AGENDA - VOLUME 1
NOVEMBER 22-23, 1996
SCAC MEETING

INDEX - VOLUME 1

PRELIMINARY DRAFT OF PROPOSED REVISIONS TO THE TEXAS RULES OF APPELLATE PROCEDURE

This draft consists of the initial recommendations of the Supreme Court Advisory Committee, edited for style by Bryan A. Garner, with tentative modifications by the Supreme Court. This draft has not been approved by the Supreme Court or the Court of Criminal Appeals, nor has it been finally reviewed by the Advisory Committee or Mr. Garner.

November 20, 1996

CURRENT RULE	PROPOSED RULE
SECTION ONE. APPLICABILITY OF RULES	SECTION ONE. APPLICABILITY OF RULES
RULE 1. SCOPE OF RULES; LOCAL RULES OF COURTS OF APPEALS	**RULE 1. SCOPE OF RULES; LOCAL RULES OF COURTS OF APPEALS**
(a) **Scope of Rules.** These rules govern procedure in appeals to courts of appeals from district courts, constitutional county courts, county courts at law and other statutory courts; review by the Court of Criminal Appeals or the Supreme Court of decisions of the courts of appeals; in direct appeals of death penalty cases to the Court of Criminal Appeals from district courts; in direct appeals to the Supreme Court from district courts; and in applications for writs or other relief which a court of appeals, the Court of Criminal Appeals, the Supreme Court or any judge of any appellate court is competent to give.	(a) **Scope.** These rules govern procedure in appellate courts and before appellate judges.
(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.	(b) **Local Rules.** (1) *Promulgation.* A court of appeals may promulgate rules governing its practice that are not inconsistent with these rules. Local rules governing civil cases must first be approved by the Supreme Court.Local rules governing criminal cases must first be approved by the Court of Criminal Appeals. (2) *Copies.* The clerk must provide a copy of the court's local rules to anyone who requests them. (3) *Party's noncompliance.* A court must not dismiss an appeal for noncompliance with a local rule without giving the noncomplying party notice and a reasonable opportunity to cure the noncompliance.
	Notes and Comments Comment to 19957 change: Paragraph Subdivision (a) is simplified without substantive change. Subdivision (b) is divided into subparts and amended to make clear that any person is entitled to a copy of local rules. Paragraph (b)(3), restricting dismissal of a case for noncompliance with a local rule, is added.

CURRENT RULE	PROPOSED RULE
RULE 2. RELATIONSHIP TO JURISDICTION AND SUSPENSION	RULE 2. SUSPENSION OF RULES
(a) Relationship to Jurisdiction. These rules shall not be construed to extend or limit the jurisdiction of the courts of appeals, the Court of Criminal Appeals or the Supreme Court as established by law.	
(b) Suspension of Rules in 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 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.	On a party's motion or on its own initiative an appellate court may — to expedite a decision or for other good cause — suspend a rule's operation in a particular case and order a different procedure; but a court must not construe this rule to suspend any provision in the Code of Criminal Procedure or to alter the time for perfecting an appeal in a civil case.
	Notes and Comments Comment to 1997 change: Former subdivision (a) regarding the jurisdiction of the appellate courts is deleted. The power to suspend rules is extended to civil cases. Other nonsubstantive changes are made.

CURRENT RULE	PROPOSED RULE
SECTION TWO. GENERAL PROVISIONS	SECTION TWO. GENERAL PROVISIONS
RULE 3. DEFINITIONS; UNIFORM TERMINOLOGY	RULE 3. DEFINITIONS; UNIFORM TERMINOLOGY
(a) Terms in Rules. Certain terms used in these rules are defined as follows: 'Appellant' is the party taking the appeal or suing out a writ of error to the court of appeals. 'Appellee' is the party adverse to 'appellant.' 'Petitioner' is the party applying to the Supreme Court for a writ of error, 'Respondent' is the party adverse to 'petitioner' in the Supreme Court. 'Court below' is the trial court from which the appeal or writ of error is taken. 'Appellate court' includes the courts of appeals, the Supreme Court and the Court of Criminal Appeals. 'Relator' is the person seeking relief in an original proceeding in the appellate court. 'Respondent' is the party against whom relief is sought in an original proceeding in the appellate court. 'Applicant' is a party seeking a writ of habeas corpus in the trial court.	**(a) Definitions.** (1) *Appellant* means a party taking an appeal to an appellate court. (2) *Appellate court* means the courts of appeals, the Court of Criminal Appeals, and the Supreme Court. (3) *Appellee* means a party adverse to an appellant. (4) *Petitioner* means a party petitioning the Supreme Court for review. (5) *Relator* means a person seeking relief in an original proceeding in an appellate court. (6) *Respondent* means: (A) a party adverse to a petitioner in the Supreme Court; or (B) a party against whom relief is sought in an original proceeding in an appellate court.
(b) Uniform Terminology in Criminal Cases. SUPREME COURT TEXT In briefs and other papers in criminal appeals, the parties should be referred to as 'the appellant' and 'the appellee;' procedural labels such as 'appellee,' 'petitioner,' 'respondent,' 'movant,' etc. should be avoided unless they are necessary to clarify a question of procedural law. In habeas corpus proceedings the person for whose relief the writ is asked should be referred to as 'the applicant.'	**(b) Uniform Terminology in Criminal Cases.** In documents filed in criminal appeals, the parties are *the State* and *the appellant*. But if the State has appealed under Article 44.01 of the Code of Criminal Procedure, the defendant is *the appellee*. Otherwise, papers should use real names for parties, and such labels as *appellee, petitioner, respondent,* and *movant* should be avoided unless necessary for clarity. In habeas corpus proceedings, the person for whose relief the writ is requested is *the relator*.

CURRENT RULE	PROPOSED RULE
	Notes and Comments Comment to 1997 change: The writ of error is now referred to as an "appeal" in Rule 45 and the definitions of "appellant" and "appellee" apply to a writ of error appeal. Therefore, the reference to suing out a writ of error to the court of appeals is deleted from subdivision (a). The definitions of "court below" and "applicant" are deleted from subdivision (a) as those terms are no longer used in these rules. The version of subdivision (b) previously adopted by the Supreme Court was deleted in favor of the version previously adopted by the Court of Criminal Appeals. Other nonsubstantive changes are made.

CURRENT RULE	PROPOSED RULE
RULE 4. SIGNING, FILING AND SERVICE	RULE 4. SIGNING; FILING; NUMBER OF COPIES; FORM OF DOCUMENTS; SERVICE
(a) Signing. Each 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 brief and give his address and telephone number.	(a) Signing. (1) *Represented parties.* If a party is represented by counsel, a document filed on that party's behalf must be signed by at least one of the party's attorneys. For each attorney whose name appears on a document as representing that party, the document must contain that attorney's State Bar of Texas identification number, mailing address, telephone number, and fax number, if any. (2) *Pro se parties.* A party not represented by counsel must sign any document that the party files and give the party's address and telephone number.
(b) Filing. The filing of records, briefs and other papers in the appellate court as required by these rules shall be made by filing them with 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, 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 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.	(b) Filing. (1) *With whom.* A document is filed in an appellate court by delivering it to: (A) the clerk of the court in which the document is to be filed; or (B) a justice or judge of that court who is willing to accept delivery. A justice or judge who accepts delivery must note on the document the date and time of delivery, which will be considered the time of filing, and must promptly send it to the clerk. (2) *Mailed documents.* A document received within ten days after the filing deadline is considered timely filed if : (A) it was sent to the proper clerk by United States Postal Service first-class, express, registered, or certified mail; (B) it was placed in an envelope or wrapper properly addressed and stamped; and (C) it was deposited in the mail on or before the last day for filing.

CURRENT RULE	PROPOSED RULE
	(3) *Proof of mailing.* Though it may consider other proof, the appellate court will accept the following as conclusive proof of the date of mailing: (A) a legible postmark affixed by the United States Postal Service; (B) a receipt for registered or certified mail if the receipt is endorsed by the United States Postal Service; or (C) a certificate of mailing by the United States Postal Service. (4) *Electronic filing.* A court of appeals may by local rule permit papers to be filed, signed, or verified by electronic means that are consistent with technological standards, if any, that the Supreme Court establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.

CURRENT RULE	PROPOSED RULE
(c) Number of Copies. (1) Each party shall file six copies of briefs, petitions, motions and other papers with the Clerk of the Court of Appeals in which the case is pending. Any court of appeals may by local rule authorize the filing of fewer or more copies. (2) SUPREME COURT TEXT Each party shall file twelve copies of its application for writ of error or of its petition for discretionary review with the Clerk of the Court of Appeals. (2) COURT OF CRIMINAL APPEALS TEXT Each party shall file twelve copies of its application for writ of error with the Clerk of the Court of Appeals. In addition to filing an original petition for discretionary review with the Clerk of the Court of Appeals, the party shall deliver eleven copies. The State Prosecuting Attorney may deliver the eleven copies to the Clerk of the Court of Criminal Appeals. (3) Each party shall file twelve copies of all other papers addressed to the Supreme Court or Court of Criminal Appeals with the clerk of the court to which it is addressed.	(c) Number of Copies. (1) *Courts of Appeals.* (A) A party must file: (i) the original and two copies of all documents in an original proceeding; (ii) the original and two copies of all motions in an appellate proceeding; and (iii) the original and five copies of all other documents. (B). A court of appeals may by local rule require the filing of more or fewer copies of any document other than a petition for discretionary review. (2) *Supreme Court and Court of Criminal Appeals.* A party must file the original and 11 copies of any document addressed to either the Supreme Court or the Court of Criminal Appeals. (3) *Exception for record.* Only one copy of the record need be filed in any proceeding.

CURRENT RULE	PROPOSED RULE
(d) Papers Typewritten or Printed. SUPREME COURT TEXT All applications, briefs, petitions, motions and other papers shall be printed or typewritten. The use of recycled paper is strongly encouraged. Typewritten papers must be with a double space between the lines and on heavy white paper in clear type. **(d) Papers Typewritten or Printed.** COURT OF CRIMINAL APPEALS TEXT All applications, briefs, petitions, motions and other papers shall be printed or typewritten. Typewritten papers must be with a double space between the lines and on heavy white paper in clear type.	(d) Form. Except for the record, a document filed with an appellate court must — unless the court accepts another form in the interest of justice — be in the following form: (1) *Printing.* A document may be produced by standard typographic printing or by any duplicating process that produces a distinct black image. Printing may appear on both sides of the paper. (2) *Paper type and size.* The paper on which the document is produced must be white or nearly white, and opaque. Paper must be 8½ by 11 inches. (3) *Margins.* Papers must have at least one-inch margins on both sides and at the top and bottom. (4) *Spacing.* Text must be double-spaced, but footnotes, block quotations, short lists, and issues or points of error may be single-spaced.
	(5) *Typeface.* A document must be printed in standard 10-character-per-inch (cpi) nonproportionally spaced Courier typeface or in 13-point or larger proportionally spaced typeface. But if the document is printed in a proportionally spaced typeface, footnotes may be printed in typeface no smaller than 10-point.

CURRENT RULE	PROPOSED RULE
	(6) *Binding and covering.* A petition for review, petition for discretionary review, or brief must be bound so as to ensure that it will not lose its cover or fall apart in regular use. A petition or brief should be stapled once in the top left hand corner or be bound so that it will lie flat when open, and the front and back covers should be durable. Covers must not be plastic or be red, black, or dark blue. (7) *Contents of cover.* A document's front cover must contain the case style, the cause number, the title of the document being filed, the name of the party filing the document, the name, mailing address, telephone number, fax number, and State Bar of Texas identification number of the lead counsel for the filing party. If a party requests oral argument in the court of appeals, the request must appear on the front cover of the brief. (8) *Appendix.* An appendix may be bound either with the document to which it is related or separately. If separately bound, the appendix must comply with paragraph (6). An appendix should be tabbed and indexed. (9) *Nonconforming documents.* Unless every copy of a document conforms to these rules, the court may strike the document and return all nonconforming copies to the filing party. The court must identify the error to be corrected and state a deadline for the party to resubmit the document in a conforming format. If another nonconforming document is filed, the court may strike the document and prohibit the party from filing further documents of the same kind. The use of footnotes, smaller or condensed typeface, or compacted or compressed printing features to avoid the limits of these rules are grounds for the court to strike a document.

CURRENT RULE	PROPOSED RULE
(e) Service of All Papers Required. Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served by a party or person acting for him on all other parties to the appeal or review. Service on a party represented by counsel shall be made on counsel. **(f) Manner of Service.** Service may be personal, by mail, or by telephonic document transfer to the party's current telecopier number. Personal service includes delivery of the copy to a clerk 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. **(g) 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 acknowledgement or proof of service but shall require such to be filed promptly thereafter.	(e) Service. (1) *Service of all documents required.* At or before the time of a document's filing, the filing party must serve a copy on all parties to the appeal or review. But a party need not serve a copy of the record except as required by Rule 120. (2) *Manner of service.* Service on a party represented by counsel must be made on that party's lead counsel. Service may be personal, by mail, by commercial mail or delivery service, or by fax. Personal service includes delivery to any responsible person at the office of the lead counsel for the party served. . (3) *When complete.* (A) Service by mail is complete on mailing. (B) Service by commercial mail or delivery service is complete when the document is placed in the control of the mail or delivery service. (C) Service by fax is complete on receipt.
	(4) *Proof of service.* A document presented for filing must contain a proof of service in the form of either an acknowledgment of service by the person served or a certificate of service. Proof of service may appear on or be affixed to the filed document. The clerk may permit a document to be filed without proof of service but will require the proof to be filed promptly. (5) *Certificate requirements.* A certificate of service must be signed by the person who made the service and must state: (A) the date and manner of service; (B) the name and address of each person served; and (C) if the person served is a party's attorney, the name of the party represented by that attorney.

CURRENT RULE	PROPOSED RULE
	Notes and Comments Comment to 1997 change: Subdivision (d), prescribing the form of documents filed in the appellate courts, is changed and the form to be used is stated in significantly more detail. Former subdivisions (f) and (g), regarding service of documents, are merged into paragraph (e). Numerous other technical and nonsubstantive changes are made throughout the rule.

CURRENT RULE	PROPOSED RULE
RULE 5. COMPUTATION OF TIME	RULE 5. COMPUTING TIME; EFFECT OF NO NOTICE OF JUDGMENT, MODIFIED JUDGMENT, AND SERVICE BY PUBLICATION
(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.	**(a) Computing Time.** (1) *In general.* The day of an act, event, or default after which a designated period begins to run is not included when computing a period prescribed or allowed by these rules, by court order, or by statute. The last day of the period is included, but if that day is a Saturday, Sunday, or legal holiday, the period extends to the end of the next day that is not a Saturday, Sunday, or legal holiday. (2) *Clerk's office closed or inaccessible.* If the act to be done is filing a document, and if the clerk's office where the document is to be filed is closed or inaccessible during regular hours on the last day for filing the document, the period for filing the document extends to the end of the next day when the clerk's office is open and accessible. The closing or inaccessibility of the clerk's office may be proved by a certificate of the clerk or counsel, by a party's affidavit, or by other satisfactory proof.

CURRENT RULE	PROPOSED RULE
(b) Beginnings of Periods in Civil Cases. (1) *Date of Signing.* In civil cases, the date a judgment or order is signed as shown of record shall determine the beginning of the periods described by these rules for filing in the trial court the various documents in connection with an appeal, including but not limited to an appeal bond, certificate of cash deposit, or notice or affidavit in lieu thereof, and bills of exception, and for filing of the petition for writ of error if review is sought by writ of error, and for filing in the appellate court of the transcript and statement of facts; but this rule shall not determine what constitutes rendition of a judgment or order for any other purpose. (2) *Date to Be Shown.* Judges, attorneys and clerks are directed to use their best efforts to cause all judgments, decisions and orders of any kind in civil cases to be reduced to writing and signed by the trial judge with the date of signing stated therein. If the date of signing is not recited in the judgment or order, it may be shown in the record by a certificate of the judge or otherwise; provided, however, that the absence of a showing of the date in the record shall not invalidate any judgment or order. (3) *Notice of Judgment.* When the final judgment or other appealable order is signed in a civil case, the clerk of the court shall immediately give notice to the parties or their attorneys of record by first-class mail advising that the judgment or order was signed. Failure to comply with the provisions of this rule shall not affect the periods mentioned in subparagraph (b)(1) of this rule, except as provided in subparagraph (b)(4). (4) *No Notice of Judgment.* If within twenty days after the judgment or other appealable order is signed in a civil case, a party adversely affected by it or his attorney has neither received the notice required by subparagraph (b)(3) of this rule nor acquired actual knowledge of the order, then with respect to that party all the periods mentioned in subparagraph (b)(1) except the period for filing a petition for writ of error shall begin on the date that such party or his attorney received such notice or acquired actual knowledge of the signing, whichever occurred first,	(b) No Notice of Trial Court's Judgment in Civil Case. (1) *Additional time to file documents.* (A) In general. In a civil case, if a party affected by a judgment or other appealable order has not — within 20 days after the judgment or order was signed — either received the notice required by Texas Rule of Civil Procedure 306a or acquired actual knowledge of the judgment's or order's signing, then a period that, under these rules, runs from the signing of a judgment or order will begin for that party on the earlier of the date when the party receives notice or acquires actual knowledge of the judgment's or order's signing. But in no event may the periods begin more than 90 days after the judgment or order was signed. (B) Exception for restricted appeal. Subparagraph (a) does not extend the time for perfecting a restricted appeal under Rule 45. (2) *Procedure to gain additional time.* The procedure to gain additional time is governed by Texas Rule of Civil Procedure 306a.5.

CURRENT RULE	PROPOSED RULE
but in no event shall such periods begin more than ninety days after the original judgment or other appealable order was signed. (5) *Motion, Notice and Hearing.* In order to establish the application of subparagraph (b)(4) of this rule, the party adversely affected is required to prove in the trial court, on sworn motion and notice, the date on which the party or his attorney first either received a notice of the judgment or acquired actual knowledge of the signing and that this date was more than twenty days after the judgment was signed. The trial judge shall find the date upon which the party or his attorney first either received a notice of the judgment or acquired actual knowledge of the signing of the judgment at the conclusion of the hearing and include this finding in the court's order.	(3) *The court's order.* After hearing the motion, the trial court must sign a written order that finds the date when the party or the party's attorney first either received notice or acquired actual knowledge of the judgment's or order's signing.
(c) **Nunc Pro Tunc Order.** In civil cases, when a corrected judgment has been signed after expiration of the court's plenary power pursuant to Rule 316 of the Texas Rules of Civil Procedure, the periods mentioned in subparagraph (b)(1) of this rule shall run from the date of signing the corrected judgment with respect to any complaint that would not be applicable to the original judgment.	**(c) Periods Affected by Modified Judgment.** (1) *During plenary-power period.* In a civil case, if a judgment is modifiedin any respect while the trial court retains plenary power, a period that, under these rules, runs from the date when the judgment or order is signed will run from the date when a modifiedjudgment is signed. (2) *After plenary power expires.* If the trial court corrects or reforms the judgment under Texas Rule of Civil Procedure 316 after expiration of the trial court's plenary power, all periods provided in these rules that run from the date the judgment or order is signed run from the date the corrected judgment or order is signed for complaints that would not apply to the original judgment.

CURRENT RULE	PROPOSED RULE
(d) When Process Served by Publication. With respect to a motion for new trial in a civil case filed more than thirty days after the judgment was signed pursuant to Rule 329 of the Texas Rules of Civil Procedure, when process has been served by publication, the periods provided by subparagraph (b)(1) shall be computed as if the judgment were signed on the date of filing the motion.	(d) Periods Affected When Process Served by Publication. In a civil case, if process was served by publication and if a motion for new trial was filed under Texas Rule of Civil Procedure 329 more than 30 days after the judgment was signed, a period that, under these rules, runs from the date when the judgment or order is signed will be computed as if the judgment or order were signed on the date when the motion for new trial was filed.
(e) Notice of Judgment of Appellate Court. When the court of appeals renders judgment or grants or overrules a motion for rehearing, the clerk shall immediately give notice to the parties or their attorneys of record of the disposition made of the cause or of the motion, as the case may be. The notice shall be given by first-class mail and be so marked as to be returnable to the clerk in case of nondelivery.	

