE STATEMENT OF FACTS ON APPEAL

Existing Rule 53(k):

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(k) Duty of Appellant to File. It is the appellant's duty to cause the statement of facts to be filed with the Clerk of the Court of Appeals.

Proposed Amended Rule 53(k):

(k) Duty of Appellant to File. (No change.)

Suggested Revision:

(k) Duty of ~~Appellant~~ Court Reporter to File It is the ~~appellant's~~ court reporter's duty to cause the statement of facts to be filed with the Clerk of the Court of Appeals.

TRAP
RULE 54. TIME TO FILE RECORD

Existing Rule 54(c):

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(c) **Extension of Time.** An extension of time may be granted for late filing in a court of appeals of a transcript or statement of facts, if a motion reasonably explaining the need therefor is filed by appellant with the court of appeals not later than fifteen days after the last date for filing the record. Such motion shall also reasonably explain any delay in the request required by Rule 53(a).

Proposed Amended Rule 54(c):

(c) No change.

Suggested Revision:

Rule 54(c). This rule should also include a requirement to reasonably explain any delay in the request required by rule 51(b).

(c) **Extension of Time** An extension of time may be granted for late filing in a court of appeals of a transcript or statement of facts, if a motion reasonably explaining the need therefor is filed, by appellant in the case of the late transcript and by the court reporter in the case of a late statement of facts, with the court of appeals not later than 15 days after the last date for filing the record. Such motion shall also reasonably explain any delay in the request required Rule 53(a).

TRAP
RULE 57. DOCKETING THE APPEAL

Existing Rule 57(b):

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(b) **Attorneys' Names.** Before an attorney has filed his brief he may notify the clerk in writing of the fact that he represents a named party to the appeal, which fact shall be by the clerk noted upon the docket, opposite the name of the party for whom he appears, and shall be regarded by the court as having whatever effect is given to the appearance of a party to a case without brief filed. After briefs have been filed, the name of the attorney or attorneys signed to the brief shall be entered by the clerk on the docket, opposite the name of the appropriate party if such names have not already been so entered. The clerk shall add the names of additional counsel on request.

Proposed Amended Rule 57(b):

(b) Attorneys' Names. Before an attorney has filed his [or her] brief he [or she] may notify the clerk in writing of the fact that he [or she] represents a named party to the appeal, which fact shall be ~~by the clerk~~ noted [by the clerk] upon the docket, opposite the name of the party for whom ~~he~~ [the attorney] appears, and shall be regarded by the court as having whatever effect is given to the appearance of a party to a case without [a] brief [having been] filed. After briefs have been filed, the name of [each] ~~the~~ attorney ~~or attorneys~~ sign~~ed to~~[ing] the brief shall be entered by the clerk on the docket, opposite the name of the appropriate party if such names have not already been so entered. The clerk shall add the names of additional counsel [up]on request.

Suggested Revision:

Rule 57(b). This rule should allow the clerk to add additional counsel on request; however, the clerk should be allowed to designate one attorney for each party for the purpose of receiving notice and for the filing of papers, if the attorneys fail to timely designate lead counsel.

TRAP
RULE 59. VOLUNTARY DISMISSAL

Existing Rule 59(b):

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(b) Criminal Cases. The appeal may be dismissed if the appellant withdraws his notice of appeal at any time prior to the decision of the appellate court. The withdrawal shall be in writing signed by the appellant and his counsel and filed in duplicate with the clerk of the court of appeals in which the appeal is pending, who shall immediately forward the duplicate copy to the clerk of the trial court in which the notice of appeal was filed. Notice of appeal may not be withdrawn after the decision of the court of appeals is delivered without the consent of the State and approval of the court of appeals. If consent and approval are obtained, the opinion of the court of appeals shall be withdrawn and the appeal shall be dismissed. Notice of the dismissal shall be sent to the clerk of the trial court in which notice of appeal was filed.

Proposed Amended Rule 59(b):

(b) No change.

Suggested Revision:

Rule 59(b). Provides that the clerk of the appellate court forward a duplicate copy of the motion to dismiss the appeal to the clerk of the trial court. This is not necessary since the filing of the motion does not represent any action by the court. The ruling by the appellate court is what is determinative.

TRAP
RULE 61. DISPOSITION OF PAPERS WHEN APPEAL DISMISSED IN CIVIL CASES

Existing Rule 61:

In all cases in which appeals or writs of error are dismissed, the appellant or party filing the transcript or statement of facts, without further leave of court, shall have the right to withdraw the transcript or statement of facts, unless it contains original papers belonging to an adverse party, in which event, leave of court shall be had before such original papers are withdrawn.

No Proposed Amendment

Suggested Revision:

Rule 61. This rule should provide for the disposition of all papers in all cases, with reference to the appropriate statutes governing disposition of exhibits, etc.

TRAP
RULE 72. MOTIONS TO DISMISS FOR WANT OF JURISDICTION

Existing Rule 72:

Motions to dismiss for want of jurisdiction to decide the appeal and for such defects as defeat the jurisdiction in the particular case and cannot be waived shall also be made, filed and docketed within thirty days after the filing of the transcript in the court of appeals; provided, however, if made afterwards they may be entertained by the court upon such terms as the court may deem just and proper.

Proposed Amended Rule 72:

Motions to dismiss for want of jurisdiction to decide the appeal and for such [other] defects as defeat the jurisdiction in the particular case and [which] cannot be waived shall also be made, filed and docketed within thirty days after the filing of the transcript in the court of appeals; provided, however, if made afterwards they may be entertained by the court upon such terms as the court may deem just and proper.

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

Suggested Revision:

Rule 72. Why is this rule necessary? If the defect is truly jurisdictional, it can't be waived and, therefore, can be raised at any time.

TRAP
RULE 73. FORM AND CONTENT OF MOTIONS FOR EXTENSION OF TIME

Existing Rule 73(i):

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(i) when an extension of time is requested for filing the statement of facts, the facts relied upon to reasonably explain the need for an extension must be supported by the affidavit of the court reporter, or the certificate of the trial judge, which shall include the court reporter's estimate of the earliest date when the statement of facts will be available for filing.

No Proposed Amendment

Suggested Revision:

Rule 73(i). When an extension of time is requested for the filing of the transcript, the facts relied upon to reasonably explain the need for an extension must be supported by the affidavit of the trial clerk. This requirement should be added to this rule.

TRAP
RULE 74. REQUISITES OF BRIEFS

Existing Rule 74:

Briefs shall be brief. Briefs shall be filed with the Clerk of the Court of Appeals. They shall be addressed to "The Court of Appeals" of the correct Supreme Judicial District. In civil cases the parties shall be designated as "Appellant" and "Appellee", and in criminal cases as "Appellant" and "State".

(a) Names of All Parties. A complete list of the names of all parties shall be listed at the beginning of the appellant's brief, so the members of the court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision of the case.

(b) Table of Contents and Index of Authorities. The brief shall contain at the front thereof a table of contents with page references where the discussion of each point relied upon may be found and also an index of authorities alphabetically arranged, together with reference to the pages of the brief where the same are cited. The subject matter of each point or group of points shall be indicated in the table of contents.

(c) Preliminary Statement. The brief should contain a brief general statement of the nature of the cause or offense, i.e., whether it is suit for damages on a note, or a prosecution for murder, and the result in the court. Such statement should seldom exceed one-half page. The details should be reserved and stated in connection with the points to which they are pertinent.

