

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

## **INDEX**

1. Report of Subcommittee on Texas Rules of Appellate Procedure dated November 14, 1994
2. Report of Subcommittee on TRCP 15-165

4543.001

LHS  
hnd

✓ 11-16-94

SB  
LHS MB J

**PLEASE BRING THIS PACKET  
TO THE  
SUPREME COURT ADVISORY COMMITTEE  
MEETING ON  
NOVEMBER 18 AND 19, 1994**

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

- Rule 4 In paragraph (b), the following was inserted as the first sentence: "The attorney in charge for a party is the attorney to whom orders and notices to that party should be sent and on whom papers and copies of papers should be served." In addition, paragraph (b) was moved to Rule 7(a) and the remaining paragraphs of Rule 4 were renumbered. The Notes and Comments following the rule have been revised accordingly.
- Rule 5 "other than a Saturday, Sunday, or legal holiday" was deleted from the third sentence.
- Rule 7 Paragraph (a) was deleted and Rule 4(b) was substituted in its place. The Notes and Comments following the rule have been revised accordingly.
- Rule 13(i) "fee or" was inserted in front of deposit in two instances.
- Rule 16 An alternative to the last sentence was added to the report, along with a comment by the Section Committee.
- Rule 19 "not" was added before "ex officio" and before "within the personal knowledge"
- Rule 20 "and disclose the source of any fee paid or to be paid for preparation of the brief," was added.
- Rule 40 ", and (5) in accelerated appeals, that the appeal is accelerated" was added to subdivision (a)(2).
- Rule 41 "Ordinary" was deleted from the title of the rule.
- Rule 42 "or as extended in accordance with Rule 41(a)(2)" was added to the end of the first sentence and an explanation was added to the Notes and Comments. The last sentence of subdivision (a)(3) was deleted.
- Rule 44 Paragraph (a) was deleted and the following was added:
- (a) Notice of appeal in habeas corpus and bail proceedings shall be given in writing, filed with the clerk of the trial court, within ten days after the judgment or order is entered by the trial court, either in writing or in open court. The transcript and statement of facts, if requested by the applicant or the state, shall be filed in the appellate court within fifteen days after notice

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

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

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

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

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

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

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

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

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

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

**Rule 131** In paragraph (c), the following is stricken: Example: "This is a suit for damages in excess of \$1000.00 for personal injuries growing out of an automobile collision. The opinion of the court of appeals correctly states the nature and results of the suit, except in the following particulars: (If any.)" Paragraph (j), regarding intervention, was deleted

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

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

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

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

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

SECTION ONE. APPLICABILITY OF RULES

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

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

Notes and Comments

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

RULE 2. RELATIONSHIP TO  
JURISDICTION AND  
SUSPENSION

- (a) Relationship to Jurisdiction. [No change.]
- (b) Suspension of Rules in Civil and Criminal Matters. Except as otherwise provided in these rules, in the interest of expediting a decision or for other good cause shown, ~~a court of appeals, or the Court of Criminal Appeals~~ the appellate court in which the appeal is pending may suspend requirements and provisions of any rule in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction. ~~Provided, however, that~~ Nothing in this rule shall be

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

#### Notes and Comments

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

### SECTION TWO. GENERAL PROVISIONS

#### RULE 3. DEFINITIONS AND UNIFORM TERMINOLOGY

[No change.]

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

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

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

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

(c) **Number of Copies.**

(1) Each party shall file six Six copies of motions, petitions, applications, briefs, petitions, motions and other papers shall be filed with the 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. Only one copy of the record is required to be filed in accordance with these rules.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Notes and Comments

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

#### RULE 5. COMPUTATION OF TIME

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

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

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

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

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

#### Notes and Comments

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

### RULE 6. COMMUNICATIONS WITH THE APPELLATE COURT.

[No change.]

