

AGENDA
MARCH 17-18, 1995
SCAC MEETING

INDEX

1. Supreme Court Advisory Committee Proposed Amendments to Texas Rules of Appellate Procedure dated March 13, 1995; Additional Changes to Appellate Rules; and TRAP 7
2. Report of Discovery Subcommittee on TRCP 10, Expert Witnesses

**SUPREME COURT ADVISORY COMMITTEE
PROPOSED AMENDMENTS TO
TEXAS RULES OF APPELLATE PROCEDURE
March 13, 1995**

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

(a) [No change.]

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

Notes and Comments

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

TRAP 2. RELATIONSHIP TO JURISDICTION AND SUSPENSION

(a) [No change.]

(b) **Suspension of Rules in Civil and Criminal Matters.**

Except as otherwise provided in these rules, in the interest of expediting a decision or for other good cause shown, ~~a court of appeals or the Court of Criminal Appeals~~ the appellate court in which the appeal is pending may suspend requirements and provisions of any rule in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction. ~~Provided, however, that~~ Nothing in this rule shall be construed to allow any court to suspend requirements or provisions of the Code of Criminal Procedure or to extend the time for perfecting appeal in a civil matter.

Notes and Comments

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

TRAP 4. ~~SIGNING, FILING AND SERVICE~~ FILED PAPERS--GENERAL RULES

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

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

deemed as filed in time, ~~provided, however, that a certificate of mailing by the United States Postal Service or a legible postmark affixed by the United States Postal Service shall be prima facie evidence of the date of mailing.~~ A legible postmark affixed by the United States Postal Service, a receipt for registered or certified mail, or a certificate of mailing by the United States Postal Service shall be accepted as conclusive proof of mailing, but other proof may be considered.

(c) Number of Copies.

(1) ~~Each party shall file 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) From former Rules 14(f) and 130~~

(2) ~~Each party shall file twelve copies of its application for writ of error or of its petition for discretionary review.~~ Twelve copies of each application for writ of error shall be filed with the 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) From former Rule 121(a)(3)~~

~~(3) Copies to be Filed. Three copies of the motion, petition and brief shall be delivered to the clerk of the court of appeals when the petition is delivered to that court, if the petition is delivered to the Supreme Court, 12 copies shall be delivered. In an original proceeding commenced in a court of appeals, each party shall deliver three copies of all petitions and briefs provided for in the rule governing original proceedings (Rule 120) to the clerk of the court of appeals. If the proceeding is commenced in the Supreme Court or the Court of Criminal Appeals, twelve copies shall be delivered. Any court of appeals may by local rule authorize the filing of more copies. Only one copy of the record is required to be filed in accordance with the rules governing original proceedings.~~

~~(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.~~

~~(d) Papers Typewritten or Printed Form. All applications, briefs, petitions, motions and other papers shall be printed or typewritten. The use of recycled paper is strongly encouraged.~~

~~Typewritten papers must be with a double space between the lines and on heavy white paper in clear type.~~

~~**(d)(1) and (d)(2) from former Rule 74(f)**~~

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

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

~~**(d)(2) From former Rule 74(f)**~~

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

~~**(d)(3) From former Rule 74(f)**~~

(3) Length of Briefs and Applications. ~~Except as specified by local rule of the court of appeals,~~ Appellate briefs and applications in civil cases (including amicus briefs) shall not exceed 50 fifty pages of 10 point courier type with one-inch margins, or the equivalent, exclusive of pages containing the list of names and addresses of parties, the table of contents, index of authorities, issues or points of error, and any addendum or appendix containing statutes, rules, regulations, etc. and the like, and excerpts from the record crucial to the issues presented. The court may, upon motion or by local rule, permit a longer brief. ~~A~~ The court ~~of appeals~~ may direct that a party file a brief, or another brief, in a particular case. If any brief is unnecessarily lengthy or not prepared in conformity with these rules, the court may require same to be redrawn.

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

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

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

(f) **Manner of Service.** Service may be personal, by mail, or by telephonic document transfer to the party's current telecopier number. Personal service includes delivery of the copy to a ~~clerk~~ secretary or other responsible person at the office of counsel. Service by mail is complete on mailing. Service by telephonic document transfer is complete on receipt. Service on a party represented by counsel shall be made on that party's attorney in charge, as defined in Rule 7(a), and on another attorney if one has been designated by the attorney in charge pursuant to Rule 7(a). No service may be made on the party represented.

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

proof of service but shall require such acknowledgment or proof to be filed promptly thereafter.

Notes and Comments

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

TRAP 5. COMPUTATION OF TIME

(a) **In General.** In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday or legal holiday, in which event the period extends to the end of the next day which is not a Saturday, Sunday or legal holiday. When the act to be done is the filing of a paper in court, and the clerk's office is closed or inaccessible on the last day of the period so computed, the period extends to the end of the next day on which the clerk's office is open and accessible. Proof of closing or inaccessibility of the clerk's office may be made by a certificate of the clerk or counsel or by affidavit of the party.

