AGENDA
NOVEMBER 18-19, 1994
SCAC MEETING

INDEX

4543.001

11-16-94

SB

PLEASE BRING THIS PACKET

TO THE

SUPREME COURT ADVISORY COMMITTEE

MEETING ON

NOVEMBER 18 AND 19, 1994

CHANGES FROM SEPTEMBER 7, 1994 DRAFT TO NOVEMBER 14, 1994 DRAFT

Rule 4 — In paragraph (b), the following was inserted as the first sentence: "The attorney in charge for a party is the attorney to whom orders and notices to that party should be sent and on whom papers and copies of papers should be served." In addition, paragraph (b) was moved to Rule 7(a) and the remaining paragraphs of Rule 4 were renumbered. The Notes and Comments following the rule have been revised accordingly.

Rule 5 — "other than a Saturday, Sunday, or legal holiday" was deleted from the third sentence.

Rule 7 — Paragraph (a) was deleted and Rule 4(b) was substituted in its place. The Notes and Comments following the rule have been revised accordingly.

Rule 13(i) — "fee or" was inserted in front of deposit in two instances.

Rule 16 — An alternative to the last sentence was added to the report, along with a comment by the Section Committee.

Rule 19 — "not" was added before "ex officio" and before "within the personal knowledge"

Rule 20 — "and disclose the source of any fee paid or to be paid for preparation of the brief," was added.

Rule 40 — ", and (5) in accelerated appeals, that the appeal is accelerated" was added to subdivision (a)(2).

Rule 41 — "Ordinary" was deleted from the title of the rule.

Rule 42 — "or as extended in accordance with Rule 41(a)(2)" was added to the end of the first sentence and an explanation was added to the Notes and Comments. The last sentence of subdivision (a)(3) was deleted.

Rule 44 — Paragraph (a) was deleted and the following was added:

(a) Notice of appeal in habeas corpus and bail proceedings shall be given in writing, filed with the clerk of the trial court, within ten days after the judgment or order is entered by the trial court, either in writing or in open court. The transcript and statement of facts, if requested by the applicant or the state, shall be filed in the appellate court within fifteen days after notice

of appeal is filed. The applicant's brief shall be filed within 10 days after the record is filed and the state's brief shall be filed within 10 days after the applicant's brief is filed. The appellate court may shorten or extend the time for filing the record or the briefs upon written motion of a party setting out a reasonable explanation for the need for such action.

Rule 52 "or" inserted before "Code of Criminal Procedure" and "and" was substituted for "or" before "any relevant statute."

Rule 55(c) "trial judge, who . . ." substituted for "trial court, which . . .."

Rule 56 "and determine whether it complies with the requirements of Rule 40 and was filed within the time prescribed by Rule 41(a)(1)" was deleted from the first sentence of paragraph (a). "On receipt of the copy of the notice of appeal, the clerk shall docket the appeal." was added to subparagraph (a)(1) and "If it appears to the clerk that the notice of appeal is proper in the court of appeals and timely, the clerk shall file it and docket the appeal in the order of receiving the notice." was deleted from that subparagraph. "or thirty days in the case of an accelerated appeal," was added to the first sentence of paragraph (c).

Rule 57 In paragraph (a), "of the appellate court" was inserted after "clerk". In subparagraph (a)(3), the following was added: "and if by mail, the date of mailing". In subparagraph (a)(5), the following was added: "or any other filing that could affect the time for perfecting the appeal". In subparagraph (a)(10), the following was added: "and if the trial was electronically recorded, that it was so recorded". A new paragraph (d) was added, as follows: "(d) The docketing statement is for administrative purposes and does not affect the jurisdiction of the appellate court."

Rule 74 In paragraph (h)(5), "trial court, which" was changed to "trial judge, who".

Rule 87 The following changes were made in subdivision (b)(1): "send an acknowledgement to the clerk of the appellate court of the receipt of the mandate and" was deleted from the first sentence; "same" was deleted and "mandate" inserted in the first sentence; "and the clerk of the appellate court" was deleted from the last sentence.

Rule 100 "to the trial court's final judgment" was added to the first sentence of paragraph (a) and a comment was added under the Notes and Comments.

Rule 120 Paragraph (a)(2) "deposit for costs shall be made" is changed to "filing fee shall be paid". In paragraph (c)(1), "relator is entitled to the relief sought"

was inserted in the first sentence, and "a writ of habeas corpus should be issued" was deleted.

Rule 131 — In paragraph (c), the following is stricken: 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.)" Paragraph (j), regarding intervention, was deleted

Transcript Order (B)(5) — "51(d)" was stricken and "53(e)" inserted in two instances.

TRCP 264 — A revised Rule 264a and 264b were inserted and Rule 264 which appeared in the previous report was deleted.

CUMULATIVE REPORT OF RECOMMENDATIONS OF COMMITTEE ON STATE APPELLATE RULES OF THE JUDICIAL PRACTICE AND ADVOCACY SECTION OF THE STATE BAR OF TEXAS
1991-1994

PROPOSED AMENDMENTS TO TEXAS RULES OF APPELLATE PROCEDURE
November 14, 1994

NOTE TO ADVISORY COMMITTEE: The proposed amendments in this report, unless otherwise indicated, have been approved and are recommended by the Committee on State Appellate Rules Appellate Practice and Advocacy Section of the State Bar, which is referred to in this report as the "Section Committee." However, the "Explanations," "Notes to the Advisory Committee, and the "Notes and Comments" have not been considered in detail by the entire committee. The "Notes and Comments," which specify the proposed changes, are included by way of assistance to the Supreme Court when it publishes the amendments, and, therefore, are worded as though the amendments have already been adopted.

SECTION ONE. APPLICABILITY OF RULES

RULE 1. SCOPE OF RULES; LOCAL RULES OF COURTS OF APPEALS

(a) **Scope of Rules.** [No change.]

(b) **Local Rules.** Each court of appeals may, from time to time, make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made shall before their promulgation be furnished to the Supreme Court and to the Court of Criminal Appeals for approval. When an appeal or original proceeding is docketed, the clerk shall mail a copy of the court's local rules to all counsel of record who request it. No appeal shall be dismissed for noncompliance with a local rule without notice to the noncomplying party and a reasonable opportunity to cure the noncompliance.

Notes and Comments

Change by 1994 amendments: The last sentence of paragraph (b) has been added.

RULE 2. RELATIONSHIP TO JURISDICTION AND SUSPENSION

(a) **Relationship to Jurisdiction.** [No change.]

(b) **Suspension of Rules in Civil and Criminal Matters.** Except as otherwise provided in these rules, in the interest of expediting a decision or for other good cause shown, ~~a court of appeals, or the Court of Criminal Appeals~~ the appellate court in which the appeal is pending may suspend requirements and provisions of any rule in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction. ~~Provided, however, that~~ nNothing in this rule shall be

construed to allow any court to suspend requirements or provisions of the Code of Criminal Procedure or to extend the time for perfecting appeal in a civil matter.

Notes and Comments

Change by 1994 amendment: The power to suspend rules in paragraph (b) as in criminal cases is extended to civil cases.

SECTION TWO. GENERAL PROVISIONS

RULE 3. DEFINITIONS AND UNIFORM TERMINOLOGY

[No change.]

RULE 4. ~~SIGNING, FILING AND SERVICE~~ FILED PAPERS—GENERAL RULES

(a) **Signing.** Each motion, petition, application, brief, ~~motion~~ or other paper filed shall be signed by or on behalf of the attorney in charge ~~at least one of the attorneys~~ for the filing party and shall give the State Bar of Texas identification number, the mailing address, telephone number, and telecopier number, if any, of each attorney whose name appears as an attorney for the party ~~is signed thereto~~. A party ~~who is~~ not represented by an attorney shall sign the ~~his~~ brief or other paper and give his or her address and telephone number.

EXPLANATION: The additions extend the rule to petitions for mandamus, motions for rehearing, etc. Inclusion of original proceedings will make the rule comprehensive and will define more particularly the requirements for such proceedings.

(b) **Filing of Papers.** The filing of records, motions, petitions, applications, briefs and other papers in the appellate court as required by these rules shall be made by delivering ~~filing~~ them ~~with~~ to the clerk, except that any justice or judge of the court may permit the papers to be filed with ~~him~~ the justice or judge, in which event ~~he~~ the justice or judge shall note thereon the filing date and time and forthwith transmit them to the office of the clerk. If any document ~~a motion for rehearing, any matter relating to taking an appeal or writ of error from the trial court to any higher court, or application for writ of error or petition for discretionary review~~ is sent to the proper clerk by first-class United States mail or by registered or certified mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail on or before the last day for filing same, the same, if received by the clerk not more than ten days ~~tardily~~ after the last day for filing, shall be filed by the clerk and be deemed as filed in time~~; provided, however, that a certificate of mailing by the United States Postal Service or a legible postmark affixed by the United States Postal Service shall be prima facie evidence of the date of mailing~~. A legible postmark affixed by the United States Postal Service, a receipt for registered or certified mail, or a certificate of mailing by the United States Postal Service shall be accepted as conclusive proof of mailing, but other proof may be considered.

(c) **Number of Copies.**

(1) ~~Each party shall file six~~ Six copies of motions, petitions, applications, briefs, ~~petitions, motions~~ and other papers shall be filed with the ~~C~~clerk of the C~~c~~ourt of ~~A~~appeals in which the case is pending. Any court of appeals may by local rule authorize the filing of fewer or more copies. Only one copy of the record is required to be filed in accordance with these rules.

(2) ~~Each party shall file twelve copies of its application for writ of error or of its petition for discretionary review.~~ Twelve copies of each application for writ of error shall be filed with the ~~C~~clerk of the ~~C~~court of ~~A~~appeals. The original of each petition for discretionary review shall be filed with the clerk of the court of appeals and eleven copies shall be delivered to the clerk. ~~In addition to filing an original petition for discretionary review with the clerk of the court of appeals, the party shall deliver to the clerk eleven copies.~~ The State Prosecuting Attorney may deliver the eleven copies to the Clerk of the Court of Criminal Appeals.

(3) In an original proceeding commenced in a court of appeals, each party shall deliver three copies of all petitions and briefs provided for in the rule governing original proceedings (Rule 120) to the clerk of the court of appeals. If the proceeding is commenced in the Supreme Court or the Court of Criminal Appeals, twelve copies shall be delivered. Any court of appeals may by local rule authorize the filing of more copies. Only one copy of the record is required to be filed in accordance with the rules governing original proceedings.

(~~3~~4) 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.

EXPLANATION: The proposed amendments to paragraphs (c) and (d) consolidate filing and copy requirements in current Rules 4(b) and 4(c), 74(i), 121(a)(3), 130(b), and 160 and apply to filing of other papers where filing and copy requirements are not specified.

(d) ~~**Papers Typewritten or Printed**~~ **Form.** ~~All applications, briefs, petitions, motions and other papers shall be printed or typewritten. The use of recycled paper is strongly encouraged. Typewritten papers must be with a double space between the lines and on heavy white paper in clear type.~~

(1) *Paper.* All documents shall be typewritten or printed on opaque white or near-white paper, size 8 1/2 inches by 11 inches, unless commercially printed. The use of recycled paper is strongly encouraged.

(2) *Spacing; Binding; Copying.* Typewritten papers must be with a double space between the lines except that footnotes may be single spaced. Briefs and applications shall be bound so as to ensure that the bound copy will not lose its cover or fall apart in regular use. It is preferred that briefs be bound to permit them to lie flat when open, and they must do so if the cover is plastic or any material not easily folded. Every brief must have front and back covers of durable quality. The front cover must clearly indicate the name of the party on whose behalf the brief is being filed. Briefs may be produced by any duplicating process in 8½ x 11 inch size and shall use only one side of each sheet.

(3) *Length of Briefs and Applications.* Appellate briefs and applications in civil cases (including amicus briefs) shall not exceed fifty pages of 10 point courier type with one-inch margins, or the equivalent, exclusive of pages containing the list of names and addresses of parties, the table of contents, index of authorities, issues or points of error, and any addendum or appendix containing statutes, rules, regulations, and the like, and excerpts from the record crucial to the issues presented. The court may, upon motion or by local rule, permit a longer brief. The court 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 it to be redrawn.

EXPLANATION: These proposals include the provisions of current Rule 4(d) and also provide a standard format so that counsel will not attempt to evade page limitations.

NOTE TO ADVISORY COMMITTEE: It is not the intent of the Section Committee to limit the size of commercially printed briefs. The restriction of record excerpts to matters crucial to the issues is added to avoid unnecessary bulk and to discourage long appendices.

(4) *Rejection of Briefs.* Unless every copy of a brief conforms to this rule, the clerk is authorized to return unfiled all nonconforming copies. An extension of ten days is allowed for the re-submission in a conforming format of a rejected brief.

(5) *Amendment.* An application, brief, petition, motion, or other paper may be amended at any time when justice requires upon such reasonable terms as the court may prescribe.

(e) **Service ~~of All Papers~~ Required.** Copies of all papers filed ~~by any party~~ and not required by these rules to be served by the clerk shall, at or before the time of filing, be served by the filing a party ~~or person acting for him~~ on all other parties to the trial court's judgment ~~appeal or review. Service on a party represented by counsel shall be made on counsel.~~ Except as provided in the rules governing original proceedings, service of a copy of the record is not required.

EXPLANATION: The requirements in original proceedings are more particularly defined.

(f) **Manner of Service.** Service may be personal, by mail, or by telephonic document transfer to the party's current telecopier number. Personal service includes delivery of the copy to a ~~clerk~~ secretary or other responsible person at the office of counsel. Service by mail is complete on mailing. Service by telephonic document transfer is complete on receipt. Service on a party represented by counsel shall be made on that party's attorney in charge, as defined in paragraph (b), and on another attorney if one has been designated by the attorney in charge pursuant to paragraph (b). No service may be made on the party represented.

EXPLANATION: "Secretary" is substituted because the Section Committee is not sure of the meaning of "clerk" in an American lawyer's office. Service on the attorney in charge will relieve the attorney of the burden of serving more than two opposing attorneys.

(g) **Proof of Service.** Papers presented for filing shall be served and shall contain an acknowledgement of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names and addresses of the persons served, certified by the person who made the service. Proof of service may appear on or be affixed to the papers filed. The clerk may permit papers to be filed without acknowledgment or proof of service but shall require such acknowledgment or proof to be filed promptly thereafter.

Notes and Comments

Change by 1994 amendments: The rule has been redrafted and pertinent provisions of former Rule 121 have been incorporated. The language in paragraph (e)(4) concerning record excerpts is added to avoid unnecessary bulk.

RULE 5. COMPUTATION OF TIME

(a) **In General.** In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday or legal holiday, in which event the period extends to the end of the next day which

is not a Saturday, Sunday or legal holiday. When the act to be done is the filing of a paper in court, and the clerk's office is closed or inaccessible on the last day of the period so computed, the period extends to the end of the next day on which the clerk's office is open and accessible. Proof of closing or inaccessibility of the clerk's office may be made by a certificate of the clerk or counsel or by affidavit of the party. Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper and the notice or paper is served by mail, three days shall be added to the prescribed period.

(b) - (e) [No change.]

EXPLANATION: The Section Committee is of the opinion that closing or inaccessibility of the clerk's office is sufficient reason to extend the time for filing papers and that a certificate of the clerk or of counsel is reliable proof of that fact. This amendment would be consistent with the recent decisions concerning locally-declared holidays. In re V.C., 829 S.W.2d 772 (Tex. 1992); Miller Brewing Co. v. Villarreal, 829 S.W.2d 770 (Tex. 1992). It would also take care of the problem in extreme weather when the court is inaccessible.

(f) **No notice of Judgment of Appellate Court.** Notwithstanding any provision of these rules concerning the time for filing a motion for extension of the period for filing a motion for rehearing, application for writ of error, or petition for discretionary review, an extension of such period may be granted by the appellate court in which a motion for extension would properly be filed on ~~sworn~~ motion showing that neither the party desiring to file such motion for rehearing, application for writ of error, or petition for discretionary review nor his attorney had notice or actual knowledge of the judgment or order from which such period began to run before the last day of such period and stating the earliest date either the party or his attorney received such notice or actual knowledge. Such a motion for extension shall be filed within fifteen days of the date either the party or his attorney first had such notice or actual knowledge, but in no event more than ninety days after the beginning of such period. When such a motion is granted, the period in question shall begin to run on the date of granting the motion.

Notes and Comments

Change by 1994 amendments: The last two sentences of paragraph (a) have been added and the requirement of a "sworn" motion has been deleted from paragraph (f), since the evidence supporting the motion is governed by Rule 19(d).

RULE 6. COMMUNICATIONS WITH THE APPELLATE COURT.

[No change.]

RULE 7. APPEARANCE, WITHDRAWAL, AND SUBSTITUTION OF COUNSEL

(a) **Attorney in Charge in the Appellate Court.** The attorney in charge for a party is the attorney to whom orders and notices to that party should be sent and on whom papers and copies of papers should be served. The attorney who signed the notice of appeal shall be the attorney in charge for the appellant. The attorney who was in charge for any party other than the appellant in the trial court shall be deemed the attorney in charge for that party on appeal. Any party may designate a different attorney in charge by filing and serving a written designation specifying a different attorney in charge, giving the State Bar of Texas identification number, mailing address, telephone number and telecopier number. The attorney in charge may also designate one other attorney for that party to receive notices and copies.

EXPLANATION: Designation of the attorney in charge will enable the attorneys and the clerk to identify the attorney to whom copies must be sent and will relieve them of the burden of sending notices and copies to several attorneys for the same parties. The attorney that signed the notice of appeal is designated because the appellate clerk has no easy way to identify the attorney in charge in the trial court before the transcript is filed and that attorney may not be the attorney on appeal.

(b) Withdrawal and Substitution. Counsel shall be permitted to withdraw or other counsel may be substituted upon such terms and conditions as may be deemed appropriate by the appellate court. The motion for leave to withdraw as counsel shall be accompanied by either a showing that a copy of the motion has been furnished to the party with a notice advising the party of any ensuing deadlines and settings of the cause or written acceptance of employment by new counsel indicated.

Notes and Comments

Change by 1994 amendments: Paragraph (a) is new. Former Rule 7 is retained as paragraph (b).

RULES 8 - 10

[No change.]

RULE 11. DUTIES OF COURT REPORTERS

(a) (1) & (2) [No change.]

(3) filing all exhibits with the clerk and making copies of the exhibits for inclusion in the statement of facts when a statement of facts is prepared;

(4) [No change.]

(5) preparing and filing a statement of facts in any case in which a party has filed a notice of appeal, has made a request for a statement of facts, and has paid the reporter's fee or made satisfactory arrangements for such payment;

(~~5~~6) performing such other duties relating to the reporter's official duties as may be directed by the judge presiding.

Notes and Comments

Change 1994 amendment: (1) Paragraph (a)(3) has been amended to clarify the division of labor between the clerk and the court reporter in correspondence with Civil Procedure Rules 75a and 75b. (2) Paragraph (a)(5) has been added to transfer responsibility for filing the statement of facts from the appellant to the reporter.

RULE 12. WORK OF COURT REPORTERS

(a) It shall be the joint responsibility of the trial and appellate courts to ensure that the work of the court reporter is accomplished timely. When a notice of appeal has been filed and the appellant has made a proper and timely request for a statement of facts and has paid the reporter's fee or made satisfactory arrangements for payment, the appellate court and the official court reporter, rather than the parties, have responsibility to see that the statement of facts is filed. If a substitute or predecessor reporter has recorded any part of the trial or other proceeding, the official reporter has responsibility to obtain from the substitute or predecessor reporter a transcription of such proceedings.

(b) & (c) [No change.]

Notes and Comments

Change by 1994 amendment: The second sentence of paragraph (a) has been added to transfer responsibility for filing the statement of facts to the official reporter and the appellate court.

RULE 13. DEPOSIT FOR COSTS IN CIVIL CASES

(a) **On Filing Notice of Appeal.** ~~**Filing Transcript.**~~ Upon receipt of a notice of appeal in the appellate court ~~tendering the transcript to the clerk for filing~~, the appellant shall deposit with the ~~C~~clerk of the ~~C~~court of ~~A~~appeals the sum of fifty dollars ~~$50~~ as costs.

EXPLANATION: This proposal conforms to the provisions of proposed Rule 40(a)(1) that the appeal is perfected by filing of a notice of appeal in the trial court and that a copy of the notice be forwarded to the appellate court.

~~(b) Motion to Extend of to File Record. Upon filing a motion for extension of time for filing a record or to direct the clerk to file a record on appeal or for writ of error from the trial court, the movant shall deposit with the Clerk of the Court of Appeals a deposit of $5 as costs.~~

(c) - (f) [No change except paragraphs relettered as (b) - (e)]

(~~f~~g) **Other Proceedings.** Upon filing of other motions or proceedings not specifically enumerated in this rule, when no notice of appeal ~~record~~ has been filed with the clerk of the trial court, the party filing such motion or proceeding shall deposit the sum of ten dollars ~~$10~~ if in the court of appeals, or seventy-five dollars ~~$75~~ if in the Supreme Court as ~~all~~ costs in such proceedings. When a record is later filed in the same proceeding or oral argument is set, only an additional deposit of forty dollars ~~$40~~ shall be required if in the court of appeals or fifty dollars ~~$50~~ if in the Supreme Court.

(~~g~~h) [No change.]

(i) **Failure to Make Deposit.** If any fee or deposit required by this rule is not tendered when required, the appellate clerk shall notify the appellant or other moving party, and if the fee or deposit is not tendered within ten days after receiving such notification, the clerk shall refer the matter to the court for appropriate action ~~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~~.

(~~i~~j) [No change.]

(k) **Inability to Pay.** If the appellant has filed in the trial court an affidavit of inability to pay costs and has given the notice required by Rule 45(d) ~~40(a)(3)~~, and any contest of the ~~such~~ affidavit has been overruled, the appellant ~~he~~ shall be entitled without making a deposit for costs to filing of the notice of appeal and filing of ~~file~~ the record in the court of appeals, and, if the decision of the court of appeals is adverse to him, to the filing of an application for writ of error~~, without making any deposit for costs~~. In all other proceedings in which a cost deposit is required by this rule, a party unable to pay such costs may make an affidavit of his inability to do so and deliver it to the clerk of the appellate court upon filing the petition or motion. If the affidavit is filed in connection with an application for writ of error, it shall be delivered to the ~~C~~clerk of the ~~C~~court of ~~A~~appeals to be forwarded to the Supreme Court with the record for action by the Supreme Court. Contest of any such affidavit in the appellate court shall be governed by Rule 45 ~~40(a)(3)~~.

Notes and Comments

Change by 1994 amendment: This rule has been amended to conform to the amendments to Rules 40, 45, 50(d), 51(e) and 53(k).

RULES 14 - 15

[No change.]

RULE 16. COURT OF APPEALS UNABLE TO TAKE IMMEDIATE ACTION

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. Any action taken under this rule by a court other than the one in which the appeal or original proceeding is filed, or, if not filed, would have jurisdiction of it, has the same effect as if taken by the other court. After taking or denying such action, the court so acting shall, as soon as practicable, send a copy of its order and the documents presented to it, or copies of them, to the court on whose behalf the action was taken, and that court shall proceed with the matter whenever a quorum is available.

[Alternative to the last sentence: After taking or denying such action, on certification by the transferor court that it is available, the court so acting shall as soon as practicable, send it back to the transferor court for any additional action.]

EXPLANATION: The alternative to the last sentence is based on the discussion in the Supreme Court Advisory Committee meeting of September 16, 1994.

RULE 18. DUTIES OF APPELLATE COURT CLERK

(a) **Docketing the Case and Monitoring the Record.** The ~~C~~clerk of the ~~C~~court of ~~A~~appeals shall have the responsibility for docketing the appeal and monitoring the filing of the record in accordance with Rule ~~57~~ 56(a). The clerk shall put the docket number of athe case on each separate item (transcript, statement of facts, motion, pleading, letter, etc.) ~~that is~~ received in connection with the case, as well as putting the docket number on the envelope in which the record is stored.

(b) - (d) [No change.]

RULE 19. MOTIONS IN THE APPELLATE COURTS

(a) - (c) [No change.]

(d) **Evidence on Motions.** Motions need not be verified, except that a motion dependent on facts not ~~apparent~~ in the record ~~and not~~ or not ex officio known to the court, or not within the personal knowledge of the attorney signing the motion must be supported by affidavits or other satisfactory evidence.

(e) & (f) [No change.]

(g) **Particular Motions.**

(1) *Motions to Dismiss for Want of Jurisdiction.* 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.

(2) *Motions Relating to Informalities in the Record.* All motions relating to informalities in the manner of bringing a case into court shall be filed within thirty days after the filing of the transcript in the court of appeals; otherwise the objection shall be considered as waived, if it can be waived by a party.

(3) *Motions for Extension of Time.* All motions for extension of time shall be filed with the clerk of the appellate court in which the case is pending. All motions for extension of time shall specify the following:

(a) the court below and the date of judgment, together with the number and style of the case;

(b) in criminal cases, the offense for which the appellant was convicted and the punishment assessed;

(c) if the appeal has been perfected, the date when the appeal was perfected;

(d) the deadline for filing the item in question;

(e) the length of time requested for the extension;

(f) the number of extensions of time that have been granted previously regarding the item in question; and

(g) the facts relied upon to reasonably explain the need for an extension.

(4) *Motion for Extension of Time to File Application.* All motions for extension of time for filing an application for writ of error shall be filed in, directed to, and acted upon by the

Supreme Court. Twelve copies of the motion for extension of time shall be filed in the Supreme Court not later than fifteen days after the last date for filing an application. A copy of the motion shall also be filed at the same time in the court of appeals and the Clerk of the Supreme Court shall notify the court of appeals of the action taken on the motion by the Supreme Court. Each such motion shall specify the following:

(a) the court of appeals and the date of its judgment, together with the number and style of the case;

(b) the date upon which the last timely motion for rehearing was overruled;

(c) the deadline for filing the application; and

(d) the facts relied upon to reasonably explain the need for an extension.

(5) *Motions to Postpone Argument.* Motions made to postpone argument of the case to a future day, unless consented to by the opposite party, shall be supported by sufficient cause, unless such sufficient cause is apparent to the court.

Notes and Comments

Change by 1994 amendments: (1) Paragraph (d) has been amended to eliminate the requirement of an oath in the case of facts within the personal knowledge of the attorney. (2) Paragraph (g) incorporates the provisions of other rules concerning motions, as follows: (g)(1) from former Rule 72, (g)(2) from former Rule 71, (g)(3) from former Rule 160, (g)(4) from former Rule 73, and (g)(5) from former Rule 70.

RULE 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, shall identify the person, association, or corporation on whose behalf the brief is tendered and disclose the source of any fee paid or to be paid for preparation of the brief, and 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 the 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.

EXPLANATION: Although most amici curiae follow the practice of identifying the client on whose behalf the brief is filed, the Section Committee is of the opinion that this should be required.

Notes and Comments

Change by 1994 amendments: The rule has been amended to add the requirement to identify the person, association, or corporation on whose behalf the brief is filed.

RULE 21. RECORDING AND BROADCASTING OF COURT PROCEEDINGS

[No change.]

SECTION THREE. NEW TRIALS, ARREST OF JUDGMENT, AND NUNC PRO TUNC

PROCEEDINGS IN CRIMINAL CASES

[No change.]

SECTION FOUR. APPEALS FROM JUDGMENTS AND ORDERS OF TRIAL COURTS

RULE 40. ORDINARY APPEAL— HOW PERFECTED

(a) Appeals in Civil Cases.

