AGENDA
MARCH 18-19, 1994
SCAC MEETING

INDEX

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 or 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 the 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 he 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,*

123 S.W.2d 123, 124 (Tex. Civ. App,--El Paso 1938, writ dism'd).

In case of review by writ of error, the petition for the writ, as well as the bond, had to name the adverse parties, as does the writ-of-error provision in current **Rule 45(c)** (formerly Tex. R. Civ. P. 360. 590 S.W.2d 835, 836 (Tex. Civ. App.--Houston [14th Dist.] 1979. Only those parties whose interests might be materially affected by reversal or modification of the particular part of any judgment attempted to be reviewed on appeal, and who did not join in the petition for writ of error, were adversely interested and had to be joined as defendants in error in order to confer jurisdiction upon the appellate court to review that particular part of the judgment. *Spur Independent School Dist. v. W.A.Holt Co.*, 74 S.W.2d 420, 422 (Tex. Civ. App.--Waco 1934, writ dism'd w.o.j.).

A quick review of authorities from other jurisdictions indicates that the requirement for the appellant to name the adverse parties is widespread. The *Federal Court of Appeals Manual, 2d Ed.*, § 13.5, at p. 152 comments that it is "good practice" for the notice of appeal to contain the names of the appellees. The same authority at p. 156 states:

> When the issues and rulings as to all parties are not the same, so that it is not clear from the mere act of appealing that all are intended to be appellees, it is particularly important to take care in designating the appellees.

Likewise, in *Martineau, Modern Appellate Practice,* § 5.4, at p. 75, the following comment indicates the problems that may arise if the parties to the appeal are not identified:

> Since a case may be docketed before it is clear who may attack the judgment, who will defend it, and who will not participate in the appeal, the appellate attorney will continue to be confused as to the status of the parties in the appellate court. . . . As a matter of practice, in the absence of information to the contrary, all parties in the trial court who do not file a notice of appeal should be treated as appellees until such time as a party files a document indicating the contrary.

In *4 Am. Jar., Appeal and Error* § 276, p, 772, the following appears:

> All parties in favor of whom judgment was rendered and who would be adversely affected by is reversal must be made appellees.

Further in *4 Am. Jar., Appeal and Error* § 278, p. 806:

> As a general rule the notice . . . should specify the parties . . . against whom relief is sought.

Likewise, in *4 C.J.S. Appeal and Error* § 1, at p. 314:

> Generally, parties to appellate proceedings should be expressly designated, and no person not specifically named and designated, can be regarded as a party to the proceeding.

This cursory review should suffice to show that designating the parties to be affected by the appeal is not generally regarded as a hardship on appellants. The Supreme Court's rationale for permitting the bond to be made payable to the clerk is not clear, but presumably it was a measure for convenience of appellants. In this context, the convenience of other parties to the judgment in determining promptly and easily whether they will need to resist an appeal should be balanced against the convenience of appellants in the rare case where they may have difficulty in determining who may be adversely affected by a reversal, especially if the appellants may amend the notice and bring in any party that should have been named. In the opinion of a majority of the Committee, that balance should be struck in favor of requiring the notice of appeal to identify the parties.

Another reason for requiring the notice to name the appellees is the problem of protecting those parties that have no reason to believe that the judgment on appeal will affect their interests. This problem will be discussed in Memorandum Number Two.

Memorandum of Law Number Two

Rights of Nonappealing Parties

The Section Committee has had extended discussions concerning parties in the trial court that would not be affected by the appeal and what provisions should be made in the appellate rules for their protection. In brief, a majority of the Committee concludes that the rights of absent parties would be adequately protected by requiring the notice of appeal to specify the parties against whom appellate relief is sought and by amendments to Rules 81 and 184 providing that the judgment of the appellate court does not bind absent parties or adversely affect their interests. Under these amendments, the Committee is of the opinion that such parties need not be sent copies of notices, briefs, orders, or opinions unless they file a request for such copies. As an extra precautions, the Committee proposes that such parties be permitted to intervene in appellate proceedings whenever they consider that the judgment of the appellate court has or might affect their interests adversely.

In the Committee's opinion, appellate judgments adverse to the interests of absent parties are quite rare. The Committee

recognizes cases reversing an entire judgment "where the respective rights of the appealing and nonappealing parties are so interwoven or dependent on each other as to require a reversal of the whole judgment," *Lockhart v. A.W.Snyder & Co.*, 163 S.W.2d 385, 392 (Tex. 1942). The same result has been reached when the appellant "can be given the full measure of relief to which he is entitled in no other way than by reversal of the judgment between nonappealing parties," *American Indemnity Co. v. Martin*, 84 S.W.2d 697, 698 (Tex. 1935). But in these cases, the trial court's judgment had been adverse to the nonappealing parties and the reversal was in their favor. Presumably, they would have had no interest in appearing in the appellate court to oppose the reversal. Other cases of this sort include *Ex parte Elliot*, 815 S.W.2d 251 (Tex. 1991); *Guajardo v. Chavana*, 762 S.W.2d 683, 685 (Tex.App.--San Antonio 1988, writ denied); *American Petrofina, Inc. v. PPG Industries, Inc.*, 679 S.W.2d 740, 757 (Tex.App.--Fort Worth 1984, writ dism. agr.); *Belz v. Belz*, 666 S.W.2d 243, 244 (Tex.App.--Dallas 1984, no writ).

It is quite another matter, however, for an appellate court to reverse a judgment *favorable* to an absent party because in that case the absent party's interests would be adversely affected by the reversal. In very rare cases appellate courts have failed to make this distinction and have extended the "interwoven and dependent" rule by reversing entire judgments that were favorable to absent parties. Since the absent party has no opportunity to appear and defend his interests, such a decision would seem to raise a question of due process unless the case is the kind where the trial court's judgment is binding on absent parties, such as a probate case or a proceedings to which the doctrine of virtual representation applies.

For example, in *Turner, Collie & Braden*, 642 S.W.2d 160, 166 (Tex. 1982), the trial court had awarded recovery to a contractor against a developer for a balance due on a sewer construction contract and had denied recovery by the developer on its counterclaim for defects. The judgment had also awarded the developer recovery on its third-party claim against a firm of engineers for faulty design. The engineers appealed and obtained a reversal and a remand for a new trial, but the developer had not filed a cross-appeal of the contractor's judgment against it. The Supreme Court held that the entire judgment should be reversed because a new trial without the contractor might result in a conflict in the judgments.

It seems to the Committee that this is bad law. An injustice was done to the contractor in reversing the judgment favorable to him when he had no opportunity to appear and defend it. Obviously, the appellant-engineers had no interest in defending it on the contractor's behalf. If the developer had desired to preserve its right to a new trial as against the contractor, it should have filed a cross-appeal and named him as a cross-appellee. Otherwise, even if the contractor had received copies of the briefs and of the opinion of the appellate court,

as the 1990 amendments would now require, it is not clear whether the contractor, who was not a party to the appeal, would have had standing to appear and oppose reversal of his favorable judgment. And if, as in *Turner,* no such relief had been sought in the briefs and the contractor's first notice of the threatened reversal was a copy of the opinion, to let him appear and attempt to defend the judgment after the appellate court has already decided to reverse it does not seem to be an adequate remedy.

These considerations have persuaded the Committee that even in those rare cases where the rights of an absent party might be affected adversely by a reversal, copies of briefs and other papers would provide him little protection. He cannot reasonably be expected to examine carefully copies of papers in a case where no one has appealed from a judgment in his favor, and, if he does so and anticipates some question that may affect him, his remedy is uncertain. The only effective protection of his rights would be to require that he be made party to the appeal so that he may take full advantage of an appellee's rights in the normal appellate process. The Section Committee, therefore, recommends that Revised **Rule 40(b)** require that the notice of appeal identify the adverse parties and that **Rules 81 and 184** be amended to provide that the judgment of the appellate court does not *adversely* affect the rights of absent parties. Such a rule would be in accordance with the Supreme Court's decision in *Jackson v. Fontaine's Clinics, Inc.*, 499 S.W.2d 87, 92 (Tex. 1973), in which only one of several defendants appealed and the Supreme Court refused to reverse the judgment with respect to the nonappealing defendants because the recovery against them had been for relatively minor sums and a new trial would expose them to greater liability.

However, to provide further protection for absent parties, the Committee proposes amending other rules so as to give notice to parties to the trial court's judgment not named as appellants or appellees in the notice of appeal that they are not so named and also to give them the right to serve and file a request for copies of briefs, orders, and opinions on appeal if they anticipate that their interests may be adversely affected. The Committee proposes giving them the additional right to intervene in the appeal if they anticipate that any relief sought or granted would adversely affect their interests. Such amendments would be of greater importance if the proposed amendments to Rules 81 and 184 are not adopted.

The Committee is of the opinion that the above recommendations would be sufficient to protect the rights of absent parties against any appellate decision adverse to their interests without requiring appellate parties and appellate clerks to send copies of briefs, orders, and opinions to absent parties who have made no request for copies, and, therefore, presumably, have no interest in the appeal. Consequently, the amendments above explained are recommended, although the Committee anticipates that absent parties would rarely have

occasion to invoke this procedure.

Memorandum of Law Number Three

Writ of Error in Court of Appeals

Historically two methods of review of trial court judgments have been employed in Anglo-American jurisprudence. These two methods reflected the ancient English division between common-law and chancery courts. Writ of error was the method of review at common law, and appeal was the method in chancery. *First Dallas Petroleum, Inc. v. Hawkins,* 727 S.W.2d 640, 641 (Tex. App.--Dallas 1987, no writ). These two methods of review were adopted in Texas by statute, and a vestige of the common-law practice remains in **Tex. R. App. P. 45**, which restricts writ-of-error review to parties that did not participate in the trial.

In *Brown v. McLennan County Children's Services,* 627 S.W.2d 390, 392, (Tex. 1982), the Supreme Court, following a long line of Texas cases, stated the four elements necessary for a review by writ of error as follows:

> (1) [I]t must be brought within six months of the date of judgment; (2) by a party to the suit; (3) who did not participate in the trial; and (4) error must be apparent from the face of the record.

The expression "apparent from the face of the record" has caused much confusion. It seems to reflect the English common-law writ-of-error practice which allowed consideration only of errors of law appearing on the "judgment roll," the clerk's record of the proceedings. Accordingly, there is a line of cases holding that the "face of the record" does not include oral evidence that can be shown only by a statement of facts. See *Appraisal Review Board v. International Church of the Foursquare Gospel,* 719 S.W.2d 160 (Tex. 1986); *Houston Oil Co. v. Kimball,* 103 Tex. 94, 122 S.W. 537 (1909); *First Dallas Petroleum*, 727 S.W.2d at 643. These cases are consistent with the holding in *McKanna v. Edgar*, S.W.2d 927, 930 (Tex. 1965), that jurisdiction over a nonresident defendant "must affirmatively appear on the face of the record," and, therefore, could not be shown by oral evidence.

Other cases hold, however that writ of error affords the same scope of review as an appeal and, accordingly, that "face of the record" includes evidence shown by a statement of facts. See *Brown*, 627 S.W. at 394; *First Dallas Petroleum*, 727 S.W. at 648, 650. Of course, if writ-of-error review allows sufficiency-of-the-evidence review by examination of a statement of facts, then the expression "apparent from the face of the record" has lost its original meaning and, in fact has no meaning at all that distinguishes writ-of-error review from the usual rule that confines appellate review to consideration of the appellate

record.

However, because of the use of "face of the record" with a different meaning in other contexts, as in *McKanna v. Edgar*, the expression is confusing and misleading and should be completely discarded in the context of appellate review. If, in fact, the only differences between the writ-of-error practice and the usual appellate procedure are that writ of error is available only to parties that did not participate in the trial and that it may be instituted within six months of the judgment, the confusion will be eliminated and the practice will be simplified by abolishing the writ-of error practice and providing simply that a party that did not participate in the trial may file a notice of appeal within six months of the judgment. This is what the Section Committee proposes in repealing **Rule 45** and adopting proposed **Rule 41(a)(3)**

Memorandum of Law Number Four

Presumption of Completeness of Partial Record

Rule 53(d), which provides a presumption that nothing omitted from the record is relevant to the appeal when the appellant has filed a statement of the points relied on, makes no exception for cases in which the appellant urges legal or factual insufficiency of the evidence to support a fact finding. Presumably, in adopting former TRCP 377a, later carried forward as TRCP 377(c), the predecessor to Rule 53(d), the Supreme Court intended that even in such cases the appellee's right to designate additional evidence would insure that all relevant evidence would be included. The Committee does not believe that the Supreme Court has ever departed from this position. *See Christiansen v. Prezelski*, 782 S.W.2d 842 (Tex. 1990); *Producer's Construction Co. v. Muegge*, 669 S.W.2d 717 (Tex. 1984); *Steger & Bizzell v.Vandewater Construction, Inc.*, 811 S.W.2d 687 (Tex.App.--Austin 1991, writ denied); Pope and McConnico, *Practicing Law with 1981 Texas Rules,* 32 BAYLOR LAW REV. 511, 512. In *Schafer v. Conner*, 813 S.W.2d 153, 154 (Tex. 1991), the Supreme Court reaffirmed the holding of *Englander v. Kennedy*, 428 S.W.2d 806, 897 (Tex. 1968) that "in the absence of a complete statement of facts, it is presumed that the omitted evidence supports the judgment," but the opinion shows that in *Schafer* the appellant had failed to comply with Rule 53(d) by including "a statement of the points to be relied on in his request to the court reporter."

Some of the courts of appeals, however, have had difficulty applying the presumption of completeness under Rule 53(d) to points requiring consideration of the "entire record." *See Galvin v. Gulf Oil Corp.*, 759 S.W.2d 167, 172-73 (Tex.App.--Dallas 1988, writ denied); *Tapiador v. North American Lloyds*, 772 S.W.2d 954, 955 (Tex.App.--Houston [1st Dist.] 1989, writ denied). Also, in *Greenwood v. State*, 823 S.W.2d 660, 661 (Tex.

Crim. App. 1992) a majority of the Court of Criminal Appeals, notwithstanding the scholarly and well-reasoned dissenting opinion of Judge Clinton, held that the presumption of completeness under Rule 53(d) did not apply to the sufficiency of the evidence because presentation of a partial record made review of the "entire record" impossible. The majority referred to its "constitutional mandate" to review the "entire record" in determining the sufficiency of the evidence to support a finding of guilt. In *O'Neal v. State*, 826 S.W.2d 172, 173 (Tex. Crim. App, 1992), the majority reaffirmed the holding in *Greenwood*, declaring that "the entire record of the trial before the fact finder" must be brought before the appellate court.

The Committee is of the opinion that if there is such an exception to the presumption of completeness under Rule 53(d), the rule should be clarified by an express exception. Recognizing the majority holding in criminal cases, the Committee recommends an amendment expressly providing that if the question of sufficiency of the evidence to support a finding of guilt is raised, the record must include all the evidence presented to the jury at the guilt phase of the trial, or that would have been presented to a jury if a jury had not been waived. Thus, when the presumption of completeness is properly invoked under Rule 53(d), evidence presented to the court outside the presence of the jury or at the penalty phase of the trial need not be included unless other points would require consideration of such evidence.

The Committee is not persuaded, however, that the Supreme Court has recognized or should recognize such an exception in civil cases. The Committee recommends that the rule be clarified by providing specifically that the presumption applies when the "statement of the points to be relied on" identifies a particular fact finding concerning which the appellant asserts that the evidence is legally or factually insufficient and also that the partial record designated by the parties shall be considered the "entire record" for the purpose of reviewing the points so stated. Such a provision would be in accordance with *Alford v. Whaley*, 794 S.W.2d (Tex.App.--Houston, [1st Dist.] 1992, no writ), in which the court, after overruling the appellee's objection to the partial record tendered under Rule 53(d), proceeded to consider the appellant's insufficiency-of-evidence point in the light of the "entire record" then before the court.

The Committee is of the opinion that the presumption of completeness should not be weakened because it is an important means to reduce the cost of appeals and also the burden on the appellate courts. Recognizing such an exception would deprive the rule of much of its utility. For example, in a personal injury case, if the appellant asserts factual insufficiency of the evidence to support a specific liability finding, testimony of medical experts would rarely, if ever, be relevant. Also, if the appellant asserts insufficiency of the evidence to support a specific damage finding, such as the plaintiff's past and future

loss of income, much of the liability evidence would not be relevant unless other points are relied on as well. Likewise, in a complex contract case when the record on liability is relatively short but the evidence on damages is extensive, or vice versa, much expense can be eliminated by limiting the points relied on without limiting the appeal under Rule 40(a)(4), a remedy that would not be available because no severable claims would be involved.

The Committee is convinced that requiring the appellee to designate additional evidence he considers relevant to the points stated would cast on him no unfair burden. Under Rule 53(b) the appellee may designate additional evidence to be included at the appellant's expense, and if, after reading the appellant's brief, he realizes that additional evidence is required, the appellate court has a mandatory duty under Rule 55(b) to grant leave to file a supplemental record. If either party in obvious bad faith designates more or less evidence than reasonably required, the court has authority under Rule 89 to impose costs accordingly, regardless of the outcome of the appeal.

CUMULATIVE REPORT OF RECOMMENDATIONS OF
COMMITTEE ON STATE APPELLATE RULES OF THE
JUDICIAL PRACTICE AND ADVOCACY SECTION OF THE
STATE BAR OF TEXAS
1991-1993

PROPOSED AMENDMENTS TO TEXAS RULES OF APPELLATE PROCEDURE

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.

EXPLANATION: *The Section Committee is of the opinion that summary dismissal is too drastic a penalty for violation of a local rule. This proposed amendment is consonant with Rule 83.*

Notes and Comments

Change by 1994 amendments: The last sentence of Subdivision (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 subdivision (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

(a) **Signing.** Each motion, petition, application, brief, ~~motion~~ or other paper filed shall be signed by at least one of the attorneys for the 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. A party who is not represented by an attorney shall sign his or her brief 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) **Designation of Lead Counsel.** Each motion, petition, application, brief, or other paper shall designate the lead appellate counsel for the party or parties on whose behalf the paper is filed. In the absence of such a designation, the first attorney whose personal signature appears on the paper shall be considered lead counsel for the purpose of receiving notices and other papers. Lead counsel may designate one other attorney to receive notices and copies also.

EXPLANATION: Designation of lead counsel will enable the attorneys and the clerk to identify the attorney to whom copies must be sent.

(~~c~~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 of the court may permit the papers to be filed with him, in which event he 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 (including a motion pursuant to Rule 301 or Rule 329b, TEX.R.CIV.P., or a request or notice pursuant to Rules 296-98, TEX.R.CIV.P.), or application for writ of error or petition for discretionary review is sent to the proper clerk by first-class United States 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~~ twenty days tardily, 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. If the instrument is not received by the clerk by the twentieth day, then the filing party shall have ten days to present to the proper clerk a copy of the certificate of mailing showing that the instrument was timely and properly mailed under this rule. In that event, the filing party shall be permitted to file the instrument within such ten-day period.

(~~d~~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 ~~C~~clerk of the C~~c~~ourt of A~~a~~ppeals 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 ~~C~~clerk of the ~~C~~court of A~~a~~ppeals. 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 motions, petitions and briefs provided for in the rules governing original proceedings (Rules 120 and 121) to the clerk of the court of appeals. If the proceeding is commenced in the Supreme Court or the Court of Criminal Appeals, twelve copies shall be delivered. Any court of appeals may by local rule authorize the filing of more copies. Only one copy of the record is required to be filed in accordance with the rules governing original proceedings.

