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TO: Members, Supreme Court Advisory Committee  
FROM: William V. Dorsaneo, III  
RE: Texas Rules of Appellate Procedure

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

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

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

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

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

*Last sentence of 100g  
UA; pg. 563*

pg. 583-585 / U.A.

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

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

U.A.

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

Repeal  
old  
adopt  
new.

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

pg. 781-783

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

consensus  
leave  
alone

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

- Rule 3(b). Uniform Terminology in Criminal Cases. 738
- Rule 4(c). Number of Copies.
- Rule 4(f). Manner of Service.
- Rule 5(b)(5). Motion, Notice and Hearing.
- Rule 11. Duties of Court Reporters.
- Rule 12. Work of Court Reporters.
- Rule 13(i). Failure to Make Deposit.
- Rule 16. Court of Appeals Unable To Take Immediate Action.
- Rule 20. Amicus Curiae Briefs
- Rule 40(a)(3). When Party Unable To Give Security.
- Rule 40(b). Appeals in Criminal Cases.

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

Rule 91. Copy of Opinion, etc.  
Rule 100(f). En Banc Reconsideration  
Rule 130(b). Time and Place of Filing  
Rules 131 and  
132. Applications  
Appendix for Criminal Cases

TRAP

RULE 3. Definitions; Uniform Terminology

Existing Rule 3(b):

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

No Proposed Amendment

Suggested Revision:

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

Rule 3(b)

TRAP  
RULE 4. SIGNING, FILING AND SERVICE

Existing Rule 4(c):

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**(c) Number of Copies.**

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

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

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

Proposed Rule 4(c):

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**(c) (No change.)**

Suggested Revision:

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

TRAP  
RULE 4. SIGNING, FILING AND SERVICE

Existing Rule 4(f):

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

Proposed Rule 4(f):

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

Suggested Revision:

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

Rule 4(f)

TRAP  
RULE 5. COMPUTATION OF TIME

Existing Rule 5(b)(5):

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

Proposed Rule 5(b)(5):

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(b) (No change.)

Suggested Revision:

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

Rule 5(b)(5)

TRAP  
RULE 11. DUTIES OF COURT REPORTERS

Existing Rule 11:

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

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

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

(3) filing all exhibits with the clerk;

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

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

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

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

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

No Proposed Amendment

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Suggested Revision:

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

TRAP  
RULE 12. WORK OF COURT REPORTERS

Existing Rule 12:

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

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

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

Proposed Rule 12:

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(a) (No change.)

(b) (No change.)

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

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

Suggested Revision:

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

TRAP  
RULE 13. DEPOSIT FOR COSTS IN CIVIL CASES

Existing Rule 13(i):  

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

No Proposed Amendment  

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Suggested Revision:  

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

Rule 13(i)

TRAP

RULE 16. COURT OF APPEALS UNABLE TO TAKE IMMEDIATE ACTION

Existing Rule 16:

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

No Proposed Amendment

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

Suggested Revision:

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

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

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

TRAP  
RULE 20. AMICUS BRIEFS

Existing Rule 20:

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

Proposed Rule 20:

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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, 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 list of names and addresses of parties, the table of contents, index of authorities, points of error, and any addendum containing statutes, rules, regulations, etc. The court may, upon motion and order, permit a longer brief.]

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

Suggested Revision:

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

TRAP  
RULE 40. ORDINARY APPEAL -- HOW PERFECTED

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

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

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

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

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

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

Suggested Revision:

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

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

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

TRAP  
RULE 40. ORDINARY APPEAL -- HOW PERFECTED

Existing Rule 40(b)(1):

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**(b) Appeals in Criminal Cases.**

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

Proposed Rule 40(b)(1):

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**(b) Appeals in Criminal Cases.**

(1) (No change.)

Suggested Revision:

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

Rule 40(b)(1)

TRAP  
RULE 41. ORDINARY APPEAL -- WHEN PERFECTED

Existing Rule 41(a)(1):

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(1) *Time to Perfect Appeal.* When security for costs on appeal is required, the bond or affidavit in lieu thereof shall be filed with the clerk within thirty days after the judgment is signed, or, within ninety days after the judgment is signed if a timely motion for new trial has been filed by any party. If a deposit of cash is made in lieu of bond, the same shall be made within the same period.

no

Proposed Rule 41(a)(1):

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(1) Time to Perfect Appeal. When security for costs on appeal is required, the bond or affidavit in lieu thereof shall be filed with the clerk within thirty days after the judgment is signed, or, within ninety days after the judgment is signed if a timely motion for new trial has been filed by any party [or if any party has timely filed a request for findings of fact and conclusions of law in a nonjury case]. If a deposit of cash is made in lieu of bond, the same shall be made within the same period.

Suggested Revision:

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

Rule 41(a)(1)

TRAP  
RULE 41. ORDINARY APPEAL -- WHEN PERFECTED

Existing Rule 41(a)(2):

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

Proposed Rule 41(a)(2):

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

Suggested Revision:

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

TRAP  
RULE 42. ACCELERATED APPEALS IN CIVIL CASES

Existing Rule 42(a)(3):

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(3) In all accelerated appeals from interlocutory orders and in quo warranto proceedings, the bond, or the notice or affidavit in lieu thereof, shall be filed, or the deposit in lieu of bond shall be made, within twenty days after the judgment or order is signed. The record shall be filed in the appellate court within thirty days after the judgment or order is signed. The appellant's brief shall be filed within twenty days after the record is filed, and appellee's brief shall be filed within twenty days after appellant's brief is filed. Failure to file either the record or appellant's brief within the time specified, unless reasonably explained, shall be ground for dismissal or affirmance under Rule 60, but shall not affect the court's jurisdiction or its authority to consider material filed late.