(d) Points of Error. A statement of the points upon which an appeal is predicated shall be stated in short form without argument and be separately numbered. In parentheses after each point, reference shall be made to the page of the record where the matter complained of is to be found. A point is sufficient if it directs the attention of the appellate court to the error about which complaint is made. In civil cases, complaints that the evidence is legally or factually insufficient to support a particular issue or finding, and challenges directed against any conclusions of law of the trial court based upon such issues or findings, may be combined under a single point of error raising both contentions if the record references and the argument under the point sufficiently direct the court's attention to the nature of the complaint made regarding each such issue or finding or legal conclusion based thereon. Complaints made as to several issues or findings relating to one ground of recovery or defense may be combined in one point, if separate record references are made.

(e) Brief of Appellee. The brief of the appellee shall reply to the points relied upon by the appellant in due order when practicable; and in civil cases, if the appellee desires to complain of any ruling or action of the trial court, his brief in regard to such matters shall follow substantially the form of the brief for appellant.

(f) Argument. A brief of the argument may present separately or grouped the points relied upon for reversal. The argument shall include: (1) a fair, condensed statement of the facts pertinent to such points, with reference to the pages in the record where the same may be found; and (2) such discussion of the facts and the authorities relied upon as may be requisite to maintain the point at issue. If

complaint is made of any part of the charge given or refused, such part of the charge shall be set out in full. If complaint is made of the improper admission or rejection of evidence, the substance of such evidence so admitted or rejected shall be set out with references to the pages of the record where the same may be found. Repetition or prolixity of statement or argument must be avoided. Any statement made by appellant in his original brief as to the facts or the record may be accepted by the court as correct unless challenged by the opposing party.

(g) Prayer for Relief. The nature of the relief sought should be clearly stated.

(h) Length of Briefs. Except as specified by local rule of the court of appeals, appellate briefs in civil cases shall not exceed 50 pages, exclusive of pages containing the table of contents, index of authorities, points of error, and any addendum containing statutes, rules, regulations, etc. The court may, upon motion, permit a longer brief. A court of appeals may direct that a party file a brief, or another brief, in a particular case. If any brief is unnecessarily lengthy or not prepared in conformity with these rules, the court may require same to be redrawn.

(i) Number of Copies. Each party shall file six copies of his brief in the court of appeals in which the case is pending. Any court of appeals may by rule authorize the filing therein of fewer or more copies of briefs.

(j) Briefs Typewritten or Printed. The brief of either party may be typewritten, or printed. If typewritten, it must be double spaced.

(k) Appellant's Filing Date. Appellant shall file his brief within thirty days after the filing of the transcript and statement of facts, if any, except that in accelerated appeals and habeas corpus appeals appellant shall file his brief within the time prescribed by Rule 42 or Rule 44.

(*l*) Failure of Appellant to File Brief.

(1) *Civil Cases.* In civil cases, when the appellant has failed to file his brief in the time prescribed, the appellate court may dismiss the appeal for want of prosecution, unless reasonable explanation is shown for such failure and that appellee has not suffered material injury thereby. The court may, however, decline to dismiss the appeal, whereupon it shall give such direction to the cause as it may deem proper.

(2) *Criminal Cases.* In criminal cases, appellant's failure to file a brief in the time prescribed shall not authorize dismissal of the appeal or, except as herein provided, consideration of the appeal without briefs. When the appellant's brief has not been filed within such time, the clerk of the appellate court shall notify counsel for the parties and the trial judge that appellant's brief has not been filed If no satisfactory response is received within ten days, the appellate court shall order the trial judge to immediately conduct a hearing to determine whether the appellant desires to prosecute his appeal, whether the appellant is indigent, or if not indigent, whether retained counsel has abandoned the appeal, and to make appropriate findings and recommendations. For this purpose the trial judge shall conduct such hearings as may be necessary, make appropriate findings and recommendations, and prepare a record of the proceedings. If the appellant is indigent, the judge shall take such measures as may be necessary to assure effective representation of counsel, which may include the appointment of new counsel. The record so made, including any orders and findings of the trial judge, shall be sent to the appellate court, which may take appropriate action to insure that the appellant's rights are protected, including contempt proceedings against counsel. If the trial judge finds that the appellant no longer desires to prosecute the appeal, or that he is not indigent but has failed to make necessary arrangements for filing a brief, the appellate court may consider the appeal without briefs, as justice may require.

(m) Appellee's Filing Dates. Appellee shall file his brief within twenty-five days after the filing of appellant's brief. In civil cases, when appellant has failed to file his brief as provided in this rule, the appellee may, prior to the call of the case, file his brief, which the court may in its discretion regard as a correct presentation of the case, and upon which it may, in its discretion, affirm the judgment of the court below without examining the record.

(n) Modifications of Filing Time. Upon written motion showing a reasonable explanation of the need for more time, the court may grant either or both parties further time for filing their respective briefs, and may extend the time for submission of the case. The court may also shorten the time for filing briefs and the submission of the cause in case of emergency, when in its opinion the needs of justice require it.

(*o*) Amendment or Supplementation. Briefs may be amended or supplemented at any time when justice requires upon such reasonable terms as the court may prescribe, and if the court shall strike or refuse to consider any part of a brief, the court shall on reasonable terms allow the same to be amended or supplemented.

(p) Briefing Rules to be Construed Liberally. The purpose of briefs being to acquaint the court with the points relied upon, the manner in which they arose, together with such argument of facts and law as will enable the court to decide the same, a substantial compliance with these rules will suffice in the interest of justice; but for a flagrant violation of this rule the court may require the case to be rebriefed.

Proposed Amended Rule 74:

Briefs shall be brief. Briefs shall be filed with the Clerk of the Court of Appeals. They shall be addressed to "The Court of Appeals" of the correct ~~Supreme/Judicial/D~~ [d]istrict. In civil cases the parties shall be designated as "Appellant" and "Appellee", and in criminal cases as "Appellant" and "State".

(a) Names of All Parties [to the Trial Court's Final Judgment]. A complete list of the names [and addresses] of all parties [to the trial court's final judgment and their counsel in the trial court, if any] shall be listed at the beginning of the appellant's brief, so the members of the court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision of the case [and so the clerk of the court of appeals may properly notify the parties to the trial court's final judgment and their counsel, if any, of the judgment and all orders of the court of appeals].

(b) Table of Contents and Index of Authorities. (No change.)

(c) Preliminary Statement. (No change.)

(d) Points of Error. (No change.)

(e) Brief of Appellee. (No change.)

(f) Argument. (No change.)

(g) Prayer for Relief. (No change.)

(h) Length of Briefs. Except as specified by local rule of the court of appeals, appellate briefs in civil cases shall not exceed 50 pages, exclusive of pages containing the [list of names and addresses of parties,] table of contents, index of

Proposed Amended Rule 74 (Continued):

authorities, points of error, and any addendum containing statutes, rules, regulations, etc. The court may, upon motion, permit a longer brief. A court of appeals may direct that a party file a brief, or another brief, in a particular case. If any brief is unnecessarily lengthy or not prepared in conformity with these rules, the court may require same to be redrawn.

(i) Number of Copies. (No change.)

