

**AGENDA**  
**MARCH 18-19, 1994**  
**SCAC MEETING**

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3-18-94

RECOMMENDED AMENDMENTS TO THE  
TEXAS RULES OF APPELLATE PROCEDURE

and

TEXAS RULES OF CIVIL PROCEDURE

REPORT OF  
THE COMMITTEE ON STATE APPELLATE RULES  
of the  
APPELLATE PRACTICE AND ADVOCACY SECTION,  
STATE BAR OF TEXAS

SUMMARY AND EXPLANATION OF PROPOSED CHANGES

**Objective of the Committee**

The objective of the Committee on State Rules of the Appellate Practice and Advocacy Section (herein referred to as the Section Committee) for the past several years has been to draft and propose amendments that would make the rules more "user friendly," that is, to make them clear and definite so as to reduce the occasion for litigation of procedural matters and also to remove some of the procedural obstacles, and thus to make the appellate process easier and less expensive for both the appellate practitioner and the appellate courts. The recommendations in the "Cumulative Report" are responsive to the suggestions of various lawyers and judges and are a culmination of the work of the Committee over several years.

**Membership**

The Section Committee has been composed of Sarah B. Duncan and Elaine Carlson of San Antonio, Michael A. Hatchell of Tyler, Chief Justice Austin McCloud of Eastland, Chief Justice, Retired, Paul Nye of Corpus Christi, and William V. Dorsaneo III, Ron Goranson, Kevin Keith, Ruth Kohlman, and Chief Justice, Retired, Clarence Guittard of Dallas. Justice Nathan Hecht of the Supreme Court and Judge Sam Houston Clinton of the Court of Criminal Appeals have participated ex officio. Judge Guittard has chaired the committee. Molly Anderson of Tyler has acted as reporter and secretary. The recommendations in the "Cumulative Report" have been approved by the full committee, which has not always been unanimous. This summary and explanation, and also the notes and explanations in the cumulative report, have not been approved specifically by the committee and are primarily the comments of the chair.

## Summary of Recommendations

### 1. Perfecting of Appeal by Notice Rather Than Bond. Rules 40, 41.

The Section Committee recommends dispensing with the cost bond or cash deposit as a method of perfecting an appeal and requiring instead a notice of appeal. Instead of securing the costs by a bond or cash deposit, the Committee proposes provisions for advance payment of the filing fee and the fees for preparation of the transcript and statement of facts. A party unable to pay the costs would be allowed to do so without payment of costs on filing an affidavit of inability, subject to contest, as heretofore. The provisions concerning the affidavit of inability to pay costs would be retained, but transferred to proposed Rule 45, since Rule 40 would no longer concern security for costs.

To accomplish this change, the Section Committee recommends that Rule 40 be amended to provide for perfection of the appeal by notice and that all rules referring to security for costs be amended accordingly.

**Issue 1: Should an appeal be perfected by a notice of appeal rather than by giving security for costs?**

### 2. Review by Writ of Error in Court of Appeals--Party Not Participating in Trial. Rules 41(a)(3) (new), present Rule 45.

The Committee proposes repeal of present Rule 45, concerning perfection of a writ of error by petition and bond for review of trial court judgments and to amend Rule 41 by adding subdivision (a)(3), providing that a party that has not participated in the trial may perfect an appeal by filing a notice of appeal within six months of the signing of the judgment. This amendment would abolish any distinction in the method of review except for the difference in filing time. (See Memorandum of Law Number Three, attached.)

**Issue 2: Should the writ-of-error practice in reviewing trial court judgments be abolished, and, instead, should a party that did not participate in the trial be allowed six months to perfect an appeal?**

### 3. Rights of Absent Parties.

Several rules were amended in 1990 to require notices and copies of briefs and opinions to all parties to the trial court's judgment, including those against whom no appellate relief is sought and not named as parties to the appeal. See Texas Rules of Appellate Procedure Rules 46(d), 74(a), 74(q), 91, 131(a), 132(c), 136(h) and 190(b). The apparent objective of these amendments was to protect parties to the trial court's judgment that are not parties to the appeal but whose rights might be affected adversely by the judgment of the appellate court. The Committee has

undertaken to carry forward and implement this objective by several proposed amendments. The Committee has also undertaken to relieve the parties and appellate clerks of the burden of sending briefs, notices, orders, and opinions to absent parties with no interest in the appeal while, nevertheless, protecting them against any appellate judgment adverse to their interests. (See Memorandum of Law Number Two, attached.)