~~(1) *When Security is Required.* When security for costs is required by law, the appeal is perfected when the bond, cash deposit or affidavit in lieu thereof has been filed or made, or if affidavit is contested, when the contest is overruled. The writ of error is perfected when the petition and bond or cash deposit is filed or made (when bond is required), or affidavit in lieu thereof is filed, or, if contested, when the contest is overruled.~~

~~(2) *When Security is Not Required.* When security for costs on appeal is not required by law, the appellant shall in lieu of a bond file a written notice of appeal with the clerk or judge which shall be filed within the time otherwise required for filing the bond. Oral notice or a recital in the judgment of notice does not comply with this rule. Such notice shall be sufficient if it states the number and style of the case, the court in which pending, and that appellant desires to appeal from the judgment or some designated portion thereof. Copy of the notice shall be mailed by counsel for appellant in the same manner as the mailing of copies of the appeal bond.~~

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

~~(A) When the appellant is unable to pay the cost of appeal or give security therefor, he shall be entitled to prosecute an appeal or writ of error by filing with the clerk, within the period prescribed by Rule 41, his affidavit stating that he is unable to pay the costs of appeal or any part thereof, or to give security therefor.~~

~~(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.~~

~~(C) Any interested officer of the court or party to the suit, may file a contest to the affidavit within ten days after notice thereof, whereupon the court trying the case (if in session) or (if not in session) the judge of the court or county judge of the county in which the case is pending shall set the contest for hearing, and the clerk shall give the parties notice of such setting. The contest need not be under oath.~~

~~(D) The burden of proof at the hearing of the contest shall rest upon the appellant to sustain the allegations of the affidavit.~~

~~(E) If no contest is filed in the allotted time, the allegations of the affidavit shall be taken as true. If a contest is filed, the court shall hear the same within ten days after its filing unless the court extends the time for hearing and determining the contest by a~~

~~signed written order made within the ten day period. The court shall not extend the time for more than twenty additional days after the date of the order of extension. If no ruling is made on the contest within the ten day period or within the period of time as extended by the court, the allegations of the affidavit shall be taken as true.~~

~~(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.~~

EXPLANATION: Present paragraphs (1), and (2), would be deleted and the following revision of the rule is proposed to abolish the requirement of security for costs and substitute notice of appeal. The provisions of paragraph (3) concerning affidavit of inability to give security for costs, with minor revisions, would be moved to new Rule 45.

(1) *Notice of Appeal.* The appeal is perfected when a written notice of appeal is filed with the clerk of the trial court. The clerk shall immediately forward to the appellate court designated in the notice a copy of the notice showing the date of filing.

(2) *Contents of Notice.* The notice of appeal shall state: (1) the number and style of the case in the trial court and the court in which it is pending, (2) the date of the judgment or order appealed from and that appellant desires to appeal, (3) the names of all appellants filing the notice, (4) the court to which the appeal is taken, and (5) in accelerated appeals, that the appeal is accelerated.

(3) *Signing and Service of Notice.* The notice of appeal shall be signed and served and shall contain proof of service in accordance with Rule 4.

(4) *Amendment of Notice.* The notice may be amended at any time until after filing of appellant's brief by filing an amended notice in the appellate court, subject to being stricken on motion of any party affected by the amended notice on showing of cause. The amendment may correct defects or omissions in the notice. The notice may be amended after filing of the appellant's brief only on leave of the appellate court and on such terms as the court may prescribe.

(~~5~~4) Notice of Limitation of Appeal. No attempt to limit the scope of an appeal shall be effective unless the severable portion of the judgment from which the appeal is taken is designated in a notice expressly entitled "Notice of Limitation of Appeal" served on all other parties to the trial court's final judgment within fifteen days after judgment is signed, or if a motion for new trial, a motion to modify the judgment, a motion to reinstate filed pursuant to Civil Procedure Rule 165a, or a request for findings of fact is filed by any party, within seventy-five days after the judgment is signed.

EXPLANATION: This requirement will avoid overlooking a limitation of the appeal contained in some other filing.

(~~6~~5) Judgment Not Suspended by Appeal. Except as provided in Rule 43, the filing of a notice of appeal ~~bond or the making of a deposit or affidavit~~ does not have the effect of suspending enforcement of the judgment. Unless a supersedeas bond or deposit is made as provided in Rule 47, execution may issue thereon as if no appeal ~~or writ of error~~ had been taken.

(b) Appeals in Criminal Cases. [No Change.]

Notes and Comments

Change by 1994 amendments. (1) Paragraph (a) has been rewritten to replace the requirement of a bond or other security to perfect the appeal with a notice of appeal. (2) The provision for filing an affidavit to secure costs on appeal have been transferred to new Rule 45. (3) The contents of the notice of appeal are prescribed. (4) Amendment of the notice to correct defects and omissions is allowed. (5) A notice of limitation of the appeal must be so titled.

RULE 41. ~~ORDINARY~~ APPEAL--WHEN PERFECTED

(a) Appeals in Civil Cases.

(1) *Time to Perfect Appeal.* The notice of 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, motion to modify the judgment, motion to reinstate filed pursuant to Civil Procedure Rule 165a, or a request for findings of fact has been filed by any party ~~or if any party has timely filed a request for findings of fact and conclusions of law~~ in a case tried without a jury. ~~If a deposit of cash is made in lieu of bond, the same shall be made within the same period.~~

EXPLANATION: This amendment is proposed to conform this rule to Rule 329b(g) of the Texas Rules of Civil Procedure and also to replace the provisions concerning security for costs with the notice of appeal provided in Rule 40.

(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.~~

(b) Appeals in Criminal Cases.

(1) *Time to Perfect Appeal.* Appeal is perfected when notice of appeal is filed within thirty (fifteen by the state) days after the day sentence is imposed or suspended in open court or the day an appealable order is signed by the trial judge; except, if a motion for new trial is timely filed, notice of appeal shall be filed within ninety days of the day sentence is imposed or suspended in open court.

EXPLANATION: This draft follows the second version of paragraph (1) adopted by the Court of Criminal Appeals by order effective July 1, 1989. The earlier version, which still appears in the published rules, is identical except that it does not include the provision concerning appeals by the state. In the opinion of the Committee, the earlier version should be treated as amended by this later version.

(2) *Extension of Time.* [No change.]

(c) Prematurely Filed Documents. [No change.]

Notes and Comments

Change by 1994 amendments: (1) Notice of appeal is substituted for bond or other security as method of perfecting appealing civil cases. (2) The reference to a motion to modify conforms this rule to Rule 329(g) of the Texas Rules of Civil Procedure. (3) The two versions of paragraph (a)(1) have been combined.

RULE 42. ACCELERATED APPEALS IN CIVIL CASES

(a) Mandatory Acceleration.

(1) & (2) [No Change.]

(3) In all accelerated appeals from interlocutory orders and in quo warranto proceedings, the notice of appeal, ~~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 or as extended in accordance with Rule 41(a)(2). 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.~~

(b) & (c) [No Change.]

Notes and Comments

Change by 1994 amendment: The first sentence was amended to resolve a conflict in the cases regarding the availability of a motion for extension in accelerated appeals. The other amendments extend abolition of the cost bond to perfection of interlocutory appeals.

RULE 43.

[No change.]

RULE 44. APPEALS IN HABEAS CORPUS AND BAIL; CRIMINAL CASES

~~(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.~~

(a) Notice of appeal in habeas corpus and bail proceedings shall be given in writing, filed with the clerk of the trial court, within ten days after the judgment or order is entered by the trial court, either in writing or in open court. The transcript and statement of facts, if requested by the applicant or the state,

shall be filed in the appellate court within fifteen days after notice of appeal is filed. The applicant's brief shall be filed within 10 days after the record is filed and the state's brief shall be filed within 10 days after the applicant's brief is filed. The appellate court may shorten or extend the time for filing the record or the briefs upon written motion of a party setting out a reasonable explanation for the need for such action.

(b) - (g) [No change.]

~~**RULE 45. APPEAL BY WRIT OF ERROR IN CIVIL CASES TO COURT OF APPEALS**~~

~~A party may appeal a final judgment to the court of appeals by petition for writ of error by complying with the requirements set forth below.~~

~~**(a) Filing Petition.** The party desiring to sue out a writ of error shall file with the clerk of the court in which the judgment was rendered a written petition signed by him or by his attorney, and addressed to the clerk.~~

~~**(b) No Participating Party at Trial.** No party who participates either in person or by his attorney in the actual trial of the case in the trial court shall be entitled to review by the court of appeals through means of writ of error.~~

~~**(c) Requisites of Petition.** The petition shall state the names and residences of the parties adversely interested, shall describe the judgment with sufficient certainty to identify it and shall state that the appellant desires to remove the same to the court of appeals for revision and correction.~~

~~**(d) Time for Filing.** The writ of error, in cases where the same is allowed, may be sued out at any time within six months after the final judgment is signed.~~

~~**(e) Cost Bond or Substitute.** At the time of filing the petition, or within six months provided by paragraph (d), the appellant shall file with the clerk an appeal bond, cash deposit in lieu of bond, affidavit of inability to pay costs, or a notice of appeal if no bond is required, as provided by these rules for appeals.~~

~~**(f) Notice.** When the petition for writ of error and cost bond, or the clerk's certificate showing cash deposit in lieu of bond, or affidavit of inability to pay costs, or the notice of appeal, if permitted, is filed, the clerk shall notify the parties by mailing a copy of the petition and bond, or the substitute for the bond to all parties to the judgment other than the party or parties filing the petition for writ of error. The failure of the clerk to notify the parties shall not affect the validity of the appeal.~~

~~**(g) Recipients and Sufficiency of Notice.** The notification of a party shall be given by mailing copies of the instruments to the attorney of record or, if the party is not represented by an attorney, then to the party at his last known address. Such notification is sufficient notwithstanding the death of the party or his attorney prior to the giving of the notification. The clerk shall note on the file docket the names of the parties to whom he mails the copies, with the date of mailing.~~

~~**(h) Perfection.** The writ of error is perfected when the petition and bond or cash deposit in lieu of bond is filed or made (when security is required), or affidavit of inability to pay is filed or a contest is overruled, or a notice of appeal, if permitted, is filed.~~

EXPLANATION: This rule is repealed. Provisions for writ of error in §§51.012 and 51.013 of the Government Code should be listed by the Supreme Court as repealed under the Rule-Making Act. Proposed new Rule 45 follows.

RULE 45. WHEN PARTY IS UNABLE TO PAY COSTS

(a) When the appellant is unable to pay the cost of appeal, including the cost of preparing the record, ~~or give security therefor,~~ he or she shall be entitled to preparation and filing of the record without payment and to prosecute the ~~an~~ appeal without paying the filing fee by filing with the clerk of the trial court, within the time prescribed by Rule 41, an affidavit complying with paragraph (b) of this rule ~~stating that the appellant is unable to pay the costs of appeal or any part thereof or to give security therefor.~~

(b) Contents of Affidavit The affidavit shall contain complete information as to the party's identity, nature and amount of governmental entitlement income, nature and amount of employment income, other income (interest, dividends, etc.), spouse's income if available to the party, real and personal property owned (other than homestead), cash and amounts on deposit subject to withdrawal, dependents, debts, and monthly expenses. The affidavit shall contain the following statements: "I am unable to pay the court costs. I verify that the statements in this affidavit are true and correct." The affidavit shall be sworn before a notary public or other officer authorized to administer oaths.

(c) Attorney's Certificate. If the party is represented by an attorney providing free legal services, without contigency, because of the party's indigency, the attorney may file a certificate to that effect to assist the court in understanding the financial condition of the party.

(~~d~~b) Notice. 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.

(~~e~~c) Contest. Any interested officer of the court or party to the suit, may file a contest to the affidavit within ten days after notice thereof, whereupon the court trying the case (if in session) or (if not in session) the judge of the court or county judge of the county in which the case is pending shall set the contest for hearing, and the clerk shall give the parties notice of such setting. The contest need not be under oath.

EXPLANATION: Although the rule in its present form, Rule 40 (a)(3), does not require the contest to be under oath, there is confusion on this point. The Committee's investigation reveals that clerks and court reporters routinely file contests in practically every case in which an affidavit of inability is filed and that these contests are usually under oath. Apparently, therefore, the requirement of an oath has little effect in deterring unnecessary contests and may as well be expressly eliminated.

(~~f~~d) The burden of proof at the hearing of the contest shall rest upon the appellant to sustain the allegations of the affidavit.

(~~g~~e) If no contest is filed in the allotted time, the allegations of the affidavit shall be taken as true. If a contest is filed, the court shall hear the same within ten days after its filing unless the court extends the time for hearing and determining the contest by a signed written order made within the ten day period. The court shall not extend the time for more than twenty additional days after the date of the order of extension. If no written order ~~ruling~~ is made on the contest within the ten day period or within the period of time as extended by the court, the allegations of the affidavit shall be taken as true.

(hf) 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.

NOTE TO ADVISORY COMMITTEE: This is current Rule 40(a)(3) with proposed amendment concerning verification of a contest. It is moved here because the proposed amendment to Rule 40 would not require a bond. These provisions of current Rule 40, however, must be retained to exempt a party unable to pay costs from the requirements in proposed Rules 51(c) and 53(g) concerning advance payment for the record.

Notes and Comments

Change by 1994 amendment: (1) Review by writ of error is abolished and former Rule 45 is repealed. (2) The provisions concerning inability to pay costs provided in former Rule 40(a)(3) have been inserted here because the requirement of a bond or other security for costs has been eliminated from Rule 40. (3) The provision in paragraph (c) concerning an oath to support a contest of the affidavit of inability to pay costs has been added. The only changes to current Rule 40(a)(3) are those designated above, besides moving former 40(a)(3) to this rule.

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

~~(a) Cost Bond. Unless excused by law, the appellant shall execute a bond payable to the appellee in the sum of $1000 unless the court fixes a different amount upon its own motion or motion of either party or any interested officer of the court. If the bond is filed in the amount of $1000, no approval by the court is necessary. The bond on appeal shall have sufficient surety and shall be conditioned that appellant shall prosecute his appeal or writ of error with effect and shall pay all costs which have accrued in the trial court and the cost of the statement of facts and transcript. Each surety shall give his post office address. Appellant may make the bond payable to the clerk instead of the appellee, and same shall inure to the use and benefit of the appellee and the officers of the court, and shall have the same force and effect as if it were payable to the appellee.~~

~~(b) Deposit. In lieu of a bond, appellant may make a deposit with the clerk pursuant to Rule 18 in the amount of $1,000, and in that event the clerk shall file among the papers his certificate showing that the deposit has been made and copy same in the transcript, and this shall have the force and effect of an appeal bond.~~

~~(c) Increase or Decrease in Amount. Upon the court's own motion or motion of any party or any interested officer of the court, the court may increase or decrease the amount of the bond or deposit required. The trial court's power to increase or decrease the amount shall continue for thirty days after the bond or certificate is filed, but no order increasing the amount shall affect perfecting of the appeal or the jurisdiction of the appellate court. If a motion to increase the amount is granted, the clerk and official reporter shall have no duty to prepare the record until the appellant complies with the order. If the appellant fails to comply with such order, the appeal shall be subject to dismissal or affirmance under Rule 60. No motion to increase or decrease the amount shall be filed in the appellate court until thirty days after the bond or certificate is filed. In determining the question of whether an appellant's bond or deposit should be increased to more than the minimum amount of $1000, the court shall credit the appellant with such sums as have been paid by appellant on the costs to the clerk of the trial court or to the court reporter.~~

~~(d) Notice of Filing. Notification of the filing of the bond or certificate of deposit shall promptly be given by each appellant by serving a copy thereof on all parties in the trial court together with notice of the date on which the appeal bond or certificate was filed. Failure to so serve 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. 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.~~

~~(f) Amendment; New Appeal Bond or Deposit. On motion to dismiss an appeal or writ of error for a defect of substance or form in any bond or deposit given as security for costs, the appellate court may allow the filing of a new bond or the making of a new deposit in the trial court on such terms as the appellate court may prescribe. A certified copy of the new bond or certificate of deposit shall be filed in the appellate court.~~

Notes and Comments

This rule is repealed because of abolition of the security requirement in Rule 40(a).

RULE 46. [Reserved]

RULE 47. SUSPENSION OF ENFORCEMENT OF JUDGMENT PENDING APPEAL IN CIVIL CASES

[No change.]

RULE 48. DEPOSIT IN LIEU OF BOND

[No change.]

RULE 49. APPELLATE REVIEW OF SECURITY IN CIVIL CASES

(a) **Sufficiency.** The sufficiency of a ~~cost or~~ supersedeas bond or deposit or the sureties thereon or of any other bond or deposit under Rule 47 shall be reviewable by the appellate court for insufficiency of the amount or of the sureties or the securities deposited, whether arising from initial insufficiency or any subsequent condition which may arise affecting the sufficiency of the bond or deposit. The court in which the appeal is pending shall, upon motion showing such insufficiency, require an additional bond or deposit to be filed and approved by the clerk of the trial court and a certified copy to be filed in the appellate court.

(b) [No change.]

(c) **Alterations in Security.** If upon its review, the appellate court requires additional security for suspension of enforcement of the judgment, enforcement of the judgment shall be suspended for twenty days after the order of the court of appeals is served. If the judgment debtor fails to comply with the order within that period, the clerk shall notify the trial court that execution may be issued on the judgment. The additional security shall not release the security previously posted or alternative security arrangements made.

~~If the clerk finds that the original supersedeas bond or deposit is insufficient to secure the costs, he shall notify appellant of such insufficiency. If a judgment debtor fails, within twenty days after such notice, to file a new bond or make a new deposit in the trial court sufficient to secure payment of the costs and to file a certified copy of the bond or certificate of deposit in the appellate court, the appeal or writ of error shall be dismissed. The additional security shall not release the liability of the surety on the original supersedeas bond.~~

Notes and Comments.

Change by 1994 amendments: The references to security for costs have been deleted.

RULE 50. RECORD ON APPEAL

(a) **Contents.** The record on appeal shall consist of all papers on file in the trial court, including those contained in the a transcript and, where necessary to the appeal, a statement of facts.

EXPLANATION: The record on appeal would consist of all papers filed in the trial court, but only those specified in Rule 51(a) and those designated by the parties would be included in the transcript, as provided in Rule 51. Any other papers designated by any party or by the trial or appellate court would be certified in a supplemental transcript and transferred to the appellate court by the clerk of the trial court on informal request of any party or of the trial or the appellate court without the necessity of a motion for leave, as provided by Rule 55 Thus no presumption would be needed concerning the contents of papers not included in the transcript.

(b) [No change.]

(c) **Agreed Statement.** The parties may agree upon a brief statement of the case and of the facts proven as will enable the appellate court to determine whether there is error in the judgment. Such statement shall be ~~copied into~~ included in the transcript in lieu of the proceedings themselves.

(d) **Burden on Appellant.** The burden is on the appellant, or other party seeking review, to ~~see that a sufficient record is presented~~ designate a record sufficient to show error requiring reversal.

(e) *No change unless the SCAC adopts provisions for electronic statement of facts, in which case the following is recommended:*

(e) **Lost or Destroyed Record.** When the record or any portion thereof is lost or destroyed, copies ~~it~~ may be substituted in the trial court and when so substituted the record may be prepared and transmitted to the appellate court as in other cases. If the appellant has made a timely request for a statement of facts, but a significant portion of the court reporter's notes and records have been lost or destroyed without the appellant's fault or if the proceedings were electronically recorded and the recording, or a significant portion thereof, have been lost or destroyed, or a significant portion of the proceedings are inaudible without appellant's fault, and the parties cannot agree on a statement of facts, the appellant may be is entitled to a new trial unless the parties agree on a statement of facts.

(f) [No change.]

Notes and Comments

Change by 1994 amendment: (1) Paragraph (a) and (c) are amended to embody the concept that all papers in the trial court are part of the record on appeal and accessible as needed, though only those listed in

Rule 51(a) and designated by the parties need be sent up in the transcript, original and as supplemented. (2) Paragraph (d) is amended to conform to the concept of transferring to the clerk and reporter of the trial court responsibility for filing the record, as provided in the amendments to Rules 51(c) and 53(k).

RULE 51. THE TRANSCRIPT ON APPEAL

(a) Contents. Unless otherwise designated by the parties in accordance with Rule 50, the transcript on appeal shall include copies of the following: in civil cases, the ~~live pleadings upon which the trial was held~~ last petition and answer and any supplements thereto filed by each party; in criminal cases, copies of the indictment or information, any special pleas and motions of the defendant which were presented to the court and overruled, and any written waivers; the court's docket sheet; the charge of the court and the verdict of the jury, or the court's findings of fact and conclusions of law; the court's judgment or other order appealed from; any motions for new trial, motion to modify the judgment, request for findings of fact and conclusions of law, or motion to reinstate filed pursuant to Civil Procedure Rule 165a, and any ~~the~~ order of the court thereon; any notice of appeal; ~~any appeal bond, affidavit in lieu of bond or clerk's certificate of a deposit in lieu of bond;~~ any notice of limitation of appeal in civil cases made pursuant to Rule 40; any formal bills of exception provided for in Rule 52; in civil cases, a certified bill of costs, including the cost of the transcript ~~and the statement of facts (if any)~~, showing any credits for payments made; any designation of matters to be included in the transcript pursuant to paragraph (b) of this rule and any filed paper listed in such a designation ~~and, subject to the provisions of paragraph (b) of this rule, any filed paper any party may designate as material.~~ The clerk may consult with the attorneys for the parties concerning the pleadings to be included.

> ***EXPLANATION: (1) A motion to modify the judgment should be included because, like a motion for new trial, it extends the appellate timetable. (2) Since the notice of filing of the appeal, rather than the bond, will give the names and addresses of parties to the trial court's judgment not named as parties to the appeal, it should be available to the clerk of the appellate court.***

(b) Written Designation. At or before the time prescribed for perfecting the appeal, any party may file with the clerk a written designation specifying matter for inclusion in the transcript; the designation must be specific and the clerk shall disregard any general designation such as one for "all papers filed in the cause." The party making the designation shall serve a copy of the designation on all other parties. Failure to timely make the designation provided for in this paragraph shall not be grounds for refusing to file a transcript or supplemental transcript tendered within the time provided by Rule 54(a); however, if the designation specifying such matter is not timely filed, the failure of the clerk to include designated matter will not be grounds for complaint on appeal. In civil cases, if any party requests more of the proceedings than necessary to be included in the transcript, that party may be required by the appellate court to pay the costs of the unnecessary portions, regardless of the outcome of the appeal.

(c) Duty of Clerk. Upon perfection of the appeal, and payment or arrangement to pay the fee, the clerk of the trial court shall prepare the transcript under signature of the clerk ~~his hand~~ and the seal of the court and immediately transmit it ~~the transcript~~ to the appellate court designated by the appellant for filing. 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 of the trial court for use by the parties with permission of the court. The trial court clerk and the appellate court, rather than the parties, have responsibility to see that the transcript is prepared and filed.

(d) Original Papers ~~Exhibits~~. When the trial court is of the opinion that original papers ~~or exhibits~~ should be inspected by the appellate court or sent to the appellate court in lieu of copies, it may make such order

therefor and for the safekeeping, transportation, and return thereof as it deems proper. The order shall contain a list of such original papers ~~exhibits~~ in numerical order, with a brief identifying description of each, and~~, so far as practicable,~~ all such papers ~~exhibits~~ shall be arranged in the order listed and firmly bound together. The appellate court on its own initiative may direct the clerk of the trial court ~~below~~ to send to it any original paper ~~or exhibit~~ for its inspection.

Notes and Comments

Change by 1994 amendments: (1) Responsibility is imposed on the trial court clerk rather than the appellant to file the transcript in the appellate court. (2) Requiring the appellant to pay or make arrangements to pay the clerk before the clerk is required to prepare the transcript is intended to change the rule announced in *Click v. Tyra*, ___ S.W.2d ___ (Tex. 1994). (3) The provision concerning original exhibits is moved to Rule 53.

RULE 52 PRESERVATION OF APPELLATE COMPLAINTS

In order to present a complaint for appeal, a party must present a record showing compliance with the Rules of Civil Procedure, Rules of Civil Evidence, Rules of Criminal Evidence, or Code of Criminal Procedure and any relevant statute.

~~(a) General Rule. In order to preserve a complaint for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling he desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion. If the trial judge refuses to rule, an objection to the court's refusal to rule is sufficient to preserve the complaint. It is not necessary to formally except to rulings or orders of the trial court.~~

~~(b) Informal Bills of Exception and Offers of Proof. When the court excludes evidence, the party offering same shall as soon as practicable, but before the court's charge is read to the jury, be allowed to make, in the absence of the jury, an offer of proof in the form of a concise statement. The court may, or at the request of a party shall, direct the making of the offer in question and answer form. A transcription of the reporter's notes showing the offer, whether by concise statement or question and answer, showing the objections made, and showing the ruling thereon, when included in the record certified by the reporter, shall establish the nature of the evidence, the objections and the ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made and the ruling. No further offer need be made. No formal bills of exception shall be needed to authorize appellate review of the question whether the court erred in excluding the evidence. When the court hears objections to offered evidence out of the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections.~~

~~(c) Formal Bills of Exception. The preparation and filing of formal bills of exception shall be governed by the following rules:~~

~~(1) No particular form of words shall be required in a bill of exception, but the objection to the ruling or action of the court shall be stated with such circumstances, or so much of the evidence as may be necessary to explain, and no more, and the whole as briefly as possible.~~

~~(2) When the statement of facts contains all the evidence requisite to explain the bill of exception, evidence need not be set out in the bill; but it shall be sufficient to refer to the same as it appears in the statement of facts.~~

(3) The ruling of the court in giving or qualifying instructions to the jury shall be regarded as approved unless a proper objection is made.

(4) Formal bills of exception shall be presented to the judge for his allowance and signature.

(5) The court shall submit such bill to the adverse party or his counsel, if in attendance on the court, and if found to be correct, the judge shall sign it without delay and file it with the clerk.

(6) If the judge finds such bill incorrect, he shall suggest to the party or his counsel such corrections as he deems necessary therein, and if they are agreed to he shall make such corrections, sign the bill and file it with the clerk.

(7) Should the party not agree to such corrections, the judge shall return the bill to him with his refusal endorsed thereon, and shall prepare, sign and file with the clerk such bill of exception as will, in his opinion, present the ruling of the court as it actually occurred.

(8) Should the party be dissatisfied with said bill filed by the judge, he may, upon procuring the signatures of three respectable bystanders, citizens of this State, attesting to the correctness of the bill as presented by him, have the same filed as part of the record of the cause; and the truth of the matter in reference thereto may be controverted and maintained by affidavits, not exceeding five in number on each side, to be filed with the papers of the cause, within ten days after the filing of said bill and to be considered as a part of the record relating thereto. On appeal the truth of such bill of exceptions shall be determined from such affidavits.

(9) In the event a formal bill of exceptions is filed and there is a conflict between its provisions and the provisions of the statement of facts, the bill of exceptions shall control.

(10) Anything occurring in open court or in chambers that is reported and so certified by the court reporter may be included in the statement of facts rather than in a formal bill of exception; provided that in a civil case the party requesting that all or part of the jury arguments or the voir dire examination of the jury panel be included in the statement of facts shall pay the cost thereof, which cost shall be separately listed in the certificate of costs prepared by the clerk of the trial court, and the same may be taxed in whole or in part by the appellate court against any party to the appeal.

(11) Formal bills of exception shall be filed in the trial court within sixty days after the judgment is signed in a civil case or within sixty days after the sentence is pronounced or suspended in open court in a criminal case, or if a timely motion for new trial has been filed formal bills of exception shall be filed within ninety days after the judgment is signed in a civil case or within ninety days after sentence is pronounced or suspended in open court in a criminal case. When formal bills of exception are filed they may be included in the transcript or in a supplemental transcript.

(d) Necessity for Motion for New Trial in Civil Cases. A point in a motion for new trial is prerequisite to appellate complaint in those instances provided in Rule 324(b) of the Texas Rules of Civil Procedure. A party desiring to complain on appeal in a nonjury case that the evidence was legally or factually insufficient to support a finding of fact, that a finding of fact was established as a matter of law or was against the overwhelming weight of the evidence, or of the inadequacy or excessiveness of the damages found by the court shall not be required to comply with paragraph (a) of this rule.

RULE 53. THE STATEMENT OF FACTS ON APPEAL

(a) - (c) [No change.]

(d) **Partial Statement.** If appellant requests or prepares a partial statement of facts, the appellant ~~he~~ shall include in the ~~his~~ request or proposal a statement of the points to be relied on and shall thereafter be limited to such points. If such statement is filed, there shall be a presumption on appeal that nothing omitted from the record is relevant to any of the points specified or to the disposition of the appeal. Any other party may designate additional portions of the evidence to be included in the statement of facts. Those additional portions requested by another party must be included in the statement of facts at appellant's cost unless the trial court orders that all or part of the additional portion designated was unnecessary, in which event the trial court may order the other party to pay the costs of the unnecessary portions. Nothing herein shall be construed to limit or impair the power of the appellate court to tax the costs otherwise. The partial record so designated by the parties shall be considered the entire record for the purpose of reviewing the points so stated. The same presumption shall apply with respect to any point included in the request that complains of the legal or factual insufficiency of the evidence to support any specific fact finding identified in that point, except that in a criminal case, if the statement identifies insufficiency of the evidence to support a finding of guilt as a point to be relied on, the record shall include all the evidence presented to the jury at the guilt phase of the trial or that would have been so presented if a jury had not been waived.