(j) Briefs Typewritten or Printed. (No change.)

(k) Appellant's Filing Date. (No change.)

(l) Failure of Appellant to File Brief. (No change.)

(m) Appellee's Filing Dates. (No change.)

(n) Modifications of Filing Time. (No change.)

(o) Amendment or Supplementation. (No change.)

(p) Briefing Rules to be Construed Liberally. (No change.)

[(q) Service of Briefs. All briefs filed in the appellate court shall at the same time be served on all parties to the trial court's final judgment.]

[COMMENT TO 1990 CHANGE: This amendment, together with other similar amendments conforming other appellate rules, requires the parties to any appeal to serve copies of all papers filed with the clerk of the appellate court (except the statement of facts and the transcript), and the clerk of the appellate court to mail notice and copies of all appellate court orders and opinions on all parties to the trial court's judgment.]

Suggested Revision:

Rule 74. Should refer to judicial district not Supreme Judicial District.

Rule 74(a). This rule as well as other previous rules and comments suggests that the clerk of the court of appeals notify the parties to the trial court's final judgment and their counsel, if any, of the orders of the court. There are 2 problems with this requirement. First, the appellate courts should notify counsel only, not the party and their counsel. Second, all parties to the trial court's judgment may not be involved in the appellate process. In other words, if ten parties are named in the judgment but only three are involved in the appeal, then there is no need to send routine notices to the other seven parties no longer involved. In addition, this rule requires that the brief contain a list of the names and addresses of all parties to the trial court's final judgment and their counsel in the trial court. Again, shouldn't counsel on appeal be the important factor. For example, one party may have had attorney A for trial counsel and now has retained attorney B. The notice provisions throughout the appellate rules will cause a great increase in expense if the appellate courts are required to notify all parties to the judgment and their trial counsel and their appellate counsel. For example, a will contest involving several heirs.

Rule 74(h). This rule should apply to the length of briefs in both civil and criminal cases.

TRAP
RULE 75. ARGUMENT

Existing Rule 75(f):

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(f) A party to the appeal desiring oral argument shall file a request therefor at the time he files his brief in the case. Failure of a party to file a request shall be deemed a waiver of his right to oral argument in the case. Although a party waives his right to oral argument under this rule, the court of appeals may nevertheless direct such party to appear and submit oral argument on the submission date of the case.

The court of appeals may, in its discretion, advance civil cases for submission without oral argument where oral argument would not materially aid the court in the determination of the issues of law and fact presented in the appeal. Notice of the submission date of cases without oral argument shall be given by the clerk in writing to all attorneys of record, and to any party to the appeal not presented by counsel, at least twenty-one days prior to the submission date. The date of the notice shall be deemed to be the date such notice is delivered into the custody of the United States Postal Services in a properly addressed post-paid wrapper (envelope).

No Proposed Amendment

Suggested Revision:

Rule 75(f). A party to the appeal desiring oral argument shall make request therefor at the time he files his brief in the case <u>by noting on the front right-hand corner of his brief that he is requesting oral argument.</u> This addition states the specific place to request the oral argument, as opposed to letters, cards, notes, etc. that are kept in files away from the briefs. Also the court should be able to advance both civil <u>and</u> criminal cases for submission without oral argument where oral argument would not materially aid the court. Also the time limit for notice to the parties should be changed from 21 days to 2 weeks so that the notice provisions concerning argument and no argument cases is the same. See Rule 77.

TRAP
RULE 80. JUDGMENT OF COURT OF APPEALS

Existing Rule 80(c):

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(c) Other Orders. In addition, the court of appeals may make any other appropriate order, as the law and the nature of the case may require.

No Proposed Amendment

Suggested Revision:

In addition, the court of appeals may make any other appropriate order as the law and the nature of the case may require, including abating the appeal and remanding the cause to the trial court for a hearing on any issue.

TRAP
RULE 86. MANDATE

Existing Rule 86(a)(4) and (e):

(a) **Issuance of Mandate.** The clerk shall issue a mandate in accordance with the judgment and shall deliver it to the clerk of the trial court without waiting for the payment of costs upon expiration of one of the following periods:

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(4) Fifteen days after receipt by the clerk of an order of the Supreme Court denying writ of error or an order of the Court of Criminal Appeals refusing discretionary review.

***

(e) **Recall of Mandate.** If a court of appeals vacates, modifies, corrects or reforms its judgment after the mandate has been issued, the mandate shall have no further effect and a new mandate may be issued. The clerk shall at once give notice of such act to the clerk of the trial court and to all parties.

No Proposed Amendment

Suggested Revision:

Rule 86(a)(4). The time limit for issuing a mandate should be increased to allow for the filing deadline of a motion for rehearing in the higher courts to elapse. In most instances within 15 days after receipt by the clerk of the order of the Supreme Court denying writ, we have not yet received the record back from the higher court. Therefore, we should be allowed to wait for the return of the record until we issue our mandate.

Rule 86(e). Once a mandate issues, a court of appeals should not be able to vacate, modify, correct or reform its judgment unless it is to correct a clerical error.

TRAP
RULE 87. ENFORCMENT OF JUDGMENTS AFTER MANDATE

Existing Rule 87(b)(1):

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(b) In Criminal Cases.

(1) *Judgment of Affirmance.* When the judgment of the appellate court affirms the judgment of the court below in a case in which bail has been allowed, the clerk of the trial court shall send an acknowledgement to the clerk of the appellate court of the receipt of the mandate and immediately file the same and forthwith issue a capias for the arrest of the defendant for the execution of the sentence of the court, which shall recite the fact of conviction, setting forth the offense and the judgment and sentence of the court, the appeal from and affirmance of such judgment and the filing of such mandate, and shall command the sheriff to arrest and take into his custody the defendant and place him in jail and therein keep him until delivered to the proper authorities, as directed by said sentence. Such capias may issue to any county of this State, and shall be executed and returned as in felony cases, except that no bail shall be taken in such cases. The sheriff shall forthwith execute such capias as directed. The sheriff shall notify the clerk of the trial court and the clerk of the appellate court when the mandate has been carried out and executed.

No Proposed Amendment

Suggested Revision:

Rule 87(b)(1). It is not necessary for the trial clerk to acknowledge receipt of the mandate to this Court. Also it is not necessary for the sheriff to notify us when the mandate has been carried out and executed. We would suggest that this language be deleted.

TRAP
RULE 88. EXECUTION ON FAILURE TO PAY COSTS IN CIVIL CASES

Existing Rule 88:

If neither party to a civil case pays the costs before the time prescribed for issuance of the mandate, the clerk of the appellate court shall prepare a bill of costs showing the party or parties against whom such costs have been adjudged and shall transmit it to the clerk of the trial court, who shall issue execution for same as for costs in the trial court. On collection, any costs due to the clerk of the appellate court shall be remitted to such clerk.

No Proposed Amendment

Suggested Revision:

Rule 88. This rule should allow the appellate court to collect costs after issuance of a mandate also.

The appendix should apply to both civil and criminal cases and should delete references to supreme judicial district and to appellant and the state . It should read appellant and appellee since the State is now allowed to appeal. Also the thickness of each volume of the transcript should be set forth.