In accordance with this objective, the Committee recommends the following amendments to protect absent parties and also to relieve the parties and appellate clerks of the burden of sending copies of briefs, orders, and opinions to absent parties unless they have filed a request for such copies.

(a) Proposed Rule 40(a)(2) would require that the notice of appeal list the names of all parties to the trial court's judgment and the names, addresses, and telephone numbers of their attorneys and to designate which parties are appellants, which are appellees, and which are not parties to the appeal. Those not listed as appellants or appellees would not be parties to the appeal unless named in a later notice. This notice would be served on all parties to the trial court's judgment so as to advise them of their status with respect to the appeal and so that they may decide whether further action is necessary; thus parties not named as appellees would not need to retain counsel to examine briefs and determine whether the judgment on appeal might affect their interests adversely. The notice of appeal would also advise the appellate court of the names, addresses, and telephone number of the parties to the appeal so that the clerk would not be required to search the transcript to determine the parties to whom notices and copies of orders should be sent. Liberal allowance is made in proposed Rule 40(a)(4) for amendment of the notice so that additional parties may be designated and so that failure to comply strictly with all requirements of the rule would not affect the court's jurisdiction. (A minority of the Committee opposes the requirement that the parties to the appeal be identified in the notice of appeal.)

**Issue 3a: Should the notice of appeal name as appellees the parties against whom appellate relief is sought?**

(b) Proposed Rule (4)(g) (new) would be inserted to permit any party to the trial court's judgment not named as a party to the appeal to serve and file a request for copies of briefs, orders, and opinions. As explained below, amendments to other rules would relieve the clerk and the parties to the appeal of the burden of sending copies to any nonparty to the appeal not filing such a request.

(c) Rules 74(q), 136(h), and 190(b) would be amended to relieve the parties of the burden to send copies of briefs to absent parties other than those that have filed a request for copies, as permitted by proposed Rule (4)(g); also, Rules 91,

132(c) and 190(c) would be amended to relieve the clerks of the appellate courts of the duty to send notices and copies of orders and opinions to absent parties other than those that have filed such a request.

(d) Rules 74(a) and 131(a) would still require the appellant's brief and the application for writ of error to list all parties to the trial court's judgment so that the justices may be advised of any ground for recusal, since reversal of entire judgment may favor an absent party. These amendments would also require the appellant or petitioner to state whether any party in trial court not named as a party to the appeal has filed request for copies of briefs, orders, and opinions, as by proposed Rule (4)(g).

**Issue 3b,c,d:** Should a party to the trial court's judgment not named in the notice of appeal as a party to the appeal be sent copies briefs, orders, and opinions only when such absent party files a request for such copies? (See Memorandum of Law Number One, attached.)

(e) Rule 74(o) (new) would be added to permit any party in the trial court not named as a party to the appeal to file a brief as an "intervening appellee" opposing any appellate relief that such a party considers to be adverse to his or her rights or interests. Rule 131(k) (new) would be added to permit an absent party to intervene to oppose such adverse appellate relief in the Supreme Court either by an application for writ of error, a response to an application, or a motion for rehearing. The Committee is of the opinion that these provisions would be rarely invoked and may not be necessary if the other proposals explained above are adopted.

**Issue 3e:** Should a party to the trial court's judgment not named as a party to the appeal be permitted to file an intervening brief in the court of appeals or in the Supreme Court if such a party considers that the judgment on appeal might be adverse to his or her rights or interests?

(f) Rules 81(d) (new) and 184(d) (new) would be added to provide that the judgment of the appellate court does not adversely affect the rights of absent parties unless the case is the kind in which the judgment of the trial court would be binding on absent parties. These amendments would not affect cases where the reversal is favorable to an absent party.