(~~3~~4) Each party shall file twelve copies of all other papers addressed to the Supreme Court or Court of Criminal Appeals with the clerk of the court to which it is addressed.

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

(ed) **Form of Papers.** 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 on heavy white paper, size 8-1/2 inches by 11 inches, in clear type with a double space between the lines ~~and on heavy white paper in clear type.~~

(1) *Typeface.* Whether typewritten or printed, papers produced by any duplicating or copying process shall be in either:

(i) *Option A.* 11-point non-proportional (Courier) typeface produced by a typewriting element or print font. Each page shall contain no more than 27 lines of double-spaced text and each line shall not exceed 6½ linear inches of text; or

(ii) *Option B.* Proportional fonts printed in no smaller than 12-point, produced using office automation devices. The use of san serif type is prohibited. Each page shall contain no more than 27 lines of double-spaced text and each line of text shall not exceed 6½ linear inches. Smaller fonts and the use of compacted or otherwise compressed printing features will be grounds for rejection of a brief.

(2) *Footnotes.* Footnotes may appear in type two points smaller than the option selected. For example, if Option B is selected, footnotes may appear in 10-point type.

(3) *Binding-Copying.* 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.

(4) *Length of Briefs and Applications.* Appellate briefs and applications in civil cases (including amicus briefs) shall not exceed 50 pages if option A is used, 40 pages if option B is used, 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. Details of the type of paper, etc., are subject to further consideration and will be included in a supplemental report. The restriction of record excerpts to matters crucial to the issues is added to avoid unnecessary bulk and to discourage long appendices.

(5) *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.

(6) *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.

(fe) 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 party or person acting for him on all other parties to the appeal or review. Copies of all briefs shall also be served on any other party to the trial court's judgment that has filed a request for copies of briefs, orders, and opinions, as permitted by subdivision (g). ~~Service on a party represented by counsel shall be made on counsel.~~ Except as provided in the rules governing original proceedings (Rules 120 and 121), a copy of the record is not required to be served on all other parties. When a court of appeals has been presented with a petition and a record in an original proceeding and a subsequent proceeding is commenced in the Supreme Court concerning the matter, the record in the Supreme Court may consist of an index of those papers previously made part of the record and served in the court of appeals proceeding, together with any additional papers material to the relator's claim for relief in the Supreme Court.

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

(g) Request for Copies. Any party to the trial court's judgment not named as an appellant or appellee in the notice of appeal may file in the appellate court and serve on all parties to the appeal a request for copies of all briefs, orders, and opinions of the appellate court.

NOTE TO ADVISORY COMMITTEE: This provision is inserted here because it is related to the provisions requiring service of briefs. No provision is made for service of papers other than briefs, orders, or opinions, on nonparties to the appeal.

(hf) 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 lead counsel, as defined in subdivision (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 leading counsel will relieve the attorney of the burden of serving more than two opposing attorneys.

(ig) 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: (1) The rule has been redrafted and pertinent provisions of Rule 121 have been incorporated. (2) The provision in subdivision (b) for lead counsel relieves the appellate attorney and the appellate clerk from sending multiple copies to numerous counsel for the same party. (3) The language in subdivision (e)(4) concerning record excerpts is added to avoid unnecessary bulk. (4) Subdivision (g) concerning a request for copies by parties to the trial court's judgment not named as parties to the appeal conforms to other amendments that limit the duty to send copies of briefs, orders, and judgments to absent parties to those that have made a request for such copies. No provision is made for service of papers other than briefs, orders, and opinions on nonparties to the appeal.

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, other than a Saturday, Sunday, or legal holiday, 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); Miller 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. [Strike "sworn" in first sentence of this subdivision so that counsel need not swear to matters within his knowledge. Evidence on the motion would be governed by proposed Rule 19(d).]

Notes and Comments

Change by 1994 amendments: The last two sentences of subdivision (a) have been added and the requirement of a "sworn" motion has been deleted from subdivision (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) Appearance. Before an attorney has filed his or her brief he or she may notify the clerk in writing of the fact that he or she represents a named party to the appeal, which fact shall be noted by the clerk upon the docket, opposite the name of the party for whom the attorney appears, and shall be regarded by the court a s having whatever effect is given to the appearance of a party to a case without a brief having been filed. After briefs have been filed, the name of each attorney signing the brief shall be entered by the clerk on the docket, opposite the name of the appropriate party if such names have not already been so entered. The clerk shall add the names of additional counsel upon request.

(b) 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: Subdivision (a) has been moved here from Rule 57(b). Former Rule 7 is retained as subdivision (b).

Rules 8-10

[No change.]

RULE 11. DUTIES OF COURT REPORTERS

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

(3) ~~filing all exhibits with the clerk;~~ keeping custody of all exhibits and filing them with the appellate court as a part of the statement of facts if so ordered;

(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.

(~~5~~6) 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) Subdivision (a)(3) has been amended to transfer responsibility

for the exhibits from the clerk to the reporter. (2) Subdivision (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 reporter has recorded any part of the trial or other proceeding, the official reporter has responsibility to obtain from the substitute reporter a transcription of such proceedings.

NOTE TO ADVISORY COMMITTEE: The Section Committee will give further consideration to what responsibility, if any, the official reporter should have for the work of a predecessor official reporter.

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

Notes and Comments

Change by 1994 amendment: The second sentence of subdivision (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

(a) On Filing Notice of Appeal. ~~Filing Transcript.~~ Upon filing of a notice of appeal in the appellate court ~~tendering the transcript to the clerk for filing~~, the appellant shall deposit with the ~~C~~clerk of the ~~C~~court of A~~a~~ppeals the sum of $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)-(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 ~~40(a)(c)~~, and any contest of such affidavit has been overruled, the appellant ~~he~~ shall be entitled to filing of ~~file~~ the record in the court of appeals, and, if the decision of the court of appeals is adverse to him, 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 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 A~~a~~ppeals 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: Subdivisions (a) and (k) are amended to conform to the amendments to Rules 40, 45, 50(d), 51(e) and 53(k).

Rules 14-17

[No change.]

Rule 18. Duties of Appellate Court Clerk

(a) Docketing the Case and Monitoring the Record. The ~~C~~clerk of the ~~C~~court of Aappeals 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 athe 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 ex officio known to the court, or 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) *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.

(4) *Other 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.

(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.

NOTE TO ADVISORY COMMITTEE: If the Supreme Court does not adopt the Section Committee's recommendation that responsibility for filing the record be transferred from the appellant to the trial court clerk and reporter, subdivision (g) should also include the provisions of current Rule 73(c) and (i). Also, Rule 73(c) & (i) must be incorporated as 19(g)(4)(i) if responsibility for filing statement of facts is not shifted to the court reporter as proposed in amendments to rule 12, 50, 53)

Notes and Comments

Change by 1994 amendments: (1) Subdivision (d) has been amended to eliminate the requirement of an oath in the case of facts within the personal knowledge of the attorney. (2) Subdivision (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 160, 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 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.

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 subparagraphs (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 subparagraph (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.

[Present subparagraphs (1), (2), and (3) deleted.]

(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 from the judgment or some designated portion thereof, (3) the date on which the notice is filed, (4) the names of all appellants filing the notice and the names, addresses, and

telephone numbers of their attorneys, (5) the names of all appellees against whom relief is sought on appeal and the names, addresses and telephone numbers of their attorneys, and (6) the names of all other parties to the trial court's final judgment on whose behalf no appeal is taken and against whom no appellate relief is sought, and the names, addresses, and telephone numbers of their attorneys in the trial court. (7) If the appeal may be filed in one of several appellate courts, the notice shall specify the court to which the appeal is taken. (8) The notice shall include also the address and telephone number of any party not represented by attorney, but if either is not known, appellant or his or her counsel shall certify in the notice that he or she has made a diligent inquiry but has been unable to discover the address and telephone number, and the certificate shall give any available information, such as the probable county of residence, that might serve to identify and locate the unrepresented party. (9) If the appellant is not represented by an attorney, the notice shall be under oath. Failure to name any party to the trial court's judgment in the notice shall not affect the appeal with respect to the parties named.

NOTE TO ADVISORY COMMITTEE: Several members of the Section Committee oppose the requirement that the notice of appeal identify the appellees. A minority report stating this view will be presented.

(3) Service of Notice. The notice of appeal shall be served on all parties to the trial court's final judgment other than the appellants filing the notice. Failure to so serve any other party is ground for dismissal of the appellant's appeal or other appropriate action with respect to any party prejudiced by such failure.

EXPLANATION: (1) The requirement of security for costs is eliminated and replaced by the notice of appeal as the method of perfecting the appeal and by requirements that appellant pay in advance for the transcript, statement of facts, and filing fee in appellate court. (See proposed amendments to Rules 51(c), 53(g), and 13(a).)

(2) The requirement to state the names of all parties to the trial court's judgment against whom appellate relief is sought and the names, addresses, and telephone numbers of their attorneys will enable the clerk of the appellate court to give them notices of filings and to notify them of "the judgment and all orders of the court of appeals" without searching the transcript for names and addresses.

(3) This notice will also enable other parties to the trial court's judgment to determine at an early date whether they are parties to the appeal and what action they should take, if any.

(4) The appellant need not be required to send the notice to parties represented by attorneys or state their addresses, but if any parties are unrepresented, the notice should state their addresses, if known, and should be sent to them.

(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 add or omit parties or correct defects or omissions al 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.

(54) 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 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.

(65) 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 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.]

Notes and Comments

Change by 1994 amendments. (1) Subdivision (a) has been rewritten to replace the requirement of a bond or other security to perfect the appeal with a notice of appeal. (2) The provision for filing an affidavit to secure costs on appeal have been transferred to new Rule 45. (3) The contents of the notice of appeal are prescribed, including identification of the parties to the appeal and the parties to the trial court's judgment not named as parties to the appeal. (4) Amendment of the notice to correct defects and omissions is allowed and provision is made that failure to name or serve some parties does not affect the appeal with respect to others. (5) A notice of limitation of the appeal must be so titled.

RULE 40a. CROSS-APPEALS

(a) Notice of Cross-Appeal; Contents and Filing. Unless the appeal is limited in accordance with Rule 40(a)(5), an appellee may file cross-points in his brief complaining of any ruling or action of the trial court without perfecting a separate appeal as against the appellant. Within fifteen days after the perfection of the original appeal, or within fifteen days after the filing of a notice of limitation of appeal, an appellee may perfect a cross-appeal against the appellant or any other party to the trial court's judgment by filing a "Notice of Cross-Appeal" stating (1) date on which the notice is filed, (2) the names of all cross-appellants filing the notice and the names, addresses, and telephone numbers of their attorneys in the trial court, and (3) the names of all cross-appellees against whom relief is sought by the cross-appeal and the names, addresses and telephone numbers of their attorneys. The notice shall include also the address and telephone number of any cross-appellee not represented by an attorney, but if either is not known, the cross-appellant or his or her counsel shall certify in the notice that he or she has made a diligent inquiry but has been unable to discover the address and telephone number, and the certificate shall given any available information, such as the probable city or county of residence, that might serve to identify and locate the unrepresented party. If the cross-appellant is not represented by an attorney, the notice shall be under oath. Failure to name any party to the trial court's judgment in the notice shall not affect the cross-appeal with respect to the parties named.

EXPLANATION: Although Rule 74(e) and the opinions of the Supreme Court in Donwerth v. Preston II Chrysler-Dodge, 775 S.W.2d 634 (Tex. 1989), and Warren v. Triland Investment Group, 779 S.W.2d 808 (Tex. 1989), make clear that an appellee may "complain of any action or ruling of the trial court without filing a separate appeal," the right of an appellee to seek relief against a third party without doing so is not so clear. Young v. Kilroy Oil Co., 673 S.W.2d 236, 241, 242 (Tex.

App. [1st Dist] 1984, writ ref'd n.r.e.); Sheldon L. Pollack Corp. v. Valdez, 791 S.W.2d 380, 384 (Tex. App. -- Corpus Christi 1990, writ denied). This procedure would provide a remedy when the original appeal has been limited or the appellee seeks relief against a third party.

(b) **Service of Notice.** The notice shall be served on all parties to the trial court's final judgment other than the cross-appellants filing the notice. Failure to so serve any party to the trial court's judgment is ground for dismissal of the cross-appeal or other appropriate action with respect to any party prejudiced by such failure.

(c) **Conditional Cross-Appeal.** A cross-appeal may be conditioned on the granting of appellate relief against the cross-appellant.

(d) **Rules Governing.** A cross-appeal is governed by all rules applicable to other appeals except: (1) no record need be filed other than such additional portions of the record as may be necessary to support the cross-appeal; (2) the cross-appellee may designate additional portions of the evidence and other proceedings within fifteen days after service of a copy of the notice of cross-appeal or within fifteen days after service of any other request for additional portions of the record, whichever date is later.

Notes and Comments

Change by 1994 amendments: New rule.

RULE 41. ORDINARY APPEAL— WHEN PERFECTED

(a) Appeals in Civil Cases.

(1) *Time to Perfect Appeal.* The notice of appeal ~~When security for costs on appeal is required, the bond or affidavit in lieu thereof,~~ shall be filed with the clerk within thirty days (fifteen by the state in criminal cases) after the judgment is signed, or, within ninety days after the judgment is signed if a timely motion for new trial or motion to modify, correct, or reform the judgment has been filed by any party or if any party has timely filed a request for findings of fact and conclusions of law in a case tried without a jury. ~~If a deposit of cash is made in lieu of bond, the same shall be made within the same period.~~

EXPLANATION: This amendment is proposed to conform this rule to Rule 329b(g) of the Texas Rules of Civil Procedure and also to replace the provisions concerning security for costs with the notice of appeal provided in Rule 40. The parenthetical reference to appeals by the state in criminal cases seems inappropriate here, since this subdivision applies only to civil cases and criminal cases are governed by subdivision (b)(1) of this rule.

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

(3) Party Not Participating in Trial. A party to the final judgment who did not participate in person or by attorney in the actual trial of the case shall file the notice of appeal within six months after the judgment is signed, whether or not a motion for new trial or a motion to modify, correct, or reform the judgment has been filed. Such a notice of appeal shall contain a certificate by the attorney that the appellant did not participate in person or by attorney in the actual trial of the case. If the appellant is not represented by an attorney, the certificate shall be under oath.

EXPLANATION: Subdivision (a)(3) would abolish the writ of error practice and permit an appeal within six months after judgment by a party that has not participated in the trial. Cases limiting review by writ of error to the "face of the record" would no longer be relevant. The provisions of proposed Rule 40 requiring notice of appeal and service on opposing parties would take the place of the provision for petition and bond in current Rule 45. (See memorandum of law No. 2.) Abolition of the writ-of-error practice may require repeal of §§ 51.012 and 51.013 of the Civil Practice and Remedies Code by listing these sections as repealed under the Rule Making Act.

(b) Appeals in Criminal Cases.

(1) *Time to Perfect Appeal.* Appeal is perfected when notice of appeal is filed within thirty (fifteen by the state) days after the day sentence is imposed or suspended in open court or the day an appealable order is signed by the trial judge; except, if a motion for new trial is timely filed, notice of appeal shall be filed within ninety days of the day sentence is imposed or suspended in open court.

EXPLANATION: This draft follows the second version of subdivision (1) adopted by the Court of Criminal Appeals by order effective July 1, 1989. The earlier version, which still appears in the published rules, is identical except that it does not include the provision concerning appeals by the state. In the opinion of the Committee, the earlier version should be treated as amended by this later version.

(2) *Extension of Time.* [No change.]

(c) Prematurely Filed Documents. [No change.]

Notes and Comments

Change by 1994 amendments: (1) Notice of appeal is substituted for bond or other security as method of perfecting appealing civil cases. (2) The reference to a motion to modify conforms this rule to Rule 329(g) of the Texas Rules of Civil Procedure. (3) The two versions of subdivision (a)(1) have been combined. (4) Subdivision (a)(3) replaces the writ of error procedure in former Rule 45 with a notice of appeal within six months of judgment by a party that did not participate in the trial.

RULE 42. ACCELERATED APPEALS IN CIVIL CASES

(a) Mandatory Acceleration.

(1)(2) [No Change.]

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

(b)(c) [No Change.]

Notes and Comments

Change by 1994 amendment: The amendment extends abolition of the cost bond to perfection of interlocutory appeals.

RULES 43, 44.

[No change.]

~~**RULE 45. APPEAL BY WRIT OF ERROR IN CIVIL CASES TO COURT OF APPEALS**~~

~~A party may appeal a final judgment to the court of appeals by petition for writ of error by complying with the requirements set forth below:~~

~~**(a) Filing Petition.** The party desiring to sue out a writ of error shall file with the clerk of the court in which the judgment was rendered a written petition signed by him or by his attorney, and addressed to the clerk.~~

~~**(b) No Participating Party at Trial.** No party who participates either in person or by his attorney in the actual trial of the case in the trial court shall be entitled to review by the court of appeals through means of writ of error.~~

~~**(c) Requisites of Petition.** The petition shall state the names and residences of the parties adversely interested, shall describe the judgment with sufficient certainty to identify it and shall state that the appellant desires to remove the same to the court of appeals for revision and correction.~~

~~**(d) Time for Filing.** The writ of error, in cases where the same is allowed, may be sued out at any time within six months after the final judgment is signed.~~

~~**(e) Cost Bond or Substitute.** At the time of filing the petition, or within six months provided by paragraph (d), the appellant shall file with the clerk an appeal bond, cash deposit in lieu of bond, affidavit of inability to pay costs, or a notice of appeal if no bond is required, as provided by these rules for appeals.~~

~~(f) Notice. When the petition for writ of error and cost bond, or the clerk's certificate showing cash deposit in lieu of bond, or affidavit of inability to pay costs, or the notice of appeal, if permitted, is filed, the clerk shall notify the parties by mailing a copy of the petition and bond, or the substitute for the bond to all parties to the judgment other than the party or parties filing the petition for writ of error. The failure of the clerk to notify the parties shall not affect the validity of the appeal.~~

~~(g) Recipients and Sufficiency of Notice. The notification of a party shall be given by mailing copies of the instruments to the attorney of record or, if the party is not represented by an attorney, then to the party at his last known address. Such notification is sufficient notwithstanding the death of the party or his attorney prior to the giving of the notification. The clerk shall note on the file docket the names of the parties to whom he mails the copies, with the date of mailing.~~

~~(h) Perfection. The writ of error is perfected when the petition and bond or cash deposit in lieu of bond is filed or made (when security is required), or affidavit of inability to pay is filed or a contest is overruled, or a notice of appeal, if permitted, is filed.~~

EXPLANATION: ***This rule is repealed because of the substitution of proposed Rule 41 (a)(3) allowing a notice of appeal within six months after judgment in lieu of the writ of error practice. Provisions for writ of error in §§51.012 and 51.013 of the Government Code should be listed by the Supreme Court as repealed under the Rule-Making Act. Proposed new Rule 45 follows.***

RULE 45. WHEN PARTY IS UNABLE TO PAY COSTS

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

(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.

EXPLANATION: Although the rule in its present form, Rule 40 (a)(3), does not require the contest to be under oath, there is confusion on this point. The Committee's investigation reveals that clerks and court reporters routinely file contests in practically every case in which an affidavit of inability is filed and that these contests are usually under oath. Apparently, therefore, the requirement of an oath has little effect in deterring unnecessary contests and may as well be expressly eliminated.