### RULE 7. APPEARANCE, WITHDRAWAL, AND SUBSTITUTION OF COUNSEL

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

*when signed  
first appeal*  
- 5 -

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

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

#### Notes and Comments

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

#### RULES 8 - 10

[No change.]

#### RULE 11. DUTIES OF COURT REPORTERS

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

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

(4) [No change.]

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

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

#### Notes and Comments

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

#### RULE 12. WORK OF COURT REPORTERS

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

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

#### Notes and Comments

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

#### RULE 13. DEPOSIT FOR COSTS IN CIVIL CASES

*fee*

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

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

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

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

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

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

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

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

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

#### Notes and Comments

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

#### RULES 14 - 15

[No change.]

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

The inability of any court of appeals having jurisdiction of a cause, matter, or controversy requiring immediate action to take such immediate action by reason of the illness or absence or unavailability of at least two of the justices thereof may be established either by the certificate of the clerk or any justice of such court of appeals, or by the affidavit of counsel for any party to such proceeding establishing the facts to the satisfaction of the court of appeals from which immediate action is sought. In determining the nearest court of appeals within the meaning of section 22.220(b) of the Government Code its straight-line distance from the courthouse of the county where such cause, matter, or controversy is or was last pending in the trial court shall govern. A court of appeals is available to take immediate action under the provisions of said Article when two or more justices thereof, not disqualified, are present for duty or can readily become present for duty within the time when such action must be taken. If the inability of the nearest court of appeals to take such immediate action is also established in the manner hereinabove provided, such action may be taken by the court of appeals next nearest to such courthouse. Any action taken under this rule by a court other than the one in which the appeal or original proceeding is filed, or, if not filed, would have jurisdiction of it, has the same effect as if taken by the other court. After taking or denying such action, the court so acting shall, as soon as practicable, send a copy of its order and the documents presented to it, or copies of them, to the court on whose behalf the action was taken, and that court shall proceed with the matter whenever a quorum is available.

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

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

## RULE 18. DUTIES OF APPELLATE COURT CLERK

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

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

## RULE 19. MOTIONS IN THE APPELLATE COURTS

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

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

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

(g) Particular Motions.

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

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

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

- (a) the court below and the date of judgment, together with the number and style of the case;
- (b) in criminal cases, the offense for which the appellant was convicted and the punishment assessed;
- (c) if the appeal has been perfected, the date when the appeal was perfected;
- (d) the deadline for filing the item in question;
- (e) the length of time requested for the extension;
- (f) the number of extensions of time that have been granted previously regarding the item in question; and
- (g) the facts relied upon to reasonably explain the need for an extension.

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

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

- (a) the court of appeals and the date of its judgment, together with the number and style of the case;
- (b) the date upon which the last timely motion for rehearing was overruled;
- (c) the deadline for filing the application; and
- (d) the facts relied upon to reasonably explain the need for an extension.

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

#### Notes and Comments

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

### RULE 20. AMICUS CURIAE BRIEFS

The clerk of the appellate court may receive but not file amicus curiae briefs. An amicus curiae shall comply with the briefing rules for the parties, shall identify the person, association, or corporation on whose behalf the brief is tendered and disclose the source of any fee paid or to be paid for preparation of the brief, and shall show in the brief that copies have been furnished to all attorneys of record in the case. In civil cases, an amicus curiae brief shall not exceed 50 pages in length, exclusive of pages containing the list of names and addresses of parties, the table of contents, index of authorities, points of error, and any addendum containing statutes, rules, regulations, etc. The court may, upon motion and order, permit a longer brief.

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

#### Notes and Comments

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

### RULE 21. RECORDING AND BROADCASTING OF COURT PROCEEDINGS

[No change.]

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

## PROCEEDINGS IN CRIMINAL CASES

[No change.]

### SECTION FOUR. APPEALS FROM JUDGMENTS AND ORDERS OF TRIAL COURTS

#### RULE 40. ORDINARY APPEAL— HOW PERFECTED

(a) Appeals in Civil Cases.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