**Issue 3f:** Should the judgment on appeal affect adversely the rights or interests of parties to the trial court's judgment not named in the notice of appeal as an appellant or appellee?

**4. Cross-Appeals. Rule 40a (new).**

This proposal would clarify the requirements for a cross-appeal against an appellant, a co-appellee, or any other party to the trial court's judgment. The cross-appellant would not be required to perfect a separate appeal as against the original appellant unless the appellant has limited the appeal, but would be required to file a notice of cross-appeal with respect to any other party to the trial court's judgment, including a co-appellee. A cross-appeal may be conditioned on the granting of appellant relief against the cross-appellant.

**Issue 4: Should an appellee be required to perfect a separate cross-appeal in order to seek appellate relief against a co-appellee or any party to the trial court's judgment other than an appellant, but not be required to do so for a cross-appeal against the appellant unless the appellant has limited the appeal?**

**5. The Record on Appeal. Rules 11, 12, 50, 51(c), 55, 61.**

(a) **Original Papers.** The Committee recommends that Rule 51(c) be amended to provide for sending up the original papers in the transcript, thus avoiding the delay and expense of copies. The papers would be arranged, numbered, indexed, bound, and certified in the same manner as any other transcript. Proposed Rule 51(d) would give any party the right to the filing of a transcript consisting of copies of the filed papers on payment of the clerk's fee, which would not be taxed as costs. In the rare case of loss of the transcript, copies would be supplied from the parties' files. On disposition of the appeal, a proposed amendment to Rule 61 would require that the papers be sent back to the trial court.

**Issue 4a: Should an appeal be taken on the original filed papers rather than copies unless a party prefers to pay for copies?**

(b) **Papers Omitted from Transcript.** Proposed amendments to Rules 50 and 55 would provide that the record on appeal consists of all papers filed in the trial court, but that only those designated by the parties should be included in the transcript. Any other filed papers designated by any party by an informal request or by the trial or appellate court would be certified in a supplemental transcript and transferred to the appellate court by the clerk of the trial court.

**Issue 4b: Should all papers filed in the trial court be available to the parties in the appellate court without the necessity of a motion for leave to supplement the record?**

(c) **Preparation and Filing of Appellate Record.** Rules 11, 12, 51, and 53 would be amended to transfer responsibility for filing the transcript and statement of facts from the appellant

to the court reporter and the clerk of the trial court, who would be responsible to the appellate court. A copy of the notice of appeal filed with the appellate court would advise that court of the pendency of the appeal, and amendments to Rule 56 would direct the clerk of the appellate court to monitor preparation and filing of the record. Appellant's responsibility would be to designate any papers to be included in the transcript in addition to those specified in Rule 51(a) and to pay the clerk's fee before the transcript is filed and also to designate the contents of the statement of facts and pay the reporter's fee or make satisfactory arrangement for payment before the statement of facts is filed. When the appellant has satisfied these requirements, the clerk and the reporter would have responsibility to file the record in the appellate court. Thus filing the record within the time allowed would not affect the jurisdiction of the appellate court and motions by the appellant to extend the time would be obviated. If the appellant fails to pay or arrange to pay for the record, the appeal would be subject to dismissal for want of prosecution.

In the opinion of the Section Committee, under current rules the appellate court has the ultimate responsibility for preparation and filing of the record and these proposals would greatly simplify the process and would avoid loss of the right to appellate review because of failure of appellant's counsel to comply with technical requirements. Amendments to Rule 56 would make the clerk of the appellate court responsible to monitor preparation and filing of the record and to advise the court when any enforcement action may be necessary.

**Issue 4c:** (1) After the appellant designates the record and pays the fees of the clerk and reporter, should they rather than the appellant have the responsibility to prepare and file the appellate record? (2) Should the court of appeals, through its clerk, have responsibility to monitor the preparation and filing of the appellate record?