ALTERNATIVE: If the Advisory Committee and the Supreme Court should be of the opinion that an oath should be required, then, in lieu of the amendment above proposed, the Committee recommends the following:

The contest shall be under oath, but may be on information and belief, and if on information and belief, shall state what information contestant has upon which to base a belief that the affiant is able to pay the costs or a substantial portion thereof.

(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.

NOTE TO ADVISORY COMMITTEE: This is current Rule 40(a)(3) with proposed amendment concerning verification of a contest. It is moved here because the proposed amendment to Rule 40 would not require a bond. These provisions of current Rule 40, however, must be retained to exempt a party unable to pay costs from the requirements in proposed Rules 51(c) and 53(g) concerning advance payment for the record. As an alternative to providing that the contest need not be under oath, the Committee recommends an express provision that an oath is required.

Notes and Comments

Change by 1994 amendment: (1) Review by writ of error is abolished and former Rule 45 is repealed because of the amendment to Rule 41(a)(3) allowing six months to perfect an appeal by a party that did not participate in the trial. (2) The provisions concerning inability to pay costs provided in former Rule 40(a)(3) have been inserted here because the requirement of a bond or other security for costs has been eliminated from Rule 40. (3) The provision in subdivision (c) concerning an oath to support a contest of the affidavit of inability to pay costs has been added. The only changes to current Rule 40(a)(3) are those designated above, besides moving former 40(a)(3) to this rule.

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

~~**(a) Cost Bond.** Unless excused by law, the appellant shall execute a bond payable to the appellee in the sum of $1000 unless the court fixes a different amount upon its own motion or motion of either party or any interested officer of the court. If the bond is filed in the amount of $1000, no approval by the court is necessary. The bond on appeal shall have sufficient surety and shall be conditioned that appellant shall prosecute his appeal or writ of error with effect and shall pay all costs which have accrued in the trial court and the cost of the statement of facts and transcript. Each surety shall give his post office~~

~~address. Appellant may make the bond payable to the clerk instead of the appellee, and same shall inure to the use and benefit of the appellee and the officers of the court, and shall have the same force and effect as if it were payable to the appellee.~~

~~(b) Deposit. In lieu of a bond, appellant may make a deposit with the clerk pursuant to Rule 48 in the amount of $1,000, and in that event the clerk shall file among the papers his certificate showing that the deposit has been made and copy same in the transcript, and this shall have the force and effect of an appeal bond.~~

~~(c) Increase or Decrease in Amount. Upon the court's own motion or motion of any party or any interested officer of the court, the court may increase or decrease the amount of the bond or deposit required. The trial court's power to increase or decrease the amount shall continue for thirty days after the bond or certificate is filed, but no order increasing the amount shall affect perfecting of the appeal or the jurisdiction of the appellate court. If a motion to increase the amount is granted, the clerk and official reporter shall have no duty to prepare the record until the appellant complies with the order. If the appellant fails to comply with such order, the appeal shall be subject to dismissal or affirmance under Rule 60. No motion to increase or decrease the amount shall be filed in the appellate court until thirty days after the bond or certificate is filed. In determining the question of whether an appellant's bond or deposit should be increased to more than the minimum amount of $1000, the court shall credit the appellant with such sums as have been paid by appellant on the costs to the clerk of the trial court or to the court reporter.~~

~~(d) Notice of Filing. Notification of the filing of the bond or certificate of deposit shall promptly be given by each appellant by serving a copy thereof on all parties in the trial court together with notice of the date on which the appeal bond or certificate was filed. Failure to so serve all other parties shall be ground for dismissal of the appellant's appeal or other appropriate action if an appellee is prejudiced by such failure.~~

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

~~(f) Amendment: New Appeal Bond or Deposit. On motion to dismiss an appeal or writ of error for a defect of substance or form in any bond or deposit given as security for costs, the appellate court may allow the filing of a new bond or the making of a new deposit in the trial court on such terms as the appellate court may prescribe. A certified copy of the new bond or certificate of deposit shall be filed in the appellate court.~~

Notes and Comments

This rule is repealed because of abolition of the security requirement in Rule 40(a).

RULE 46. SECURITY FOR COSTS IN THE TRIAL COURT

After a notice of appeal has been filed, an appellee that has obtained a judgment against the appellant for costs, or any officer interested in such costs, may file a motion in the trial court to require the appellant to give security for the costs so adjudged against the appellant. If the trial court grants the motion and the appellant fails to comply with the order within twenty days after notice that such and order has been issued, the clerk of the trial court shall file in the appellate court a copy of the order and a certificate

showing that the appellant has failed to comply with it. Unless, within twenty days from the filing of the certificate, appellant complies with the order and files in the appellate court a certificate of compliance or shows in the appellate court good cause for noncompliance, the appeal may be dismissed.

***EXPLANATION:** The Section Committee's proposal to dispense with the bond or cash deposit as security for the appellate costs would also eliminate the requirement of current Rule 46(a) that the bond be conditioned that appellant "shall pay all costs which have accrued in the trial court." This proposed rule, by analogy to Rule 143 of the Texas Rules of Civil Procedure, would permit the appellee to obtain such security without requiring it as a means of perfecting the appeal. Presumably, this rule would be invoked no more frequently than Rule 143 and perhaps also no more frequently than in cases where the costs are so high that the appellant would seek additional security under current Rule 46(c). The Committee is of the opinion that the matter should be considered first by the trial court, which would be in a better position to determine the amount of the costs.*

Notes and Comments

Change by 1994 amendment: New rule, replacing former Rule 46.

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

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

(b) Money Judgment. When the judgment awards recovery of a sum of money, the amount of the bond or deposit shall be at least the amount of judgment, interest, and costs. The trial court may make an order ~~to provide security in an amount or type~~ deviating from this general rule if after notice to all parties and a hearing the trial court finds:

~~(1) as to civil judgments rendered in a bond forfeiture proceeding, a personal injury or wrongful death action, a claim covered by liability insurance or a workers' compensation claim~~ that posting the amount of the bond or deposit will cause irreparable harm to the judgment debtor, and not posting such bond or deposit will cause no substantial harm to the judgment creditor. In such a case, the trial court may stay enforcement of the judgment based upon an order that ~~which~~ adequately protects the judgment creditor against any loss or damage occasioned by the appeal;

~~(2) as to civil judgments rendered other than in a bond forfeiture proceeding, a personal injury or wrongful death action, a claim covered by liability insurance or a workers' compensation claim, that~~

~~posting the security at an amount of the judgment, interest, and costs would cause irreparable harm to the judgment debtor, and ordering the security at a lesser amount would not substantially decrease the degree to which a judgment creditor's recovery under the judgment would be secured after the exhaustion of all appellate remedies~~.

(c) through (j) [No change.]

(k) Continuing Trial Court Jurisdiction. The trial court shall have continuing jurisdiction during the pendency of an appeal from a judgment, even after the expiration of its plenary power, to order the amount and the type of security and the sufficiency of sureties and, upon any changed circumstances, to modify the amount or the type of security required to continue the suspension of the execution of the judgment. If the security or sufficiency of sureties is ordered or altered by order of the trial court after the attachment of jurisdiction in an appellate court ~~of the court of appeals~~, the judgment debtor shall notify the appellate court having jurisdiction of the appeal ~~court of appeals~~ of the security determination by the trial court. The trial court's exercise of discretion under this rule is subject to review under Rule 49.

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

Notes and Comments

Change by 1994 amendment: (1) Subdivision (b) has been simplified to provide the same standard for modifying the requirement for superseding the judgment in all cases where a sum of money has been awarded and the provision in subdivision (a) for compliance with Rule 46 has been deleted. (2) The provisions concerning an agreement to suspend enforcement have been added.

Rule 48. DEPOSIT IN LIEU OF BOND

[No change.]

RULE 49. APPELLATE REVIEW OF SECURITY IN CIVIL CASES

(a) Sufficiency. The sufficiency of a ~~cost or~~ supersedeas bond or deposit or the sureties thereon or of any other bond or deposit under Rule 46 or Rule 47 shall be reviewable by the appellate court for insufficiency of the amount or of the sureties or the securities deposited, whether arising from initial insufficiency or any subsequent condition which may arise affecting the sufficiency of the bond or deposit. The court in which the appeal is pending shall, upon motion showing such insufficiency, require an additional bond or deposit to be filed and approved by the clerk of the trial court and a certified copy to be filed in the appellate court.

(b) [No change.]

(c) Alterations in Security. If upon its review, the appellate court requires additional security for suspension of enforcement of the judgment, enforcement of the judgment shall be suspended for twenty days after the order of the court of appeals is served. If the judgment debtor fails to comply with the order within that period, the clerk shall notify the trial court that execution may be issued on the judgment. The additional security shall not release the security previously posted or alternative security arrangements

made.

~~If the clerk finds that the original supersedeas bond or deposit is insufficient to secure the costs, he shall notify appellant of such insufficiency. If a judgment debtor fails, within twenty days after such notice, to file a new bond or make a new deposit in the trial court sufficient to secure payment of the costs and to file a certified copy of the bond or certificate of deposit in the appellate court, the appeal or writ of error shall be dismissed. The additional security shall not release the liability of the surety on the original supersedeas bond.~~

Notes and Comments.

Change by 1994 amendments: The references to security for costs have been deleted.

RULE 50. RECORD ON APPEAL

(a) Contents. The record on appeal shall consist of all papers on file in the trial court, including those contained in the a transcript and, where necessary to the appeal, a statement of facts.

EXPLANATION: The record on appeal would consist of all papers filed in the trial court, but only those specified in Rule 51(a) and those designated by the parties would be included in the transcript, as provided in Rule 51. Any other papers designated by any party 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 on informal request of any party or of the trial or the appellate court without the necessity of a motion for leave, as provided by Rule 55 Thus no presumption would be needed concerning the contents of papers not included in the transcript.

(b) [No change.]

(c) Agreed Statement. The parties may agree upon a brief statement of the case and of the facts proven as will enable the appellate court to determine whether there is error in the judgment. Such statement shall be ~~copied into~~ included in the transcript in lieu of the proceedings themselves.

(d) Burden on Appellant. The burden is on the appellant, or other party seeking review, to ~~see that a sufficient record is presented~~ designate a record sufficient to show error requiring reversal.

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

Notes and Comments

Change by 1994 amendment: (1) Subdivision (a) and (c) are amended to embody the concept that all papers in the trial court are part of the record on appeal and accessible as needed, though only those listed in Rule 51(a) and designated by the parties need be sent up in the transcript, original and as supplemented. (2) Subdivision (d) is amended to conform to the concept of transferring to the clerk and reporter of the trial court responsibility for filing the record, as provided in the amendments to Rules 51(c) and 53(k).

RULE 51. THE TRANSCRIPT ON APPEAL

(a) **Contents.** Unless otherwise designated by the parties in accordance with Rule 50, the transcript on appeal shall include ~~copies of~~ the following: in civil cases, the ~~live pleadings upon which the trial was held~~ last petition and answer and any supplements thereto filed by each party; in criminal cases, copies of the indictment or information, any special pleas and motions of the defendant which were presented to the court and overruled, and any written waivers; the court's docket sheet; the charge of the court and the verdict of the jury, or the court's findings of fact and conclusions of law; the court's judgment or other order appealed from; any motions for new trial or to correct, modify, or reform the judgment and the order of the court thereon; any notice of appeal; ~~any appeal bond, affidavit in lieu of bond or clerk's certificate of a deposit in lieu of bond;~~ any notice of appeal; any notice of cross-appeal; any notice of limitation of appeal in civil cases made pursuant to Rule 40; any formal bills of exception provided for in Rule 52; in civil cases, a certified bill of costs, including the cost of the transcript and the statement of facts (if any), showing any credits for payments made; any designation of matters to be included in the transcript; and, subject to the provisions of paragraph (b) of this rule, any filed paper any party may designate as material. The clerk may consult with the attorneys for the parties concerning the pleadings to be included.

EXPLANATION: (1) A motion to correct, modify, or reform the judgment should be included because, like a motion for new trial, it extends the appellate timetable. (2) Since the notice of filing of the appeal, rather than the bond, will give the names and addresses of parties to the trial court's judgment not named as parties to the appeal, it should be available to the clerk of the appellate court. (3) Any notice of cross-appeal should be in the transcript because it perfects the cross-appeal.

(b) [No change.]

(c) **Duty of Clerk.** Upon perfection of the appeal, and payment or arrangement to pay the fee therefor, the clerk of the trial court shall arrange in order of filing the original papers listed in subdivision (a) and those designated by the parties and the trial court, cause them to be consecutively paginated, indexed, and bound in one or more numbered volumes, certify them ~~prepare~~ under his hand and the seal of the court and immediately transmit the transcript to the appellate court designated by the appellant. ~~The pages of the transcript shall be numbered consecutively and there shall be an index prepared by the clerk showing the location of each document in the transcript.~~ The transcript shall be prepared in the form directed by the Supreme Court and the Court of Criminal Appeals which will make an order or orders in such respect for the guidance of trial clerks. In criminal cases, the transcript shall be made in duplicate and one copy shall be retained by the clerk for use by the parties with permission of the court. The appellate court and the clerk, rather than the parties, have responsibility to see that the transcript is filed. Such original papers, when so prepared, certified, and filed, shall constitute the transcript on appeal.

(d) **Copies of Papers.** Any party, on payment or arrangement to pay the fee therefor, or the clerk, may obtain one or more copies of the transcript, as so filed, and the appellant or the clerk may cause such a copy to be filed with the appellate court in lieu of the original papers. Such copies shall not be taxed as costs.

~~(d) **Original Exhibits.** When the trial court is of the opinion that original papers or exhibits should be inspected by the appellate court or sent to the appellate court in lieu of copies, it may make such order therefor and for the safekeeping, transportation, and return thereof as it deems proper. The order shall contain a list of such original exhibits in numerical order, with a brief identifying description of each,~~

~~and, so far as practicable, all such exhibits shall be arranged in the order listed and firmly bound together. The appellate court on its own initiative may direct the clerk of the court below to send to it any original paper or exhibit for its inspection.~~

~~(g) Original Papers in Lieu of Transcript. For good cause, including the time or expense of preparing copies, the appellant may move the trial court to permit the filing of original papers in the appellate court in lieu of a transcript. If the motion is granted, the original papers listed in subdivision (a) and those designated by the parties shall be arranged in order of filing, consecutively numbered, indexed, bound, certified by the clerk, and transmitted to the appellate court in the same manner as any other transcript.~~

EXPLANATION: The federal practice of sending up the original papers seems satisfactory, since papers are rarely lost and copies can be supplied on motion from the parties' files. The Committee recommends this as the preferred practice in civil cases because it would save costs and would also relieve the clerk of the trial court of the burden of copying the filed papers. Subdivision (d) would permit any party to obtain a transcript with copies on payment of the clerk's fee, and in criminal cases a copy of the papers would be made and kept by the trial court clerk for the use of the parties.

Notes and Comments

Change by 1994 amendments: (1) Subdivision (a) has been amended to provide for including the last pleadings of each party as supplemented rather than live pleadings; to add motion to modify judgment, notice of cross-appeal, and designation of matters in transcript; to expressly authorize the clerk to confer with counsel; and to delete the appeal bond or other security for costs. (4) Subdivision (c) has been amended to provide for inclusion of original papers rather than copies in the transcript. (5) Subdivision (d) has been added. (6) Former subdivision (d) concerning original exhibits has been amended and moved to Rule 53.

RULE 52 PRESERVATION OF APPELLATE COMPLAINTS

(a) General Rule. ~~In order to preserve~~ As a prerequisite to the presentation of a complaint for appellate review, ~~a party must have presented to the trial court~~ a timely request, objection or motion must appear of record, stating the specific grounds for the ruling ~~he~~ the complaining party desired the trial court to make if the specific grounds were not apparent from the context. ~~It is also necessary for the complaining party to obtain a ruling~~ Except as provided in paragraph (d) of this Rule, the court's ruling upon the complaining party's request, objection or motion must also appear of record. If the trial judge refuses to rule, an objection to the court's refusal to rule is sufficient to preserve the complaint. It is not necessary to formally except to rulings or orders of the trial court.

(b) ~~Informal Bills of Exception and~~ Offers of Proof. When the court excludes evidence, the party offering same shall as soon as practicable, but before the court's charge is read to the jury, be allowed to make, in the absence of the jury, an offer of proof in the form of a concise statement. The court may, or at the request of a party shall, direct the making of the offer in question and answer form. A transcription of the reporter's notes or of the electronic tape recording showing the offer, whether by concise statement or question and answer, showing the objections made, and showing the ruling thereon, when included in the ~~record~~ statement of facts certified by the reporter or recorder shall establish the nature of

the evidence, the objections and the ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made and the ruling. No further offer need be made. No formal bills of exception shall be needed to authorize appellate review of the question whether the court erred in excluding the evidence. When the court hears objections to offered evidence out of the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections.

(c) **Formal Bills of Exception.** The preparation and filing of formal bills of exception shall be governed by the following rules:

(1) No particular form of words shall be required in a bill of exception, but the objection to the ruling or action of the court shall be stated with such circumstances, or so much of the evidence as may be necessary to explain, and no more, and the whole as briefly as possible.

(2) When the statement of facts contains all the evidence requisite to explain the bill of exception, evidence need not be set out in the bill; but it shall be sufficient to refer to the same as it appears in the statement of facts.

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

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

(5) The court shall submit such bill to the adverse party or ~~his~~ the adverse party's counsel, if in attendance on the court, and if found to be correct, the judge shall sign it without delay and file it with the clerk.

(6) If the judge finds such bill incorrect, ~~he~~ the judge shall suggest to the party or ~~his~~ the party's counsel such corrections as the judge deems necessary therein, and if they are agreed to ~~he~~ the judge shall make such corrections, sign the bill and file it with the clerk.

(7) Should the party not agree to such corrections, the judge shall return the bill to ~~him~~ that party with ~~his~~ the judge's refusal endorsed thereon, and shall prepare, sign and file with the clerk such bill of exception as will, in ~~his~~ the judge's opinion, present the ruling of the court as it actually occurred.

(8) Should the party be dissatisfied with said bill filed by the judge, ~~he~~ the party may, upon procuring the signatures of three respectable bystanders, citizens of this state, attesting to the correctness of the bill as presented by ~~him~~ that party, have the same filed as part of the record of the cause; and the truth of the matter in reference thereto may be controverted and maintained by affidavits, not exceeding five in number on each side, to be filed with the papers of the cause, within ten days after the filing of said bill and to be considered as a part of the record relating thereto. On appeal the truth of such bill of exceptions shall be determined from such affidavits.

(9) In the event a formal bill of exceptions is filed and there is a conflict between its provisions and the provisions of the statement of facts, the bill of exceptions shall control.

(10) Anything occurring in open court or in chambers that is reported or recorded and

so certified by the court reporter or recorder may be included in the statement of facts rather than in a formal bill of exception; provided that in a civil case the party requesting that all or part of the jury arguments or the voir dire examination of the jury panel be included in the statement of facts shall pay the cost thereof, which cost shall be separately listed in the certificate of costs prepared by the clerk of the trial court, and the same may be taxed in whole or in part by the appellate court against any party to the appeal.

(11) Formal bills of exception shall be filed in the trial court within sixty days after the judgment is signed in a civil case or within sixty days after the sentence is pronounced or suspended in open court in a criminal case, or if a timely motion for new trial has been filed formal bills of exception shall be filed within ninety days after the judgment is signed in a civil case or within ninety days after sentence is pronounced or suspended in open court in a criminal case. When formal bills of exception are filed they may be included in the transcript or in a supplemental transcript.