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

(f) **No Notice of Judgment of Appellate Court.** Notwithstanding any provision of these rules concerning the time for filing a motion for extension of the period for filing a motion for rehearing, application for writ of error, or petition for discretionary review, an extension of such period may be granted by the appellate court in which a motion for extension would properly be filed on ~~sworn~~ motion showing that neither the party desiring to file such motion for rehearing, application for writ of error, or petition for discretionary review nor his attorney had notice or actual knowledge of the judgment or order from which such period

began to run before the last day of such period and stating the earliest date either the party or his attorney received such notice or actual knowledge. Such a motion for extension shall be filed within fifteen days of the date either the party or his attorney first had such notice or actual knowledge, but in no event more than ninety days after the beginning of such period. When such a motion is granted, the period in question shall begin to run on the date of granting the motion.

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

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

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

Notes and Comments

Comment to 1995 change: The last two sentences of paragraph (a) have been added and the requirement of a "sworn" motion has been deleted from paragraph (f), since the evidence supporting the motion is governed by Rule 19(d). Paragraph (g) was added.

TRAP 7. APPEARANCE, WITHDRAWAL, AND SUBSTITUTION OF COUNSEL

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

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

Notes and Comments

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

TRAP 9. SUBSTITUTION OF PARTIES

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

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

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

(be) Public Officers; Separation from Office.

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

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

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

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

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

Notes and Comments

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

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

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

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

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

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

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

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

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

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

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

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

Notes and Comments

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

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

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

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

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

Notes and Comments

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

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

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

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

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

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

~~**(kd) Inability to Pay.**~~ ~~If the appellant has filed in the trial court an affidavit of inability to pay costs and has given the notice required by Rule 40(a)(3), 45(d) and any contest of such~~

affidavit to the appellant's claim of inability has ~~been overruled,~~
not been sustained by written order ~~he~~ the appellant shall be
entitled, without paying a filing fee, to filing of the notice of
appeal and filing of file the record in the court of appeals, and,
if the decision of the court of appeals is adverse to the appellant
~~him,~~ to the filing of an application for writ of error, ~~without~~
~~making any deposit for costs.~~ In all other proceedings in which a
fee cost deposit is required by this rule, a party unable to pay
such fee costs may make an affidavit of ~~his~~ inability to do so and
deliver the affidavit ~~it~~ to the clerk of the appellate court along
with upon filing the petition or motion being filed. If the
affidavit is filed in connection with an application for writ of
error, it shall be delivered to the ~~C~~clerk of the ~~C~~court of
~~A~~ppels to be forwarded to the Supreme Court with the record for
action by the Supreme Court. Contest of any such affidavit in the
appellate court shall be governed by Rule 45 ~~40(a)(3).~~

Notes and Comments

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

SUPREME COURT ORDER RELATING TO FEES CHARGED IN CIVIL CASES

BY THE SUPREME COURT AND THE COURTS OF APPEALS

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

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

(a1) Filing Transcript Appeals. Upon tendering the transcript to the clerk for filing receipt of a notice of appeal in the appellate court the appellant shall deposit with pay to the Clerk of the Court of Appeals the sum of \$50 as costs fifty dollars.

(a2) Original Proceedings. Upon the filing of a motion for leave to file a petition for writ of mandamus, prohibition, injunction, or other like an original proceeding as provided in Rule 120, or a petition for writ of habeas corpus, the movant or relator shall deposit with pay to the clerk of the court of appeals the sum of twenty dollars—a deposit of \$20 as costs if in the court of appeals or \$50 if in the Supreme Court. If the motion for leave is granted, or if the petition for writ of habeas corpus proceeding is set for argument submission, the movant or relator shall deposit an additional sum of \$30 in pay to the clerk of the court of appeals or \$75 in the Supreme Court the additional sum of thirty dollars.

~~(g3) Other Proceedings.~~ Upon filing of ~~any other motions~~ or proceedings not specifically enumerated in this rule, when no record has been filed with the clerk in the court of appeals, the party filing such motion or the proceeding shall deposit the sum of \$10 if in pay to the clerk of the Court of Appeals, or \$75 if in the Supreme Court as all costs of such proceedings. When a record is later filed in the same proceeding, only an additional deposit of \$40 shall be required if in the court of appeals or \$50 if in the Supreme Court the sum of _____ dollars.

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

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

~~(d1) An Application for Writ of Error.~~ Upon filing an application for writ of error with the Clerk of the Court of Appeals, the petitioner shall deliver to the clerk of that court of the court of appeals, payable to the clerk of the Supreme Court, the sum of \$50 as costs in the Supreme Court, and fifty dollars. ~~The~~ clerk shall forward the deposit fee to the Supreme Court with the record. If the application for writ of error is granted, the petitioner shall deposit with pay to the Clerk of the Supreme Court the additional sum of \$75 as costs in the Supreme Court seventy-five dollars.