CURRENT RULE	PROPOSED RULE
(f) No Notice of Judgment of Appellate Court. Notwithstanding any provision of these rules concerning the time for filing a motion for extension of the period for filing a motion for rehearing, application for writ of error, or petition for discretionary review, an extension of such period may be granted by the appellate court in which a motion for extension would properly be filed on sworn motion showing that neither the party desiring to file such motion for rehearing, application for writ of error, or petition for discretionary review nor his attorney had notice or actual knowledge of the judgment or order from which such period began to run before the last day of such period and stating the earliest date either the party or his attorney received such notice or actual knowledge. Such a motion for extension shall be filed within fifteen days of the date either the party or his attorney first had such notice or actual knowledge, but in no event more than ninety days after the beginning of such period. When such a motion is granted, the period in question shall begin to run on the date of granting the motion.	(c) No Notice of Judgment of Appellate Court; Effect on Time to File Certain Documents. (1) *Additional time to file documents.* In a civil case, a party may move for additional time to file a motion for rehearing in the court of appeals, a petition for review, or a petition for discretionary review, if the party did not — until after the time expired for filing the document — either receive notice of the judgment or order from the clerk or acquire actual knowledge of the rendition of the judgment or order. (2) *Procedure to gain additional time.* The motion must state the earliest date when the party or the party's attorney received notice from the clerk or acquired actual knowledge that the judgment or order had been rendered. The motion must be filed within 15 days of that date but in no event more than 90 days after the date of the judgment or order. (3) *Where to file.* (A) A motion for additional time to file a motion for rehearing in the court of appeals must be filed in and ruled on by the court of appeals in which the case is pending. (B) A motion for additional time to file a petition for review must be filed in and ruled on by the Supreme Court.
	(C) A motion for additional time to file a petition for discretionary review must be filed in and ruled on by the Court of Criminal Appeals. (4) *Order of the court.* If the court finds that the party did not — within the time for filing the motion for rehearing, petition for review, or petition for discretionary review, as the case may be — receive the notice or have actual knowledge of the signing of the judgment or order, the court must grant the motion. If the court grants the motion, the time for filing the document will begin to run on the date when the court grants the motion.

CURRENT RULE	PROPOSED RULE
	Notes and Comments Comment to 1997 change: Subdivision (b) is made to apply to periods prescribed by these rules and not those prescribed by the Texas Rules of Civil Procedure. Reference is made to the Rules of Civil Procedure for the procedure to be used to gain additional time. The phrase "modified, corrected or reformed in any respect" in subdivision (c) is shortened to "modified in any respect" but no change is substance is intended. Former subdivision (e) regarding notice of judgment by the court of appeals is deleted as redundant of Rule 18. Subdivision (e) (formerly subdivision (f)) is revised and now makes clear that the court must grant the motion for additional time if the court finds that the party did not receive the notice in time. Other nonsubstantive changes are made throughout the rule.

CURRENT RULE	PROPOSED RULE
RULE 6. COMMUNICATIONS WITH THE APPELLATE COURT	RULE 6. COMMUNICATIONS WITH THE COURT
Correspondence or other communications relative to any matter before the court must be conducted with the clerk and shall not be addressed to or conducted with any of the justices or judges or other members of the court's staff.	Parties and counsel may communicate with the appellate court about a case only through the clerk.
	Notes and Comments Comment to 1997 change: The rule is simplified without substantive change.

CURRENT RULE	PROPOSED RULE
RULE 7. SUBSTITUTION OF COUNSEL	RULE 7. LEAD COUNSEL; APPEARANCE; WITHDRAWAL OF COUNSEL
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.	(a) **Lead Counsel.** (1) *For appellant.* Unless another attorney is designated, lead counsel for an appellant is the attorney whose signature first appears on the notice of appeal. (2) *For a party other than appellant.* Unless another attorney is designated, lead counsel for a party other than an appellant is the attorney whose signature first appears on the first document filed in the appellate court on that party's behalf. (3) *How to designate.* The original or a new lead counsel may be designated by filing a notice stating that attorney's name, mailing address, telephone and fax numbers, and State Bar of Texas identification number. New lead counsel and either the party or the former lead counsel must sign the notice.
	(b) **Appearance of Other Attorneys.** An attorney other than lead counsel may file a notice stating that the attorney represents a specified party to the proceeding and giving that attorney's name, mailing address, telephone and fax numbers, and State Bar of Texas identification number. The clerk will note on the docket the attorney's appearance. When a brief or motion is filed, the clerk will note on the docket the name of each attorney, if not already noted, who appears on the document.
	(c) **To Whom Communications Sent.** Any notice, copies of documents filed in the appellate court, or other communication must be sent: (1) only to the lead counsel for a represented party; (2) if a party does not have a lead counsel, to the party's lead counsel in the trial court until that attorney either files a nonrepresentation notice under subdivision (d), or is allowed to withdraw under subdivision (e), and f rom that time forward, to the party until that party designates a lead counsel; (3) if a party is not represented by counsel, to the party.

CURRENT RULE	PROPOSED RULE
	(d) Nonrepresentation Notice. (1) *In general.* If, in accordance with paragraph (c)(2), the lead counsel in the trial court is being sent notices, copies of documents, or other communications, that attorney may at any time file a nonrepresentation notice in the appellate court. The notice must: (A) state that the attorney is not representing the party on appeal; (B) state that the court and other counsel should communicate directly with the party in the future; (C) give the party's name and last known address and telephone number; and (D) be signed by the party. (2) *Appointed counsel.* In a criminal case, an attorney appointed by the trial court to represent an indigent party cannot file a nonrepresentation notice.

CURRENT RULE	PROPOSED RULE
	(e) Withdrawal. An appellate court may, on appropriate terms and conditions, permit an attorney to withdraw from representing a party in the appellate court. (1) *Contents of motion.* A motion for leave to withdraw must contain the following: (A) a list of current deadlines and settings in the case; (B) the party's name and last known address and telephone number; (C) a statement that a copy of the motion was delivered to the party; and (D) a statement that the party was notified in writing of the right to object to the motion. (2) *Delivery to party.* The motion must be delivered to a party either in person or by mailing — both by certified and by first-class mail — to the party at the party's last known address. (3) *If motion granted.* If the court grants the motion, the withdrawing attorney must immediately notify the party, in writing, of any deadlines or settings that the attorney knows about at the time of withdrawal but that were not previously disclosed to the party. The withdrawing attorney must file a copy of that notice with the court clerk.
	Notes and Comments Comment to 1997 change: The rule is substantially revised and now provides for designation of lead counsel in the appellate court, as well as for the appearance and substitution of attorneys. The provisions of former Rule 57(b) are incorporated in the rule.

CURRENT RULE	PROPOSED RULE
RULE 8. AGREEMENTS OF COUNSEL	RULE 8. AGREEMENTS OF COUNSEL
All agreements of parties or their counsel relating either to the merits or conduct of the case in the court or in reference to a waiver of any of the requirements prescribed by the rules, looking to the proper preparation of an appeal or writ of error or submission, shall be in writing, signed by the parties or their counsel, and filed with the transcript or be contained in it, and, to the extent that such agreement may vary the regular order of proceeding, shall be subject to such orders of the appellate court as may be necessary to secure a proper presentation of the case.	To be enforceable, an agreement of parties or their counsel concerning an appellate court proceeding must be in writingand signed by the parties or their counsel. Such an agreement is subject to any appellate court order necessary to ensure that the case is properly presented.
	Notes and Comments Comment to 1997 change: The requirement that an agreement be filed and included in the transcript is deleted and other nonsubstantive changes are made.

CURRENT RULE	PROPOSED RULE
RULE 9. SUBSTITUTION OF PARTIES	RULE 9. SUBSTITUTING PARTIES
(a) **Death of a Party in Civil Cases.** If any party to the record in a cause dies after rendition of judgment in the trial court, and before such cause has been finally disposed of on appeal, such cause shall not abate by such death, but the appeal may be perfected and the court of appeals or the Supreme Court, if it has granted or thereafter grants a writ therein, shall proceed to adjudicate such cause and render judgment therein as if all parties thereto were living, and such judgment shall have the same force and effect as if rendered in the lifetime of all parties thereto. If appellant dies after judgment, and before the expiration of the time for perfecting appeal, sixty days after the date of such death shall be allowed in which to perfect appeal and file the record, and all bonds or other papers may be made in the names of the original parties the same as if all the parties thereto were living. (b) **Death of Appellant in a Criminal Case.** If the appellant in a criminal case dies after an appeal is perfected but before the mandate of the appellate court is issued, the appeal shall be permanently abated.	(a) **Parties Who Are Not Public Officers.** (1) *Death of a Party.* (A) *Civil cases.* If a party to a civil case dies after the trial court renders judgment but before the case has been finally disposed of on appeal, the appeal may be perfected, and the appellate court will proceed to adjudicate the appeal as if all parties were alive. The appellate court's judgment will have the same force and effect as if rendered when all parties were living. The decedent party's name may be used on all papers. (B) *Criminal cases.* If the appellant in a criminal case dies after an appeal is perfected but before the appellate court issues the mandate, the appeal will be permanently abated. (2) *Substitution for Other Reasons.* If substitution of a party in the appellate court is necessary for a reason other than death or separation from public office, the appellate court may order substitution on any party's motion at any time.

CURRENT RULE	PROPOSED RULE
(c) Public Officers; Separation From Office. (1) When a suit in mandamus, prohibition, or injunction is brought against a person holding a public office, in his official capacity, and after final trial and judgment in the trial court, and appeal has been taken, if such person should vacate such office, the suit shall not abate, but his successor may be made a party thereto by a motion showing such facts. (2) Unless waived, the clerk shall give the successor ten days notice of such motion, whereupon the court shall hear and determine same, and its judgment, order or decree shall be enforced, and the successor bound thereby. (3) In such cases, the successor shall not be liable for any costs that have accrued prior to the time he was made a party.	(b) Public Officers; Death or Separation from Office. (1) *Automatic Substitution of Officer*. When a public officer is a party in an official capacity to an appeal or original proceeding, and if that person ceases to hold office before the appeal or original proceeding is finally disposed of, the public officer's successor is automatically substituted as a party. Proceedings following substitution are to be in the name of the substituted party, but any misnomer that does not affect the substantial rights of the parties may be disregarded. An order of substitution may be entered at any time, but failure to enter an order does not affect the substitution. (2) *Abatement*. If the case is an original proceeding under Rule 120, the court must abate the proceeding to allow the successor to reconsider the original party's decision. In all other cases, the suit will not abate, and the successor will be bound by the appellate court's judgment or order as if the successor were the original party.
(d) **Substitution for Other Causes.** If substitution of a successor to a party in the appellate court is necessary for any reason other than death or separation from public office, the appellate court may order such substitution upon motion of any party at any time or as the court may otherwise determine.	
	Notes and Comments Comment to 1997 change: The subdivisions are redesignated. Former subdivision (a) regarding death of a party in a civil case is now paragraph (a)(1). Former subdivision (b) regarding death of a party in a criminal case is now paragraph (a)(2). Former subdivision (c) regarding separation of office by public officers is now subdivision (b). Former paragraph (c)(3) regarding a successor's liability for costs is deleted. Former subdivision (d) regarding substitution for other causes is now subdivision (c). Paragraphs (a)(1) and (2) are revised without substantive change. Subdivision (b) is revised to make it applicable to all cases in which a public office holder is a party, and to make substitution automatic. Subdivision (c) is amended without substantive change.

CURRENT RULE

PROPOSED RULE

CURRENT RULE	PROPOSED RULE
RULE 10. TRIAL COURT DOCKET OF APPEALED CASES SUPREME COURT TEXT In every case removed by appeal or writ of error to an appellate court, the clerk of the trial court shall, in making up the docket at each succeeding term, keep the said cause in its proper place on the docket for disposition after the appeal has been decided; and immediately upon return of the mandate from the appellate court shall, if the judgment has been affirmed or reversed and rendered, remove the case from the docket and proceed to issue process to enforce the judgment as in other cases; but if the judgment has been reversed and remanded he shall continue the cause on the docket with its original file number for trial. COURT OF CRIMINAL APPEALS TEXT (a) In every case removed by appeal or writ of error to an appellate court, the clerk of the trial court shall, in making up the docket at each succeeding term, keep the said cause in its proper place on the docket for disposition after the appeal has been decided; and immediately upon return of the mandate from the appellate court shall, if the judgment has been affirmed or reversed and rendered, remove the case from the docket and proceed to issue process to enforce the judgment as in other cases; but if the judgment has been reversed and remanded he shall continue the cause on the docket with its original file number for trial. (b) Clerk's Summary Sheet. In every case when a clerk of a district court forwards a transcript to the Court of Criminal Appeals involving an application for writ of habeas corpus filed pursuant to Article 11.07 of the Code of Criminal Procedure, the clerk shall prepare and transmit a summary sheet summarizing the proceedings involved with the application. The summary sheet shall be prepared in the form directed by the Court of Criminal Appeals, which will make an order in such respect for the guidance of the district clerks (Reference Rule 4, Appendix for Criminal Cases, Texas Rules of Appellate Procedure).	RULE 10. [Repealed] **Notes and Comments** Comment to 1997 change: The rule regarding docketing of cases by the trial-court clerk was repealed as unnecessary.

CURRENT RULE	PROPOSED RULE

CURRENT RULE	PROPOSED RULE
RULE 11. DUTIES OF COURT REPORTERS	RULE 11. WORK OF COURT REPORTERS AND COURT RECORDERS
(a) The duties of official court reporters shall be performed under supervision of the presiding judge of the court and shall include, but not be limited to: (1) attending all sessions of court and making a full record of the evidence when requested by the judge or any party to a case, together with all objections to the admissibility of the evidence, the rulings and remarks of the court thereon; (2) making a full record of jury arguments and voir dire examinations when requested to do so by the attorney for any party to a case, together with all objections to such arguments, the rulings and remarks of the court thereon; (3) filing all exhibits with the clerk; (4) preparing official transcripts of all such evidence or other proceedings, or any portion thereof, subject to the laws of this state, these rules and the instructions of the presiding judge of the court; and (5) performing such other duties relating to the reporter's official duties as may be directed by the judge presiding.	(a) **Duties of Court Reporters and Recorders.** The official court reporter or court recorder must: (1) attend court sessions and make a full record of the proceedings unless excused by the court; (2) take and mark all exhibits offered in evidence during a proceeding; (3) file all exhibits with the trial-court clerk after a proceeding ends;
	(4) perform the duties prescribed by Rules 53 and 54; and (5) perform other acts relating to the reporter's or recorder's official duties, as the judge directs.

CURRENT RULE	PROPOSED RULE
(b) Exhibits and materials used in the trial of a case and all of the record in a case are subject to such orders as the court may enter thereon.	(b) **Additional Duties of Court Recorder.** The official court recorder must also: (1) ensure that the recording system functions properly throughout the proceeding and that a complete, clear, and transcribable recording is made; (2) make a detailed, legible log of all proceedings being recorded, showing: (A) the number and style of the case before the court; (B) the name of each person speaking; (C) the event being recorded such as the voir dire, the opening statement, direct and cross-examinations, and bench conferences; (D) each exhibit offered, admitted, or excluded; (E) the time of day of each event; and (F) the index number on the recording device showing where each event is recorded; (3) make a typewritten copy of the proceedings' original log; (4) after a proceeding ends, file with the clerk the original and the typewritten copy of the log; (5) have the original recording stored to ensure that it is preserved and is accessible; and (6) ensure that no one gains access to the original recording without the court's written order.
	(c) **Priorities of Reporters and Recorders.** The trial court must help ensure that the court reporter's or court recorder's work is timely accomplished by setting work priorities. The reporter's or recorder's duties relating to proceedings before the court take preference over other work.
	(d) **Report of Reporters and Recorders.** To aid the judge in setting priorities under (c), each court reporter and court recorder must give the judge a monthly written report showing the amount and nature of the business pending in the reporter's or recorder's office. A copy of this report must be filed with the appellate clerk of each district in which the court sits.

CURRENT RULE	PROPOSED RULE
(c) In case of illness, press of official work, or unavoidable absence or disability of the official court reporter to perform the duties in (a) above, the presiding judge of the court may, in his discretion, authorize a deputy reporter to act in place of and perform the duties of the official reporter.	(e) **Appointing Deputy Reporter or Recorder.** When the official court reporter or recorder is unable to perform the duties in (a) or (b) because of illness, press of official work, or unavoidable absence or disability, the trial courtmay designate a deputy reporter or recorder. If the court appoints a deputy reporter or recorder, that person must file with the trial-court clerk a document stating: (1) the date the deputy reporter or recorder worked; (2) the court in which the reporter or recorder worked; and (3) the cause number of any case recorded by the reporter or recorder.
(d) When a defendant is convicted and sentenced to a term of more than two years and no appeal is taken, the court reporter shall file the nontranscribed notes of the proceeding with the district clerk within 20 days following the expiration of the time for perfecting appeal. The district clerk shall not be required to retain the notes beyond 15 years from the date of their filing.	(f) **Filing of Notes When Defendant Convicted.** When a defendant is convicted and sentenced to a term exceeding two years and does not appeal, the court reporter must — within 20 days after the time to perfect the appeal has expired — file the untranscribed notes of the proceeding with the district clerk. The district clerk need not retain the notes beyond 15 years of their filing date.
	Notes and Comments Comment to 1997 change: Rules 11 and 12 are merged into a single rule. Former Rule 11(a), (c) and (d) now appear as Rule 11 (a), (e) and (f); former Rule 11(b) is deleted; former Rule 12(a) is deleted and the substance is now in Rules 18, 53 and 56; former Rule 12(b) and (c) now appear as Rule 11(c) and (d). The rule is made to apply to court recorders as well as court reporters. Paragraph (a)(1) merges paragraphs (a)(1) and (2) of the former rule, and now requires the reporter to make a record of voir dire and closing argument unless excused by the judge. Paragraph (a)(2) is new, but codifies current practice. Subdivision (b) is new and specifies rules for electronic statements of facts. Other technical and nonsubstantive changes are made.

RULE 12. WORK OF COURT REPORTERS	RULE 12.

CURRENT RULE	PROPOSED RULE
(a) It shall be the joint responsibility of the trial and appellate courts to insure that the work of the court reporter is accomplished timely. (b) The presiding judge of the trial court shall insure that the work of the court reporter is timely accomplished by setting priorities on the various elements of the reporter's workload to be observed by the reporter in the conduct of the business of the court reporter's office. Duties relating to proceedings before the court shall take preference over other work. (c) To aid the judge in setting the priorities in (b) above, each court reporter shall report in writing to the judge on a monthly basis the amount and nature of the business pending in the court reporter's office. A copy of this report shall be filed with the Clerk of the Court of Appeals of each district in which the court sits.	[Repealed]
	Notes and Comments Change by 1997 amendment: The provisions of former Rule 12 have been relocated to Rule 11.

CURRENT RULE	PROPOSED RULE
RULE 13. DEPOSIT FOR COSTS IN CIVIL CASES	RULE 13. FEES IN CIVIL CASES
(a) Filing Transcript. Upon tendering the transcript to the clerk for filing, the appellant shall deposit with the Clerk of the Court of Appeals the sum of $50 as costs.	
(b) Motion to Extend or to File Record. Upon filing a motion for extension of time for filing a record or to direct the clerk to file a record on appeal or for writ of error from the trial court, the movant shall deposit with the Clerk of the Court of Appeals a deposit of $5 as costs.	

CURRENT RULE	PROPOSED RULE
(c) **Original Proceedings.** Upon the filing of a motion for leave to file a petition for writ of mandamus, prohibition, injunction, or other like proceeding, or a petition for writ of habeas corpus, the movant or relator shall deposit with the clerk a deposit of $20 as costs if in the court of appeals or $50 if in the Supreme Court. If the motion for leave is granted, or if the petition for habeas corpus is set for argument, the movant or relator shall deposit an additional sum of $30 in the court of appeals or $75 if in the Supreme Court. (d) **On Application for Writ of Error.** Upon filing an application for writ of error with the Clerk of the Court of Appeals, the petitioner shall deliver to the clerk of that court the sum of $50 as costs in the Supreme Court, and the clerk shall forward the deposit to the Supreme Court with the record. If the writ is granted, the petitioner shall deposit with the Clerk of the Supreme Court the additional sum of $75 as costs in the Supreme Court. (e) **Extension of Time for Application for Writ of Error.** Upon filing a motion to extend the time for filing an application for writ of error, the petitioner shall file with the Clerk of the Supreme Court the sum of $50 as costs. (f) **Direct Appeals to Supreme Court.** Upon filing of the record in a direct appeal from the district court to the Supreme Court as provided by Rule 140, the appellant shall deposit the sum of $100 as costs in the Supreme Court. (g) **Other Proceedings.** Upon filing of other motions or proceedings not specifically enumerated in this rule, when no record has been filed with the clerk, the party filing such motion or proceeding shall deposit the sum of $10 if in the court of appeals, or $75 if in the Supreme Court as all costs in such proceedings. When a record is later filed in the same proceeding, only an additional deposit of $40 shall be required if in the court of appeals or $50 if in the Supreme Court. (h) **Amounts May Vary.** The dollar amounts provided in this rule may vary from time to time as set by applicable statute, court order, or rule. (i) **Failure to Make Deposit.** If the required deposit for costs is not tendered, the clerk may decline to file the record, motion, or petition, or the court may dismiss the proceeding.	A party who is not excused by statute or these rules from paying costs must pay — at the time an item is presented for filing — whatever fees are required by statute or Supreme Court order. The appellate court may enforce this rule by any order that is just. **Notes and Comments** Comment to 1997 change: The rule is simplified. The fees an appellate court may charge in a civil case are now specified by Supreme Court order.