(d) ~~Necessity for~~ Motions for New Trial in Civil Cases. A point in a motion for new trial is prerequisite to appellate complaint in those instances provided in Rule 324(b) of the Texas Rules of Civil Procedure. Unless the taking of evidence is necessary for the presentation of a complaint made in a motion for new trial, the overruling of the motion by operation of law in accordance with Rule 329b of the Texas Rules of Civil Procedure is sufficient to preserve for appellate review the complaints properly made in the motion.

(e) Non-Jury Cases. A party desiring to complain on appeal in a nonjury case that the evidence was legally or factually insufficient to support a finding of fact, that a finding of fact was established as a matter of law or was against the overwhelming weight of the evidence, or of the inadequacy or excessiveness of the damages found by the court shall not be required to comply with paragraph (a) of this rule.

Notes and Comments

Change by 1994 amendments: The rule has been revised to define what the appellate record should show as grounds of complaint on appeal.

RULE 53. THE STATEMENT OF FACTS ON APPEAL

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

(d) Partial Statement. If appellant requests or prepares a partial statement of facts, he shall include in his request or proposal a statement of the points to be relied on and shall thereafter be limited to such points. If such statement is filed, there shall be a presumption on appeal that nothing omitted from the record is relevant to any of the points specified or to the disposition of the appeal. Any other party may designate additional portions of the evidence to be included in the statement of facts. The partial record so designated by the parties shall be considered the entire record for the purpose of reviewing the points so stated. The same presumption shall apply with respect to any point included in the request that complains of the legal or factual insufficiency of the evidence to support any specific fact finding identified in that point, except that in a criminal case, if the statement identifies insufficiency of the evidence to support a finding of guilt as a point to be relied on, the record shall include all the evidence presented to the jury at the guilt phase of the trial or that would have been so presented if a jury had not been waived.

EXPLANATION: This amendment is prompted by the recent decisions that the presumption of completeness under this rule cannot be applied to points requiring review of the "entire record," including legal and factual sufficiency points and points requiring the appellant to present the entire statement of facts to discharge the burden to show harmful error. Since the rule has no exception for such points, the Committee is of the opinion that the rule should be clarified. Notwithstanding the per curiam opinion in Schafer v. Conner, 813 S.W.2d 154, 155 (Tex. 1991) the Section Committee is of the opinion that the presumption should apply to such insufficiency points if the fact finding complained of is specifically identified so that the appellee can request inclusion of additional pertinent testimony, if any. Subdivision (b) of this rule permits such a request within ten days of service of a copy of the appellant's request. If counsel for the appellee does not realize the need for additional evidence until he or she reads the appellant's brief, the appellate court has a mandatory duty under Rule 55(b) to permit a supplemental record to be filed.

The Section Committee believes that this presumption is an important means to reduce the cost of appeals, and, therefore, it should not be weakened in this respect.

For criminal cases, since a majority of the Court of Criminal Appeals has held that it has the responsibility to review "the entire record of the trial before the fact finder" in determining sufficiency of the evidence to support a finding of guilt, an express exception is recommended. See O'Neill v. State, 826 S.W.2d 172, 173 (Tex. Crim. App. 1992).

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

(g) **Reporter's Fees.** The appellant shall either pay or make arrangements to pay the official court reporter his or her fee on completion of the statement of facts. The official court reporter shall include in his or her certification the amount of the ~~his~~ charges for preparation of the statement of facts. The Supreme Court and the Court of Criminal Appeals may from time to time make an order providing the fees which court reporters may charge.

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

(j) ~~Free~~ Statement of Facts Without Prepayment.

(1) *Civil Cases.* In any case where the appellant has filed the affidavit required by Rule 45 to appeal his case without paying the fees of the clerk and official court reporter ~~bond~~, and no contest is filed, or any contest is overruled, the court or judge upon application of appellant shall order the official reporter to prepare a statement of facts, and to deliver it to the appellate court ~~appellant~~, but the court reporter shall receive no pay for same.

(2) *Criminal Cases.* Within the time prescribed for perfecting the appeal an appellant unable to pay for the statement of facts may, by motion and affidavit, move the trial court to have the statement of facts furnished without charge. After hearing the motion, if the court finds the appellant is unable to pay for or give security for the statement of facts, the court shall order the reporter to furnish the statement of facts, and when the court certifies that the statement of facts has been furnished to the appellant, the court reporter shall be paid from the general funds of the county, by the county in which the offense was committed the sum set by the trial judge.

(k) **Duty of ~~Appellant~~ Reporter to File.** It is the official court reporter's ~~appellant's~~ duty, on payment or arrangement to pay the fee, to cause the statement of facts to be filed with the ~~C~~clerk of the

Ccourt of Aappeals.

(l) **Original Exhibits.** When the trial court is of the opinion that original exhibits should be inspected by the appellate court or sent to the appellate court in lieu of copies, it may make such order therefor and for the safekeeping, transportation, and return thereof as it deems proper. The order shall contain a list of such original exhibits in numerical order, with a brief identifying description of each, and, so far as practicable, all such exhibits shall be arranged in the order listed and firmly bound together. The appellate court on its own initiative may direct the official reporter of the court below to send to it any original exhibit for its inspection.

(lm) **Duplicate Statement in Criminal Cases.** [No change.]

(mn) **When No Statement of Facts Filed in Appeals of Criminal Cases.** [No change.]

Notes and Comments

Change by 1994 amendments: (1) Subdivision (d) has been clarified to apply the presumption of completeness of the record to points complaining of legal and factual insufficiency of evidence to support fact findings and to other cases where, notwithstanding the presumption, the appellate courts have held that a partial record was insufficient to show harmful error, and the exception recognized by the Court of Criminal Appeals in criminal cases has been expressly stated. (2) Subdivision (g) has been amended to require the appellant to pay the reporter's fee before filing of the statement of facts. (3) Subdivision (j)(1) has been amended to delete the reference to the bond. (4) Subdivisions (j)(1) and (k) have been amended to transfer responsibility for filing the statement of facts from the appellant to the reporter. (5) The provisions of subdivision l have been moved here from Rule 51(d).

RULE 54. TIME TO FILE RECORD

(a) **In Civil Cases—Ordinary Timetable**. When a notice of appeal has been filed, the triaL court clerk, the reporter that recorded the proceedings, and the appellate court rather than the parties have responsibility to see that the transcript and statement of facts, if requested, are filed. The clerk and the official reporter shall file the transcript and statement of facts, if any, ~~shall be filed~~ in the appellate court within sixty days after the judgment is signed, or, if a timely motion for new trial or to modify the judgment has been filed by any party, or if any party has timely filed a request for findings of fact and conclusions of law in a case tried without a jury, within one hundred twenty days after the judgment is signed. If an appeal is filed by a party who has not participated in person or by counsel in the actual trial of the case, ~~a writ of error has been perfected to the court of appeals~~ the record shall be filed within sixty days after the notice of appeal is filed ~~perfection of the writ of error~~. Failure to file either the transcript or the statement of facts within such time shall not affect the jurisdiction of the court or the court's authority to consider materials filed late., ~~but shall be ground for dismissing the appeal, affirming the judgment appealed from, disregarding materials filed, or applying presumptions against the appellant, either on appeal or on the court's own motion, as the court shall determine. The court has authority to consider all timely filed transcripts and statements of facts, but shall have no authority to consider a late filed transcript or statement of facts, except as permitted by this rule.~~.

(b) [No change.]

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

Notes and Comments

Change by 1994 amendments: Since the trial court clerk and reporter and the appellate court have responsibility to file the record, provisions for motions for extension of time are deleted.

RULE 55. AMENDMENT OF THE RECORD

[Delete current Rule 55.]

(a) **Omissions from the Transcript.** If anything material is omitted from the transcript, the trial court, the appellate court, or any party may by letter direct the clerk of the trial court to prepare, certify, and file in the appellate court a supplemental transcript containing the omitted papers.

(b) **Inaccuracies in the Transcript.** If any defect or inaccuracies appear in the transcript, the clerk of the appellate court shall return it to the clerk of the trial court, specifying the defect or inaccuracy and instructing that clerk to correct the transcript and refile it in the appellate court.

(c) **Inaccuracies in the Statement of Facts.** Any inaccuracies in the statement of facts may be corrected by agreement of the parties; should any dispute arise after filing in the appellate court as to whether the statement of facts accurately discloses what occurred in the trial court, the appellate court shall submit the matter to the trial court, which shall after notice to the parties and hearing, settle the dispute and make the statement of facts conform to what occurred in the trial court.

Notes and Comments

The rule has been rewritten to implement the amendments transferring responsibility for the record from the appellant to the trial court clerk and reporter and the appellate court.

~~**RULE 56. Receipt of the Record by the Court of Appeals**~~

[Deleted.]

RULE 56. DUTIES OF THE APPELLATE CLERK ON RECEIPT OF THE NOTICE OF APPEAL AND RECORD.

(a) **On Receiving Notice of Appeal.** On receiving a copy of the notice of appeal from the clerk of the trial court, the clerk of the appellate court shall endorse on it the time of receipt and determine whether it complies with the requirements of Rule 40 and was filed within the time prescribed by Rule 41(a)(1).

(1) **Proper and Timely Notice.** 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.

Each case filed in the court of appeals shall be assigned a docket number consisting of four parts separated by hyphens: (1) the number of the court of appeals district, (2) the last two digits of the year in which the case is filed, (3) the number assigned to the case, and (4) the designation "CV" for civil and "CR" for criminal cases.

(2) Defective or Improper Notice. If it seems to the clerk that the notice is defective or that it was not filed in time, the clerk shall notify the parties and the trial court clerk of the defect so that the defect may be remedied if it can be. If, after thirty days from such notification, no proper notice of appeal has been received, the clerk shall refer the matter to the appellate court, which shall make an appropriate order.

(b) On Receiving the Record. On receiving the transcript from the trial court clerk or receiving the statement of facts from the reporter, the appellate court clerk shall determine whether the transcript complies with the requirements of Rule 51 and whether the statement of facts complies with the requirements of Rule 53. If so, the clerk shall endorse on each the date of receipt, file it, and notify the parties of the filing and the date. If not, the clerk shall endorse on the transcript or statement of facts the date of receipt and return it to the trial court clerk or reporter, specifying the defects, and instructing the clerk or reporter to correct the defects and return it to the appellate court.

(c) On Expiration of Time for Filing Record. On expiration of the time for filing the transcript or statement of facts without a proper transcript or statement of facts being filed, the clerk shall so notify the parties and the trial judge, trial court clerk or reporter. If, after thirty days from such notification, no proper transcript or statement of facts is received, the clerk shall refer the matter to the appellate court, which shall make an appropriate order to avoid further delay and preserve the rights of the parties.

~~**RULE 56. RECEIPT OF THE RECORD BY COURT OF APPEALS**~~

~~**(a) Duty of Clerk on Receiving Transcript.** The clerks of the courts of appeals shall receive the transcripts delivered and sent to them, and receipt for same is required; but they shall not be required to take a transcript out of the post office or any express office, unless the postage or charges thereon be fully paid. Upon receipt of the transcript, it shall be the duty of the clerk to examine it in order to ascertain whether or not, in case of an appeal, a proper appeal bond, notice of appeal or affidavit in lieu thereof (when bond is required) have been given; and in case of a writ of error, whether or not the petition and bond or affidavit in lieu thereof (when bond is required) appear to have been filed. If it seems to the clerk that the appeal or writ of error has not been duly perfected, the clerk shall note on the transcript the day of its reception and refer the matter to the court. If upon such reference the court shall be of the opinion that the transcript shows that the appeal or writ of error has been duly perfected, it shall order the transcript to be filed as of the date of its reception. If not, it shall cause notice of the defect to issue to the attorneys of record of the appellant, to the end that they may take steps to amend the record, if it can be done; for which a reasonable time shall be allowed. If the transcript does not show the jurisdiction of the court, and if after notice it is not amended, the appeal shall be dismissed.~~

~~If a transcript, properly endorsed (when endorsement is required), is received by the clerk within the time allowed by these rules, the clerk shall endorse his or her filing thereon, showing the date of its reception, and shall notify both appellant and the adverse party of the receipt of the transcript. If it is not properly endorsed, or an original transcript is received after the time allowed, the clerk shall, without filing it, make a memorandum upon it of the date of its reception and keep it in his or her office subject to the direction of the person who applied for it or to the disposition of the court, and shall notify the person who applied for a transcript why it has not been filed. The transcript shall not be filed until a proper showing has~~

~~been made to the court for its not being properly endorsed or received in proper time, and upon this being done, the court may order it filed, if the rules have been complied with, upon such terms as may be deemed proper, having respect to the rights of the opposite party.~~

~~(b) Duty of Clerk on Receiving Statement of Facts. Upon receipt of a statement of facts, the clerk shall ascertain if it is presented within the time allowed and also if it has been properly authenticated in accordance with these rules. If the clerk finds that the statement of facts is presented in time and has been certified by the official court reporter, the clerk shall file it forthwith; otherwise, the clerk shall endorse thereon the time of the receipt of such statement of facts, hold the same subject to the order of the court of appeals, and notify the party (or the party's attorney) tendering the statement of facts of the action and state the reasons therefor.~~

EXPLANATION: *Since the appellant would be relieved of responsibility to monitor the trial court and reporter concerning preparation and filing of the record, the logical responsibility should fall on the clerk of the appellate court, subject to ultimate control by that court. Consequently, the Section Committee recommends that the appeal be docketed as soon as the notice of appeal is filed and that the clerk have responsibility to monitor the filing dates, establish lines of communications with trial court clerks and reporters, handle the problems informally when possible, and, if unsuccessful, should have authority to take appropriate action, and refer the matter, when necessary for enforcement, to the appellate court, which, in any event, should bear ultimate responsibility. The Section Committee is of the opinion that this procedure, which parallels that in the federal courts, will protect litigants from errors of counsel and problems with clerks and reporters and will obviate motions and orders for extension of time. The clerk will, of course, rely on legal staff personnel when necessary.*

Notes and Comments

Change by 1994 amendments: The rule has been rewritten to implement the amendments transferring responsibility for the record from the appellant to the trial court clerk and reporter and the appellate court and to provide for docketing the appeal on filing of the notice of appeal.

~~RULE 57. DOCKETING THE APPEAL~~

~~(a) Docket Numbers. Each case filed in a court of appeals shall be assigned a docket number that consists of four parts separated by hyphens: (1) the number of the supreme judicial district, (2) the last two digits of the year in which the case is filed, (3) the number which is assigned to the case, and (4) the designation "CV" for civil cases or "CR" for criminal cases. Each case filed in the court of appeals shall be docketed in the order of filing. A motion relating to an appeal perfected but not yet filed shall be docketed likewise and shall be assigned a number, which shall be also assigned to the appeal when filed.~~

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

~~already been so entered. The clerk shall add the names of additional counsel upon request.~~

Notes and Comments

Subdivision (a) of this rule has been included in Rule 56(a) and subdivision (b) has been moved to 7(a).

RULE 58. PREMATURE APPEAL

[No change.]

RULE 59. VOLUNTARY DISMISSAL

(a) Civil Cases.

(1) The appellate court may finally dispose of an appeal ~~or writ of error~~ as follows:

(A) [No change.]

(B) [No change.]

(2) If no transcript has been filed, the agreement or motion shall be accompanied by certified or sworn copies of the judgment appealed from and of the appeal bond or other document perfecting or attempting to perfect the appeal ~~or writ of error~~.

(3) [No change.]

(b) Criminal Cases. [No change.]

Notes and Comments

Change by 1994 amendments: References to the writ of error procedure have been deleted in view of the repeal of former rule 45

RULE 60. INVOLUNTARY DISMISSAL

(a) Civil Cases.

(1) If an appeal ~~or writ of error~~ is subject to dismissal for want of jurisdiction or for failure of appellant to comply with any requirements of these rules or any order of the court, the appellee may file a motion for dismissal or for affirmance and judgment for costs on the appeal bond or for the cash deposit. If the ground of the motion is failure to file the transcript, the motion shall be supported by certified or sworn copies of the judgment and the appeal bond or other document perfecting or attempting to perfect the appeal ~~or writ of error~~.

(2) If it appeals to the appellate court that an appeal ~~or writ of error~~ is subject to dismissal for want of jurisdiction or for failure to comply with any requirements of these rules or any order of the court, the court may, on its own motion, give notice to all parties that the case will be dismissed unless the appellant or any party desiring to continue the appeal ~~or writ of error~~, files with the court within ten days a response showing grounds for continuing the appeal or writ of error.

(b) Criminal Cases. [No change.]

Notes and Comments

Change by 1994 amendments: References to the writ of error procedure have been deleted in view of the repeal of former rule 45.

RULE 61. DISPOSITION OF RECORD ON FINAL DISPOSITION OF APPEAL ~~PAPERS WHEN APPEAL DISMISSED~~ IN CIVIL CASES

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

On final disposition of the appeal in a civil case, the appellate court shall dispose of the record as follows:

(a) Transcript. The appellate court shall return the transcript to the trial court clerk. A party that has requested a transcript consisting of copies, as allowed by Rule 51(d), shall have the right to withdraw it.

(b) Statement of Facts. The party that has requested the statement of facts shall have the right to withdraw it unless it contains original papers belonging to an adverse party, in which case leave of court shall be had before such original papers are withdrawn.

NOTE TO ADVISORY COMMITTEE; In considering this proposal, consideration should be given to the repeal or amendment the last sentence of Rule 18(d): "Transcripts and other papers in cases finally disposed of shall not be taken from the clerk's office." Although the Section Committee recommends that the transcript, which consists of the original filed papers, should be returned to the clerk of the trial court, further consideration will be given to disposition of the statement of facts and whether it should be subject to withdrawal and use as evidence in subsequent litigation. Accordingly, this matter is retained on the agenda of tlhe Section Committee for consideration and recommendation in a later report.

Notes and Comments

Change by 1994 amendments: The rule has been rewritten to conform to the provisions of Rule 51 as amended and to apply to all final dispositions by the appellate court, whether by dismissal or decision

on the merits.

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

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

~~RULE 70. MOTIONS TO POSTPONE ARGUMENT~~

~~Motions made to postpone argument of the case to a future day, unless consented to by the opposite party, shall be supported by sufficient cause, verified by affidavit, unless such sufficient cause is apparent to the court.~~

Comments and Notes

This rule has been moved to Rule 19(f)(5).

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

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

Comments and Notes

This rule has been moved to Rule 19(f)(2).

~~RULE 72. 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.~~

Comments and Notes

This rule has been moved to Rule 19 (f)(1).

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

~~All motions for extension of time shall be in writing and shall be filed with the Clerk of the Court of Appeals in which the case will be heard. Each such motion shall specify the following:~~

~~(a) the court below and the date of judgment, together with the number and style of the case;~~

~~(b) in criminal cases, the offense for which the appellant was convicted and the punishment assessed;~~

~~(c) when extension of time is sought for filing the record, the filing dates of any original and amended motions for new trial, together with the date when they were overruled;~~

~~(d) if the appeal has been perfected, the date when the appeal was perfected;~~

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

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

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

~~(h) the facts relied upon to reasonably explain the need for an extension; and~~

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

Comments and Notes

This rule has been moved to Rule 19(f)(4).