TRAP
RULE 90. OPINIONS, PUBLICATION AND CITATION

Existing Rule 90(e) and (h):

***

(e) Determination to Publish. A majority of the justices participating in the decision of a case shall determine, prior to the time it is issued, whether an opinion meets the criteria for publishing, and if it does not meet the criteria for publication, the opinion shall be distributed only to the persons specified in Rule 91, but a copy may be furnished to any interested person. On each opinion a notation shall be made to "publish" or "do not publish."

***

(h) Order of the Supreme Court. Upon the grant or refusal of an application for writ of error, whether by outright refusal or by refusal no reversible error, an opinion previously unpublished shall forthwith be released for publication, if the Supreme Court so orders.

Proposed Amended Rule 90(c) and (h):

~~(e)~~ [c)] **Determination to Publish.** A majority of the justices participating in the decision of a case shall determine, prior to the time it is issued, whether an opinion meets the criteria for publishing, and if it does not meet the criteria for publication, the opinion shall be distributed only to the persons specified in Rule 91, but a copy may be furnished to any interested person. On each opinion a notation shall be made to "publish" or "do not publish." [Any party may move the appellate court to reconsider the determination whether to publish an opinion. The justices participating in the decision of a case may reconsider their determination whether to publish an opinion after it has issued. However, the appellate court shall not

Proposed Amended Rule 90(c) and (h) (Continued):

order any unpublished opinion to be published after the Supreme Court or Court of Criminal Appeals has acted on any party's application for writ of error, discretionary review, or any other relief. **The Supreme Court or the Court of Criminal Appeals may on request of any party or non-party to a court of appeals decision order a court of appeals opinion published at any time.**]

(h) Order of the Supreme Court. Upon the grant or refusal of an application for writ of error, ~~whether by outright refusal or by refusal no reversible error~~ an opinion previously unpublished shall forthwith be released [by the clerk of the court of appeals] for publication. ~~If the Supreme Court so orders~~

[COMMENT TO 1990 CHANGE: To preclude publication of an unpublished opinion by a court of appeals after court action in the appeal by the Supreme Court or the Court of Criminal Appeals; to provide that anyone, whether or not a party, can seek an order from the Supreme Court or Court of Criminal Appeals to publish any such opinion at any time; to require the clerks of the courts of appeals to release for publication all court of appeals opinions following grant or refusal of writ of error by the Supreme Court of Texas and to make other textual changes.]

Suggested Revision:

Rule 90[c)]. This should be corrected to include a full set of ( ). Does section (c) allow for a request by a court of appeals to the Supreme Court or Court of Criminal Appeals to publish a previously unpublished court of appeals opinion? If not, the rule should do so.

Rule 90(h). This rule states that, if an application for writ of error is granted or refused, automatically, the previously unpublished opinion of the Court of Appeals shall be published. There may be times when the Court initially grants, and then withdraws the decision. Publishing should simply be ordered by the Court when necessary, and not be an automatic occurrence.

TRAP
RULE 91. COPY OF OPINION AND JUDGMENT TO ATTORNEYS, ETC.

Existing Rule 91:

On the date an opinion of an appellate court is handed down, it shall be the duty of the clerk of the appellate court to mail or deliver to the clerk of the trial court, to the trial judge who tried the case, and to one of the attorneys for the plaintiffs or the State and one of the attorneys for the defendants a copy of the opinion delivered by the appellate court and a copy of the judgment rendered by such appellate court as entered in the minutes. The copy received by the clerk of the trial court shall be by him filed among the papers of the cause in such court. When there is more than one attorney on each side, the attorneys may designate in advance the one to whom the copies of the opinion and judgment shall be mailed. In criminal cases, copies shall also be provided to the State Prosecuting Attorney, P.O. Box 12405, Austin, Texas 78711 and to the Clerk of the Court of Criminal Appeals and any appellant representing himself.

Proposed Amended Rule 91:

TRAP 91. Copy of Opinion and Judgment to ~~Attorneys, Etc.~~ [Interested Parties, and Other Courts]

On the date an opinion of an appellate court is handed down, ~~it shall be the duty of~~ the clerk of the appellate court ~~to~~ [shall] mail or deliver to the clerk of the trial court, to the trial judge who tried the case, and to ~~one of the attorneys for the plaintiffs or the State and one of the attorneys for the defendants~~ [the State and each of the defendants in a criminal case and to each of the parties to the trial court's final judgment in a civil case] a copy of the opinion ~~delivered~~ [handed down] by the appellate court and a copy of the judgment rendered by ~~such~~ [the] appellate court as entered in the minutes. [Delivery or a party having counsel indicated of record shall be made on counsel.] The ~~copy received by the~~ clerk of the trial court

RULE 91. COPY OF OPINION AND JUDGMENT TO ATTORNEYS, ETC. (Continued)

Proposed Amended Rule 91 (Continued):

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shall be/by/him filed [the copy of the opinion] among the papers of the cause in such court. When there is more than one attorney on /each/side [for a party], the attorneys may designate in advance the one to whom the copies of the opinion and judgment shall be mailed. In criminal cases, copies shall also be provided to the State Prosecuting Attorney, P. O. Box 12405, Austin, Texas 78711 and to the Clerk of the Court of Criminal Appeals and/any/appellant/representing/himself.

[COMMENT ON 1990 CHANGE: This amendment, together with other similar amendments conforming other appellate rules, requires the parties to any appeal to serve copies of all papers filed with the clerk of the appellate court (except the statement of facts and the transcript), and the clerk of the appellate court to mail notice and copies of all appellate court orders and opinions on all parties to the trial court's judgment.]

Suggested Revision:

Rule 91. Again this rule requires the clerk of the court to notify parties that might not be parties to the appeal. This rule, unlike the prior rules, specifically allows for service to be on counsel indicated of record instead of the party. What counsel? Previous rules require a listing of trial counsel, but, again, appellate counsel is what is important. There should be a provision here, as well as a general provision applying to all of the appellate rules, that, if more than one attorney represents a party and if the attorneys fail to designate in advance the one to whom copies of all correspondence is to be sent, then the appellate court may so designate.

TRAP
RULE 100. MOTION AND SECOND MOTION FOR REHEARING

Existing Rule 100(f):

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(f) **En Banc Reconsideration.** A majority of the justices of the court en banc may order an en banc reconsideration of any decision of a panel within fifteen days after such decision is issued with or without a motion for reconsideration en banc. A majority of the justices may call for an en banc review by (1) notifying the clerk in writing within said fifteen day period, or (2) by written order issued within said fifteen day period, either with or without en banc conference. In such event, the panel decision shall not become final, and the case shall be resubmitted to the court for an en banc review and disposition.

Proposed Amended Rule 100(f):

(f) En Banc Reconsideration. A majority of the justices of the court en banc may order an en banc reconsideration of any decision of a panel ~~within fifteen days after such decision is issued~~ [the period of the court's plenary jurisdiction[with or without a motion for reconsideration en banc. A majority of the justices may call for an en banc review by (1) notifying the clerk in writing within said ~~fifteen day~~ period, or (2) by written order issues within said ~~fifteen day~~ period, either with or without en banc conference. In such event, the panel decision shall not become final, and the case shall be resubmitted to the court for an en banc review and disposition.

Suggested Revision:

TRAP100: There is a textual error in subparagraph f. I believe the word "within" has been inadvertently omitted.