CURRENT RULE	PROPOSED RULE
(j) **Exempt Party.** No deposit shall be required of any party who, under these rules or any applicable statute, is not required to give security for costs. (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 40(a)(3), and any contest of such affidavit has been overruled, he shall be entitled to 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 Clerk of the Court of Appeals to be forwarded to the Supreme Court with the record for action by the Supreme Court. Contest of any such affidavit in the appellate court shall be governed by Rule 40(a)(3).	

CURRENT RULE	PROPOSED RULE
	IN THE SUPREME COURT OF TEXAS Misc. Docket No. 97-_____ **FEES CHARGED IN CIVIL CASES ON APPEAL TO SUPREME COURT AND COURTS OF APPEALS** **ORDERED:** A. The following fees have been set by statute and will be collected by the clerk except from parties who are otherwise exempt by statute. 1. In the Supreme Court. (a) petition for review . . . . . $ 50 (b) additional fee if petition for review is granted $ 75 (c) original proceeding . . . . . $ 50 (d) additional fee if Court requests a response to an original proceeding . . . . . $ 75** (e) certified question from a federal court . . . . $100 (f) case appealed to the Supreme Court from the district courts by direct appeal . . . . . $100 (g) any other proceeding filed in the Supreme Court $75 (h) administering an oath with sealed certificate of oath . . . . . $ 5 (i) photocopying . . . . . $ .50 per page $5 minimum TEX. GOV'T CODE § 51.005(b) and (c).

CURRENT RULE	PROPOSED RULE
	2. In the courts of appeals. (a) for cases appealed to and filed in the court of appeals from the district and county courts $ 50 (b) petition for writ of mandamus, prohibition, injunction, and other similar proceedings originating in the court of appeals .... $ 20** (c) additional fee if Court requests a response to the original proceeding ..... $ 30** (d) administering an oath with sealed certificate of oath ..... $ 5 (e) photocopying for certification or comparing documents for certification ..... $.50 per page $5 minimum TEX. GOV'T CODE § 51.207(b) and (c) B. Additionally, the following fees are set: 1. In the Supreme Court, the clerk will collect the following fees: (a) Certifying or comparisons of documents ..... $ 10 per hour plus copy fee ($5 minimum) (b) Motions for rehearing ..... $15 (c) Motions not otherwise listed ..... $10 (d) Responses/replies ..... $10 (e) Exhibits tendered for oral argument ..... $25 (f) Document search fee ..... $10 per hour ($5 minimum) (g) Tape of oral argument ..... $5 per tape (h) Facsimile received ..... $.50 per page (i) Facsimile sent ..... $.50 per page plus $.50 per minute for long distance charge, if any

CURRENT RULE	PROPOSED RULE
	2. In the courts of appeals, the clerk will collect the following fees: (a) Motions not otherwise listed ..... $10 (b) Responses/replies ..... $10 (c) Exhibits tendered for oral argument ..... $25 (d) Tape of oral argument ..... $5 per tape (e) Facsimile received ..... $.50 per page (i) Facsimile sent ..... $.50 per page plus $.50 per minute for long distance charge, if any

CURRENT RULE	PROPOSED RULE
RULE 14. DUTY OF CLERKS TO ACCOUNT	**RULE 14.**
When the Clerk of the Supreme Court receives any money due a Clerk of the Court of Appeals, or the clerk of any court of appeals receives any money due the Clerk of the Supreme Court, or the clerk of another court of appeals, the clerk so receiving same shall pay such money over to the clerk to whom it is due. If he refuses to do so upon demand, the clerk to whom the same is due may file in the Supreme Court a motion against him, and, upon ten days' notice to him, the Supreme Court may enter judgment against him and the sureties on his official bond for such amount.	[Repealed]
	Notes and Comments Change by 1997 amendment: The provisions of former Rule 14 have been incorporated in Rule 18.

CURRENT RULE	PROPOSED RULE
RULE 15. RECUSAL OR DISQUALIFICATION OF JUSTICES OF COURTS OF APPEALS, THE SUPREME COURT AND JUDGES OF THE COURT OF CRIMINAL APPEALS	RULE 15. RECUSAL OR DISQUALIFICATION OF APPELLATE JUDGES
(a) Within thirty days after the filing of a proceeding in a court of appeals, the Supreme Court, or the Court of Criminal Appeals, any party may file with the clerk of the court a motion stating grounds why a justice or judge before whom the case is pending should not sit in the case. The court shall allow the filing of a motion after the expiration of thirty days if the motion is grounded upon reasons not known within the thirty day period and upon a showing of good cause.	(a) **Grounds for Disqualification or Recusal.** The grounds for disqualification or recusal of an appellate court justice or judge are the same as those provided in Texas Rule of Civil Procedure 18b. In addition, a justice or judge must recuse in any proceeding in which the justice or judge previously participated in the trial or decision of any material issue.
(b) On the day the motion is filed, copies shall be served on all other parties or their counsel of record, together with notice that movant expects the motion to be presented to the justice or judge ten days after the filing of such motion unless otherwise ordered by the justice or judge. Any other party may file with the clerk of the court an opposing or concurring statement at any time before the motion is decided. (c) Prior to any further proceeding in the case, the justice or judge shall either recuse himself or certify the matter to the entire court, which will decide the motion by a majority of the justices or judges of the court sitting en banc. A justice or judge who is challenged shall not sit en banc to consider the motion. If a majority of the justices or judges are challenged, the court shall nonetheless decide the motion as to each justice or judge, one at a time, by a majority of the justices or judges sitting en banc except the particular justice or judge being considered each time shall not sit en banc to consider the motion as it directly affects that justice or judge. **(d) To the extent that a motion to recuse is granted, the matter is not reviewable. To the extent that a motion to recuse is denied, the normal appellate review process shall apply.**	(b) **Procedure for Disqualification or Recusal.** (1) *Motion.* Within 30 days after an appellate court proceeding is begun, any party may file a motion explaining why a justice or judge before whom the case is pending should not participate in deciding the case. If the motion is grounded on a reason that the party could not reasonably have known within the 30-day period, the court must allow it to be filed late. (2) *Decision.* Before any further proceeding in the case, the challenged justice or judge must either remove himself or herself from all participation in the case or certify the matter to the entire court, which will decide the motion by a majority of the remaining judges sitting *en banc*. The challenged justice or judge must not sit with the remainder of the court to consider the motion as to him or her.
	(3) *Appeal.* An order of recusal is not reviewable, but the denial of a recusal motion is reviewable on appeal from the court of appeals' judgment.

CURRENT RULE	PROPOSED RULE
	Notes and Comments Comment to 1997 change: Former Rule 15a is incorporated as subdivision (a). The rule is changed to require recusal if the judge previously participated in the trial or decision of a material issue. Former subdivision(b) of Rule 15, requiring service of the motion, is deleted as redundant of Rule 19. The remaining subdivisions of former Rule 15 are designated as paragraphs (b)(1) - (3) and the entire rule is clarified without substantive change.

CURRENT RULE	PROPOSED RULE
RULE 15a. GROUNDS FOR DISQUALIFICATION AND RECUSAL OF APPELLATE JUDGES	
A judge of an appellate court shall disqualify or recuse himself in any proceeding in which judges must disqualify or recuse themselves under Texas Rule of Civil Procedure 18b, or in which he participated in the trial or decision of any issue in the court below.	
	Notes and Comments Comment to 1997 change: The provisions of former Rule 15a are now included in Rule 15.

CURRENT RULE	PROPOSED RULE
RULE 16. COURT OF APPEALS UNABLE TO TAKE IMMEDIATE ACTION	RULE 16. COURT OF APPEALS UNABLE TO TAKE IMMEDIATE ACTION
The inability of any court of appeals having jurisdiction of a cause, matter, or controversy requiring immediate action to take such immediate action by reason of the illness or absence or unavailability of at least two of the justices thereof may be established either by the certificate of the clerk or any justice of such court of appeals, or by the affidavit of counsel for any party to such proceeding establishing the facts to the satisfaction of the court of appeals from which immediate action is sought. In determining the nearest court of appeals within the meaning of section 22.220(b) of the Government Code its straight-line distance from the courthouse of the county where such cause, matter, or controversy is or was last pending in the trial court shall govern. A court of appeals is available to take immediate action under the provisions of said Article when two or more justices thereof, not disqualified, are present for duty or can readily become present for duty within the time when such action must be taken. If the inability of the nearest court of appeals to take such immediate action is also established in the manner hereinabove provided, such action may be taken by the court of appeals next nearest to such courthouse.	(a) **Inability to Act.** A court of appeals is unable to take immediate action if it cannot — within the time when action must be taken — assemble a panel because members of the court are ill, absent, or unavailable. A justice who is disqualified or recused is unavailable. A court of appeals' inability to act immediately may be established by certificate of the clerk, a member of the court, or a party's counsel, or by affidavit of a party.
	(b) **Nearest Available Court of Appeals.** If a court of appeals is unable to take immediate action, the nearest court of appeals that is able to take immediate action may do so with the same effect as the other court. The nearest court of appeals is the one whose courthouse is nearest — measured by a straight line — the courthouse of the trial court. (c) **Further Proceedings.** After acting or refusing to act, the nearest court of appeals must promptly send a copy of its order, and the original or a copy of any document presented to it, to the other court, which will conduct any further proceedings in the matter. **Notes and Comments** Comment to 1997 change: The rule is rewritten and simplified.

CURRENT RULE	PROPOSED RULE
RULE 17. ISSUANCE OF PROCESS BY APPELLATE COURT	RULE 17. ISSUANCE OF WRIT OR PROCESS BY APPELLATE COURT
(a) Any writ or process issuing from any appellate court shall bear the teste of the chief justice or presiding judge under the seal of said court and be signed by the clerk, and, unless otherwise expressly provided by law or by these rules, shall be directed to the party or court to be served, may be served by the sheriff or any constable of any county of the State of Texas within which such person to be served may be found, and shall be returned to the court from which it issued according to the direction of the writ. Whenever such writ or process shall not be executed, the clerk is authorized to issue another like process or writ upon the application of the party who requested the former writ or process. Two or more writs may be issued simultaneously at the request of any party.	(a) General. (1) *Signature under seal.* A writ or process issuing from an appellate court must bear the court's seal and be signed by the clerk. (2) *To whom directed; by whom served.* Unless these rules or a statute provides otherwise, the writ or process must be directed to the party or court to be served. The writ or process may be served by the sheriff or a constable of the county in which the person or court to be served may be found. (3) *Return; lack of execution; simultaneous writs.* The writ or process must be returned to the issuing court according to the writ's direction. If the writ or process is not executed, the clerk may issue another writ or process if requested by of the party who requested the former writ or process. At a party's request, the clerk may issue two or more writs simultaneously.
(b) Any party who has appeared in person or by attorney in any proceeding in the appellate court, or who has actual knowledge of the court's opinion, judgment, or order, shall be bound by such opinion, judgment, or order to the same extent as if personally served as provided in subdivision (a).	(b) **Appearance Without Service; Actual Knowledge.** A party who appears in person or by attorney in an appellate court proceeding — or who has actual knowledge of the court's opinion judgment, or order related to a writ or process — is bound by the opinion, judgment, or order to the same extent as if personally served under (a).
	Notes and Comments Comment to 1997 change: Subdivision (a) of the former rule is divided into three paragraphs. Other nonsubstantive changes are made.

CURRENT RULE	PROPOSED RULE
RULE 18. DUTIES OF CLERK OF APPELLATE COURT	RULE 18. DUTIES OF APPELLATE CLERK IN GENERAL
(a) **Docketing the Case.** The Clerk of the Court of Appeals shall have the responsibility for docketing the appeal in accordance with Rule 57. The clerk shall put the docket number of a case on each separate item (transcript, statement of facts, brief, motion, pleading, letter, etc.) that is received in connection with that case, as well as putting the docket number on the envelope in which the record is stored.	(a) **Docketing the Case and Monitoring the Record.** The appellate clerk must docket the appeal or original proceeding and monitor the record's filing . The clerk must put the case's docket number on each item received in connection with the case and must put the docket number on the envelope in which the record is stored.
(b) **Preparing the Record.** The record of each case shall be filed in one or more envelopes which in criminal cases shall conform to the following specifications: extra heavy weight stock, one-piece construction with flaps, congress-tie, non-collapsing style construction with closed corners, width of 14 1/2 inches, height of 9 inches, thickness of 1/2 inch, 1 inch, 1 1/2 inches, 2 inches, 3 inches, or 4 inches. On the front of the first envelope containing the record, the clerk shall set forth the information required by order of the Court of Criminal Appeals.	
(c) **Custody of Papers.** The clerk shall be responsible for every record or other paper in a cause that is missing from his office, unless he can produce the receipt of an attorney for the same, or otherwise show, by satisfactory evidence, that some one took it from his custody or from the courtroom without his consent, or that it had passed into the hands of one of the justices or judges of the court, and had not been returned to his custody.	(b) **Custody of Papers.** The clerk must safeguard the record and every other item filed in a case. If the record or any part of it or any other item is missing, the court will make an order for the replacement of the record or item that is just under the circumstances.

CURRENT RULE	PROPOSED RULE
(d) **Withdrawing Papers.** (1) *Receipt.* Neither the record nor any of the papers in a cause shall be withdrawn from the custody of the clerk, nor taken from his office or the courtroom, without a receipt left therefor. (2) *Case Under Submission.* While a case is under submission, either on the merits of the appeal or on motion, the clerk shall not permit the record or any papers to be removed from his office, except on the order of one of the justices or judges of the court. (3) *Case Not Under Submission.* When the case is pending in the appellate court, but is not under submission, either before submission or after decision, any party or his attorney may obtain possession of the record on leaving the receipt required by subsection (1) but when a decision on the merits has been issued, only the losing party or his attorney shall be allowed to take the record out of the clerk's office until after said party has filed his motion for a rehearing or until the time for filing such motion has expired. (4) *Original Exhibits.* Original papers and exhibits sent up by order of the court below for the inspection of the appellate court, will be retained in the office, and will not be allowed to go out of the custody of the clerk, except by order of one of the justices or judges of the court, which order must be filed with the papers of the cause. Any party or attorney withdrawing such papers or exhibits shall leave a receipt identifying the papers or exhibits which he had received, and if he fails to return them, the court may accept the opposing party's statement concerning their nature and contents. (5) *Return of Papers.* The attorney or party withdrawing any record, exhibits, or other papers before submission shall return them to the clerk promptly on demand and, in any event, not later than one day before submission. If withdrawn after submission, they shall be returned on demand. No attorney or party shall take or allow to be taken any transcript, statement of facts, or other papers out of the reach of the court so that it cannot be produced in court or in the clerk's office on demand. (6) *After Decision in the Supreme Court.* Attorneys desiring to withdraw papers from the clerk's office after the decision of a cause or of an application for writ of error in the Supreme Court to prepare a	(c) **Withdrawing Papers.** The clerk may permit the record or other filed item to be taken from the clerk's office at any time, on the following conditions: (1) the clerk must have a receipt for the item; (2) the clerk should make reasonable conditions to ensure that the withdrawn item is preserved and returned; (3) the clerk may demand the return of an item at any time; (4) after the case is submitted to the court and before the court's decision, no item can be withdrawn;

CURRENT RULE	PROPOSED RULE
purpose shall first file with the clerk an agreement with opposing counsel or an order of the court or a justice thereof. The clerk is not authorized to allow papers to be taken from his office without such an agreement or order. Transcripts and other papers in cases finally disposed of shall not be taken from the clerk's office.	(5) after the court's decision, the losing party must be given priority in withdrawing an item; (6) the clerk may not allow original documents filed under Rule 51(f) or original exhibits filed under Rule 53(g) to be taken from the clerk's office; (7) if the court allows an original item to be taken by a party and it is not returned, the court may accept the opposing party's statement concerning the document's or exhibit's nature and contents; (8) an item must not be removed from the court's jurisdiction; and (9) the court may, on the motion of any party or its own initiative, modify any of these conditions.
	(d) **Clerk's Duty to Account.** The clerk of an appellate court who receives money due another court must promptly pay the money to the court to whom it is due. This rule is enforceable by the Supreme Court.
	(e) **Notices of Court's Judgments and Orders.** In any proceeding, the clerk of an appellate court must promptly send a notice of any judgment or order of the court to all parties to the proceeding.
	Notes and Comments Comment to 1997 change: Subdivision (a) is amended to make the appellate court clerk responsible for monitoring the filing of the record. Subdivision (c) is revised and simplified. Former Rule 14, which is revised and simplified without change in substance, is relocated here as subdivision (d). Subdivision (e), requiring the clerk to send a notice of any order or judgment of an appellate court, is added. Other nonsubstantive changes are made.

CURRENT RULE	PROPOSED RULE
RULE 19. MOTIONS IN THE APPELLATE COURTS	RULE 19. MOTIONS IN THE APPELLATE COURTS
(a) Content of Motions; Response; Reply. Unless another form is elsewhere prescribed by these rules, an application for an order or other relief shall be made by filing a motion for such order or relief with proof of service on all other parties. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion, shall state with particularity the grounds on which it is based, and shall set forth the order or relief sought. If a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion. Any party may file a response to a motion within 10 days after service of the motion, but the court may shorten or extend the time for responding to any motion.	(a) Contents of Motions; Response. (1) *Motion.* Unless these rules prescribe another form, a party must apply by motion for an order or other relief. The motion must: (A) contain or be accompanied by any matter specifically required by a rule governing such a motion; (B) state with particularity the grounds on which it is based; (C) set forth the order or relief sought; (D) be served and filed with any brief, affidavit, or other paper filed in support of the motion; and (E) contain or be accompanied by a certificate stating that the filing party conferred — or made a reasonable attempt to confer — with all other parties about the merits of the motion and whether those parties agreed to the relief sought. (2) *Response.* A party may file a response to a motion at any time before the court rules on the motion or by any deadline set by the court. The court may determine a motion before a response is filed.
(b) **Docketing Motions.** The clerk shall file each motion under the docket number assigned to the appeal and make an appropriate notation on the docket of the filing of such motion and any response thereto, together with the name of the attorney filing same, if not otherwise shown on the docket.	
(c) **Notice of Motions.** The clerk, upon filing and docketing a motion shall, unless waived, give notice to the opposite party or his attorney of record, by transmitting a brief notice of the nature or purpose of such motion to said party or his attorneys by letter.	

CURRENT RULE	PROPOSED RULE
(d) **Evidence on Motions.** Motions dependent on facts not apparent in the record and not ex officio known to the court must be supported by affidavits or other satisfactory evidence.	(b) **Evidence on Motions.** A motion need not be verified unless it depends on the following types of facts, in which case the motion must be supported by affidavit or other satisfactory evidence. The types of facts requiring proof are those that are: (1) not in the record; (2) not within the court's knowledge in its official capacity; or (3) not within the personal knowledge of the attorney signing the motion.
(e) **Determination of Motions.** As a general rule, no motion, other than a motion to extend the time for filing the record or briefs in a criminal case, shall be heard or determined until ten days after the notice provided for in paragraph (c) of this Rule 19 has been mailed. In cases of emergency, motions may be acted upon at any time, without awaiting a response. Any party adversely affected by such action may request reconsideration, vacation or modification of such action.	**(c) Determining Motions.** (1) Time for determination. A court should not hear or determine a motion until 10 days after the motion was filed, unless: (A) the motion is to extend time to file briefs; (B) the motion states that the parties have conferred and that no party opposes the motion; or (C) the motion is an emergency. (2) *Reconsideration.* If a motion is determined prematurely, any party adversely affected may request the court to reconsider its order.
(f) **Power of a Single Justice or Judge to Entertain Motions.** In addition to the authority expressly conferred by these rules or by law, a single justice or judge of an appellate court may entertain and may grant or deny any request for relief which under these rules may properly be sought by motion, except that in a civil case a single justice may not act upon a motion for leave to file a petition for a writ of mandamus, prohibition or injunction or dismiss or otherwise determine an appeal or motion for rehearing. In addition an appellate court may provide by order or rule that any motion or class of motions must be acted upon by the court.	(d) **Power of Panel or Single Justice or Judge to Entertain Motions.** (1) *Single Justice.* In addition to the authority expressly conferred by these rules or by law, a single justice or judge of an appellate court may grant or deny a request for relief that these rules allow to be sought by motion. But in a civil case, a single justice must not do the following: (A) act on petition for an extraordinary writ; or (B) dismiss or otherwise determine an appeal or a motion for rehearing. (2) *Panel.* An appellate court may provide, by order or rule, that a panel or the full court must act on any motion or class of motions.