AB. BRIEFS AND ARGUMENT IN THE COURTS OF APPEALS

RULE 74. REQUISITES OF BRIEFS

Briefs shall be brief. Briefs shall be filed with the ~~C~~clerk of the ~~C~~court of Aappeals" of the ~~correct~~ district in which the appeal is pending.. In both civil and criminal cases the parties shall be designated as "Appellant" and "Appellee.", ~~and in criminal cases as "Appellant" and "Appellee".~~

EXPLANATION: No material change; repetitive language eliminated.

(a) Names of All Parties to the Trial Court's Final Judgment. A complete list of the names and addresses of all parties to the trial court's final judgment and the names and addresses of their counsel in the trial court, if any, shall be listed at the beginning of the appellant's brief, so that the members of the court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision of the case and so that the clerk of the court of appeals may properly notify the parties ~~to the trial court's final judgment or their counsel~~ to the appeal, if any, of the judgment and all orders of the court of appeals. The brief shall include also the address of any party not represented by an attorney, but if the address is not known, shall certify that appellant's attorney has made a diligent inquiry but has been unable to discover it, and the certificate shall give any available information, such as the probable county of residence, that might serve to identify and locate the unrepresented party. If the

appellant is not represented by an attorney, the notice shall be under oath. The list shall specify any party to the trial court's judgment not named as a party to the appeal and also any such party that has filed a request for copies of briefs, orders, and opinions, as permitted by Rule 4(g).

EXPLANATION: (1) The Section Committee is of the opinion that the requirement to list the addresses of parties represented by counsel is burdensome and serves no purpose. Also, the appellant's counsel should not be required to list the address of an unrepresented party if he certifies that he has made a diligent inquiry but has been unable to discover it.

(2) The Section Committee is of the opinion that in order that the clerk may know who should receive copies of orders and opinions, the brief should specify the parties to the trial court's judgment not named as parties to the appeal and which of them, if any, have filed a request for copies.

(3) Rule 74(a), as amended in 1990, requires the brief to list "all parties to the trial court's final judgment" and requires the clerk to "notify the parties to the trial court's final judgment or their counsel, if any, of the judgment and all orders of the court of appeals," including those who are not parties to the appeal. The Section Committee is of the opinion that notice to and service on parties to the trial court's judgment that are not parties to the appeal serves no useful purpose unless those parties have filed a request for such copies, but that all parties to the judgment should be listed in the appellant's brief so that the justices will know whether there is any ground for disqualification. Accordingly, the proposed amendment to Rule 74(a) requires the brief to list all parties to the judgment, but that the clerk should be required to send notices and copies of orders only to those nonparties to the appeal that have filed a request for copies. Likewise, proposed Rule 4(f) would require service of copies of briefs on only those nonparties to the appeal that have filed a request for copies.

(b) [No change.]

(c) [No change.]

~~(d) **Points of Error.** A statement of the points upon which an appeal is predicated shall be stated in short form without argument and be separately numbered. In parenthesis after each point, reference shall be made to the page of the record where the matter complained of is to be found. A point is sufficient if it directs the attention of the appellate court to the error about which complaint is made. In civil cases, complaints that the evidence is legally or factually insufficient to support a particular issue or finding, and challenges directed against any conclusions of law of the trial court based upon such issues or findings, may be combined under a single point of error raising both contentions if the record references and the argument under the point sufficiently direct the court's attention to the nature of the complaint made regarding each such issue or finding or legal conclusion based thereon. Complaints made as to several issues or findings relating to one ground of recovery or defense may be combined in one point, if separate record references are made.~~

(d) **Issues Presented.** A statement of the issues or points presented for review, expressed in the terms and circumstances of the case but without unnecessary detail, shall be stated in short and concise form and without argument or repetition. The statement of an issue or point presented will be deemed to comprise every subsidiary question fairly included therein. Each issue or point should be supported by reference to the page(s) of the record where the ruling or other matter complained of is

shown.

EXPLANATION: This revision of subdivision (d) is intended to relax the technicalities that have been imposed on the "point of error" practice.

(e) **Brief of Appellee.** The brief of the appellee shall respond to the issues or points raised ~~reply to the points relied upon~~ by the appellant in due order when practicable; and in civil cases, if the appellee desires to complain of any ruling or action of the trial court, ~~his brief in regard to such matters~~ or when judgment is rendered non obstante veredicto or notwithstanding the findings of a jury on one or more questions, the appellee may bring forward by cross-point any issue or point that would have vitiated the verdict or would have prevented an affirmance of the judgment had one been rendered by the trial court in harmony with the verdict, including although not limited to the point or issue that one or more of the jury's findings have insufficient support in the evidence or are against the overwhelming preponderance of the evidence as a matter of fact, and the ground that the verdict and judgment based thereon should be set aside because of improper argument of counsel.

The failure to bring forward by cross-points such issues or points as would vitiate the verdict shall be deemed a waiver thereof; provided, however, that if a cross-point is upon an issue or point which requires the taking of evidence in addition to that adduced upon the trial of the cause, it is not necessary that the evidentiary hearing be held until after the appellate court determines that the cause be remanded to consider such a cross-point.

In presenting cross-points, the appellee's brief shall follow substantially the form of the brief for appellant.

(f) **Argument.** A brief of the argument may present separately or grouped the issues or the points relied upon for reversal. A summary of the entire argument may be included either after the preliminary statement or at the conclusion of the brief. The argument shall include: (1) a fair, condensed statement of the facts pertinent to such issues or points, with reference to the pages in the record where the same may be found; and (2) such discussion of the facts and the authorities relied upon as may be requisite to maintain the point at issue. If complaint is made of any part of the charge given or refused, such part of the charge shall be set out in full. If complaint is made of the improper admission or rejection of evidence, the substance of such evidence so admitted or rejected shall be set out with references to the pages of the record where the same may be found. Repetition or prolixity of statement or argument must be avoided. Any statement made by appellant in his original brief as to the facts or the record may be accepted by the court as correct unless challenged by the opposing party.

(g) **Prayer for Relief.** The nature of the relief sought should be clearly stated. No relief that would adversely affect the rights of any party to the trial court's judgment should be included in the prayer unless that party is named as a party to the appeal.

EXPLANATION: The Section Committee is of the opinion that the appellant should name as an appellee any party to the trial court's judgment whose rights would be adversely affected by the relief sought.

~~(h) Length of Briefs. Except as specified by local rule of the court of appeals, appellate briefs in civil cases shall not exceed 50 pages, exclusive of pages containing the list of names and addresses of parties, the table of contents, index of authorities, points of error, and any addendum containing statutes, rules, regulations, etc. The court may, upon motion, permit a longer brief. A court of appeals may direct~~

~~that a party file a brief, or another brief, in a particular case. If any brief is unnecessarily lengthy or not prepared in conformity with these rules, the court may require same to be redrawn.~~

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

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

EXPLANATION: Present subdivisions (h), (i), and (j) would be deleted in view of inclusion of the same requirements in Rules 4(d) and (4e).

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

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

(j)~~(m)~~ **Appellee's Filing Dates.** [No change.]

(k) **Appellant's Brief in Reply.** Appellant may file a brief in reply to the appellee's brief confined to the issues or points in the appellee's brief. A brief in reply shall not exceed twenty-five pages in length, exclusive of pages containing the table of contents, index of authorities, reply points or issues, and any addendum containing statutes, rules, regulations, etc. Appellant shall file his brief in reply within twenty-five days after the filing of appellee's brief. A reply brief may include a response to a cross-appeal.

~~(l)~~(n) **Modifications of Filing Time.** Upon written motion showing a reasonable explanation of the need for more time, the court may grant either or both parties further time for filing their respective briefs, and may extend the time for submission of the case. The court may also shorten the time for filing briefs and the submission of the cause in case of emergency, when in its opinion the needs of justice require it. A motion for extension of time to file a brief may be filed before or after the date the brief is due.

(m)~~(o)~~ **Amendment or Supplementation.** Briefs may be amended or supplemented at any time when justice requires upon such reasonable terms as the court may prescribe, and if the court shall strike or refuse to consider any part of a brief, the court shall on reasonable terms allow the same to be amended or supplemented. Should it appear before or after submission that the case has not been properly presented in the brief or briefs, or that the law and authorities have not been properly cited, it may decline to receive the submission, or, if received, may set it aside and make such orders as may be necessary to secure a more satisfactory submission of the case.

(n)~~(p)~~ **Briefing Rules to be Construed Liberally.** [No change.]

~~(q) Service of Briefs. All briefs filed in the appellate court shall at the same time be served on all parties to the trial court's final judgment.~~

EXPLANATION: This subdivision is deleted because of the service requirement in proposed Rule 4(f).

(o) Intervening Appellee. Any party to the trial court's judgment not previously named as a party to the appeal may file an intervening brief opposing any appellate relief the intervening appellee deems adverse to the intervening appellee's rights or interests within thirty days after the filing or service of a copy of any brief requesting such adverse relief and may file an intervening motion for rehearing within

fifteen days after receiving a copy of any judgment or opinion granting such relief.

EXPLANATION: Rule 74(a), as amended in 1990, requires the brief to list "all parties to the trial court's final judgment" and requires the clerk to "notify the parties to the trial court's final judgment or their counsel, if any, of the judgment and all orders of the court of appeals," including those who are not parties to the appeal. The proposed amendment to Rule 4(f) would limit the requirement of service of briefs on and notices to nonparties to the appeal to those that have filed a request for copies as permitted by Rule 4(g). It is not clear, however, what remedy those nonparties would have. The above procedure would provide them a remedy.

Notes and Comments

Changed by 1994 amendments: (1) Subdivision (a) has been amended to limit the requirement of listing of addresses of parties in the trial court to those not represented by counsel. (2) Subdivision (d) has been rewritten and liberalized to provide for "issues or points" rather than "points of error." (3) Subdivision (e) has been amended to incorporate the provisions of Rule 324(c), Texas Rules of Civil Procedure, concerning cross-points complaining of jury findings disregarded by the trial court in rendering judgment, with no substantive change. (4) Subdivision (f) has been amended to permit the brief to include a summary of the entire argument. (5) Subdivision (g) has been amended to require that the prayer limit the relief requested to parties named as parties to the appeal. (6) Former subdivisions (h), (i), and (j) have been deleted and their provisions have been incorporated into Rule 4(d) and 4(e) as amended. The remaining subdivisions have been renumbered. (7) Subdivision (k) has been added. (8) The last sentence has been added to subdivision (m). (9) Former Subdivision (q) has been deleted because of the service requirement in Rule 4(f) as amended. (10) Subdivision (o) has been added.

Rule 75. Oral Argument

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

(f) Request and Waiver. [First paragraph, no change; second paragraph amended as follows:] The court of appeals may, in its discretion, advance civil or criminal cases for submission without oral argument where oral argument would not materially aid the court in the determination of the issues of law and fact presented in the appeal. [Remainder of rule unchanged.]

NOTE TO ADVISORY COMMITTEE: This change is recommended by the Council of Chief Judges of the Courts of Appeals.

Notes and Comments

Change by 1994 amendments: The caption has been added to subdivision (f) and the second paragraph of that subdivision has been amended to authorize the court to advance civil as well and criminal cases without oral argument.

~~SECTION SIX.C. JUDGMENTS, OPINIONS AND REHEARING~~

CA. JUDGMENTS IN THE COURTS OF APPEALS

RULE 80. JUDGMENT OF THE COURT OF APPEALS

[No change.]

RULE 81. REVERSAL IN CIVIL AND CRIMINAL CASES

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

(d) **Rights of Absent Parties.** Except in certain kinds of cases, such as probate cases, in which the judgment of the trial court is binding on absent parties, the judgment of the appellate court does not bind absent parties or adversely affect their rights.

EXPLANATION: ***The Committee is of the opinion that if any party to the appeal seeks relief that would adversely affect an absent party's rights, the absent party should be named as an appellee or cross-appellee. This amendment would not affect a case where the respective rights of a successful appellant and of an unsuccessful nonappealing party "are so interwoven or dependent on each other as to require a reversal of the whole judgment" because in that case the rights of the absent party would not be adversely affected by the judgment. See such cases as Lockhart v. A. W. Snyder & Co., 163 S.W.2d 385, 392 (Tex. 1942), American Indemnity Co. v. Martin, 84 S.W.2d 697, 698 (Tex. 1935).***

Notes and Comments

Change by 1994 amendments: Subdivision (d) has been added.

RULE 82-83. [No change.]

RULE 84. DAMAGES FOR DELAY IN CIVIL CASES

In civil cases where the court of appeals shall determine that an appellant has taken an appeal or a relator has filed a petition in an original proceeding for delay and without sufficient cause, then the court may, as part of its judgment, award each prevailing party ~~appellee~~ an amount not to exceed ten percent of the amount of damages awarded to such prevailing party ~~appellee~~ as damages against such appellant or relator. If there is no amount awarded to the prevailing ~~appellee~~ party as money damages, then the court may award, as part of its judgment, each prevailing ~~appellee~~ party an amount not to exceed ten times the total taxable costs as damages against such appellant or relator or, in original proceedings, such other amount as the court deems just.

A request for damages pursuant to this rule, or an imposition of such damages without request, shall not authorize the court to consider allegations of error that have not been otherwise properly preserved or presented for appellate review.

Notes and Comments

Change by 1994 amendments: Penalties against relators in original proceedings have been added.

DB. OPINIONS BY THE COURTS OF APPEALS

RULE 90. OPINIONS, PUBLICATION AND CITATION

[No change.]

RULE 91. COPY OF OPINION AND JUDGMENT TO INTERESTED PARTIES AND OTHER COURTS

On the date an opinion of an appellate court is handed down, the clerk of the appellate court shall mail or deliver to the clerk of the trial court, to the trial judge who tried the case, and to the State and each of the defendants in a criminal case, and in a civil case to each of the parties to the appeal and to any party to the trial court's final judgment who has filed a request for copies of briefs, orders, and opinions, as permitted by Rule 4(g) in a civil case, a copy of the opinion handed down by the appellate court and a copy of the judgment rendered by the appellate court as entered in the minutes. Delivery to a party having counsel indicated of record shall be made to counsel. The clerk of the trial court shall file a copy of the opinion among the papers of the cause in such court. When there is more than one attorney for a party, the attorneys may designate in advance the lead counsel on ~~one to~~ whom the copies of the opinion and judgment shall be mailed, as provided by Rule 4(b). In criminal cases, copies shall also be provided to the State Prosecuting Attorney, P. O. Box 12405, Austin, Texas 78711 and to the Clerk of the Court of Criminal Appeals.

Notes and Comments

Change by 1994 amendments: The rule has been made to conform to the provision for designation of leading counsel in Rule 4(b), and the clerk has been relieved of the burden to send copies to absent parties who have not filed a request for copies.

E. REHEARING IN THE COURTS OF APPEALS

RULE 100.

[No change.]

RULE 101. RECONSIDERATION ~~ON PETITION FOR DISCRETIONARY REVIEW~~ BY COURT OF APPEALS

NOTE TO ADVISORY COMMITTEE: The Section Committee had previously approved proposed amendments to this rule and to Rule 131(e) that would abolish an assignment of error in the motion for rehearing as a prerequisite for review on writ of error and would extend the power of the court of appeals to review its decisions in criminal cases on filing

a petition for discretionary review to civil cases on filing an application for writ of error. On reconsideration at its meeting on January 28, 1994, these recommendations were withdrawn. However, the Section Committee decided that the proposal had sufficient merit for consideration by the Advisory Committee.

This proposal involves several questions: (1) Does a motion for rehearing in the court of appeals serve any useful purpose justifying the time required for filing and determination of such a motion? (2) Should an unsuccessful litigant in the court of appeals be able to invoke Supreme Court review without giving the intermediate court an opportunity to correct the errors to be urged in the Supreme Court, either on motion for rehearing or on examination of the application for writ or error before it is sent to the Supreme Court? (3) Should the petitioner be required to disclose in the court of appeals the ground on which relief will be sought in the Supreme Court? (4) Is justice better served if the court of appeals has an opportunity to make its decisions less vulnerable to Supreme Court review?

A question was raised in the Section Committee as to whether the plenary power of the court of appeals might expire before that court issues any corrected or modified opinion. That question might also exist in criminal cases under the present rule. However, since the plenary power is now defined by the time allowed the court for action by the rules rather than by expiration of the statutory term, this problem may be subject to solution by amendment of the rule.

If an assignment of error in the motion for rehearing is not to be required as a prerequisite of Supreme Court review and the court of appeals is given the opportunity to reconsider on filing the application for writ of error, conforming amendments would be required in Rules 130(b), 131(e), and 132(a).

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

A. BRIEFS AND ARGUMENT IN THE SUPREME COURT

RULE 130. FILING OF APPLICATION IN COURT OF APPEALS

(a) **Method of Review.** The Supreme Court may review final judgments of the courts of appeals upon writ of error.

(b) **~~Number of Copies;~~ Time and Place of Filing.** ~~Twelve copies of t~~The application shall be filed with the ~~C~~clerk of the ~~C~~court of A~~a~~ppeals that delivered the decision within thirty days after the day the judgment and opinion are issued or within thirty days after the day the last timely motion for rehearing is overruled ruling on all timely filed motions for rehearing. An application filed prior to the filing of a motion for rehearing by a party shall not preclude a party, including the party filing the application, from filing a motion for rehearing, or the court of appeals from ruling on such motion. An application filed prior to the last ruling on all timely filed motions for rehearing shall be deemed to have been filed on the date of but subsequent to the last ruling on any such motion.

(c) **Successive Applications.** If any party files an application within the time specified or as extended by the Supreme Court any other party who was entitled to file an application may do so within forty days after the overruling of the last timely motion for rehearing filed by any party or within ten days after the filing of any preceding application, whichever is the later date.

~~(d) Extension of Time. An extension of time may be granted for late filing in a court of appeals of an application to the Supreme Court for writ of error if a motion reasonably explaining the need therefor is filed with the Supreme Court not later than fifteen days after the last date for filing an application. A motion for late filing of an application shall be directed to and acted upon by the Supreme Court. A copy of the motion shall be filed at the same time in the court of appeals, and the Clerk of the Supreme Court shall notify the court of appeals of the action taken on the motion by the Supreme Court.~~

Notes and Comments

Change by 1994 amendments: (1) The provision for copies has been moved to amended Rule 4(d)(2). (2) Subdivision (c) has been amended to permit a successive application to be filed within ten days after any preceding application, though later than forty days after the order overruling the last motion for rehearing. (3) Former subdivision (d) has been deleted and its provisions have been included in amended Rule 19(g)(3).

RULE 131. REQUISITES OF APPLICATIONS

The application for writ of error shall be addressed to "The Supreme Court of Texas," and shall state the name of the party or parties applying for the writ. The parties shall be designated as "Petitioner" and "Respondent." Applications for writs of error shall be as brief as possible. The respondent should file a brief in response. The application shall contain the following:

(a) **Names of All Parties to the Trial Court's Final Judgment.** A complete list of the names and addresses of all parties to the trial court's final judgment and the names and addresses of their counsel in the trial court, if any, shall be listed on the first page of the application, so that the members of the court may at once determine whether they are disqualified to serve or should recuse themselves from participation in the decision of the case and so that the clerk of the court may properly notify the parties to the trial court's final judgment that have filed a request for copies as permitted by Rule 4(g) and or their counsel, if any, of the judgment and all orders of the Supreme Court. The application shall include also the address of any party not represented by an attorney, but if the address is not known, shall certify that petitioner's attorney has made a diligent inquiry but has been unable to discover it, and the certificate shall give any available information, such as the probable city or county of residence, that might serve to identify and locate the unrepresented party. If the petitioner is not represented by an attorney, the certificate shall be under oath. The list shall specify any party to the trial court's judgment not named as a party to the appeal and also any such party that has filed a request for copies of briefs, orders, and opinions, as permitted by Rule 4(g).