EXPLANATION: This amendment is prompted by the recent decisions that the presumption of completeness under this rule cannot be applied to points requiring review of the "entire record," including legal and factual sufficiency points and points requiring the appellant to present the entire statement of facts to discharge the burden to show harmful error. Since the rule has no exception for such points, the Committee is of the opinion that the rule should be clarified. Notwithstanding the per curiam opinion in Schafer v. Conner, 813 S.W.2d 154, 155 (Tex. 1991) the Section Committee is of the opinion that the presumption should apply to such insufficiency points if the fact finding complained of is specifically identified so that the appellee can request inclusion of additional pertinent testimony, if any. Paragraph (b) of this rule permits such a request within ten days of service of a copy of the appellant's request. If counsel for the appellee does not realize the need for additional evidence until he or she reads the appellant's brief, the appellate court has a mandatory duty under Rule 55(b) to permit a supplemental record to be filed.

The Section Committee believes that this presumption is an important means to reduce the cost of appeals, and, therefore, it should not be weakened in this respect.

For criminal cases, since a majority of the Court of Criminal Appeals has held that it has the responsibility to review "the entire record of the trial before the fact finder" in determining sufficiency of the evidence to support a finding of guilt, an express exception is recommended. See O'Neill v. State, 826 S.W.2d 172, 173 (Tex. Crim. App. 1992).

(e) **Unnecessary Portions.** In civil cases if any ~~either~~ party requires more of the testimony or other evidence ~~proceedings~~ than ~~is~~ necessary to be included in the statement of facts, that party may ~~he shall~~ be required by the appellate court to pay the costs of the unnecessary portions ~~thereof~~, regardless of the outcome of the appeal.

(f) [No change.]

(g) **Reporter's Fees.** Except as provided in paragraph (d) of this rule, the appellant shall either pay or make arrangements to pay the official court reporter his or her fee on completion of the statement of facts. The official court reporter shall include in his or her certification the amount of the~~his~~ charges for preparation of the statement of facts. The Supreme Court and the Court of Criminal Appeals may from time to time make an order providing the fees which court reporters may charge.

If the SCAC adopts rules for electronic court reporting, the following additional changes are recommended:

(g) **Reporter's or Recorder's Fees.** Except as provided in paragraph (d) of this rule, the appellant shall either pay or make arrangements to pay the official court reporter or recorder his or her fee on completion of the statement of facts. The official court reporter or recorder shall include in his or her certification the amount of the ~~his~~ charges for preparation of the statement of facts. The Supreme Court and the Court of Criminal Appeals may from time to time make an order providing the fees which court reporters and recorders may charge.

(h) - (i) [No change.]

If the SCAC adopts provisions for electronic court reporting, the following paragraph (j) is suggested. The remaining paragraphs would also need to be renumbered.

(j) **Electronic Recording.** The statement of facts on appeal from any proceeding that has been recorded electronically in accordance with Rule 264(b) of the Texas Rules of Civil Procedure shall be:

(1) A standard recording, labeled to reflect clearly the contents, and numbered if more than one recording unit is required, certified by the court recorder to be a clear and accurate duplicate of the original recording of the entire proceeding;

(2) A copy of the typewritten and original logs filed in the case certified by the court recorder; and

(3) All exhibits, arranged in numerical order and a brief description of each.

(j) ~~Free~~ **Statement of Facts Without Prepayment.**

(1) *Civil Cases.* In any case where the appellant has filed the affidavit required by Rule 45 to appeal his case without paying the fees of the clerk and official court reporter ~~bond~~, and no contest is filed, or any contest is overruled, the court or judge upon application of appellant shall order the official reporter to prepare a statement of facts, and to deliver it to the appellate court ~~appellant~~, but the court reporter shall receive no pay for same.

If the SCAC adopts provisions for electronic court reporting, the following version of paragraph (1) is suggested:

(1) *Civil Cases.* In any case where the appellant has filed the affidavit required by Rule 45 to appeal his case without paying the fees of the clerk and official court reporter *or recorder* ~~bond~~, and no contest is filed, or any contest is overruled, the court or judge upon application of appellant shall order the official reporter *or recorder* to prepare a statement of facts, and to deliver it to the appellate court ~~appellant~~, but the court reporter *or recorder* shall receive no pay for same.

(2) *Criminal Cases.* Within the time prescribed for perfecting the appeal an appellant unable to pay for the statement of facts may, by motion and affidavit, move the trial court to have the statement of facts furnished without charge. After hearing the motion, if the court finds the appellant is unable to pay for or give security for the statement of facts, the court shall order the reporter to furnish the statement of facts, and when the court certifies that the statement of facts has been furnished to the appellant, the court reporter shall be paid from the general funds of the county, by the county in which the offense was committed the sum set by the trial judge.

(k) **Duty of ~~Appellant~~ Reporter to File.** It is the official court reporter's ~~appellant's~~ duty, on payment or arrangement to pay the fee, to cause the statement of facts to be filed with the ~~C~~clerk of the ~~C~~court of ~~A~~appeals.

If the SCAC adopts provisions for electronic court reporting, the following version of paragraph (k) is recommended:

(k) **Duty of ~~Appellant~~ Reporter *or Recorder* to File.** It is the official court reporter's *or recorder's* ~~appellant's~~ duty, on payment or arrangement to pay the fee, to cause the statement of facts to be filed with the ~~C~~clerk of the ~~C~~court of ~~A~~appeals.

(l) **Original Exhibits.** When the trial court is of the opinion that original exhibits should be inspected by the appellate court or sent to the appellate court in lieu of copies, it may make such order therefor and for the safekeeping, transportation, and return thereof as it deems proper. The order shall contain a list of such original exhibits in numerical order, with a brief identifying description of each, and, so far as practicable, all such exhibits shall be arranged in the order listed and firmly bound together. The appellate court on its own initiative may direct the official reporter of the trial court to send to it any original exhibit for its inspection. If an exhibit is in the custody of a person other than the clerk of the trial court, the trial court or the appellate court may order the exhibit to be delivered to the appellate court.

(~~l~~m) **Duplicate Statement in Criminal Cases.** [No change.]

(~~m~~n) **When No Statement of Facts Filed in Appeals of Criminal Cases.** [No change.]

Notes and Comments

Change by 1994 amendments: (1) Paragraph (d) has been clarified to apply the presumption of completeness of the record to points complaining of legal and factual insufficiency of evidence to support fact findings and to other cases where, notwithstanding the presumption, the appellate courts have held that a partial record was insufficient to show harmful error, and the exception recognized by the Court of Criminal Appeals in criminal cases has been expressly stated. (2) Paragraph (g) has been amended to require the appellant to pay the reporter's fee before filing of the statement of facts. (3) Paragraph (j)(1) has been amended to delete the reference to the bond. (4) Paragraphs (j)(1) and (k) have been amended to transfer responsibility for filing the statement of facts from the appellant to the reporter. (5) The provisions of paragraph (*l*) have been moved here from Rule 51(d).

RULE 54. TIME TO FILE RECORD

[This rule is repealed]

~~(a) In Civil Cases -- Ordinary Timetable. The transcript and statement of facts, if any, shall be filed in the appellate court within sixty days after the judgment is signed, or, if a timely motion for new trial or to modify the judgment has been filed by any party, or if any party has timely filed a request for findings of fact and conclusions of law in a case tried without a jury, within one hundred twenty days after the judgment is signed. If a writ of error has been perfected to the court of appeals the record shall be filed within sixty days after perfection of the writ of error. Failure to file either the transcript or the statement of facts within such time shall not affect the jurisdiction of the court, but shall be ground for dismissing the appeal, affirming the judgment appealed from, disregarding materials filed, or applying presumptions against the appellant, either on appeal or on the court's own motion, as the court shall determine. The court has authority to consider all timely~~

~~filed transcripts and statements of facts, but shall have no authority to consider a late filed transcript or statement of facts, except as permitted by this rule.~~

~~(b) In Criminal Cases -- Ordinary Timetable. The transcript and statement of facts shall be filed in the appellate court within sixty days after the day sentence is imposed or suspended in open court or the order appealed from has been signed, if a motion for new trial is not filed. If a timely motion for new trial is filed, the transcript and statement of facts shall be filed within one hundred twenty days after the day sentence is imposed or suspended in open court or the order appealed from has been signed.~~

~~(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).~~

EXPLANATION: Since the burden has been transfered to the trial court clerk and reporter to file the record and the appellate clerk has the duty to monitor the filing of the record under Rule 56, the time requirements contained in this rule are no longer necessary.

RULE 55. AMENDMENT OF THE RECORD

~~(a) Inaccuracies on the Statement of Facts. Any inaccuracies may be corrected by agreement of the parties; should any dispute arise, after filing in the appellate court as to whether the statement of facts accurately discloses what occurred in the trial court, the appellate court shall submit the matter to the trial court, which shall, after notice to the parties and hearing, settle the dispute and make the statement of facts conform to what occurred in the trial court.~~

~~(b) Before Submission. If anything material to either party is omitted from the transcript or statement of facts, before submission the parties by stipulation, or the trial court, upon notice and hearing, either before or after the record has been transmitted to the appellate court, or the appellate court, on a proper suggestion or on its own initiative, may direct a supplemental record to be certified and transmitted by the clerk of the trial court or the official court reporter supplying such omitted matter. The appellate court shall permit it to be filed unless the supplementation will unreasonably delay disposition of the appeal.~~

~~(c) Defects Appearing At or After Submission. Should it be apparent during the submission or afterwards that the case has not been properly prepared as shown in the transcript, or properly presented in the brief or briefs, or that the law and authorities have not been properly cited, which will enable the court to decide the case, it may decline to receive the submission; or, if received, may set it aside and make such orders as may be necessary to secure a more satisfactory submission of the case; or should it appear to the court, after the submission of the cause, that the statement of facts has been prepared in violation of the rules, the court may require the appellant to furnish a proper statement of facts, and upon his failure to do so may disregard it.~~

(a) **Omissions from the Transcript.** If anything material is omitted from the transcript, the trial court, the appellate court, or any party may by letter direct the clerk of the trial court to prepare, certify, and file in the appellate court a supplemental transcript containing the omitted papers.

(b) **Inaccuracies in the Transcript.** If any defect or inaccuracies appear in the transcript, the clerk of the appellate court shall return it to the clerk of the trial court, specifying the defect or inaccuracy and instructing the clerk to correct the transcript and refile it in the appellate court.

(c) **Inaccuracies in the Statement of Facts.** Any inaccuracies in the statement of facts may be corrected by agreement of the parties; should any dispute arise after filing in the appellate court as to whether the statement of facts accurately discloses what occurred in the trial court, the appellate court shall submit the matter to the trial judge, who shall after notice to the parties and hearing, settle the dispute and make the statement of facts conform to what occurred in the trial court.

Notes and Comments

The rule has been rewritten to implement the amendments transferring responsibility for the record from the appellant to the trial court clerk and reporter and the appellate court.

~~**RULE 56. RECEIPT OF THE RECORD BY THE COURT OF APPEALS**~~

~~(a) Duty of Clerk on Receiving Transcript. The clerks of the courts of appeals shall receive the transcripts delivered and sent to them, and receipt for same is required; but they shall not be required to take a transcript out of the post office or any express office, unless the postage or charges thereon be fully paid. Upon receipt of the transcript, it shall be the duty of the clerk to examine it in order to ascertain whether or not, in case of an appeal, a proper appeal bond, notice of appeal or affidavit in lieu thereof (when bond is required) have been given; and in case of a writ of error, whether or not the petition and bond or affidavit in lieu thereof (when bond is required) appear to have been filed. If it seems to the clerk that the appeal or writ of error has not been duly perfected, the clerk shall note on the transcript the day of its reception and refer the matter to the court. If upon such reference the court shall be of the opinion that the transcript shows that the appeal or writ of error has been duly perfected, it shall order the transcript to be filed as of the date of its reception. If not, it shall cause notice of the defect to issue to the attorneys of record of the appellant, to the end that they may take steps to amend the record, if it can be done; for which a reasonable time shall be allowed. If the transcript does not show the jurisdiction of the court, and if after notice it is not amended, the appeal shall be dismissed.~~

~~If a transcript, properly endorsed (when endorsement is required), is received by the clerk within the time allowed by these rules, the clerk shall endorse his or her filing thereon, showing the date of its reception, and shall notify both appellant and the adverse party of the receipt of the transcript. If it is not properly endorsed, or an original transcript is received after the time allowed, the clerk shall, without filing it, make a memorandum upon it of the date of its reception and keep it in his or her office subject to the direction of the person who applied for it or to the disposition of the court, and shall notify the person who applied for a transcript why it has not been filed. The transcript shall not be filed until a proper showing has been made to the court for its not being properly endorsed or received in proper time, and upon this being done, the court may order it filed, if the rules have been complied with, upon such terms as may be deemed proper, having respect to the rights of the opposite party.~~

~~(b) Duty of Clerk on Receiving Statement of Facts. Upon receipt of a statement of facts, the clerk shall ascertain if it is presented within the time allowed and also if it has been properly authenticated in accordance with these rules. If the clerk finds that the statement of facts is presented in time and has been certified by the official court reporter, the clerk shall file it forthwith; otherwise, the clerk shall endorse thereon the time of the receipt of such statement of facts, hold the same subject to the order of the court of appeals, and notify the party (or the party's attorney) tendering the statement of facts of the action and state the reasons therefor.~~

RULE 56. DUTIES OF THE APPELLATE CLERK ON RECEIPT OF THE NOTICE OF APPEAL AND RECORD.

(a) **On Receiving Notice of Appeal.** On receiving a copy of the notice of appeal from the clerk of the trial court, the clerk of the appellate court shall endorse on it the time of receipt. The clerk shall send notification of receipt of the notice of appeal to the attorney in charge for all parties shown by the notice of appeal, by any proof of service of the notice, and by any docketing statement filed in accordance with Rule 57. The clerk shall also notify any other attorney designated pursuant to Rule 4(b) and any unrepresented party.

(1) **Proper and Timely Notice.** On receipt of the copy of the notice of appeal, the clerk shall docket the appeal. Each case filed in the court of appeals shall be assigned a docket number consisting of four parts separated by hyphens: (1) the number of the court of appeals district, (2) the last two digits of the year in which the case is filed, (3) the number assigned to the case, and (4) the designation "CV" for civil and "CR" for criminal cases.

(2) **Defective or Improper Notice.** If it seems to the clerk that the notice is defective or that it was not filed in time, the clerk shall notify the parties and the trial court clerk of the defect so that the defect may be remedied if it can be. If, after thirty days from such notification, no proper notice of appeal has been received, the clerk shall refer the matter to the appellate court, which shall make an appropriate order.

(b) **On Receiving the Record.** On receiving the transcript from the trial court clerk or receiving the statement of facts from the reporter, the appellate court clerk shall determine whether the transcript complies with the requirements of Rule 51 and whether the statement of facts complies with the requirements of Rule 53. If so, the clerk shall endorse on each the date of receipt, file it, and notify the parties of the filing and the date. If not, the clerk shall endorse on the transcript or statement of facts the date of receipt and return it to the trial court clerk or reporter, specifying the defects, and instructing the clerk or reporter to correct the defects and return it to the appellate court.

(c) **No Record Filed.** On expiration of ~~120~~ 90 days, or thirty days in the case of an accelerated appeal, after the date the judgment is signed without a proper transcript or statement of facts being filed, the clerk shall so notify the parties and the trial judge, trial court clerk or reporter. If, after ~~thirty~~ 10 days from such notification, no proper transcript or statement of facts is received, the clerk shall refer the matter to the appellate court, which shall make an appropriate order to avoid further delay and preserve the rights of the parties. If the trial court clerk's failure to file the transcript was the result of appellant's failure to pay the clerk's fee for the transcript and appellant has not filed an affidavit of inability to pay the costs as provided by Rule 45, the appellate court, on motion and notice, or on the court's own motion after notice to the appellant and after a reasonable opportunity to cure and failure to cure may dismiss the appeal for want of prosecution. If the transcript has been filed, but no statement of facts has been filed because the appellant has failed to request a statement of facts or designate the evidence to be included or has failed to pay the reporter's or the recorder's fee or to make satisfactory arrangements for payment, and has not filed an affidavit of inability to pay the costs as provided in Rule 45, the appellate court on motion and notice, or on the court's own motion after notice to appellant, and after a reasonable opportunity to cure and failure to cure, may consider and decide the appeal without a statement of facts.

EXPLANATION: ***Since the appellant would be relieved of responsibility to monitor the trial court and reporter concerning preparation and filing of the record, the logical responsibility should fall on the clerk of the appellate court, subject to ultimate control by that court. Consequently, the Section Committee recommends that the appeal be docketed as soon as the notice of appeal is filed and that the clerk have responsibility to monitor the filing dates, establish lines of communications with trial court clerks and reporters, handle the problems informally when possible, and, if unsuccessful, should have authority to take appropriate action, and refer the matter, when necessary for enforcement, to the appellate court, which, in any event, should bear ultimate responsibility. The Section Committee is of the opinion that this procedure, which parallels that in the federal courts, will protect litigants from errors of counsel and problems with***

clerks and reporters and will obviate motions and orders for extension of time. The clerk will, of course, rely on legal staff personnel when necessary.

Notes and Comments

Change by 1994 amendments: The rule has been rewritten to implement the amendments transferring responsibility for the record from the appellant to the trial court clerk and reporter and the appellate court and to provide for docketing the appeal on filing of the notice of appeal.

~~RULE 57. DOCKETING THE APPEAL~~

~~(a) Docket Numbers. Each case filed in a court of appeals shall be assigned a docket number that consists of four parts separated by hyphens: (1) the number of the supreme judicial district, (2) the last two digits of the year in which the case is filed, (3) the number which is assigned to the case, and (4) the designation "CV" for civil cases or "CR" for criminal cases. Each case filed in the court of appeals shall be docketed in the order of filing. A motion relating to an appeal perfected but not yet filed shall be docketed likewise and shall be assigned a number, which shall be also assigned to the appeal when filed.~~

~~(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 noted by the clerk upon the docket, opposite the name of the party for whom 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 attorney signing 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 upon request.~~

Notes and Comments

Paragraph (a) of this rule has been included in Rule 56(a) and paragraph (b) has been moved to 7(a).

RULE 57. DOCKETING STATEMENT

(a) Upon receipt of the notice of appeal, the clerk of the appellate court shall send to the appellant a docketing statement form which shall include a request for the following information:

(1) If the appellant filing the statement is represented by an attorney, the name of the appellant filing the statement and the name, address, telephone number, telecopier number, and State Bar of Texas identification number of the appellant's attorney in charge and of one other attorney to receive copies of papers, if so designated by the attorney in charge;

(2) If the appellant filing the statement is not represented by an attorney, the name, address, and telephone number of the appellant;

(3) The date the notice of appeal was filed in the trial court, and if by mail, the date of mailing;

(4) The date the judgment or other order appealed from was signed;

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

(6) The names of all other parties to the trial court's judgment, and the names, addresses, telephone number, and telecopier number of their attorneys in charge in the trial court;

(7) The name, address, and telephone number of any party to the trial court's judgment, other than appellants, not represented by an attorney, and if the address and telephone number is not known, that the appellant has made a diligent inquiry, but has not been able to discover the address and telephone number;

(8) The general nature of the suit (personal injury, breach of contract, temporary injunction, etc.);

(9) Whether the appeal should be advanced for submission or is accelerated pursuant to Rule 42 or other rules or statutes;

(10) Whether a statement of facts has been or will be requested, and if the trial was electronically recorded, that it was so recorded;

(11) Whether appellant intends to seek temporary or ancillary relief pending the appeal;

(12) The date of filing of any affidavit of inability to pay the costs of appeal, the date of notice of the affidavit, and the date of any order overruling the contest;

(13) Any other information required by the court of appeals.

(b) Within ten days after receiving the docketing statement form, the appellant shall file and serve the docketing statement.

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

(d) The docketing statement is for administrative purposes and does not affect the jurisdiction of the appellate court.

Notes and Comments

Change by 1994 amendments: New rule.

***EXPLANATION:** This rule would enable the appellate court to docket the case after filing of the notice of appeal and to take charge of the case, including preparation and filing of the record, before the transcript is filed. It would also relieve the appellate clerk of the burden of searching the transcript in order to identify the parties and their attorneys. The appellant's docketing statement may be served with the notice of appeal.*

RULE 58. PREMATURE APPEAL

[No change.]

RULE 59. VOLUNTARY DISMISSAL

(a) Civil Cases.

(1) The appellate court may finally dispose of an appeal ~~or writ of error~~ as follows:

(A) [No change.]

(B) [No change.]

(2) If no transcript has been filed, the agreement or motion shall be accompanied by certified or sworn copies of the judgment appealed from and of the appeal bond or other document perfecting or attempting to perfect the appeal ~~or writ of error~~.

(3) [No change.]

(b) Criminal Cases. [No change.]

Notes and Comments

Change by 1994 amendments: References to the writ of error procedure have been deleted in view of the repeal of former rule 45.

RULE 60. INVOLUNTARY DISMISSAL

(a) Civil Cases.

(1) If an appeal ~~or writ of error~~ is subject to dismissal for want of jurisdiction or for failure of appellant to comply with any requirements of these rules or any order of the court, the appellee may file a motion for dismissal or for affirmance, and judgment for costs on the appeal bond or for the cash deposit. If the ground of the motion is failure to file the transcript, the motion shall be supported by certified or sworn copies of the judgment and the appeal bond or other document perfecting or attempting to perfect the appeal ~~or writ of error~~.

(2) If it appears to the appellate court that an appeal ~~or writ of error~~ is subject to dismissal for want of jurisdiction or for failure to comply with any requirements of these rules or any order of the court, the court may, on its own motion, give notice to all parties that the case will be dismissed unless the appellant or any party desiring to continue the appeal ~~or writ of error~~, files with the court within ten days a response showing grounds for continuing the appeal or writ of error.

(b) Criminal Cases. [No change.]

Notes and Comments

Change by 1994 amendments: References to the writ of error procedure have been deleted in view of the repeal of former rule 45.

RULE 61. DISPOSITION OF PAPERS

WHEN APPEAL DISMISSED IN CIVIL CASES

[No change.]

SECTION FIVE. ~~MOTIONS,~~ BRIEFS, ARGUMENT, ~~AND~~ SUBMISSION, DECISION, AND REHEARING IN THE COURT OF APPEALS

~~A. MOTIONS IN THE COURTS OF APPEALS~~

~~RULE 70. MOTIONS TO POSTPONE ARGUMENT~~

~~Motions made to postpone argument of the case to a future day, unless consented to by the opposite party, shall be supported by sufficient cause, verified by affidavit, unless such sufficient cause is apparent to the court.~~

Notes and Comments

This rule has been moved to Rule 19(g)(5).

~~RULE 71. MOTIONS RELATING TO INFORMALITIES IN THE RECORD~~

~~All motions relating to informalities in the manner of bringing a case into court shall be filed within thirty days after the filing of the transcript in the court of appeals; otherwise the objection shall be considered as waived, if it can be waived by the party.~~

Notes and Comments

This rule has been moved to Rule 19(g)(2).

~~RULE 72. MOTIONS TO DISMISS FOR WANT OF JURISDICTION~~

~~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.~~

Notes and Comments

This rule has been moved to Rule 19 (g)(1).

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

~~All motions for extension of time shall be in writing and shall be filed with the Clerk of the Court of Appeals in which the case will be heard. Each such motion shall specify the following:~~

~~(a) the court below and the date of judgment, together with the number and style of the case;~~

~~(b) in criminal cases, the offense for which the appellant was convicted and the punishment assessed;~~

~~(c) when extension of time is sought for filing the record, the filing dates of any original and amended motions for new trial, together with the date when they were overruled;~~

~~(d) if the appeal has been perfected, the date when the appeal was perfected;~~

~~(e) the deadline for filing of the item in question;~~

~~(f) the length of time requested for the extension;~~

~~(g) the number of extensions of time which have been granted previously regarding the item in question;~~

~~(h) the facts relied upon to reasonably explain the need for an extension; and~~

~~(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.~~

Notes and Comments

This rule has been moved to Rule 19(g)(4).

AB. BRIEFS AND ARGUMENT IN THE COURTS OF APPEALS

RULE 74. REQUISITES OF BRIEFS

Briefs shall be brief. Briefs shall be filed with the ~~C~~clerk of the ~~C~~court of ~~A~~appeals" of the ~~correct~~ district in which the appeal is pending. In both civil and criminal cases the parties shall be designated as "Appellant" and "Appellee," ~~, and in criminal cases as "Appellant" and "Appellee".~~

EXPLANATION: No material change; repetitive language eliminated.

(a) ~~Names of All Parties to the Trial Court's Final Judgment~~ **Identity of Parties and Counsel.** A complete list of ~~the names and addresses of~~ all parties to the trial court's final judgment and the names and addresses of their counsel in the trial court, if any, shall be listed at the beginning of the appellant's brief, so that 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 that the clerk of the court of appeals may properly notify the parties to the trial court's final judgment or their counsel, if any, of the judgment and all orders of the court of appeals. The brief shall include also the address of any party not represented by an attorney, but if the address is not known, shall certify that appellant's attorney has made a diligent inquiry but has been unable to discover it, and the certificate shall give any available information, such as the probable county of residence, that might serve to identify and locate the unrepresented party. If the appellant is not represented by an attorney, the certificate shall be under oath.

EXPLANATION: (1) The Section Committee is of the opinion that the requirement to list the addresses of parties represented by counsel is burdensome and serves no purpose. Also, the appellant's counsel

should not be required to list the address of an unrepresented party if he certifies that he has made a diligent inquiry but has been unable to discover it. (2) The Section Committee is of the opinion that in order that the clerk may know who should receive copies of orders and opinions, the brief should specify the parties to the trial court's judgment not named as parties to the appeal and which of them, if any, have filed a request for copies.

(b) [No change.]

(c) [No change.]

~~(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 parenthesis 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.~~

(d) **Issues Presented.** A statement of the issues or points presented for review, expressed in the terms and circumstances of the case but without unnecessary detail, shall be stated in short and concise form and without argument or repetition. The statement of an issue or point presented will be deemed to cover every subsidiary question fairly included therein. Each issue or point should be supported by reference to the page(s) of the record where the ruling or other matter complained of is shown.

EXPLANATION: This revision of paragraph (d) is intended to relax the technicalities that have been imposed on the "point of error" practice.

(e) **Brief of Appellee or Cross-Appellee.** The brief of the appellee or cross-appellee shall respond to the issues or points raised ~~reply to the points relied upon~~ by the appellant or cross-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, the appellee may do so by including in cross-points in his or her brief. ~~his brief in regard to such matters~~

When judgment is rendered non obstante veredicto or notwithstanding the findings of a jury on one or more questions, the appellee may bring forward by cross-point any issue or point that would have vitiated the verdict or would have prevented an affirmance of the judgment had one been rendered by the trial court in harmony with the verdict, including although not limited to the point or issue that one or more of the jury's findings have insufficient support in the evidence or are against the overwhelming preponderance of the evidence as a matter of fact, and the ground that the verdict and judgment based thereon should be set aside because of improper argument of counsel.

The failure to bring forward by cross-points such issues or points as would vitiate the verdict shall be deemed a waiver thereof; provided, however, that if a cross-point is upon an issue or point which requires the taking of evidence in addition to that adduced upon the trial of the cause, it is not necessary that the evidentiary hearing be held until after the appellate court determines that the cause be remanded to consider such a cross-point.

In presenting cross-points, the appellee's brief shall follow substantially the form of the brief for appellant.

(f) **Cross-Appeal.** Unless the appeal is limited in accordance with Rule 40(a)(5), an appellee may proceed as a cross-appellant by including cross-points in his or her brief complaining of any ruling or action of the trial court as to any party to the trial court's final judgment without perfecting a separate appeal.

(gf) **Argument.** A brief of the argument may present separately or grouped the issues or the points relied upon for reversal. A summary of the entire argument may be included either after the preliminary statement or at the conclusion of the brief. The argument shall include: (1) a fair, condensed statement of the facts pertinent to such issues or 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.