CURRENT RULE	PROPOSED RULE
	(c) **Particular Motions.** (1) *Motions relating to informalities in the record.* A motion relating to informalities in the manner of bringing a case into court must be filed within 30 days after the transcript is filed in the court of appeals. The objection, if waivable, will otherwise be deemed waived. (2) *Motions to extend time.* (A) Contents of motion in general. All motions to extend time must state: (i) the deadline for filing the item in question; (ii) the length of the extension sought; (iii) the facts relied on to reasonably explain the need for an extension; and (iv) the number of previous extensions granted regarding the item in question.
	(B) Contents of motion to extend time to file notice of appeal. A motion to extend the time for filing a notice of appeal must also specify: (i) the trial court; (ii) the date of the trial court's judgment; and (iii) the case number and style of the case in the trial court. (C) Contents of motion to extend time to file petition for review or petition for discretionary review. A motion to extend time to file a petition for review or petition for discretionary review must also specify: (i) the court of appeals; (ii) the date of the court of appeals' judgment; (iii) and the case number and style of the case in the court of appeals.
	(3) *Motions to postpone argument.* Unless all parties agree, or unless sufficient cause is apparent to the court, a motion to postpone argument of a case must be supported by sufficient cause.

CURRENT RULE	PROPOSED RULE
	Notes and Comments Comment to 1997 change: In subdivision (a), a response may be filed at any time before the court rules on the motion.Former subdivision (b), the provision regarding docketing motions is covered by Rule 18(a) and is deleted; the provision for noting attorneys names on the docket is covered by Rule 7(b) and is deleted. Former subdivision (c), requiring the clerk to send notices of the filing of motions is deleted as unnecessary since the parties must serve all papers under Rule 4. Former subdivision (d), now subdivision (b), is amended to eliminate the requirement of an oath in the case of facts within the personal knowledge of the attorney. Former subdivision (e), now subdivision (c), allows the court to determine the motion 10 days after it is filed, but specific exceptions are stated. Subdivision (e) is new and incorporates the provisions of other rules concerning motions, as follows: (e)(1) from former Rule 71,; (e)(2) from former Rules 73, 130(d), and 160; and (e)(3) from former Rule 70. Other nonsubstantive changes are made.

CURRENT RULE	PROPOSED RULE
RULE 20. AMICUS CURIAE BRIEFS	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, 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.	An appellate clerk may receive, but not file, an amicuscuriae brief. An amicus curiae brief must: (a) comply with the briefing rules for parties; (b) identify the personor entity on whose behalf the brief is tendered; (c) disclose the source of any fee paid or to be paid for preparing the brief; and (d) certify that copies have been furnished to all parties.
	Notes and Comments Comment to 1997 change: The rule is rewritten and now requires disclosure of the identity of the person, or entity on whose behalf the brief is filed and the source of any fee paid.

CURRENT RULE	PROPOSED RULE
RULE 21. RECORDING AND BROADCASTING OF COURT PROCEEDINGS	RULE 21. RECORDING AND BROADCASTING COURT PROCEEDINGS
Any trial or appellate court may permit broadcasting, televising, recording, or photographing of proceedings in the courtroom only in the following circumstances: **(a)** in accordance with guidelines promulgated by the Supreme Court or the Court of Criminal Appeals, or	(a) **Recording and Broadcasting Permitted.** An appellate court may permit courtroom proceedings to be broadcast, televised, recorded, or photographed in accordance with this rule.
(b) when broadcasting, televising, recording, or photographing will not unduly distract participants or impair the dignity of the proceedings and (i) the parties have consented, and consent to being depicted or recorded is obtained from each witness whose testimony will be broadcast, televised, or photographed, or (ii) in the case of oral argument in appellate courts, if approved by order of the court, or (c) when broadcasting, televising, recording, or photographing investiture, or ceremonial proceedings.	**(b) Procedure.** (1) *Request to cover court proceeding.* (A) A person wishing to broadcast, televise, record, or photograph a court proceeding must file with the court clerk a request to cover the proceeding. The request must state: (i) the case style; (ii) the date and time when the proceeding is to begin; (iii) the name of the requesting person or organization; (iv) the type of coverage requested (for example, televising or photographing); and (v) the type and extent of equipment to be used. (B) A request to cover argument of a case must be filed no later than five days before the date the case is set for argument and must be served on all parties to the case. A request to cover any other proceeding must be filed no later than two days before the date when the proceeding is to begin. (2) *Response.* Any party may file a response to the request. If the request is to cover argument, the response must be filed no later than two days before the date set for argument. If a party objects to coverage of the argument, the response should state the injury that will allegedly result from coverage.

CURRENT RULE	PROPOSED RULE
	(3) *Court may shorten time.* The court may, in the interest of justice, shorten the time for filing a document under this rule if no party or interested person would be unduly prejudiced. (4) *Decision of court.* In deciding whether to allow coverage, the court may consider information known *ex parte* to the court. The court must enter a written order allowing, denying, or limiting coverage. The court may allow, deny, limit, or terminate coverage for any reason the court considers necessary or appropriate, such as protecting the parties' rights or the dignity of the court and ensuring the orderly conduct of the proceedings.
	(c) Equipment and Personnel. The court may: (1) require that a person seeking to cover a proceeding demonstrate or display the equipment that will be used; (2) prohibit equipment that produces distracting sound or light; (3) prohibit signal lights or devices showing when equipment is operating, or require their concealment; (4) prohibit moving lights, flash attachments, or sudden lighting changes; (5) require the use of the courtroom's existing sound and lighting systems; (6) specify the placement of personnel and equipment; (7) determine the number of cameras to be allowed in the courtroom; and (8) require pooling of equipment if more than one person wishes to cover a proceeding.
	(d) Sanctions. The court may sanction a violation of this rule by measures that include barring a person or organization from access to future coverage of proceedings in that court for a defined period.

CURRENT RULE	PROPOSED RULE
	Notes and Comments Comment to 1997 change: The rule is rewritten and now allows recording and broadcasting of court proceedings at the discretion of the court and subject to the stated guidelines.

CURRENT RULE	PROPOSED RULE
	RULE 22. BANKRUPTCY
	(a) **Notice of Bankruptcy.** Any party may file a notice that a party is in bankruptcy. The notice must contain: (1) the bankrupt party's name; (2) the court in which the bankruptcy proceeding is pending; (3) the bankruptcy proceeding's style and cause number; (4) the date when the bankruptcy petition was filed; and (5) an authenticated copy of the bankruptcy petition.
	(b) **Effect of Bankruptcy.** A bankruptcy suspends all periods in these rules from the date when the bankruptcy petition is filed, in accordance with federal lawA period that began to run and had not expired at the time the proceeding was suspended begins again when the proceeding is reinstated or severed under subdivision (c). A document filed by a party while the proceeding is suspended will be deemed filed on the same day, but after, the court reinstates or severs the appeal and will not be considered ineffective because it was filed while the proceeding was suspended.
	(c) **Motion to Reinstate or Sever Appeal Suspended by Bankruptcy.** (1) *Motion to reinstate.* If a case has been suspended by a bankruptcy filing, a party may move that the court of appeals reinstate the appeal ifpermitted by federal law or the bankruptcy court.If the bankruptcy court has lifted or terminated the stay a certified copy of the order must be attached to the motion. (2) *Motion to sever.* A party may move to sever the appeal with respect to the bankrupt party and to reinstate the appeal with respect to the other parties. The motion must show that the case is severable and must comply with applicable federal law regarding severance of a bankrupt party. The court may proceed under this paragraph on its own initiative.

CURRENT RULE	PROPOSED RULE
	Notes and Comments Comment to 1997 change: This is a new rule.

CURRENT RULE	PROPOSED RULE
	RULE 23. MANDATE
	(a) **Issuance.** The clerk of the appellate court that rendered the judgment must issue a mandate in accordance with the judgment and deliver it to the clerk of the court to which it is directed when one of the following periods expires: (1) *In the court of appeals.* (A) Ten days after the time has expired for filing a motion to extend time to file a petition for review or a petition for discretionary review if: (i) no timely petition for review or petition for discretionary review has been filed; (ii) no timely filed motion to extend time to file a petition for review or petition for discretionary review is pending; and (iii) in a criminal case, the Court of Criminal Appeals has not granted review on its own initiative. (B) Ten days after the time has expired for filing a motion to extend time to file a motion for rehearing of a denial, refusal, or dismissal of a petition for review, or a refusal or dismissal of a petition for discretionary review if no timely filed motion for rehearing or motion to extend time is pending.
	(2) *In the Supreme Court and the Court of Criminal Appeals.* Ten days after the time has expired for filing a motion to extend time to file a motion for rehearing if no timely filed motion for rehearing or motion to extend time is pending.

CURRENT RULE	PROPOSED RULE
	(3) *Agreement to Issue.* The mandate may be issued earlier if the parties so agree, or for good cause on the motion of a party. (b) **Stay of Mandate.** A party may move to stay issuance of the mandate pending the United States Supreme Court's disposition of a petition for writ of certiorari. The motion must state the grounds for the petition and the circumstances requiring the stay. The appellate court authorized to issue the mandate may grant a stay if it finds that the grounds are substantial and that the petitioner or others would incur serious hardship from the mandate's issuance if the United States Supreme Court were later to reverse the judgment. In a criminal case, the stay will last for no more than 60 days, to permit the timely filing of a petition for writ of certiorari. After that period and others mentioned in this rule expire, the mandate will issue.
	(c) **File Number.** The mandate must contain the case's trialcourt file number.
	(d) **Filing of Mandate.** The clerk receiving the mandate will file it with the case's other papers and note it on the docket.
	(e) **Costs.** The mandate will be issued without waiting for costs to be paid. If the Supreme Court declines to grant reveiw, Supreme Court costs will be paid in the court of appeals.
	(f) **Mandate in Accelerated Appeals.** The appellate court's order on an appeal from an interlocutory order takes effect when the mandate is issued. The court may issue the mandate with its order or delay the mandate until the appeal is finally disposed of. If the mandate is issued, any further proceeding in the trial court must conform to the mandate.
	(g) **Recall of Mandate.** If an appellate court vacates or modifies its judgment or order after issuing its mandate, the appellate clerk must promptly notify the clerk of the court to which the mandate was directed and all parties. The mandate will have no effect and a new mandate may be issued.
	Notes and Comments Comment to 1997 change: This is a new rule that combines the provisions of former Rules 86, 186, 231, and 232.

CURRENT RULE	PROPOSED RULE
	RULE 24. PLENARY POWER OF THE COURTS OF APPEALS, AND EXPIRATION OF TERM
	(a) **Plenary Power of Courts of Appeals.** A court of appeals' plenary power over its judgment expires: (1) 60 days after judgment if no motion to extend time or motion for rehearing is then pending; or (2) 30 days after the court overrules all timely filed motions for rehearing and motions to extend time to file a motion for rehearing.
	(b) **Plenary Power Continues After Petition Filed.** In a civil case, the court of appeals retains plenary power to vacate or modify its judgment during the periods prescribed in (a) even if a party has filed a petition for review in the Supreme Court.
	(c) **Proceedings After Plenary Power Expires.** After its plenary power expires, the court cannot vacate or modify its judgment. But the court may: (1) correct a clerical error; (2) issue and recall its mandate as these rules provide; (3) enforce or suspend enforcement of its judgment as these rules or applicable law provide; and (4) order its opinion published in accordance with Rule 90.
	(d) **Expiration of Term.** The expiration of the appellate court's term does not affect the court's plenary power or its jurisdiction over a case that is pending when the court's term expires.
	Notes and Comments Comment to 1997 change: This is a new rule except the provisions of former Rule 234 are incorporated as paragraph (d).

CURRENT RULE	PROPOSED RULE
REPEALER Section 22.220(b) of the Government Code is repealed to the extent it conflicts with Rule of Appellate Procedure 16. 1.Texas Rules of Appellate Procedure have been amended to provide for petition for review rather than applications for writ of error. To this extent, the wording from the schedule has been altered. 2.Texas Rules of Appellate Procedure have been amended to delete the requirement of a motion for leave to file. To maintain the statute's principal of bifurcated fee, the additional fee is predicated upon the court requesting the real parties to respond.	**REPEALER** 1. Texas Rules of Appellate Procedure have been amended to provide for petition for review rather than applications for writ of error. To this extent, the wording from the statute has been altered. 2. Texas Rules of Appellate Procedure have been amended to delete the requirement of a motion for leave to file an original proceeding. To maintain the statute's principal of bifurcated fee, the additional fee is predicated upon the court requesting the real parties to respond.

CURRENT RULE	PROPOSED RULE
	RULE 25. WHEN PARTY IS INDIGENT (a) Civil Cases. (1) *Establishing indigence.* A party who cannot pay the costs of a civil proceeding in an appellate court may proceed without advance payment of costs if: (A) the party files an affidavit of indigency in compliance with this rule; and (B) the claim of indigency is not contested or, if a contest is filed, the contest is not sustained by written order. (2) *Contents of affidavit.* The affidavit of indigency must identify the party filing the affidavit and must state what amount of costs, if any, the party can pay. The affidavit must also contain complete information about: (A) the nature and amount of the party's current employment income, government-entitlement income, and other income; (B) the income of the party's spouse and whether that income is available to the party; (C) real and personal property the party owns; (D) cash the party holds and amounts on deposit that the party may withdraw; (E) the party's other assets; (F) the number and relationship to the party of any dependents; (G) the nature and amount of the party's debts; (H) the nature and amount of the party's monthly expenses; (I) the party's ability to obtain a loan for court costs; (J) whether an attorney is providing free legal services to the party without a contingent fee; and (K) whether an attorney has agreed to pay or advance court costs. (3) *When and where affidavit filed.*

CURRENT RULE	PROPOSED RULE
	(A) Appeals. An appellant must file the affidavit of indigency in the trial court with or before the notice of appeal. An appellee who is required to pay part of the cost of preparation of the record under Rule 51(b)(3) or 53(c)(3) must file an affidavit of indigency in the trial court within 15 days after the date when the appellee becomes responsible for paying that cost. (B) Other proceedings. In any other appellate court proceeding, a petitioner must file the affidavit of indigency in the court in which the proceeding is filed, with or before the document seeking relief. A respondent who requests preparation of a record in connection with an appellate court proceeding must file an affidavit of indigency in the appellate court within 15 days after the date when the respondent requests preparation of the record. (C) Extension of time. The appellate court may extend the time to file an affidavit of indigency if, within 15 days after the deadline for filing the affidavit the party files: (i) the affidavit of indigency; and (ii) files in the appellate court a motion that complies with Rule 19(e)(2). (4) *Duty of clerk.* (A) Trial court clerk. If the affidavit of indigency is filed with the trial court clerk under (3)(A), the clerk must promptly send a copy of the affidavit to the appropriate court reporter or court recorder. (B) Appellate court clerk. If the affidavit of indigency is filed with the appellate court clerk under (3)(B) and if the filing party is requesting the preparation of a record, the appellate court clerk must: (i) send a copy of the affidavit to the trial court clerk and the appropriate court reporter or recorder; and (ii) send to the trial court clerk, the court reporter or recorder, and all parties, a notice stating the deadline for filing a contest to the affidavit of indigency.

CURRENT RULE	PROPOSED RULE
	(5) *Contest to affidavit.* The clerk, the court reporter or recorder, or any party may challenge the claim of indigency by filing — in the court in which the affidavit was filed — a contest to the affidavit. The contest must be filed on or before the date set by the clerk if the affidavit was filed in the appellate court, or within 10 days after the date when the affidavit was filed if the affidavit was filed in the trial court. The contest need not be sworn. (6) *No contest filed.* Unless a contest is timely filed, no hearing will be conducted, the affidavit's allegations will be deemed true, and the party will be allowed to proceed without advance payment of costs. (7) *Burden of proof.* If a contest is filed, the party who filed the affidavit of indigency must prove the affidavit's allegations. If the indigent party is incarcerated at the time the hearing on a contest is held, the affidait must be considered as evidence and is sufficient to meet the indigent party's burden to present evidence without the indigent party attending the hearing. (8) *Decision in appellate court.* If the affidavit of indigency is filed in an appellate court and a contest is filed, the court may: (A) conduct a hearing and decide the contest; (B) decide the contest based on any timely filed papers; (C) request the written submission of additional evidence and, without conducting a hearing, decide the contest based on that evidence and on any timely filed papers; or (D) refer the matter to the trial court with instructions to hear evidence and grant the appropriate relief. (9) *Hearing and decision in the trial court.* If the affidavit of indigency is filed in the trial court and a contest is filed, or if the appellate court refers a contest to the trial court, the trial court must set a hearing and notify the parties and the official court reporter or recorder of the setting. (A) Time for hearing. Unless the trial court signs an order extending the time — which extension cannot exceed 20 days from the date of that

CURRENT RULE	PROPOSED RULE
	(i) within 10 days after the contest was filed, if initially filed in the trial court; or (ii) within 10 days after the trial court received a contest referred from the appellate court. (B) Time for written decision; effect. Unless — within the period set for the hearing — the trial court signs an order sustaining the contest, the affidavit's allegations will be deemed true, and the party will be allowed to proceed without advance payment of costs. (10) *Record to be prepared without prepayment.* If a party establishes indigency, the trial court clerk must prepare the transcript without prepayment, and the court reporter or recorder must prepare the statement of facts without prepayment. (11) *Partial payment of costs.* If the party can pay or give security for some of the costs, the court must order the party, in writing, to pay or give security, or both, to the extent of the party's ability. The court will allocate the payment among the officials to whom payment is due. (12) *Later ability to pay.* If a party who has proceeded in the appellate court without having to pay all the costs is later able to pay some or all of the costs, the appellate court may order the party to pay costs to the extent of the party's ability. (13) *Costs defined.* As used in this rule, *costs* means: (A) a filing fee relating to the case in which the affidavit of inability is filed; and (B) the charges for preparing the transcript and statement of facts in that case. (b) **Criminal Cases.** Within the time for perfecting the appeal, an appellant who is unable to pay for the statement of facts may, by motion and affidavit, ask the trial court to have the statement of facts furnished without charge. If after hearing the motion the court finds that the appellant cannot pay or give security for the statement of facts, the court must order the reporter to furnish the statement of facts. When the court certifies that the statement of facts has been furnished to the appellant, the reporter must be paid from the general funds of the county in which the offense was committed, in the amount set by the trial court.

CURRENT RULE	PROPOSED RULE
	Notes and Comments Comment to 1997 change: The rule is new and combines the provisions of former Rules 13(k), 40(a)(3) and 53(j). The procedure for proceeding in an appellate court without advance payment of costs, in both appeals and original proceedings, is stated. The information that must be given in the affidavit is prescribed. An extension of time to file the affidavit is now available. The indigent party is no longer required to served the court reporter or recorder, but must file the affidavit with the appropriate clerk who is to notify the court reporter or recorder. A contest need not be under oath. Provision is made for later ability to pay the costs. Other changes are made. **Reference** *See also* Civil Practice and Remedies Code section 13.003

CURRENT RULE	PROPOSED RULE
SECTION THREE. NEW TRIALS, ARREST OF JUDGMENT, AND NUNC PRO TUNC PROCEEDINGS IN CRIMINAL CASES	SECTION THREE. NEW TRIALS, ARREST OF JUDGMENT, AND NUNC PRO TUNC PROCEEDINGS IN CRIMINAL CASES
A. NEW TRIALS IN CRIMINAL CASES	**A. NEW TRIALS**
RULE 30. DEFINITION AND GROUNDS	**RULE 30. DEFINITION, WHEN REQUIRED, AND GROUNDS**
(a) Definition. A "new trial" is the rehearing of a criminal action after a finding or verdict of guilt has been set aside upon motion of an accused. Except to adduce facts of a matter not otherwise shown on the record, a motion for new trial is not a requisite to presenting a point of error on appeal.	(a) **Definition.** *New trial* means the rehearing of a criminal action after the trial court has, on the defendant's motion, set aside a finding or verdict of guilt.
	(b) **When Motion for New Trial Required.** A motion for new trial is a prerequisite to presenting a point of error on appeal only when necessary to adduce facts not in the record.
(b) **Grounds.** A new trial shall be granted an accused for the following reasons: (1) Except in a misdemeanor case when maximum punishment may be by fine only, where the accused is an individual who has been tried in his absence, unless otherwise authorized by law, or has been denied counsel; (2) Where the court has misdirected the jury as to the law or has committed some other material error calculated to injure the rights of the accused; (3) Where the verdict has been decided by lot or in any other manner than by a fair expression of opinion by the jurors; (4) Where a juror has received a bribe to convict or has been guilty of any other corrupt conduct; (5) Where any material witness of the defendant has by force, threats or fraud been prevented from attending the court, or where any evidence tending to establish the innocence of the accused has been intentionally destroyed or withheld preventing its production at trial;	(c) **Grounds.** The defendant must be granted a new trial for any of the following reasons: (1) except in a misdemeanor case in which the maximum possible punishment is a fine, when the defendant has been unlawfully tried in absentia or has been denied counsel; (2) when the court has misdirected the jury about the law or has committed some other material error likely to injure the defendant's rights; (3) when the verdict has been decided by lot or in any manner other than a fair expression of the jurors' opinion; (4) when a juror has been bribed to convict or has been guilty of any other corrupt conduct; (5) when a material defense witness has been kept from court by force, threats, or fraud, or when evidence tending to establish the defendant's innocence has been intentionally destroyed or withheld, thus preventing its production at trial;

CURRENT RULE	PROPOSED RULE
(6) Where new evidence favorable to the accused has been discovered since trial;*	(6) when new evidence favorable to the defendant has been discovered since trial;
(7) Where after retiring to deliberate the jury has received other evidence; or where a juror has conversed with any other person in regard to the case; or where a juror became so intoxicated as to render it probable that his verdict was influenced thereby;	(7) when, after retiring to deliberate, the jury has received other evidence; when a juror has talked with anyone about the case; or when a juror became so intoxicated that his or her vote was probably influenced as a result;
(8) Where the court finds the jury has engaged in such misconduct that the accused has not received a fair and impartial trial; and	(8) when the jury has engaged in such misconduct that the defendant did not receive a fair and impartial trial; or
(9) Where the verdict is contrary to the law and evidence.	(9) when the verdict is contrary to the law and the evidence.
	Notes and Comments The rule is amended without substantive change.