EXPLANATION: (1) The Section Committee is of the opinion that the requirement to list the addresses of parties represented by counsel is burdensome and serves no purpose. Also, the petitioner's counsel should not be required to list the address of an unrepresented party if he certifies that he has made a diligent inquiry but has been unable to discover it.

(2) The Section Committee is of the opinion that in order that the clerk may know who should

receive copies of orders and opinions, the application should specify the parties to the trial court's judgment not named as parties to the appeal and which of them, if any, have filed a request for copies. The clerk should be relieved of he burden to send notices to nonparties to the appeal unless they have files a request for copies as permitted by Rule 4(g).

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

(c) Statement of the Case. The application should contain a brief general statement of the nature of the suit, -- for instance, whether it is a suit for damages, on a note, or in trespass to try title, and that the statement as contained in the opinion of the court of appeals is correct, except in the particulars pointed out. Example: "This is a suit for damages in excess of $1000.00 for personal injuries growing out of an automobile collision. The opinion of the court of appeals correctly states the nature and results of the suit, except in the following particulars: (If any.)" Such statement should seldom exceed one-half page. The details of the case should be reserved to be stated in connection with the points to which they are pertinent.

(d) Statement of Jurisdiction. Except in those cases in which the jurisdiction of the court depends on a conflict of decisions under subsection (a)(2) of section 22.001 of the Government Code, the petition should merely state that the Supreme Court has jurisdiction under a particular subsection of section 22.001 of the Government Code. Example: "The Supreme Court has jurisdiction of this suit under subsection (a)(6) of section 22.001 of the Government Code." When jurisdiction of the Supreme Court depends on a conflict of decisions, the conflict on the question of law should be clearly and plainly stated.

~~**(e) Points of Error.** A statement of the points upon which the application is predicated shall be stated in short form without argument and be separately numbered. In parenthesis after each point, reference shall be made to the page of the record where the matter complained of is to be found. Whether the matter complained of originated in the trial court or in the court of appeals, it shall be assigned as error in the motion for rehearing in the court of appeals. Points will be sufficient if they direct the attention of the court to the error relied upon. Complaints about several issues or findings relating to one element of recovery or defense may be combined in one point, if separate record references are made.~~

Issues Presented. A statement of the issues or points presented for review, expressed in the terms and circumstances of the case but without unnecessary detail, shall be stated in short and concise form and without argument or repetition. The statement of an issue or point presented will be deemed to comprise every subsidiary question fairly included therein. Each issue or point should be supported by reference to the page(s) of the record where the ruling or other matter complained of is shown. Whether the matter complained of originated in the trial court or in the court of appeals, it shall be assigned as error in the motion for rehearing in the court of appeals.

EXPLANATION: This revision of subdivision (e) is intended to relax the technicalities that have been imposed on the "point of error" practice.

(f) Brief of the Argument. The brief of the argument may present separately, or grouped if germane, the issues or points ~~of error~~ relied upon for reversal, the argument to include such pertinent

statements from the record as may be requisite, together with page references and such discussion of the authorities as is deemed necessary to make clear the issues or points ~~of error~~ complained of. A summary of the argument may be included either after the statement of the case or at the conclusion of the brief. The opinion of the court of appeals will be considered with the application, and statements therein, if accepted by counsel as correct, need not be repeated.

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

(h) Amendment. The application may be amended at any time when justice requires upon such reasonable terms as the court may prescribe.

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

(i)~~(j)~~ **Court May Require Application Redrawn.** If any brief or application for writ of error is unnecessarily lengthy or not prepared in conformity with these rules, the Supreme Court may require same to be redrawn.

(j)~~(k)~~ **Intervention.** Any party to the trial court's judgment not previously named as a party to the appeal may file an intervening application for writ of error opposing any appellate relief he or she deems adverse to his or her rights or interests within the time allowed for filing an application, or may file a response to any application within the time allowed for filing a response. Such a party may also file an intervening motion for rehearing within the time allowed for a motion for rehearing or within fifteen days after receiving a copy of any judgment or opinion granting such relief.

***EXPLANATION:** Rule 131, as amended in 1990, requires the application to list "all parties to the trial court's final judgment," and Rule 132, as amended, requires the clerk to "notify the parties to the trial court's final judgment," including those who are not parties to the appeal, of the filing of the application for writ of error. The present proposed amendments would limit the requirement of the clerk to notify nonparties to the appeal to nonparties that have filed a request for copies as permitted by Rule 4(f). It is not clear, however, what remedy those nonparties would have. Subdivision (j) would provide them a remedy, if appropriate.*

Notes and Comments

Change by 1993 amendments:

(1) Subdivision (a) has been amended to relieve counsel of the requirement to include the addresses of parties represented by attorneys and to permit counsel to make a certificate of diligent inquiry if the address of an unrepresented party is not known.

(2) Subdivision (a) has been further amended to require the list of parties to specify those not named as parties to the appeal and whether such parties have filed a request for copies of briefs, orders, and opinions.

(3) Subdivision (e) has been rewritten to provide for "issues or points" rather than "points of error" and to abolish the requirement of a point in the motion for rehearing as a prerequisite for further review.

(4) Subdivision (i) has been stricken because it duplicates Rule 4(e).

(5) Subdivision (j) has been added.

RULE 132. FILING AND DOCKETING APPLICATION IN SUPREME COURT

(a) Duty of Clerk of Court of Appeals. When an application for writ of error to the Supreme Court is filed with the ~~C~~clerk of the ~~C~~court of Aappeals, ~~he~~ the clerk shall record the filing of the application, and shall, after the court of appeals has ruled on all timely filed motions for rehearing, promptly forward it to the Clerk of the Supreme Court with the original record in the case and the opinion of the court of appeals, the motions filed in the case, and certified copies of the judgment and orders of the court of appeals. The clerk need not forward any exhibits that are not documentary in nature unless ordered to do so by the Supreme Court.

(b) Expenses. The party applying for the writ of error shall deposit with the ~~C~~clerk of the ~~C~~court of Aappeals a sum sufficient to pay the expressage or carriage of the record to and from the Clerk of the Supreme Court.

(c) Duty of the Clerk of the Supreme Court. The Clerk of the Supreme Court shall receive the application for writ of error, shall file it and the accompanying record from the court of appeals, and shall enter the filing upon the docket, but he shall not be required to receive the application and record from the post office or express office unless the postage or express charges shall have been paid. The clerk shall notify each party to the ~~trial court's final judgment~~ appeal and any party to the trial court's final judgment that has filed a request for copies of briefs, orders, and opinions,, as listed on the first page of the application, by letter of the filing trial court's of the application in the Supreme Court, and the clerk shall send copies of the opinion and all orders of the Supreme Court to all such parties.. Notification to parties having counsel indicated of record shall be made to lead counsel, as defined by Rule 4(b).

***EXPLANATION:** The Section Committee is of the opinion that the clerk should not be required to notify more than one attorney for each party and that copies need be sent to only those nonparties to the appeal that have filed a request for copies of briefs, orders, and opinions, as permitted by Rule 4(g).*

Notes and Comments

Change by 1994 amendments: (1) Subdivision (c) has been amended to make explicit the clerk's duty to notify counsel, implied by Rule 131(a), but to limit the duty to lead counsel. (2) Subdivision (c) has been amended further to limit the clerk's duty to send notices and copies to those absent parties that have filed a request for copies.

RULE 136. BRIEFS OF RESPONDENTS AND OTHERS

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

~~**(h) Service of Briefs.** Any application filed in the court of appeals and all briefs filed in the~~

~~Supreme Court shall at the same time be served on all parties to the trial court's final judgment.~~

Notes and Comments

Change by 1994 amendments: Former subdivision (h) has been deleted and its provisions have been included in amended Rule 4(f).

[Move unchanged rules 133, 134 and 135 to Section Six from current Section Nine and renumber rules accordingly.]

RULE 137. PETITIONER'S BRIEF IN REPLY

Petitioner may file a brief in reply to the respondent's brief confined to the issues or points in the application for writ of error. Petitioner's brief in reply shall not exceed twenty-five pages in length, exclusive of pages containing the table of contents, index of authorities, reply points or issues, and any addendum containing statutes, rules, regulations, etc.

Notes and Comments

New Rule.

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

~~RULE 160. FORM AND CONTENT OF MOTIONS FOR EXTENSION OF TIME~~

~~All motions for extension of time for filing an application for writ of error shall be filed in, directed to, and acted upon by the Supreme Court. Twelve copies of the motion for extension of time shall be filed in the Supreme Court. A copy of the motion shall also be filed at the same time in the court of appeals and the Clerk of the Supreme Court shall notify the court of appeals of the action taken on the motion by the Supreme Court. Each such motion shall specify the following:~~

~~(a) the court of appeals and the date of its judgment, together with the number and style of the case;~~

~~(b) the date upon which the last timely motion for rehearing was overruled;~~

~~(c) the deadline for filing the application; and~~

~~(d) the facts relied upon to reasonably explain the need for an extension.~~

Notes and Comments

Former Rule 160 has been deleted and its provisions have been incorporated into Rule 19(g)(3).

B. SUBMISSION IN THE SUPREME COURT

RULE 170. SUBMISSION

Causes may be heard and submitted in such order as the Supreme Court may deem to be in the best interest and convenience of the parties or their attorneys. The Supreme Court may determine that causes should be submitted without oral argument, upon the vote of at least six members.

RULE 171-172. [Move from Section 12, No change.]

C. JUDGMENTS IN THE SUPREME COURT

RULE 180. DECISION

In each cause, the Supreme Court shall either affirm the judgment of the court of appeals, or reverse and render such judgment as the court of appeals should have rendered, or remand the cause to the court of appeals, or reverse the judgment and remand the cause to the trial court, if it shall appear that the justice of the cause demands another trial.

RULE 181. [Move from Section 12 unchanged.]

RULE 182. JUDGMENT ON AFFIRMANCE OR RENDITION

(a) [No change.]

(b) Damages for Delay. Whenever the Supreme Court shall determine that an application for writ of error or an original proceeding has been taken for delay and without sufficient cause, then the court may, as a part of its judgment, award each prevailing respondent an amount not to exceed ten percent of the amount of damages awarded to such respondent as damages against such petitioner or relator. If there is no amount awarded to the prevailing respondent as money damages, then the court may award, as part of its judgment, each prevailing respondent an amount not to exceed ten times the taxable costs as damages against such petitioner or relator, or, in an original proceeding, such other amount as the court deems just.

A request for damages pursuant to this rule, or an imposition of such damages without request, shall not authorize the court to consider allegations of error that have not been otherwise properly preserved or presented for review.

Notes and Comments

Change by 1994 amendments: The penalty provision has been extended to original proceedings.

RULE 183. ENFORCEMENT OF JUDGMENT

[Move from Section 12 unchanged.]

RULE 184. REVERSAL AND REMAND

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

(c) **Nature of Remand.** If the judgment of a court of appeals shall be reversed, the Supreme Court may remand the case either to the court of appeals from which it came or to the trial court for another trial. In order to obtain a remand to the court of appeals for consideration of factual sufficiency points or other points briefed but not considered by the court of appeals, it is not necessary that such points be briefed in the Supreme Court if a request is made for such relief in the Supreme Court, either originally or on motion for rehearing.

EXPLANATION: *This proposed amendment is prompted by the opinion in which the Supreme Court refused to remand to the court of appeals for consideration of factual sufficiency cross-points not briefed in the Supreme Court, Davis v. City of San Antonio, 752 S.W.2d 518, 521-22 (Tex. 1988). The opinion indicates that the case would have been remanded if the respondent's brief had specifically prayed for a remand, but refused to allow respondent to amend its brief to request a remand. The proposed amendment would clarify the requirements for a remand to the court of appeals and would permit such a request to be made on rehearing.*

(d) Rights of Absent Parties. Except in certain kinds of cases, such as probate cases, in which the judgment of the trial court is binding on absent parties, the relief granted by the Supreme Court does not bind absent parties or adversely affect their rights.

EXPLANATION: *The Committee is of the opinion that if any party to the appeal seeks relief that would adversely affect an absent party's rights, the absent party should be named as an appellee or cross-appellee. This amendment would not affect a case where the respective rights of a successful appellant and of an unsuccessful nonappealing party "are so interwoven or dependent on each other as to require a reversal of the whole judgment" because in that case the rights of the absent party would not be adversely affected by the judgment. See such cases as Lockhart v. A. W. Snyder & Co., 163 S.W.2d 385, 392 (Tex. 1942, American Indemnity Co. v. Martin, 84 S.W. 2d 697, 698 (Tex. 1935).*

Notes and Comments

Change by 1994 amendments: Subdivision (d) and the last sentence of subdivision (e) have been added.

RULE 185. NO AFFIRMANCE, REVERSAL OR DISMISSAL FOR WANT OF FORM OR SUBSTANCE

[No change, moved from Section 12.]

RULE 186. MANDATE

[No change, moved from Section 12.]

~~SECTION FOURTEEN~~ D. REHEARING IN THE SUPREME COURT

RULE 190. MOTION FOR REHEARING

(a) **[No change.]**

(b) **Contents ~~and Service~~.** The points relied upon for the rehearing shall be distinctly specified in the motion. The motion shall state the name and address of the attorneys of record for the parties to the trial court's final judgment, and if there is no attorney of record, the name and address of the party to the trial court's final judgment. ~~The party filing such motion shall serve on each party~~ all other parties to the appeal ~~and on any parties~~ to the trial court's final judgment that ~~have filed a request for copies as permitted by Rule 4(g) or his attorney of record, a true copy of such motion, and shall note on the motion so filed with the clerk that such copies have been so served.~~

(c) **Notice of the Motion.** Upon the filing of the motion, the clerk shall notify the attorneys of record or other mail a notice of the filing to the leading counsel for all parties to the appeal and to other parties to the trial court's final judgment that have filed a request for copies as permitted by Rule (4)(g) by mail of the filing.

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

EXPLANATION: The Committee is of the opinion that notices and copies should be sent to only those nonparties to the appeal that have filed a request for copies of briefs, orders, and opinions, as permitted by Rule 4(g). The rights of an absent party not filing such a request would be protected by the proposed amendment to Rule 81, which provides that the rights of absent parties are not adversely affected by the judgment of the Supreme Court.

Notes and Comments

Change by 1994 amendments: (1) The service provisions of Subdivision (b) have been deleted and included in Rule 4(g). (2) Subdivision (c) has been amended to relieve the clerk of the duty to send notices and copies to absent parties other than those who have filed a request for copies.

SECTION SEVEN. CERTIFIED QUESTIONS IN CIVIL CASES

RULES 110-114. [No change.]

SECTION EIGHT ~~EIGHT~~. ORIGINAL PROCEEDINGS IN CIVIL CASES
RULE 120. HABEAS CORPUS IN CIVIL CASES

[No change.]

RULE 121. MANDAMUS, PROHIBITION AND INJUNCTION IN CIVIL CASES

(a) **Commencement.** An original proceeding for a writ of mandamus, prohibition or injunction in an appellate court shall be commenced by delivering to the clerk of the court the following:

(1) *Motion for Leave to File.* When the court of appeals is authorized to exercise concurrent jurisdiction over an original proceeding, the motion should first be presented to the court of appeals. The motion for leave to file in the Supreme Court shall state the date of presentation of the petition to the court of appeals and that court's action on the motion or petition or the compelling reason that a motion was not first presented to the court of appeals.

(2) *Petition.* The petition shall include this information and be in this form:

(A) The party seeking relief shall be denominated relator, and the real party in interest ~~party against whom relief is sought~~ shall be denominated respondent. Any judge, court, tribunal, or other person against whom relief is sought for an act or omission in his or her official capacity shall also be named a respondent, but his or her name shall not be included in the title of the proceeding.

(B) ~~If any judge, court, tribunal or other respondent in the discharge of duties of a public character is named as respondent, the petition shall disclose the name of the real party in interest, if any, or the party whose interest would be directly affected by the proceeding.~~ The petition shall state the address of each respondent and of his attorney, if represented in the underlying cause. ~~and real party in interest.~~

(C) The petition shall set forth in a concise and positive manner all facts that are necessary to establish relator's right to the relief sought. It shall be accompanied by a certified or sworn copy of the order complained of and other relevant exhibits.

(D) The petition shall state the relief sought and the basis for the relief, as well as the compelling circumstances which establish the necessity for the writ to issue.

(E) The petition shall include or be accompanied by a brief of authorities and argument in support of the petition.

(F) The petition shall contain an affidavit verifying the truth of all factual allegations.

(G) The petition shall contain a certificate of service, or a certificate explaining the absence of service.

~~(3) *Copies to be Filed.* Three copies of the motion, petition and brief shall be delivered to the clerk of the court of appeals when the petition is delivered to that court; if the petition is delivered to the Supreme Court, 12 copies shall be delivered.~~

~~(4) *Record and Relevant Exhibits.* The petition shall be accompanied by a certified or sworn copy of the order complained of and other relevant exhibits.~~

(3) *Record.* The relator has the burden to see that a sufficient record is presented to show the basis for the relief sought as well as the compelling circumstances which necessitate the issuance of the writ and that the relator's remedy at law is not adequate. The record shall consist of a certified or sworn copy of the order complained of and any filed paper that is material to the relator's claim for relief, together with the portion of the evidence presented, if any, in a properly authenticated form, as shall be necessary to demonstrate the relator's right to the relief sought. The relator is required to prepare the record and to deliver one copy of the record with the petition. In preparing the record, the relator shall not include more of the proceedings than is necessary and no presumption shall be applied that anything omitted from the record is relevant. Any other party may file an additional record before the date on which the petition is scheduled for oral argument.

(~~4~~5) *Deposit.* The deposit for costs shall be made as provided by Rule 13.

(b) Service. Relator shall promptly serve upon each respondent ~~and each real party in interest~~ a copy of the motion, petition, brief, and record. Service on a party represented by counsel in the underlying cause, if any underlying cause is referred to in the petition, shall be made on counsel.

(c) Action on Motion. The court may request that respondent ~~or the real party in interest~~ submit a reply, and in that event, the clerk will so notify all identified parties. When it appears that relator may be unduly prejudiced by delay, or the court concludes for any other reason that a reply should not be requested, it may act upon the motion without giving prior notice to the respondent. If the court is of the tentative opinion that relator is entitled to the relief sought, the motion for leave to file will be granted, the petition filed, and the cause placed upon the docket. Otherwise, the motion will be overruled.

(d) Temporary Relief. If the facts stated in the petition show that relator will be prejudiced unless immediate temporary relief is granted, the court may grant temporary relief after granting the motion for leave to file, without notice to respondents, as the exigencies of the case require. The court may require a bond for the protection of the adverse parties as a condition to the temporary relief. An order granting temporary relief shall be effective until the final decision of the case, unless vacated or modified.

(e) Notification ~~and Answer~~. The clerk shall notify by mail all identified parties and their attorneys, if represented by counsel, of the filing of the petition and, within seven days after mailing the notice of the filing, respondent ~~and any real party in interest, separately or jointly,~~ may file an answer with the clerk and serve upon the relator an answer, a brief of authorities, opposing exhibits, and a verified statement of any undisputed facts material to the proceeding. The court in its discretion may shorten or extend the time. The reply shall comply with the requirements set forth herein for the petition. In the event the motion is granted, relator shall immediately make the additional deposit for costs required by Rule 13.