(hg) **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 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, 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 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.~~

***EXPLANATION:** Present paragraphs (h), (i), and (j) would be deleted in view of inclusion of the same requirements in Rules 4(d) and (4e).*

The following is suggested if the SCAC decides to adopt rules for electronic court reporting. The paragraphs which follow would need to be renumbered.

(h) **Electronic Statement of Facts.** When an electronic statement of facts has been filed, the following rules shall apply:

(1) *Appendix.* Each party shall file with the brief one copy of an appendix containing a typewritten or printed transcription of all portions of the recorded statement of facts and one copy of all exhibits relevant to the issues raised on appeal. The appellee's appendix need not repeat any of the evidence included in the appellant's appendix. Transcriptions shall be presumed to be accurate unless objection is made. The form of the appendix and transcription shall conform to any specifications of the Supreme Court concerning the form of the statement of facts.

(2) *Presumption.* The appellate court shall presume that nothing omitted from the appendices filed by the parties is relevant to any of the issues raised or to disposition of the appeal. The appellate court has no duty to review any part of the electronic recording.

(3) *Supplemental Appendix.* The appellate court may direct a party to file a supplemental appendix containing additional portions of the recorded statement of facts and may grant a party leave to do so.

(4) *Inability to Pay.* If any party is unable to pay the cost of an appendix and files the affidavit provided by Rule 45, and any contest to the affidavit is overruled, the recorder shall transcribe or have transcribed such portions of the recorded statement of facts as the party designates and shall file it as that party's appendix.

NOTE TO COMMITTEE: When a party is unable to pay, should the entire statement of facts be transcribed?

(5) *Inaccuracies.* Any inaccuracies in transcriptions of the recorded statement of facts may be corrected by agreement of the parties. Should any dispute arise after the statement of facts or any appendices are filed as to whether any electronic recording or transcription of it accurately discloses what occurred in the trial court, the appellate court may resolve the dispute by reviewing the recording or the court may submit the matter to the trial judge, who, after notice to the parties and hearing, shall settle the dispute and make the statement of facts or transcription conform to what occurred in the trial court.

(6) *Costs.* The actual expense of appendices, but not more than the amount prescribed for official reporters, shall be taxed as costs. The appellate court may disallow the cost of portions of appendices that it considers surplusage or that do not conform to any specifications prescribed by the Supreme Court.

(i)~~(k)~~ **Appellant's Filing Date.** [No change.]

(j)~~(l)~~ **Failure of Appellant to File Brief.** [No change.]

(k)~~(m)~~ **Appellee's or Cross-Appellee's Filing Dates.** An ~~A~~appellee or cross-appellee shall file a ~~his~~ brief within twenty-five days after the filing of an appellant's or cross-appellant's brief. In civil cases, when an appellant has failed to file a ~~his~~ brief as provided in this rule, an ~~the~~ appellee or cross-appellee may, prior to the call of the case, file a ~~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.

(l) **Appellant's Brief in Reply.** Appellant may file a brief in reply to the appellee's brief confined to the issues or points in the appellee's brief. A brief in reply shall not exceed twenty-five pages in length, exclusive of pages containing the table of contents, index of authorities, reply points or issues, and any addendum containing statutes, rules, regulations, etc. Appellant shall file his brief in reply within twenty-five days after the filing of appellee's brief. A reply brief may include a response to a cross-appeal.

(m)~~(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. A motion for extension of time to file a brief may be filed before or after the date the brief is due.

(n)~~(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. Should it appear before or after submission that the case has not been properly presented in the

brief or briefs, or that the law and authorities have not been properly cited, it may decline to receive the submission, or, if received, may set it aside and make such orders as may be necessary to secure a more satisfactory submission of the case.

(o)~~(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.~~

EXPLANATION: This paragraph is deleted because of the service requirement in proposed Rule 4(f).

Notes and Comments

Changed by 1994 amendments: (1) Paragraph (a) has been amended to limit the requirement of listing of addresses of parties in the trial court to those not represented by counsel. (2) Paragraph (d) has been rewritten and liberalized to provide for "issues or points" rather than "points of error." (3) Paragraph (e) has been amended to incorporate the provisions of Rule 324(c), Texas Rules of Civil Procedure, concerning cross-points complaining of jury findings disregarded by the trial court in rendering judgment, with no substantive change. (4) Paragraph (f) has been amended to permit the brief to include a summary of the entire argument. (5) Former paragraphs (h), (i), and (j) have been deleted and their provisions have been incorporated into Rule 4(d) and 4(e) as amended. The remaining paragraphs have been renumbered. (6) Paragraph (k) has been added. (7) The last sentence has been added to paragraph (m). (8) Former paragraph (q) has been deleted because of the service requirement in Rule 4(f) as amended.

RULE 75. ORAL ARGUMENT

(a) - (e) [No Change.]

(f) Request and Waiver. [First paragraph, no change; second paragraph amended as follows]

The court of appeals may, in its discretion, advance civil or criminal 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 Service in a properly addressed post-paid wrapper (envelope).

NOTE TO ADVISORY COMMITTEE: This change is recommended by the Council of Chief Judges of the Courts of Appeals.

Notes and Comments

Change by 1994 amendments: The caption has been added to paragraph (f) and the second paragraph of that paragraph has been amended to authorize the court to advance civil as well and criminal cases without oral argument.

RULE 76 - 79

[No change.]

~~SECTION SIX. C. JUDGMENTS, OPINIONS AND REHEARING~~

CA. JUDGMENTS IN THE COURTS OF APPEALS

RULE 80. JUDGMENT OF THE COURT OF APPEALS

[No change.]

RULE 81. REVERSAL IN CIVIL AND CRIMINAL CASES

[No change.]

RULE 82 - 83.

[No change.]

RULE 84. DAMAGES FOR DELAY IN CIVIL CASES

In civil cases where the court of appeals shall determine that an appellant has taken an appeal or a relator has filed a petition in an original proceeding for delay and without sufficient cause, then the court may, as part of its judgment, award each prevailing party ~~appellee~~ an amount not to exceed ten percent of the amount of damages awarded to such prevailing party ~~appellee~~ as damages against such appellant or relator. If there is no amount awarded to the prevailing ~~appellee~~ party as money damages, then the court may award, as part of its judgment, each prevailing ~~appellee~~ party an amount not to exceed ten times the total taxable costs as damages against such appellant or relator or, in original proceedings, such other amount as the court deems just.

A request for damages pursuant to this rule, or an imposition of such damages without request, shall not authorize the court to consider allegations of error that have not been otherwise properly preserved or presented for appellate review.

Notes and Comments

Change by 1994 amendments: Penalties against relators in original proceedings have been added.

RULE 85 - 86

[No change.]

RULE 87. ENFORCEMENT OF JUDGMENTS AFTER MANDATE

First paragraph [No change.]

(a) [No change.]

(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 mandate ~~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.

(2) and (3) [No change.]

RULE 88 - 89

[No change.]

DB. OPINIONS BY THE COURTS OF APPEALS

RULE 90. OPINIONS, PUBLICATION AND CITATION

[No change.]

RULE 91. COPY OF OPINION AND JUDGMENT TO INTERESTED PARTIES AND OTHER COURTS

On the date an opinion of an appellate court is handed down, the clerk of the appellate court shall mail or deliver to the clerk of the trial court, to the trial judge who tried the case, and to the State and each of the defendants in a criminal case, and in a civil case to each of the parties to the trial court's final judgment ~~in a civil case~~, a copy of the opinion handed down by the appellate court and a copy of the judgment rendered by the appellate court as entered in the minutes. Delivery to a party having counsel indicated of record shall be made to counsel. The clerk of the trial court shall file a copy of the opinion among the papers of the cause in such court. When there is more than one attorney for a party, the attorneys may designate in advance the attorney in charge on ~~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.

Notes and Comments

Change by 1994 amendments: The rule has been made to conform to the provision for designation of attorney in charge in Rule 4(b).

E. REHEARING IN THE COURTS OF APPEALS

RULE 100.

(a) **Motion for Rehearing.** Any party to the trial court's final judgment desiring a rehearing of any matter determined by a court of appeals or any panel thereof must, within fifteen days after the date of rendition of the judgment or decision of the court, file with the clerk of the court a motion in writing for a rehearing, in which the points relied upon for the rehearing shall be distinctly specified.

(b) - (g) [No change.]

Notes and Comments

Change by 1994 amendments: The amendment to paragraph (a) clarifies the right of a party to the trial court's final judgment to file a motion for rehearing, if that party is aggrieved by the court of appeals judgment, as a prerequisite to filing an application for writ of error that challenges the action taken by the court of appeals.

~~**RULE 101. RECONSIDERATION ON PETITION FOR DISCRETIONARY REVIEW**~~

~~Within fifteen days after a petition for discretionary review to the Court of Criminal Appeals has been filed with the Clerk of the Court of Appeals which delivered the decision, a majority of justices who participated in the decision may summarily reconsider and correct or modify the opinion and judgment of the court and shall cause the clerk to certify a copy thereof and include it among the materials forwarded to the Clerk of the Court of Criminal Appeals in accordance with Rule 202(f).~~

SECTION SIX ~~NINE. APPLICATION FOR WRIT OF ERROR AND BRIEF IN RESPONSE IN THE SUPREME COURT~~ BRIEFS, ARGUMENT, SUBMISSION, DECISION, AND REHEARING IN THE SUPREME COURT

A. BRIEFS AND ARGUMENT IN THE SUPREME COURT

RULE 130. FILING OF APPLICATION IN COURT OF APPEALS

(a) **Method of Review.** The Supreme Court may review final judgments of the courts of appeals upon writ of error.

(b) ~~**Number of Copies;**~~ **Time and Place of Filing.** ~~Twelve copies of t~~The application shall be filed with the ~~C~~clerk of the ~~C~~court of ~~A~~appeals that delivered the decision within thirty days after the day the judgment and opinion are issued or within thirty days after the day the last timely motion for rehearing is overruled ruling on all timely filed motions for rehearing. 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.

(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 may do so within forty days after the overruling of the last timely motion for rehearing filed by any party or within ten days after the filing of any preceding application, whichever is the later date.

~~(d) Extension of Time. An extension of time may be granted for late filing in a court of appeals of an application to the Supreme Court for writ of error if a motion reasonably explaining the need therefor is filed with the Supreme Court not later than fifteen days after the last date for filing an application. A motion~~

~~for late filing of an application shall be directed to and acted upon by the Supreme Court. A copy of the motion shall be filed at the same time in the court of appeals, and the Clerk of the Supreme Court shall notify the court of appeals of the action taken on the motion by the Supreme Court.~~

Notes and Comments

Change by 1994 amendments: (1) The provision for copies has been moved to amended Rule 4(d)(2). (2) Paragraph (c) has been amended to permit a successive application to be filed within ten days after any preceding application, though later than forty days after the order overruling the last motion for rehearing. (3) Former paragraph (d) has been deleted and its provisions have been included in amended Rule 19(g)(3).

RULE 131. REQUISITES OF APPLICATIONS

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~~ Identity 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 the names and addresses of their counsel in the trial court, if any, shall be listed on the first page of the application, so that 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 that the clerk of the court may properly notify the parties to the trial court's final judgment or their counsel, if any, of the judgment and all orders of the Supreme Court. The application shall include also the address of any party not represented by an attorney, but if the address is not known, shall certify that petitioner's attorney has made a diligent inquiry but has been unable to discover it, and the certificate shall give any available information, such as the probable city or county of residence, that might serve to identify and locate the unrepresented party. If the petitioner is not represented by an attorney, the certificate shall be under oath.

EXPLANATION: (1) The Section Committee is of the opinion that the requirement to list the addresses of parties represented by counsel is burdensome and serves no purpose. Also, the petitioner's counsel should not be required to list the address of an unrepresented party if he certifies that he has made a diligent inquiry but has been unable to discover it.

(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 parenthesis 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.~~

Issues Presented. A statement of the issues or points presented for review, expressed in the terms and circumstances of the case but without unnecessary detail, shall be stated in short and concise form and without argument or repetition. The statement of an issue or point presented will be deemed to cover every subsidiary question fairly included therein. Each issue or point should be supported by reference to the page(s) of the record where the ruling or other matter complained of is shown. 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.

EXPLANATION: This revision of paragraph (e) is intended to relax the technicalities that have been imposed on the "point of error" practice.

NOTE TO ADVISORY COMMITTEE: The Section Committee recommends that Rule 101 be repealed, that an assignment in the motion for rehearing be a prerequisite to Supreme Court review, as currently provided in Rule 131(e), and not for review by the Court of Criminal Appeals, as currently provided by Rule 200(d). However, the Section Committee suggests that the SCAC consider eliminating an assignment in the motion for new trial as a prerequisite of Supreme Court review. The last sentence in paragraph (e) should be struck if the Committee decides that an assignment in the motion for rehearing should not be a prerequisite to appellate review.

(f) **Brief of the Argument.** The brief of the argument may present separately, or grouped if germane, the issues or 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 issues or points ~~of error~~ complained of. A summary of the argument may be included either after the statement of the case or at the conclusion of the brief. 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.~~

(i)~~(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.

Notes and Comments

Change by 1994 amendments: (1) Paragraph (a) has been amended to relieve counsel of the requirement to include the addresses of parties represented by attorneys and to permit counsel to make a certificate of diligent inquiry if the address of an unrepresented party is not known. (2) Paragraph (e) has been rewritten to provide for "issues or points" rather than "points of error" and to abolish the requirement of a point in the motion for rehearing as a prerequisite for further review. (3) Paragraph (i) has been stricken because it duplicates Rule 4(e). (4) Paragraph (j) has been added.

RULE 132. FILING AND DOCKETING APPLICATION IN SUPREME COURT

(a) Duty of Clerk of Court of Appeals. When an application for writ of error to the Supreme Court is filed with the ~~C~~clerk of the ~~C~~court of ~~A~~appeals, ~~he~~ the clerk 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. The party applying for the writ of error shall deposit with the ~~C~~clerk of the ~~C~~court of ~~A~~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 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, and the clerk shall send copies of the opinion and all orders of the Supreme Court to all such parties. Notification to parties having counsel indicated of record shall be made to the attorney in charge ~~counsel~~, as defined by Rule 4(b).

***EXPLANATION:** The Section Committee is of the opinion that the clerk should not be required to notify more than one attorney for each party and that copies need be sent to only those nonparties to the appeal that have filed a request for copies of briefs, orders, and opinions, as permitted by Rule 4(g).*

Notes and Comments

Change by 1994 amendments: Paragraph (c) has been amended to make explicit the clerk's duty to notify counsel, implied by Rule 131(a), but to limit the duty to the attorney in charge.

RULE 133 - 135

[Move unchanged rules 133, 134 and 135 to Section Six
from current Section Nine and renumber rules accordingly.]

RULE 136. BRIEFS OF RESPONDENTS AND OTHERS

(a) - (g) [No change.]

~~(h) Service of Briefs. Any application filed in the court of appeals and all briefs filed in the Supreme Court shall at the same time be served on all parties to the trial court's final judgment.~~

Notes and Comments

Change by 1994 amendments: Former paragraph (h) has been deleted and its provisions have been included in amended Rule 4(f).

RULE 137. PETITIONER'S BRIEF IN REPLY

Petitioner may file a brief in reply to the respondent's brief confined to the issues or points in the application for writ of error. Petitioner's brief in reply shall not exceed twenty-five pages in length, exclusive of pages containing the table of contents, index of authorities, reply points or issues, and any addendum containing statutes, rules, regulations, or the like.

Notes and Comments

New Rule.

~~SECTION ELEVEN. MOTIONS IN THE SUPREME COURT~~

~~RULE 160. FORM AND CONTENT OF MOTIONS FOR EXTENSION OF TIME~~

~~All motions for extension of time for filing an application for writ of error shall be filed in, directed to, and acted upon by the Supreme Court. Twelve copies of the motion for extension of time shall be filed in the Supreme Court. A copy of the motion shall also be filed at the same time in the court of appeals and the Clerk of the Supreme Court shall notify the court of appeals of the action taken on the motion by the Supreme Court. Each such motion shall specify the following:~~

~~(a) the court of appeals and the date of its judgment, together with the number and style of the case;~~

~~(b) the date upon which the last timely motion for rehearing was overruled;~~

~~(c) the deadline for filing the application; and~~

~~(d) the facts relied upon to reasonably explain the need for an extension.~~

Notes and Comments

Former Rule 160 has been deleted and its provisions have been incorporated into Rule 19(g)(3).

B. SUBMISSION IN THE SUPREME COURT

RULE 170 - 172

[Move from Section 12, No change.]

C. JUDGMENTS IN THE SUPREME COURT

RULE 180 & 181

[Move from Section 12 unchanged.]

RULE 182. JUDGMENT ON AFFIRMANCE OR RENDITION

(a) [No change.]

(b) **Damages for Delay.** Whenever the Supreme Court shall determine that an application for writ of error or an original proceeding has been taken for delay and without sufficient cause, then the court may, as a part of its judgment, award each prevailing respondent an amount not to exceed ten percent of the amount of damages awarded to such respondent as damages against such petitioner or relator. If there is no amount awarded to the prevailing respondent as money damages, then the court may award, as part of its judgment, each prevailing respondent an amount not to exceed ten times the taxable costs as damages against such petitioner or relator, or, in an original proceeding, such other amount as the court deems just.

A request for damages pursuant to this rule, or an imposition of such damages without request, shall not authorize the court to consider allegations of error that have not been otherwise properly preserved or presented for review.

Notes and Comments

Change by 1994 amendments: The penalty provision has been extended to original proceedings.

RULE 183. ENFORCEMENT OF JUDGMENT

[Move from Section 12 unchanged.]

RULE 184. REVERSAL AND REMAND

(a) & (b) [No change.]

(c) **Nature of Remand.** If the judgment of a court of appeals shall be reversed, the Supreme Court may remand the case either to the court of appeals from which it came or to the trial court for another trial. In order to obtain a remand to the court of appeals for consideration of factual sufficiency points or other points briefed but not considered by the court of appeals, it is not necessary that such points be briefed in the Supreme Court if a request is made for such relief in the Supreme Court, either originally or on motion for rehearing.

EXPLANATION: This proposed amendment is prompted by the opinion in which the Supreme Court refused to remand to the court of appeals for consideration of factual sufficiency cross-points not briefed in the Supreme Court, Davis v. City of San Antonio, 752 S.W.2d 518, 521-22 (Tex. 1988). The opinion indicates that the case would have been remanded if the respondent's brief had specifically prayed for a remand, but refused to allow respondent to amend its brief to request a remand. The proposed amendment

would clarify the requirements for a remand to the court of appeals and would permit such a request to be made on rehearing.

Notes and Comments

Change by 1994 amendments: _____

RULE 185. NO AFFIRMANCE, REVERSAL OR DISMISSAL FOR WANT OF FORM OR SUBSTANCE

[No change, moved from Section 12.]

RULE 186. MANDATE

[No change, moved from Section 12.]

~~SECTION FOURTEEN~~ D. REHEARING IN THE SUPREME COURT

RULE 190. MOTION FOR REHEARING

(a) [No change.]

(b) Contents ~~and Service~~. The points relied upon for the rehearing shall be distinctly specified in the motion. The motion shall state the name and address of the attorneys of record for the parties to the trial court's final judgment, and if there is no attorney of record, the name and address of the party to the trial court's final judgment. The party filing such motion shall serve on each party to the trial court's final judgment that or his attorney of record, a true copy of such motion, and shall note on the motion so filed with the clerk that such copies have been so served.

(c) Notice of the Motion. Upon the filing of the motion, the clerk shall notify the attorneys of record or other parties to the trial court's final judgment by mail of the filing.

(d) & (e) [No change.]

Notes and Comments

Change by 1994 amendments: _____

SECTION SEVEN. CERTIFIED QUESTIONS IN CIVIL CASES

RULES 110 - 114

[Rules transferred here with no change. Must be renumbered.]

SECTION EIGHT ~~EIGHT~~. ORIGINAL PROCEEDINGS IN CIVIL CASES

~~RULE 120. HABEAS CORPUS IN CIVIL CASES~~

~~(a) Commencement. A petition seeking the issuance of a writ of habeas corpus shall be presented to the clerk of the appellate court along with the appropriate deposit for costs, as provided in Rule 13.~~

~~(b) Petition. The petition shall be in the following form and contain the following information:~~

~~(1) The party seeking the writ shall be denominated relator.~~

~~(2) The petition shall identify all parties whose interest would be directly affected by the proceedings and shall state the addresses of all such interested parties.~~

~~(3) The petition shall contain a certificate of service upon all interested parties or a certificate explaining the absence of service.~~

~~(4) The petition shall set forth in a concise and positive manner a summary of the facts necessary to establish relator's right to the relief sought.~~

~~(5) The petition shall be accompanied by a brief in support of the petition.~~
~~(6) The petition shall be accompanied by proof of restraint of the relator.~~
~~(7) The petition shall be accompanied by a certified copy of the order, judgment or decree of which relator has been held to be in violation, a certified copy of the motion and order or judgment of contempt, a certified copy of the order or judgment of commitment, and when appropriate, a statement of facts.~~

~~(8) The petition shall contain an affidavit verifying the truth of all factual allegations.~~

~~(c) Concurrent Jurisdiction. When the Supreme Court and one or more courts of appeals are authorized to exercise concurrent jurisdiction over matters of habeas corpus, the petition seeking issuance of the writ shall first be presented to a court of appeals. The petition for writ of habeas corpus filed in the Supreme Court shall state the date of any presentation to a court of appeals and that court's action on the petition.~~

~~(d) Action on Petition. If the court is of the tentative opinion that the writ should issue, the court will set the amount of bond, order relator released and schedule the petition for oral argument. Otherwise, the court shall deny the writ without further hearing.~~

~~(e) Notification by Clerk. The clerk shall notify all identified parties or their attorneys of record of the action of the court and of the date set for oral argument, if oral argument is set. In the event oral argument is set, relator shall immediately make the appropriate additional deposit for costs, as provided by Rule 13.~~

~~(f) Reply. In the event the case is set for oral argument, any interested party may submit an additional brief of authorities and a verified answer provided, however, such additional brief and answer shall be filed with the clerk and served upon all other parties at least ten days prior to the date scheduled for oral argument, unless another time is designated by the court.~~

~~(g) Order of Court. If after hearing oral argument, the court determines that the writ should be granted, it shall enter an order to that effect. Otherwise, the court shall remand relator to custody and direct the clerk to issue an order of commitment. If relator is not available for return to custody, pursuant to the order of commitment, the court may declare the bond to be forfeited.~~

~~(h) Notice of Order. When the appellate court grants, refuses or dismisses a habeas corpus proceeding or a motion for rehearing, the clerk of the court shall notify the parties or their attorneys of record by sending them a letter by first class mail.~~

RULE 120. ORIGINAL PROCEEDINGS IN CIVIL CASES

(a) **Commencement.** An original proceeding seeking extraordinary relief in an appellate court in a civil case, including a writ of habeas corpus, mandamus, prohibition, or injunction, shall be commenced by filing with the clerk documents containing the following requisites:

(1) *Petition.* The petition shall be in the following form and shall contain the following information:

(A) *Parties.*

(i) The party seeking relief shall be named relator.

(ii) Any judge, court, tribunal, officer, or other person against whom relief is sought for an act or omission in his or her official capacity shall be named a respondent, but his or her name shall not be included in the title of the proceeding.

(iii) Any person whose interest would be affected by the relief sought shall be named a respondent.

(iv) The names, addresses, and telephone numbers of all relators and respondents and of all attorneys representing those parties in any underlying cause referred to in the petition shall be stated. The address and telephone number of a party represented by counsel in the underlying cause need not be stated.

(B) *Jurisdiction.*

i) *Authority.* The petition shall cite the particular statute or other authority giving the court jurisdiction to grant original relief.

(ii) *Habeas Corpus.* If a writ of habeas corpus is sought, the petition shall show that relator is restrained of his or her liberty.

(iii) *Inadequacy of Legal Remedy.* In other original proceedings relating to an underlying cause, the petition shall state the facts showing that relator has no adequate remedy by appeal or other legal remedy.

(iv) *Concurrent Jurisdiction.* If the Supreme Court and the court of appeals have concurrent jurisdiction, the petition shall be presented first to the court of appeals unless there is a compelling reason not to do so. A petition filed in the Supreme Court shall state the date of presentation to the court of appeals and that court's action

on the petition or the compelling reason that the petition was not first presented to the court of appeals.

(C) *Facts.* The petition shall state concisely and without argument the facts necessary to establish a compelling necessity for and relator's right to the relief sought, including a summary of the relevant proceedings in any underlying cause. All factual statements shall be verified by affidavit made on personal knowledge showing that the affiant is competent to testify to the matters stated.

(D) *Argument and Authorities.* The petition shall contain a brief of the argument, including a statement of the issues or points presented as the basis for relief together with argument and authorities supporting relator's right to the relief sought in conformity with the requirements of Rule 74 if in the court of appeals and Rule 131 if in the Supreme Court.

(E) *Prayer.* The petition shall state the particular relief sought and the names of the parties against whom relief is sought.

(F) *Certificate of Service.* The petition shall contain a certificate of service on all respondents or a certificate explaining the absence of service.

(2) *Deposit.* A filing fee shall be paid as provided in Rule 13.

(3) *Record.* The relator shall prepare and file with the petition one copy of a record consisting of a certified or sworn copy of the order complained of and also, if in the Supreme Court, the order or opinion of the court of appeals, if any. The record shall also contain any filed paper material to the relator's claim for relief, together with that portion of the evidence presented in any underlying proceeding, in a properly authenticated form, necessary to demonstrate the relator's right to the relief sought. If a writ of habeas corpus is sought, the record shall contain proof of restraint of the relator. The record shall not include more of the proceedings than is necessary, and it shall not be presumed that anything omitted from the record, including any additional record filed by the respondent, is relevant.

(b) **Service.** Relator shall promptly serve upon each respondent a copy of the petition and record. If the relator seeks temporary or emergency relief other than a writ of habeas corpus, the relator shall immediately notify or make a diligent effort to notify each respondent of the filing of the petition. Service on a party represented by counsel in the underlying cause, if an underlying cause is referred to in the petition, shall be made on counsel.

(c) **Action on Petition.**

(1) *Habeas Corpus.* If the court is of the tentative opinion that relator is entitled to the relief sought, the court will set the amount of a bond to be executed by relator as a condition of release, order relator released on execution and filing of the bond, and schedule oral argument on the petition. Otherwise, the court shall deny the relief sought without further hearing.

(2) *Other Original Proceedings.* In any other original proceeding the court may request that respondents submit a reply to the petition, and in that event, the clerk will so notify all identified parties. If the court is of the tentative opinion that relator is entitled to the relief sought, or that a serious question concerning such relief requires further consideration, the court will schedule oral argument on the petition. Otherwise, the petition will be denied. Before setting oral argument, and without the notice provided by paragraph (e), the court or any justice acting for the court may hold an informal conference

with the parties, in person or by telephone, at which the respondents or their counsel are invited by telephone or other expedited communication to state orally any objection to further consideration of the petition and any information that may help the court make an expeditious disposition of the petition, including a convenient time for oral argument.

(3) *In the Supreme Court.* In cases over which the Supreme Court has original jurisdiction to issue writs of mandamus, prohibition, or injunction, and in which the order of a lower court complained of is in conflict with an opinion of the Supreme Court or is contrary to the Constitution, a statute, or a rule of civil or appellate procedure, the Supreme Court may, after respondents have had an opportunity to file an answer as provided by paragraph (f), grant the relief sought without hearing argument.

(d) **Temporary Relief.** If the facts stated in the petition show that relator will be prejudiced unless immediate temporary relief is granted, the court may, without notice to respondents, grant such temporary relief as the exigencies of the case require. The court may require a bond for the protection of the adverse parties as a condition of temporary relief. Whenever practicable, before granting the any immediate relief without the notice provided by paragraph (e), the court or any justice acting for the court shall hold an informal conference with the parties, in person or by telephone, at which the respondents, in any underlying proceeding, or their counsel are invited by telephone or other expedited communication to state orally any objection to the immediate relief sought and any suggestions concerning the amount of the bond and the time for oral argument. The appellate court may but is not required to invite the trial judge in the underlying proceeding to participate in the conference. No stay of an underlying proceeding shall be ordered without such a conference. An order granting temporary relief shall be effective until the final decision of the case, unless vacated or modified.

