AGENDA
MARCH 17-18, 1995
SCAC MEETING

INDEX

SUPREME COURT ADVISORY COMMITTEE
PROPOSED AMENDMENTS TO
TEXAS RULES OF APPELLATE PROCEDURE

March 13, 1995

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

(a) [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

Comment to 1995 change: The last sentence of paragraph (b) has been added.

TRAP 2. RELATIONSHIP TO JURISDICTION AND SUSPENSION

(a) [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~~ ~~n~~Nothing 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

Comment to 1995 change: The power to suspend rules in paragraph (b) as in criminal cases is extended to civil cases.

TRAP 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 ~~at least one of the attorneys~~ or on behalf of the attorney in charge 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 ~~is signed thereto~~ appears as an attorney for the party. A party ~~who is~~ not represented by an attorney shall sign ~~his~~ the brief or other paper and give his or her address and telephone number.

(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 ~~filing~~ delivering 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 ~~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~~ any document 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 s~~Six copies of motions, petitions, applications, briefs, ~~petitions, motions~~ and other papers shall be filed with the ~~c~~clerk of the ~~c~~court 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) From former Rules 140 and 130)

(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) From former Rule 121(a)(3)

(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.~~ 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.

(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.~~

((d)(1) and (d)(2) from former Rule 74(j))

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

(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.

((d)(2) From former Rule 74(j))

(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 of more than ten pages 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.

((d)(3) From former Rule 74(j))

(3) *Length of Briefs and Applications.* ~~Except as specified by local rule of the court of appeals, a~~Appellate briefs and applications in civil cases (including amicus briefs) shall not exceed ~~50~~ 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, ~~etc.~~ 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. ~~A~~ The 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.

(4) *Rejection of Briefs.* Unless every copy of a brief conforms to this rule, the clerk is authorized to return unfiled all nonconforming copies with a notation identifying the error to be corrected. 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 ~~a~~ the filing party ~~or person acting for him~~ on all other parties to the ~~appeal or review~~ trial court's judgment. ~~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.

(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 Rule 7(a), and on another attorney if one has been designated by the attorney in charge pursuant to Rule 7(a). No service may be made on the party represented.

(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

Comment to 1995 change: The rule has been redrafted and pertinent provisions of former Rule 121(a)(3) have been incorporated. The language in paragraph (d)(3) concerning record excerpts is added to avoid unnecessary bulk.

TRAP 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.

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

(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.

(g) Effect of Bankruptcy; Notice If a case involves a party who has filed a bankruptcy petition in a federal court, or against whom a bankruptcy petition has been filed, all time periods specified in these rules for commencing or continuing an appeal are suspended from the date the petition was filed until the appellate court orders reinstatement of the case or a severance is ordered as provided in Rule 19(g)(6). Any such period begins to run anew on the day after the order is signed and runs for the entire period. Any paper filed while the appeal is suspended shall be deemed to have been filed on the date of, but subsequent to, the time of signing the order of reinstatement or severance and shall not be held ineffective because of the suspension or premature filing.

Any party to the trial court's final judgment may file in the trial court and the appellate court a notice or suggestion of bankruptcy containing: (i) the name of the bankrupt party and the name of the person filing the bankruptcy petition, if other than the bankrupt party; (ii) the name and location of the court in which the bankruptcy proceeding is pending; (iii) the date of the

filing of the bankruptcy petition, or the date of the stay order; and, (iv) an authenticated copy of the bankruptcy petition or stay order.

Notes and Comments

Comment to 1995 change: 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). Paragraph (g) was added.

TRAP 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 whose signature first appears on 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.

(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

Comment to 1995 change: Paragraph (a) is new. Former Rule 7 is retained as paragraph (b).

TRAP 9. SUBSTITUTION OF PARTIES

(a) Death of a Party. ~~in~~

(1) *Civil Cases.* If any party to ~~the record in~~ a ~~cause~~ civil case dies after rendition of judgment in the trial court, and before ~~such cause~~ the case has been finally disposed of on appeal, ~~such cause~~ the case shall not abate ~~by such death~~, but the appeal may be perfected and the appellate court ~~of appeals or the Supreme Court, if it has granted or thereafter grants a writ therein,~~ shall proceed to adjudicate ~~such cause and render judgment therein~~ the appeal as if all parties ~~thereto~~ were living.~~, and such~~ The judgment of the appellate court shall have the same force and effect as if rendered in the lifetime of all parties ~~thereto~~. If the appellant dies after rendition of judgment in the trial court~~,~~ and before expiration of the time for perfecting appeal, sixty days after the date of ~~such~~ the death of the appellant shall be allowed in which to perfect an appeal. ~~and file the record, and all~~ All ~~bonds or other~~ papers may be made in the name of the original party~~ies the same~~ as if all the parties ~~thereto~~ were living.

~~(b)~~(2) ~~Death of Appellant in a~~ *Criminal Cases*. [No change.]

(be) Public Officers; Separation from Office.

(1) *Motion to Substitute Successor.* When ~~a suit in mandamus, prohibition, or injunction is brought against~~ a person holding a public office, appears of record as a party in his or her official capacity, to any appeal or original proceeding in an appellate court, ~~and after final trial and judgment in the trial court, and appeal has been taken, if such person should vacate such office,~~

and that person vacates the office or dies before final disposition of the appeal or original proceeding, the suit shall not abate, but ~~his~~ the successor or any other party may ~~be made a party thereto by~~ file a motion showing ~~such facts~~ that the original party as shown in the record has vacated the office or has died and that the person sought to be made a party has qualified as the successor.

(2) *Notice and Order.* Unless ~~waived~~ the motion is agreed to in writing by all parties, the clerk shall immediately give ~~the successor~~ any party not so agreeing ~~ten days~~ notice of ~~such~~ the filing of the motion~~,~~. No sooner than ten days after filing of the motion ~~whereupon~~ the court shall ~~hear and~~ determine ~~same,~~ from the motion and any response to it whether the alleged successor is a proper party, and, if the court so determines, the successor shall be substituted as a party to the suit and shall be bound by the ~~and its~~ judgment, order, or decree ~~shall be enforced, and the successor bound thereby~~ of the court as if the successor were the original party. The court may so proceed on its own motion.

(3) *Costs.* ~~In such cases, T~~the successor shall not be liable for any costs that ~~have~~ accrued ~~prior to the time~~ before he or she was made a party.

~~**(d) Substitution for Other Causes.** If substitution of a successor to a party in the appellate court is necessary for any reason other than death or separation from public office, the appellate court may order such substitution upon motion of any party at any time or as the court may otherwise determine.~~

Notes and Comments

Comment to 1995 change: The paragraphs are redesignated. Former paragraph (a) is now paragraph (a)(1); former paragraph (b) is now paragraph (a)(2); former paragraph (c) is now paragraph (b); and former paragraph (d) is repealed. Paragraph (a)(1) is revised without change in substance. Paragraph (b)(1) is revised to make it applicable to all cases in which a public office holder is a party; the procedure for substitution is clarified and any party may now move to substitute the successor as a party to the proceeding. In paragraph (b)(2), the requirement of a hearing is deleted.

~~**TRAP 11. DUTIES OF COURT REPORTERS**~~ [Repealed.]

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

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

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

~~(3) filing all exhibits with the clerk;~~

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

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

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

~~(c) In case of illness, press of official work, or unavoidable absence or disability of the official court reporter to~~

~~perform the duties in (a) above, the presiding judge of the court may, in his discretion, authorize a deputy reporter to act in place of and perform the duties of the official reporter.~~

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

Notes and Comments

Comment to 1995 change: The provisions of Rule 11 have been relocated to Texas Rule of Civil Procedure 264a.

~~**TRAP 12. WORK OF COURT REPORTERS**~~ [Repealed.]

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

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

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

Notes and Comments

Comment to 1995 change: The provisions of Rule 12 have been relocated to Texas Rule of Civil Procedure 264a.

TRAP 13. ~~DEPOSIT FOR COSTS~~ FEES IN CIVIL CASES

(a) Order of Supreme Court. The Supreme Court and the courts of appeals shall charge such fees in civil cases as may be prescribed from time to time by the Supreme Court in an order or orders rendered for that purpose.

~~**(b) Motion to Extend or 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.~~

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

(~~j~~c) Exempt Party. ~~No deposit shall be required of any party who, under these rules or any applicable statute,~~ If a party is not required to give security for costs under these rules or any applicable statute, that party shall not be required to pay any fee required by this rule.

(~~k~~d) 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 ~~40(a)(3)~~, 45(d) and any contest ~~of such~~

~~affidavit~~ to the appellant's claim of inability has ~~been overruled~~, not been sustained by written order ~~he~~ the appellant shall be entitled, without paying a filing fee, 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 the appellant ~~him~~, to the filing of an application for writ of error~~, without making any deposit for costs~~. In all other proceedings in which a fee ~~cost deposit~~ is required by this rule, a party unable to pay such fee ~~costs~~ may make an affidavit of ~~his~~ inability to do so and deliver the affidavit ~~it~~ to the clerk of the appellate court along with ~~upon filing~~ the petition or motion being filed. 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

Comment to 1995 change: The rule is amended to make clear that amounts paid to appellate courts are fees and not deposits. Paragraph (a) is new. The fees the courts of appeals may charge in civil cases are to be provided by order of the Supreme Court and no longer appear in the rule. Paragraph (b) (formerly paragraph (i)) is amended to make clear that the clerk may no longer refuse to file a paper for failure to pay the fee, but must refer the matter to the court for decision. In addition to the forgoing, former paragraphs (j) and (k) now appear as paragraphs (c) and (d) respectively, and the provisions of former paragraphs (a) through (h) appear in the Supreme Court order setting fees.

SUPREME COURT ORDER RELATING TO FEES CHARGED IN CIVIL CASES BY THE SUPREME COURT AND THE COURTS OF APPEALS

In compliance with the provisions of Rule 13, Texas Rules of Appellate Procedure, the Supreme Court hereby directs that the Supreme Court and the courts of appeals shall charge the following fees in civil cases:

(a) Fees in the Courts of Appeals. The following fees are to be charged in the courts of appeals:

(~~a~~1) ~~Filing Transcript~~ Appeals. Upon ~~tendering the transcript to the clerk for filing~~ receipt of a notice of appeal in the appellate court the appellant shall ~~deposit with~~ pay to the ~~C~~clerk of the ~~C~~court of ~~A~~appeals the sum of ~~$50 as costs~~ fifty dollars.

(~~e~~2) Original Proceedings. Upon ~~the~~ filing ~~of a motion for leave to file a petition for writ of mandamus, prohibition, injunction, or other like~~ an original proceeding as provided in Rule 120, ~~or a petition for writ of habeas corpus,~~ the ~~movant or~~ relator shall ~~deposit with~~ pay to the clerk of the court of appeals the sum of twenty dollars ~~a deposit of $20 as costs if in the court of appeals or $50 if in the Supreme Court~~. If the ~~motion for leave is granted, or if the petition for writ of habeas corpus~~ proceeding is set for ~~argument~~ submission, the ~~movant or~~ relator shall ~~deposit an additional sum of $30 in~~ pay to the clerk of the court of appeals ~~or $75 in the Supreme Court~~ the additional sum of thirty dollars.

(~~g~~3) Other Proceedings. Upon filing ~~of~~ any other ~~motions or~~ proceedings ~~not specifically enumerated in this rule, when no record has been filed with the clerk~~ in the court of appeals, the party filing ~~such motion or~~ the proceeding shall ~~deposit the sum of $10 if in~~ pay to the clerk of the ~~C~~court of ~~A~~appeals~~, or $75 if in the Supreme Court as all costs of such proceedings. When a record is later filed in the same proceeding, only an additional deposit of $40 shall be required if in the court of appeals or $50 if in the Supreme Court~~ the sum of dollars.

(4) Other Motions. Upon filing any other motion in the court of appeals, the movant shall pay to the clerk of the court of appeals the sum of dollars.

(b) Fees in the Supreme Court. The following fees are to be charged in the Supreme Court:

(~~d~~1) ~~On~~ Application for Writ of Error. Upon filing an application for writ of error ~~with the Clerk of the Court of Appeals~~, the petitioner shall deliver to the clerk ~~of that court~~ of the court of appeals, payable to the clerk of the Supreme Court, the sum of ~~$50 as costs in the Supreme Court, and~~ fifty dollars. ~~t~~The clerk shall forward the ~~deposit~~ fee to the Supreme Court with the record. If the application for writ of error is granted, the petitioner shall ~~deposit with~~ pay to the ~~C~~clerk of the Supreme Court the additional sum of ~~$75 as costs in the Supreme Court~~ seventy-five dollars.

(e2) Motion for Extension of Time for Filing Application for Writ of Error. Upon filing a motion to extend the time for filing an application for writ of error, the petitioner shall ~~file with~~ pay to the ~~C~~clerk of the Supreme Court the sum of ~~$50 as costs~~ fifty dollars.