**(d) Contents of Transcript. Rule 51(a).** Proposed amendments to this rule would specify as papers to be routinely included in the transcript any motion to correct, modify, or reform the judgment because Rule Tex. R. Civ. P. 329b(g) provides that such a motion, like a motion for new trial, extends the appellate timetable. This rule would also be amended to include routinely the notice of appeal, and any designation of matters to be included in the transcript.

**(e) Original Exhibits. Rules 53(k) and 53(l),** replacing present Rule 51(d). These proposals would transfer from the clerk to the official reporter the responsibility for custody of original exhibits and of filing them with the appellate court as part of the statement of facts when so ordered.

**Issue 4e: Should the official reporter rather than the clerk have responsibility for original exhibits?**

(f) **Review on Partial Record. Rule 53(d).** When the appellant files a request for a partial record and also files a "statement of the points to be relied on," as provided by Rule 53(d), there is confusion as to whether the appellate court may properly apply the presumption "that nothing omitted from the record is relevant to any of the points specified or to the disposition of the appeal" with respect to a point that must be reviewed "in the light of the entire record." Such points include those raising factual or legal insufficiency of the evidence and points alleging procedural errors involving application of the harmless error rule. (See Memorandum of Law No. 2 attached.)

The proposed amendments to Rules 50, 51, and 55 would obviate this problem with respect to the transcript because all the papers filed in the trial court would be considered part of the record on appeal and available to the appellate court on informal request.

The problem would remain, however, with respect to a partial statement of facts. The Section Committee recommends that Rule 53(d) be amended to provide explicitly that the statement of facts on appeal be presumed to contain all relevant evidence and to constitute the "entire record" for the purpose of the issues presented for review. In those cases requiring review of the "entire record," including cases involving contentions that the evidence is insufficient to support a fact finding, if the appellee relies on evidence not designated by the appellant, ample opportunity is provided by Rules 53(b) and 55(b) to bring such additional evidence to the court's attention. Since some of the criminal cases have raised a constitutional question about the presumption of completeness, perhaps the rule should contain an express exception to the presumption in certain criminal cases. (See Memorandum of Law Number Four, attached.)

**Issue 4f: When the appellant files a statement of points under Rule 53(d), should the partial statement of facts designated by the parties be presumed to contain the entire record pertinent to the issues on appeal?**

(g) **Preservation of Appellate Complaints. Rule 52.**

This rule has been revised to clarify and define what the appellate record must show in order to present a ground for complaint on appeal.

**Issue 4g: As a prerequisite to a complaint on appeal, should the record show that the complainant has presented the point to the trial judge and obtained his ruling on it? Does the proposed amendment accomplish**

that result?

(h) **Order Directing Form of Transcript and Statement of Facts Following Rules 51 and 53.** A revision of this order is proposed to conform to the proposed amendments to Rules 51 and 53. To facilitate references to the record, the transcript is to be designated "Record, Volume 1," and, if more than one volume, as "Record, Volume 1.1, 1.2," etc. Likewise, the statement of facts is to be designated as "Record, Volume 2," and, if more than one volume, as "Record, Volume 2.1, 2.2," etc. These designations would comply substantially with the present practice in criminal cases, as required by the Court of Criminal Appeals.

**Issue 4h: Should the form of the appellate record be standardized as proposed to facilitate references in the briefs?**

**5. Briefs and Applications for Writ of Error. Rules 74, 131, 136, 137.**

(a) **Addresses of Parties. Rules 74(a), 131(a).** These rules would be amended to relieve the appellant or petitioner of the burden to list in the brief or application the addresses of parties represented by counsel and, in the case of a party not represented, would allow the attorney to certify that he or she has made a diligent inquiry but has been unable to discover the address.

**Issue 5a: Should the appellant or petitioner be required to list the addresses as well as the names of parties represented by counsel?**

(b) **Issues or Points of Error. Rules 74(d), 131e.** These rules would be amended to permit the appellant or petitioner to use a broad statement of issues rather than formal points of error. The intent is to avoid the technicalities that some courts of appeals have imposed on the point-of-error practice, but the use of points of error would still be acceptable.