(e) **Notification.** The clerk shall notify by mail all identified parties and their attorneys, if represented by counsel, of the filing of the petition and the date set for oral argument.

(f) **Answer.** At least five days before the date set for oral argument, respondents may file with the clerk and serve upon the relator an answer containing a verified statement of any facts material to the proceeding and a brief of authorities, and may also file an additional record containing exhibits relied on by respondents. The court in its discretion may shorten or extend the time. The answer and additional record shall comply with the requirements set forth in this rule for the relator's petition and record, so far as applicable.

(g) **Groundless Petition or Misleading Statement or Record.** If the petition is so clearly groundless as to indicate that the proceeding is not brought in good faith or that it is brought for delay of an underlying proceeding or if any party makes a factual statement in the petition or answer or files a record that is misleading, either by way of a gross affirmative misstatement or an omission of obviously important and material facts, the court may, on motion and notice or on the court's own motion, after notice, impose a penalty as provided by Rule 84 if in the court of appeals or Rule 182(b) if in the Supreme Court.

(h) **Order of the Court.** If, after hearing argument, the court determines that all or part of the relief sought by relator should be granted, it shall issue an order to that effect. Otherwise, the court shall deny relief. If the court denies a writ of habeas corpus, the court shall remand the relator to custody and order the clerk to issue an order of commitment; if relator is not available for return to custody pursuant to the order of commitment, the court may order the bond forfeited and render judgment accordingly against the surety.

(i) **Notice of Order.** When the appellate court grants or denies the relief sought in the petition, or dismisses the petition, or grants or overrules a motion for rehearing, the clerk of the court shall notify counsel for the parties and any unrepresented parties by sending them a letter by first-class mail.

Notes and Comments

Change by 1994 amendments: Rules 120, 121, and 122 have been consolidated and condensed into this rule. The procedure in all original proceedings has been made more nearly uniform. The principal substantive changes are: (1) The motion for leave to file and the court's granting of leave before filing of the petition have been abolished; (2) the documents to be filed by the relator have been reduced to a petition and a record containing proceedings in the underlying cause; (3) the petition is required to contain a statement of jurisdiction, a statement of facts, a brief of argument and authorities, and a prayer for relief; (4) any real party in interest is required to be made a respondent; (5) no judge or officer against whom relief is sought is permitted to be named in the title of the proceeding; (6) the provisions for filing, service, copies, and some of the provisions for service have been incorporated into Rule 4; (7) service on any party represented by counsel in an underlying cause is authorized to be made on counsel; (8) the court is authorized to hold an informal conference with the parties before setting argument on the petition and is required to do so, if practicable, before granting temporary relief.

~~**RULE 121. MANDAMUS, PROHIBITION AND INJUNCTION IN CIVIL CASES**~~

~~(a) **Commencement.** An original proceeding for a writ of mandamus, prohibition or injunction in an appellate court shall be commenced by delivering to the clerk of the court the following:~~

~~*(1) Motion for Leave to File.* When the court of appeals is authorized to exercise concurrent jurisdiction over an original proceeding, the motion should first be presented to the court of appeals. The motion for leave to file in the Supreme Court shall state the date of presentation of the petition to the court of appeals and that court's action on the motion or petition or the compelling reason that a motion was not first presented to the court of appeals.~~

~~*(2) Petition.* The petition shall include this information and be in this form:~~

~~(A) The party seeking relief shall be denominated relator, and the party against whom relief is sought shall be denominated respondent.~~

~~(B) If any judge, court, tribunal or other respondent in the discharge of duties of a public character is named as respondent, the petition shall disclose the name of the real party in interest, if any, or the party whose interest would be directly affected by the proceeding. The petition shall state the address of each respondent and real party in interest.~~

~~(C) The petition shall set forth in a concise and positive manner all facts that are necessary to establish relator's right to the relief sought. It shall be accompanied by a certified or sworn copy of the order complained of and other relevant exhibits.~~

~~(D) The petition shall state the relief sought and the basis for the relief, as well as the compelling circumstances which establish the necessity for the writ to issue.~~

~~(E) The petition shall include or be accompanied by a brief of authorities and argument in support of the petition.~~

~~(F) The petition shall contain an affidavit verifying the truth of all factual allegations.~~

~~(G) The petition shall contain a certificate of service, or a certificate explaining the absence of service.~~

~~*(3) Copies to be Filed.* Three copies of the motion, petition and brief shall be delivered to the clerk of the court of appeals when the petition is delivered to that court; if the petition is delivered to the Supreme Court, 12 copies shall be delivered.~~

~~*(4) Record and Relevant Exhibits.* The petition shall be accompanied by a certified or sworn copy of the order complained of and other relevant exhibits.~~

~~*(5) Deposit.* The deposit for costs shall be made as provided by Rule 13.~~

~~**(b) Service.** Relator shall promptly serve upon respondent and each real party in interest a copy of the motion, petition, brief, and record.~~

~~**(c) Action on Motion.** The court may request that respondent or the real party in interest submit a reply, and in that event, the clerk will so notify all identified parties. When it appears that relator may be unduly prejudiced by delay, or the court concludes for any other reason that a reply should not be requested, it may act upon the motion without giving prior notice to the respondent. If the court is of the tentative opinion that relator is entitled to the relief sought, the motion for leave to file will be granted, the petition filed, and the cause placed upon the docket. Otherwise, the motion will be overruled.~~

~~**(d) Temporary Relief.** If the facts stated in the petition show that relator will be prejudiced unless immediate temporary relief is granted, the court may grant temporary relief after granting the motion for leave to file, without notice to respondents, as the exigencies of the case require. The court may require a bond for the protection of the adverse parties as a condition to the temporary relief. An order granting temporary relief shall be effective until the final decision of the case, unless vacated or modified.~~

~~**(e) Notification.** The clerk shall notify by mail all identified parties of the filing of the petition and, within seven days after mailing the notice of the filing, respondent and any real party in interest, separately or jointly, may file with the clerk and serve upon the relator an answer, a brief of authorities, opposing exhibits, and a verified statement of any undisputed facts material to the proceeding. The court in its discretion may shorten or extend the time. The reply shall comply with the requirements set forth herein for the petition. In the event the motion is granted, relator shall immediately make the additional deposit for costs required by Rule 13.~~

~~**(f) Oral Argument.** In the event the motion is granted, the appellate court will schedule the petition for oral argument and relator, respondent or any other real party in interest, separately or jointly, may file and serve an additional brief of authorities and a verified answer provided, however, such additional brief and answer shall be filed with the clerk and served upon all parties at least five days prior to the date scheduled for oral argument, unless another time is designated by the court.~~

~~**(g) Notice of Order.** When the appellate court grants, refuses or dismisses a mandamus or other original proceeding, or a motion for rehearing, the clerk of the court shall notify the parties or their attorneys of record by sending them a letter by first class mail.~~

~~RULE 122. ORDERS OF SUPREME COURT ON PETITION FOR MANDAMUS AND PROHIBITION~~

~~In cases over which the Supreme Court has mandamus, habeas corpus, or prohibition jurisdiction and in which the action or order of the respondent is in conflict with an opinion of the Supreme Court or is contrary to the Constitution, a statute or a rule of civil or appellate procedure, the Supreme Court may grant leave to file the petition and may, after respondent and any real party in interest has had an opportunity to file a reply as provided by paragraph (e) of Rule 121, without hearing argument, grant the writ and make such orders in writing as may be appropriate.~~

SECTION NINE ~~TEN~~. DIRECT APPEALS TO THE SUPREME COURT

RULE 140. DIRECT APPEALS TO THE SUPREME COURT

[No change.]

~~SECTION ELEVEN. MOTIONS IN THE SUPREME COURT~~

~~RULE 160. FORM AND CONTENT OF MOTIONS FOR EXTENSION OF TIME~~

~~All motions for extension of time for filing an application for writ of error shall be filed in, directed to, and acted upon by the Supreme Court. Twelve copies of the motion for extension of time shall be filed in the Supreme Court. A copy of the motion shall also be filed at the same time in the court of appeals and the Clerk of the Supreme Court shall notify the court of appeals of the action taken on the motion by the Supreme Court. Each such motion shall specify the following:~~

~~(a) the court of appeals and the date of its judgment, together with the number and style of the case;~~

~~(b) the date upon which the last timely motion for rehearing was overruled;~~

~~(c) the deadline for filing the application; and~~

~~(d) the facts relied upon to reasonably explain the need for an extension.~~

Notes and Comments:

The provisions of this rule have been incorporated into amended Rule 19(g)(4).

SECTION TEN ~~FIFTEEN~~. DISCRETIONARY REVIEW IN CRIMINAL CASES

RULE 200. DISCRETIONARY REVIEW IN GENERAL

[No change.]

RULE 201. DISCRETIONARY REVIEW WITHOUT PETITION

[No change.]

RULE 202. DISCRETIONARY REVIEW WITH PETITION

(a) [No change.]

(b) The original petition shall be filed with the ~~C~~clerk of the ~~C~~court of ~~A~~appeals which delivered the decision within 30 days after the day the judgment is entered or within 30 days after the day the last timely motion for rehearing is overruled. If the court of appeals issues a judgment or opinion that is in any respect different from its original or previous judgment or opinion, the petition shall be filed within 30 days after the day the court of appeals issues the corrected or modified opinion or judgment.

NOTE TO ADVISORY COMMITTEE: The proposed amendment should be deleted if Rule 101 is repealed.

(c) - (l) [No change.]

Notes and Comments

Change by 1994 amendments: The second sentence is added to conform this rule to the amendment to Rule 101.

RULE 203. BRIEF ON THE MERITS

[No change.]

SECTION ELEVEN ~~SIXTEEN~~. DIRECT APPEALS AND EXTRAORDINARY MATTERS IN THE COURT OF CRIMINAL APPEALS, INCLUDING POST CONVICTION APPLICATIONS FOR WRIT OF HABEAS CORPUS

RULES 210 - 214.

[No change.]

SECTION SEVENTEEN. SUBMISSIONS, ORAL ARGUMENTS, AND OPINIONS IN THE COURT OF CRIMINAL APPEALS

RULES 220 - 223.

[No change.]

SECTION EIGHTEEN. REHEARINGS AND MANDATE IN THE COURT OF CRIMINAL APPEALS

RULES 230 - 234.

[No change.]

ORDER
OF THE SUPREME COURT OF TEXAS
DIRECTING THE FORM OF THE RECORD ON APPEAL IN CIVIL CASES

Pursuant to the provisions of Rules 51(c) and 53(h), TEX.R.APP.P., the Supreme Court of Texas directs that, in the event of an appeal ~~or writ of error~~ from a trial court to an appellate court in a civil case, the clerk

shall prepare a record consisting of a transcript and a statement of facts in accordance with applicable Rules in the following format:

(A) Transcript

(1) The clerk shall collect all proceedings, instruments, and other papers (a) specified in Rule 51(a), TEX.R.APP.P., (b) designated by the parties pursuant to Rule 51(b), TEX.R.APP.P., and (c) ordered by the trial judge to be included in the transcript. Each proceeding, instrument, and other paper shall clearly show the date of filing. As far as practicable, each order and judgment shall show the date of signing by the judge, as well as date of entry in the minutes. The clerk shall then make a legible copy, on 8½ by 11 inch paper, of all such proceedings, instruments, and other papers and arrange the copies in ascending chronological order, by date of filing or occurrence. with each proceeding, instrument, or other paper beginning at the top of a page ~~separating each proceeding, instrument, or other paper one from another in such a manner that each is readily distinguishable~~. The clerk shall then consecutively number the pages of the transcript in the bottom right-hand corner of each page and bind them ~~the copies~~ in a heavy cover in such a manner that, when opened, the transcript will lie flat. The clerk shall include only those papers specified in Rule 51(a), specifically designated by the parties according to their titles, or ordered included by the trial judge, and shall disregard general designations, such as "all pleadings," "all other filed papers," and the like. The clerk shall not include briefs, memoranda of authorities, citations, subpoenas, interrogatories, answers to interrogatories, and the like, unless each item is specifically designated by the title.

(2) The clerk shall designate the transcript "Record, Volume 1~~.1~~." If the transcript consists of more than one volume, the first volume of the transcript shall be designated "Record, Volume 1.1," the second volume shall be designated "Record, Volume 1.2," and so forth, so that the transcript may be cited in the briefs simply as, for example, "R1 543" or "Tr 543".

(3) The front cover of the first volume of the transcript shall include the following information and be in substantially the following form:

TRANSCRIPT

RECORD, VOLUME 1 (OR VOLUME 1.1 OF VOLUMES)

(Trial Court) No. _____

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

_____, Appellant(s)

vs.

_____, Appellee(s)

Appealed to the
(Supreme Court of Texas at Austin, Texas
or Court of Appeals for the ___ Court of Appeals District
of Texas, at _____, Texas).

Appellate Attorney for Appellant(s):
(name) _____
(address) _____
_____
Telephone# _____
FAX # _____
SBOT# _____

Appellate Attorney for Appellee(s):
(name) _____
(address) _____
_____
Telephone# _____
FAX # _____
SBOT# _____

Delivered to (Supreme Court of Texas at Austin, Texas or Court of Appeals for the _____ Court of Appeals District of Texas, at _____, Texas) on the ____ day of _____, 19__.

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

(Appellate Court) Cause No. _____

Filed in the (Supreme Court of Texas at Austin, Texas or Court of Appeals for the _____ Court of Appeals District of Texas, at _____, Texas) this ____ day of _____, 19 __.

_____, Clerk
By _____, Deputy

The front cover of the second and subsequent volumes of the transcript shall include the same information and be in substantially the same form as that set forth above, except that second and subsequent volumes may, but need not, include statements of delivery and filing.

(4) The clerk shall prepare and include on the first pages of the transcript a detailed index identifying each proceeding, instrument, or other paper included in the transcript as it is denominated, the date of occurrence or filing, and the page where it first appears. The index must conform to the order in which matters appear in the transcript, rather than in alphabetical order. The index shall be double spaced.

(5) After the index, the clerk shall include a caption in substantially the following terms:

The State of Texas §
County of _____ §

In the _____ (County Court of Judicial District Court) of _____ County, Texas, the Honorable _____, sitting as Judge of said Court, the following proceedings were held and the following instruments and other papers were filed in this cause, to wit:

No. _____

_____	§	IN THE _____ COURT
	§	
vs.	§	
	§	
_____	§	_____ COUNTY, TEXAS

(6) The 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 all the original ~~true and correct copies of all~~ proceedings, instruments, and other papers specified by Rule 51(a), TEX.R.APP.P., all proceedings, instruments, and other papers specified by Rule 51(a), TEX.R.APP.P., and all proceedings, instruments, and other papers the trial judge ordered included in the transcript in Cause No. _____, styled _____ v. _____ ___ in said court.

GIVEN UNDER MY HAND AND SEAL at my office in _____, Texas this __ day of _____, 19 __.

(clerk) _____
(title) _____
By _____, Deputy

(7) In the event of a flagrant violation of this Order in the preparation of a transcript, on motion of a party or *sua sponte*, the appellate court may require the clerk to amend the transcript or to prepare a new transcript in proper form at his or her own expense. In such event, the clerk may be further required to provide, at his or her own expense, a copy of the amended or new transcript to all parties who have previously made a copy of the original, defective transcript.

(B) STATEMENT OF FACTS

(1) Unless an electronically recorded statement of facts is made and filed in accordance with Rule 53(o), ~~t~~The court reporter shall type or print the statement of facts in this following format:

(a) The top and bottom margins shall be 1 inch. The margin on the left-hand side of the page shall be not less than 1¼ inches nor more than 2 inches.

(b) The statement of facts shall be in readable typeface (at least 12-point), in upper and lower case, and double-spaced.

(c) The statement of facts shall be typed or printed on one side only of opaque and unglazed white paper not less than 13-pound weight, 8½ by 11 inches in size.

(d) Each separate proceeding and hearing (pretrial hearing, voir dire, trial on the merits, etc.) shall be bound in a separate volume or as many volumes as necessary to prevent each from being over two inches thick.

(e) The first page of the first volume of the statement of facts of each such proceeding or hearing shall be numbered "1" and each following page relating to the same proceeding or hearing, whether in the first or a subsequent volume, shall be numbered consecutively at the top right-hand corner of the page, so that page references will be sufficient without referring to the particular volume number.

(f) Each volume of the statement of facts shall be securely bound on the left margin.

(g) The court reporter shall designate the statement of facts "Record, Volume 2"~~.1 of the record~~. If the statement of facts consists of more than one volume, the first volume of the statement of facts shall be designated "Record, Volume 2.1," the second volume shall be

designated "Record, Volume 2.2." ~~the third volume shall be designated Volume 2.3~~, and so forth, so that the statement of facts may be cited simply as, for example, "R2 587" or "SF 587".

(2) The front cover page of each volume of the statement of facts shall include the following information and be in substantially the following form:

(Trial Court) No. _____

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

STATEMENT OF FACTS
RECORD, VOLUME 2 (OR VOLUME 2.1 OF VOLUMES)

APPEARANCES:

Attorney for Plaintiff(s):	Attorney for Defendant(s):
(name) _____	(name) _____
(address) _____	(address) _____
_____	_____
Telephone# _____	Telephone# _____
FAX # _____	FAX # _____
SBOT# _____	SBOT# _____

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

(3) The court reporter shall include an index of the testimony at the beginning of each volume of the statement of facts showing the following information in substantially the following form:

INDEX OF TESTIMONY

Witness	Direct	Cross	Re-Direct	Re-Cross
John Doe	4	8	16	20

A master index of the testimony of all witnesses shall be included in the statement of facts at the beginning of the first volume or as a separate volume.

(4) The court reporter shall also include an index of the exhibits at the beginning of each volume of the statement of facts showing the following information in substantially the following form:

INDEX OF EXHIBITS

Exhibit #	Description	Marked	Identified	Offered	Received
DX 1	Copy of Judgment in Cause #24310	3	4	5	6

A master index of the exhibits shall be included in the statement of facts at the beginning of the first volume or as a separate volume.

(5) Unless ordered otherwise pursuant to Rule ~~51(d)~~ 53(e), TEX.R.APP.P., neither physical evidence nor original exhibits are to be included in the record on appeal. Each item of physical evidence shall be described on a separate piece of paper in such a manner that it may be identified, including the exhibit number. When a legible copy of a photograph or any other paper exhibit cannot be made, the original exhibit shall be included in the record under order of the trial court made pursuant to Rule ~~51(d)~~ 53(e). Copies of the exhibits and the descriptions of physical evidence received in each separate proceeding or hearing shall be placed in numerical order at the end of the statement of facts of that proceeding or hearing or, if the exhibit material is voluminous, in a separate volume or volumes. ~~Original exhibits shall not be bound, but shall be sent to the appellate court in an envelope, box or other appropriate container.~~

(6) The statement of facts shall conclude with a certificate containing the following information and in substantially the following form:

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 proceeding 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 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

Certification Number: _____
Date of Expiration: _____
Business Address: _____
_____
Telephone Number: _____

(7) In the event of a flagrant violation of this Order in the preparation of a statement of facts, on motion of a party or *sua sponte*, the appellate court may require the court reporter to amend the statement of facts or to prepare a new statement of facts in proper form at his or her own expense. In such even, the court reporter may be further required to provide, at his or her own expense, a copy of the amended or new statement of facts to all parties who have previously made a copy of the original, defective statement of facts.

SIGNED this _____ day of _____, 199__.

_____
Chief Justice Thomas R. Phillips

_____
Justice

_____
Justice

_____
Justice

_____
Justice

_____
Justice

_____
Justice

_____
Justice

_____
Justice

Notes and Comments

Change by 1994 amendments: The changes would conform the order to the amendments to Rules 51 and 53.

PROPOSED AMENDMENTS

TO

TEXAS RULES OF CIVIL PROCEDURE

RULE 8. ATTORNEY IN CHARGE

On the occasion of a party's first appearance through counsel, the attorney whose signature first appears on the initial pleadings for any party shall be the attorney in charge, unless another attorney is specifically designated therein. Thereafter, until such designation is changed by written notice to the court and all other parties in accordance with Rule 21a, said attorney in charge shall be responsible for the suit as to such party. The designation or redsignation of the attorney in charge on appeal does not constitute redesignation of the attorney in charge in the trial court.

All communications from the court or other counsel with respect to a suit shall be sent to the attorney in charge.

NOTE TO ADVISORY COMMITTEE: The Section Committee makes no recommendation as to whether electronic recording without an official court reporter should be permitted, but does recommend that if the Supreme Court decides to allow such recording, the court's temporary orders should be replaced by amendments to both TRAP and TRCP. The Section Committee has included most of the necessary amendments to TRAP in the foregoing proposals, but the phrase "or recorder" may need to be added after "reporter" in other rules. In addition, the following revisions or TRCP 264 are suggested.

TRCP 264a. ~~DUTIES~~ WORK OF COURT REPORTERS AND COURT RECORDERS

(a) Duties of Court Reporters. The ~~duties of~~ official court reporters duties 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~~ procedings 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)~~ provided, however, that the making of a ~~full~~ record of jury arguments and voir dire examinations is not required unless specifically ~~when~~ requested ~~to do so~~ by ~~the attorney for any~~ a party or the judge ~~to a case, together with all objections to such arguments, the rulings and remarks of the court thereon~~;

(2) taking and marking all exhibits offered in evidence during any proceeding;

(3) filing all exhibits with the trial court clerk after the completion of any proceding;

(4) making copies of the exhibits for inclusion in the statement of facts when a statement of facts is prepared;

(45) preparing an official transcripts of ~~all such evidence or other~~ any proceedings, or ~~any~~ portion thereof, when required to do so by ~~subject to~~ the laws of this state, or these rules, ~~and the instructions of the presiding judge of the court~~ or when a party or other person has made a proper request for a transcript (including a request for a statement of facts made pursuant to Rule of Appellate Procedure 53(a)) and has paid the reporter's fee or made satisfactory arrangements for such payment; ~~and~~

(6) ~~preparing and~~ timely filing in the court of appeals a statement of facts in any case in which a party has filed a notice of appeal, has made a request for a statement of facts, and has paid the reporter's fee or made satisfactory arrangements for such payment; and

(~~5~~7) performing such other duties relating to the reporter's official duties as may be directed by the judge presiding.

(b) **Duties of Court Recorder.** The official court recorders duties shall be:

(1) assuring that the recording system is functioning properly throughout the proceeding and that a complete, distinct, clear, and transcribable recording is made;

(2) attending sessions of court and making a complete recording of the procedings when requested by the judge or any party to a case; provided, however, that the recording of jury arguments and voir dire examinations is not required unless specifically requested by a party or the judge;

(3) making a detailed, legible log of all proceedings while recording, showing the number and style of the case before the court, the correct name of each person speaking, the event being recorded (*e.g.*, voir dire, opening, direct examination, cross-examination, argument, bench conferences, and the like), and all offers, admissions, and exclusions of exhibits. The log shall state the time of day of each event and the counter number on the recording device showing where each event is recorded;

(4) making a typewritten copy of the original log of the proceedings;

(5) filing with the clerk, after the completion of any proceeding, the original log and the typewritten copy of the original;

(6) taking and marking all exhibits offered in evidence during any proceeding;

(7) filing all exhibits with the trial court clerk after the completion of any proceeding;

(8) Storing or providing for storage of the original recording to assure its preservation and accessibility;

(9) Prohibiting or providing for denial of access to the original recording by any person without written order of the judge of the court;

(10) making copies of the exhibits for inclusion in the statement of facts when a statement of facts is prepared;

(11) preparing or obtaining a certified duplicate of the original recording of any proceeding, or portion thereof, when required to do so by the laws of this state or these rules, or when a party or other person has made a proper request for a copy of the recording (including a request for a statement of facts made pursuant to Rule of Appellate Procedure 53(a)) and has paid the recorder's fee or made satisfactory arrangements for such payment;

(12) timely filing in the court of appeals a statement of facts in any case in which a party has filed a notice of appeal, has made a request for a statement of facts, and has paid the reporter's fee or made satisfactory arrangements for such payment; and

(13) Performing such other 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) **Priorities of Reporters and Recorders.** The presiding judge of the trial court shall ensure that the work of the court reporter or court recorder is timely accomplished by setting priorities on the various elements of the reporter's or recorder's workload to be observed by the reporter or recorder in the conduct of the business of ~~the court reporter's~~ his or her office. Duties relating to proceedings before the court shall take preference over other work.

(d) **Report of Reporters and Recorders.** To aid the judge in setting the priorities in paragraph (b) ~~above~~, each court reporter and court recorder shall report in writing to the judge on a monthly basis the amount and nature of the business pending in the court reporter's or court recorder's office. A copy of this report shall be filed with the ~~C~~clerk of the ~~C~~court of ~~A~~appeals of each district in which the court sits.

EXPLANATION: Paragraphs (c) and (d) were moved here from Rule of Appellate Procedure 12(b) and (c).

(ee) **Appointment of Deputy Reporter or Recorder.** In case of illness, press of official work, or unavoidable absence or disability of the official court reporter or recorder to perform the duties in (a) or (b) above, the presiding judge of the court may, in his or her discretion, authorize a deputy reporter or recorder to act in place of and perform the duties of the official reporter or recorder.

TRCP 264b ELECTRONIC RECORDING OF COURT PROCEEDINGS

Electronic Recording. Any court authorized by the Supreme Court in civil cases, or the Court of Criminal Appeals in criminal cases, to make an electronic record in lieu of a stenographic record of its proceedings shall be governed by the following requirements:

(1) *Equipment.* Any equipment used for electronic recording of court proceedings shall include separate microphones for the witness, the examining attorney, all cross-examining attorneys, and the judge. The equipment shall be adequate to make a clear, distinct, separate, and transcribable recording of the voice of each person to whom a microphone is assigned, even when more than one person speaks at the same time. The equipment shall have a backup capacity so that if any component fails to function properly, the trial may proceed without substantial interruption.

(2) *Recorder.* To operate the electronic recording equipment the judge shall appoint one or more recorders, who shall be certified to record court proceedings by any official agency authorized to certify the qualifications of electronic recorders of court proceedings if there is such an agency. Instead, the judge may appoint a properly qualified official court reporter to serve as recorder.

(3) *Responsibility of Judge.* During any court proceeding being recorded by electronic equipment in lieu of stenographic means, the judge shall make sure that each person being recorded is speaking so that his or her voice can be properly recorded.

(4) *Certificate of Judge.* Each electronically recorded statement of facts filed in an appellate court shall be accompanied by a certificate of the judge that heard the case stating that the equipment used complied with paragraph (1), that it was operated throughout the proceeding by a recorder qualified as required in paragraph (2), and that the judge is satisfied that the recording is a clear, distinct, transcribable, and complete recording of the proceeding that it purports to include.

(5) *Party May Employ Court Reporter.* Any party may, at that party's own expense, hire a certified court reporter to make a stenographic record at the trial or hearing. The court may use the stenographic record to resolve any claim that the official (electronic) record is incomplete or inaccurate under applicable rules.

(6) *Effect of Rule.* This rule does not in itself authorize any court to record its proceedings by electronic equipment in lieu of stenographic means. This rule supersedes all special orders of the Supreme Court prescribing rules for specified courts to use such equipment, except to the extent that such orders authorize the use of electronic recording equipment in the specified courts. The Supreme Court may, from time to time, authorize other courts to record their proceedings by electronic equipment in accordance with this rule and may withdraw such authority from any or all courts previously authorized.

Notes and Comments

Change by 1995 amendments. New rule.

NOTE TO ADVISORY COMMITTEE: The following proposals for amendment of the Rules of Civil Procedure may not be strictly within the scope of the State Appellate Rules Committee of the Appellate Practice and Advocacy Section but, in the opinion of this Section Committee, they are related to appellate practice and are of particular interest to appellate lawyers. They are included in this report for referral to whatever subcommittee or task force of the Advisory Committee may be appropriate to consider them.

RULE 296. REQUESTS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

In any case tried in the district or county court without a jury, any party may request the court to state in writing its findings of fact and conclusions of law. Such request shall be entitled "Request for Findings of Fact and Conclusions of Law" and shall be filed within twenty days after judgment is signed with the clerk of the court, who shall immediately call such request to the attention of the judge who tried the case. The party making the request shall serve it on all other parties in accordance with Rule 21a. Such a request for findings of fact and conclusions of law ~~is proper only after a plenary trial before the judge without a jury, and~~ shall have no effect with respect to any matter determined in response to a motion for summary judgment.