(f) Oral Argument. In the event the motion is granted, the appellate court will schedule the petition for oral argument and relator~~,~~ and respondent ~~or any other real party in interest, separately or jointly,~~ may file and serve an additional brief of authorities and a verified answer provided, however, such additional brief and answer shall be filed with the clerk and served upon all parties at least five days prior to the date scheduled for oral argument, unless another time is designated by the court.

(g) Notice of Order. When the appellate court grants, refuses or dismisses a mandamus or other original proceeding, or a motion for rehearing, the clerk of the court shall notify counsel for the parties or any individual unrepresented parties ~~their attorneys of record~~ by sending them a letter by first-class mail.

EXPLANATION: This proposed amendment would conform the rule to the proposed amendment to Rule 4. See explanation following Rule 4(f).

Notes and Comments

Change by 1994 amendments. (1) Subdivision (a)(2)(A) has been amended to avoid naming the judge or other official in the title. (2) The provisions for filing, copies, and some of the provisions for service have been incorporated into Rule 4. (3) Subdivision (a)(3) concerning the record has been amplified. (4) Subdivisions (e) and (g) have been amended to require notice to parties represented by attorneys to be sent to counsel.

RULE 122. ORDERS OF SUPREME COURT ON PETITION FOR MANDAMUS AND PROHIBITION

In cases over which the Supreme Court has mandamus, habeas corpus, or prohibition jurisdiction and in which the action or order ~~of the respondent~~ complained of is in conflict with an opinion of the Supreme Court or is contrary to the Constitution, a statute or a rule of civil or appellate procedure, the Supreme Court may grant leave to file the petition and may, after ~~respondent and any real party in interest has~~ respondents have had an opportunity to file a reply as provided by paragraph (e) of Rule 121, without hearing argument, grant the writ and make such orders in writing as may be appropriate.

NOTE TO ADVISORY COMMITTEE: relocating these rules may require them to be renumbered.

Notes and Comments

Change by 1994 amendments: The rule has been amended to conform to the amendments to Rule 121.

NOTE TO ADVISORY COMMITTEE: Relocating these rules may require them to be renumbered.

SECTION NINE ~~TEN~~. DIRECT APPEALS TO THE SUPREME COURT

RULE 140. DIRECT APPEALS TO THE SUPREME COURT

[No change.]

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

~~RULE 160. FORM AND CONTENT OF MOTIONS FOR EXTENSION OF TIME~~

~~All motions for extension of time for filing an application for writ of error shall be filed in, directed to, and acted upon by the Supreme Court. Twelve copies of the motion for extension of time shall be filed in the Supreme Court. A copy of the motion shall also be filed at the same time in the court of appeals and the Clerk of the Supreme Court shall notify the court of appeals of the action taken on the motion by the Supreme Court. Each such motion shall specify the following:~~

~~(a) the court of appeals and the date of its judgment, together with the number and style of the case;~~

~~(b) the date upon which the last timely motion for rehearing was overruled;~~

~~(c) the deadline for filing the application; and~~

~~(d) the facts relied upon to reasonably explain the need for an extension.~~

Notes and Comments:

The provisions of this rule have been incorporated into amended Rule 19(g)(4).

SECTION TEN ~~FIFTEEN~~. DISCRETIONARY REVIEW IN CRIMINAL CASES

RULE 200. DISCRETIONARY REVIEW IN GENERAL

[No change.]

RULE 201. DISCRETIONARY REVIEW WITHOUT PETITION

[No change.]

RULE 202. DISCRETIONARY REVIEW WITH PETITION

(a) [No change.]

(b) The original petition shall be filed with the ~~C~~clerk of the ~~C~~court of A~~a~~ppeals which delivered the decision within 30 days after the day the judgment is entered or within 30 days after the day the last timely motion for rehearing is overruled. If the court of appeals issues a judgment or opinion that is in any respect different from its original or previous judgment or opinion, the petition shall be filed within 30 days after the day the court of appeals issues the corrected or modified opinion or judgment.

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

Notes and Comments

Change by 1994 amendments: The second sentence is added to conform this rule to the amendment to Rule 101.

RULE 203. BRIEF ON THE MERITS

[No change.]

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

RULES 210-214.

[No change.]

SECTION SEVENTEEN. SUBMISSIONS, ORAL ARGUMENTS, AND OPINIONS IN THE COURT OF CRIMINAL APPEALS

RULES 220-223.

[No change.]

SECTION EIGHTEEN. REHEARINGS AND MANDATE IN THE COURT OF CRIMINAL APPEALS

RULES 230-234.

[No change.]

ORDER
OF THE SUPREME COURT OF TEXAS
DIRECTING THE FORM OF THE RECORD ON APPEAL IN CIVIL CASES

Pursuant to the provisions of Rules 51(c) and 53(h), TEX.R.APP.P., the Supreme Court of Texas directs that, in the event of an appeal ~~or writ of error~~ from a trial court to an appellate court in a civil case, the clerk shall prepare a record consisting of a transcript and a statement of facts in accordance with applicable Rules in the following format:

(A) Transcript

(1) The clerk shall collect all original proceedings, instruments, and other papers (a) specified in Rule 51(a), TEX.R.APP.P., (b) designated by the parties pursuant to Rule 51(b), TEX.R.APP.P., and (c) ordered by the trial judge to be included in the transcript. Each proceeding, instrument, and other paper shall clearly show the date of filing. As far as practicable, each order and judgment shall show the date of signing by the judge, as well as date of entry in the minutes. The clerk shall then arrange ~~make a legible copy, on 8½ by 11 inch paper, of~~ all such proceedings, instruments, and other papers ~~and arrange the copies~~ in ascending chronological order, by date of filing or occurrence, separating each proceeding, instrument, or other paper one from another in such a manner that each is readily distinguishable. The clerk shall then consecutively number the pages of the transcript in the bottom right-hand corner of each page and bind them ~~the copies~~ in a heavy cover in such a manner that, when opened, the transcript will lie flat. The clerk shall include only those papers specified in Rule 51(a), specifically designated by the parties according to their titles, or ordered included by the trial judge, and shall disregard general designations, such as "all pleadings," "all other filed papers," and the like. The clerk shall not include briefs, memoranda of authorities, citations, subpoenas, interrogatories, answers to interrogatories, and the like, unless each item is specifically designated by tbe title.

On request of any party in accordance with Rule 51(d) and payment or arrangement to pay the fee therefor, the clerk shall, in lieu of the original papers, prepare, certify, and file with the appellate court a

transcript consisting of legible copies of such original papers on 8 1/2 by 11 inch paper.

(2) The clerk shall designate the transcript "Record, Volume 1~~.1~~." If the transcript consists of more than one volume, the first volume of the transcript shall be designated "Record, Volume 1.1," the second volume shall be designated "Record, Volume 1.2," and so forth, so that the transcript may be cited in the briefs simply as, for example, "R1 543" or "Tr 543".

(3) The front cover of the first volume of the transcript shall include the following information and be in substantially the following form:

TRANSCRIPT

RECORD, VOLUME 1 (OR VOLUME 1.1 OF VOLUMES)

(Trial Court) No. _____

In the _____ District (County) Court
of _____ County, Texas,
Honorable _____, Judge Presiding.

_____, Appellant(s)

vs.

_____, Appellee(s)

Appealed to the
(Supreme Court of Texas at Austin, Texas
or Court of Appeals for the ___ Court of Appeals District
of Texas, at _____, Texas).

Appellate Attorney for Appellant(s): Appellate Attorney for Appellee(s):

(name) _____ (name) _____
(address) _____ (address) _____
_____ _____
Telephone# _____ Telephone# _____
FAX # FAX #
SBOT# _____ SBOT# _____

Delivered to (Supreme Court of Texas at Austin, Texas or Court of Appeals for the ___ Court of Appeals District of Texas, at _____, Texas) on the ___ day of _____, 19_.

(signature)_____
(name of clerk)_____
(title)_____

(Appellate Court) Cause No. _____

Filed in the (Supreme Court of Texas at Austin, Texas or Court of Appeals for the ___ Court of Appeals District of Texas, at _____, Texas) this ___ day of _____, 19 _.

_____, Clerk
By_____, Deputy

The front cover of the second and subsequent volumes of the transcript shall include the same information and be in substantially the same form as that set forth above, except that second and subsequent volumes may, but need not, include statements of delivery and filing.

(4) The clerk shall prepare and include on the first pages of the transcript a detailed index identifying each proceeding, instrument, or other paper included in the transcript as it is denominated, the date of occurrence or filing, and the page where it first appears. The index must conform to the order in which matters appear in the transcript, rather than in alphabetical order. The index shall be double spaced.

(5) After the index, the clerk shall include a caption in substantially the following terms:

The State of Texas §
County of _____ §

In the _____ (County Court of Judicial District Court) of _____ County, Texas, the Honorable _____, sitting as Judge of said Court, the following proceedings were held and the following instruments and other papers were filed in this cause, to wit:

No. _____

_____	§	IN THE _____ COURT
	§	
vs.	§	
	§	
_____	§	_____ COUNTY, TEXAS

(6) The transcript shall conclude with a certificate in substantially the following form:

The State of Texas §
County of _____ §

I, _____, Clerk of the _____ Court of _____ County, Texas. do hereby certify that the above and foregoing proceedings, instruments, and other papers contained in Volume ___, Pages ___, inclusive, to which this certification is attached and made a part thereof, are all the original ~~true and correct copies of all~~ proceedings, instruments, and other papers specified by Rule 51(a), TEX.R.APP.P., all proceedings, instruments, and other papers specified by Rule 51(a), TEX.R.APP.P., and all proceedings, instruments, and other papers the trial judge ordered included in the transcript in Cause No. _____, styled _____ v. _____ in said court.

GIVEN UNDER MY HAND AND SEAL at my office in _____, Texas this ___ day of ___ _____, 19 _.

(clerk)_____
(title)_____

By _____, Deputy

(7) In the event of a flagrant violation of this Order in the preparation of a transcript, on motion of a party or *sua sponte*, the appellate court may require the clerk to amend the transcript or to prepare a new transcript in proper form at his or her own expense. In such event, the clerk may be further required to provide, at his or her own expense, a copy of the amended or new transcript to all parties who have previously made a copy of the original, defective transcript.

(B) STATEMENT OF FACTS

(1) Unless an electronically recorded statement of facts is made and filed in accordance with Rule 53(o), t~~T~~he court reporter shall type or print the statement of facts in this following format:

(a) The top and bottom margins shall be 1 inch. The margin on the left-hand side of the page shall be not less than 1¼ inches nor more than 2 inches.

(b) The statement of facts shall be in readable typeface (at least 12-point), in upper and lower case, and double-spaced.

(c) The statement of facts shall be typed or printed on one side only of opaque and unglazed white paper not less than 13-pound weight, 8½ by 11 inches in size.

(d) Each separate proceeding and hearing (pretrial hearing, voir dire, trial on the merits, etc.) shall be bound in a separate volume or as many volumes as necessary to prevent each from being over two inches thick.

(e) The first page of the first volume of the statement of facts of each such proceeding or hearing shall be numbered "1" and each following page relating to the same proceeding or hearing, whether in the first or a subsequent volume, shall be numbered consecutively at the top right-hand corner of the page, so that page references will be sufficient without referring to the particular volume number.

(f) Each volume of the statement of facts shall be securely bound on the left margin.

(g) The court reporter shall designate the statement of facts "Record, Volume 2" ~~1 of the record~~. If the statement of facts consists of more than one volume, the first volume of the statement of facts shall be designated "Record, Volume 2.1," the second volume shall be designated "Record, Volume 2.2," ~~the third volume shall be designated Volume 2.3~~, and so forth, so that the statement of facts may be cited simply as, for example, "R2 587" or "SF 587".

(2) The front cover page of each volume of the statement of facts shall include the following information and be in substantially the following form:

(Trial Court) No. _____

(NAME OF PLAINTIFF)	§	IN THE _____ COURT
	§	
vs.	§	
	§	
(NAME OF DEFENDANT)	§	OF _____ COUNTY, TEXAS

STATEMENT OF FACTS

RECORD, VOLUME 2 (OR VOLUME 2.1 OF __ VOLUMES)

APPEARANCES:

Attorney for Plaintiff(s): Attorney for Defendant(s):
(name)_____ (name)_____ (address)_____ (address)_____
Telephone #_____ Telephone #_____ FAX #_____ FAX #_____
_____ SBOT #_____ SBOT #_____

On the __ day of _____, 19__, the above entitled and numbered cause came on to be heard (for trial) in the said Court, Honorable (name of Judge presiding), Judge Presiding, and following proceedings were held, to wit:

(3) The court reporter shall include an index of the testimony at the beginning of each volume tof the satement of facts showing the following information in substantially the following form:

INDEX OF TESTIMONY

Witness	Direct	Cross	Re-Direct	Re-Cross
John Doe	4	8	16	20

A master index of the testimony of all witnesses shall be included in the statement of facts at the beginning of the first volume or as a separate volume.

(4) The court reporter shall also include an index of the exhibits at the beginning of each volume of the statement of facts showing the following information in substantially the following form:

INDEX OF EXHIBITS

Exhibit #	Description	Marked	Identified	Offered	Received
DX 1	Copy of Judgment in Cause #24310	3	4	5	6

A master index of the exhibits shall be included in the statement of facts at the beginning of the first volume or as a separate volume.

(5) Unless ordered otherwise pursuant to Rule 51(d), TEX.R.APP.P., neither physical evidence nor original exhibits are to be included in the record on appeal. Each item of physical evidence shall be described on a separate piece of paper in such a manner that it may be identified, including the exhibit number. When a legible copy of a photograph or any other paper exhibit cannot be made, the original exhibit shall be included in the record under order of the trial court made pursuant to Rule 51(d). Copies of the exhibits and the descriptions of physical evidence received in each separate proceeding or hearing shall be placed in numerical order at the end of the statement of facts of that proceeding or hearing or, if the exhibit material is voluminous, in a separate volume or volumes. ~~Original exhibits shall not be bound, but shall be sent to the appellate court in an envelope, box or other appropriate container.~~

(6) The statement of facts shall conclude with a certificate containing the following information and in substantially the following form:

THE STATE OF TEXAS §
COUNTY OF _____ §

I, _____, official court reporter in and for the _____ Court of _____ County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceeding requested in writing by counsel for the parties to be included in the statement of facts in the above styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this transcription of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

WITNESS my hand this the ___ day of ____, 19 _.

(signature)_____
Official Court Reporter

Certification Number: _____
Date of Expiration: _____
Business Address: _____
_____
Telephone Number: _____

(7) In the event of a flagrant violation of this Order in the preparation of a statement of facts, on motion of a party or *sua sponte*, the appellate court may require the court reporter to amend the statement of facts or to prepare a new statement of facts in proper form at his or her own expense. In such even, the court reporter may be further required to provide, at his or her own expense, a copy of the amended or new statement of facts to all parties who have previously made a copy of the original, defective statement of facts.

SIGNED this ___ day of _____, 1991.

_____
Chief Justice Thomas R. Phillips

_____
Justice

_____
Justice

_____
Justice

_____
Justice

_____
Justice

_____
Justice

_____
Justice

_____
Justice

Notes and Comments

Change by 1994 amendments: The changes would conform the order to the amendments to Rules 51 and 53.

LIDDELL, SAPP, ZIVLEY, HILL & LABOON, L.L.P.
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March 14, 1994

TO: SEE ATTACHED ADDRESSEE LIST

Re: Sanctions

Dear Members of the Rules Advisory Committee:

One of the issues unresolved when we adjourned in January was the status of what comment, if any, should be made to a new Rule 166d having to do with the nature of the hearing and the kinds of evidence that would be required or permitted for a court to consider in deciding whether or not to impose sanctions. For the time being, we propose the following comment:

Comment to Rule 166d

Nature of Hearing and Evidence. Due process requires that, before sanctions are imposed, the alleged offender be afforded fair notice and an opportunity to be heard. The procedure employed may vary with the circumstances, provided that due process requirements are satisfied. The court, in its discretion, shall determine whether to hold a hearing on sanctions under consideration, as well as the type of evidence to be considered. See [Rule on Hearings, Task Force on Revision of the Texas Rules of Civil Procedure]. A hearing is ordinarily required prior to the issuance of any sanction that is based upon a finding of bad faith on the part of the alleged offender. A hearing is appropriate whenever it would assist the court in its consideration of the sanctions issue or would significantly assist the alleged offender in the presentation of his or her defense.

None of the Subcommittee members is entirely happy with this language, but we do not feel it is a good idea to go further in drafting a comment at this time for two reasons. First, in our January meeting, a majority of the full Committee favored Tommy Jacks' approach to limiting a trial court's power to impose sanctions in discovery controversies, at least in the initial stages. The Subcommittee Members feel that until the full Committee has approved the language that it wants to submit on this pivotal issue, it is difficult if not impossible to draft an appropriate comment. You will recall that Tommy Jacks was to work further on a version of

the Sanctions Rule acceptable to him, but his schedule is such that he has been unable to complete his draft. He will not be able to meet with us this Friday, and so we feel we can go no further at this time. If the full Committee finally decides to propose a rule on sanctions substantially similar to that proposed by Tommy Jacks, a majority of the members of the Subcommittee on Sanctions expect to recommend an alternate or minority proposal to the Supreme Court substantially along the lines recommended by the Sanctions Task Force as modified by discussions in our recent meetings of the full Committee, namely a codification of Transamerican.

Second, a majority of the Subcommittee on Sanctions believes that the issue of what things a trial court may consider is of such importance that it should be addressed with all of the rules in mind rather than being restricted to a rule on sanctions. What we are getting to here is the question of whether such a list should apply to motions for continuance and other pretrial matters. One of the issues of most concern is whether a trial court may even consider unsworn representations of counsel in making its decision, and whether if the trial court may consider such representations, it is required to afford opposing counsel the right to cross-examine, and so forth. We feel that these issues should be discussed by the entire Committee and that the decision of the Committee should be incorporated to apply to more than just sanctions.

I look forward to seeing each of you this Friday and Saturday.

Yours truly,

Joe Latting

Joseph Latting
For the Firm

JL/cb

cc: The Honorable Nathan L. Hecht
Mr. Lee Parsley
Ms. Holly H. Duderstadt

A1/230603.
1000/002

Texas Supreme Court Advisory Committee
Discovery Subcommittee

Working Draft (3/14) -- Discovery Period, Modification, Interrogatory, Expert Witness, and Deposition Rules

RULE 166b. FORMS AND SCOPE OF DISCOVERY; *DISCOVERY PERIOD;* PROTECTIVE ORDERS; SUPPLEMENTATION OF RESPONSES.

. . . .

3. **Discovery Period.** The discovery period shall begin on the date of the first oral deposition or the date on which the first documents are produced upon the request of any party to the action, whichever is earlier, and shall continue for six months. The discovery period may be shortened or extended by the court for good cause shown or by agreement of the parties.

RULE 166c. *MODIFICATION OF DISCOVERY PROCEDURE AND LIMITATIONS BY AGREEMENT AND BY COURT ORDER; MEANING OF "SIDE".*

1. **Modification by Agreement.** The parties may by written agreement modify the procedures and limitations set forth in these rules. An agreement affecting an oral deposition is enforceable if the agreement is recorded in the deposition transcript.

2. **Modification by Court Order.** The procedures and limitations set forth in these rules may be modified by court order, either upon the court's own initiative or upon a showing of good cause.