**Issue 5a: Should the appellant or petitioner be permitted to state the issues on appeal broadly rather than by "points of error" directed to specific rulings?**

(c) **Brief of Appellee. Rule 74(e).** The provisions of Tex. R. Civ. P. 324(c) concerning cross-points in the appellee's brief attacking fact findings have been incorporated here.

(d) **Summary of Argument. Rules 74(f), 131(f).** An amendment to these rules would allow but not require a summary of the argument in the brief or application.

**Issue 5d: Should a summary of the entire argument be**

permitted or required?

(e) **Appellant's or Petitioner's Brief in Reply.** Proposed Rules 74(k) and 137 (new) would provide that appellant may file a brief in reply containing not more than twenty-five pages confined to the issues or points in appellee's or respondent's brief. In the court of appeals the brief in reply would have to be filed within twenty-five days after the filing of the appellee's brief, but that time limitation is not recommended for a reply brief in the Supreme Court.

**Issue 4e: Should the right of the appellant or petitioner to file a reply to the brief of the appellee or respondent be defined and limited as to time and contents?**

(f) **Modification of Filing Time.** Rule 74 (m) would be amended to provide that a motion to extend the time for filing a brief may be filed before or after the date the brief is due.

**Issue 4f: Should a party be permitted to file a motion to extend the time for filing a brief after the date the brief is due?**

(g) **Successive Application for Writ of Error--Time.** Rule 130(c). This rule would be amended to provide that a successive application may be filed alternatively within ten days after the filing of any previous application because if an extension has been granted for the original application, the forty-day period after the order overruling the motion for rehearing may allow less than ten days for filing the successive application.

**Issue 5f: Is this provision necessary to give a party filing a successive application for writ of error sufficient time to prepare and file it?**

## **6. Signing, Filing, Service, etc. Rules 4, 121.**

(a) **Signing.** These rules have been extensively revised to codify and clarify various provisions applying to filings generally in the appellate courts, including original proceedings. Requirements for the record in original proceedings have been clarified. The principal changes in this rule are summarized as follows:

**Issue 6a: Should common requirements for all papers filed in the appellate court, whether in appellate or original proceedings, be stated together in one rule?**

(b) **Lead Counsel.** Rule 4(b) (new). This proposal would permit a party to designate lead counsel on whom papers may be served and to whom notices may be given. In the absence of such a designation, the first attorney whose signature appears would

be treated as lead counsel. Rules 91 and 132(c) would be amended to allow clerks to send copies of notices, orders, and opinions to lead counsel only. This would substantially reduce the mailing burden on appellate clerks, as well as on opposing counsel.

**Issue 6b: Should copies of briefs, notices, motions, orders, opinions, etc. be served on or sent to only one attorney (or two, if requested) for each party or group of parties represented by the same attorneys?**

**(c) Form of Papers Filed.** Rule 4(d) and 4(e) would be amended to prescribe uniform requirements for copies, typeface, footnotes, binding, etc., of papers, including briefs, so as to prevent evasion of page limitations.

**Issue 6c: Is the proposed standard format necessary and feasible?**

**(d) Length of Briefs.** Rule 4(d)(4) would be amended to provide that the length of briefs and applications should be fifty pages if non-proportional typeface is used and forty pages if proportioned fonts are used. (The Section Committee still has under consideration how these limits would affect commercially printed briefs.) Permitted excerpts from the record would be limited to those crucial to the issues.

#### **7. Computation--Inaccessibility of Clerk. Rule 5(a).**

This rule would be amended to extend the time for filing any paper when the last day of the filing period would fall on a day when the clerk's office is closed for any reason, such as extreme weather or a non-statutory holiday. A certificate by the clerk or counsel, an affidavit of a party, or any other competent evidence would provide proof. This rule would be amended further to add three days to the filing period for a response to a paper or notice served by mail.