RULE 297. ~~TIME TO FILE~~ FILING FINDINGS OF FACT AND CONCLUSIONS OF LAW

(a) Time to File. The court shall file its findings of fact and conclusions of law within twenty days after a timely request is filed. The court shall cause a copy of its findings and conclusions to be mailed to each party in the suit.

(b) Late Filing. If the court fails to file timely findings of fact and conclusions of law, the party making the request shall, within thirty days after filing the original request, file with the clerk and serve on all other parties in accordance with Rule a "Notice of Past Due Findings of Fact and Conclusions of Law" which shall be immediately called to the attention of the court by the clerk. Such notice shall state the date the original request was filed and the date the findings and conclusions were due. Upon filing this notice, the time for the court to file findings of fact and conclusions of law is extended to forty days from the date the original request was filed. The court's authority and duty to file findings and conclusions are not affected by expiration of the court's plenary power over the judgment.

EXPLANATION: Questions have been raised as to whether a court has power to file findings and conclusions after expiration of the court's plenary power. This question may arise when additional or amended findings and conclusions are filed, as provided by Rule 298, particularly if the original findings were filed late under Rule 297. The Section Committee is of the opinion that findings and conclusions, whether filed before or after expiration of the court's plenary power, do not in themselves change the judgment, although they may support a timely motion to modify or a ground for reversal. Consequently,

counsel filing a request for additional findings would be well advised to file a motion to modify if he believes that additional or amended findings would support a change in the judgment.

Notes and Comments

Change by 1994 amendments: The last sentence has been added. Findings and conclusions do not in themselves change the judgment, but may provide grounds for a timely motion to modify the judgment or for reversal on appeal.

NOTE TO ADVISORY COMMITTEE; The Section Committee considers the findings-and-conclusions practice unsatisfactory and has studied various proposals to correct it, but has not been able to develop a satisfactory solution. One proposal is to make the findings part of the decision process, analogous to jury findings, and to incorporate the request for additional findings into the motion to modify the judgment. Another is to adopt something like the federal practice.

RULE 298. ADDITIONAL OR AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

After the court files original findings of fact and conclusions of law, any party may file with the clerk of the court a request for specified additional or amended findings or conclusions. The request for these findings shall be made within ~~ten~~ twenty days after the filing of the original findings and conclusions by the court. Each request made pursuant to this rule shall be served on each party to the suit in accordance with Rule a.

The court shall file any additional or amended findings and conclusions that are appropriate within ten days after such request is filed, and cause a copy to be mailed to each party to the suit. No findings or conclusions shall be deemed or presumed by any failure of the court to make any additional findings or conclusions.

EXPLANATION: The Committee is of the opinion that counsel needs more than ten days after the filing of original findings and conclusions to prepare and file a request for additional or amended findings.

Notes and Comments

Change by 1994 amendments: The time for requesting additional findings is extended from ten to twenty days.

H. JUDGMENTS

RULE 300. JUDGMENTS, DECREES AND ORDERS

(a) **Definition; Rendition and Entry.** "Judgment" as used in these rules includes a decree and any order that disposes of a claim. A judgment is rendered when the judge pronounces it in open court or, if not so pronounced, when a written draft of the judgment is signed by the judge and delivered to the clerk for entry in the minutes of the court. A judgment pronounced in open court shall be promptly written, signed by the judge, and entered in the minutes.

Source: New rule; codification of existing law.

(b) **Form and Substance.** ~~The entry of the~~ A judgment shall contain the full names of the parties, ~~as stated in the pleadings,~~ for and against whom the judgment is rendered and for what recovery. The judgment ~~of the court~~ shall conform to the pleadings, the nature of the case proved, and the verdict, if any, and shall ~~be so framed as to~~ give ~~the~~ each party all the relief to which ~~he may be~~ each party is entitled either in law or in

equity. Only one final judgment shall be rendered in any cause except ~~where it is~~ as otherwise specially provided by law.

Source: Rules 301, 306.

(c) Conformity to Fact Findings. When ~~Where~~ a special verdict is rendered by a jury or the ~~, or the conclusions of~~ facts found by the judge are separately stated, the judge ~~court~~ shall render judgment in accordance with the facts so found ~~thereon~~ unless the findings are set aside or a new trial is granted, or judgment is rendered as a matter of law notwithstanding the verdict or jury finding under these rules.

Source: Rule 300.

(d) Motion for Judgment. Any party may ~~prepare and submit~~ file a motion for judgment accompanied by a proposed judgment ~~to the court~~ for signature.

Source: Rule 305; conforms to current practice; provision for motion invokes the service requirement of Rule 21.

(e) On Counterclaim. If the defendant establishes a demand against the plaintiff upon a counterclaim exceeding that established against ~~him~~ the defendant by the plaintiff, the ~~court~~ judge shall render judgment for the defendant for the excess.

Source: Rule 302.

(f) Enforcement. The court shall issue such process and writs as may be necessary to cause its judgments, ~~and~~ decrees, and orders to be carried into execution.

Source: Rule 308, first clause of first sentence.

(g) Judgment for Personal Property. Where the judgment is for personal property, and it is shown by the pleadings and evidence and the verdict, if any, that such property has an especial value to the plaintiff, the court may award a special writ for the seizure and delivery of such property to the plaintiff; and in such case may enforce its judgment by attachment, fine and imprisonment.

Source: Rule 308, after first clause.

(h) Judgments in Foreclosure Proceedings. Judgments for the foreclosure of mortgages and other liens shall ~~be~~ provide: that the plaintiff recover his debt, damages, and costs, with a foreclosure of the plaintiff's lien on the property subject ~~thereto, and,~~ to the lien; except in judgments against ~~executors, administrators and guardians~~ personal representatives, that an order of sale shall issue ~~to any sheriff or any constable withing the State of Texas, directing him to seize and sell the same,~~ for the property as under execution~~, in satisfaction of the judgment~~; and, that if the property cannot be found, or if the proceeds of ~~such~~ the sale ~~be~~ are insufficient to satisfy the judgment, then ~~to take the money or any~~ the balance ~~thereof~~ remaining unpaid, shall be taken out of ~~any~~ other property of the defendant, as in case of ordinary executions. ~~When~~ An order foreclosing a lien ~~upon~~ on real estate ~~is made in a suit having as its object the foreclosure of such lien, such order shall have all the~~ has the force and effect of a writ of possession ~~as between the parties to the foreclosure suit and any person claiming under the defendant to such suit by any right acquired pending such suit;~~ and the ~~court~~ order shall so provide ~~direct in the judgment providing for issuance of such order. The~~ and direct the sheriff or other officer ~~executing such order of sale~~ to place the purchaser of the property ~~sold thereunder~~ in possession ~~thereof~~ within thirty days after the ~~day of~~ date of the foreclosure sale.

Source: Rule 309, 310.

(i) Judgments Against Personal Representatives. A judgment for the recovery of money against an executor, administrator, or guardian, shall state that it is to be paid in the due course of administration. No execution shall issue ~~thereon~~, but it shall be certified to the county court, sitting in ~~matters of~~ probate, to be ~~there~~ enforced ~~in accordance with~~ under the law. ~~but a~~ A judgment against an executor ~~appointed and acting~~ under a will dispensing with the action of the county court ~~in reference to such estate~~ shall be enforced against the property of the testator in the hands of the executor, by execution, as in other cases.

Source: Rule 313.

I. NEW TRIALS

RULE 301. MOTION FOR JUDGMENT OR DETERMINATION OF FACT AS A MATTER OF LAW

(a) Grounds. If the evidence is not legally sufficient for a reasonable jury to find against the movant on a particular issue of fact, or if the undisputed evidence establishes the issue to be established in the movant's favor, the judge may declare the issue to be established in the movant's favor as a matter of law for all purposes in the pending suit, and, if, under the controlling law, a judgment cannot properly be rendered against the movant on any claim, counterclaim, cross-claim, or third-party claim without a finding adverse to movant on that issue, then the court may grant a motion for judgment as a matter of law in the movant's favor on that claim.

(b) Form. A motion for judgment as a matter of law or for a declaration that the evidence is legally insufficient for a reasonable jury to find one or more issues of fact against the movant or that the undisputed evidence establishes one or more issues in the movant's favor, shall identify the issue or issues referred to and explain the complaint so that it can be clearly understood by the judge.

Source: Rules 268, 300, 301; Federal Rules 50(a)(last sentence) and 51.

RULE 302. MOTIONS TO MODIFY JUDGMENT, TO DISREGARD JURY FINDINGS, AND TO ADD OR AMEND FINDINGS IN NONJURY CASES

A motion to modify may include any basis for modifying, correcting, or reforming the judgment in any respect, for disregarding one or more fact findings in a jury or nonjury case on an issue or issues having no legally sufficient evidential basis or having no proper legal effect on the judgment, or for adding or amending findings of fact in a nonjury case. Each such motion shall specify the grounds for the modification and the relief sought. Overruling a motion to modify does not preclude a motion for new trial, nor does overruling a motion for new trial preclude a motion to modify. ~~A motion to modify, correct, or reform a judgment (as distinguished from motion to correct the record of a judgment under Rule 316), if filed, shall be filed and determined within the time prescribed by this rule for a motion for new trial and shall extend the trial court's plenary power and the time for perfecting an appeal in the same manner as a motion for new trial. Each such motion shall be in writing and signed by the party or his attorney and shall specify the respects in which the judgment should be modified, corrected, or reformed. The overruling of such a motion shall not preclude the filing of a motion for new trial, nor shall the overruling of a motion for new trial preclude the filing of a motion to modify, correct, or reform.~~

Source: Rule 329b(g).

RULE 303. MOTIONS TO CORRECT ~~CORRECTION OF~~ CLERICAL MISTAKES ON ~~IN~~ JUDGMENT RECORD.

Clerical mistakes in the record of any judgment may be corrected by the judge in open court according to the truth or justice of the case after notice of the motion ~~therefor~~ has been given to the parties interested in such judgment, as provided in Rule 21a, and thereafter the execution shall conform to the judgment as amended.

Source: Rule 316.

RULE 320. MOTIONS FOR NEW TRIAL

(a) Grounds. A new trials may be granted and a judgment may be set aside for good cause, on motion of a party or on the judge's ~~court's~~ own motion ~~on such terms as the court shall direct~~ in the following instances:

(1) when the evidence is factually insufficient for a reasonable jury to have found against the movant on an issue of fact on which a finding adverse to the movant on the issue of liability is necessary under the controlling law to support the judgment against the movant on any claim, counterclaim, cross-claim, or third-party claim, or when a jury finding against the movant on such an issue is against the overwhelming preponderance of the evidence;

(2) when the damages awarded by the jury are manifestly too large or too small because of the factual insufficiency or overwhelming preponderance of the evidence;

(3) when the trial judge has made an error of law that is reasonably calculated to cause and probably did cause rendition of an improper judgment;

(4) when misconduct of the jury or of the officer in charge of the jury or any communication made to the jury or a juror's erroneous or incorrect answer on voir dire examination has probably resulted in injury to the movant;

(5) when new evidence has been discovered that was not available at the trial by the movant's use of reasonable diligence and, if presented at the trial, probably would have resulted in a verdict favorable to the movant;

(6) when a default judgment was improper because of a defect in service of process, the petition, or insufficiency of the evidence of damages or when the movant's failure to file an answer or to appear at the trial after proper notification may be excused on equitable grounds and the movant sets up a meritorious claim or defense;

(7) when a defendant cited by publication moves to set aside a judgment for good cause;

(8) when there is a material and irreconcilable conflict in jury findings;

(9) when any improper evidence, error in the court's charge, argument of counsel, or other trial court occurrence or ruling probably resulted in an improper verdict or judgment adverse to the movant.

Source: Rules 320, 327 and 329.

(b) Form. Complaints in general terms shall not be considered. ~~Grounds of objections couched in general terms — as that the court erred in its charge, in sustaining or overruling exceptions to the pleadings, and in excluding or admitting evidence, the verdict of the jury is contrary to law, and the like — shall not be considered by the court.~~ Each complaint in a motion for new trial shall briefly identify the ruling of the court, or that part of the charge given to the jury, or the written questions, instructions, or definitions refused, or the evidence admitted or excluded, or the fact finding without legal or factual evidentiary support, or other matter complained of, in such a way that the complaint can be clearly identified and understood by the judge. ~~Each~~

~~point relied upon in a motion for new trial or in arrest of judgment shall briefly refer to that part of the ruling of the court, charge given to the jury, or charge refused, admission or rejection of evidence, or other proceedings which are designated to be complained of, in such a way that the objection can be clearly identified and understood by the court.~~

Source: First sentence - Rule 322; second sentence - Rule 321.

(c) Affidavits. Supporting affidavits are required for complaints based on facts not in evidence, such as:

(1) jury misconduct not otherwise shown of record;

(2) newly discovered evidence;

(3) equitable grounds to set aside a default judgment;

(4) good cause to set aside a judgment after citation by publication.

(d) **Procedure for Jury Misconduct.**

(1) Hearing. When the ground of a the motion for new trial, supported by affidavit, is misconduct of the jury or of the officer in charge of ~~them~~ the jury, or ~~because of~~ any communication made to the jury, or a juror's ~~that a juror gave an~~ erroneous or incorrect answer on voir dire examination, the judge ~~court~~ shall hear evidence ~~thereof~~ from members of the jury or others in open court, and may grant a new trial if ~~such misconduct proved, or the communication made, or the erroneous or incorrect answer on voir dire examination, be material, and if~~ it reasonably appears from the evidence both on the hearing of the motion and from the record as a whole on the trial of the case ~~and from the record as a whole~~ that injury probably resulted to the complaining party.

(2) Testimony of Jurors. A juror may not testify as to any matter or statement occurring during the ~~course of the~~ jury's deliberations or ~~to the effect of anything upon his or~~ on any ~~other~~ juror's mind or emotions or mental processes, as influencing any other juror's ~~him to~~ assent to or dissent from the verdict ~~concerning his mental processes in connection therewith, except that a juror may testify whether any outside influence was improperly brought to bear upon any juror.~~ Nor may a juror's ~~his~~ affidavit or ~~evidence of~~ any statement by a juror ~~him~~ concerning ~~a~~ any matter about which the juror ~~he~~ would be precluded from testifying be ~~received for~~ admitted in evidence for any of these purposes. However, a juror may testify whether any outside influence was improperly brought to bear on any juror.

Source: Rule 327.

(e) **Excessive Damages; Remittitur**

(1) Excessive damages. If the judge is of the opinion that the damages found by the jury are not supported by legally or factually sufficient evidence, the judge may determine the greatest amount of damages reasonably sustainable by the evidence and may, as a condition of overruling a motion for new trial, suggest that the party claiming such damages file a remittitur of the excess within a specified period.

(2) Voluntary remittitur. Any party in whose favor a judgment has been rendered may remit any part thereof in open court, or by executing and filing with the clerk a written remittitur signed by the party or the party's attorney of record, and duly acknowledged by the party or the party's attorney. Such remittitur shall be a part of the record of the cause. Execution shall issue for the balance only of such judgment.

Source: Paragraph (2) - Rule 315.

(f) Partial New Trial. If the judge is of the opinion ~~When it appears to the court~~ that a new trial should be granted on a point or points that affect only a part of the matters in controversy ~~and that such part~~ that is clearly separable without unfairness to the parties, the judge ~~court~~ may grant a new trial as to that part only, but ~~provided that~~ a separate trial on unliquidated damages alone shall not be ordered if liability issues are contested.

Source: Rule 320.

RULE 321. PRESERVATION OF COMPLAINTS

(a) General Preservation Rule. ~~In order to preserve~~ As a prerequisite to the presentation of a complaint for appellate review, ~~a party must have presented to the trial court~~ a timely request, objection, or motion must appear of record, stating the specific grounds for the ruling ~~he~~ that the complaining party desired the trial court to make if the specific grounds were not apparent from the context. ~~It is also necessary for the complaining party to obtain a~~ Except as provided in paragraph (e) of this Rule, the judge's ruling upon the complaining party's request, objection, or motion must also appear of record. If the trial judge refuses to rule, an objection to the judge's ~~court's~~ refusal to rule is sufficient to preserve the complaint. ~~It is not necessary to formally except~~ Formal exceptions to rulings or orders of the trial court are not required. A party properly notified but absent from the trial waives all objections and complaints that the party would be required to raise at trial if present, unless the party's absence was induced by another party.

Source: Texas Rule of Appellate Procedure 52(a).

(b) Jury Cases; When Motion for New Trial Required. In a jury case, as a prerequisite to appellate review, the following complaints shall be made in a motion for new trial:

(1) jury misconduct, newly discovered evidence, failure to set aside a judgment by default, or any other complaint on which evidence must be heard; ~~A complaint on which evidence must be heard such as one of jury misconduct or newly discovered evidence or failure to set aside a judgment by default;~~

(2) ~~A complaint of~~ factual insufficiency of ~~the~~ evidence to support a jury finding;

(3) ~~A complaint~~ that a jury finding is against the overwhelming ~~weight~~ preponderance of the evidence;

(4) ~~A complaint of~~ factual inadequacy or excessiveness of the damages found by the jury; ~~or~~

~~(5) Incurable jury argument if not otherwise ruled on by the trial court.~~

(5) any improper evidence, argument of counsel, or other occurrence in the jury's presence so prejudicial that it could not have been cured by an instruction by the judge and probably resulted in a verdict adverse to the movant; and

(6) a material and irreconcilable conflict in jury findings.

Source: Rule 324(b).

(c) Jury Cases; Legal Sufficiency of Evidence. A complaint that a jury finding is not based on legally sufficient evidence or that a finding is established as a matter of law need not be made in a motion for new trial if otherwise shown in the record, but must be made in the trial court and may be included in a motion for judgment as a matter of law, a motion to declare an issue established in the movant's favor as a matter of

law, a motion to modify the judgment, or in a motion for new trial as a prerequisite to appellate review of denial of the relief requested in the motion.

(d) **Nonjury Cases; Legal and Factual Sufficiency of Evidence.** ~~A party desiring to complain on appeal in~~ In a nonjury case, a complaint that the evidence ~~was~~ is legally or factually insufficient to support a finding of fact, that a finding of fact was established as a matter of law or was against the overwhelming weight of the evidence, or of the inadequacy or excessiveness of the damages found by the ~~court~~ judge, as distinguished from a request that the judge amend a fact finding or made an additional finding of fact, may be made for the first time on appeal in the complaining party's brief ~~shall not be required to comply with paragraph (a) of this rule.~~

Source: Texas Rule of Appellate Procedure 52(d).

(e) **Presentation of Motions.** Unless the taking of evidence is necessary for presentation of a complaint in a motion for new trial, the overruling by operation of law of a motion for new trial or of a motion to modify the judgment is sufficient to preserve for appellate review the complaints properly made in the motion.

(f) **Informal Bills of Exception and Offers of Proof.** When ~~the court excludes~~ evidence is excluded, the offering party ~~offering same~~ shall as soon as practicable, but before the ~~court's~~ charge is read to the jury, be allowed to make, in the absence of the jury, an offer of proof in the form of a concise statement. The judge ~~court~~ may, or at the request of a party shall, direct the making of the offer in question and answer form. A transcription of the reporter's notes or of the electronic tape recording showing the offer, whether by concise statement or question and answer, showing the objections made, and ~~showing~~ the ruling ~~thereon~~, when included in the ~~record~~ statement of facts certified by the reporter or recorder, shall establish the nature of the evidence, the objections and the ruling. The judge ~~court~~ may add any other or further statement showing ~~which shows~~ the character of the evidence, the form in which ~~it was~~ offered, the objection made, and the ruling. No further offer need be made. No formal bills of exception are ~~shall be~~ needed to authorize appellate review of exclusion of ~~the question whether the court erred in excluding the~~ evidence. When the judge ~~court~~ hears objections to offered evidence out of the presence of the jury and rules that the ~~such~~ evidence be admitted, the ~~such~~ objections are ~~shall be~~ deemed to apply to the ~~such~~ evidence when it is admitted before the jury without the necessity of repeating them ~~those objections.~~

Source: Texas Rule of Appellate Procedure 52(b).

(g) **Formal Bills of Exception.** The preparation and filing of formal bills of exception shall be governed by the following rules:

(1) No particular form of word shall be required in a bill of exception, but the objection to the ruling or action of the judge ~~court~~ and the ruling complained of shall be stated with such circumstances, or so much of the evidence as may be necessary to explain, and no more, and the whole as briefly as possible.

(2) When the statement of facts contains all the evidence requisite to explain the bill of exception, evidence need not be set out in the bill; but it shall be sufficient to refer to the same as it appears in the statement of facts.

(3) The ruling of the judge ~~court~~ in giving or qualifying instructions to the jury shall be regarded as approved unless a proper and timely objection is made.

NOTE TO ADVISORY COMMITTEE: This subparagraph should conform to the rules concerning objections to the charge—or, perhaps, it may be omitted.

(4) Formal bills of exception shall be presented to the judge for ~~his~~ allowance and signature.

(5) The judge ~~court~~ shall submit the ~~such~~ bill to the adverse party or ~~his~~ the adverse party's counsel, if in attendance on the court, and if the adverse party finds it ~~found~~ to be correct, the judge shall sign it without delay and file it with the clerk.

(6) If the judge finds the ~~such~~ bill incorrect, ~~he~~ the judge shall suggest to the parties ~~party~~ or their ~~his~~ counsel such corrections as the judge deems necessary ~~therein~~, and if they are agreed to ~~he~~ the judge shall make such corrections, sign the bill and file it with the clerk.

(7) Should the parties ~~party~~ not agree to the judge's suggested ~~such~~ corrections, the judge shall return the bill to ~~him~~ the complaining party with ~~his~~ the judge's refusal endorsed on it ~~thereon~~, and shall prepare, sign and file with the clerk such a bill of exception as will, in ~~his~~ the judge's opinion, present the ruling of the court as it actually occurred.

(8) Should the complaining party be dissatisfied with the ~~said~~ bill filed by the judge, ~~he~~ the complaining party may, upon procuring the signatures of three respectable bystanders, citizens of this state, attesting to the correctness of the bill as originally presented ~~by him~~, have it ~~the same~~ filed as part of the record of the cause~~;and~~ The truth of the matter ~~in reference thereto~~ may be controverted and maintained by affidavits, not exceeding five in number on each side, ~~to be~~ filed with the papers of the cause, within ten days after the filing of the ~~said~~ bill ~~and to be considered as a part of the record relating thereto~~. On appeal the truth of the ~~such~~ bill ~~of exceptions~~ shall be determined from the ~~such~~ affidavits so filed.

(9) In the event of a ~~formal bill of exceptions is filed and there is a~~ conflict between a formal bill and ~~its provisions and the provisions of~~ the statement of facts, the bill ~~of exceptions~~ shall control.

(10) Anything occurring in open court or in chambers that is reported or recorded and so certified by the court reporter or recorder may be included in the statement of facts rather than in a formal bill of exceptions~~; provided that~~ In ~~in~~ a civil case the party requesting that all or part of the jury arguments or the voir dire examination of the jury panel be included in the statement of facts shall pay the cost thereof, which ~~cost~~ shall be separately listed in the certified bill of costs ~~certificate of costs prepared by the clerk of the trial court~~, and ~~the same~~ may be taxed in whole or in part by the appellate court against any party to the appeal.

(11) Formal bills of exception shall be filed in the trial court within sixty days after the judgment is signed in a civil case or within sixty days after the sentence is pronounced or suspended in open court in a criminal case, or if a timely motion for new trial or motion to modify request for findings, or motion to reinstate pursuant to Rule 165a has been filed, formal bills of exception shall be filed within ninety days after the judgment is signed in a civil case or within ninety days after sentence is pronounced or suspended in open court in a criminal case. When a formal bills of exception is ~~are~~ filed, it ~~they~~ may be included in the transcript or in a supplemental transcript.

Source: Texas Rule of Appellate Procedure 52(c).

J. TIMETABLES

RULE 322. TIME FOR FILING AND RULING ON MOTIONS

(a) **Motion for Judgment as a Matter of Law in Jury Cases.** A motion for judgment as a matter of law or for a declaration that the evidence is legally insufficient for a reasonable jury to find a particular issue of fact against the movant or that a finding in the movant's favor is established by the undisputed evidence may be presented at the close of the adverse party's evidence, or at the close of all the evidence, or after verdict and before judgment, or after judgment, and shall not be considered waived if not presented earlier. If presented

after judgment, the motion shall be presented in a motion to modify the judgment within the time allowed for filing such motions.

(b) **Motion for New Trial or to Modify Judgment.**

(1) A motion for new trial or to modify the judgment, if filed, shall be filed before ~~prior to~~ or within thirty days after the judgment or other order complained of is signed.

(2) One or more amended motions for new trial or to modify the judgment may be filed without leave of court before any preceding motion requesting the same relief ~~for new trial~~ filed by the movant is overruled and within thirty days after the judgment or other order complained of is signed.

(3) If ~~In the event~~ an original or amended motion for new trial or to modify~~, correct, or reform~~ the judgment is not determined by written order signed within seventy-five days after the judgment was signed, it shall be considered overruled by operation of law at the expiration of that period.

(4) ~~The trial court,~~ Regardless of whether an appeal has been perfected, the trial court has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within thirty days after the judgment is signed.

(5) If a motion for new trial or to modify the judgment is timely filed by any party, ~~the trial court,~~ regardless of whether an appeal has been perfected, the trial court has plenary power to grant a new trial or to vacate, modify, correct or reform the judgment until thirty days after all such timely-filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first.

(6) On expiration of the time within which the trial court has plenary power, the trial court cannot set aside a judgment ~~cannot be set aside by the trial court~~ except on ~~by~~ bill of review for sufficient cause filed within the time allowed by law; but ~~provided that~~ the court may at any time correct a clerical error in the record of a judgment and render judgment nunc pro tunc under Rule 303 ~~316,~~ and may also sign an order declaring a previous judgment or order to be void because signed after the court's plenary power had expired and may also file findings of fact and conclusions of law if within the time allowed by Rule 297.

Source: Rule 329b.

(c) **Effective Dates and Beginning of Periods ~~Periods to Run from Signing of Judgment.~~**

(1) *Beginning of Periods.* The date an ~~of~~ judgment or order is signed as shown of record ~~shall~~ determines the ~~beginning of the periods prescribed by these rules for the~~ court's plenary power to grant a new trial or to vacate, or modify, correct or reform a judgment or order and for filing in the trial court ~~the various~~ documents that ~~these rules authorize~~ a party ~~to~~ may file within ~~such~~ those periods, including~~, but not limited to,~~ motions for new trial, motions to modify ~~judgment~~, motions to reinstate a case dismissed for want of prosecution, and motions to vacate a judgment ~~and requests for findings of fact and conclusions of law; but this rule shall not determine what constitutes rendition of a judgment or order for any other purpose~~.

(2) *Date to be Shown.* ~~Judges, attorneys and clerks are directed to use their best efforts to cause all~~ All judgments, decisions, and orders of any kind ~~to~~ shall be reduced to writing and signed by the trial judge with the date of signing expressly stated ~~therein~~ in it. If the date of signing is not recited in the judgment or order, it may be shown in the record by a certificate of the judge or otherwise; ~~provided, however, that~~ the absence of a showing of the date in the record does ~~shall~~ not invalidate ~~any~~ a judgment or an order.

(3) *Notice of Judgment.* When ~~the final judgment or other appealable order~~ an appealable judgment or order is signed, the clerk of the court shall immediately give notice of the signing to the parties ~~or their attorneys of record~~ by first-class mail ~~advising that the judgment or order was signed~~. Failure to comply with ~~the provisions of~~ this rule shall not affect the periods mentioned in paragraph (1) ~~of this rule~~, except ~~as provided in~~ under paragraph (4).

(4) *No Notice of Judgment.* If within twenty days after the judgment or other appealable order is signed, a party adversely affected by it ~~or his attorney~~ has neither received the notice required by paragraph (3) nor acquired actual knowledge of the order, then ~~with respect to~~ for that party ~~all~~ the periods ~~mentioned~~ in paragraph (1) shall begin on the date that ~~such~~ party ~~or his attorney~~ received ~~such~~ notice or acquired actual knowledge of the signing, whichever occurred first, but in no event shall those periods begin more than ninety days after the original ~~judgment or other~~ appealable order was signed.