(e3) Original Proceedings. Upon filing ~~of a motion for leave to file a petition for writ of mandamus, prohibition, injunction, or other like~~ an original proceeding as provided in Rule 120, ~~or a petition for writ of habeas corpus,~~ the ~~movant or~~ relator shall ~~deposit with~~ pay to the clerk of the Supreme Court the sum of fifty dollars ~~a deposit of $20 as costs if in the court of appeals or $50 if in the Supreme Court~~. If the ~~motion for leave is granted, or if the petition for writ of habeas corpus~~ proceeding is set for ~~argument~~ submission, the ~~movant or~~ relator shall ~~deposit an additional sum of $30 in the court of appeals or $75 in the~~ pay to the clerk of the Supreme Court the additional sum of seventy-five dollars.

(f4) Direct Appeals to Supreme Court. Upon filing of the record in a direct appeal ~~from the district court to the Supreme Court~~ as provided by Rule 140, the appellant shall ~~deposit~~ pay to the clerk of the Supreme Court the sum of ~~$100 as costs in the Supreme Court~~ one hundred dollars.

(5) Certified Questions from a Court of Appeals. Upon filing a certified question from a court of appeals as provided by Rule 110, the parties to the case in the court of

appeals shall pay to the clerk of the Supreme Court the sum of seventy-five dollars.

(6) Certified Questions from a Federal Court. Upon filing a certified question from a federal court as provided in Rule 114, the parties to the case before the federal court shall pay to the clerk of the Supreme Court the sum of one hundred dollars.

(~~6~~7) Other Proceedings. Upon filing ~~of other motions or~~ any other proceeding~~s~~ in the Supreme Court ~~not specifically enumerated in this rule, when no record has been filed with the clerk~~, the party filing ~~such motion or~~ the proceeding shall ~~deposit the sum of $10 if in the court of appeals, or $75 if in~~ pay to the clerk of the Supreme Court ~~as all costs of such proceedings. When a record is later filed in the same proceeding, only an additional deposit of $40 shall be required if in the court of appeals or $50 if in the Supreme Court~~ the sum of _____ dollars.

(8) Motion for Rehearing. Upon filing in the Supreme Court a motion for rehearing of any matter, the movant shall pay to the clerk of the Supreme Court the sum of ten dollars. If the motion is granted, the movant shall pay the additional sum of fifteen dollars to the clerk of the Supreme Court.

(9) Other Motions. Upon filing any other motion in the Supreme Court, the movant shall pay to the clerk of the Supreme Court the sum of ten dollars.

(10) Reply, Supplemental, Amended or Letter Briefs. Upon filing a reply, supplemental, amended or letter brief, the party filing such brief shall pay to the clerk of the Supreme Court the sum of five dollars.

(11) Filing Exhibits After Initial Filing. If exhibits are filed after the initial filing of exhibits, the party filing the exhibits shall pay to the clerk of the Supreme Court the sum of twenty-five dollars.

(c) Fees in Both Supreme Court and Courts of Appeals. The following fees shall be charged by both the courts of appeals and the Supreme Court:

(1) Administering Oath. A fee of five dollars shall be charged for administering any oath and giving a sealed certificate of the oath.

(2) Certified Copies. A fee of five dollars shall be charged for certification of any paper or record of five pages or less. A fee of one dollar per page shall be charged for each additional page. These fees are in addition to any photocopying fee.

(3) Comparing a Document. A fee of five dollars shall be charged for comparing any document of five pages or less with an original document filed in the offices of the court. A fee of one dollar per page shall be charged for each additional page. These fees are in addition to any certification fee.

(4) Photocopying Fees - Public Document. A fee of five dollars and seventy-five cents shall be charged for photocopying any public document of ten pages or less. A fee of seventy-five cents shall be charged for each additional page.

(5) Photocopying Fees - Nonpublic Document. A fee of five dollars shall be charged for photocopying any nonpublic document of ten pages or less. A fee of fifty cents shall be charged for each additional page.

(6) Search Fees. A fee of ten dollars per hour shall be charged to search through any case in the custody of the clerk which has not been permanently stored. A fee of twenty dollars per hour shall be charged to search for or through any case which has been permanently stored by the clerk.

(7) Duplication of Audio Tape. A fee of five dollars shall be charged to provide a duplicate copy of the audio tape of any oral argument if the blank tape has been provided by the requestor. A fee of eight dollars shall be charged to provide a duplicate copy of the audio tape of any oral argument if the blank tape is provided by the clerk. Tapes provided by the requestor shall allow 90 minutes of recording.

(8) Outbound Facsimile Fees. A fee of five dollars for the first page and two dollars for each additional page shall be charged for sending documents via facsimile to any point in the continental United States. A fee of six dollars and fifty cents for the first page and two dollars for each additional

page shall be charged for sending documents via facsimile to any point outside the continental United States.

(9) Inbound Facsimile Fees. A fee of five dollars for any document of ten pages or less, and a fee of fifty cents per page for each additional page, shall be charged for documents received via facsimile.

(~~h~~d) Amounts May Vary. The dollar amounts provided in this ~~rule~~ order may vary from time to time ~~as set by~~ in accordance with applicable statute, court order, or rule.

Notes and Comments

Comment to 1995 change: The order is new and consolidates all fees to be charged by the appellate courts in civil cases. The fees stated in the order were taken from former TEX. R. APP. P. 13 and 114(d), TEX. GOV'T CODE ANN. §§ 51.005 and 51.207, and Order of the Supreme Court of Texas of November 8, 1989.

~~**TRAP 14. DUTY OF CLERKS TO ACCOUNT**~~ [Repealed.]

~~When the Clerk of the Supreme Court receives any money due a Clerk of the Court of Appeals, or the clerk of any court of appeals receives any money due the Clerk of the Supreme Court, or the clerk of another court of appeals, the clerk so receiving same shall pay such money over to the clerk to whom it is due. If he refuses to do so upon demand, the clerk to whom the same is due may file in the Supreme Court a motion against him, and, upon ten days' notice to him, the Supreme Court may enter judgment against him and the sureties on his official bond for such amount.~~

Notes and Comments

Comment to 1995 change: The provisions of Rule 14 have been relocated to Rule 18.

TRAP 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.

Notes and Comments

Comment to 1995 change: The last sentence is added to clarify the roles of the cuort that has jurisdiction but cannot take immediate action and the court from which immediate action is obtainable

TRAP 18. DUTIES OF APPELLATE COURT CLERK

(a) Docketing the Case and Monitoring the Record. The ~~C~~clerk of the appellate ~~C~~court ~~of Appeals~~ shall have the responsibility for docketing the appeal and monitoring the filing of the record in accordance with Rule ~~57~~ 56(a) or, if in the Supreme Court, in accordance with Rule 152(c). The clerk shall put the docket number of ~~a~~ the case on each separate item (transcript, statement of facts, brief, motion, pleading, letter, etc.) ~~that is~~ received in connection with that case, as well as putting the docket number on the envelope in which the record is stored.

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

(6) *After Decision ~~in the Supreme Court~~.* ~~Attorneys desiring to withdraw papers from the clerk's office after the decision of a cause or of an application for writ of error in the Supreme Court to prepare a motion for rehearing or for some other purpose shall first file with the clerk an agreement with opposing counsel or an order of the court or a justice thereof. The clerk is not authorized to allow papers to be taken from his office without such an agreement or order. Transcripts and other papers in cases finally disposed of shall not be taken from the clerk's office.~~ After its decision, the appeallate court, or one of its justices or judges, may allow papers to be withdrawn from the clerk's office on written agreement of the parties or on motion showing reasonable grounds. The order permitting withdrawal shall include such directions and conditions as may be

required to ensure preservation and return of the papers withdrawn.

~~(e) from former Rule 14~~

(e) ~~Duty of~~ Clerk's Duty to Account. When the Clerk of the Supreme Court receives any money due a Clerk of the Court of Appeals, or the clerk of any court of appeals receives any money due the Clerk of the Supreme Court, or the clerk of another court of appeals, the clerk so receiving same shall pay such money over to the clerk to whom it is due. If he refuses to do so upon demand, the clerk to whom the same is due may file in the Supreme Court a motion against him, and, upon ten days' notice to him, the Supreme Court may enter judgment against him and the sureties on his official bond for such amount.

Notes and Comments

Comment to 1995 change: (1) Paragraph (a) is amended to make the appellate court clerk responsible for monitoring the filing of the record. (2) All of paragraph (d) is revised to make more specific the procedure for withdrawal of the record. (3) Paragraph (d)(6) now provides that the record may be withdrawn after final disposition of the case. Former Rule 14, which is revised without change in substance, is relocated here as paragraph (e).

TRAP 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~~ 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.

(g)(1) From former Rule 72

(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.

(g)(2) From former Rule 71

(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 the party.

~~(a)(3) From former Rule 73~~

(3) ~~*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 ~~C~~clerk of the appellate ~~C~~court ~~of appeals~~ in which the case ~~will be heard~~ is pending. ~~Each such~~ 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) 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~~c) if the appeal has been perfected, the date when the appeal was perfected;

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

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

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

(~~h~~g) 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.~~

((g)(4) From former Rule 160 and 130(d))

(4) ~~Form and Content of~~ *Motions 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~~. 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.

((g)(5) From former Rule 70)

(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, ~~verified by affidavit~~, unless such sufficient cause is apparent to the court.

(6) *Motion to Reinstate or Sever Appeal Suspended by Bankruptcy.* In a case that is suspended under Rule 5(g), any party may move the court of appeals to reinstate the appeal on expiration of the stay under federal law, the lifting of the stay by the bankruptcy court, or on the ground that the appeal has not been stayed under federal law. If the stay has been lifted or terminated by court order, the motion shall contain a certified copy of the order of the bankruptcy court. In addition, any party to the appeal other than the bankrupt party may move to sever the appeal with respect to the bankrupt party and to reinstate the appeal with respect to the other parties. The motion must show that the cause is severable and that proceeding with the appeal will not adversely effect the bankrupt party or the bankruptcy estate.

Notes and Comments

Comment to 1995 change: (1) Paragraph (d) is 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 73, (g)(4) from former Rule 130(d) and 160, and (g)(5) from former Rule 70. Paragraph (g)(6) is new.

TRAP 20. AMICUS CURIAE BRIEFS

The clerk of the appellate court may receive but not file amicus curiae briefs. An amicus curiae shall comply with the briefing rules for the parties, 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.

Notes and Comments

Comment to 1995 change: The rule is amended to require disclosure of the identify of the person, association, or corporation on whose behalf the brief is filed and the source of any fee paid.

TRAP 22. PUBLIC ACCESS TO APPELLATE COURT RECORDS

(a) Opinions, Judgments and Orders. All final opinions, including concurring and dissenting opinions and all final judgments and other orders made during the pendency of an appeal are public information, subject to public access and inspection, and shall never be sealed.

(b) Court Records. All documents included in the transcript, or in the statement of facts, and any other papers or items made part of the record on appeal or otherwise filed or presented for filing and received in an appellate court are presumed to be open to the general public and are "court records" under this rule, except the following:

(1) documents, papers or other items to which public access is restricted by law;

(2) documents, papers or items that the trial court has ordered sealed or concerning which the trial court has otherwise restricted access;

(3) documents, papers or other items have been filed with the trial court or in an appellate court in camera and for the purpose of obtaining a ruling on the discoverability of the documents, papers or other items;

(4) documents, papers or items filed in an action originally arising under the Family Code; or

(5) documents, papers or other items that the appellate court has ordered sealed under paragraph (c) below.

(c) Hearing. Court records that are presumed to be open to the general public under paragraph (b) above may be sealed only as provided in Texas Rule of Civil Procedure Rule 76a. The appellate court may refer any motion to seal court records to the trial court to decide or to make recommendations for decision by the appellate court.

Notes and Comments

Comment to 1995 change: This is a new rule patterned on Tex.R. Civ.P. 76a. The principal difference between this draft and Civil Procedure Rule 76a is that this draft does not define the term court records to exclude some filed papers or to include any documents not filed of record. See Tex.R.Civ.P. 76a(2). Also the language of Paragraph (b)(4) is patterned after comparable language in both Civil Procedure Rules 76a and 166b.