**Issue 7: Would this amendment avoid problems of closing or inaccessibility of the clerk's office?**

#### **8. Motions in the Appellate Court. Rule 19.**

The proposed amendments to this rule would consolidate into one rule provisions concerning most of the motions in the appellate court, including motions to dismiss for want of jurisdiction (present Rule 72), motions relating to informalities in the record (present Rule 71), motions to postpone argument (present Rule 70), and motions for extension of time (present Rule 73). Rule 19(d) would be amended to provide that a motion within the personal knowledge of the attorney signing the motion

need not be verified.

**Issue 8:** Should a written statement signed by counsel be taken as proof of matters within counsel's knowledge?

**9. Contest of Pauper's Affidavit--Swearing. Rule 45(c).**

Present Rule 40(a)(3) would be moved to Rule 45 (in place of the repealed rule concerning writ of error from trial court) because the affidavit of inability to pay costs would no longer be relevant to perfection of the appeal. Because of uncertainty under the present rule as to whether the contest must be sworn to, alternative proposals are presented to resolve this question. The Section Committee recommends either that the contestant's oath not be required or that the oath be explicitly required and that the affidavit of the contestant, if made on information and belief, must state what information the contestant has on which to base a belief that the appellant is unable to pay the costs or a substantial portion thereof.

**Issue 9:** (1) Should officers of the court and others contesting appellant's affidavit of inability to pay costs be required to swear that the appellant is able to pay the costs? (2) If permitted to swear on information and belief, should the contestant be required to state the information on which to base such a belief?

**10. Oral Argument in Criminal Cases. Rule 75(f).**

The Council of Chief Judges of Courts of Appeals recommends that this rule be amended to give the courts of appeals the same authority in criminal cases as they now have in civil cases to advance cases for submission and dispose of them without oral argument where oral argument would not materially aid the court in determination of the issues presented in the briefs.

**Issue 10:** Should the court of appeals have authority in criminal cases to advance submission and dispose of the case without oral argument when it finds that oral argument would not materially aid the court?

**11. Original Proceedings--Real Party in Interest. Rule 121(a)(2).**

This amendment would require the petition to name the real party in interest as a respondent in original proceedings and would provide that the name of any judge or other official named as a respondent should not appear in the title of the proceeding.

**Issue 11:** (1) In original proceedings should the real party in interest be named a respondent? (2) Should the name of the judge or other official respondent appear in the title of the proceeding?

**12. Remand to Court of Appeals--Factual Sufficiency. Rule 184(c).**

This amendment would clarify the requirements for obtaining a remand to the court of appeals for consideration of factual insufficiency points not previously considered. It would obviate any requirement that such points be briefed in the Supreme Court and would allow a request for such a remand to be made on motion for rehearing in the Supreme Court. See *Davis v. City of San Antonio*, 752 S.W.2d 518, 521-22 (Tex. 1988).

**Issue 12:** When the Supreme Court reverses a judgment of the court of appeals, should the respondent, in its brief or on motion in the Supreme Court, and without briefing such points in the Supreme Court, be able to obtain a remand to the court of appeals for consideration of factual insufficiency points briefed but not passed on by the court of appeals?

**13. Suspension of Enforcement of Judgment. Rule 47(b).**

This rule allowing deviation from the requirement of a supersedeas bond in the full amount of a money judgment to suspend its enforcement would be broadened and simplified to apply to all money judgments where the trial judge finds that posting a bond for the full amount would "cause irreparable harm to the judgment debtor," and that not posting such bond or deposit would "cause no substantial harm to the judgment creditor."

**Issue 13:** Should the trial judge have discretion to allow supersedeas of the judgment without requiring security for the full amount whenever the judge finds that full security would "cause irreparable harm to the judgment debtor" and that not posting full security would "cause no substantial harm to the judgment creditor"?

**14. Miscellaneous Amendments to Appellate Rules.**

The Section Committee is of the opinion that the following proposed amendments to the appellate rules are self-explanatory and require no extended discussion:

**(a) Dismissal for Noncompliance with Local Rules.**

An addition to Rule 1(b) would provide that no appeal should

be dismissed for noncompliance with a local rule without notice and a reasonable opportunity to comply.