(5) *Motion, Notice, and Hearing.* ~~In order~~ To establish the application of paragraph (4) ~~of this rule~~, the party adversely affected is required to prove in the trial court, on sworn motion and notice, elements of paragraph (4) 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. The trial court shall find the date on which the party or his attorney first either received 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.

(6) *Nunc Pro Tunc Order.* When a corrected judgment has been signed after expiration of the court's plenary power ~~pursuant to Rule 316~~, the periods ~~mentioned in paragraph (1) of this rule~~ in subparagraph (1) of this paragraph shall run from the date of signing the corrected judgment ~~with respect to any complaint~~ for complaints that would not ~~be applicable~~ apply to the original document.

(7) ~~*When Process Served by Publication.* With respect to~~ For a motion for new trial filed more than thirty days after the judgment was signed ~~pursuant to Rule 329~~ when process has been served by publication, the periods ~~provided by paragraph~~ in subparagraph (1) shall be computed as if the judgment were signed on the date of filing the motion.

(8) *Modified Judgments.* If a judgment is modified, corrected or reformed in any respect, the time for appeal shall run from the time the modified, corrected, or reformed judgment is signed, but if a correction is made ~~pursuant to Rule 316~~ after expiration of the period of plenary power provided by this rule, no complaint shall be heard on appeal that could have been presented in an appeal from the original judgment.

Source: Paragraphs 1 - 7 - Rule 306a; Paragraph 8 - Rule 329b(h).

RULE 627. TIME FOR ISSUANCE

If no supersedeas bond or notice of appeal, as required of agencies exempt from filing bonds, has been filed and approved, the clerk of the court or justice of the peace shall issue the execution upon such judgment upon application of the successful party or his attorney after the expiration of thirty days from the time a final judgment is signed. If a timely motion for new trial ~~or in arrest of judgment~~ or motion ~~to vacate or to~~ modify the judgment is filed, the clerk shall issue the execution upon the judgment on application of the party or his attorney after the expiration of thirty days from the time the order overruling the motion is signed or from the time the motion is overruled by operation of law.

Notes and Comments

Change by 1994 amendment: The motion to modify is added to conform to Tex. R. Civ. P. 329b(g) and the motion to vacate is also added.

RULE 634. EXECUTION SUPERSEDED

~~The clerk or justice of the peace shall immediately issue a writ of supersedeas suspending all further proceedings under any execution previously issued when a supersedeas bond is afterward filed and approved within the time prescribed by law or these rules.~~

If a supersedeas bond is filed and approved at any time during the appellate process, the clerk or justice of the peace shall immediately issue a writ of supersedeas, which shall suspend all further ~~proceedings~~ under any previously issued writ of execution or other enforcement process.

EXPLANATION: *Rule 634 would be amended to reverse the decision in Texas Emp. Ins. Ass'n v. Engelke, 790 S.W.2d 93 (Tex. App.- Houston [1st Dist.] 1990, orig. proc.), in which the court of appeals held that a supersedeas bond filed after a levy on a writ of execution, but before the funds were turned over to the judgment creditor, does not prevent the officer from turning the funds over to the judgment creditor. As amended, Rule 634 makes clear that the filing and approval of a supersedeas bond prevents any further attempts to enforce the judgment by means of a writ of execution or garnishment or a turnover order.*

Notes and Comments

Change by 1994 amendments: The rule has been rewritten to give immediate effect to a supersedeas bond, though an execution may have already been levied.

RULE 657. JUDGMENT FINAL FOR POSTJUDGMENT GARNISHMENT

In the case mentioned in subsection 3, section 63.001, Civil Practice and Remedies Code, the judgment in the underlying proceeding, whether based upon a liquidated demand or an unliquidated demand, shall be deemed final and subsisting for the purpose of postjudgment garnishment from and after the date it is signed, unless either a supersedeas bond or deposit shall have been approved and filed in accordance with Texas Rule of Appellate Procedure 47 or the judgment debtor has complied with an order of alternate security under Texas Rule of Appellate Procedure 47 or section 52.002 of the Texas Property Code. A writ of garnishment may issue, upon application and order, no earlier than the date upon which a writ of execution might issue under Rules 627 and 628 of the Texas Rules of Civil Procedure.

Notes and Comments

Change by 1994 amendments: The rule has been clarified and the last sentence has been added.

NOTE TO ADVISORY COMMITTEE: *The following conforming amendments to the remaining garnishment rules have been approved by the Section Committee.*

RULE 658. APPLICATION FOR WRIT OF GARNISHMENT AND ORDER

Either at the commencement of a suit, ~~or~~ at any time during its progress, or following the rendition of a final judgment, the ~~plaintiff~~ garnishor may file an application for a writ of garnishment. Such application shall be supported by affidavits of the ~~plaintiff~~ garnishor, his agent, his attorney, or other person having knowledge of relevant facts. The application shall comply with all statutory requirements and shall state the grounds for issuing the writ and the specific facts relied upon by the ~~plaintiff~~ garnishor to warrant the required findings of the court. The writ shall not be quashed because two or more grounds are stated conjunctively or disjunctively.

The application and any affidavits shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence; provided that facts may be stated based upon information and belief if the grounds of such belief are specifically stated.

a. Postjudgment Garnishment. A postjudgment writ of garnishment may issue upon written order granting the application, which may be ex parte and in the absence of a hearing. The court in its order granting the application shall make specific findings of facts to support the statutory grounds found to exist and shall specify the maximum value of property or indebtedness that may be garnished. No bond shall be required for a postjudgment writ of garnishment.

b. Prejudgment Garnishment. No writ shall issue before final judgment except upon written order of the court after a hearing, which may be ex parte. The court in its order granting the application shall make specific findings of facts to support the statutory grounds found to exist, and shall specify the maximum value of property or indebtedness that may be garnished and the amount of bond required of ~~plaintiff~~ the garnishor. Such bond shall be in an amount which, in the opinion of the court, shall adequately compensate the defendant in the underlying proceeding in the event ~~plaintiff~~ the garnishor fails to prosecute his suit to effect, and pay all damages and costs as shall be adjudged against him for ~~wrongfully~~ suing out the writ of garnishment. The court shall further find in its order the amount of bond required of the defendant in the underlying proceeding to replevy, which, unless the defendant exercises his option as provided under Rule 664, shall be the amount of ~~plaintiff's~~ the garnishor's claim, one year's accrual of interest if allowed by law on the claim, and the estimated costs of court. The order may direct the issuance of several writs at the same time, or in succession, to be sent to different counties.

RULE 658A. BOND FOR PREJUDGMENT GARNISHMENT

No writ of garnishment shall issue before final judgment until the ~~party applying therefor~~ garnishor has filed with the officer authorized to issue such writ a bond payable to the defendant in the underlying proceeding in the amount fixed by the court's order, with sufficient surety or sureties as provided by statute, conditioned that the ~~plaintiff~~ garnishor will prosecute his suit to effect and pay to the extent of the penal amount of the bond all damages and costs as may be adjudged against him for ~~wrongfully~~ suing out such writ of garnishment.

After notice to the opposite party, either before or after the issuance of the writ, the defendant or plaintiff in the underlying proceeding may file a motion to increase or reduce the amount of such bond, or to question the sufficiency of the sureties. Upon hearing, the court shall enter its order with respect to such bond and the sufficiency of the sureties.

Should it be determined from the garnishee's answer, if such is not controverted, that the garnishee is indebted to the defendant in the underlying proceeding, or has in his hands effects belonging to the defendant, in an amount or value less than the amount of the debt claimed by the ~~plaintiff~~ garnishor, then after notice to the defendant the court in which such garnishment is pending upon hearing may reduce the required amount of such bond to double the sum of the garnishee's indebtedness to the defendant plus the value of the effects in his hands belonging to the defendant.

RULE 659. CASE DOCKETED

When the foregoing requirements of these rules have been complied with, the judge, or clerk, or justice of the peace, as the case may be, shall docket the case in the name of the ~~plaintiff~~ garnishor as plaintiff and of the garnishee as defendant; and shall immediately issue a writ of garnishment directed to the garnishee, commanding him to appear before the court out of which the same is issued at or before 10 o'clock a.m. of the Monday next following the expiration of twenty days from the date the writ was served, if the writ is issued out of the district or county court; or the Monday next after the expiration of ten days from the date the writ was

served, if the writ is issued out of the justice court. The writ shall command the garnishee to answer under oath upon such return date what, if anything, he is indebted to the defendant in the underlying proceeding, and was when the writ was served, and what effects, if any, of the defendant in the underling proceeding ~~he~~ has in his possession, and had when such writ was served, and what other persons, if any, within his knowledge, are indebted to the defendant in the underlying proceeding or have effects belonging to him in their possession.

RULE 661. FORM OF WRIT

The following form of writ may be used:

The State of Texas.

To E.F., Garnishee, greeting:

Whereas, in the _____ Court of _____ County (if a justice court, state also the number of the precinct), in a certain cause wherein A.B. is plaintiff and C.D. is defendant, the plaintiff, (having recovered a final judgment against C.D. or claiming an indebtedness against the said C.D.) of _____ dollars, besides interest and costs of suit, has applied for a writ of garnishment against you, E.F.; therefore you are hereby commanded to be and appear before said court at _____ in said county (if the writ is issued from the county or district court, here proceed: 'at 10 o'clock a.m. on the Monday next following the expiration of twenty days from the date of service hereof.' If the writ is issued from a justice of the peace court, here proceed: at or before 10 o'clock a.m. on the Monday next after the expiration of ten day from the date of service hereof.' In either event, proceed as follows:) then and there to answer upon oath what, if anything, you are indebted to the said C.D., and were when this writ was served upon you, and what effects, if any, of the said C.D. you have in your possession, and had when this writ was served, and what other persons, if any, within your knowledge, are indebted to the said C.D. or have effects belonging to him in their possession. You are further commanded NOT to pay to defendant any debt or to deliver to him any effects, pending further order of this court. Herein fail not, but make due answer as the law directs."

RULE 663A. SERVICE OF WRIT ON DEFENDANT IN THE UNDERLYING PROCEEDING

The defendant in the underlying proceeding shall be served in any manner prescribed for service of citation or as provided in Rule 21a with a copy of the writ of garnishment, the application, accompanying affidavits and orders of the court as soon as practicable following the service of the writ. There shall be prominently displayed on the face of the copy of the writ served on the defendant, in ten-point type and in a manner calculated to advise a reasonably attentive person of its contents, the following:

"To _____, Defendant:

You are hereby notified that certain properties alleged to be owned by you have been garnished. If you claim any rights in such property, you are advised:

"YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WRIT."

RULE 664. DEFENDANT IN UNDERLYING PROCEEDING MAY REPLEVY

At any time before judgment is rendered in the underlying proceeding, should the garnished property not have been previously claimed or sold, the defendant in the underlying proceeding may replevy the same, or any part thereof, or the proceeds from the sale of the property if it has been sold under order of the court, by giving bond with sufficient surety or sureties as provided by statute, to be approved by the officer who levied the writ, payable to ~~plaintiff~~ the garnishor, in the amount fixed by the court's order, or, at the defendant's option, for the value of the property or indebtedness sought to be replevied (to be estimated by the officer), plus one year's interest thereon at the legal rate from the date of the bond, conditioned that the defendant~~, garnishee,~~ in the underlying proceeding shall satisfy, to the extent of the penal amount of the bond, any judgment which may be rendered against him in ~~such action~~ the underlying proceeding.

On reasonable notice to the opposing party (which may be less than three days) either party shall have the right to prompt judicial review of the amount of bond required, denial of bond, sufficiency of sureties, and estimated value of the property, by the court which authorized issuance of the writ. The court's determination may be made upon the basis of affidavits, if uncontroverted, setting forth such facts as would be admissible in evidence; otherwise, the parties shall submit evidence. The court shall forthwith enter its order either approving or modifying the requirements of the officer or of the court's prior order, and such order of the court shall supersede and control with respect to such matters.

On reasonable notice to the opposing party (which may be less than three days) the defendant shall have the right to move the court for a substitution of property, of equal value as that garnished, for the property garnished. Provided that there has been located sufficient property of the defendant's to satisfy the order of garnishment, the court may authorize substitution of one or more items of ~~defendant's~~ property of the defendant in the underlying proceeding for all or for part of the property garnished. The court shall first make findings as to the value of the property to be substituted. If property is substituted, the property released from garnishment shall be delivered to defendant, if such property is personal property, and all liens upon such property from the original order of garnishment or modification thereof shall be terminated. Garnishment of substituted property shall be deemed to have existed from date of garnishment on the original property garnished, and no property on which liens have become affixed since the date of garnishment of the original property may be substituted.

RULE 664A. DISSOLUTION OR MODIFICATION OF WRIT OF GARNISHMENT

A defendant whose property or account has been garnished or any intervening party who claims an interest in such property or account, may by sworn written motion, seek to vacate, dissolve or modify the writ of garnishment, and the order directing its issuance, for any grounds or cause, extrinsic or intrinsic. Such motion shall admit or deny each finding of the order directing the issuance of the writ except where the movant is unable to admit or deny the finding, in which case movant shall set forth the reasons why he cannot admit or deny. Unless the parties agree to an extension of time, the motion shall be heard promptly, after reasonable notice to the ~~plaintiff~~ the garnishor (which may be less than three days), and the issue shall be determined not later than ten days after the motion is filed. The filing of the motion shall stay any further proceedings under the writ, except for any orders concerning the care, preservation or sale of any perishable property, until a hearing is had, and the issue is determined. The writ shall be dissolved unless, at such hearing, the plaintiff the garnishor shall prove the grounds relied upon for its issuance, but the court may modify its previous order granting the writ and the writ issued pursuant thereto. The movant shall, however, have the burden to prove that the reasonable value of the property garnished exceeds the amount necessary to secure the debt, interest for one year, and probable costs. He shall also have the burden to prove facts to justify substitution of property.

The court's determination may be made upon the basis of affidavits, if uncontroverted, setting forth such facts as would be admissible in evidence; otherwise, the parties shall submit evidence. The court may make all such orders including orders concerning the care, preservation or disposition of the property (or the proceeds therefrom if the same has been sold), as justice may require. If the movant has given a replevy bond, an order to vacate or dissolve the writ shall vacate the replevy bond and discharge the sureties thereon, and if the court

modifies its orders or the writ issued pursuant thereto, it shall make such further orders with respect to the bond as may be consistent with its modification.

RULE 667. JUDGMENT BY DEFAULT

If the garnishee fails to file an answer to the writ of garnishment at or before the time directed in the writ, it shall be lawful for the court, at any time after judgment shall have been rendered against the defendant in the underlying proceeding, and on or after appearance day, to render judgment by default, as in other civil cases, against such garnishee for the full amount of such judgment against the defendant together with all interest and costs that may have accrued in the main case and also in the garnishment proceedings. The answer of the garnishee may be filed as in any other civil case at any time before such default judgment is rendered.

RULE 668. JUDGMENT WHEN GARNISHEE IS INDEBTED

Should it appear from the answer of the garnishee or should it be otherwise made to appear and be found by the court that the garnishee is indebted to the defendant in the underlying proceeding in any amount, or was so indebted when the writ of garnishment was served, the court shall render judgment for the ~~plaintiff~~ garnishor against the garnishee for the amount so admitted or found to be due to the defendant from the garnishee, unless such amount is in excess of the amount of the ~~plaintiff's~~ garnishor's judgment against the defendant with interest and costs, in which case, judgment shall be rendered against the garnishee for the full amount of the judgment already rendered against the defendant, together with interest and costs of the suit in the original case and also in the garnishment proceedings. If the garnishee fail or refuse to pay such judgment rendered against him, execution shall issue thereon in the same manner and under the same conditions as is or may be provided for the issuance of execution in other cases.

RULE 669. JUDGMENT FOR EFFECTS

Should it appear from the garnishee's answer, or otherwise, that the garnishee has in his possession, or had when the writ was served, any effects of the defendant liable to execution, including any certificates of stock in any corporation or joint stock company, the court shall render a decree ordering sale of such effects under execution in satisfaction of ~~plaintiff's~~ garnishor's judgment and directing the garnishee to deliver them, or so much thereof as shall be necessary to satisfy plaintiff's judgment, to the proper officer for that purpose.

RULE 673. MAY TRAVERSE ANSWER

If the ~~plaintiff~~ garnishor should not be satisfied with the answer of any garnishee, he may controvert the same by his affidavit stating that he has good reason to believe, and does believe, that the answer of the garnishee is incorrect, stating in what particular he believes the same to be incorrect. The defendant in the underlying proceeding may also, in like manner, controvert the answer of the garnishee.

RULE 675. DOCKET AND NOTICE

The clerk of the court or the justice of the peace, on receiving certified copies filed in the county of the garnishee's residence under the provisions of the statutes, shall docket the case in the name of the ~~plaintiff~~ garnishor as plaintiff, and of the garnishee as defendant, and issue a notice to the garnishee, stating that his answer has been so controverted, and that such issue will stand for trial on the docket of such court. Such notice shall be directed to the garnishee, be dated and tested as other process from such court, and served by delivering a copy thereof to the garnishee. It shall be returnable, if issued from the district or county court, at ten o'clock a.m. of the Monday next after the expiration of twenty days from the date of its service; and if issued from the

justice court, to the next term of such court convening after the expiration of twenty days after the service of such notice.

RULE 677. COSTS

Where the garnishee is discharged upon his answer, the costs of the proceeding, including a reasonable compensation to the garnishee, shall be taxed against the ~~plaintiff~~ garnishor; where the answer of the garnishee has not been controverted and the garnishee is held thereon, such costs shall be taxed against the defendant in the underlying proceeding and included in the execution provided for in this section; where the answer is contested, the costs shall abide the issue of such contest.

11-18-94

Committee on State Appellate Rules
Appellate Practice and Advocacy Section

and

SCAC Subcommittee on Appellate Rules

Report to Advisory Committee on Proposals for Amending Appellate Rules

Rule 41(a)(1), 52(c)(1) Page 984

1. Proponent: Michael Northrup, San Francisco

2. Proposal: A motion to modify the judgment does not extend the time for perfecting the appeal or for filing a bill of exception.

3. Draft (by Section Committee): See below.

4. Comment: This statement is erroneous because TRCP 329b(g) provides that a motion to modify "shall extend . . . the time for perfecting the appeal in the same manner as a motion for new trial." Nevertheless, TRAP 41(a)(1) should expressly so provide, and TRAP 52((c)(1) should also so provide with respect to filing a bill of exception.

5. Committee Action: Proposed TRAP 41a)(1) provides that the time for filing the notice of appeal shall be filed within ninety days after the judgment is signed "if a timely motion for new trial, motion to modify the judgment, motion to reinstate pursuant to Rule of Civil Procedure 165a, or a request for findings of fact has been filed . . . ." Cum. Rep. 11/2/94, p. 13.

Likewise, proposed TRCP 321(g)(11), which carries forward TRAP 52(c)(1), provides, "if a timely motion for new trial, or motion to modify, request for findings, or motion to reinstate pursuant to Rule 165a has been filed, formal bills of exception shall be filed within ~~sixty~~ days after the judgment is signed . . . ."

Rule 51c Page 985

1. Proponent: Michael Northrup

2. Proposal: From a theoretical standpoint, making original exhibits part of the transcript while putting the court reporter in charge of the exhibits is incongruous with other rules relating to the

The rules as so amended would seem to make original exhibits, when sent to the appellate court in lieu of copies, part of the statement of facts rather than the transcript, and, therefore, should be transmitted to the appellate court by the reporter as provided by proposed TRAP 51(k). It is assumed that the exhibits, though in the custody of the clerk, would be available to the reporter for that purpose. However, perhaps TRAP 51(*f*) should expressly provide that the reporter should transmit them to the appellate court when the trial court, as well as the appellate court so orders.

TRCP Rules 296-298 Page 989

1. Proponent: Elaine Carlson, Houston

2. Proposal: Amend TRCP 296-298 to make all times for deadlines run from the date the judgment is signed.

3. Draft (by Section Committee): See Cum. Rep. 11/2/94, pp. 64, 65.

4. Comment: These proposed amendments do not make all the periods run from the date of the judgment, but the proposed amendment to TRCP 298 changes the time for filing a request for additional findings from ten to twenty days, thus avoiding what Professor Carlson refers to as "a needless trap for the practicing bar."

5. Committee Action: No further action has been taken by the Section Committee or the SCAC Subcommittee on Appellate Rules.

TRCP Rule 329B Page 990

1. Proponent: Elaine Carlson, Houston.

2. Proposal: Either TRCP 329b should be changed to extend plenary power by a timely filing of a request for findings or make clear in the comments to Rule 329b that it does not.

3. Draft (by):

4. Comment:

5. Committee Action: The proposed amendment to TRCP 297(b) would provide: "The court's authority and duty to file findings and conclusions are not affected by expiration of the court's plenary power over the judgment." Cum. Rep. 11/2/94, p. 65. Neither the Section Committee nor the SCAC Subcommittee on Appellate Rules has considered whether a timely request for findings should extend the trial court's plenary power.

Rule 40(a)(4) [40(a)(5)] Page 991

1. Proponent: Elaine Carlson, Houston

2. Proposal: Amend rule 40(a)(4) [proposed 40(a)(5), Cum. Rep. 11/2/94, p. 12] to include a provision to extend the time to file a notice of limitation of appeal if a timely request for findings/conclusions is filed.

3. Draft (by):

4. Comment:

5. Committee Action: No action has been taken on this proposal.

Rule 40(a)(4) [40(a)(5)] Page 991

1. Proponent: Elaine Carlson, Houston

2. Proposal: Amend rule 40(a)(4) [proposed 40(a)(5), Cum. Rep. 11/2/94, p. 12] to include a provision to extend the time to file a notice of limitation of appeal if a timely request for findings/conclusions is filed.

3. Draft (by):

4. Comment:

5. Committee Action: No action has been taken on this proposal.

Rule 4 Pages 993, 994

1. Proponent: Paul Nye, Corpus Christi

3. Draft (by):

4. Comment:

5. Committee Action: No action on this proposal.

Rule ___ Page 995

1. Proponent: Katherine A. Kinser, Dallas

2. Proposal: Sanctions in appellate courts.

3. Draft (by):

4. Comment: See penalty provisions in proposed Rules 84, 182(b).

5. Committee Action: Refer to Task Force on Sanctions.

Rule 120, 121 Page 997

1. Proponent: Frank Evans, Houston

2. Proposal: Do something about "impact of mandamus and other extraordinary proceedings."

3. Draft (by):

4. Comment: Do what? What is the problem?

5. Committee Action: None required.

Rule 90(i) Page 997

1. Proponent: Frank Evans, Houston

2. Proposal: Unpublished opinions.

Better system for making unpublished opinions of greater benefit to the bar and the judiciary.

1. Proponent: Charles Spain, Austin

2. Proposal: Mailing

(1) Texas Rule of Appellate Procedure 4(b): I don't understand why the appellate mailbox rule applies only to "a motion for rehearing, any matter relating to taking an appeal or writ of error from the trial court to any higher court, or application for writ of error or petition for discretionary review." Texas Rule of Civil Procedure 5 applies to "any document." Is Rule 4(b) really more restrictive, and if so, is there a good reason why it is more restrictive? I recommend amending Rule 4(b) so it applies to "any document," which is certainly what the bar thinks (and perhaps prays) it means.

3. Draft (b):

4. Comment: See current Cumulative Report at TRAP4(b).

5. Committee Action: SCAC approval has been obtained.

Rule 4(h) Page 1004

1. Proponent: Thomas S. Leatherbury, Dallas

2. Proposal: Sealing records, as per draft below.

3. Draft (by proponent):

All final opinions, including concurring and dissenting opinions, as well as all orders made during the pendency of cases are specifically made public information, subject to public access and inspection, and shall never be sealed. All other records, including applications, motions, briefs, and exhibits, filed with any Texas Court of Appeals, the Texas Court of Criminal Appeals, or the Supreme Court of Texas are subject to Texas Rule of Civil Procedure 76a, provided, however, that all evidence offered in connection with a sealing motion shall be by affidavit.

4. Comment:

5. Committee Action: Combined Appellate Rules' Committee is still working on this problem.

Rule 5(a) Page 1007

1. Proponent: Michol O'Connor, Houston

2. Proposal: Courthouse closed.

Rules 51(c), 53(k) Page 001014

1. Proponent: Richard N. Countiss, Houston
2. Proposal: Adapt federal system of transmitting record to appellate court.
3. Draft (by):
4. Comment: Included in proposed Rules 51(c), 53(k).
5. Committee Action: None required. SCAC disapproved proposal on 3/18/94.

TRAP Rule 11 Page 001016

1. Proponent: Paul Nye, Corpus Christi
2. Proposal: Specify who files exhibits with appellate court.
3. Draft (by):
4. Comment: Included in proposed Rule 11(a)(3). Approved by SCAC.
5. Committee Action: TRCP rules 75a and 75b are being studied further.

TRAP Rule 12 Page 001017

1. Proponent: Paul Nye, Corpus Christi
2. Proposal: References in this rule should be to the district not Supreme Judicial District.
3. Draft (by):
4. Comment: Amendment previously adopted.
5. Committee Action: None required.

and counsel cannot agree about the disposition of the motion. Agreed or joint motions would be signed by all parties or their counsel similar to Texas Rule of Appellate Procedure 8.

3. Draft (by):

4. Comment:

5. Committee Action: Disapprove proponent's recommendation.

TRAP Rule 20 Page 001022

1. Proponent: Charles Adkin Spain, Jr., Austin

2. Proposal: Rule 20: Since the new Rules for Admission to the Bar now govern pro hac vice admissions in the appellate courts, will nonadmitted attorneys tendering amicus curiae briefs have to comply with Rule for Admission to the Bar 19?

3. Draft (by):

4. Comment:

5. Committee Action: Disapprove proponent's recommendation as unnecessary.

TRAP Rule 20(b) Page 001025A

1. Proponent: Richard N. Countiss, Houston

2. Proposal: I am increasingly concerned by the abuse of the amicus curiae rules in appellate matters. More and more special interest groups are filing amicus curiae briefs in an attempt to overwhelm any litigant who takes a position contrary to the particular special interest.

Most of these briefs are filed at the last minute when there is insufficient time to respond to them before oral argument. Also, most make no attempt at an objective discussion of the law (which is what an amicus curiae brief is supposed to do).

I suggest that the following changes int he amicus curiae rules should be considered:

(1) Place a time limit on filing of amicus curiae briefs. A limitation of something like sixty days after the appellee's brief is filed seems to me to be a fair time frame.

(2) Require the amicus to file a Motion for Leave to File the Amicus Brief, demonstrating in the

(1) to (3) No change.

(4) Notice of Limitation of Appeal. No attempt to limit the scope of an appeal shall be effective unless the severable portion of the judgment from which the appeal is taken is designated in a notice served on all other parties to the trial court's final judgment within fifteen days after judgment is signed, or if a motion for new trial or request for findings of fact or conclusions of law is are filed by any party, within seventy-five days after the judgment is signed.

(5) No change.

(b) No change.

(1) to (2) No change.

4. Comment: Good point.

5. Committee Action: Adopt. See Cumulative Report at TRAP 40(a)(5). SCAC approved general concept as shown in Cumulative Report.

TRAP Rule 52 Page 001032

1. Proponent: Michol O'Connor, Houston

2. Proposal: The filing of the request for findings and conclusions, however, does not extend the time to file the formal bill of exception under rule 52, TEX.R.APP.P. I think it should.

3. Draft (by proponent): Preservation of Appellate Complaints

(a) to (b) No change.

(c) Formal Bills of Exception.

(1) to (10) No change.

(11) Formal bills of exception shall be filed in the trial court within sixty days after the judgment is signed in a civil case or within sixty days after the sentence is pronounced or suspended in open court in a criminal case, or if a timely motion for new trial or request for findings of fact and conclusions of law have ~~has~~ been filed, formal bills of exception shall be filed within ninety days after the judgment is signed in a civil case or within ninety days after sentence is pronounced or suspended in open court in a criminal case. When formal bills of exception are filed they may be included in the transcript or in a supplemental transcript.