TRAP 23. MANDATE

((a) From former Rule 86(a)

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

(1) *In the court of appeals.*

((a)(1)(A) From former Rule 86(a)(1)

(A) ~~Forty-five~~ Fifty days after the judgment, if no timely motion for rehearing or petition for discretionary review has been filed~~, and no timely motion has been filed to extend the time for filing petition for discretionary review~~ and no ~~discretionary~~ review has been granted by the Court of Criminal Appeals on its own motion;

((a)(1)(B) From former Rule 86(a)(2)

(B) ~~Forty-five~~ Fifty days after the last timely motion for rehearing has been overruled, if no timely application for writ of error or petition for discretionary review has been filed and no timely motion has been filed to extend the time for filing application for writ of error or petition for discretionary review and no ~~discretionary~~ review has been granted by the Court of Criminal Appeals on its own motion;

(a)(1)(C) From former Rule 86(a)(3)

(C) ~~Fifteen~~ Twenty days after any timely motion to extend time for filing an application for writ of error ~~or petition for discretionary review~~ has been overruled;

(a)(1)(D) From former Rule 86(a)(4)

(D) ~~Fifteen~~ Twenty days after receipt by the clerk of an order of the Supreme Court denying, refusing, or dismissing a writ of error ~~or an order of the Court of Criminal Appeals refusing discretionary review~~ if no motion for rehearing of the application for writ of error has been filed;

(E) Twenty days after receipt by the clerk of an order of the Supreme Court overruling a motion for rehearing of an application for writ of error or an order overruling a motion to extend the time for filing an application for writ of error or an order overruling a motion to extend the time for filing a motion for rehearing of an application for writ of error;

(F) Twenty days after receipt by the clerk of an order of the Court of Criminal Appeals refusing discretionary review;

(a)(2) Part of former Rule 186(a)

(~~a~~2) ~~At the expiration of~~ In the Supreme Court fifteen days ~~from~~ after the rendition of judgment if no motion for rehearing and no motion to extend the time for filing a motion

for rehearing has been filed, or ~~at the expiration of fifteen days~~ after overruling ~~the~~ a motion for rehearing~~, the clerk shall issue and deliver the court's mandate in the cause to the lower court without further payment of costs. In cases in which the Supreme Court declines to grant an application for writ of error, costs of the Supreme Court shall be paid in the court of appeals and the mandate issued from that court. Every mandate issued by teh Supreme Court shall contain the file number in the trial court.~~ or a motion to extend the time for filing a motion for rehearing.

((a)(3) From former Rule 231)

(3) ~~When a decision of the Court of Criminal Appeals becomes final, the clerk of the court shall issue a mandate to the court below, including the court of appeals whose decision has been reviewed on petition for discretionary review. A decision of the court shall be final at the expiration of 15 days from the ruling on the final motion for rehearing or from the rendition of the decision if no motion for rehearing is filed.~~ In the Court of Criminal Appeals, fifteen days after the rendition of judgment if no motion for rehearing has been filed or fifteen days after overruling a motion for rehearing.

((b) From former Rule 86(c)

(b) Stay of Mandate. ~~If a writ of error has been denied by the Supreme Court or discretionary review has been refused by the Court of Criminal Appeals, the petitioner~~ A party may move for a

stay of the mandate pending disposition by the Supreme Court of the United States of a petition for certiorari. The motion shall show the grounds for ~~such~~ the petition and the circumstances requiring a stay of the mandate. The ~~court of appeals~~ appellate court authorized to issue the mandate may grant ~~such~~ a stay if it finds that the grounds are substantial and that serious hardship would result to the petitioner or others from issuance of the mandate in the event of reversal by the Supreme Court of the United States.

(From former Rule 232(1)

~~The Court of Criminal Appeals may~~ In a criminal case, the stay ~~the mandate of the court~~ shall be effective for not more than 60 days ~~on motion of a party~~ to permit the timely filing of an appeal or petition for writ of certiorari to the United States Supreme Court. After expiration of ~~the time~~ that period and of the periods mentioned by this rule, if no petition for certiorari has been filed, the mandate ~~of the court~~ shall issue.

((c) From the first sentence of former Rule 86(d)

(c) File Number. The mandate shall contain the file number of the case in the trial court.

((d) From the second sentence of former Rule 86(d)

(d) Filing of Mandate. When the mandate of the appellate court ~~of appeals~~ is received by the proper clerk, ~~he~~ the clerk shall file it with the papers of the cause, and note it upon the docket.

((e) Part of former Rule 186(a)

(e) Costs. The mandate shall be issued without waiting for the payment of costs. In cases in which the Supreme Court declines to grant an application for writ of error, costs of the Supreme Court shall be paid in the court of appeals and the mandate issued from that court.

((f) From former Rule 86(e) and 186(c)

(f) If ~~a~~ an appellate court ~~of appeals~~ vacates, modifies, corrects or reforms its judgment after the mandate has been issued, the mandate shall have no further effect and a new mandate may be issued. The clerk shall at once give notice of ~~such~~ this act to the clerk of the ~~trial~~ court to which the mandate was directed and to all parties.

Notes and Comments

Comment to 1995 change: This is a new rule which combines the provisions of former Rules 86, 186, 231, and 232. The forty-five day periods applicable to courts of appeals under former Rule 86 are extended to fifty days, and the fifteen day periods are extended to twenty days.

TRAP 24. PLENARY POWER AND EXPIRATION OF TERM

(a) Civil Cases. In a civil case, an appellate court's plenary power over its judgment does not expire until:

(1) forty-five days after the judgment, if no timely motion for rehearing has been filed and no motion to extend the time for filing has been filed, or

(2) forty-five days after the overruling of the last timely motion for rehearing, or fifteen days after the overruling of a timely motion to extend the time for filing a motion for rehearing, and

(3) the court of appeals retains plenary power to vacate, modify correct or reform its judgment during the periods prescribed in subparagraphs (a)(1) and (a)(2) regardless of whether an application for writ of error has been filed in the Supreme Court before their expiration.

(b) Criminal Cases. In a criminal case the appellate court's plenary power over its judgment expires:

(1) forty-five days after the judgment, if no timely motion for rehearing has been filed and no motion to extend the time for filing has been filed, or

(2) forty-five days after the overruling of the last timely motion for rehearing or fifteen days after the overruling of a timely motion to extend the time for filing a motion for rehearing in the court of appeals, and

(3) notwithstanding the provisions of this rule, the Court of Criminal Appeals may grant review or rehearing whenever due process so requires.

(c) Proceedings After Expiration of Plenary Power. On the expiration of the court's plenary power, the court has no authority to set aside or modify its judgment. Nevertheless, the court may, after expiration of its plenary power,

(1) correct clerical errors,

(2) issue its mandate as provided by these rules,

(3) enforce its judgment if the case is not pending in the Supreme Court on writ of error or in the Court of Criminal Appeals on discretionary review, and

(4) order publication of an opinion previously designated not for publication in accordance with Rule 90.

(d) Expiration of Term. Expiration of the term of the appellate court does not affect the court's plenary power or the court's authority to decide any matter in a case pending when the term expires.

Notes and Comments

Comment to 1995 change: This is a new rule except the provisions of Rule 234, which are incorporated.

TRAP 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.~~

(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 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, and (4) in accelerated appeals, that the appeal is accelerated.

(3) *Signing and Service of Notice.* The notice of appeal shall be signed and served on all parties to the trial court's final judgment, or in an interlocutory appeal, on all parties to the proceedings in the trial court, 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.

(~~4~~5) 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.

(~~5~~6) Judgment Not Suspended by Appeal. Except as provided in Rule 43, the filing of a ~~bond or the making of a deposit or affidavit~~ notice of appeal 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) [No Change.]

Notes and Comments

Comment to 1995 change. (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 provisions regarding inability to pay have been relocated to 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.

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

(a) Appeals in Civil Cases.

(1) *Time to Perfect Appeal.* ~~When security for costs on appeal is required, the bond or affidavit in lieu thereof,~~ The notice of appeal 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 Texas Rule of Civil Procedure 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.~~

(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.* Except as provided in Rule 44 ~~A~~appeal is perfected when notice of appeal is filed within thirty (fifteen by the state) days after the day sentence is imposed or suspended in open court or the day an appealable order is signed by the trial judge; except, if a motion for new trial is timely filed, notice of appeal shall be filed within ninety days after the day sentence is imposed or suspended in open court.

(2) [No change.]

(c) Prematurely Filed Documents. No ~~appeal or bond or affidavit in lieu thereof,~~ notice of appeal~~,~~ or notice of limitation of appeal shall be held ineffective because prematurely filed. In civil cases, every such instrument shall be deemed to have been filed on the date of but subsequent to the time of signing of the judgment or the time of the overruling of motion for new trial, if such a motion is filed. In criminal cases, every such instrument shall be deemed to have been filed on the date of but subsequent to the imposition or suspension of sentence in open court or the signing of appealable order by the trial judge, provided that no notice of appeal shall be effective if given before a finding of guilt is made or a verdict is received.

Notes and Comments

Comment to 1995 change: (1) The two versions of paragraph (a)(1) have been combined. (2) Notice of appeal is substituted for bond or other security as method of perfecting appeal in civil cases. (3) The references to a motion to modify, motion to reinstate, and request for findings of fact are added.

TRAP 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 bond, or the notice or affidavit in lieu thereof,~~ the notice of appeal 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

Comment to 1995 change: 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.

TRAP 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.

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

Notes and Comments

Comment to 1995 change: The reference to a reasonable explanation for shortening or extending the time for fiing the record is deleted.

~~**TRAP 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.~~

TRAP 45. WHEN PARTY IS UNABLE TO PAY COSTS

From former Rule 40(a)(3)

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

(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 contingency, 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.

(~~b~~d) 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 or court recorder 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~~e) 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.

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

(~~e~~g) 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~~ written order 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~~h) 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.

Notes and Comments

Comment to 1995 change: (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) are inserted here. (3) Paragraphs (b) is new and conforms the affidavit requirement to Texas Rule of Civil Procedure 145. (4) Pargraph (c) is new. (5) The provision in paragraph (c) concerning an oath to support a contest of the affidavit of inability to pay costs is added.

~~TRAP 46. BOND FOR COSTS ON APPEAL IN CIVIL CASES.~~ [Repealed.]

~~(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 48 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).

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

(a) Suspension of Enforcement. Unless otherwise provided by law or these rules, a judgment debtor may suspend the execution of the judgment by written agreement with the creditor or by filing a good and sufficient bond to be approved by the clerk, subject to review by the court on hearing, or making the deposit provided by Rule 48, payable to the judgment creditor in the amount provided below, conditioned that the judgment debtor shall prosecute his appeal or writ of error with effect and, in case the judgment of the Supreme Court or court of appeals shall be against him, he shall perform its judgment, sentence or decree and pay all such damages and costs as said court may award against him. ~~If the bond or deposit is sufficient to secure the costs and is filed or made within the time prescribed by Rule 41, it constitutes sufficient compliance with Rule 46.~~ The trial court may make such orders as will adequately protect the judgment creditor against any loss or damages occasioned by the appeal.

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

(k) Continuing Trial Court Jurisdiction. The trial court shall have continuing jurisdiction during the pendency of an appeal from a judgment, even after the expiration of its plenary power, to order the amount and the type of security and the sufficiency of sureties and, upon any changed circumstances, to modify the amount or the type of security required to continue the suspension of the execution of the judgment. If the security or sufficiency of

sureties is ordered or altered by order of the trial court after the attachment of jurisdiction ~~of the~~ in an appellate court ~~of appeals~~, the judgment debtor shall notify the appellate court ~~of appeals~~ having jurisdiction of the appeal of the security determination by the trial court. The trial court's exercise of discretion under this rule is subject to review under Rule 49.

(1) **Agreement Suspending Enforcement.** To be enforceable, an agreement suspending enforcement of the judgment shall be in writing, filed with the trial court, and also with any appellate court in which the appeal is pending.

Notes and Comments

Comment to 1995 change: Comment to 1995 change: Paragraph (a) is amended to authorize the parties to suspend execution by "written agreement" of the judgment debtor with the judgment creditor. Paragraph (a) is further amended by deleting the sentence concerning the sufficiency of a supersedeas bond as a cost bond so that the rule conforms with other amendments eliminating bonds and deposits for costs from the appellate process. Paragraph (k) is amended to clarify that the "appellate court having jurisdiction of the appeal" is the court of appeals to be notified if the trial court modifies the amount or type of security after the "attachment of jurisdiction in an appellate court." Paragraph (1) is added to provide the method for making an enforceable agreement suspending enforcement in accordance with the companion amendment to paragraph (a).

TRAP 48. DEPOSIT IN LIEU OF BOND

Wherever these rules provide for the filing of a surety bond, the party may in lieu of filing the bond deposit cash or, with leave of court, a negotiable obligation of the government of the United States of America or any agency thereof, or ~~with leave of court,~~ 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, that is insured by the government of the United States of America or any agency thereof, in the amount fixed for the surety bond, conditioned in the same manner as would be a surety bond for the protection of other parties. Any interest thereon shall constitute a part of the deposit.

Notes and Comments

Comment to 1995 change: The rule is amended to require "leave of court" whenever a deposit in lieu of a surety bond is made unless the deposit is made in "cash". The purpose of the amendment is to make it unnecessary for the clerk to determine what is a "negotiable obligation."

TRAP 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 from 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 with 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.

Comment to 1995 change: The references to security for costs have been deleted.

TRAP 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.

(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) Lost or Destroyed Record. When the record or any portion thereof is lost or destroyed, ~~it~~ copies 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, the appellant ~~is~~ may be entitled to a new trial unless the parties agree on a statement of facts.

(f) [No change.]