* This paragraph was disapproved by the Texas Legislature, effective September 1, 1993. Acts 1993, 73rd Leg., ch. 900, Section 11.02, codified as Tx. Gov't Code § 22.108(b). See also Code Crim. Pro. Art. 40.001, Code of Criminal Procedure.

CURRENT RULE	PROPOSED RULE
RULE 31. MOTION—FILING, PRESENTING AND RULING	RULE 31. MOTION FOR NEW TRIAL: FILING, PRESENTMENT, AND COURT'S RULING
(a) Time to File and Amend. (1) *To File.* A motion for new trial if filed may be filed prior to, or shall be filed within 30 days after, date sentence is imposed or suspended in open court. (2) *To Amend.* Before a motion or an amended motion for new trial is overruled it may be amended and filed without leave of court within 30 days after date sentence is imposed or suspended in open court.	(a) **Time to File and Amend.** (1) *To file.* A defendant may file a motion for new trial before, but no later than 30 days after, the date when the trial court imposes or suspends sentence in open court. (2) *To amend.* Within 30 days after the date when the trial court imposes or suspends sentence in open court but before the court overrules any preceding motion for new trial, a defendant may, without leave of court, file one or more amended motions for new trial.
(b) State May Controvert. (1) The State may take issue in writing with the truth of any reason set forth by accused in his motion. That the State has controverted a motion for new trial will not relieve an accused of his responsibility to present his motion timely to the court.	(b) **State May Controvert; Effect.** The State may oppose in writing any reason the defendant sets forth in the motion for new trial. The State's having opposed a motion for new trial does not affect a defendant's responsibilities under (c).
(c) Time to Present. (1) *In Term of Court.* An accused shall present his motion for new trial to the court within ten days after filing it, unless in his discretion the trial judge permits it to be presented and heard within 75 days from after date sentence is imposed or suspended in open court. (2) *New Term of Court.* A motion for new trial need not be heard during the term it is filed. Within time limits prescribed in this rule an accused may file a motion for new trial, present it and have it heard and determined during a new term of court or in vacation.	(c) **Time to Present.** (1) *In term of court.* A defendant must present his motion for new trial within 10 days of filing it, unless the trial court in its discretion permits it to be presented and heard within 75 days from the date when the court imposes or suspends sentence in open court. (2) *New term of court.* The trial court need not hear a motion for new trial during the term in which it is filed. A defendant may — within the periods prescribed in this rule — file a motion for new trial, present it, and have it heard and determined during a new term of court or in vacation.
(d) Hearing. The court is authorized to hear evidence by affidavit or otherwise and to determine the issues.	(d) **Types of Evidence Allowed at Hearing.** The court may receive evidence by affidavit or otherwise.

CURRENT RULE	PROPOSED RULE
(e) Determination. (1) *Time to Rule*. The court shall determine a motion for new trial within 75 days after date sentence is imposed or suspended in open court. (2) *Ruling*. The judge shall not sum up, discuss or comment on evidence in the case. The judge shall grant or refuse the motion for new trial. (3) *Failure to Rule*. A motion not timely determined by written order signed by the judge shall be considered overruled by operation of law upon expiration of the period of time prescribed in section (e)(1) of this rule.	(e) Court's Ruling. (1) *Time to rule*. The court must rule on a motion for new trial within 75 days after imposing or suspending sentence in open court. (2) *Ruling*. In its order on a motion for new trial, the court must not summarize, discuss, or comment on evidence but must simply grant or deny the motion. (3) *Failure to rule*. A motion not timely ruled on by written order will be deemed denied when the period prescribed in (1) expires.
	Notes and Comments The rule is amended without substantive change.

CURRENT RULE	PROPOSED RULE
RULE 32. EFFECT OF NEW TRIAL	RULE 32. EFFECT OF GRANTING MOTION FOR NEW TRIAL
Granting a new trial restores the case to its position before the former trial including, at the option of either party, arraignment or pretrial proceedings initiated by that party. The prior conviction shall not be regarded as a presumption of guilt, nor shall it be alluded to in argument or in presence of jury.	Granting a motion for new trial restores the case to its position before the former trial, including, at any party's option, arraignment or pretrial proceedings initiated by that party. The prior conviction must not be regarded as a presumption of guilt, nor may it be alluded to in the presence of the jury that hears the case on retrial.

CURRENT RULE	PROPOSED RULE
B. ARREST OF JUDGMENT IN CRIMINAL CASES	**B. ARREST OF JUDGMENT IN CRIMINAL CASES**
RULE 33. MOTION AND GROUNDS	RULE 33. DEFINITION AND GROUNDS
(a) **Definition.** A motion in arrest of judgment is an oral or written suggestion to the trial court by an accused that judgment was not rendered against him in accordance with law for reasons stated in the motion.	(a) **Definition.** *Motion in arrest of judgment* means a defendant's oral or written suggestion that, for reasons stated in the motion, the judgment rendered against him was contrary to law. Such a motion is made in the trial court.
(b) **Grounds.** A motion may state a reason that is a ground provided for an exception to substance of an indictment or information or that in relation to the indictment or information a verdict is defective in substance, or any other reason that renders the judgment invalid.	(b) **Grounds.** The motion may be based on any of the following grounds: (1) that the indictment or information is subject to an exception on substantive grounds; (2) that in relation to the indictment or information a verdict is substantively defective; or (3) that the judgment is invalid for some other reason.
	Notes and Comments The rule is amended without substantive change.

CURRENT RULE	PROPOSED RULE
RULE 34. MOTION—TIME TO MAKE AND TO RULE	RULE 34. MOTION IN ARREST OF JUDGMENT: FILING AND COURT'S RULING
(a) **Time to Make.** A motion in arrest of judgment, if made, may be made prior to, or shall be made within thirty days after, date sentence is imposed or suspended in open court.	(a) **Time to Make.** A defendant may file a motion in arrest of judgment before, but no later than 30 days after, the date when the trial court imposes or suspends sentence in open court.
(b) **Time to Rule.** A court must determine a motion in arrest of judgment by oral order or written order signed by the judge within 75 days after date sentence is imposed or suspended in open court. A motion not timely determined shall be considered overruled by operation of law upon expiration of that period.	(b) **Court's Ruling.** (1) *Time to rule; form of ruling.* The court must rule on a motion in arrest of judgment within 75 days after imposing or suspending sentence in open court. The ruling may be oral or in writing. (2) *Failure to rule.* A motion not timely ruled on will be deemed denied when the period prescribed in (1) expires.
(c) **Effect of Overruling.** An order overruling a motion in arrest of judgment shall be considered as an order overruling a motion for new trial for purposes of giving notice of appeal.	
	Notes and Comments The rule is amended without substantive change.

CURRENT RULE	PROPOSED RULE
RULE 35. EFFECT OF ARRESTING JUDGMENT	RULE 35. EFFECT OF RULING
(a) **Effect.** Arresting judgment restores an accused to his position before indictment or information was presented.	(a) **Effect of Denying.** For purposes of the defendant's giving notice of appeal, an order denying a motion in arrest of judgment will be considered an order denying a motion for new trial.
(b) **Further Effect.** If the trial court determines from the evidence adduced at trial that the accused may be convicted on a proper indictment or information or, in relation thereto, on a proper verdict, the judge may remand the accused to custody or fix bail; otherwise the accused shall be discharged.	(b) **Effect of Granting.** (1) *Defendant restored.* If judgment is arrested, the defendant is restored to the position that he or she had before the indictment or information was presented. (2) *Defendant discharged or remanded.* If the judgment is arrested, the defendant will be discharged. But the trial court may remand the defendant to custody or fix bail if the court determines, from the evidence adduced at trial, that the defendant may be convicted on a proper indictment or information, or on a proper verdict in relation to the indictment or information.

CURRENT RULE	PROPOSED RULE
C. NUNC PRO TUNC PROCEEDINGS	**C. NUNC PRO TUNC PROCEEDINGS**
RULE 36. JUDGMENT AND SENTENCE	RULE 36. JUDGMENT AND SENTENCE
(a) **When Done.** Unless a new trial has been granted, the judgment arrested, or an appeal has been taken, failure of the court to enter judgment and pronounce sentence may be corrected at any time by entering judgment and pronouncing sentence.	(a) **When Done.** Unless the trial court has granted a new trial or arrested the judgment, or unless the defendant has appealed, a failure to enter judgment and pronounce sentence may be corrected at any time by the court's doing so.
(b) **Credit.** The trial court shall give the defendant credit on the sentence finally pronounced for all time the defendant has spent in confinement from the time judgment and sentence should have been entered and pronounced, as well as from the time of his arrest and confinement to the time the judgment and sentence should have been entered and pronounced.	(b) **Credit on Sentence.** When sentence is pronounced, the trial court must give the defendant credit on that sentence for: (1) all time the defendant has been confined since the time when judgment and sentence should have been entered and pronounced; and (2) all time between the defendant's arrest and confinement to the time when judgment and sentence should have been entered and pronounced.
	Notes and Comments The rule is amended without substantive change.

CURRENT RULE	PROPOSED RULE
SECTION FOUR. APPEALS FROM JUDGMENTS AND ORDERS OF TRIAL	SECTION FOUR. APPEALS FROM TRIAL-COURT JUDGMENTS AND ORDERS A. PROCEDURE TO APPEAL
RULE 40. ORDINARY APPEAL—HOW PERFECTED	RULE 40. PERFECTING APPEAL
(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.	**(a) Civil Cases.** (1) *Notice of appeal.* An appeal is perfected when a written notice of appeal is filed with the trial court clerk. If a notice of appeal is mistakenly filed with the appellate court, the notice is deemed to have been filed the same day with the trial court clerk, and the appellate clerk must immediately send the trial court clerk a copy of the notice. (2) *Jurisdiction of appellate court.* The filing of a notice of appeal by any party invokes the appellate court's jurisdiction over all parties to the trial court's judgment or order appealed from. Any party's failure to take any other step required by these rules, including the failure to perfect a cross-appeal, does not deprive the appellate court of jurisdiction but is ground only for the appellate court to act as it considers appropriate, including dismissing the appeal. (3) *Who must file notice.* A party who seeks to alter the trial court's judgment or other appealable order must file a notice of appeal. Parties whose interests are aligned may file a joint notice of appeal. The appellate court may not grant a party who does not file a notice of appeal more favorable relief than did the trial court except for just cause. (4) *Alignment of parties.* The first party to file a notice of appeal is the appellant for purposes of these rules. On motion of any party or on its own initiative, the appellate court may realign the parties. (5) *Contents and service of notice.* The notice of appeal must: (A) identify the trial court and state the case's trial court number and style; (B) state the date of the judgment or order appealed from; (C) state that the party desires to appeal;

CURRENT RULE	PROPOSED RULE
(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. (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. (4) *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 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.	(D) state the court to which the appeal is taken unless the appeal is to either the First or Fourteenth Court of Appeals, in which case the notice must state that the appeal is to either of those courts; (E) state the name of each party filing the notice; (F) in an accelerated appeal, state that the appeal is accelerated; (G) in a restricted appeal under Rule 45: (i) state the name and address of each party to the trial court's judgment; (ii) state that the appellant is a party affected by the trial court's judgment but did not participate — either in person or through counsel — in the actual trial of the case; (iii) state that the appellant did not timely file either a postjudgment motion, request for findings of fact and conclusions of law, or notice of appeal; and (iv) be verified by the appellant if the appellant does not have counsel; and (H) be served on all parties to the trial court's final judgment or, in an interlocutory appeal, on all parties to the trial court proceeding, and a copy filed with the appellate court clerk.

CURRENT RULE	PROPOSED RULE
(5) *Judgment Not Suspended by Appeal.* Except as provided in Rule 43, the filing of a 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.	(6) *Amending the notice.* An amended notice of appeal correcting a defect or omission in an earlier filed notice may be filed in the appellate court at any time before the appellant's brief is filed. The amended notice is subject to being struck for cause on the motion of any party affected by the amended notice. After the appellant's brief is filed, the notice may be amended only on leave of the appellate court and on such terms as the court may prescribe.
	(7) *Enforcement of judgment not suspended by appeal.* The filing of a notice of appeal does not suspend enforcement of the judgment. Enforcement of the judgment may proceed unless: (A) the judgment is superseded in accordance with Rule 47, or (B) the party may supersede the judgment without security by filing a notice of appeal.

CURRENT RULE	PROPOSED RULE
(b) Appeals in Criminal Cases. (1) Appeal is perfected in a criminal case by giving timely notice of appeal; except, it is unnecessary to give notice of appeal in death penalty cases. Notice of appeal shall be given in writing filed with the clerk of the trial court. Such notice shall be sufficient if it shows the desire of the defendant to appeal from the judgment or other appealable order; but if the judgment was rendered upon his plea of guilty or nolo contendere pursuant to Article 1.15, Code of Criminal Procedure, and the punishment assessed does not exceed the punishment recommended by the prosecutor and agreed to by the defendant and his attorney, in order to prosecute an appeal for a nonjurisdictional defect or error that occurred prior to entry of the plea the notice shall state that the trial court granted permission to appeal or shall specify that those matters were raised by written motion and ruled on before trial. The clerk of the trial court shall note on copies of the notice of appeal the number of the cause and the day that notice was filed, and shall immediately send one copy to the clerk of the appropriate court of appeals and one copy to the attorney for the State. (2) *Effect of Appeal in Criminal Cases.* In the appeal of a criminal case when the record has been filed in the appellate court all further proceedings in the trial court, except as provided by law or by these rules, shall be suspended and arrested until the mandate of the appellate court is received by the trial court.	(b) **Criminal Cases.** (1) *Perfection of appeal.* In a criminal case, appeal is perfected by giving timely notice of appeal. In a death-penalty case, however, it is unnecessary to give notice of appeal. (2) *Form and sufficiency of notice.* Notice must be given in writing and filed with the trial court clerk. Notice is sufficient if it shows the defendant's desire to appeal from the judgment or other appealable order. But in order to appeal** a nonjurisdictional defect that occurred before the defendant's plea was entered, all of the following conditions must be satisfied: (A) the judgment must have been rendered upon the defendant's guilty or no-contest plea under Article 1.15 of the Code of Criminal Procedure; (B) the punishment assessed must not exceed the punishment recommended by the prosecutor and agreed to by the defense; and (C) the notice must either: (i) state that the trial court granted permission to appeal; or (ii) specify that the defect was raised by written motion and ruled on before trial. (3) *Clerk's duties.* The trial-court clerk must note on copies of the notice of appeal the cause number and the date when the notice was filed. The clerk must then immediately send one copy to the clerk of the appropriate court of appeals and one copy to the State's attorney. (4) *Effect of appeal.* Once the record has been filed in the appellate court, all further proceedings in the trial court — except as provided otherwise by law or by these rules — will be suspended until the trial court receives the appellate-court mandate.

** In the alternative, this could read *in order to perfect an appeal of.* — BAG.

CURRENT RULE	PROPOSED RULE
	Notes and Comments Comment on 1997 change: In civil cases, the requirement of an appeal bond is repealed. Appeal is perfected by filing a notice of appeal. A notice must be filed by any party seeking to alter the trial court's judgment. The restricted appeal — formerly the appeal by writ of error — is perfected by filing a notice of appeal in the trial court as in other appeals. The contents of the notice of appeal is prescribed. The notice of limitation of appeal is repealed. No substantive changes are made to subdivision (b).

CURRENT RULE	PROPOSED RULE
RULE 41. ORDINARY APPEAL–WHEN PERFECTED	**RULE 41. TIME TO PERFECT APPEAL**
(a) Appeals in Civil Cases. **SUPREME COURT TEXT** (1) *Time to Perfect Appeal.* When security for costs on appeal is required, the bond or affidavit in lieu thereof shall be filed with the clerk within thirty days after the judgment is signed, or, within ninety days after the judgment is signed if a timely motion for new trial has been filed by any party or if any party has timely filed a request for findings of fact and conclusions of law in a 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. **COURT OF CRIMINAL APPEALS TEXT** (1) *Time to Perfect Appeal.* When security for costs on appeal is required, the bond or affidavit in lieu thereof shall be filed with the clerk within thirty days (fifteen by the state) after the judgment is signed, or, within ninety days after the judgment is signed if a timely motion for new trial has been filed by any party or if any party has timely filed a request for findings of fact and conclusions of law in a 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.	(a) Civil Cases. The notice of appeal must be filed within 30 days after the judgment is signed, except as follows: (1) the notice of appeal must be filed within 90 days after the judgment is signed if any party timely files: (A) a motion for new trial; (B) a motion to modify the judgment; (C) a motion to reinstate under Texas Rule of Civil Procedure 165a; (D) or a request for findings of fact and conclusions of law if the trial court heard live testimony — not before a jury — in connection with the order or judgment appealed from; (2) in an accelerated appeal, the notice of appeal must be filed within 20 days after the order is signed; (3) in a restricted appeal under Rule 45, the notice of appeal must be filed within six months after the judgment or order is signed; and (4) if any party timely files a notice of appeal, another party may file a notice of appeal within the applicable period stated above or 14 days after the first filed notice of appeal, whichever is later.

CURRENT RULE	PROPOSED 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. **(b) Appeals in Criminal Cases.** SUPREME COURT TEXT (1) *Time to Perfect Appeal.* Appeal is perfected when notice of appeal is filed within thirty 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 after the day sentence is imposed or suspended in open court. COURT OF CRIMINAL APPEALS TEXT (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 after the sentence is imposed or suspended in open court. (2) *Extension of Time.* An extension of time for filing notice of appeal may be granted by the court of appeals if such notice is filed within fifteen days after the last day allowed and within the same period a motion is filed in the court of appeals reasonably explaining the need for such extension.	(b) **Criminal Cases.** The notice of appeal must be filed: (1) within 30 days — 15 days if the state is the appellant — after the day sentence is imposed or suspended in open court, or after the day the trial court signs an appealable order; or (2) within 90 days after the day sentence is imposed or suspended in open court if any party timely files a motion for new trial. **(c) Extension of Time.** The appellate court may extend the time to file the notice of appeal if, within 15 days after the deadline for filing the notice of appeal the party: (1) files in the trial court the notice of appeal; and (2) files in the appellate court a motion to extend time that complies with Rule 19(e)(2).

CURRENT RULE	PROPOSED RULE
(c) **Prematurely Filed Documents.** No appeal or bond or affidavit in lieu thereof, notice of appeal, or notice of limitation of appeal shall be held ineffective because prematurely filed. In civil cases, every such instrument shall be deemed to have been filed on the date of but subsequent to the time of signing of the judgment or the time of the overruling of motion for new trial, if such a motion is filed. In criminal cases, every such instrument shall be deemed to have been filed on the date of but subsequent to the imposition or suspension of sentence in open court or the signing of an appealable order by the trial judge, provided that no notice of appeal shall be effective if given before a finding of guilt is made or a verdict is received.	
	Notes and Comments Comment to 1997 change: All times for perfecting appeal in a civil cases — including the time for perfecting a restricted appeal and the time for perfecting a cross-appeal — are stated. An extension of time is available for all appeals perfected under this rule. The provisions of former subdivision (c) regarding prematurely filed documents are moved to Rule 46(a).