**(b) Suspension of Rules. Rule 2(b).**

This rule, which gives the appellate court authority in criminal cases to suspend the requirements and provisions of any rule in a particular case, would be amended to apply to civil cases except with respect to the time for filing a notice of appeal.

**(c) Amicus Curiae--Identification of Client. Rule 20.**

An amicus curiae would be required to identify the client on whose behalf the brief is tendered.

**(d) Notice of Limitation of Appeal--Caption. Rule 40(a)(4).**

This proposal would require any document containing a notice of limitation of appeal to be expressly so entitled so that it would be less likely to be overlooked by opposing counsel.

**(e) Time for Appeal--Motion to Modify Judgment. Rule 41(a)(1).** This rule would be amended to conform to Tex. R. Civ. P. 329(g) by including as an event extending the time to file an appeal the filing of a motion to modify, correct, or reform the judgment.

**(f) Damages for Delay in Civil Cases. Rules 84 and 182(b)** would extend the provisions for damages for delay in civil cases to original proceedings.

**15. Miscellaneous Amendments to Rules of Civil Procedure.**

The Section Committee, most of whom also serve on the Task Force on Appellate Rules of the Advisory Committee, also recommends certain amendments to the Rules of Civil Procedure, but recognizes that these recommendations may properly be considered also by the task force assigned to study these rules. These proposals are as follows:

**(a) Request for Findings and Conclusions. TRCP 297, 298, 329b(f).**

These rules would be amended to provide that the trial court's authority to file findings and conclusions, if properly requested, is not affected by expiration of the court's plenary power, and also to provide that a request for additional or amended findings and conclusions may be made within twenty days, rather than within ten days, after the original findings and conclusions are filed.

**NOTE:** The Section Committee considers the findings-and-

conclusions practice unsatisfactory and has studied various proposals to correct it, but has not been able to develop a satisfactory solution. One proposal is to make the findings part of the decision process, analogous to jury findings, and to incorporate the request for additional findings into the motion to modify, correct, or reform the judgment. Another is to adopt something like the federal practice. The Section Committee recommends that the Task Force assigned to these rules make a careful study of this problem.

**(b) Prerequisites of Appeal. TRCP 324.** (1) The Section Committee suggests that subdivision (b)(4) be amended to provide that a complaint that the damages found by the jury are in excess of the pleading need not be raised by a motion for new trial. (2) The Committee also recommends that subdivision (c) concerning cross-points in an appellee's brief on appeal attacking jury findings be moved to TRAP 74.

**(c) Execution Superseded TRCP 634.** An amendment to this rule would provide that filing a supersedeas bond suspends execution proceedings, even though a writ of execution may have already been levied.

**(d) Garnishment. TRCP 657** would be amended to provide that compliance with TRAP 47, allowing supersedeas without filing security for the full amount of the judgment, suspends postjudgment garnishment proceedings and that a postjudgment writ of garnishment may issue no earlier than the date for issuance of a writ of execution. An amendment to TRCP 658 would define the procedure for obtaining a postjudgment writ of garnishment. Other amendments to TRCP 658-677 would clarify the references to the garnishment proceeding and the underlying proceeding and distinguish between the parties to the garnishment and the underlying proceeding.

#### **Other Proposed Amendments**

The "Cumulative Report" contains other proposed amendment to the appellate rule, most of which are of minor textual character or changes in various rule to conform to other amendments recommended. Although the Advisory Committee probably will not need a full discussion of all of these proposals, the Section Committee hopes that all its proposals will be carefully scrutinized and that any comments and suggestions not raised in the meetings of the Advisory Committee be submitted to the Section Committee in writing.

#### **Matters for Further Consideration**

Various matters are before the Section Committee for further consideration and will be subjects of a later report to the Advisory Committee. Among these are the following:

1. **Electronic Statement of Facts.** The Section Committee has under consideration problems arising from application of the model order of the Supreme Court allowing the use of an electronically recorded statement of facts. The Committee is of the opinion that preparation of the statement of facts is a major cause of delay on appeal and that the ultimate solution will be technological. Investigation of the practices in other states and consultations with court reporters would be advisable. TRAP 53 should be amended to allow for technological developments. Meanwhile, the Supreme Court's model order should be amended to remedy some of the current problems and provisions should be made in TRAP 53 and 54.