Notes and Comments

Comment to 1995 change: (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(l). (3) Paragraph (e) is amended to require that a "significant portion" of the statement of facts, whether recorded stenographically or electronically, must be lost, destroyed, or inaudible before the appellant may be entitled to a new trial. (4) The references to electronic recordings are added.

TRAP 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 ~~the~~ any 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; ~~and, subject to the provisions of paragraph (b) of this rule, any filed paper any party may designate as material~~ 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. The clerk may consult

with the attorneys for the parties concerning the pleadings to be included.

(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 with the clerk to pay the fee, the clerk of the trial court shall prepare the transcript under ~~his hand~~ signature of the clerk and the seal of the court and immediately transmit ~~the transcript~~ it 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 ~~or exhibits~~ papers 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~~ papers in numerical order, with a brief identifying description of each, and~~, so far as practicable,~~ all such ~~exhibits~~ papers 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

Comment to 1995 change: (1) Paragraph (a) is amended to delete the references to "live pleadings" and the appeal bond, and several items are added to the list of those to be included in the transcript. (2) The rule is amended to provide that the clerk may consult with the attorneys regarding the items to be included in the transcript. (3) Paragraph (b) is amended to delete the sentence allowing the clerk to not include items in the record if the designation was not timely. (4) Paragraph (b) is amended to provide that the appellate court may require any party to pay the

costs of unnecessary portions of the statement of facts. (5) Paragraph (c) is amended to shift responsibility to the trial court clerk rather than the appellant to file the transcript in the appellate court. (6) Paragraph (c) is amended to require the appellant to pay or make arrangements to pay the clerk before the clerk is required to prepare the transcript, and is intended to change the rule announced in *Click v. Tyra*, 867 S.W.2d 406 (Tex. App. Houston [14th Dist.] 1994, orig. proc.). (7) The provision concerning original exhibits is moved from paragraph (d) to Rule 53(m).

TRAP 52 PRESERVATION OF APPELLATE 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. No complaint shall be considered waived if the ground stated is sufficiently specific to make the judge aware of the complaint. ~~It is also necessary for the complaining party to obtain a~~ The judge's ruling upon the complaining party's request, objection, or motion must also appear of record provided that in civil cases the overruling by operation of law of a motion for new trial or a motion to modify the judgment is sufficient to preserve for appellate review the complaints properly made in the motion unless the taking of evidence is necessary for proper presentation of the complaint in the trial court. A ruling may be shown in the judgment, in a signed separate order, in the statement of facts, or in a formal bill of exceptions. 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.

(b) 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~~,~~ or before the judgment is signed in a nonjury case, be allowed to make, in the absence of the jury, an offer of proof in the form of a concise statement. The ~~court~~ judge 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 ~~court~~ judge may add any other or further statement ~~which shows~~ showing 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~~ are needed to authorize appellate review of ~~the question whether the court erred in excluding the~~ exclusion of evidence. When the ~~court~~ judge hears objections to offered evidence out of the presence of the jury and rules that ~~such~~ the evidence be admitted, ~~such~~ the objections ~~shall be~~ are deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating ~~those objections~~ them.

(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~~ judge 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) [No change.]

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

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

(5) The ~~court~~ judge shall submit ~~such~~ the bill to the adverse party or ~~his~~ the adverse party's counsel, if in attendance on the court, and if ~~found~~ the adverse party finds it 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~~ the judge shall suggest to the ~~party~~ parties or their counsel such corrections as ~~he~~ 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 ~~party~~ parties not agree to ~~such~~ the judge's suggested corrections, the judge shall return the bill to ~~him~~ the complaining party with ~~his~~ the judge's refusal endorsed ~~thereon~~ on it, 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 ~~said~~ the bill filed by the judge, ~~he~~ the complaining party may, upon procuring the signature of three respectable bystanders, citizens of this State, attesting to the correctness of the bill as originally presented ~~by him~~, have ~~the same~~ it filed as part of the record of the cause.~~; and t~~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~~ the bill ~~and to be considered as a part of the record relating thereto~~. On appeal the truth of ~~such~~ the bill of exceptions shall be determined from the such affidavits so filed.

(9) In the event ~~a formal bill of exception is filed and there is a~~ of conflict between ~~its provisions and the provisions of~~ a formal bill and 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 exception.~~; provided that i~~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~~, certified bill

of costs 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, motion to modify, request for findings, or motion to reinstate pursuant to Civil Procedure 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 bill~~s~~ of exception ~~are~~ is filed, it ~~they~~ may be included in the transcript or in a supplemental transcript.

(d) ~~**Necessity for Motion for New Trial in Civil Cases**~~ **Complaints of Legal and Factual Sufficiency of Evidence in Civil Nonjury 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.~~ In a nonjury case, a complaint regarding the legal or factual insufficiency of

the evidence, including a complaint that the damages found by the court are excessive or inadequate, as distinguished from a request that the judge amend a fact finding or make an additional finding of fact, may be made for the first time on appeal in the complaining party's brief.

Notes and Comments

Comment to 1995 change: Paragraph (a) is amended to make it clear that an express ruling is not necessary to preserve complaints for appellate review in cases in which a motion for new trial or to modify a judgment is overruled by operation of law unless the proper presentation of the complaint in the trial court, such as a complaint that a new trial should be granted on equitable grounds, requires the taking of evidence. This change is intended to codify the rule announced in Cecil v. Smith, 804 S.W.2d 509 (Tex. 1994). Paragraph (a) is further amended to make it clear that an express ruling may be made of record in the trial court's judgment, in a separate order, in a formal bill of exception or in the statement of facts. This change is intended to disapprove cases requiring a separate written order or a judgment recital when a motion for a directed verdict is overruled. See Sipco Serv. Marine v. Wyatt Field Serv., 857 S.W.2d 602, 608-609 (Tex. App.-Houston [1st Dist.] 1993, no writ). Paragraph (a) is further amended by adding an anti-waiver provision stating that "No complaint shall be considered waived if the ground stated is sufficiently specific to make the judge aware of the complaint." Paragraph (b) is amended to provide for "court recorders" as well as "electronic" statements of fact in conformity with other rule changes. Paragraph (b) is further amended to provide that an informal bill must be made "before the judgment is signed in a nonjury case." Paragraph (c) is revised textually and grammatically without changing its procedural requirements except for subparagraphs (10) and (11). Subparagraph (10) recognizes the use of "court recorders" and substitutes the phrase "certified bill of costs" for "certificate of costs prepared by the clerk of the trial court." Paragraph (11) is changed to extend the time for filing a formal bill of exception if a timely "motion to modify, request for findings, or motion to reinstate pursuant to Civil Procedure Rule 165a" is filed as well as when a "timely motion for new trial ... has been filed." Paragraph (d) is rewritten to simplify its language without changing its procedural content.

TRAP 53. THE STATEMENT OF FACTS ON APPEAL

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

(d) **Partial Statement.** If appellant requests or prepares a partial statement of facts, ~~he~~ the appellant shall include in ~~his~~ the 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.

(e) **Unnecessary Portions.** In civil cases if ~~either~~ any party requires more of the testimony or other ~~proceedings~~ evidence 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 ~~thereof~~ of the unnecessary portions, regardless of the outcome of the appeal.

(f) [No change.]

(g) **Reporter's or Recorder's Fees.** Except as provided in paragraph (d) of this rule, the appellant shall either pay or make arrangements with the official court reporter or recorder to pay his or her fee before preparation of the statement of facts. The official court reporter or recorder shall include in his or her certification the amount of ~~his~~ the 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.]

(j) **Electronic Recording.** The statement of facts on appeal from any proceeding that has been recorded electronically in accordance with Civil Procedure Rule 264b 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~~k) ~~Free~~ Statement of Facts Without Prepayment.

(1) *Civil Cases.* In any case where the appellant has filed the affidavit required by Rule ~~40~~ 45 to appeal his case without ~~bond~~ paying the fees of the clerk and official court reporter or recorder, 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 ~~appellant~~ the appellate court, but the court reporter or recorder shall receive no pay for same.

(2) [No change.]

(~~k~~l) Duty of ~~Appellant~~ Reporter or Recorder to File. It is the ~~appellant's~~ official court reporter's or recorder'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.

(m) Original Exhibits.

[From former Rule 51(d)]

(1) 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 exhibits in numerical order, with a brief identifying description of each~~, and,~~ exhibit. In so far as practicable, all such exhibits shall be arranged in the order listed, ~~and~~ firmly bound together, and transmitted by the official court reporter or recorder to the clerk of the appellate court.

(2) The trial court clerk shall, upon request by the court reporter, deliver all original exhibits to the court reporter. The court reporter shall return to the clerk the original of any exhibit copied for inclusion in the statement of facts or omitted from the statement of facts. The court reporter shall include original exhibits in the statement of facts if ordered by the trial court to send originals in lieu of copies. The appellate court on its own initiative may direct the ~~clerk of the court below~~ official reporter of the trial court to send to it any original ~~paper or~~ exhibit for its inspection. If an exhibit is in the possession of a person other than the clerk of the trial court, the trial court or the appellate court may order that person to deliver the exhibit to the appellate court.

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

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

Notes and Comments

Comment to 1995 change: (1) Paragraph (d) is 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 is expressly stated. (2) Paragraph (e) is clarified without change in substance. (3) Paragraph (g) is amended to require the appellant to pay the reporter's fee before the reporter is required to prepare the statement of facts. (4) Paragraph (j) concerning the statement of facts in cases recorded electronically is new. (5) Paragraph (k)(1) is amended to delete the reference to the bond and to make clear that the appellant who is unable to pay the costs of appeal is entitled to have the record prepared without payment of the fees for preparation. (6) Paragraphs (l) is amended to transfer responsibility for filing the statement of facts from the appellant to the reporter. (7) The provisions of paragraph (m)(1) are moved here from Rule 51(d) and paragraph (m)(2) is new but is taken from Civil Procedure Rule 75b.

TRAP 54. TIME TO FILE RECORD [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).~~

Notes and Comments

Comment to 1995 change: The rule is repealed in view of the transfer to the trial court clerk, the court reporter or recorder, and the appellate court clerk of the responsibility for timely filing the record.

TRAP 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. If the missing material cannot be found in the clerk's office, the parties may, by written stipulation, deliver a copy of the omitted material to the clerk to include in a supplemental transcript. If the parties cannot agree on the accuracy of the copy, upon motion of either party or of the appellate court, the trial court shall, after notice to all parties and hearing, determine what constitutes an accurate copy of the missing material and order it to be included in a supplemental transcript.

(c) Inaccuracies in the Statement of Facts. Any inaccuracies in the statement of facts may be corrected by agreement of the

parties without recertification by the court reporter. If any dispute arises 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.

~~TRAP 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.~~

TRAP 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 7(a) and any unrepresented party.

(From former Rule 51(a))

(a1) ~~Docket Numbers~~ Proper and Timely Notice. On receipt of the copy of the notice of appeal, the clerk shall docket the appeal. 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~~ court of appeals 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 and "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.~~

(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 ninety 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 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.

Notes and Comments

Comment to 1995 change: The rule is rewritten to implement the amendments transferring responsibility for the record from the appellant to the trial court clerk and reporter or recorder and the appellate court and to provide for docketing the appeal on filing of the notice of appeal.

TRAP 57. DOCKETING ~~THE APPEAL~~ STATEMENT

~~(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.~~

(a) In civil cases, 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 name and county of the trial court, the name of the judge who tried the case, and 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 other party to the trial court's judgment, 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) The name of the court reporter or recorder;

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

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

(14) Whether a supersedeas bond has or will be filed;

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

~~(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.~~

(b) In criminal cases, upon receipt of the notice of appeal, the clerk of the appellate court shall send to the party appealing, a docketing statement form which shall include a request for the following information:

(1) If the party appealing is represented by an attorney, the name of the appealing party and the name, address, telephone number, telecopier number, and State Bar of Texas identification number of the appealing party's attorney and whether the attorney is appointed or retained;

(2) If the party appealing is not represented by an attorney, the name, address, and telephone number of the party;

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

(4) The name and county of the trial court, the name of the judge who tried the case, and the date the judgment or other order appealed from was signed;

(5) The date that sentence was imposed or suspended in open court, or the date that the judgment or order appealed from was signed by the judge;

(6) The date of filing of any motion for new trial, motion in arrest of judgment, or any other filing that could affect the time for perfecting the appeal;

(7) The offense charged, the date of the offense, the plea entered by the defendant, whether the trial was jury or nonjury, the punishment assessed, and whether the appeal is from a pretrial order;

(8) Whether the appeal involves the validity of any statute, ordinance, or rule;

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

(10) The name of the court reporter or recorder;

(11) 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;

(12) Any other information required by the appellate court.

(c) Within ten days after receiving the docketing statement form, the party appealing shall file and serve the docketing statement.

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

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

Notes and Comments

Comment to 1995 change: Paragraph (a) of this rule has been included in Rule 56(a), paragraph (b) is deleted and the entire rule was rewritten.