CURRENT RULE	PROPOSED RULE
RULE 42. ACCELERATED APPEALS IN CIVIL CASES	RULE 42. ACCELERATED APPEALS IN CIVIL CASES
(a) Mandatory Acceleration. (1) Appeals from interlocutory orders (when allowed by law) shall be accelerated. In appeals from interlocutory orders, no motion for new trial shall be filed. The trial judge need not file findings of fact and conclusions of law, but may file findings and conclusions within thirty days after the judgment is signed. (2) Appeals in quo warranto proceedings shall be accelerated. In quo warranto, the filing of a motion for new trial shall not extend the time for perfecting the appeal or the time for filing appellant's brief; but the trial court shall have power to grant such a motion, if timely filed, until fifty days after the judgment or order appealed from is signed. If not determined by written order within that period, the motion shall be deemed overruled by operation of law. (3) In all accelerated appeals from interlocutory orders and in quo warranto proceedings, the bond, or the notice or affidavit in lieu thereof, shall be filed, or the deposit in lieu of bond shall be made, within twenty days after the judgment or order is signed. The record shall be filed in the appellate court within thirty days after the judgment or order is signed. The appellant's brief shall be filed within twenty days after the record is filed, and appellee's brief shall be filed within twenty days after appellant's brief is filed. Failure to file either the record or appellant's brief within the time specified, unless reasonably explained, shall be ground for dismissal or affirmance under Rule 60, but shall not affect the court's jurisdiction or its authority to consider material filed late.	(a) **Interlocutory Orders.** An appeal from an interlocutory order, when allowed, will be accelerated. Filing a motion for new trial will not extend the time to perfect the appeal. The trial court need not, but may — within 30 days after the order is signed — file findings of fact and conclusions of law. (b) **Quo Warranto.** An appeal in a quo warranto proceeding will be accelerated. In such a proceeding, filing a motion for new trial will not extend the time to perfect the appeal. But the trial court may grant a timely filed motion for new trial until 50 days after the judgment or appealable order is signed. If not determined by written order within that period, the motion for new trial will be deemed overruled. (c) **Filing Documents.** In an accelerated appeal, the time for filing the notice of appeal is provided in Rule 41(a), the time for filing the record is provided in Rule 54(a), and the time for filing briefs is provided in Rule 74(f).
(b) **Discretionary Acceleration.** The court of appeals, on motion of any party or an order of the court, may advance any appeal and give it priority over other cases.	
(c) **Transcript and Briefs.** The court of appeals may hear an appeal that is accelerated under paragraphs (a) or (b) of this rule on the original papers sent up from the trial court or on sworn and uncontroverted copies of such papers in lieu of a transcript, and may shorten the time for filing briefs or allow the case to be submitted without briefs.	(d) **Transcript and Briefs.** In lieu of a transcript, the court of appeals may hear an accelerated appeal on the original papers forwarded by the trial court or on sworn and uncontroverted copies of those papers submitted by the parties. The court may allow the case to be submitted without briefs.

CURRENT RULE	PROPOSED RULE
	Notes and Comments Comment to 1997 change: Former paragraphs (a)(1), (2) and (3) are redesignated as subdivisions (a),(b) and (c). A motion for new trial is now permitted in an appeal from an interlocutory order, but it does not extend the time to perfect appeal. All deadlines for filing items in an accelerated appeal from former paragraph (a)(3) are moved to other rules and a reference to those rules is provided. Former subdivision (b), regarding discretionary acceleration, is deleted. See Rule 76(a). The provision in subdivision (d) (formerly subdivision (c)) allowing the court to shorten the time to file briefs is deleted. See Rule 74(f)(5).

CURRENT RULE	PROPOSED RULE
RULE 43. ORDERS PENDING INTERLOCUTORY APPEAL IN CIVIL CASES	RULE 43. ORDERS PENDING INTERLOCUTORY APPEAL IN CIVIL CASES
(a) **Effect of Appeal.** No order denying interlocutory relief shall be suspended or superseded by an appeal therefrom. The pendency of an appeal from an order authorizing a cause to proceed as a class action suspends such order and also suspends trial on the merits in such cases. Otherwise, the pendency of an appeal from an order granting interlocutory relief does not suspend the order appealed from unless supersedeas is granted in accordance with subdivision (b) or unless the appellant is entitled to supersede the judgment without security by giving notice of appeal.	(a) **Effect of Appeal.** Perfecting an appeal from an order granting interlocutory relief does not suspend the order appealed from unless: (1) the order is superseded in accordance with (b); or (2) the appellant is entitled to supersede the order without security by filing a notice of appeal.
(b) **Security.** Except as provided in paragraph (a) the trial court may permit interlocutory orders to be suspended pending an appeal therefrom by filing security pursuant to Rule 47. Denial of such suspension may be reviewed for abuse of discretion on motion by the appellate court.	(b) **Security.** The trial court may permit an order granting interlocutory relief to be superseded pending an appeal from the order, in which event the appellant may supersede the order in accordance with Rule 47. If the trial court refuses to permit the appellant to supersede the order, the appellant may move the appellate court to review that decision for abuse of discretion.
(c) **Temporary Orders of Appellate Court.** On perfection of an appeal from an interlocutory order, the appellate court may issue such temporary orders as it finds necessary to preserve the rights of the parties until disposition of the appeal and may require such security as it deems appropriate, but it shall not suspend the trial court's order if the appellant's rights would be adequately protected by supersedeas or other orders pursuant to Rules 47 or 49. (d) **Further Proceedings in Trial Court.** Pending an appeal from an interlocutory order, the trial court retains jurisdiction of the cause and may issue further orders, including dissolution of the order appealed from, but the court shall make no order granting substantially the same relief as that granted by the order appealed from, or any order contrary to the temporary orders of the appellate court, or any order that would interfere with or impair the effectiveness of any relief sought or granted on appeal. The trial court may proceed with a trial on the merits, except as provided in subdivision (a).	(c) **Temporary Orders of Appellate Court.** When an appeal from an interlocutory order is perfected, the appellate court may issue any temporary orders necessary to preserve the parties' rights until disposition of the appeal and may require appropriate security. But the appellate court must not suspend the trial court's order if the appellant's rights would be adequately protected by supersedeas or another order made under Rule 47.

CURRENT RULE	PROPOSED RULE
(e) **Enforcement of Temporary Orders.** Pending an appeal from an interlocutory order, the order may be enforced only by the appellate court in which the appeal is pending, except that the appellate court may refer any enforcement proceeding to the trial court with instructions to hear evidence and grant such relief as may be appropriate. The appellate court may also instruct the trial court to make findings and report them with his recommendations to the appellate court.	(d) **Enforcement of Temporary Orders.** While an appeal from an interlocutory order is pending, only the appellate court in which the appeal is pending may enforce the order. But that appellate court may: (1) refer any enforcement proceeding to the trial court with instructions to hear evidence and grant appropriate relief; or (2) instruct the trial court to make findings and recommendations and report them to the appellate court.
	(e) **Further Proceedings in Trial Court.** While an appeal from an interlocutory order is pending, the trial court retains jurisdiction of the case and may make further orders, including one dissolving the order appealed from, and may proceed with a trial on the merits. But the court must not make an order that: (1) grants substantially the same relief as the appealed order; (2) is inconsistent with any appellate court temporary order; or (3) interferes with or impairs the effectiveness of any relief sought or that may be granted on appeal.
(f) **Review on Further Orders.** When an appeal is pending from an interlocutory order, any further appealable interlocutory order of the trial court concerning the same subject-matter and any interlocutory order that would interfere with or impair the effectiveness of the relief sought or granted on appeal may be brought before the appellate court for review on motion, either on the original record or with a supplement thereto.	(f) **Review of Further Orders.** (1) *Motion to review further orders.* While an appeal from an interlocutory order is pending, on a party's motion or on the appellate court's own initiative, the appellate court may review the following: (A) a further appealable interlocutory order concerning the same subject matter; and (B) any interlocutory order that interferes with or impairs the effectiveness of the relief sought or that may be granted on appeal. (2) *Record.* The party filing the motion may rely on the original record or may file a supplemental record with the motion.

CURRENT RULE	PROPOSED RULE
(g) **Mandate.** The order of the appellate court on appeal from an interlocutory order takes effect when the mandate is issued. The court may issue the mandate immediately on announcing its decision if the circumstances require, or it may delay the mandate until final disposition of the appeal. All further proceedings in the trial court shall conform to the mandate. If the appellate court modifies its decision after issuing a mandate, a new mandate shall be issued accordingly.	
(h) Rehearing. The appellate court may either deny the right to file a motion for rehearing or shorten the time for filing, and in that event a motion for rehearing shall not be a prerequisite to any review available in the Supreme Court.	
	Notes and Comments Comment to 1997 change: The provision in subdivision (a) providing that an appeal from an order certifying a class suspends the order is repealed. The provision in subdivision (a) providing that an order denying interlocutory relief cannot be suspended is repealed, but no substantive change is intended. The provisions of former subdivision (g) regarding the mandate are moved to Rule 23(f) and (g). The provision of former subdivision (h) regarding rehearings is moved to Rule 100(d).

CURRENT RULE	PROPOSED RULE
RULE 44. APPEALS IN HABEAS CORPUS AND BAIL; CRIMINAL CASES	RULE 44. APPEALS IN CRIMINAL HABEAS CORPUS, BAIL, AND EXTRADITION PROCEEDINGS
(a) **The Record.** In habeas corpus or bail proceedings when written notice of appeal from a judgment or an order is filed, the transcript and, if requested by the applicant, a statement of facts, shall be prepared and certified by the clerk of the trial court and, within fifteen days after the notice of appeal is filed, sent to the appellate court for review. The appellate court may shorten or extend the time for filing the record if there is a reasonable explanation for the need for such action. When the record is received by the appellate court, the court shall set the time for the filing of briefs, if briefs are desired, and shall set the appeal for submission.	(a) **Filing the Record; Submission.** When written notice of appeal from a judgment or order in a habeas corpus or bail proceeding is filed, the trial court clerk must prepare and certify the transcript and, if the applicant requests, the court reporter or recorder must prepare and certify a statement of facts. The clerk must send the transcript and the court reporter or recorder must send the statement of facts to the court of appeals within 15 days after the notice of appeal is filed. On reasonable explanation, the court of appeals may shorten or extend the time to file the record. When the court of appeals receives the record, the court will — if it desires briefs — set the time for filing briefs, and will set the appeal for submission.
(b) **Hearing.** Such cases, taken to the court of appeals by appeal, shall be heard at the earliest practicable time. The appellant need not be personally present, and such appeal shall be heard and determined upon the law and the facts arising upon record. No incidental question which may have arisen on the hearing of the application before the court below shall be reviewed. The only design of the appeal is to do substantial justice to the party appealing.	(b) **Hearing.** An appeal in a habeas corpus or bail proceeding will be heard at the earliest practicable time. The appellant need not personally appear, and the appeal will be heard and determined upon the law and the facts shown by the record. The court of appeals will not review any incidental question that might have arisen on the hearing of the application before the trial court. The sole purpose of the appeal is to do substantial justice to the appealing party.
(c) **Orders on Appeal.** In such cases, the appellate court shall render such judgment and make such orders as the law and the nature of the case may require, and may make such orders relative to the costs in the case as may seem right, allowing costs and fixing the amount, or allowing no cost at all.	(c) **Orders on Appeal.** The court of appeals will render whatever judgment and make whatever orders the law and the nature of the case require. The court may make an appropriate order relating to costs, whether allowing costs and fixing the amount, or allowing no costs.

CURRENT RULE	PROPOSED RULE
(d) **Stay of Mandate.** Notwithstanding Rule 86 and other provisions of these rules, when an appellate court affirms the judgment of the court below in an extradition matter, thereby sanctioning extradition of appellant, or reverses the judgment of the court below in a bail matter, including bail pending appeal pursuant to Article 44.04(g), CCP, thereby granting or reducing the amount of bail, within fifteen days after the appellate court has rendered judgment a party who in good faith intends to seek discretionary review shall file with the clerk of the appellate court a motion for stay of mandate, appending thereto his petition for discretionary review showing reasons for review of the judgment of the appellate court by the Court of Criminal Appeals. The clerk shall promptly submit the motion with appendix to the appellate court or one or more judges as the court deems appropriate for immediate consideration and determination. If the motion for stay is granted, the clerk shall file the petition for discretionary review and process the cause in accordance with Rule 202(f). If the motion is denied, the clerk shall issue a mandate in accordance with the judgment of the appellate court, and the losing party may present the motion with appendix to the Clerk of the Court of Criminal Appeals who will promptly submit them to the Court or one or more judges as the Court deems appropriate for immediate consideration and determination. The Court of Criminal Appeals may deny the motion or stay or recall the mandate. If mandate is stayed or recalled, the clerk of the appellate court shall file the petition for discretionary review and process the cause in accordance with Rule 202(f).	(d) Stay of Mandate. (1) *When motion for stay required.* Despite Rule 23 or any other of these rules, in the following circumstances a party who in good faith intends to seek discretionary review must — within 15 days after the court of appeals renders judgment — file with the court of appeals clerk a motion for stay of mandate, to which is appended the party's petition for discretionary review showing reasons why the Court of Criminal Appeals should review the appellate court judgment: (A) when a court of appeals affirms the judgment of the trial court in an extradition matter and thereby sanctions a defendant's extradition; or (B) when a court of appeals reverses the trial court's judgment in a bail matter — including bail pending appeal under Article 44.04(g) of the Code of Criminal Procedure — and thereby grants or reduces the amount of bail. (2) *Determination of the motion.* The clerk must promptly submit the motion and appendix to the court of appeals, or to one or more judges as the court deems appropriate, for immediate consideration and determination. (A) If the motion for stay is granted, the clerk will file the petition for discretionary review and process the case in accordance with Rule 202(f). (B) If the motion is denied, the clerk will issue a mandate in accordance with the court of appeals' judgment.
	(3) *Denial of stay.* If the motion for stay is denied under (d)(2)(B), the losing party may then present the motion and appendix to the clerk of the Court of Criminal Appeals, who will promptly submit them to the Court, or to one or more judges as the Court deems appropriate, for immediate consideration and determination. The Court of Criminal Appeals may deny the motion or stay or recall the mandate. If the mandate is stayed or recalled, the court of appeals clerk will file the petition for discretionary review and process the case in accordance with Rule 202(f).

CURRENT RULE	PROPOSED RULE
(e) **Judgment Conclusive.** The judgment of the court of appeals in appeals in such cases shall be final and conclusive if discretionary review is not granted by the Court of Criminal Appeals. If discretionary review is granted, the judgment of the Court of Criminal Appeals shall be final and conclusive. In either case, no further application in the same case can be made for the writ, except in cases specially provided for by law.	(e) **Judgment Conclusive.** The court of appeals' judgment is final and conclusive if the Court of Criminal Appeals denies discretionary review. If the Court of Criminal Appeals grants discretionary review, that court's judgment is final and conclusive. In either case, no further application in the same case can be made for the writ unless the law provides otherwise.
(f) **Appellant Detained by Other Than Officer.** If the appellant in such a case is detained by any person other than an officer, the sheriff receiving the mandate of the appellate court shall immediately cause the person so held to be discharged; and the mandate shall be sufficient authority therefor.	(f) **Defendant Detained by Other Than Officer.** If the defendant is held by a person other than an officer, the sheriff receiving the appellate-court mandate so ordering must immediately cause the defendant to be discharged, for which discharge the mandate is sufficient authority.
(g) **Judgment to be Certified.** In such cases, the judgment of the appellate court shall be certified by the clerk thereof to the officer holding the defendant in custody or, when he is held by any person other than an officer, to the sheriff of the proper county.	(g) **Judgment to be Certified.** The appellate court clerk will certify the court's judgment to the officer holding the defendant in custody or, if the defendant is held by a person other than an officer, to the appropriate sheriff.
	Notes and Comments Comment to 1997 change: The rule is revised without substantive change.

CURRENT RULE	PROPOSED RULE
RULE 45. APPEAL BY WRIT OF ERROR IN CIVIL CASES TO COURT OF APPEALS	RULE 45. RESTRICTED APPEAL TO COURT OF APPEALS IN CIVIL CASES
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.	A party who did not participate — either in person or through counsel — in the actual trial of a case and who did not timely file a postjudgment motion or request for findings of fact and conclusions of law may file a notice of appeal within the time permitted by Rule 41(a)(4). But the appeal is restricted to complaints or error apparent on the face of the record, which comprises those papers on file with the trial court clerk at the time the judgment was rendered and the testimony and other evidence shown by a statement of facts.
(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.	

CURRENT RULE	PROPOSED RULE
(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.	

CURRENT RULE	PROPOSED RULE
	Notes and Comments Comment to 1997 change: The appeal by writ of error procedure is repealed. A procedure for an appeal filed within 6 months — called a restricted appeal — is substituted. This rule sets out who may take a restricted appeal. Rules 40 and 41 set out the method of perfection and the time for filing the appeal.

CURRENT RULE	PROPOSED 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 $1000, 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.	

CURRENT RULE	PROPOSED RULE
(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.	

CURRENT RULE	PROPOSED RULE

CURRENT RULE	PROPOSED RULE
	RULE 46. PREMATURE FILINGS
	(a) Prematurely Filed Notice of Appeal. (1) *Civil cases.* In a civil case, a prematurely filed notice of appeal is effective and deemed filed on the day of, but after, the event that begins the period for perfecting the appeal. (2) *Criminal cases.* In a criminal case, a prematurely filed notice of appeal is effective and deemed filed on the same day, but after, sentence is imposed or suspended in open court, or the appealable order is signed by the trial court. But a notice of appeal is not effective if filed before the trial court makes a finding of guilt or receives a jury verdict.
	(b) **Other Premature Actions.** The appellate court may treat actions taken before an appealable order is signed as relating to an appeal of that order and give them effect as if they had been taken after the order was signed. The appellate court may allow an appealed order that is not final to be modified so as to be made final and may allow the modified order and all proceedings relating to it to be included in a supplemental record.
	(c) **If Appealed Order Modified or Vacated.** If the trial court modifies or vacates an order after it has been appealed, the appellate court may treat the appeal as from the subsequent order and may treat actions relating to the appeal of the first order as relating to the appeal of the subsequent order. The subsequent order and actions relating to it may be included in the original or supplemental record. Any party may nonetheless appeal from the subsequent order.
	Notes and Comments Comment to 1997 change: The former rule — providing for a cost bond on appeal — is repealed. This rule is new and combines the provisions of former Rules 41(c) and 58.

CURRENT RULE	PROPOSED RULE
RULE 47. SUSPENSION OF ENFORCEMENT OF JUDGMENT PENDING APPEAL IN CIVIL CASES	B. SUSPENSION OF JUDGMENT 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 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.	**(a) Suspension of Enforcement.** (1) *Methods.* Unless the law or these rules provide otherwise, a judgment debtor may supersede the judgment by: (A) filing with the trial court clerk a written agreement with the judgment creditor for suspending enforcement of the judgment; (B) filing with the trial court clerk a good and sufficient bond; (C) making a deposit with the trial court clerk in lieu of a bond; or (D) providing alternate security ordered by the court.
	(2) *Bonds.* (A) A bond must be: (i) in the amount required by (b); (ii) payable to the judgment creditor; (iii) signed by the judgment debtor or the debtor's agent; (iv) signed by a sufficient surety or sureties as obligors; and (v) conditioned as required by (4). (B) To be effective a bond must be approved by the trial court clerk. On motion of any party, the trial court will review the bond.

CURRENT RULE	PROPOSED RULE
	(3) *Deposit in lieu of bond.* (A) Types of deposits. Instead of filing a surety bond, a party may deposit with the trial court clerk: (i) cash; (ii) a cashier's check payable to the clerk, drawn on any federally insured and federally or state-chartered bank or savings-and-loan association; or (iii) with leave of court, a negotiable obligation of the federal government or of any federally insured and federally or state-chartered bank or savings-and-loan association. (B) Amount of deposit. The deposit must be in the amount required by (b). (C) Clerk's duties; interest. The clerk must promptly deposit any cash or a cashier's check in a federally-insured, interest-bearing account. Interest that accrues on the deposit will constitute a part of the deposit. The clerk must hold the deposit until the conditions of liability in (4) are extinguished. The clerk must then release any remaining funds in the deposit to the judgment debtor.
	(4) *Conditions of liability.* The surety or sureties on a bond, deposit in lieu of bond, or any alternate security ordered by the court is liable for all damages and costs that may be awarded against the debtor — up to the amount of the bond, deposit, or security — if: (A) the debtor does not perfect an appeal or the debtor's appeal is dismissed, and the debtor does not perform the trial court's judgment after demand by the creditor; (B) the debtor does not perform an adverse judgment final on appeal after demand by the creditor; or (C) the judgment is for the recovery of an interest in real or personal property, and the debtor does not pay the creditor — after demand — the value of the property interest's rent or revenue during the pendency of the appeal.