TRAP
Rule 130. FILING OF APPLICATION IN COURT OF APPEALS

Existing Rule 130(b):

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(b) Time and Place of Filing. The application shall be filed with the Clerk of the Court of Appeals within thirty days after the overruling of the last timely motion for rehearing filed by any party.

Proposed Amended Rule 130(b):

(b) [Number of Copies:] Time and Place of Filing. [Twelve copies of] T[t]he application shall be filed with the Clerk of the Court of Appeals within thirty days after the ~~overruling of the last~~ [on all] timely [filed] motion[s] for rehearing~~filed by any party~~. [An application filed prior to the filing of a motion for rehearing by a party shall not preclude a party, including the party filing the application, from filing a motion for rehearing, or the court of appeals from ruling on such motion. An application filed prior to the last ruling on all timely filed motions for rehearing shall be deemed to have been filed on the date of but subsequent to the last ruling on any such motion].

[COMMENT TO 1990 CHANGE: To provide that the court of appeals shall rule on all timely filed motions for rehearing regardless of any prematurly filed application for writ of error and to deem that all premature applications for writ of error are filed on the date of but subsequent to the last ruling by the court of appeals on the last timely filed motion for rehearing.]

Suggested Revision:

Prematurely filed applications for writ of error. The Supreme Court has listened to us and has attempted to resolve the problem stated in our *Wadsworth* opinions, beginning with *Wadsworth Business Center-Willowbrook Limited Partnership*, 775 S.W.2d 663 (Tex. App.--Dallas 1989, writ pending). Whether it has been resolved, only time can tell. Tex. R. App. P. 130(b) now expressly provides that a writ application "filed prior to the filing of a motion for rehearing by a party shall not preclude . . . the court of appeals from ruling on such motion." In such cases, the application is treated as a premature application, deemed filed on the date of, but subsequent to, the filing of the motion.

I note that the wording of the amended rule only contemplates that the application be filed before the motion; it does not literally address the situation in which a motion is filed, but just not ruled upon, before the application is filed. (Because of the different deadlines--15 days for a motion, 30 days for an application--the latter situation is far more likely.) Nonetheless, if we have jurisdiction to issue an order on a motion that is filed after a writ application, we must have jurisdiction to issue an order, after a writ application, on a motion that was filed before the application. Additionally, the comment to the rule states that the amendment is "[t]o provide that the court of appeals shall rule on *all* timely filed motions for rehearing regardless of any prematurely filed application for writ of error . . . " (emphasis added). Thus, the rule seems sufficiently clear, but it may need caselaw explounding.

TRAP

RULE 131. REQUISITES OF APPLICATIONS

Existing Rule 131:

The application for writ of error shall be addressed to "The Supreme Court of Texas," and shall state the name of the party or parties applying for the writ. The parties shall be designated as "Petitioner" and "Respondent." Applications for writs of error shall be as brief as possible. The respondent should file a brief in response. The application shall contain the following:

(a) Names of All Parties. A complete list of the names of all parties shall be listed on the first page of the application, so the members of the court may at once determine whether they are disqualified to serve or should recuse themselves from participation in the decision of the case.

(b) Table of Contents and Index of Authorities. The application shall contain at the front thereof a table of contents with page references where the discussion of each point relied upon may be found and also an index of authorities alphabetically arranged, together with reference to the pages of the application where the same are cited. The subject matter of each point or group of points shall be indicated in the table of contents.

(c) Statement of the Case. The application should contain a brief general statement of the nature of the suit,—for instance, whether it is a suit for damages, on a note, or in trespass to try title, and that the statement as contained in the opinion of the court of appeals is correct, except in the particulars pointed out. Example: "This is a suit for damages in excess of $1000.00 for personal injuries growing out of an automobile collision. The opinion of the court of appeals correctly states the nature and results of the suit, except in the following particulars: (If any.)" Such statement should seldom exceed one-half page. The details of the case should be reserved to be stated in connection with the points to which they are pertinent.

(d) Statement of Jurisdiction. Except in those cases in which the jurisdiction of the court depends on a conflict of decisions under subsection (a)(2) of section 22.001 of the Government Code, the petition should merely state that the Supreme Court has jurisdiction under a particular subsection of section 22.001 of the Government Code. Example: "The Supreme Court has jurisdiction of this suit under subsection (a)(6) of section 22.001 of the Government Code." When jurisdiction of the Supreme Court depends on a conflict of decisions, the conflict on the question of law should be clearly and plainly stated.

(e) Points of Error. A statement of the points upon which the application is predicated shall be stated in short form without argument and be separately numbered. In parentheses after each point, reference shall be made to the page of the record where the matter complained of is to be found. Whether the matter complained of originated in the trial court or in the court of appeals, it shall be assigned as error in the motion for rehearing in the court of appeals. Points will be sufficient if they direct the attention of the court to the error relied upon. Complaints about several issues or findings relating to one element of recovery or defense may be combined in one point, if separate record references are made.

(f) Brief of the Argument. The brief of the argument may present separately, or grouped if germane, the points of error relied upon for reversal, the argument to include such pertinent statements from the record as may be requisite, together with page references and such discussion of the authorities as is deemed necessary to make clear the points of error complained of. The opinion of the court of appeals will be considered with the application, and statements therein, if accepted by counsel as correct, need not be repeated.

(g) Prayer for Relief. The nature of the relief sought by the application should be clearly stated.

(h) Amendment. The application may be amended at any time when justice requires upon such reasonable terms as the court may prescribe.

(i) Length of Application. An application shall not exceed 50 pages in length, exclusive of pages containing the table of contents, index of authorities, points of error, and any addendum containing statutes, rules, regulations, etc. The court may, upon motion and order, permit a longer brief.

(j) Court May Require Application Redrawn. If any brief or application for writ of error is unnecessarily lengthy or not prepared in conformity with these rules, the Supreme Court may require same to be redrawn.

RULE 131. REQUISITES OF APPLICATIONS (Continued)

Proposed Amended Rule 131:

The application for writ of error shall be addressed to "The Supreme Court of Texas," and shall state the name of the party or parties applying for the writ. The parties shall be designated as "Petitioner" and "Respondent." Applications for writs of error shall be as brief as possible. The respondent should file a brief in response. The application shall contain the following:

(a) Names of All Parties. A complete list of the names [and addresses] of all parties [to the trial court's final judgment and their counsel in the trial court, if any] shall be listed on the first page of the application, so the members of the court may at once determine whether they are disqualified to serve or should recuse themselves from participation in the decision of the case [and so the clerk of the court may properly notify the parties to the trial court's final judgment and their counsel, if any, of the judgment and all orders of the Supreme Court].

(b) (No change.)

(c) (No change.)

(d) (No change.)

(e) (No change.)

(f) (No change.)

(h) (No change.)

(i) (No change.)

(j) (No change.)

Proposed Amended Rule 131 (Continued):

[COMMENT TO 1990 CHANGE: This amendment, together with other similar amendments conforming other appellate rules, requires the parties to any appeal to serve copies of all papers filed with the clerk of the appellate court (except the statement of facts and the transcript), and the clerk of the appellate court to mail notice and copies of all appellate court orders and opinions on all parties to the trial court's judgment.]

Suggested Revision:

Again, this rule requies notification by the clerk on all trial parties instead of appellate parties (counsel). See previous comments.