TRAP 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~~2) [No change.]

(b) [No change.]

Notes and Comments

Comment to 1995 change: Paragraph (a)(2) is deleted.

TRAP 60. INVOLUNTARY DISMISSAL

(a) Civil Cases. ~~(1)~~ If an appeal ~~or writ of error~~ is subject to dismissal for want of jurisdiction, or for want of prosecution, or for failure of the appellant to comply with any requirements of these rules, or any order of the court, or any notice from the clerk requiring a response or other action within a specified time, ~~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~~ the court may, on motion and notice, or on its own motion after ten days' notice to all parties, dismiss the appeal or affirm the judgment appealed from.

~~(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) [No change.]

Notes and Comments

Comment to 1995 change: Paragraph (a) is amended to delete the reference to appeal by writ of error and to provide for the dismissal of an appeal for failure to comply with the rules, a court order, or a notice from the clerk. Paragraph (a)(2) is deleted.

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

[Repealed.]

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

Notes and Comments

Comment to 1995 change: The rule was repealed as unnecessary in light of comprehensive treatment of the same subject in the Government Code.

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

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

~~TRAP 70. MOTIONS TO POSTPONE ARGUMENT~~ [Repealed.]

~~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

Comment to 1995 change: The provisions of Rule 70 have been relocated to Rule 19(g)(5).

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

[Repealed.]

~~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

Comment to 1995 change: The provisions of Rule 71 have been relocated to Rule 19(g)(2).

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

[Repealed.]

~~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

Comment to 1995 change: The provisions of Rule 70 have been relocated to Rule 19(g)(1).

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

[Repealed.]

~~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

Comment to 1995 change: The provisions of Rule 73 have been relocated to Rule 19(g)(3).

AB. BRIEFS AND ARGUMENT IN THE COURTS OF APPEALS

TRAP 74. REQUISITES OF BRIEFS

Briefs shall be brief. Briefs shall be filed with the ~~c~~clerk of the ~~c~~court of ~~a~~appeals. They shall be addressed to "The Court of Appeals" of the ~~correct~~ district in which the appeal is pending. ~~In civil cases the parties shall be designated as "Appellant" and "Appellee", and in criminal cases as "Appellant" and "Appellee".~~

(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.

(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.

(e) **Brief of Appellee or Cross-Appellee.** The brief of the appellee or cross-appellee shall ~~reply to the points relied upon~~ respond to the issues or points raised by the appellant or cross-appellant in due order when practicable; and in civil cases, ~~if the~~ an appellee or cross-appellee may ~~desires to~~ complain of any ruling or action of the trial court~~,~~ ~~his brief in regard to such matters~~ by including in cross-points his or her brief.

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 waives the complaint not brought forward. Notwithstanding the general preservation requirements of Rule 52(a), if a cross-point requires additional evidence, 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 in regard to such matters 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.

(~~f~~g) **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.

(gh) Prayer for Relief. [No change.]

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

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

(1) Appendix. Each party shall file separately in the court of appeals at or before the time the party's brief is due one copy of an appendix containing a typewritten or printed transcription of all portions of the recorded

statement of facts that the party considers relevant to the issues raised on appeal and may include one copy of relevant exhibits. 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. Written notice of the filing of an appendix must be given to all parties to the trial court's final judgment at the time it is filed, together with a specification of the parts of the recorded statement of facts included by reference to the counter numbers in the court recorder's logs. Service of a copy of the appendix is not required.

(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. Any party unable to pay the cost of an appendix shall file the affidavit provided by Rule 45, and in addition shall state in the affidavit (or a supplement)

that the affiant does not have either the access to the necessary equipment or the skill necessary to prepare the appendix. If all contests to the affidavit are 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.

(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.

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

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

(ml) Appellee's or Cross-Appellee's Filing Dates. An ~~A~~appellee or cross-appellee shall file ~~his~~ a 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 ~~his~~ a brief as provided in this rule, ~~the~~ an appellee or cross-appellee may, ~~prior to the call of the case,~~ file ~~his~~ a 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.

(m) Appellant's Brief in Reply. An 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, or the like. An 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.

(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.

(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.

(p) [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.~~

Notes and Comments

Comment to 1995 change: (1) Paragraph (a) is amended to limit the requirement of listing of addresses of parties in the trial court to those not represented by counsel. (2) Paragraph (d) is rewritten and liberalized to provide for "issues or points" rather than "points of error." (3) Paragraph (e) is amended to apply to the cross-appelle, and to incorporate the provisions of Texas Rule of Civil Procedure 324(c), concerning cross-points complaining of jury findings disregarded by the trial court in rendering judgment, with no substantive change. (4) Paragraph (f) regarding cross-appeals is new. (5) Paragraph (g) (formerly paragraph (f) is amended to permit the brief to include a summary of the entire argument. (6) Former paragraphs (h), (i), and (j) are deleted and their provisions are incorporated into Rule 4(c) and 4(d) as amended. (7) Paragraph (i), regarding the electronic statement of facts is new. (8) Paragraph (l) (formerly paragraph (m)) is

amended to provide filing dates for the brief of the cross-appellee. (9) Paragraph (m) is new. (10) The last sentence is added to Paragraph (n). (11) Former paragraph (q) is deleted deleted because of the service requirement in Rule 4(e) as amended. (12) In addition to the changes noted above, former paragraphs (g), (k), and (l), have been redesignated (h), (j), and (k) respectively.

TRAP 75. ORAL ARGUMENT

(a) Right to Argument. Except as provided in paragraph (f), ~~W~~when a case is properly prepared for submission, any party who has filed briefs in accordance with the rules prescribed therefor and who has made a timely request for oral argument under (f) hereof may, upon the call of the case for submission, submit an oral argument to the court.

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

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

The court of appeals may, in its discretion, advance civil 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).

Notes and Comments

Comment to 1995 change: The exception in paragraph (a) is added. The caption is added to paragraph (f) and the second paragraph of amended to authorize the court to advance civil as well and criminal cases without oral argument.

~~GB~~. SUBMISSION IN THE COURTS OF APPEALS.

SECTION SIX. JUDGMENTS, OPINIONS AND REHEARING

A. JUDGMENTS IN THE COURTS OF APPEALS

TRAP 80. JUDGMENT OF THE COURT OF APPEALS

(a) Time. [No change.]

(b) Types of Judgment. The court of appeals may: (1) affirm the judgment of the trial court ~~below~~; (2) modify the judgment of the trial court ~~below~~ by correcting or reforming it, and, as so modified, affirm it; (3) reverse the judgment of the trial court ~~below~~ and ~~dismiss the case or~~ render the judgment ~~or decree~~ that the trial court ~~below~~ should have rendered; ~~or~~ (4) reverse the judgment of the trial court ~~below~~ and remand the case for further proceedings; (5) vacate the judgment of the trial court and dismiss the case; or (6) dismiss the appeal.

(c) Remand in Interest of Justice. In cases in which the court of appeals has found reversible error, the court of appeals may remand the cause to the trial court for another trial in the interest of justice.

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

(~~d~~e) Presumptions in Criminal Cases. [No change.]

Notes and Comments

Comment to 1995 change: Paragraph (b) is amended to specify all of the types of judgments a court of appeals is authorized to render, including dismissals. Paragraph (c) is added to codify the ability of a court of appeals to remand the cause to the trial court "in the interest of justice" if there is reversible error in the trial ccourt's judgment. Paragraphs (c) and (d) are redeisgnated as paragraph (d) and (e).

TRAP 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 ~~appellee~~ party an amount not to exceed ten percent of the amount of damages awarded to such ~~appellee~~ prevailing party 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

Comment to 1995 change: Penalties against relators in original proceedings have been added.

~~TRAP 86. MANDATE~~ [Repealed.]

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

~~(1) Forty-five days after the judgment, if no timely motion for rehearing or petition for discretionary review has been filed, and no timely motion has been filed to extend the time for filing petition for discretionary review and no discretionary review has been granted by the Court of Criminal Appeals on its own motion;~~

~~(2) Forty-five days after the last timely motion for rehearing has been overruled, if no timely application for writ of error or petition for discretionary review has been filed and no timely motion has been filed to extend the time for filing application for writ of error or petition for discretionary review and no discretionary review has been granted by the Court of Criminal Appeals on its own motion;~~

~~(3) Fifteen days after any timely motion to extend the time for filing an application for writ of error or petition for discretionary review has been overruled;~~

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

~~(b) The mandate may be issued earlier by agreement of the parties, or on motion showing good cause.~~

~~(c) If a writ of error has been denied by the Supreme Court or discretionary review has been refused by the Court of Criminal Appeals, the petitioner may move for a stay of mandate pending disposition by the Supreme Court of the United States of a petition for writ of certiorari. The motion shall show the grounds for such petition and the circumstances requiring a stay of the mandate. The court of appeals may grant such a stay if it finds that the grounds are substantial and that serious hardship would result to the petitioner or others from issuance of the mandate in the event of reversal by the Supreme Court of the United States.~~

~~(d) The mandate shall contain the file number of the case in the trial court. When the mandate of the court of appeals is received by the proper clerk, he shall file it with the papers of the cause, and note it upon the docket.~~

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

Notes and Comments

Comment to 1995 change: The provisions of former Rule 86 have been relocated to Rule 23.

B. OPINIONS BY THE COURTS OF APPEALS

TRAP 90. OPINIONS, PUBLICATION AND CITATION

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

(i) Unpublished Opinions. ~~Unpublished o~~Opinions designated "Not for publication" shall not be cited as authority by counsel or by a court.

Notes and Comments

Comment to 1995 change: The reference to "unpublished opinions" in paragraph (i) is deleted and a reference to opinions designated "Not for publication" is inserted.

TRAP 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 ~~one to~~ attorney in charge 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

Comment to 1995 change: The rule has been made to conform to the provision for designation of attorney in charge in Rule 7(a).

C. REHEARING IN THE COURTS OF APPEALS

TRAP 100. MOTION AND FURTHER MOTION FOR REHEARING

(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

Comment to 1995 change: 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.

SECTION EIGHT. ORIGINAL PROCEEDINGS IN CIVIL CASES

TRAP 120. ~~HABEAS CORPUS~~ ORIGINAL PROCEEDINGS IN CIVIL CASES

(a) Commencement. An ~~petition~~ original proceeding seeking ~~the issuance of~~ extraordinary relief in an appellate court in a civil case, including a writ of habeas corpus, mandamus, prohibition, or injunction, shall be ~~presented to~~ commenced by filing with the clerk ~~of the appellate court along with the appropriate deposit for costs, as provided in Rule 13.~~ documents containing the following requisites:

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

(~~1~~A) Parties.

(i) The party seeking ~~the writ~~ relief shall be ~~denominated~~ named relator.

(C)(i)A(iii) from former Rule 121(a)(2)(b)

(ii) ~~If~~ aAny judge, court, tribunal, officer, 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 addressof each respondent and real party in interest.~~ person against whom relief is sought for an act or omission in his or her official capacity shall be named a respondent,

out his or her name shall not be included in the title of the proceeding.

(Current Rule 120(b)(2)

(2iii) ~~The petition shall identify all parties~~ Any person whose interest would be ~~directly~~ affected by ~~the proceedings and shall state the addresses of all such interested parties~~ the relief sought shall be named a respondent.

(iv) The names, addresses, and telephone numbers of all realtors and respondents and 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.

(From current Rule 120(b)(6)

(6ii) *Habeas Corpus.* If a writ of habeas corpus is sought, ~~T~~the petition shall ~~be accompanied by proof of restraint of the~~ 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.

(From current Rule 120(c))

(eiv) *Concurrent Jurisdiction.* ~~When~~ If the Supreme Court and ~~one or more~~ the courts of appeals ~~are authorized to exercise~~ have concurrent jurisdiction ~~over matters of habeas corpus~~, the petition ~~seeking issuance of the writ~~ shall ~~first~~ be presented first to ~~a~~ the court of appeals unless there is a compelling reason not to do so. ~~The~~ A petition ~~for writ of habeas corpus~~ filed in the Supreme Court shall state the date of any presentation to ~~a~~ 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.

(From current Rule 120(b)(4) and former Rule 121(a)(2)(c))

(4C) *Facts.* The petition shall ~~set forth in a~~ state concisely and ~~positive manner a summary of~~ 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.

(From current Rule 120(5) and former Rule 121(a)(2)(E))

(~~5~~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.

(From former Rule 121(a)(1)(D))

(~~D~~E) *Prayer.* The petition shall state the particular relief sought and the ~~the basis for the relief, as well as the compelling circumstances which establish the necessity for the writ to issue~~ names of the parties against whom relief is sought.

(From current Rule 120(3) and former Rule 121(a)(2)(G))

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

(From current Rule 120(a) and former Rule 121(b)(2)(5))

(~~5~~2) *Deposit.* ~~The deposit for costs~~ A filing fee shall be ~~made~~ paid as provided in Rule 13.