CURRENT RULE	PROPOSED RULE
	(5) *Orders of trial court.* The trial court may make any order necessary to adequately protect the judgment creditor against loss or damage that the appeal might cause. (6) *Effect of supersedeas.* Enforcement of a judgment must be suspended to the extent the judgment is superseded. Enforcement begun before the judgment is superseded must cease when the judgment is superseded. If execution has been issued, the clerk will promptly issue a writ of supersedeas.
(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 the judgment, interest, and costs. The trial court may make an order to provide for 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 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.	**(b) Amount of Bond, Deposit or Security.** (1) *Type of judgment.* (A) For recovery of money. When the judgment is for money, the amount of the bond, deposit, or security must be at least the amount of the judgment, interest for the estimated duration of the appeal, and costs.

CURRENT RULE	PROPOSED RULE
(c) **Land or Property.** When the judgment is for the recovery of land or other property, then the bond, deposit, or orders which adequately protect the judgment creditor for any loss or damage occasioned by the appeal shall be further conditioned that the judgment debtor shall, in case the judgment is affirmed, pay to the judgment creditor the value of the rent or hire of such property during the appeal, and the bond, deposit, or alternate security shall be in the amount estimated or fixed by the trial court. (d) **Foreclosure on Real Estate.** When the judgment is for the recovery of or foreclosure upon real estate, the judgment debtor may suspend the enforcement of the judgment insofar as it decrees the recovery of or foreclosure against said specific real estate by posting security in the amount and type to be ordered by the trial court, not less than the rents and hire of said real estate; but if the amount of the security is less than the amount of any money judgment, with interest and costs, then the judgment creditor can execute against any other property of the judgment debtor unless the trial court within its discretion orders a suspension of enforcement of the money judgment with or without the posting of additional security.	(B) For recovery of property. When the judgment is for the recovery of an interest in real or personal property, the trial court will determine the type of security that the judgment debtor must post. The amount of that security must be at least: (i) the value of the property interest's rent or revenue, if the property interest is real; or (ii) the value of the property interest on the date when the court rendered judgment, if the property interest is personal.
(e) **Foreclosure on Personal Property.** When the judgment is for the recovery of or foreclosure upon specific personal property, the judgment debtor may suspend the enforcement of the judgment insofar as it decrees the recovery of or foreclosure against said specific personal property by posting security in an amount and type to be ordered by the trial court, not less than the value of said property on the date of rendition of judgment, but if the amount of the security is less than the amount of the money judgment with interest and costs, then the judgment creditor can execute against any other property of the judgment debtor unless the trial court within its discretion orders a suspension of enforcement of the money judgment with or without the posting of additional security.	
(f) **Other Judgment.** When the judgment is for other than money or property or foreclosure, the security shall be in such amount and type to be ordered by the trial court as will secure the judgment creditor for any loss or damage occasioned by the appeal. The trial court may decline to permit the judgment to be suspended on filing by the judgment creditor of security to be ordered by the trial court in such an amount as will secure the judgment debtor in any loss or damage caused by any relief granted if it is determined on final disposition that such relief was improper.	(C) Other judgment. When the judgment is for something other than money or an interest in property, the trial court must set the amount and type of security that the judgment debtor must post. The security must adequately protect the judgment creditor against loss or damage that the appeal might cause. But the trial court may decline to permit the judgment to be superseded if the judgment creditor posts security ordered by the trial court in an amount and type that will secure the judgment debtor against any loss or damage caused by the relief granted the judgment creditor if an appellate court determines, on final disposition, that that relief was improper.

CURRENT RULE	PROPOSED RULE
(g) **Conservatorship or Custody.** When the judgment is one involving the conservatorship or custody of a minor, the appeal, with or without security shall not have the effect of suspending the judgment as to the conservatorship or custody of the minor, unless it shall be so ordered by the court rendering the judgment. However, the appellate court, upon a proper showing, may permit the judgment to be superseded in that respect also.	(D) Conservatorship or custody. When the judgment involves the conservatorship or custody of a minor or other person under legal disability, enforcement of the judgment will not be suspended, with or without security, unless ordered by the trial court. But upon a proper showing, the appellate court may suspend enforcement of the judgment with or without security.
(h) For State or Subdivision. When the judgment is in favor of the State, a municipality, a State agency, or a subdivision of the State in its governmental capacity, and is such that the judgment holder has no pecuniary interest in it and no monetary damages can be shown, the security shall be allowed and its amount and type ordered within the discretion of the trial court, and the liability of the judgment debtor shall be for the amount of the security if the appeal is not prosecuted with effect. Under equitable circumstances and for good cause shown by affidavit or otherwise, the court rendering judgment on the security may allow recovery for less than its full amount.	(E) For a governmental entity. When a judgment in favor of a governmental entity in its governmental capacity is one in which the entity has no pecuniary interest, the trial court must determine whether to suspend enforcement, with or without security, taking into account the harm that is likely to result to the judgment debtor if enforcement is not suspended, and the harm that is likely to result to others if enforcement is suspended. The appellate court may review the trial court's determination and suspend enforcement of the judgment, with or without security, or refuse to suspend the judgment. If security is required, recovery is limited to the governmental entity's actual damages resulting from suspension of the judgment.
	(2) *Lesser amount.* The trial court may order a lesser amount than required by (1) if, after notice to all parties and a hearing, the court finds: (A) that posting a bond, deposit, or security in the amount required by (1) will irreparably harm the judgment debtor; and (B) that posting a bond, deposit, or security in a lesser amount will not substantially impair the judgment creditor's ability to recover under the judgment after all appellate remedies are exhausted.
(i) Certificate of Deposit. If the judgment debtor makes a deposit in lieu of a bond, the clerk's certificate that the deposit has been made shall be sufficient evidence thereof.	
(j) Effect of Security. Upon the filing and approval of a proper supersedeas bond, deposit, or the provision of such alternate security as ordered by the trial court in compliance with these rules, execution of the judgment or so much thereof as has been superseded, shall be suspended, and if execution has been issued, the clerk shall forthwith issue a writ of supersedeas.	

CURRENT RULE	PROPOSED RULE
(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 of the court of appeals, the judgment debtor shall notify the 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.	(c) **Continuing Trial Court Jurisdiction; Duties of Judgment Debtor.** (1) Even after the trial court's plenary power expires, the trial court has continuing jurisdiction to do the following: (A) order the amount and type of security and decide the sufficiency of sureties; and (B) if circumstances change, modify the amount or type of security required to continue the suspension of a judgment's execution. (2) The trial court's exercise of discretion under this subdivision is reviewable under (d). (3) If, after jurisdiction attaches in an appellate court, the trial court orders or modifies the security or decides the sufficiency of sureties, the judgment debtor must notify the appellate court of the trial court's action.
	(d) **Appellate Review.** (1) *Motions; review.* On a party's motion to the appellate court, that court may review: (A) the sufficiency or excessiveness of the amount of security; (B) the sureties on any bond; (C) the type of security; and (D) the determination whether to permit suspension of enforcement. (2) *Grounds of review.* Review may be based both on conditions as they existed at the time the trial court signed an order, and on changes in those conditions afterward. (3) *Temporary orders.* The appellate court may issue any temporary orders necessary to preserve the parties' rights.

CURRENT RULE	PROPOSED RULE
	(4) *Action by appellate court.* The motion must be heard at the earliest practicable time. The appellate court may require that the amount of a bond, deposit, or other security be increased or decreased, and that another bond, deposit, or security be provided and approved by the trial court clerk. The appellate court may require other changes in the trial court order. The appellate court may remand to the trial court for entry of findings of fact or for the taking of evidence. (5) *Effect of ruling.* If the appellate court orders additional or other security to supersede the judgment, enforcement will be suspended for 20 days after the appellate court's order. If the judgment debtor does not comply with the order within that period, the judgment may be enforced. When any additional bond, deposit, or security has been filed, the trial court clerk must notify the appellate court. The posting of additional security will not release the previously posted security or affect any alternative security arrangements that the judgment debtor previously made unless specifically ordered by the appellate court.
	Notes and Comments Comment to 1997 change: The rule is substantially revised. Paragraph (a)(1) now provides for superseding the judgment by agreement. Paragraph (a)(2) provides for a surety bond. Paragraph (a)(3) is taken from former Rule 48 and provides for a deposit in lieu of the bond, including specific provisions for the release of the deposit. Paragraph (a)(4) provides the conditions for the surety to honor the bond and for the deposit to be paid to the judgment creditor. Paragraph (a)(6) makes clear that all enforcement is to cease when the judgment is superseded. In subdivision (b), the provisions for determining the amount of the bond or deposit are simplified. All provisions regarding superseding a judgment for an interest in property are merged into paragraph (b)(1)(B). The procedure for allowing security in a lesser amount is moved to paragraph (b)(2) and is made applicable to all judgments. Subdivision (d) is taken from former Rule 49. The procedure for appellate review is more precisely stated.

CURRENT RULE	PROPOSED RULE
RULE 48. DEPOSIT IN LIEU OF BOND	**RULE 48. DEPOSIT IN LIEU OF BOND**
Wherever these rules provide for the filing of a surety bond, the party may in lieu of filing the bond deposit cash or a negotiable obligation of the government of the United States of America or any agency thereof, or with leave of court, deposit a negotiable obligation of any bank or savings and loan association chartered by the government of the United States of America or any state thereof, that is insured by the government of the United States of America or any agency thereof, in the amount fixed for the surety bond, conditioned in the same manner as would be a surety bond for the protection of other parties. Any interest thereon shall constitute a part of the deposit.	
	[Repealed] **Notes and Comments** Comment to 1997 change: The rule is repealed. The provisions of the former rule are moved to Rule 47(a)(3).

CURRENT RULE	PROPOSED RULE
RULE 49. APPELLATE REVIEW OF BONDS IN CIVIL CASES	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 47 shall be reviewable by the appellate court for insufficiency of the amount or of the sureties or of the securities deposited, whether arising from initial insufficiency or from 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 with and approved by the clerk of the trial court, and a certified copy to be filed in the appellate court.	
(b) Appellate Review of Order Setting Security or Suspending Enforcement of Judgment Pending Appeal. The trial court's order setting security or staying enforcement of a judgment by law or these rules is subject to review on a motion to the appellate court for insufficiency or excessiveness. Such motions shall be heard at the earliest practical time. The appellate court may issue such temporary orders as it finds necessary to preserve the rights of the parties. The appellate court reviewing the trial court's order may require a change in the trial court's order. The appellate court may remand to the trial court for findings of fact or the taking of evidence.	

CURRENT RULE	PROPOSED RULE
(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.	
	[Repealed] **Notes and Comments** Comment to 1997 change: The rule is repealed. The provisions of former Rule 49 are moved to Rule 47(d).

CURRENT RULE	PROPOSED RULE
RULE 50. RECORD ON APPEAL	C. THE RECORD RULE 50. APPELLATE RECORD
(a) **Contents.** The record on appeal shall consist of a transcript and, where necessary to the appeal, a statement of facts.	(a) **Contents.** The appellate record consists of a transcript and, if necessary to the appeal, a statement of facts.
(b) **Stipulation as to Record.** The parties by written stipulation filed with the clerk of the trial court may designate the parts of the record, proceedings and evidence to be included in the record on appeal.	(b) **Agreed Record.** By written stipulation filed with the trial court clerk, the parties may agree on the contents of the appellate record. An agreed record will be presumed to contain all evidence and transcript items relevant to the appeal. To request matter to be included in the agreed record, the parties must comply with the procedures in Rules 51 and 53.
(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 the transcript in lieu of the proceedings themselves.	(c) **Agreed Statement of the Case.** In lieu of a statement of facts, the parties may agree on a brief statement of the case . The statement must be filed with the trial court clerk and included in the transcript.
(d) **Burden on Appellant.** The burden is on the appellant, or other party seeking review, to see that a sufficient record is presented to show error requiring reversal.	(d) **Burden on Party Seeking Review.** The appellant or other party seeking review bears the burden of designating a record sufficient to show error requiring reversal.
	(e) **Form.** The Supreme Court and Court of Criminal Appeals will prescribe the form of the transcript and statement of facts.
(e) **Lost or Destroyed Record.** When the record or any portion thereof is lost or destroyed it may be substituted in the trial court and when so substituted the record may be prepared and transmitted to the appellate court as in other cases. If the appellant has made a timely request for a statement of facts, but the court reporter's notes and records have been lost or destroyed without appellant's fault, the appellant is entitled to a new trial unless the parties agree on a statement of facts.	
(f) **Violation of Rules: Costs.** An appellate court may impose or withhold costs as the circumstances of the case may require for any infraction of the rules with respect to the preparation of the record on appeal.	

CURRENT RULE	PROPOSED RULE
	Notes and Comments Comment to 1997 change: In subdivision (b), the requisites of an agreed record are more clearly stated. Subdivision (e) is new, but is taken from former Rules 51(c) and 53(h). The provisions of former subdivision (e), regarding a lost or destroyed record, are moved to Rules 51(e) and 53(f). Former subdivision (f) regarding a violation of the rules is repealed.

CURRENT RULE	PROPOSED RULE
RULE 51. THE TRANSCRIPT ON APPEAL	RULE 51. THE TRANSCRIPT ON APPEAL

CURRENT RULE	PROPOSED RULE
(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; 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 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 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; and, subject to the provisions of paragraph (b) of this rule, any filed paper any party may designate as material.	(a) Contents. Unless the parties designate the contents of the transcript by agreement under Rule 50(b), the transcript must include copies of the following: (1) in civil cases, all pleadings on which the trial was held; (2) in criminal cases, the indictment or information,any special plea or defense motion that was presented to the court and overruled, and any written waiver; (3) the court's docket sheet; (4) the court's charge and the jury's verdict, or the court's findings of fact and conclusions of law; (5) the court's judgment or other order that is being appealed; (6) any request for findings of fact and conclusions of law, any post-judgment motion, and the court's order on the motion; (7) the notice of appeal; (8) any formal bill of exception; (9) any request for a statement of facts, including any statement of points or issues under Rule 53(c); (10) any request for preparation of the transcript; (11) in civil cases, a certified bill of costs, including the cost of the transcript and any statement of facts, showing credits for payments made; and

CURRENT RULE	PROPOSED RULE
	(12) subject to (b), any filed paper that a party designates to have included in the transcript. (b) Request for Additional Items.
(b) **Written Designation.** At or before the time prescribed for perfecting the appeal, any party may file with the clerk a written designation specifying matter for inclusion in the transcript; the designation must be specific and the clerk shall disregard any general designation such as one for 'all papers filed in the cause.' The party making the designation shall serve a copy of the designation on all other parties. Failure to timely make the designation provided for in this paragraph shall not be grounds for refusing to file a transcript or supplemental transcript tendered within the time provided by Rule 54(a); however, if the designation specifying such matter is not timely filed, the failure of the clerk to include designated matter will not be grounds for complaint on appeal.	
	(1) *Time for Request.* At any time before the transcript is prepared, any party may file with the trial court clerk a written designation specifying items to be included in the transcript. (2) *Request must be specific.* A party requesting that an item be included in the transcript must specifically describe the item so that the clerk can readily identify it. The clerk will disregard a general designation, such as one for "all papers filed in the cause." The clerk may consult with the parties concerning items to be included in the transcript. (3) *Requesting unnecessary items.* In a civil case, if a party requests that more items than necessary be included in the transcript or supplemental transcript, the appellate court may — regardless of the appeal's outcome — require that party to pay the costs for the preparation of the unnecessary portion. (4) *Failure to timely request.* An appellate court must not refuse to file a transcript or supplemental transcript because of a failure to timely request items to be included in the transcript. But if the request is not timely filed, the trial court clerk's failure to include the requested items cannot be a ground for appellate complaint.

CURRENT RULE	PROPOSED RULE
(c) **Duty of Clerk.** Upon perfection of the appeal, the clerk of the trial court shall prepare under his hand and seal of the court and immediately transmit the transcript to the appellate court designated by the appellant. The pages of the transcript shall be numbered consecutively and there shall be an index prepared by the clerk showing the location of each document in the transcript. The transcript shall be prepared in the form directed by the Supreme Court and the Court of Criminal Appeals which will make an order or orders in such respect for the guidance of trial clerks. In criminal cases, the transcript shall be made in duplicate and one copy shall be retained by the clerk for use by the parties with permission of the court.	
	(c) **Supplementation.** If a relevant item has been omitted from the transcript, the trial court, the appellate court, or any party may by letter direct the trial court clerk to prepare, certify, and file in the appellate court a supplemental transcript containing the omitted item. Any supplemental transcript will be part of the appellate record. (d) **Defects or Inaccuracies.** If the transcript is defective or inaccurate, the appellate clerk must inform the trial court clerkof the defect or inaccuracy and instruct the clerk to correct the transcript.
	(e) **Transcript Lost or Destroyed.** If an item on file with the trial court and designated for inclusion in the transcript or supplemental transcript has been lost or destroyed, the parties may, by written stipulation, deliver a copy of that item to the trial court clerk for inclusion in the transcript or supplemental transcript. If the parties cannot agree, the trial court must — on any party's motion or at the appellate court's request — determine what constitutes an accurate copy of the missing item and order it to be included in the transcript or supplemental transcript.
(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.	(f) **Original Documents.** If the trial court determines that original documents filed with the trial court clerk should be inspected by the appellate court or sent to that court in lieu of copies, the trial court must make an order for the safekeeping, transportation, and return of those original documents. The order must list the original documents and briefly describe them. All the documents must be arranged in their listed sequence and bound firmly together. On any party's motion or its own initiative, the appellate court may direct the trial court clerk to send it any original document.

CURRENT RULE	PROPOSED RULE
	(g) **Duplicate Transcript in Criminal Cases.** In a criminal case, the transcript must be made in duplicate, and the trial court clerk must retain one copy for the parties to use with the court's permission.
	Notes and Comments Comment to 1997 change: The rule is substantially reorganized. Paragraph (b)(2) specifically allows the clerk to consult with the parties to determine the contents of the transcript. Paragraph (b)(3) allows the appellate court to tax costs against a party for requiring unnecessary items to be included in the transcript. Subdivision (c) is new and provides for supplementation of the transcript. The provisions of subdivision (d) are moved here from former Rule 55(b). The provisions of subdivision (e) are moved here from former Rule 50(e).

CURRENT RULE	PROPOSED RULE
RULE 52. PRESERVATION OF APPELLATE COMPLAINTS	RULE 52. PRESERVATION OF APPELLATE COMPLAINTS
(a) General Rule. In order to preserve a complaint for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling he desired the 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 upon the party's request, objection or motion. 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.	(a) Preservation; How Shown. (1) *In general.* As a prerequisite to presenting a complaint for appellate review, except for a complaint of fundamental error, the record must show that: (A) the complaint was made to the trial court by a timely request, objection, or motion that: (i) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and (ii) complied with the requirements of the Texas Rules of Evidence or the Texas Rules of Civil or Appellate Procedure; and (B) the trial court: (i) ruled on the request, objection, or motion, either expressly or implicitly; or (ii) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal.
	(2) *Ruling by operation of law.* In a civil case, the overruling by operation of law of a motion for new trial or a motion to modify the judgment preserves for appellate review a complaint properly made in the motion, unless taking evidence was necessary to properly present the complaint in the trial court. (3) *Formal exception not required.* Neither a formal exception to a trial court ruling or order nor a signed separate order is required to preserve a complaint for appeal.

CURRENT RULE	PROPOSED RULE
(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 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 certified by the reporter, 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.	(b) **Formal Bills of Exception.** To complain on appeal about a matter that would not otherwise appear in the record, a party must file a formal bill of exception. (1) *Form.* No particular form of words is required in a bill of exception. But the objection to the court's ruling or action, and the ruling complained of, must be stated with sufficient specificity to make the trial court aware of the complaint. (2) *Evidence.* When the statement of facts contains the evidence needed to explain a bill of exception, the bill itself need not repeat the evidence, and a party may attach and incorporate a transcript of the evidence authenticated by the official court reporter.
(3) The ruling of the court in giving or qualifying instructions to the jury shall be regarded as approved unless a proper objection is made.	