(d) Necessity for Motion for New Trial in Civil Cases. A point in a motion for new trial is

3. Draft (by proponent):

4. Comment: There is a conflict. See Appellate Rules Committee Report by G. Udashen.

5. Committee Action: No recommendation.

TRAP Rule 41(a) Page 001037

1. Proponent: Paul W. Nye, Corpus Christi

2. Proposal: 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.

3. Draft (by proponent):

4. Comment:

5. Committee Action: Disapproved as unnecessary.

TRAP Rule 42(a) Page 001038

1. Proponent: Paul W. Nye, Corpus Christi

2. Proposal: 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.

3. Draft (by proponent):

4. Comment: Adopt.

5. Committee Action: Recommends amendment of TRAP 42(a)(3) to refer to TRAP 41(a)(2) as shown in current Cumulative Report.

to the benefit of the court reporter and clerk, the Texas courts have held that these officers may not condition the preparation or delivery of the statement of facts or transcript upon advance payment. E.g., City of Ingleside v. Johnson, 537 S.W.2d 145 (Tex.Civ.App.--Corpus Christi 1976, orig. proceeding).

3. Draft (by proponent):

4. Comment: Proposed Rules 51(c) and 53(c) would require advance payment.

5. Committee Action: Recommend SCAC approval.

TRAP Rule 46(e) Page 001043

1. Proponent: Paul W. Nye, Corpus Christi

2. Proposal: This rule should also include making arrangements for payments to the trial clerks.

3. Draft (by proponent):

4. Comment: Proposed Rules 51(c) requires advance payment.

5. Committee Action: Recommend SCAC approval.

TRAP Rule 48 Page 001044

1. Proponent: Peter L. Brewer, Longview

2. Proposal: However, the rule goes on to state that "with leave of Court" an Appellant may "deposit a negotiable obligation of any bank or savings and loan association chartered by the government of the United States of America or any state thereof . . ."

My question is: Why is it necessary to obtain leave of court in this instance? The trial courts of this state have better things to do than to worry about whether party's check is going to bounce or whether their bank is solvent at the moment. further, it is most inconvenient for an Appellant to file this motion and obtain an order granting same when something which is as good as cash, such as a cashiers check, is presented.

I submit that there are better ways to protect the trial court's interest in being reimbursed for its costs. For example, if the negotiable obligation tendered for some reason fails, the Appellant could be given 10 days in which to tender a new obligation or face dismissal of his appeal with prejudice. Such a provision could be applied for any obligation, and such would greatly shorten Rule 48. For that matter, Rule 48 could be conveniently made a part of Rule 46(a) regarding the cost bond thereby furthering the Court's mission of

TRAP Rule 51(c) Page 001051

1. Proponent: Paul W. Nye, Corpus Christi

2. Proposal: 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.

3. Draft (by proponent):

4. Comment: Probably good suggestion.

5. Committee Action: See current Cumulative Report at TRAP 51(c), recommending SCAC approval of proposal.

TRAP Rule 52(a) Page 001052

1. Proponent: Luke Soules, San Antonio

2. Proposal:

3. Draft (by proponent): When either a timely request, objection, or motion points out distinctly a matter complained of a grounds of the compliant specific enough to support the conclusion that the trial court was made fully aware of the complaint, no waiver of error will occur by any failure to preserve error in the trial court. Delete from Rule 274 and Rule 278.

4. Comment: Consider adding to proposed TRCP 321(a).

5. Committee Action: Committee action is still being considered.

TRAP Rule 53(k), 54(c) Page 001059

1. Proponent: Murry B. Cohen, Houston

2. Proposal: Court reporter should have duty to file statement of facts and move for extension, if needed.

3. Draft (by proponent):

4. Comment: Proposed rules adopt this suggestion and dispense with motion.

TRAP Rule 57(a) Page 001065

1. Proponent: Charles Adkin Spain, Jr., Austin

2. Proposal: Rule 57(a)(1): Change "number of the supreme judicial district" to "number of the court of appeals district".

3. Draft (by proponent):

4. Comment: Has this already been done? Yes

5. Committee Action: This has been approved.

TRAP Rule 57(b) Page 001069

1. Proponent: Paul W. Nye, Corpus Christi

2. Proposal: 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.

3. Draft (by proponent):

4. Comment: Proposed Rule 4(b) provides for lead counsel to receive notices, etc., and allows another attorney to be designated.

5. Committee Action: See Cumulative Report at TRAP 7(a) for committee's recommendation to SCAC.

TRAP Rule 61 Page 001070

1. Proponent: Paul W. Nye, Corpus Christi

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

3. Draft (by proponent):

4. Comment: Committee has this problem under consideration.

4. Comment: Probably unnecessary.

5. Committee Action: Recommendation is disapproved.

TRAP Rule 74(a) Page 001076

1. Proponent: Ben Taylor, Houston

2. Proposal: Eliminate addresses of parties

3. Draft (by proponent):

4. Comment: Proposed amendment to Rule 74(a) would dispense with addresses of parties represented by counsel.

5. Committee Action: See current Cumulative Report. SCAC approval has been obtained.

TRAP Rule 74 Page 001078

1. Proponent: Paul W. Nye, Corpus Christi

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

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

3. Draft (by proponent):

4. Comment: (1) Has district problem already been cured?
(2) Proposed Rule 4(e) would.

5. Committee Action: SCAC disapproved at suggestion of Judge Clinton.

to be adjusted; I confess I have not done an exhaustive search.

4. Comment: Will changing the rule change judges' habits?

5. Committee Action: Recommendation is disapproved.

TRAP Rule 79 Page 001083

1. Proponent: Charles Adkin Spain, Jr., Austin

2. Proposal: Texas Rules of Appellate Procedure 79(d), (e) and 100(f): Is it a "motion for rehearing en banc" or a "motion for reconsideration en banc"?

3. Draft (by proponent):

4. Comment: What difference does it make? (WYD)

5. Committee Action: None.

TRAP Rule 84 Page 001088

1. Proponent: J. Hadley Edgar, Lubbock

2. Proposal: Effective September 1, 1990 the Court amended Rule 182(b) to allow the Court to award an appropriate amount as damages for delay. Prior to that time it read the same way as TRAP 84. However, TRAP 84 was not amended. Is there some reason why the Court would have a different way of awarding the amount as damages for delay for the Supreme Court than the courts of appeals or was the failure to modify TRAP 84 in line with 182(b) an oversight?

3. Draft (by proponent):

4. Comment: This is an intentional difference.

5. Committee Action: None recommended.

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. This is still being studied.

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. Disapproved by committee.

3. Draft (by proponent):

4. Comment: Same.

5. Committee Action: Same.

TRAP Rule 87(b)(1) Page 001093

1. Proponent: Paul W. Nye, Corpus Christi

2. Proposal: 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.

3. Draft (by proponent):

4. Comment:

5. Committee Action: See Cumulative Report at TRAP 87(b)(1).

TRAP Rule 88 Page 001094

1. Proponent: Paul W. Nye, Corpus Christi

2. Proposal: 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.

3. Draft (by proponent):

4. Comment:

5. Committee Action: See proposed order concerning preparation of the record in the current Cumulative Report.

1. Proponent: Gloria A. Jackson, Dallas

2. Proposal: Twice recently we have been the victim of an unpublished opinion by the Dallas Court of Appeals. The word "victim" is used because the opinions were not published but did modify or alter existing law.

3. Draft (by proponent):

4. Comment:

5. Committee Action: Recommendation is disapproved

TRAP Rule 120 Page 001106

1. Proponent: Fred Fick, Fort Worth

2. Proposal: In most original proceedings in appellate courts, the issuance of a writ is the vehicle by which relief is granted to the relator at the conclusion of the proceedings. In habeas corpus, however, the issuance of the writ must occur as the initial act of the court and prior to the court's hearing the matter upon oral argument and determination if the relator is entitled to be discharged from custody. In fact, the court does not acquire jurisdiction over the person of the relator until it causes the writ to issue or its issuance is waived by the respondent. See Ex parte Alderete, 203 S.W. 763, ___ (Tex.Crim.App. 1918).

3. Draft (by proponent):

(d) Action on Petition. If the court is of the tentative opinion that ~~the writ should issue~~ **[relator is entitled to the relief sought,]** the court will **[issue the writ],** set the amount of bond, order relator released and schedule the petition for oral argument. Otherwise, the court shall deny the writ without further hearing.

(g) Order of Court. If after hearing oral argument, the court determines that ~~the writ should be granted~~, **[relator should be discharged from custody,]** it shall enter an order to that effect. Otherwise, the court shall remand relator to custody and direct the clerk to issue an order of commitment. If relator is not available for return to custody, pursuant to the order of commitment, the court may declare the bond to be forfeited.

4. Comment: Should check this out.

5. Committee Action: See Current Cumulative Report at TRAP 120

Cumulative Report

TRAP Rule 131 Page 001116

1. Proponent: John H. Holloway, Houston

2. Proposal: Is there anything that the Supreme Court has ever published as to what a page is or what kind of type would be acceptable?

3. Draft (by proponent):

4. Comment: See Rule 4(e)

5. Committee Action: See current Cumulative Report at TRAP 4

TRAP Rule 131 Page 001118

1. Proponent: John Adams, Austin

2. Proposal: We would appreciate a rule in the next change that specifies the Court's preference on binding, binding material and color. It would also be helpful if the fees that the Court has approved, were somehow incorporated into the rules, since we still receive many filings without the required fees.

3. Draft (by proponent):

4. Comment:

5. Committee Action: Recommendation is disapproved

TRAP Rule 172 Page 001120

1. Proponent: Justice Nathan L. Hecht, Austin

2. Proposal: The Court is now considering a further change in practice, which the rule change also

3. Draft (by proponent):

4. Comment:

5. Committee Action: This is still being studied.

(2) when the damages awarded by the jury are manifestly too large or too small because of the factual insufficiency or overwhelming preponderance of the evidence; * * * .

See Cumulative Report, 11/2/94, p.68.

4. Comment: This proposal would limit the ground for new trial stated in current TRCP 324 (b)(4) to evidentiary excessiveness and inadequacy of fact findings of damages, and thus cure the problem of damages in excess of pleadings noted in *Borden, Inc. v. Guerra*, 860 S.W.2d 515, 526, n. 5 (Tex. App.--Corpus Christi 1993).

5. Committee Action: This proposed amendment is included in a proposed general revision of TRAP and the post-trial TRCP rules appearing in the Cumulative Report, 11/2/94, pp. 21, 65-74. The Section Committee will consider these amendments further before presenting them to the SCAC.

Rule 4(c) Supp. p. 451

1. Proponent: Charles A. Spain, Jr.

2. Proposal: Consider use of the term "file." A party "tenders" a document for filing, while it is the clerk who actually "files" the document. Rules do not require the clerk to file every item tendered.

3. Draft (by):

4. Comment: A document is "filed" if tendered by the party and accepted for filing by the clerk. There is no ambiguity in the rules. Whenever the rules require a document to be "filed," a tender is required; the rules do not require the clerk to accept a document tendered unless it is proper for filing. A document not accepted for filing is only "tendered."

5. Committee Action The Section Committee concludes that revision of the many filing rules to make this technical distinction would serve no useful purpose, and, consequently, that no action is required.

TRAP 41(a), TRCP 296 Supp. p. 463

1. Proponent: Alan B. Rich, Dallas

2. Proposal: Clarify whether request for findings extends timetable in summary judgment case. (See letter citing *Linwood v. NCNB*, No. 05-92-00196 (Tx. App.--Dallas Feb. 1, 1994, n.w.)(not extended), and *Chavez v. The Housing Authority of the City of El Paso*, No. 08-93-00422 (Tex. App.--El Paso, Mar. 3, 1994, n.w.)(extended}.

3. Draft (by Section Committeei): The following amendment added to TRCP 296 is recomended:

Such a request for findings of fact and conclusions of law is proper only after a plenary trial before the judge without a jury, and shall have no effect with respect to any matter determined in response to a motion for summary judgment.

See Cum.Rep. 11/2/94, p. 64.

4. Comment: Theoretically, no findings of fact are appropriate in a summary-judgment case because findings of fact are appropriate only after a nonjury trial in which the judge decides disputed fact issues, which cannot be done at a hearing on a motion for summary judgment. This proposal codifies the recent Supreme Court decision resolving the conflict.

TRAP 41(a)2, TRCP 329b(c) Supp. Page 465

1. Proponent: Charles Spain, Austin.

2. Proposal: Change deadline for ruling on motions for new trial in TRCP 329b(c) from 75th to 60th day so that trial court's jurisdiction would expire on 90th day, when perfecting instrument is due.

3. Draft (by):

4. Comment:

5. Committee Action: Pending on agenda of Section Committee.

Rule 45 Supp. Page 467, 469

1. Proponents: James E. Farris, Austin; Ronald R. Davis, Dallas.

Rule 52 Supp. Page 481

1. Proponent: Nathan Hecht, Austin

2. Proposal: Clarify rule as to whether an order overruling a motion for directed verdict must be recited in the judgment or in a separate written order. See *Sipco Serv. Marine v. Wyatt Field Serv.*, 857 S.W.2d 602, 609-10 (Tex. App.--Houston [1st Dist.]--1993].

3. Draft (by CAG):

Add to proposed TRCP 301, as drafted by the Section Committee, Cum. Rep. 11/2/94, p. 67, the following:

(c) Order. The order granting or overruling such a motion may be recited in the judgment, entered as a separate signed order, shown in the statement of facts, or otherwise made to appear in the record.

4. Comment: The Section Committee proposes to repeal TRCP 268 and include the substance of TRCP 268 in a revision of the post-verdict rules, which appears in Cum. Rep. 11/2/94, pp. 65-75. Proposed TRCP 301 would provide for a motion for judgment as a matter of law or for determination of an issue of fact as a matter or law. These proposals are included in the Cumulative Report for the information of the SCAC, but the Section Committee desires to consider them further before presenting them for action by the SCAC.

5. Committee Action: Further consideration by the Section Committee is needed before presentation to the SCAC.

Rule 264a Supp. Page 487

1. Proponent: Nathan Hecht, Austin.

2. Proposal: Conform the special rules regarding electronic statements of facts to TRAP or incorporate them into TRAP.

3. Draft (by Section Committee): See Cumulative Report, 11/2/94, pp. 19, 24, 35, 53.

4. Comment: The Section Committee recommends that the TRAP rules be amended to provided for electronic statements of facts in courts authorized to use electronic recording to supersede the special orders of the Supreme Court and Court of Criminal Appeals now in effect in order to eliminate the problems that have arisen in cases where such electronic recordings have been used.

3. Draft (by Section Committee): See Cum. Rep. 11/2/94, p. 37.

4. Comment:

5. Committee Action: This recommendation was approved by the SCAC at its meeting on 3/20/94.

BECK, REDDEN & SECREST
1331 Lamar, Suite 1570
Houston, Texas 77010

MEMORANDUM

TO: Subcommittee on TRCP Rules 15-165

DATE: November 17, 1994

FROM: David J. Beck

RE: Supreme Court Rules Advisory Committee Report

Rule 18a

Problem: If a party does not learn of a ground for recusing or disqualifying a trial judge until shortly before trial or during trial, the rule does not presently allow for the filing of such a motion. Rule 18a "procedural" requirements are mandatory and the failure to comply waives the right to complain. *E.g.*, *Enterprise v. Hachar's Inc.*, 839 S.W.2d 822, 840 (Tex. App. -- San Antonio 1992), writ denied *per curiam*, *Hachar's Inc. v. Enterprise*, 843 S.W.2d 476 (Tex. 1992); *Sun Exploration Prod. Co. v. Jackson*, 783 S.W.2d 202, 206 (Tex. 1989) (Even though Rule 18a "does not contemplate the situation in which a party does not know of the disability of the judge to sit in the case until after trial has been completed, the complaining party on remand "should be permitted to present a motion for recusal pursuant to Rule 18a.") (Justice Spears concurring opinion; the court's majority did not address issue.)

Recently, a court of appeals recognized that a "good cause" exception to the rule should apply. In *Keene Corp. v. Rogers*, 863 S.W.2d 168, 172 (Tex. App. -- Texarkana 1993, writ requested), the law firm representing the plaintiffs hired the trial judge's son-in-law as an associate of the firm two weeks after the trial had begun. The defendant filed a recusal motion which was untimely under the ten-day rule. The court of appeals recognized that since "the motion sought recusal based on a relationship ... which did not exist until the day before [the defendant] filed the motion ... good cause existed for the late filing because the basis of the motion to recuse did not exist at the time trial began." *Id.* The dissent by Judge Bleil in *Keene* argues that when a judge's son-in-law is associated with a law firm which is participating in a case before that judge, then that judge's impartiality might reasonably be questioned. Bleil argues that the majority failed to consider the appearance of partiality and instead focused on the question of no showing of active participation in the trial and no financial interest in the litigation. Bleil

believes the majority erred in holding that the judge's impartiality might not reasonably be questioned.

Proposal: Amend Rule 18a to allow the filing of such a motion within the current 10-day period or during trial for "good cause."

Rule 21 and Rule 21a

1. Problem: Despite Rule 8, which provides that "all communications ... with respect to a suit" shall be with a party's attorney-in-charge, certain rules seem to provide for service on a party's attorney or on a party. Rule 200 and Rule 201 are examples.

   Proposal: Clarify rules 18a(b), 21, 21a, 89, 200, 201, 208, and 306a to conform with Rule 8, to *require* service of all communications on the party's attorney of record when a party is represented by an attorney. [Note: Listed rules are those in Parts I and II only and provide for notice on the party or his attorney. Many rules simply provide for service on "all parties." *See, e.g.*, Justice Court Rules, Ancillary Proceedings Rules, etc.

2. Problem: Difficulty in determining all counsel involved in a case.

   Proposal: Amend Rule 21a to require that Certificate of Service show the person upon whom service was made, address, manner of service and date.

3. Problem: While the rule provides that service by telephonic transfer after 5:00 p.m. is considered service on the following day, service by courier after 5:00 p.m. is considered as service on that day. The increase in service by hand delivery has resulted in an increase in post-5:00 p.m. "under the door" service.

   Proposal: Amend Rule 21a to provide that service by either hand delivery or telephonic transfer after 5:00 p.m. shall be deemed served on the following day.

4. Problem: Request that state agencies and other government agencies be relieved from obligation of mailing by certified or registered mail.

Proposal: No change recommended. Rationale is that state and government agencies should be treated the same as other litigants.

Rule 23

Problem: Anticipated problem if Rule 23 is amended to do away with random assignment of suits.

Proposal: No change recommended. Rule 23 should continue to give District Clerks the authority to randomly assign suits.

Rule 40a Permissive Joinder

Problem: Language "arising out of same transaction, occurrence or series of transactions or occurrences" in rule is "too confusing."

Proposal: No change recommended. The language has been in the corresponding federal rule[1] since 1937 when the Federal Rules of Civil Procedure were adopted,[2] and is intended to provide some flexibility to the rule's application. Moreover, a body of law has developed which gives meaning to such language. *See Saval v. BL Ltd.*, 710 F.2d 1027 (4th Cir. 1983); *Desert Empire Bank v. Insurance Co. of North America*, 623 F.2d 1371 (9th Cir. 1980); *Nor-Tex Agencies v. Jones*, 482 F.2d 1093 (5th Cir. 1973); *Walsh v. Ford Motor Co.*, 130 F.R.D. 514 (D.D.C. 1990); *Papagiannis v. Pontikis*, 108 F.R.D. 177 (N.D. Ill. 1985). While several Texas cases recite the quoted language of the rule, none provide guidance on its interpretation.

Rule 47

---

[1] Fed. R. Civ. P. 20(a).

[2] *See* 7 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, § 1651 (2d ed. 1986).

Problem: A plaintiff can file a petition seeking money damages within the monetary boundaries of a court of *limited* jurisdiction and thereafter amend the petition to increase the amount in controversy *above* that court's jurisdictional limit, but still maintain jurisdiction in that court. It is suggested that this rule be amended to provide that a petition set forth the "maximum amount claimed."

The general rule is that "where jurisdiction is once lawfully and properly acquired, no subsequent fact or event in the particular case serves to defeat that jurisdiction." *E.g., Flynt v. Garcia*, 587 S.W.2d 109, 110 (Tex. 1979). Consequently, it is permissible to seek additional damages outside the jurisdictional limits of the court, and jurisdiction is not defeated if "[s]ubsequent amendments seek only additional damages that are accruing because of the passage of time. This is especially so where there is no allegation of bad faith or fraud in invoking the jurisdiction of the court." *Id.*; *Mr. W. Fireworks, Inc. v. Mitchell*, 622 S.W.2d 56 (Tex. 1981). Thus where the original petition pleaded an amount of damages which fell within the jurisdictional limits of the court but the plaintiff later amended to seek additional attorney's fees incurred during the course of the trial, a judgment for damages plus an additional $5,760 in attorney's fees (the total of which exceeded the $5,000 maximum jurisdictional limits of the court) was upheld. *Id.* at 577. However, where the jurisdictional limit of the court was $50,000, the plaintiff sought to recover damages in an amount "not less than $49,860" and the jury awarded the plaintiff $25,000 for each cause of action (for a total award of $125,000), the judgment was modified to reduce the damages to the amount plead because the additional $75,000 of damages "did not accrue as a result of the mere passage of time." *Picon Trans., Inc. v. Pomerantz*, 814 S.W.2d 489, 490 (Tex. App. Dallas 1991, writ denied).

Proposal: No change recommended. Case law appears to deal adequately with problem. Moreover, rule specifically allows a special exception to accomplish suggested result.

Rule 63

Problem: Parties amending pleadings only a short time before trial so that significant, new allegations are introduced on the eve of trial.

Proposal: Amend rule to permit a party to amend their pleadings not less than 30 days prior to trial as opposed to the current 7 days, except for good cause and with leave of court.

Rule 76a

Problem: It was suggested that Rule 76a does not explicitly apply to protective orders during discovery. That is incorrect. In *Chandler v. Hyundai Motor Co.*, 829 S.W.2d 774 (Tex. 1992) (per curiam), the Supreme Court reversed the court of appeal's dismissal of an interlocutory appeal of a protective order. The court of appeals had stated in its opinion that Rule 76a(8) "does not address protection from disclosure or dissemination of documents during discovery." *Id.*; *see Chandler v. Hyundai*, 1991 W.L. 148717 (Tex. App. Houston [1st Dist.] 1991) *rev'd per curiam*, 829 S.W.2d 774 (Tex. 1992). The Supreme Court reversed:

> This holding [of the court of appeals] conflicts with the clear terms of subsection 2(a) which encompasses filed discovery and subsection 2(c) which includes "discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety." In *Eli Lilly & Co. v. Marshall*, 829 S.W.2d 157 (Tex. 1992) (per curiam), we concluded that "any party aggrieved by the trial court's decision, finding or failure to find made pursuant to rule 76a, including the decision whether the document is a 'court record' as that term is defined by the rule, may seek review by interlocutory appeal. Tex. R. Civ. P. 76a(8).

Chandler v. Hyundai, 829 S.W.2d at 775.

Proposal: No change recommended.

Rule 91

Problem: Special exceptions are frequently filed immediately prior to trial because current rule does not provide a time beyond which you may *not* file special exceptions.

Proposal: No change recommended. Special exceptions are waived if not called to court's attention "before the instruction or charge to the jury or, in a non-jury case, before the judgment is signed." *See* Tex.R.Civ.P. 90. [Should we require that special exceptions be filed at least a specified number of days before trial? If so, that deadline should be some reasonable period of time *after* the opposing party's pleadings are amended.]

Rule 93

Problem: Notes and comments to Rule 93 refer to old letter subsections instead of new numbered subsections.

Proposal: Housekeeping change.

Rule 103

1. Problem: Private process servers are abusing the system by showing "badges" to feign authority.

   Proposal: Amend rule to allow service "by any person who has registered with the Secretary of State as an Authorized Process Server," and to provide that "writs of garnishment may be served by the Sheriff, Constable or by an Authorized Person."

2. Problem: Anticipated effort to expand use of process servers into eviction cases.

   Proposal: Since no change has been requested to the subcommittee's knowledge, no change is recommended.

Rule 105

Problem: Persons serving process are failing to fill out process form. Since rule presently provides that person serving process "shall endorse thereon" the relevant information, the problem is one of enforcement. While presumptions will ordinarily be made that service was proper in support of a judgment, "these

presumptions do not apply to a direct attack upon a default judgment." *Melendez v. John R. Schatzman, Inc.*, 685 S.W.2d 137, 138 (Tex. App. -- El Paso 1985, no writ); *McKanna v. Edgar*, 388 S.W.2d 927, 929 (Tex. 1965). In such a situation, "[t]he Texas Rules of Civil Procedure relating to the issuance, service and return of citation are generally regarded as mandatory, and failure to show affirmatively a strict compliance with the rules will render the attempted service of process invalid and of no effect." *H.B.&W.M., Inc. v. Smith*, 802 S.W.2d 279, 281 (Tex. App. -- San Antonio 1990, no writ). Without the information required by Rule 105 the trial court is unable to determine whether the matter is ripe for hearing. *Melendez*, 685 S.W.2d at 138. Thus, where the officer receiving delivery of process failed to endorse the day and hour of receipt or to complete the return showing execution by certified mail, all as required by Rule 105, the default judgment was invalid. *Id.*

Proposal: One possible change is to add the following sentence to rule: "If the officer or authorized person fails to endorse properly the process, the court may take appropriate action to ensure compliance with this rule."

Rule 117A(6) Tax Suits

Problem: Since Rule 99 was amended in 1987, the 90-day return of an *unexecuted* citation requirement was deleted. However, Rule 177A(6) which concerns delinquent tax suits was not changed. As a result, counties such as Bexar County re-issue about 10% of their citations and they file about 6,600 suits per year.

Proposal: Delete language regarding return of unexecuted or unserved citation in Rule 117A(6).

Rule 124

Problem: Rule 124 refers to Rule 21(a). There is no such rule.

Proposal: Housekeeping change. Eliminate "parenthesis" around "a."

Rule 145

Problem: See Karen Johnson's attached letter.

T.R.A.P. 40(a)(3) requires notice of filing of affidavit of inability be given to parties (through counsel) and to the court reporter. Also, T.R.A.P. 40(a)(c) allows "any interested officer of the court to contest affidavit of inability ... ."

Proposal: Could modify second sentence of Tex.R.Civ.P. 145(1) to read "After service of citation, the defendant 'or any interested officer of the court' may contest ... ." Since the rule indicates that the affidavit "shall be processed by the clerk," it is likely that the District Clerk will have notice of the affidavit. However, should notice to clerk be expressly required?

Rule 165a

1. Problem: Rule does not provide for a *minimum* of time between a case being placed on dismissal docket and date of dismissal hearing.

   Proposal: Amend Rule 165a to provide that a hearing may be held only after the expiration of a specified number of days from the date case appears on the dismissal docket.

   There are three bases upon which a court may dismiss a case for want of prosecution: "(1) when a party fails to appear at a hearing or trial, Rule 165a(1); (2) when the case has not been disposed of within the Supreme Court's time standards, Rule 165a(2); and (3) by the court's inherent power to dismiss when the case has not been prosecuted with due diligence." *City of Houston v. Thomas*, 838 S.W.2d 296, 297 (Tex. App. -- [1st Dist.] 1992, no writ), *citing Veteran's Land Board v. Williams*, 543 S.W.2d 89, 90 (Tex. 1976). When a court has relied on its inherent power to dismiss, the sole question is whether plaintiffs exercised due diligence in prosecuting the case and in making its decision "[t]he trial court may consider the entire history of the case, including the length of time the case was on file, the amount of activity in the case, the request for a trial setting and the existence of reasonable excuse for delay." *City of Houston v. Thomas*, 838 S.W.2d at 297; *Bard v. Frank B. Hall & Co.*, 767 S.W.2d 839, 843 (Tex. App. -- San Antonio 1989, writ denied). No single factor is ordinarily dispositive and whether the plaintiff actually intended to abandon the lawsuit is immaterial. *Ozuna v. Southwest Bio-Chemical Laboratories*, 766 S.W.2d

900, 902 (Tex. App. -- San Antonio 1989, writ denied); *City of Houston v. Thomas*, 838 S.W.2d at 297. The court's decision is reviewed by the abuse of discretion standard. *Veterans Land Board*, 543 S.W.2d at 89. Furthermore, the reinstatement provisions of Rule 165a(3) "apply only to dismissals for failure to appear ... the court need not reinstate [a case dismissed pursuant to its inherent power] upon a mere showing that the lack of prosecution was not intentional but the result of accident or mistake." *Ozuna*, 766 S.W.2d at 903.

Problem: The word "judgment" should be dropped from Rule 165a(3) because rule generally applies to order of dismissal for want of prosection.

Proposal: Delete word "judgment."

D.J.B.

DJB/ig