(From current Rule 120(b)(6), 120(b)(7), 121(a)(4))

(~~4~~3) *Record ~~and Relevant Exhibits~~.* The ~~petition shall be accompanied by~~ 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 other relevant~~

~~exhibits~~ 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. ~~The petition shall be accompanied by~~ 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.

(From former Rule 121(b))

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

(From Current Rule 120(d))

(~~d~~c) Action on Petition.

(1) *Habeas Corpus.* If the court is of the tentative opinion that ~~the writ should issue~~ 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 ~~the petition for~~ oral argument on the petition. Otherwise, the court shall deny the ~~writ~~ relief sought without further hearing.

From Current Rule 121(c)

(2) *Other Original Proceedings.* In any other original proceeding ~~T~~the court may request that respondents ~~or the real party in interest~~ submit a reply to the petition, 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~~ or that a serious question concerning such relief requires further consideration, the court will schedule oral argument on the petition. Otherwise, the ~~motion~~ petition will be ~~overruled~~ 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.

(From former Rule 121)

(3) *In the Supreme Court.* In cases over which the Supreme Court has ~~mandamus, habeas corpus, or prohibition~~ original jurisdiction to issue writs of mandamus, prohibition, or injunction, and in which the ~~action or~~ order of ~~the respondent~~ 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 ~~grant leave to file the petition and may~~, after respondents ~~and any real party in interest have~~ has had an opportunity to file an answer as provided by paragraph (ef) ~~of Rule 121, without hearing argument~~, grant ~~the writ and make such orders in writing as may be appropriate~~ leave to file the relief sought without hearing argument.

(From former Rule 121(D))

(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 ~~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 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.

(From current Rule 120(e) and former Rule 121(e))

(e) Notification ~~by Clerk~~. The clerk shall notify by mail all identified parties ~~or~~ and their attorneys ~~of record~~, if represented by counsel, of the ~~action of the court~~ filing of the petition 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 of costs, as provided by Rule 13.~~

(From current Rule 120(f) and former Rule 121(e))

(f) Answer. ~~The clerk shall notify by mail all indentified parties of the filing of the petition and, within seven days after mailing the notice of the filing,~~ At least five days before the date set for oral argument, respondents ~~and any real party interest, separately or jointly,~~ may file with the clerk and serve upon the relator an answer~~, a brief of authorities, opposing exhibits, and~~ containing a verified statement of any ~~undisputed~~ 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 ~~reply~~ answer and additional record shall comply with the requirements set forth ~~herein~~ in this rule for the relator's petition and record, so far as applicable. ~~In the event the motion is granted, realtor shall immediately make the additional deposit for costs required by Rule 13.~~

(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.

From current Rule 120(f)

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

From current Rule 120(h) and former Rule 121(f)

(~~h~~i) Notice of Order. When the appellate court grants, ~~refuses or dimisses a habeas corpus proceeding or~~ 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 ~~or their attorneys of record~~ and any unrepresented parties by sending them a letter by first-class mail.

Notes and Comments

Comment to 1995 change: 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, 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.

~~TRAP 121. MANDAMUS, PROHIBITION AND INJUNCTION IN CIVIL CASES~~

[Repealed.]

~~(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.~~

Notes and Comments

Comment to 1995 change: The provisions of Rule 121 have been relocated to Rule 120.

~~TRAP 122. ORDERS OF SUPREME COURT ON PETITION FOR MANDAMUS AND PROHIBITION~~ [Repealed.]

~~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 (c) of Rule 121, without hearing argument, grant the writ and make such orders in writing as may be appropriate.~~

Notes and Comments

Comment to 1995 change: The provisions of Rule 122 have been relocated to Rule 120.

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

A. BRIEFS AND ARGUMENT IN THE SUPREME COURT

TRAP 130. FILING OF APPLICATION IN COURT OF APPEALS

(a) [No change.]

(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

Comment to 1995 change: (1) The provision for copies has been moved to amended Rule 4(c)(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).

TRAP 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.

(b) [No change.]

(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) [No change.]

(e) ~~**Points of Error**~~. Issues Presented. A statement of the issues or points ~~upon which the application is predicated~~ 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 ~~and be separately numbered~~ or repetition. The Statement of an issue or point presented will be deemed to cover every subsidiary question fairly included therein. ~~In parenthesis after each point,~~ Each issue or point should be supported by reference ~~shall be made~~ to the page(s) of the record where the ruling or other matter complained of is ~~to be found~~ 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. ~~Points will be~~

~~sufficient if they direct the attention of the court to the error relied upon. Complaints about several issues or findings relating to one element of recovery or defense may be combined in one point, if separate record references are made.~~

(f) Brief of the Argument. The brief of the argument may present separately, or grouped if germane, the 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) [No change.]

(h) [No change.]

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

(~~j~~i) 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

Comment to 1995 change: (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." (3) Former paragraph (i) has been stricken because it duplicates Rule 4(d)(3).

TRAP 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~~ the clerk 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 ~~counsel~~ the attorney in charge, as defined by Rule 7(a).

Notes and Comments

Comment to 1995 change: Paragraph (c) has been amended to make explicit the clerk's duty to notify the attorney in charge of opinions and orders of the Court.

TRAP 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

Comment to 1995 change: Former paragraph (h) has been deleted and its provisions have been included in amended Rule 4(e).

TRAP 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

Comment to 1995 change: New Rule.

[Entire Section Repealed.]

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

~~TRAP 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:

Comment to 1995 change: The provisions of former Rule 160 have been incorporated into Rule 19(g)(4).

SECTION THIRTEEN. ~~DECISION, JUDGMENTS AND MANDATE~~
IN THE SUPREME COURT

TRAP 180. DECISION

(a) **Types of Judgment** ~~In each cause, t~~The Supreme Court ~~shall either~~ may: (1) affirm the judgment of the court of appeals~~, or~~; (2) modify the judgment of the court of appeals by correcting or reforming the judgment and, as so modified, affirm the judgment of the court of appeals; (3) reverse the judgment of the court of appeals and render ~~such~~ the judgment ~~as~~ that the court of appeals should have rendered~~, or~~; (4) reverse the judgment of the court of appeals and remand the cause to the court of appeals or the trial court for further proceedings; (5) vacate the judgments of the court of appeals and trial court and dismiss the cause; or (6) if the Supreme Court of Texas or the United States Supreme Court has announced a relevant new rule of law after the trial court or the court of appeals rendered its judgment, vacate the judgment of the court of appeals and remand the cause to the court of appeals for further proceedings in light of the newly announced rule of law ~~or reverse the judgment and remand the cause to the trial court, if it shall appear that the justice of the cause demands another trial~~.

(b) **Remand in the Interest of Justice.** In all cases in which the Supreme Court reverses the judgment of the court of appeals, the Supreme Court may remand the cause to the trial court for another trial in the interest of justice.

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

Notes and Comments

Comment to 1995 change: The rule is rewritten to clarify the types of judgments and orders that the Supreme Court may make including a remand to the court of appeals if a new rule of law is announced.

TRAP 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 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.

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

Comment to 1995 change: The sanctions provision has been extended to original proceedings.

TRAP 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.

Notes and Comments

Comment to 1995 change: The last sentence of paragraph (c) is new and is intended to change the rule announced in *Davis v. City of San Antonio*, 752 S.W.2d 518, 521-22 (Tex. 1988).

~~TRAP 186. MANDATE~~ [Repealed.]

~~(a) Issuance of Mandate. At the expiration of fifteen days from the rendition of judgment if no motion for rehearing has been filed, or at the expiration of fifteen days after overruling the motion for rehearing, the clerk shall issue and deliver the court's mandate in the cause to the lower court without further payment of costs. In cases in which the Supreme Court declines to grant an application for writ of error, costs of the Supreme Court shall be paid by the court of appeals and the mandate issued from that court. Every mandate issued by the Supreme Court shall contain the file number in the trial court.~~

~~(b) Motion for Stay Order. A party may move for a stay of the mandate pending disposition by the Supreme Court of the United States of a petition for writ of certiorari. The motion shall show the grounds for such petition and the circumstances requiring a stay of the mandate. The Supreme Court may grant such a stay if it finds that the grounds are substantial and that serious hardship would result to the party or others from issuance of the mandate in the event of reversal by the Supreme Court of the United States.~~

~~(c) Recall of Mandate. If the Supreme Court vacates, modifies, corrects, or reforms its judgment after the mandate has issued, the mandate shall have no further effect and a new mandate may be issued. The clerk shall at once give notice of such action to the clerk of the court to which the mandate was directed, and to all parties.~~

Notes and Comments

Comment to 1995 change: The provisions of former Rule 186 have been relocated to Rule 23.

SECTION FOURTEEN. ~~MOTION FOR~~ REHEARING IN THE SUPREME COURT

TRAP 190. MOTION FOR REHEARING

(a) [No change.]

(b) Contents ~~and Service~~. [No change.]

(c), (d) and (e). [No change.]

Notes and Comments

Comment to 1995 change: (1) Paragraph (b) is amended to delete the requirement to name the attorneys or parties since Rule 74 already requires that information. (2) Paragraph (b) is amended to delete the service requirement since Rule 4 provides for service. (3) Former paragraph (c) is deleted and the remaining paragraphs renumbered. (4) The date for filing the response is based on the date of service rather than the date of the notice in paragraph (c) (formerly paragraph (d)).

TRAP 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.

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

Notes and Comments

Comment to 1995 change: The second sentence is new.

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

~~**TRAP 231. MANDATE**~~ [Repealed.]

~~When a decision of the Court of Criminal Appeals becomes final, the clerk of the court shall issue a mandate to the court below, including the court of appeals whose decision has been reviewed on petition for discretionary review. A decision of the court shall be final at the expiration of 15 days from the ruling on the final motion for rehearing or from the rendition of the decision if no motion for rehearing is filed.~~

Notes and Comments

Comment to 1995 change: The provisions of Rule 231 have been recloated to Rule 23.

~~TRAP 232. STAY OF MANDATE~~ [Repealed.]

~~The Court of Criminal Appeals may stay the mandate of the court for not more than 60 days on motion of a party to permit the timely filing of an appeal or petition for writ of certiorari to the United States Supreme Court. After the expiration of the time mentioned in this rule, the mandate of the court shall issue.~~

Notes and Comments

Comment to 1995 change: The provisions of Rule 232 have been recloated to Rule 23.

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 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:

T R A N S C R I P T

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):	Appellate Attorney for Appellee(s):
(name)	(name)
(address)	(address)
Telephone#	Telephone#
FAX #	FAX #
SBOT#	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), 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 1½ 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" 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 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 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 _____, 19___.

_____
Chief Justice Thomas R. Phillips

_____ _____
Justice

_____ _____
Justice

_____ _____
Justice

_____ _____
Justice

_____ _____
Justice

_____ _____
Justice

_____ _____
Justice

Notes and Comments

Comment to 1995 change: The changes would conform the order to the amendments to Rules 51 and 53.

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

(From former TRAP 111)

(a) Duties of Court Reporters and Recorders. The duties of the official court reporter~~s~~ or court recorder 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~~ proceedings 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 party~~ a party or the judge ~~to a case, together with all objecting to such argument, 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 proceeding;

(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~~ record of ~~all such evidence or other~~ any proceedings, or ~~any~~ portion thereof, when required to do so by ~~subject to~~ the law of this state, these rules, ~~and the instructions of the presiding judge of the court~~ or when a party or other person has made a proper

request (including a request for a statement of facts pursuant to Rule 53(a)) and has paid or made satisfactory arrangements with the reporter or recorder for payment; ~~and~~

(6) 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 or recorder's fee or made satisfactory arrangements with the reporter or recorder for such payment; and

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

from former TRAP 12

(b) Additional Duties of Court Recorder. In addition to the above, the duties of the official court recorder shall include:

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

(2) 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;

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

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

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

(6) Prohibiting or denying access to the original recording by any person without written order of the judge of the court;

~~(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 ~~i~~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.

~~(e)~~ 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.

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

Notes and Comments

Comment to 1995 change:

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 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 court 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 capable of performing the duties set forth in these rules.

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

(4) *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.

THE FOLLOWING ADDITIONAL CHANGES TO THE APPELLATE RULES ARE PRESENTED FOR CONSIDERATION:

1. ***Should the rules allow matter to be printed on both sides of the paper if the document will lie flat when open? If so, Rule 4, the transcript order and the statement of facts order should be amended accordingly.***

2. ***Amend Rule (4)(c)(1) to require the filing of three copies of motions, rather than six, and to delete references to "applications" and "petitions" which cause a conflict with paragraphs (c)(2) and (3).***

(1) ~~Each party shall file~~ Three copies of motions and six copies of ~~motions, petitions, applications~~ briefs~~,~~ ~~petitions, motions~~ and other papers shall be filed with the ~~C~~clerk of ~~C~~court 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.