TRAP
RULE 132. FILING AND DOCKETING APPLICATION IN SUPREME COURT

Existing Rule 132:

(a) Duty of Clerk of Court of Appeals. When an application for writ of error to the Supreme Court is filed with the Clerk of the Court of Appeals, he shall record the filing of the application, and shall promptly forward it to the Clerk of the Supreme Court with the original record in the case and the opinion of the court of appeals, the motions filed in the case, and certified copies of the judgment and orders of the court of appeals. The clerk need not forward any exhibits that are not documentary in nature unless ordered to do so by the Supreme Court.

(b) Expenses. The party applying for the writ of error shall deposit with the Clerk of the Court of Appeals a sum sufficient to pay the expressage or carriage of the record to and from the Clerk of the Supreme Court.

(c) Duty of the Clerk of Supreme Court. The Clerk of the Supreme Court shall receive the application for writ of error, shall file it and the accompanying record from the court of appeals, and shall enter the filing upon the docket, but he shall not be required to receive the application and record from the post office or express office unless the postage or express charges shall have been paid. The clerk shall notify the attorneys of record by letter of the filing of the application in the Supreme Court.

Proposed Amended Rule 132:

(a) Duty of Clerk of Court of Appeals. When an application for writ of error to the Supreme Court is filed with the Clerk of the Court of Appeals, he shall record the filing of the application, and shall [, after the court of appeals has ruled on all timely filed motions for rehearing,] promptly forward it to the Clerk of the Supreme Court with the original record in the case and the opinion of the court of appeals, the motions filed in the case, and certified copies of the judgment and orders of the court of appeals. The clerk need not forward any exhibits that are not documentary in nature unless ordered to do so by the Supreme Court.

(b) Expenses. (No change.)

Proposed Amended Rule 132 (Continued):

(c) Duty of the Clerk of the Supreme Court. The Clerk of the Supreme Court shall receive the application for writ of error, shall file it and the accompanying record from the court of appeals, and shall enter the filing upon the docket, but he shall not be required to receive the application and record from the post office or express office unless the postage or express charges shall have been paid. The clerk shall notify [each party to the trial court's final judgment, as listed on the first page of the application,] by letter of the filing of the application in the Supreme Court. [Notification to parties having counsel indicated of record shall be made to counsel.]

[COMMENT TO 1990 CHANGE: This amendment, together with other similar amendments conforming other appellate rules, requires the the clerk of the appellate court (except the statement of facts and the transcript), and the clerk of the appellate court to mail notice and copies of all appellate court orders and opinions on all parties to the trial court's judgment.]

Suggested Revision:

Rule 132. Again, this rule requires notification by the clerk on all trial parties instead of appellate parties (counsel). See previous comments.

Existing Appendix for Criminal Cases:

RULE 1. THE RECORD ON APPEAL

Pursuant to the provisions Rules 51(c) and 53(h), the Court of Criminal Appeals directs that a record consisting of transcript and statement of facts (formerly transcription of court reporter's notes) in case of an appeal or writ of error (Article 44.43, C.C.P.) from trial court to an appellate court shall be prepared in accordance with applicable Rules in the following formats, respectively:

(a) Transcript.

(1) Proceedings, instruments and other papers specified in Rule 51(a) and matters designated by the parties pursuant to Rule 51(b) shall be collected and copied and then assembled by the clerk of the trial court in the order in which they occurred or were filed. The judge of the trial court may order included a copy of any proceeding, instrument or paper he deems proper, except original papers and exhibits [see Rule 51(d)]. There must be space between the materials such that each may be readily distinguished from the other, and there must be noted at the top the name of each instrument and other papers and at the bottom the date of filing. As far as practicable each order and judgment shall show the date of signing by the judge, as well as the date of entry in the minutes.

(2) The transcript is and shall be designated Volume 1 of the record (or more if necessary), and consecutive pagination must be at the foot of each page.

(3) The front cover page shall be labeled in bold type "TRANSCRIPT" and it shall state the number and style of the criminal case, the court in which the case is pending, the name of the judge presiding and the names and mailing addresses of attorneys for the parties. The Clerk shall endorse thereon the day the transcript was transmitted to the court of appeals and shall sign his name officially thereto, and shall provide a space for the Clerk of the Court of Appeals to endorse his filing thereon, showing the date received, and to enter the docket number assigned to the cause. For those purposes the following form will be sufficient.

TRANSCRIPT

(Trial Court) No. _____

In the _____ District (County) Court of _____ County, Texas,
Honorable _____, Judge Presiding.

_____

_____

_____, Appellant

vs.

The State of Texas

_____

_____

Appealed to the Court of Appeals for the _____ Supreme Judicial District of Texas, at _____, Texas.

_____

_____

Appellate Attorney for Appellant:
(name) _____
(address) _____
_____
_____

Appellate Attorney for State:
(name) _____
(address) _____
_____
_____

_____

_____

Delivered to Court of Appeals for the _____ Supreme Judicial District of Texas, at _____, Texas on the _____ day of _____, 19___.

(signature _____
(name of trial court clerk _____
(title) _____

_____

_____

(Court of Appeals) Cause No. _____

Filed in the Court of Appeal for the _____ Supreme Judicial District of Texas, at _____, Texas this _____ day of _____, 19___.

_____, Clerk
By _____, Deputy

VOLUME _____

(4) Contents may be either legibly duplicated, printed or typewritten. Typewriting shall be on good heavy white paper, in clear type not less than standard pica type, with a double space between the lines and typed on only one side of the paper, with no sheet cut or mutilated. When printed the transcript must be on both sides of the paper, in not less than small pica type, bound and paged in pamphlet form of octavo size and fastened at the back; in all other respects it shall conform to rules for typewritten transcripts.

(5) On the first pages there shall be a detailed index identifying each instrument or other paper as it is denominated and indicating the page where it appears. The index must conform to the order in which matters appear as transcribed, rather than alphabetical. It shall be double spaced.

(6) After the index there shall be a caption in substantially the following form:

The State of Texas
County of _____

At a term of the _____ (County Court or Judicial District Court) of _____ County, Texas, which began on the _____ day of _____, 19__, and which terminated (or will terminate by operation of law) on the _____ day of _____, 19__, the Honorable _____, sitting as Judge of said court, the following proceedings were held in this cause, to wit:

The State of Texas
vs. No. _____
_____

(7) A transcript shall conclude with a certificate in substantially the following form:

The State of Texas
County of _____

I, _____, Clerk of the _____ Court of _____ County, Texas, do hereby certify that the above and foregoing proceedings, instruments and other papers contained in Volume _____ Pages _____ inclusive, to which this certification is attached and made a part thereof, are true and correct copies of all proceedings, instruments and other papers specified by Rule 51(a) and matters designated by the parties pursuant to Rule 51(b) in Cause No. _____, styled The State of Texas vs. _____ in said court.

GIVEN UNDER MY HAND AND SEAL of said Court at Office in _____, Texas this _____ day of _____, 19__.

(name) _____
(title) _____

By _____, Deputy

(b) Statement of Facts.

(1) The front cover page shall state the number and style of the criminal case, the court in which the proceeding is pending, the names and mailing addresses of attorneys for the parties. It shall be labeled in bold type "STATEMENT OF FACTS" and it shall be designated as Volume II of the record (or the next consecutive Roman numeral). For those purposes the following form will be sufficient.