2. **Findings and Conclusions.** A more rational and less dilatory practice should be sought.

3. **Bankruptcy.** Provisions may be proposed defining the practice in the event of a stay of proceedings for bankruptcy of a party to the appeal, particularly with respect to time requirements.

4. **Disposition of Appellate Records.** Should the appellate record remain in the appellate court until Doomsday?

5. **Loss of Records.** Should provision be made for the procedure to be followed in the event of loss of appellate records?

6. **Default by Reporter.** What, if any, provision should be made for a situation in which the reporter that recorded the proceedings is missing or delays unduly the preparation of the statement of facts?

7. **Appellate Timetable:** Should a single timetable be adopted for all appeals, whether or not a motion for new trial is filed and whether or not the evidence has been electronically recorded?

8. **Other Suggested Changes in Appellate Rules.** The Section Committee will consider and make recommendations in a supplemental report concerning other proposals for amending the appellate rules suggested by members of the Advisory Committee. Drafts of any such proposals are requested. The Section Committee will also consider and report to the Advisory Committee on the proposals contained in the material distributed to the Advisory Committee before its meeting on November 19, 1993, pages 983-1128.

## Identification of Parties to the Appeal

The members of the Section Committee have disagreed as to whether requiring the notice of appeal to identify the parties to the trial court's judgment that are parties to the appeal and those that are not would raise a technical obstacle prejudicial to appellants. It has been pointed out that under current rules, the appellant may make the bond or deposit payable to the clerk, thus avoiding any requirement to name the parties against whom appellate relief is sought. This memorandum is an attempt to state the position of the majority of the Committee that any inconvenience to appellants would be slight and would more than offset by the value of notifying the parties to the trial court's judgment which of them are parties to the appeal. A separate memorandum will be presented by the minority.

Fundamental fairness seems to require that a nonappealing party should be promptly notified as to whether his interests would be affected by the appeal. For instance, if a plaintiff recovers a judgment against one defendant but not against another, and the plaintiff does not appeal, should the successful defendant have to continue paying a lawyer to monitor the record, examine the briefs when filed, and render a legal opinion as to whether the successful defendant's interests might be adversely affected by the judgment on appeal? Likewise, if the plaintiff fails to recover against any of several defendants and seeks reversal as to only one, should all the defendants be prepared to defend the judgment? In multiparty cases, should the parties to the appeal and the clerks of the appellate courts be required to send notices and copies of briefs and other papers to numerous parties that have no interest in the appeal? This seems to be a good place to set a limit on the cost and complexity of litigation.

It has been asserted that to require the appellant to identify the appellees against whom appellate relief is sought would introduce an uncertain and unprecedented complication into the appellate process. On this point a historical perspective is instructive. The procedure recommended by the Committee is essentially the same as it was under the procedural statutes as they existed before adoption of the Texas Rules of Civil Procedure. Under those statutes it was necessary for the appellant to identify the adverse parties by naming them as obligees in the appeal bond. *Wedgeworth v. Pope*, 12 S.W.2d 1045, 1046 (Tex. Civ. App.--Fort Worth, 1928, writ ref.'d). Omission of parties not necessary to the appeal was immaterial. *Wandelohr v. Rainey*, 100 Tex. 471, 100 S.W. 1155. However, omission of an adverse party was not a matter of jurisdiction, since leave could be granted to amend the bond. *Teas v. Swearingen*, 101 S.W.2d 334, 336 (Tex. Civ. App.--Fort Worth 1937, no writ). As to such omitted adverse parties, the trial court's judgment was final and the appellate court had no jurisdiction to review the judgment in so far as it affected them. *Speckels v. Kneip*, 170 S.W.2d 255, 257-58 (Tex. Civ. App.--El Paso, writ ref'd); *Miller v. Dunagan*,