3. ***Amend Rule (4)(d)(4) to eliminate ambiguity regarding the date for filing a corrected brief, as such:***

(4) *Rejection of Briefs.* Unless every copy of a brief conforms to this rule, the clerk ~~is authorized to~~ may return ~~unfiled~~ all nonconforming copies ~~with a notation identifying the error to be corrected~~ of the brief to the party who filed the brief. ~~An extension of ten days is allowed for the re-submission in a conforming format of a rejected brief.~~ The clerk shall notify the party of the error to be corrected and shall state a date on which a conforming brief shall be filed.

4. ***The prior draft of Rule 7 deemed the attorney in charge in the trial court the attorney in charge on appeal in some instances. Some members of the subcommittee expressed concerns about the attorney in charge in the trial court being "deemed" the attorney in charge on appeal when that attorney may not have agreed to take the appeal. Therefore, the following draft of Rule 7 is presented for consideration.***

RULE 7. ATTORNEY IN CHARGE; ~~SUBSTITUTION~~ WITHDRAWAL OF COUNSEL

(a) **Attorney in Charge.** Unless another attorney is designated, the attorney in charge for an appellant is the attorney whose signature first appears on the notice of appeal. Unless another attorney is designated, the attorney in charge for a party to a proceeding in an appellate court, other than an appellant, is the attorney whose signature first appears on the first document filed on behalf of that party in the appellate court. Any party may designate an attorney in charge, or a different attorney in charge, by filing a notice stating the name, mailing address, telephone

number, telecopier number, and State Bar of Texas identification number of the attorney being designated as the attorney in charge.

(b) **Communications Sent to Attorney in Charge.** All communications from the court or other counsel with respect to any proceeding in an appellate court shall be sent to the attorneys in change for all parties to the proceeding. If no attorney in charge has been designated by, or identified for, a party in accordance with paragraph (a), the clerk of the court of appeals may send the notice of the filing of the notice of appeal to the attorney in charge for that party in the trial court.

(c) **Notice of Non-representation.** If the attorney in charge in the trial court is sent the notice of the filing of the notice of appeal by the clerk in accordance with paragraph (b), that attorney may, within 15 days of receipt of the clerk's notice, file a notice of non-representation in the appellate court. The notice of non-representation shall state: (1) that the attorney is not representing the party on appeal, (2) that future communications by the court or other counsel should be sent directly to the party, and (3) the name and last known address and telephone number of the party. The attorney filing the notice shall certify that a copy of the notice of non-representation was served on the party. If the attorney does not timely file the notice of non-representation, that attorney shall be deemed to be the attorney in charge for the party.

(d) **Withdrawal.** Upon leave of court and such terms and conditions as the appellate court deems appropriate, an attorney ~~Counsel~~ shall be permitted to withdraw ~~or other counsel may be substituted upon such terms and conditions as may be deemed appropriate by~~ from representation of a party in 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~~ state any ensuing deadlines and settings of the cause ~~or written acceptance of employment by new counsel indicated~~ and the name and last known address and telephone number of the party. The attorney filing the motion to withdraw shall certify that a copy of the motion was served on the party.

5. ***Paragraph (b)(3) of Rule 9 should be deleted (formerly (c)(3)) in accordance with the vote of the SCAC in January. The comment will need to be corrected because it incorrectly shows paragraph (d) as repealed.***

6. ***Amend Rule 18 as follows:***

RULE 18. DUTIES OF CLERK OF APPELLATE COURT

(a) **Docketing the Case and Monitoring the Record.** The ~~C~~clerk of the appellate ~~C~~court ~~of Appeals shall have the responsibility~~ is responsible for docketing the appeal, or original proceeding, and monitoring the filing of the record in accordance with Rule ~~57~~ 56(a) or, if in the Supreme Court, in accordance with Rule 152(c). The clerk shall put the docket number of ~~a~~ the case on each separate item

(transcript, statement of facts, brief, motion, pleading, letter, etc.) ~~that is~~ received in connection with that case, as well as putting the docket number on the envelope in which the record is stored.

(b) [No change.]

(c) Custody of Papers. ~~The clerk shall be responsible for every record or other paper in a cause that is missing from his office, unless he can produce the receipt of an attorney for the same, or otherwise show, by satisfactory evidence, that some one took it from his custody or from the courtroom without his consent, or that it had passed into the hands of one of the justices or judges of the court, and had not been returned to his custody.~~ The clerk is responsible for the safekeeping of the record and every other paper filed in a case. If the record or a part thereof, or any other paper, is missing, it is the responsibility of the clerk to secure an identical copy of the missing item, if one is available. The cost of securing that copy shall be borne by the clerk unless the clerk (1) can produce a receipt showing that someone withdrew the record or other paper, (2) can otherwise show by satisfactory evidence that someone took the record or paper from the clerk's custody without the clerk's consent, or (3) that the record or paper passed into the hands of one of the justices or judges of the court and has not been returned to the clerk's custody. If the clerk makes the showing required herein, the cost of replacement shall be borne by the court for which the clerk is employed, or, if the court orders, by the person who withdrew the record or paper.

(d) Withdrawing Papers.

(1) *Receipt.* The clerk shall not allow any item ~~Neither the record nor any of the papers~~ filed in a case ~~cause shall~~ to be withdrawn from the custody of the clerk~~, nor taken from his office or the courtroom,~~ without first obtaining a receipt for the item from the person taking it ~~left therefor~~. The receipt shall identify the item taken, and shall state the name, address, and telephone number of the person taking the item, the date the item was taken, and the date and time the item is to be returned.

(2) *Case Under Submission.* ~~While a case is under submission, either on the merits of the appeal or on motion, t~~The clerk shall not permit ~~the record or any papers~~ any item to be removed from the clerk's custody ~~his office~~ during the period which begins when the case is submitted to the court and ends when a decision is issued~~,~~ except on ~~the~~ order of the court or one of the justices or judges of the court.

(3) *Case Not Under Submission.* ~~When the case is pending in the appellate court, but is not under submission,~~ The clerk may permit any person to remove an item from the clerk's office either before submission or after decision (subject to paragraph (d)(6) of this Rule), ~~any party or his attorney may obtain possession of the record on leaving the receipt required by subsection (1) but~~ except that when a ~~decision on the merits has been issued~~ judgment disposing of the appeal or original proceeding has been

rendered, only the losing party ~~or his attorney shall be~~ is allowed to take the record out of the clerk's office until ~~after said~~ that party has filed ~~his~~ a motion for ~~a~~ rehearing, application for writ of error, or petition for discretionary review, or until the time for filing such a motion, application, or petition has expired.

(4) *Original Papers and Exhibits.* Original papers and exhibits ~~sent up by order of the court below for the inspection of the appellate court,~~ will be retained in the office of the clerk~~,~~ and will not be allowed to go out of the custody of the clerk~~,~~ except by order of the court or one of the justices or judges of the court.~~, which order must be filed with the papers of the cause. Any party or attorney withdrawing such papers or exhibits shall leave a receipt identifying the papers or exhibits which he had received, and if he~~ If a party withdraws original papers or exhibits and fails to return them, the court may accept the opposing party's statement concerning the~~ir~~ nature and contents of the papers or exhibits.

(5) *Return of Papers.* ~~The attorney or party~~ Any person withdrawing any item ~~record, exhibits, or other papers before submission~~ shall return the~~m~~ item to the clerk ~~promptly~~ by the time specified in the receipt, or on demand of the clerk. ~~and, i~~In any event, items withdrawn before submission shall be returned not later than one day before submission. ~~If withdrawn after submission, they shall be returned on demand. No attorney or party shall take or allow to be taken any transcript, statement of facts, or other papers~~ Items withdrawn shall not be taken out of the reach of the court so that ~~it~~ the item cannot be produced in court or in the clerk's office on demand.

(6) *After Final Disposition*. ~~*Decision in the Supreme Court.* Attorneys desiring to withdraw papers from the clerk's office after the decision of a cause or of an application for writ of error in the Supreme Court to prepare a motion for rehearing or for some other purpose shall first file with the clerk an agreement with opposing counsel or an order of the court or a justice thereof. The clerk is not authorized to allow papers to be taken from his office without such an agreement or order. Transcripts and other papers in cases finally disposed of shall not be taken from the clerk's office.~~ After final disposition of an appeal, original proceeding, application for writ of error, or petition for discretionary review, the appellate court may allow filed items to be withdrawn from the clerk's office on written agreement of the parties or on motion showing reasonable grounds. The order permitting withdrawal shall include such directions and conditions as may be required to ensure preservation and return of the items withdrawn.

(e) Clerk's Duty to Account. When the Clerk of the Supreme Court receives ~~any~~ money due a ~~C~~clerk of ~~the~~ any ~~C~~court of ~~A~~appeals, or the clerk of any court of appeals receives ~~any~~ money due the ~~C~~clerk of the Supreme Court~~,~~ or the clerk of another court of appeals, the clerk ~~so~~ who receive~~ding~~ ~~same~~ the money shall immediately pay ~~such~~ the money over to the clerk to whom it is due. If ~~he~~ the clerk who received the money refuses to ~~do so~~ pay the money over to the clerk to whom

it is due upon demand, the clerk to whom the ~~same~~ money is due may file in the Supreme Court a motion asking the Supreme Court to order that the money be paid over to the clerk to whom it is due. ~~against him, and,~~ The Supreme Court shall immediately notify the clerk who received the money of the filing of the motion, and if the clerk who received the money does not pay it over to the clerk to whom it was due within ten days of the date of the notice, ~~upon ten days' notice to him,~~ the Supreme Court may enter judgment against ~~him~~ the clerk who received the money and the sureties on ~~his~~ the clerk's official bond for ~~such amount~~ the amount received.

7. ***The following change is proposed for Rule 22(b)(3):***

(3) documents, papers or other items ~~have been~~ filed ~~with the trial court or in an appellate court~~ *in camera* ~~and for the purpose of obtaining a ruling on the discoverability of the documents, papers or other items;~~

8. ***Amend Rule 51(a) as follows:***

(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 request for a statement of facts under Rule 53(a), any statement of points under Rule 53(d), 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.

9. ***In the third sentence of Rule 51(b), the clause "Failure to timely make the designation provided for in this paragraph shall not be grounds for refusing to file a transcript or supplemental transcript" should be reinstated.***

10. ***The first two sentences of Rule 53(m)(2) were rewritten to make the meaning clear.***

(2) The trial court clerk shall, upon request by the court reporter or recorder, deliver all original exhibits to the ~~court~~ reporter or recorder for use in preparing the statement of facts. The court reporter or recorder shall return ~~to the clerk~~ the original ~~of any~~ exhibits to the clerk after the reporter or recorder has copied the exhibits ~~copied~~ for inclusion in the statement of facts ~~or omitted from the statement of facts~~. . . . [remainder or paragraph unchanged]

11. ***Add Rule 54 to deal with administrative records.***

(a) **Application of Rule.** This rule applies to cases involving judicial review of state agency decisions pursuant to TEX. REV. CIV. STAT. art. 4413(36), §7.01, as amended, and to any other cases provided by law for review by the court of appeals of administrative decisions with no intervening review by the trial court.

(b) **Designation of Parties.** Whether the appeal is perfected by a petition for direct review or by a notice of removal, the party challenging the agency's decision is designated as the "appellant" and the agency is designated as the "appellee."

(c) **Direct Appeal.** A suit for judicial review of a state agency decision initiated in the court of appeals pursuant to TEX. REV. CIV. STAT. art. 4413(36), §7.01, as amended, or any similar statute, is perfected when the party challenging the agency decision files a petition for judicial review with the court of appeals. The petitions shall state (1) the number and style of the proceeding before the agency, (2) the date on which the agency's order became final and appealable, (3) that the party filing the petition desires direct review of the agency's order by the court of appeals, (4) the names of all parties filing the petition. When so filed, the petition serves as a notice of appeal pursuant to Rule 40 and for all purposes under these rules. The court of appeals shall certify on a copy of the petition that it is a copy of the petition filed with the court. The copy so certified shall be served on the agency and all parties of record before the agency as provided by Rule 4. When the copy is so certified and served, citation shall be deemed issued and served in compliance with article 4413(36), §7.01.

(d) **Removed Appeal.** If a suit for judicial review of a decision of a state agency has been filed in a trial court, any party, before the beginning of a trial, may remove the suit to the court of appeals by filing with the clerk of the trial court a notice of removal to the court of appeals pursuant to Tex. Rev. Civ. Stat. art. 4413(36), §7.01, as amended. The clerk of the trial court shall immediately forward to the appellate court a copy of the notice of removal, showing the date of filing. The notice of removal shall state (1) the number and style of the case in the trial court, (2) the number and style of the proceeding before the agency, (3) the date of the agency's final order, (4) that the party filing the notice desires to remove the case for review of the agency's order by the court of appeals, (5) the names of all

parties filing the notice of removal. When so filed, the notice of removal perfects the appeal and serves as a notice of appeal pursuant to Rule 40 and for all purposes under these rule.