(Trial Court) No. _____

THE STATE OF TEXAS IN THE _____ COURT
vs.
(NAME OF DEFENDANT) OF _____ COUNTY, TEXAS

STATEMENT OF FACTS
Volume II of _____ volumes

APPEARANCES:

(Attorney for the State)
(Mailing address)

For the State of Texas;

(Attorney(s) for Defendant)
(Mailing address(es))

For the Defendant.

On the _____ day of _____, 19__, the above and entitled cause came on to be heard (for trial) in the said Court, Honorable (name of judge presiding), Judge Presiding, and the following proceedings were held, to wit:

(2) The statement of facts shall be typewritten or printed on opaque and unglazed white paper not less than 13-pound weight, 8½ by 11 inches in size, in good standard type of pica size, 10 or 12 letters per linear inch, double spaced and in upper and lower case type, an average of 25 lines of type per page and typed on only one side of the paper, with no sheets cut or mutilated. The margin on the left-hand side of the page shall be not less than 1¼ inches nor more than 2 inches. The pages shall be numbered consecutively at the bottom of each page, securely bound on the left margin, and labeled on the cover thereof "Volume _____ of _____ Volumes."

(3) Each separate proceeding and hearing (pretrial hearing, voir dire, trial on the merits, punishment hearing, etc.) shall be bound in a separate volume, or as many volumes as necessary to prevent each from being over two inches thick, and the first page of the statement of facts of each such proceeding or hearing shall be numbered "1" and each page thereafter numbered consecutively at the foot of the page.

(4) The court reporter shall include at the beginning of each volume of the statement of facts both an alphabetical and chronological index referring to the page at which the direct examination, the cross-examination, the re-direct examination, and the re-cross examination of each witness begins. The index may be as shown in the following example or in any other form which shows the same information:

INDEX

WITNESS	DIRECT	CROSS	RE-DIRECT	RE-CROSS
John Doe	4	8	16	20

The index shall be placed in front of each volume of the statement of facts and a master index of all witnesses shall be placed in the first volume of the statement of facts.

The court reporter shall also show in a separate table in the first volume of the statement of facts the page at which any exhibit or other document copied therein appears, and the pages at which it is identified (when an exhibit is identified by more than one witness, page references shall be made where each witness identified the exhibit), offered, marked, received, and shown. The table of exhibits may be as shown in the following example or in any other form which shows the same information:

EXHIBITS' TABLE

EXHIBIT NUMBER	DESCRIPTION	MARKED	IDENTIFIED	OFFERED	REC'D	SHOWN
S-1	Copy of Judgment in Cause #13112	3	4	5	6	82

(5) Unless ordered otherwise pursuant to Rule 51(d), neither physical evidence (gun, clothing, controlled substance, etc.) nor ordinarily an original exhibit is to be included in the record on appeal. Each item of physical evidence must be described alone on a separate piece of paper; it and a legible copy of other exhibits will appear respectively on a separate page of the statement of facts. However, when a legible copy of a photograph or any paper exhibit may not be made, the original exhibit shall be included in the record under order of the trial court made pursuant to Rule 51(d).

(6) Copies of exhibits received in each separate proceeding or hearing, including those descriptions of physical evidence, will be placed in numerical order at the end of the statement of facts of that proceeding or hearing, or in a separate volume if the exhibit material is voluminous.

(7) The statement of facts shall contain a certificate signed by the court reporter in substance as follows:

THE STATE OF TEXAS)
COUNTY OF _____)

I, _____, official court reporter in and for the _____ court of _____ County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in the statement of facts, in the above styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this transcription of the record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

WITNESS my hand this the _____ day of _____, 19__.

_____
(Signature)
Official Court Reporter

RULE 2. SUPPLEMENTAL RECORD ON APPEAL

Pursuant to the provisions of Rule 45 the Court of Criminal Appeals directs that a supplemental record consisting of material in a transcript or a statement of facts shall be prepared in the format prescribed for each in 1(a) and (b), respectively, so far as it is feasible, and that the supplemental record be certified in one of the following forms as appropriate.

(a) Form 1:

The State of Texas)	In the _____ Court
v.)	of
[Defendant])	_____ County, Texas

Order for Supplemental [or "Modified"] Record without Hearing

A supplemental record [or "modification of the record"] having been deemed necessary on the defendant's motion [or "the State's motion," or "both parties' motion(s)," or "the court's own motion," or "the order of the Court of Appeals," or "the order of the Court of Criminal Appeals"], and the defendant and the State having been notified by certified or registered mail of same, and both parties having waived in writing a formal hearing thereon, the Court finds that the record is supplemented [or "modified"] in the following particulars and orders the same to be transmitted or delivered to the [name of proper court].

Supplemental Transcript, Vol. I, comprising pages 1-___,

Statement of Facts, Vol. ___, comprising pages 1-___, [etc.].

Signed and ordered entered this _____ day of _____, 19__.

_____
Judge Presiding

(b) Form 2:

The State of Texas
v.
[Defendant]

In the _____ Court
of
_____ County, Texas

Order for Supplemental [or "Modified"] Record without Hearing

The supplemental record [or "modification of the record"] having been deemed necessary on the defendant's motion [or "the State's motion," or "both parties' motion(s)," or "the court's own motion," or "the order of the Court of Appeals," or "the order of the Court of Criminal Appeals"], and the defendant and the State having been notified by certified or registered mail of same, and the defendant [or "the State," or "both parties"] having objected within 5 days from receipt of notice, the court set the matter down for hearing, and, after hearing, entered orders which caused the record to speak the truth. Such proceeding is included in the record. The Court finds that the record is supplemented [or "modified"] in the following particulars and orders the same to be transmitted or delivered to the [name of proper court].

Supplemental Transcript, Vol. I, comprising pages 1-___,

Statement of Facts, Vol. ___, comprising pages 1-___, [etc.].

Signed and ordered entered this _____ day of _____, 19__.

_____
Judge Presiding

RULE 3. PREPARING THE APPELLATE RECORD

Pursuant to Rule 18(b) the Court of Criminal Appeals directs that envelopes containing a record on appeal shall conform to every specification in that rule; that the front of each envelope shall be printed substantially as shown on the form below and that the clerk of an appellate court must set forth on the front of the first envelope containing the record on appeal the information so prescribed.

(a) Form 3:

_____ [2]

No. _____ [1]

_____
Appellant

_____ [3]

_____
County

1. Court of Appeals shall use this line.
2. Court of Criminal Appeals shall use this line.
3. Offense and punishment shall be entered on this line.

Trial Court _____
Trial Court No. _____
Trial Judge _____
Disposition _____
Date _____
Justice _____
P.C. _____
_____
Panel _____
Quarter _____
En Banc _____

S/F _____
St. B. _____
Ap. B. _____
Supp. Tr. _____
Supp. B _____
Pro Se _____

TEXAS RULES OF APPELLATE PROCEDURE

Adopted by orders of the Supreme Court and the Court of Criminal Appeals April 10, 1986

Effective September 1, 1986

This appendix, adopted by order of the Court of Criminal Appeals on April 10, 1986, effective September 1, 1986, to apply to criminal cases and criminal law matters, preserves the substance of Rule 201 and Forms 3, 4, and 5 of the former Rules of Post Trial and Appellate Procedure in Criminal Cases which were repealed effective September 1, 1986, by another order of April 10, 1986.