3. **Meaning of "Side."** For the purpose of any discovery limitation set forth in these rules, a "side," unless otherwise agreed upon by the parties, shall be determined by the court pursuant to the provisions of Rule 233.

RULE 167. REQUESTS FOR PRODUCTION AND INSPECTION

[TO FOLLOW]

RULE 167b. ENTRY UPON PROPERTY

[TO FOLLOW]

RULE 168. INTERROGATORIES TO PARTIES.

(a) Availability. Any party may file with the court and serve upon any other party written interrogatories, not exceeding [30] in number, including discrete subparts, to be answered by the party served, or, if the party served is a public or private corporation or a partnership or association, or governmental agency, by an officer or agent who shall furnish such information as is available to the party. Interrogatories that ask another party only to identify or authenticate specific documents as contemplated by Article IX of the Texas Rules of Civil Evidence shall be unlimited in number. Interrogatories may be served upon the plaintiff after commencement of the action and upon any other party with or after the service of the citation and petition upon that party.

(b) Answers and Objections.

(1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for the objection and shall answer to the extent the interrogatory is not objectionable. Answers and objections shall be preceded by the interrogatory to which they respond.

(2) The answers shall be signed and verified by the party making them, and the objections shall be signed by the attorney making them. The provisions of Rule 14 shall not apply.

(3) The party upon whom the interrogatories have been served shall file with the court and serve a copy of the answers, and objections, if any, not less than 30 days after the service of the interrogatories, except that, if the interrogatories accompany citation, a defendant may serve answers within 50 days after service of the citation and petition upon that defendant.

(4) All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown.

(c) Scope, Use at Trial. Interrogatories may relate to any matters which can be inquired into under Rule 166b, but the answers, subject to any objections as to admissibility, may be used only against the party answering the interrogatories. It is not ground for objection that such an interrogatory involves an opinion or contention that relates to fact or the application of law to fact.

(d) Contention interrogatories. A party can use contention interrogatories only (1) to request another party to generally state the facts and specifically state the legal theories upon which that party bases particular allegations, and (2) to request another party to admit or deny specific facts.

(e) Option to Produce Records. Where the answer to an interrogatory may be derived or ascertained from public records or from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and, if applicable, to provide to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. The

specification of records provided shall include sufficient detail to permit the interrogating party to locate and to identify as readily as can the party served, the records from which the answers may be ascertained, and shall specifiy a reasonable time and place at which the documents can be examined not to exceed 10 days after the date the interrogatory answer is filed.

Comment to Rule 168(d):

The answer to a contention interrogatory shall provide information sufficient to apprise the requesting party of the positions the answering party will take at trial and the factual basis thereof. A party need not marshall its proof to answer a contention interrogatory, but need only disclose more precisely the basis of its pleadings. The trial court shall not exclude evidence just because the evidence was not disclosed in answer to a contention interrogatory if the objecting party had other notice of the evidence. Only if the answer prejudiced or misled the objecting party should the contention interrogatory answer be grounds for exclusion.

RULE 170. EXPERT WITNESSES.

1. Designation of Expert Witnesses. The plaintiff shall designate any witness who is expected to offer expert testimony at trial no later than sixty (60) days before the end of the discovery period. The defendant then shall have fifteen (15) days in which to designate witnesses expected to offer expert testimony at trial. Failure to timely designate an expert expected to testify at trial shall be grounds for exclusion of the witness's expert testimony.

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

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

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

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

d. General Substance. The general substance of the expert's mental impressions and opinions.

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

3. Discovery of Documents and Tangible Things. Documents and tangible things

prepared by, provided to, or reviewed by the expert in anticipation of the expert's trial or deposition testimony may be obtained by any permissible form of discovery.

4. **Additional Discovery.** A party may obtain additional discovery regarding the mental impressions and opinions held by the expert and the facts provided to the expert only by oral deposition of the expert. A court may not order the creation of an expert's written report.

5. **Expert Depositions.** A party's experts may be deposed at any time during the forty-five (45) day period immediately following the designation of the experts. The deposition testimony of only two experts designated by any side shall count against the deposition testimony limitation set forth in Rule 200. If any side designates more than two experts, the opposing side shall be allowed an additional six (6) hours of deposition testimony for each additional expert designated.

6. **Failure to Use Expert Testimony.** If a case goes to trial, the court may, upon the request of a party, require an opposing party to reimburse the costs, including legal fees, of deposing any expert designated by such opposing party whose testimony is not used during trial.

RULE 200. DEPOSITIONS UPON ORAL EXAMINATION

1. **When Depositions May Be Taken.** After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination.

Leave of court, granted with or without notice, must be obtained only if a party seeks to take a deposition prior to the appearance day of any defendant.

2. **Notice of Examination: General Requirements; Notice of Deposition of Organization.**

a. Reasonable notice must be served in writing by the party, or his attorney, proposing to take a deposition upon oral examination, to every other party or his attorney of record. The notice shall state the name of the deponent, the time and the place of the taking of his deposition, and if the production of documents or tangible things in accordance with Rule 201 is desired, a designation of the items to be produced by the deponent either by individual item or by category and which describes each item and category with reasonable particularity. The notice shall also state the identity of persons who will attend other than the witness, parties, spouses of parties, counsel, employees of counsel, and the officer taking the deposition. If any party intends to have any other persons attend, that party must give reasonable notice to all parties of the identify of such other persons.

b. A party may in his notice name as the deponent a public or private corporation or a partnership or association or governmental agency, ~~and describe with reasonable particularity the matters on which examination is requested pursuant to TEX. R. CIV. P. 201(4).~~

3. LIMITATIONS

a. Each side to the litigation shall be entitled to initiate no more than fifty (50) hours of deposition testimony.[1] ~~except by:~~

~~1) agreement of all the parties to the litigation, pursuant to Rule 166c;~~

~~2) court order, upon the court's own initiative, in the interest of fairness and justice, or upon a showing of good cause;~~

~~b. For purpose of this rule a "side," unless otherwise agreed upon by the parties, shall be determined by the court pursuant to the provisions of Rule 233 TEX.R.CIV.P.~~

b. Only time consumed by the initiating party's examination of the deponent shall count against the initiating side's limitation. Testimony in response to cross examination by opposing sides shall count against their respective limitations.

c. The following shall not count against the fifty (50) hour limitation:

1) Examination by parties other than the initiating party;

2) Examination of the initiating party's expert witnesses by the initiating party;

3) Breaks during the deposition;

(Amended April 12, 1962, eff. Sept. 1, 1962; July 21, 1970, eff. Jan. 1, 1971; Oct. 3, 1972, eff. Feb. 1, 1973; Dec. 5, 1983, eff. April 1, 1984; April 24, 1990, eff. Sept. 1, 1990.)

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[1] Only time consumed by the initiating party's examination of the deponent is to be used in computing the limitation.

Notes and Comments

Source: Art. 3753, unchanged.

Change by amendment effective September 1, 1962: Provision regarding subpoena duces tecum inserted.

Change by amendment effective January 1, 1971: Reference to rule 202 has been changed to Rule 201.

Change by amendment effective February 1, 1973: Sentence providing that a corporation, partnership, association or governmental agency may be named as the witness has been added.

Change by amendment effective April 1, 1984: The rule is rewritten. The first sentence of paragraph one is taken from former Rule 186a and Fed.R.Civ.P. 30(a). The second sentence is based upon former Rule 186b and Fed.R.Civ.P. 30(a) and (b)(2). Paragraph two has been redrafted to provide that all parties are entitled to notice of a deposition and to conform it to the provisions of Rule 201 dealing with the subpoena duces tecum and designation of a witness by corporate deponents. The new language in section 2b is a verbatim adoption of the first sentence of Federal Rule 30(b)(6).

Comment to 1990 change: To provide for persons who may attend deposition without notification, and to provide for reasonable notice of any party's intent to have any other persons attend.

Comment to 1994 change: To provide limitations on the total number of hours that the various sides to a lawsuit can consume taking depositions, without leave of court.

RULE 201. COMPELLING APPEARANCE; PRODUCTION OF DOCUMENTS AND THINGS; DEPOSITION OF ORGANIZATION

Any person may be compelled to appear and give testimony by deposition in a civil action.

1. **Subpoena.** Upon proof of service of a notice to take a deposition, written or oral, the clerk or any officer authorized to take depositions and any certified shorthand reporter shall immediately issue and cause to be served upon the witness a subpoena directing him to appear before the officer at the time and place stated in the notice for the purpose of giving his deposition.

2. **Production.** A witness may be compelled by subpoena duces tecum to produce items or things within his care, custody or control. The subpoena duces tecum shall direct with particularity the witness to produce, at such time and place designated, documents or tangible things which constitute or contain evidence or information relating to any of the matters within the scope of the examination permitted by Rule 166b; but in that event the subpoena will be subject to the provisions of Rules 177a and 166b.

3. **Party.** When the deponent is a party, service of the notice upon the party or his attorney shall have the same effect as a subpoena served on the party. If the deponent is an agent or employee who is subject to the control of a party, notice to take the deposition which is served upon the party or the party's attorney of record shall have the same effect as a subpoena served on the deponent. A party or party's agents or employees or persons subject to that party's control, may be compelled to produce designated documents or tangible things, as in paragraph 2 hereof, if the notice sets for the individual items or categories of items to be produced with reasonable particularity.

4. **Organizations.** ~~When the deponent named in the subpoena or notice~~

~~is a public or private corporation, a partnership, association or governmental entity, the subpoena or notice shall direct the deponent so in the deponent's behalf, and, if the deponent so desires, the matters on which each person designated will testify, and shall further direct that the person or persons designated by the deponent will testify and the notice shall further direct that the person or persons designated by the deponent appear before the officer at the time and place stated in the subpoena or notice for the purpose of giving their testimony.~~

A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or organization or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The person so designated shall testify as to matters know or reasonably available to the organization. The subdivision doe not preclude taking a deposition by any other procedure authorized by these rules.[2]

5. **Time and Place.** The time and place designated shall be reasonable. The place of taking a deposition shall be int he county of the witness' residence or, where he is employed or regularly transacts business in person or at such other convenient place as may be directed by the court in which the cause is pending;

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[2] The revisor recommends replacing the present Texas rule regarding depositions of organizations, with the Federal Rule, which is clearer and has developed a body of interpretative cases that can be referred to for guidance.

provided, however, the deposition of a party or the person or persons designated by a party under paragraph 4 above may be taken in the county of suit subject to the provisions of paragraph 5 of Rule 166b. A nonresident or transient person may be required to attend in the county where he is served with a subpoena, or within one hundred miles form the place of service, or at such other convenient place as the court may direct. The witness shall remain in attendance from day to day until such deposition is begun and completed.

(Amended July 21, 1970, eff. Jan. 1, 1971; Oct. 3, 1972, eff. Feb. 1, 1973; June 10, 1980, eff. Jan. 1, 1981; Dec. 5, 1983, eff. April 1, 1984; April 24, 1984, eff. Oct. 1, 1984; July 15, 1987, eff. Jan. 1, 1988; April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

Note: Rules 201, 202, and 203 as originally adopted contained the provisions of Arts. 3754, 3755 and 3756, unchanged.

Change by amendment effective January 1, 1971; Former Rules 201, 202 and 203 have been combined; references to the commission and provision allowing party to require deposition taken more than 100 miles from court where suit is pending to be on written interrogatories have been eliminated; and provisions have been added: (1) making notice to take deposition of a party suffice as a subpoena where party has attorney of record, and (2) that deposition of a party may be taken in county of suit subject to provisions of Rule 186b.

Change by amendment effective February 1, 1973: Sentence concerning subpoena where witness is a corporation, partnership, association or governmental agency and not a party to the suit has been added.

Change by amendment effective January 1, 1981: The rule is completely rewritten.

Change by amendment effective April 1, 1984: Statutory references concerning persons authorized to take depositions have been deleted from section one. A change has been made to limit the coverage of current Rule 201(5) so that the county of suit principle applies only to persons designated by organizations, etc., who are parties.

RULE 202. NON-STENOGRAPHIC RECORDING; DEPOSITION BY TELEPHONE

1. **Non-stenographic Recording.** Any party may cause the testimony and other available evidence at a deposition upon oral examination to be recorded by other than stenographic means, including videotape recordings, without leave of court, and the non-stenographic recording may be presented at trial in lieu of reading from a stenographic transcription of the deposition, subject to the following rules:

a. Any party intending to make a non-stenographic recording shall ~~give five days' notice to all other parties by certified mail, return receipt requested, and shall specify in said notice the type of non-stenographic recording which will be used.~~ **state in the notice the method by which the testimony shall be recorded.**

b. After the notice is given **pursuant subsection (a),** any party may ~~make a motion~~ **move** for relief under Rule 166b. If a hearing is not held prior to the taking of the deposition, the non-stenographic recording shall be made subject to the court's ruling at a later time.

c. With reasonable prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the side taking the deposition. The additional record or transcript shall be made at that side's expense unless the court otherwise orders.[3]

d. Any party shall have reasonable access to the original recording and may obtain a duplicate copy at his own expense.

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[3] Source FRCP 30(b)(3).

e. ~~The expense of a non-stenographic recording shall not be taxed as costs, unless before the deposition is taken, the parties so agree, or the court os orders on motion and notice.~~ **The side initiating the non-stenographic recording shall bear the expense of the nonstenographic recording, subject to an order of the court, upon motion and notice, at the conclusion of the case, taxing the expense as court costs.**

f. ~~The non-stenographic recording shall not dispense with the requirement of a stenographic transcription of the deposition unless the court shall so order on motion and notice before the deposition is taken, and such order shall also make such provision concerning the manner of taking, preserving and filing the non-stenographic recording as may be necessary to assure that the recorded testimony will be intelligible, accurate and trustworthy. Such order shall not prevent any party from having a stenographic transcription made at his own expense.~~ In the event of an appeal, the non-stenographic recording shall be reduced to writing.

2. **Deposition by Telephone.** ~~The parties may stipulate in writing, or the court may upon motion order, that a deposition be taken by telephone.~~ **Any party, without leave of court, upon reasonable notice, may take a deposition by telephone or other remote electronic means, subject to the subsection 1(b) of this rule.** For the purposes of this rule and Rules 201, 215-1a and 215-2a, a deposition taken by telephone is taken in the district and at the place where the deponent is to answer questions propounded to him. [ADD PROVISION ABOUT LOCATION OF COURT REPORTER]. (Added Dec. 5, 1983, eff. April 1, 1984.)

Notes and Comments

This is a new rule effective April 1, 1984: This combines former Rule 215c with new deposition by telephone material that was taken form Federal Rule 30(b)(7).

Notes and Comments

The rule has been amended to make clear that any party, as a matter of right, upon reasonable notice, may take a record a deposition by other than stenographic means, including by telephone or other remote electronic means. Determination of whether such activities shall be taxed as costs shall be deferred until the conclusion of the case.

RULE 203. FAILURE OF PARTY OR WITNESS TO ATTEND OR TO SERVE SUBPOENA; EXPENSES

1. **Failure of Party Giving Notice to Attend.** If the party giving the notice of the taking of an oral deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney fees.

2. **Failure of Witness to Attend.** If a party gives notice of the taking of an oral deposition of a witness and the witness does not attend because of the fault of the party giving the notice, if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney fees.

(Added Dec. 5, 1983, eff. April 1, 1984.)

Notes and Comments

This is a new rule effective April 1, 1984. This is former Rule 215b with modification.

RULE 204. EXAMINATION, CROSS-EXAMINATION AND OBJECTIONS

1. **Written Cross-Questions on Oral Examination.** At any time before the expiration of ten days from the date of the service of the notice provided for in Rule 200, any party, in lieu of participating in the oral examination may serve written questions on the party proposing to take the deposition who shall cause them to be transmitted to the officer authorized to take the deposition who shall propound them to the witness and record the answers verbatim.

2. **Oath.** Every person whose deposition is taken upon oral examination shall be first cautioned and sworn to testify the truth, the whole truth and nothing but the truth.

3. **Examination.** The witness shall be carefully examined, his testimony shall be recorded at the time it is given and thereafter transcribed by the officer taking the deposition, or by some person under his personal supervision.

4. **Objections to Testimony.** ~~The deposition shall be conducted as if the testimony were being obtained in court, during trial. No conferences shall take place between the deponent and any participants to the deposition during examination. There shall be no objections made during the deposition, except to preserve recognized privileges under Rule ___ TEX. R. CIV. EVID. Unless agreed by all participating sides, on the record, all statements, objections and discussions of all participants shall be on the record and may be played or read to the jury or court during trial.~~ The deposition shall be conducted as if the testimony were being obtained in court, during trial. No conferences shall take place between the deponent and any participants to the deposition during examination, except to ascertain whether such privileges should be asserted. No

objections shall be made during the deposition, except to preserve recognized privileges.[4] Unless agreed by all participating sides, on the record, all statements, objections and discussions of all participants shall be on the record and may, upon leave of court, be played or read to the jury or court during trial.[5] The officer taking an oral deposition shall not sustain objections made to any of the testimony or fail to record the testimony of the witness because an objection is made by any of the parties or attorneys engaged in taking the testimony. Any objections made when the deposition is taken shall be recorded with the testimony and reserved for the action of the court in which the cause is pending. ~~Absent express agreement recorded in the deposition to the contrary:~~

~~(a) objections to the form of questions or the nonresponsiveness of answers are waived if not made at the taking of an oral deposition and;~~

~~(b) except as provided in (a) above, or unless otherwise provided by agreement of the parties recorded by the officer in the deposition transcript, the court shall not be confined to objections made at the taking of the testimony.~~

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[4] The committee recognizes the concern some attorneys may have that a questioner will take advantage of a witness if no one can assert objections at the deposition. Such tactics are of course discouraged and could be the subject of protective orders or sanctions. The committee believes the benefit of eliminating unnecessary, time-consuming and oftentimes acrimonious exchanges between counsel outweighs the potential harm of such abuse, particularly in view of the following options available to an attorney who believes his client is prejudiced by such tactics. An attorney has the right to cross examine the deponent at the time of the deposition to clarify ambiguities and misunderstandings. Further, the witness may correct the deposition at the time of signing. Lastly, a party may assert objections at time of trial, seeking to have improper questions and the responses to them stricken.

[5] The Supreme Court Advisory Board Discovery Subcommittee believes there is presently a tremendous waste of resources brought about by meaningless objections and colloquy during depositions. By eliminating the ability to make objections during the deposition and by imposing the option of playing obstructionist statements to the jury, the subcommittee believes the deposition process will be made more efficient and restore professionalism to the exercise.

(Amended Aug. 18, 1947, eff. Dec. 31, 1947; July 21, 1970, eff. Jan. 1, 1971; Dec. 5, 1983, eff. April 1, 1984; July 15, 1987, eff. Jan. 1, 1988.)

Notes and Comments

Source: Art. 3578, unchanged.

Change by amendment effective December 31, 1947: The previous rule has been almost completely redrafted and the procedure as to cross-interrogatories has been materially altered.

Change by amendment effective January 1, 1971: The requirement that written interrogatories be filed with the clerk and the reference to the commission have been eliminated; the word "questions" has been substituted for "interrogatories"; and a provision has been added requiring the party proposing to take the deposition to cause written questions to be presented to the officer.

Change by amendment effective April 1, 1984: Section one is former Rule 204 revised; section 2 comes form former Rule 205; section 3 from former Rule 206; section 4 from former Rule 207. A major change is the waiver of objections to form of questions and responsiveness of answers if not made at taking of oral deposition.