(e) **Record.**

(1) *Filing.* Within thirty days after the filing of a petition for direct review or a notice of removal to the court of appeals, the agency shall file with the clerk of the court of appeals the original or a certified copy of the agency's final order and shall also file the original or a certified copy of the agency record, as defined in TEX. GOV'T CODE § 2001.060, as amended. In a removed appeal, if the agency record has already been filed in the trial court, the clerk of the court shall transmit the agency record to the court of appeals, together with the transcript of papers filed in the trial court, as provided by Rule 51(a). If a notice of removal is filed before the agency has filed the record in the trial court, the agency shall, within thirty days, file with the clerk of the court of appeals the original or a certified copy of the agency's final order and shall also file the agency record. When filed in the court of appeals, the agency record, together with the transcript filed by the clerk of the trial court in a removed appeal, shall be considered by the appellate court as the record on appeal within Rule 50. At any stage of the proceeding, corrections to the agency record may be made as provided in Rule 55.

(2) *Form.* As far as practicable, the agency record shall be arranged and certified in accordance with the local rule adopted by the Court of Appeals for the Third District and approved by the Supreme Court.

(3) *Disposition.* After final disposition of the appeal, the agency record shall be returned to the agency or to the other parties to the appeal.

(f) **Intervention.** Within thirty days after the filing of the petition for direct review or the notice of removal, any person affected by the agency's order may intervene in a direct or removed appeal by filing with the clerk of the court of appeals a motion for leave to intervene. The motion shall contain a concise statement of the interest of the moving party, the grounds on which the intervention is sought, whether the moving party appeared before the agency, and whether the moving party supports the position of the appellant or the position of the appellee. Any other party to the appeal has ten days after service of the motion to support or oppose the intervention.

(g) **Rules Governing.** After the filing of the petition for direct review or notice of removal, the appeal proceeds as any other civil appeal and is governed by all pertinent provisions of these rules.

12. ***Amend Rule 55(a) as follows:***

(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. If the missing material cannot be found in the clerk's office, the parties may, by written stipulation, deliver a copy of the omitted material to the clerk to include in a supplemental transcript. If the parties cannot agree on the accuracy of the copy, upon motion of either party or of the appellate court, the trail court shall, after notice to all parties and hearing, determine what constitutes an accurate copy of the missing material and order it to be included in a supplemental transcript.

13. ***Amend Rule 55(c) as follows:***

(c) **Inaccuracies in the Statement of Facts.** Any inaccuracies in the statement of facts may be corrected by agreement of the parties without recertification by the court reporter. If any dispute arises ~~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. If the disputed arises after filing in the appellate court, the appellate court shall submit the matter to the trial court for decision.

(d) **Record in Administrative Appeals.** This paragraph only applies to cases involving judicial review of state agency decisions in contested cases pursuant to TEX. GOV'T CODE §§2001.171 *et. seq.* as amended. At any stage of the proceeding, the parties may, by agreement, make corrections to the agency record filed pursuant to TEX. GOV'T CODE §2001.175(b), as amended, or pursuant to Rule 54, to ensure that the agency record accurately reflects the contested case proceedings before the state agency. No recertification by the court reporter shall be required. If the parties fail to agree to any requested correction to the agency record, upon motion of any party or the appellate court, the appellate court shall send the question to the trial court, which shall, after notice and hearing, determine what constitutes an accurate copy of the agency record and order the agency to deliver it to the clerk of the court where the case is pending.

14. ***In the second sentence of Rule 74(l), "prior to the call of the case" was stricken, and "before the date set for submission" should be inserted.***

15. ***Amend Rule 90(i) as follows:***

(i) Unpublished Opinions. ~~Unpublished o~~Opinions designated "Do not publish" or "Not for publication" shall not be cited as authority by counsel or by a court.

16. *Amend Rule 130(a) as follows:*

(a) **Method of Review.** The Supreme Court may review the final judgments of ~~the~~ a courts of appeals ~~upon~~ by writ of error if a timely motion for rehearing has been overruled.

17. *Amend Rule 132(b) to delete "expressage or carriage of" and insert "expense of mailing or shipping".*

18. *In Rule 182, language previously included in the report limiting the Supreme Court to ten time costs as a sanction was deleted.*

19. *Delete all but the first sentence of Rule 190(b) and all of paragraph (c). Add "service of the motion" to the first sentence of (c) (formerly (d)), and strike "notice" from the first sentence of paragraph (c) (formerly (d)).*

20. *The ultimate disposition of papers filed with an appellate court is dictated by the Government Code and by the Rules, but is not fully stated in any single source. Therefore, the following order is presented for consideration.*

ORDER OF THE SUPREME COURT REGARDING DISPOSITION OF PAPERS IN CIVIL CASES

(a) Definitions.

(1) "*Court records*" *defined.* "Court records" or the "records of a case" are all documents included in the transcript, or in the statement of facts, and any other papers or items made part of the record on appeal or otherwise filed, or presented for filing and received, in an appellate court. "Court records" include the "record on appeal."

(2) "*Record on appeal*" *defined.* The "record on appeal" is defined in Texas Rule of Appellate Procedure 50(a).

(b) In the Courts of Appeals. In the courts of appeals, the following disposition shall be made of court records.

(1) *Determination of permanent preservation.* Before any court records are destroyed, the court of appeals shall, in accordance with TEX. GOV'T CODE § 51.204 and the guidelines provided by the State Archives, determine whether they should be permanently preserved.

(2) *Initial determination.* Immediately after final disposition of an appeal or other proceeding, the panel which decided the case shall determine whether the records of the case should be permanently preserved and shall file with the records a statement declaring that the records should or should not be permanently preserved.

(3) *Subsequent determination.* After its initial determination, but before any court records are destroyed, the court of appeals may reexamine its initial determination of whether the records should be permanently preserved and may change its designation accordingly.

(4) *Original papers and exhibits in appeals.* Without regard to the determination of whether the records of a case should be permanently preserved, within thirty days after final disposition of an appeal, any original papers or exhibits included in the record on appeal shall be returned to the trial court. The appellate court may, but is not required to, copy those papers and exhibits before returning them to the trial court.

(5) *All other papers and exhibits.* The appellate court shall keep and preserve all other records (except duplicates) until their ultimate disposition as prescribed herein.

(6) *Ultimate disposition.* Any time after the expiration of the period of time prescribed by TEX. GOV'T CODE § 51.204 or any other applicable statute, the court of appeals shall (1) destroy the records of a case finally determined to not be of permanent value, and (2) turn the records of a case finally found to be of permanent value over to the State Archives.

(c) **In the Supreme Court.** In the Supreme Court, the following disposition is made of court records.

(1) *Reverse and remand to the court of appeals.* If the Supreme Court grants an application for writ of error and reverses and remands the cause to the court of appeals, the Supreme Court returns the record on appeal to the court of appeals. The court of appeals shall then dispose of the record in accordance with paragraph (b). The Supreme Court keeps and preserves all other items which constitute the record of that case (except duplicates) until those records are turned over to the State Archives.

(2) *Affirm or reverse and remand to the trial court.* If the Supreme Court grants an application for writ of error and either affirms the court of appeals or reverses and remands to the trial court, the Supreme Court does not return the record on appeal but keeps and preserves all records of that case (except duplicates) until those records are turned over to the State Archives.

(3) *All other cases.* In all other cases, the Supreme Court (1) returns the record on appeal to the court of appeals, and (2) keeps and

preserves all other records of that case (except duplicates) until those records are turned over to the State Archives.

RULE 7. ATTORNEY IN CHARGE; ~~SUBSTITUTION~~ WITHDRAWAL OF COUNSEL

(a) Attorney in Charge. Unless another attorney is designated, the attorney in charge for an appellant is the attorney whose signature first appears on the notice of appeal. Unless another attorney is designated, the attorney in charge for a party to a proceeding in an appellate court, other than an appellant, is the attorney whose signature first appears on the first document filed on behalf of that party in the appellate court. Any party may designate an attorney in charge, or a different attorney in charge, by filing a notice stating the name, mailing address, telephone number, telecopier number, and State Bar of Texas identification number of the attorney being designated as the attorney in charge. The attorney in charge may also designate one other attorney for that party to receive notices and copies.

(b) Communications Sent to Attorney in Charge. All communications from the court or other counsel with respect to any proceeding in an appellate court shall be sent to the attorneys in change for all parties to the proceeding. If no attorney in charge has been designated by, or identified for, a party in accordance with paragraph (a), the clerk of the court of appeals may send the notice of the filing of the notice of appeal to the attorney in charge for that party in the trial court.

(c) Notice of Non-representation. If the attorney in charge in the trial court is sent the notice of the filing of the notice of appeal by the clerk in accordance with paragraph (b), that attorney may, within 15 days of receipt of the clerk's notice, file a notice of non-representation in the appellate court. The notice of non-representation shall state: (1) that the attorney is not representing the party on appeal, (2) that future communications by the court or other counsel should be sent directly to the party, and (3) the name and last known address and telephone number of the party. The attorney filing the notice shall certify that a copy of the notice of non-representation was served on the party. If the attorney does not timely file the notice of non-representation, that attorney shall be deemed to be the attorney in charge for the party.

(d) Withdrawal. Upon leave of court and such terms and conditions as the appellate court deems appropriate, an attorney ~~Counsel~~ shall be permitted to withdraw ~~or other counsel may be substituted upon such terms and conditions as may be deemed appropriate by~~ from representation of a party in 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~~ state any ensuing deadlines and settings of the cause ~~or written acceptance of employment by new counsel indicated~~ and the name and last known address and telephone number of the party. The attorney filing the motion to withdraw shall certify that a copy of the motion was served on the party.

RULE 10. Expert Witnesses

1. Request. A party may request another party to designate, and disclose information concerning, expert witnesses only as set forth in this Rule.

2. Designation of Expert Witnesses. The plaintiff shall designate any witness who is expected to offer expert testimony at trial no later than sixty (60) days before the end of the discovery period or five (5) days after the receipt of notice of the first trial setting, whichever is later. The defendant shall designate any witness who is expected to offer expert testimony at trial no later than fifteen (15) days after the plaintiff is required to designate experts. Failure to timely designate an expert shall be grounds for exclusion of that expert's testimony.

3. Disclosure of General Information. At the time a party designates testifying expert witnesses, the party shall disclose the following with respect to each expert designated:

a. Identity. The expert's name, address, and telephone number.

b. Background. The expert's background, including a current resume and bibliography.

c. Subject Matter. The subject matter on which the expert is expected to testify.

d. General Substance. The general substance of the expert's mental impressions and opinions and a brief summary of the basis thereof.

e. Documents and Tangible Things. Any document, tangible thing, reports, models, or data compilations that have been prepared by, provided to, or reviewed by the expert in anticipation of the expert's testimony.

f. Dates. At least two dates within forty-five (45) days following the date of designation on which the expert will be available to testify by deposition.

g. Reviewed consulting experts. The identity, background, and the general substance of the mental impressions and opinions of a consulting expert who is not expected to testify at trial, but whose opinions or impressions have been reviewed by a testifying expert.

However, if the expert has first-hand knowledge of relevant facts and is not an employee of or otherwise within the control of the party, the party need not provide the information required in subsection b. or e. above except that information within the party's possession, custody or control.

4. Additional Discovery. A party may obtain further discovery of the subject matter on which the testifying expert is expected to testify, the testifying expert's mental impressions and opinions, the facts known to the testifying expert (regardless of when the factual information was acquired) that relate to or form the basis of the testifying expert's mental impressions and opinions, and the same information concerning reviewed consulting experts only by oral deposition of the expert, unless the court orders the expert to prepare a report pursuant to this Rule.

5. Reports. If the discoverable factual observations, tests, supporting data, calculations, photographs, or opinions of an expert have not been recorded and reduced to tangible form, the court may order these matters reduced to tangible form and produced in addition to or in lieu of the deposition as is appropriate.

6. Expert Depositions. Each party will make its experts reasonably available in the county of suit during the forty-five (45) day period immediately following the designation of the experts. The deposition testimony of only two experts designated by any side shall

count against the deposition testimony limitation set forth in Rule 14. If any side designates more than two experts, the opposing side shall be allowed an additional six (6) hours to depose each additional expert designated.

7. Supplementation. Any document or tangible thing subsequently prepared by, provided to, or reviewed by the expert must be provided to the other side as available unless the expert designation is or has been withdrawn. A party is under a duty otherwise to amend or supplement its expert designation, disclosure of general information, and any other discovery provided by its experts (including deposition testimony) reasonably promptly after it learns that a prior response was incorrect or incomplete when made or, although correct and complete when made, is no longer correct and complete and if the corrective or additional information has not otherwise been made known to the other parties in discovery or in writing. Within 10 days of receiving amending or supplementing information, a party may initiate additional discovery limited to matters related to any new information disclosed in the amendment or supplement as provided by Rule 5.

8. Discovery of Expert Witnesses. Discovery of the identity of and information concerning witnesses who are expected to offer expert testimony at trial may be obtained only as provided in this rule unless the witness has personal knowledge of relevant facts, in which case a party may obtain discovery as provided elsewhere in these rules.