Rule 1. The Record on Appeal

Pursuant to the provisions Rule 51(c) and 53(h), the Court of Criminal Appeals directs that a record consisting of transcript and statement of facts (formerly transcription of court reporter's notes) in case of an appeal or writ of error (Article 44.43, C.C.P.) from trial court to an appellate court shall be prepared in accordance with applicable Rules in the following formats, respectively:

(a) Transcript

(1) (No change.)

(2) (No change.)

(3) The front cover page shall be labeled in bold type "TRANSCRIPT" and it shall state the number and style of the criminal case, the court in which the case is pending, the name of the judge presiding and the names and mailing addresses of attorneys for the parties. The Clerk shall endorse thereon the day the transcript was transmitted to the court of appeals and shall sign his name officially thereto, and shall provide a space for the Clerk of the Court of Appeals to endorse his filing thereon, showing the date received, and to enter the docket number assigned to the cause. For those purposes the following form will be sufficient.

TRANSCRIPT

(Trial Court) No._____

In the _____ District (County) Court of _____ County, Texas, Honorable _____, Judge Presiding.

_____, Appellant

vs.

The State of Texas

_____

_____

Appealed to the Court of Appeals for the _____ Supreme/Judicial District of Texas, at _____, Texas.

_____

_____

Appellate Attorney for Appellant:
(name)_____
(address)_____
_____
_____

Appellate Attorney for State:
(name)_____
(address)_____
_____
_____

_____

_____

Delivered to Court of Appeals for the _____ ~~Supreme/Judicial~~ District of Texas, at _____, Texas on the _____ day of _____, 19___.

(signature _____

(name of trial court clerk _____

(title _____

_____

_____

(Court of Appeals) Cause No. _____

Filed in the Court of Appeal for the _____ ~~Supreme/Judicial~~ District of Texas, at _____, Texas this _____ day of _____, 19____.

_____, Clerk

By_____, Deputy

VOLUME _____

(4) (No change.)

(5) (No change.)

(6) (No change.)

(7) (No change.)

(b) Statement of Facts. (No change.)

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

Suggested Revision:

Rule 2. This section of the appendix should be completely deleted. The rule should be that a supplemental transcript shall conform to the rules governing the original transcript. If this rule is kept, then a proper reference to the correct rule should be modified. It now refers to rule 45.

WILLIAM V. DORSANEO III
ATTORNEY AT LAW
3315 DANIELS
DALLAS, TEXAS 75275
(214) 692-2626

February 14, 1990

TO: Supreme Court Advisory Committee Members

FROM: William V. Dorsaneo, III

Re: **Committee Recommendations for Amendments to Appellate Rules**

As I will not be able to attend the meeting scheduled for Friday, February 16, I am sending you a written report that makes specific recommendations concerning the matters addressed in the document that was provided to you at our last meeting. I have also asked Rusty McMains to deliver this report or some version of it depending on his views and your input, if any.

WVD/sn

cc: Honorable Nathan Hecht
Honorable Luke Soules

WILLIAM V. DORSANEO III
ATTORNEY AT LAW
3315 DANIELS
DALLAS, TEXAS 75275
(214) 692-2628

February 13, 1990

TO: Members, Supreme Court Advisory Committee

FROM: William V. Dorsaneo, III

RE: **Suggestions for Amendment and Revision of the Texas Rules of Appellate Procedure**

This report supplements the report dated February 6, 1990 and deals with specific proposals included in that report that were not reached during the SCAC meeting of February 9-10, 1990.

It is recommended that the amendments proposed by the Corpus Christi Court of Appeals to Appellate Rules 3(b) (Uniform Terminology in Criminal Cases), 4(c) (Number of Copies), 40(b) (Appeals in Criminal Cases), 44 (Appeals in Habeas Corpus and Bail: Criminal Cases), 59(b) (Voluntary Dismissal - Criminal Cases) 87(b)(1) (Enforcement of Judgments After Mandate - Criminal Cases). Judge Clinton, as a member of the Appellate Rules subcommittee is aware of these proposals. Again, as indicated in the February 6, 1990 report, the Committee should recommend that the Supreme Court adopt the amendments to the Texas Rules of Appellate Procedure promulgated by the Court of Criminal Appeals on June 5, 1989. See 52 Tex. B.J. 893 (1989).

It is also recommended that the following proposals for amendment be considered by the full committee.

1. Rule 4(f). Manner of Service. Add the following sentence to the proposal as published in the Texas Bar Journal "Service by telephonic document transfer is complete on receipt."

2. Rule 5(b)(5). Motion, Notice and Hearing. Add the following sentence to the existing rule. "The trial judge shall find the date upon which the party or his attorney first either received a notice of the judgment or acquired actual knowledge of the signing of the judgment at the conclusion of the hearing and include this finding in the court's order."

3. Rule 40(a)(3)(B),(F). When party is unable to give security. Add the following language to the end of each subparagraph "within the time provided by paragraph (a)(1) of Rule 41."

4. Rule 41(a)(1). Time to perfect appeal. Delete the last sentence ("If a deposit of cash etc.") of the Bar Journal draft and amend the first sentence to provide "When security for costs on appeal is required, the bond, affidavit in lieu of bond or cash deposit shall be submitted to the clerk within..."

5. Rule 46. Bond for Costs on Appeal in Civil Cases.

Revise the draft as published in the Bar Journal as follows:

(d) Notice of Filing. Notification of the filing of the bond or certificate of deposit shall promptly be given by ~~counsel for~~ [each] appellant by ~~mailing~~ [serving] a copy thereof ~~to counsel of record~~ [on all parties in the trial court together with notice of ...

It appears that the word "by" was omitted from the draft proposal in the Bar Journal by inadvertence.

6. Rule 54(c). Extension of Time.

Revise the last sentence as follows:

"Such motion shall also reasonably explain any delay in the request required by Rule 53(a) [or authorized by Rule 51(b)].

7. Rule 73(i) Form and Content of Motions for Extension of Time

Modify subparagraph (i) of the existing rule by adding the following sentence:

[When an extension of time is requested for the filing of the transcript, the facts relied upon to reasonably explain the need for an extension must be supported by the affidavit of the trial court clerk.]

8. Rule 75(f). Argument

Consider revising the first sentence of this subparagraph as follows:

(f) A party to the appeal desiring oral argument shall make request therefor at the time he files his brief in

the case [by noting on the cover of the brief that oral argument is requested.]

9. Rule 80(c). Other Orders.

Consider revising this subparagraph as follows:

(c) Other Orders. In addition, the court of appeals may make any other appropriate order, as the law and nature of the case may require, [including abating the appeal and remanding the cause to the trial court for a hearing on any issue.]

10. Rule 130(b). [Number of Copies;] Time and Place of Filing.

Modify the second sentence in the draft published in the Bar Journal as follows:

The filing of an application does not preclude a party, including the party who filed the application, from filing a motion for rehearing or (preclude the court from ruling on a motion for rehearing.

A number of other suggestions including placement of responsibility on court reporters to file the statement of facts in the court of appeals (or to explain why it has not been filed on time) and notifying the time for issuance of mandates require further study before a recommendation is made.