No Proposed Amendment

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Suggested Revision:

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

Rule 42(a)(3)

TRAP

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

Existing Rule 44:

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

explanation for the need for such action. When the record is received by the appellate court, the court shall set the time for the filing of briefs, if briefs are desired, and shall set the appeal for submission.

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

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

(d) **Stay of Mandate.** Notwithstanding Rule 86 and other provisions of these rules, when an appellate court affirms the judgment of the court below in an extradition matter, thereby sanctioning extradition of appellant, or reverses the judgment of the court below in a bail matter, including bail pending appeal pursuant to Article 44.04(g), CCP, thereby granting or reducing the amount of bail, within fifteen days after the appellate court has rendered judgment a party who in good faith intends to seek discretionary review shall file with the clerk of the

appellate court a motion for stay of mandate, appending thereto his petition for discretionary review showing reasons for review of the judgment of the appellate court by the Court of Criminal Appeals. The clerk shall promptly submit the motion with appendix to the appellate court or one or more judges as the court deems appropriate for immediate consideration and determination. If the motion for stay is granted, the clerk shall file the petition for discretionary review and process the cause in accordance with Rule 202(f). If the motion is denied, the clerk shall issue a mandate in accordance with the judgment of the appellate court, and the losing party may present the motion with appendix to the Clerk of the Court of Criminal Appeals who will promptly submit them to the Court or one or more judges as the Court deems appropriate for immediate consideration and determination. The Court of Criminal Appeals may deny the motion or stay or recall the mandate. If mandate is stayed or recalled, the clerk of the appellate court shall file the petition for discretionary review and process the cause in accordance with Rule 202(f).

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

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

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

No Proposed Amendment

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TRAP

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

Suggested Revision:

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

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

Existing Rule 46(d) and (e):

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

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

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

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

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

Suggested Revision:

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

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

Rule 46(d) and (e)

TRAP  
RULE 51. THE TRANSCRIPT ON APPEAL

Existing Rule 51(c):

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

Proposed Amended Rule 51(c):

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

Suggested Revision:

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

Rule 51(c)

TRAP  
RULE 53. THE STATEMENT OF FACTS ON APPEAL

Existing Rule 53(k):

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

Proposed Amended Rule 53(k):

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

Suggested Revision:

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

TRAP  
RULE 54. TIME TO FILE RECORD

Existing Rule 54(c):

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

Proposed Amended Rule 54(c):

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(c) **No change.**

Suggested Revision:

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

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

TRAP  
RULE 57. DOCKETING THE APPEAL

Existing Rule 57(b):

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

Proposed Amended Rule 57(b):

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

Suggested Revision:

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

Rule 57(b)

TRAP  
RULE 59. VOLUNTARY DISMISSAL

Existing Rule 59(b):

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

Proposed Amended Rule 59(b):

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(b) No change.

Suggested Revision:

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

Rule 59(b)

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

Existing Rule 61:

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

No Proposed Amendment

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Suggested Revision:

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

TRAP  
RULE 72. MOTIONS TO DISMISS FOR WANT OF JURISDICTION

Existing Rule 72:

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

Proposed Amended Rule 72:

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

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

Suggested Revision:

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

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

Existing Rule 73(i):

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

No Proposed Amendment

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Suggested Revision:

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

Rule 73(i)

TRAP  
RULE 74. REQUISITES OF BRIEFS

Existing Rule 74:

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

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

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

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

(d) **Points of Error.** A statement of the points upon which an appeal is predicated shall be stated in short form without argument and be separately

numbered. In parentheses after each point, reference shall be made to the page of the record where the matter complained of is to be found. A point is sufficient if it directs the attention of the appellate court to the error about which complaint is made. In civil cases, complaints that the evidence is legally or factually insufficient to support a particular issue or finding, and challenges directed against any conclusions of law of the trial court based upon such issues or findings, may be combined under a single point of error raising both contentions if the record references and the argument under the point sufficiently direct the court's attention to the nature of the complaint made regarding each such issue or finding or legal conclusion based thereon. Complaints made as to several issues or findings relating to one ground of recovery or defense may be combined in one point, if separate record references are made.

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

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

TRAP

RULE 74. REQUISITES OF BRIEFS (Continued)

Existing Rule 74 (Continued):

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

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

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

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

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

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

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

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

(2) **Criminal Cases.** In criminal cases, appellant's failure to file a brief in the time prescribed shall not authorize dismissal of the appeal or, except as herein provided, consideration of the appeal without briefs. When the appellant's brief has not been filed within such time, the clerk of the appellate court shall notify counsel for the parties and the

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

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

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

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

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

TRAP  
RULE 74. REQUISITES OF BRIEFS (Continued)

Proposed Amended Rule 74:

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

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

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

(c) Preliminary Statement. (No change.)

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

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

(f) Argument. (No change.)

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

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