CURRENT RULE	PROPOSED RULE
(4) Formal bills of exception shall be presented to the judge for his allowance and signature. (5) The court shall submit such bill to the adverse party or his 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 shall suggest to the party or his counsel such corrections as he deems necessary therein, and if they are agreed to he 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 with his refusal endorsed thereon, and shall prepare, sign and file with the clerk such bill of exception as will, in his opinion, present the ruling of the court as it actually occurred.	(3) *Procedure.* (A) The complaining party must first present a formal bill of exception to the trial court. (B) If the parties agree on the contents of the bill of exception, the judge must sign the bill and file it with the trial court clerk. If the parties do not agree on the contents of the bill, a hearing must be set — and notice of the hearing given — in accordance with local rules or practice.
	(C) After hearing, the trial judge must do one of the following things: (i) sign the bill of exception and file it with the trial court clerk if the judge finds that it is correct; (ii) suggest to the complaining party those corrections to the bill that the judge believes are necessary to make it accurately reflect the proceedings in the trial court, and if the party agrees to the corrections, have the corrections made, sign the bill, and file it with the trial court clerk; or (iii) if the complaining party will not agree to the corrections suggested by the judge, return the bill to the complaining party with the judge's refusal written on it, and prepare, sign and file with the trial court clerk such bill as will, in the judge's opinion, accurately reflect the proceedings in the trial court.
(8) Should the party be dissatisfied with said bill filed by the judge, he may, upon procuring the signatures of three respectable bystanders, citizens of this State, attesting to the correctness of the bill as presented by him, 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.	(D) If the complaining party is dissatisfied with the bill of exception filed by the judge under (C)(iii), the party may file with the trial court clerk the bill that was rejected by the judge. That party must also file the affidavits of at least three people who observed the matter to which the bill of exception is addressed. The affidavits must attest to the correctness of the bill as presented by the party. The matters contained in that bill of exception may be controverted and maintained by additional affidavits filed by any party within ten days after the filing of that bill. The truth of the bill of exception will be determined by the appellate court.

CURRENT RULE	PROPOSED RULE
(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 and so certified by the court reporter 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.	(4) *Conflict.* If a formal bill of exception conflicts with the statement of facts, the bill controls. (5) *Time to file.* (A) *Civil cases.* In a civil case, a formal bill of exception must be filed no later than 30 days after the notice of appeal is filed. (B) *Criminal cases.* In a criminal case, a formal bill of exception must be filed: (i) no later than 60 days after the trial court pronounces or suspends sentence in open court; or (ii) if a motion for new trial has been timely filed, no later than 90 days after the trial court pronounces or suspends sentence in open court. (6) *Inclusion in transcript.* When filed, a formal bill of exception should be included in the transcript or in a supplemental transcript.
(d) Necessity for Motion 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. 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 Comment to 1997 change: Subdivision (a) is rewritten. Former subdivision (b), regarding offers of proof, is deleted. *See* TEX. R. EVID. 103. Subdivision (b), formerly subdivision (c), is also rewritten and the procedure is more definitely stated. Former subdivision (d), regarding motions for new trial, is incorporated in subdivision (a).

CURRENT RULE	PROPOSED RULE
RULE 53. THE STATEMENT OF FACTS ON APPEAL	RULE 53. THE STATEMENT OF FACTS ON APPEAL
	(a) Contents. (1) *Stenographic recording.* If the proceedings were stenographically recorded, the statement of facts consists of the court reporter's transcription of so much of the proceedings, and any of the exhibits, that the parties to the appeal designate. (2) *Electronic recording.* If the proceedings were electronically recorded, the statement of facts consists of certified copies of all tapes or other audio-storage devices on which the proceedings were recorded, any of the exhibits that the parties to the appeal designate, and certified copies of the typewritten and original logs prepared by the court recorder under Rule 11(b).
(a) **Appellant's Request.** The appellant, at or before the time prescribed for perfecting the appeal, shall make a written request to the official reporter designating the portion of the evidence and other proceedings to be included therein. A copy of such request shall be filed with the clerk of the trial court and another copy served on the appellee. Failure to timely request the statement of facts under this paragraph shall not prevent the filing of a statement of facts or a supplemental statement of facts within the time prescribed by Rule 54(a). (b) **Other Requests.** Within ten days after service of a copy of appellant's request, any party may in the same manner request additional portions of the evidence and other proceedings to be included.	**(b) Request for Preparation.** (1) *Request to court reporter or recorder.* At or before the time for perfecting the appeal, the appellant must request in writing that the official reporter or recorder prepare the statement of facts. The request must designate the exhibits to be included. A request to the court reporter must also designate the portions of the testimony to be included. (2) *Filing.* The appellant must file a copy of the request with the trial court clerk. (3) *Failure to timely request.* An appellate court must not refuse to file a statement of facts or supplemental statement of facts because of a failure to timely request it.

CURRENT RULE	PROPOSED RULE
(c) **Abbreviation of Statement.** All matters not essential to the decision of the questions presented on appeal shall be omitted. Formal parts of all exhibits and more than one copy of any document appearing in the statement of facts shall be excluded. All documents shall be abridged by omitting all irrelevant and formal portions thereof. (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. (e) **Unnecessary Portions.** In civil cases if either party requires more of the testimony or other proceedings than is necessary, he shall be required by the appellate court to pay the costs thereof, regardless of the outcome of the appeal.	(c) **Partial Statement.** (1) *Effect on appellate points or issues.* If the appellant requests a partial statement of facts, the appellant must include in the request a statement of the points or issues to be presented on appeal and will then be limited to those points or issues. (2) *Other parties may designate additions.* Any other party may designate additional exhibits and portions of the testimony to be included in the statement of facts. (3) *Costs; requesting unnecessary matter.* Additions requested by another party must be included in the statement of facts at the appellant's cost. But if the trial court finds that all or part of the designated additions are unnecessary to the appeal, the trial court may order the other party to pay the costs of the unnecessary additions. This paragraph does not affect the appellate court's power to tax costs differently. (4) *Presumptions.* The appellate court must presume that the partial record designated by the parties constitutes the entire record for purposes of reviewing the stated points or issues. This presumption applies even if the statement includes a point or issue complaining of the legal or factual insufficiency of the evidence to support a specific factual finding identified in that point or issue. (5) *Criminal cases.* In a criminal case, if the statement contains a point complaining that the evidence is insufficient to support a finding of guilt, the record must include all the evidence admitted at the trial on the issue of guilt or innocence.
	(d) **Supplementation.** If anything is omitted from the statement of facts, the trial court, the appellate court, or any party may by letter direct the official court reporter or recorder to prepare, certify, and file in the appellate court a supplemental statement of facts containing the omitted items. Any supplemental statement of facts is part of the appellate record.

CURRENT RULE	PROPOSED RULE
	(c) Inaccuracies in the Statement of Facts. (1) *Correction by agreement.* The parties may agree to correct an inaccuracy in the statement of facts without the court reporter's or court recorder's recertification. (2) *Correction by trial court.* If the parties dispute whether the statement of facts accurately discloses what occurred in the trial court, or the parties agree that it is inaccurate but cannot agree on corrections to the statement of facts, the trial court must — after notice and hearing — settle the dispute. After doing so, the court must order the court reporter or court recorder to conform the statement of facts to what occurred in the trial court, and to certify and file in the appellate court a corrected statement of facts. (3) *Correction after filing in appellate court.* If the dispute arises after the statement of facts has been filed in the appellate court, that court must submit the dispute to the trial court for resolution. The trial court must then ensure that the statement of facts is made to conform to what occurred in the trial court.
	(f) Statement Lost or Destroyed. An appellant may be entitled to a new trial under the following circumstances: (1) if the appellant has timely requested a statement of facts; (2) if, without the appellant's fault, a significant portion of the court reporter's notes and records has been lost or destroyed or — if the proceedings were electronically recorded — a significant portion of the recording has been lost or destroyed or is inaudible; (3) if the lost, destroyed, or inaudible portion is necessary to the appeal's resolution; and (4) if the parties cannot agree on a complete statement of facts.
(f) Certification by Court Reporter. The statement of facts shall be in sufficient form to be filed in the appellate court when it is certified by the official court reporter.	
(g) Reporter's Fees. The official court reporter shall include in his certification the amount of 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.	

CURRENT RULE	PROPOSED RULE
(h) **Form.** The Supreme Court and the Court of Criminal Appeals will make an order or orders directing the form of the statement of facts and the court reporter will prepare the same in conformity therewith.	
(i) **Narrative Statement.** A statement of facts prepared by the official reporter shall be in question and answer form. In lieu of requesting such a statement of facts, a party may prepare and file with the clerk of the trial court a condensed statement in narrative form of all or part of the testimony and deliver a true copy to the opposing party or his counsel, and such opposing party, if dissatisfied with the narrative statement, may within ten days after such delivery, require the testimony in question and answer form to be substituted for all or part thereof.	
(j) **Free Statement of Facts.** (1) *Civil Cases.* In any case where the appellant has filed the affidavit required by Rule 40 to appeal his case without 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 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 to File.** It is the appellant's duty to cause the statement of facts to be filed with the Clerk of the Court of Appeals.	

CURRENT RULE	PROPOSED RULE
	(g) **Original Exhibits.** (1) *Reporter or recorder may use in preparing statement of facts.* At the court reporter's or recorder's request, the trial court clerk must deliver all original exhibits to the reporter or recorder for use in preparing the statement of facts. Unless ordered to include original exhibits in the statement of facts, the court reporter or recorder must return the original exhibits to the clerk after copying them for inclusion in the statement of facts. If someone other than the trial court clerk possesses an original exhibit, either the trial court or the appellate court may order that person to deliver the exhibit to the trial court clerk. (2) *Use of original exhibits by appellate court.* (A) If the trial court determines that original exhibits should be inspected by the appellate court or sent to that court in lieu of copies, the trial court must make an order for the safekeeping, transportation, and return of those exhibits. The order must list the exhibits and briefly describe them. (B) To the extent practicable, all the exhibits must be arranged in their listed order and bound firmly together before being sent to the appellate clerk. (C) On any party's motion or its own initiative, the appellate court may direct the trial court clerk to send it any original exhibit.
(l) **Duplicate Statement in Criminal Cases.** In criminal cases, if any party desires a statement of facts included in the record, a duplicate of the statement of facts shall be prepared by the court reporter and filed with the clerk of the court.	(h) **Duplicate Statement in Criminal Cases.** In a criminal case in which a party asks for a statement of facts to be included in the record, the court reporter must prepare a duplicate of the statement of facts and file it with the trial court clerk.
(m) **When No Statement of Facts Filed in Appeals of Criminal Cases.** If the clerk of the appellate court does not receive a statement of facts when due, he shall notify the trial judge and the appellant's attorney, if the appellant's attorney can be determined from the transcript, that a statement of facts has not been filed and that in the absence of a statement of facts the appeal will be submitted on the transcript alone. If no statement of facts has been filed, the appellate court may order the trial court to hold a hearing to determine whether the appellant has been deprived of a statement of facts because of ineffective counsel or for any other reason, to make findings of fact and conclusions of law, to appoint counsel if necessary, and to transmit to the appellate court the record of the hearing. The appellate court may order a late filing of statement of facts.	

CURRENT RULE	PROPOSED RULE
	(i) **Supreme Court and Court of Criminal Appeals May Set Fee.** From time to time, the Supreme Court and the Court or Criminal Appeals may set the fee that the court reporters and recorders may charge for preparing the statement of facts.
	Notes and Comments Comment to 1997 change: The rule is substantially rewritten. Subdivision (a) defining the statement of facts is new. Former subdivision (a) is now subdivision (b). Former subdivisions (b) (Other Requests), (d) (Partial Statement) and (e) (Unnecessary Portions) are merged into subdivision (c). Subdivision (d) is new. The provisions of subdivision (e) were moved here from former Rule 55. The provisions of subdivision (f) were moved here from former Rule 50(d). The provisions of former subdivisions (f) (Certification by Court Reporter) and (h) (Form) are moved to the order of the Supreme Court and the Court of Criminal Appeals on the preparation of the statement of facts. Former subdivision (i) (Narrative Statement) is repealed. The provisions of former subdivision (j) (Free Statement of Facts) are moved to Rule 46. Former subdivision (k) (Duty of Appellant to File) is repealed; it is now the duty of the court reporter to file the statment of facts. The provisions of subdivision (g) are moved here from former Rule 51(d). Former subdivision (g) is now subdivision (i). Former subdivision (l) is now subdivision (h). The provisions of former subdivision (m) are moved to Rule 54.

CURRENT RULE	PROPOSED RULE
RULE 54. TIME TO FILE RECORD	RULE 54. TIME TO FILE RECORD; RESPONSIBILITY FOR FILING RECORD
(a) In Civil Cases--Ordinary Timetable. 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 a writ of error has been perfected to the court of appeals the record shall be filed within sixty days after 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, 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.	(a) **Civil Cases.** The applellate record must be filed in the appellate court within 30 days after the notice of appeal is filed, except in an accelerated appeal in which case the record must be filed within 10 days after the notice of appeal is filed.
(b) **In Criminal Cases--Ordinary Timetable.** The transcript and statement of facts shall be filed in the appellate court within sixty days after the day sentence is imposed or suspended in open court or the order appealed from has been signed, if a motion for new trial is not filed. If a timely motion for new trial is filed, the transcript and statement of facts shall be filed within one hundred twenty days after the day sentence is imposed or suspended in open court or the order appealed from has been signed.	(b) **Criminal Cases.** The appellate record must be filed in the appellate court: (1) if a motion for new trial is not filed, within 60 days after the date the sentence is imposed or suspended in open court or the order appealed from is signed; or (2) if a timely motion for new trial is filed, within 120 days after the date the sentence is imposed or suspended in open court or the order appealed from is signed.
(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).	(c) **Responsibility for Filing Record.** (1) *Transcript.* The trial court clerk is responsible for preparing, certifying, and timely filing the transcriptif: (A) a notice of appeal has been filed; and (B) the party responsible for paying for the preparation of the transcript has paid the clerk's fee, has made satisfactory arrangements with the clerk to pay the fee, or is entitled to appeal without payment of the fee.

CURRENT RULE	PROPOSED RULE
RULE 54. TIME TO FILE RECORD	RULE 54. TIME TO FILE RECORD; RESPONSIBILITY FOR FILING RECORD
(a) **In Civil Cases--Ordinary Timetable.** 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 a writ of error has been perfected to the court of appeals the record shall be filed within sixty days after 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, 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.	(a) **Civil Cases.** The applellate record must be filed in the appellate court within 30 days after the notice of appeal is filed, except in an accelerated appeal in which case the record must be filed within 10 days after the notice of appeal is filed.
(b) **In Criminal Cases--Ordinary Timetable.** The transcript and statement of facts shall be filed in the appellate court within sixty days after the day sentence is imposed or suspended in open court or the order appealed from has been signed, if a motion for new trial is not filed. If a timely motion for new trial is filed, the transcript and statement of facts shall be filed within one hundred twenty days after the day sentence is imposed or suspended in open court or the order appealed from has been signed.	(b) **Criminal Cases.** The appellate record must be filed in the appellate court: (1) if a motion for new trial is not filed, within 60 days after the date the sentence is imposed or suspended in open court or the order appealed from is signed; or (2) if a timely motion for new trial is filed, within 120 days after the date the sentence is imposed or suspended in open court or the order appealed from is signed.
(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).	(c) **Responsibility for Filing Record.** (1) *Transcript.* The trial court clerk is responsible for preparing, certifying, and timely filing the transcriptif: (A) a notice of appeal has been filed; and (B) the party responsible for paying for the preparation of the transcript has paid the clerk's fee, has made satisfactory arrangements with the clerk to pay the fee, or is entitled to appeal without payment of the fee.

CURRENT RULE	PROPOSED RULE
RULE 55. AMENDMENT OF THE RECORD	RULE 55. CORRECTION OF AGENCY RECORD IN ADMINISTRATIVE APPEALS
(a) Inaccuracies on the Statement of Facts. Any inaccuracies 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. (b) Before Submission. If anything material to either party is omitted from the transcript or statement of facts, before submission the parties by stipulation, or the trial court, upon notice and hearing, either before or after the record has been transmitted to the appellate court, or the appellate court, on a proper suggestion or on its own initiative, may direct a supplemental record to be certified and transmitted by the clerk of the trial court or the official court reporter supplying such omitted matter. The appellate court shall permit it to be filed unless the supplementation will unreasonably delay disposition of the appeal. (c) Defects Appearing At or After Submission. Should it be apparent during the submission or afterwards that the case has not been properly prepared as shown in the transcript, or properly presented in the brief or briefs, or that the law and authorities have not been properly cited, which will enable the court to decide the case, 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; or should it appear to the court, after the submission of the cause, that the statement of facts has been prepared in violation of the rules, the court may require the appellant to furnish a proper statement of facts, and upon his failure to do so may disregard it.	(a) Scope. This rule applies only to cases involving judicial review of stateagency decisions in contested cases under the Administrative Procedure Act. **(b) Correcting the Record.** (1) *Correction by agreement.* At any stage of the proceeding, the parties may agree to correct an agency record filed under Section 2001.175(b) of the Government Code to ensure that the agency record accurately reflects the contested case proceedings before the agency. The court reporter need not recertify the agency record. (2) *Correction by trial court.* If the parties cannot agree to a correction to the agency record, the appellate court must — on any party's motion or its own incentive — send the question to the trial court. After notice and hearing, the trial court must determine what constitutes an accurate copy of the agency record and order the agency to send an accurate copy to the clerk of the court in which the case is pending.
	Notes and Comments Comment to 1997 change: The rule is new. The provisions of the former Rule are moved to Rules 51(d) and 53(e).

CURRENT RULE	PROPOSED RULE
RULE 56. RECEIPT OF THE RECORD BY COURT OF APPEALS	RULE 56. DUTIES OF THE APPELLATE CLERK ON RECEIVING THE NOTICE OF APPEAL AND RECORD
(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.	(a) On Receiving the Notice of Appeal. On receiving a copy of the notice of appeal , the appellate clerk must: (1) endorse on the copy the time of receipt; (2) docket the appeal; and (3) notify all parties of receipt of the notice.

CURRENT RULE	PROPOSED RULE
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) **Docket Numbers.** (1) *Numbering system.* Each case filed in a court of appeals must be assigned a docket number consisting of the following four parts, separated by hyphens: (A) the number of the court of appeals district; (B) the last two digits of the year in which the case is filed; (C) the number assigned to the case; and (D) the designation "CV" for a civil case or "CR" for a criminal case. (2) *Numbering order.* Each case must be docketed in the order of its filing. (3) *Appeals not yet filed.* A motion relating to an appeal that has been perfected but not yet filed must be docketed and assigned a docket number that will also be assigned to the appeal when it is filed.
	(c) **Defective or Improper Notice.** If the appellate clerk determines that the notice of appeal is defective, the clerk must notify the parties of the defect so that it can be remedied, if possible. If a proper notice of appeal is not filed in the trial court within 30 days of the date of the clerk's notice, the clerk must refer the matter to the appellate court, which will make an appropriate order.
(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.	(d) **On Receiving the Record.** On receiving the transcript from the trial court clerk or the statement of facts from the reporter or recorder, the appellate clerk must determine whether each complies with the Supreme Court's and Court of Criminal Appeals' order on preparation of the record. If so, the clerk must endorse on each the date of receipt, file it, and notify the parties of the filing and the date. If not, the clerk must endorse on the transcript or statement of facts — whichever is defective — the date of receipt and return it to the official responsible for filing it. The appellate court clerk must specify the defects and instruct the official to correct them and return the transcript or statement of facts to the appellate court by a specified date.

CURRENT RULE	PROPOSED RULE
	(c) **If No Record Filed.** (1) *Notice of late record.* If the transcript or statement of facts has not been timely filed , the clerk must send notice to the official responsible for filing it stating that the record is late and requesting that the record be filed within 30 days. The appellate clerk must send a copy of this notice to the parties and the trial court. If the clerk does not receive the record within 30 days of the date of the notice, the clerk must refer the matter to the appellate court. The court must make whatever order is appropriate to avoid further delay and to preserve the parties' rights. (2) *If no transcript filed due to appellant's fault.* If the trial court clerk failed to file the transcript because the appellant failed to pay or make arrangementsto pay the clerk's fee for preparing the transcript, the appellate court may — on a party's motion or its own initiative — dismiss the appeal for want of prosecution unless the appellant was entitled to proceed without payment of costs. The court must give the appellant a reasonable opportunity to cure before dismissal.
	(3) *If no statement of facts filed due to appellant's fault.* Under the following circumstances, and if the transcript has been filed, the appellate court may — after first giving the appellant notice and a reasonable opportunity to cure — consider and decide those issues or points that do not require a statement of facts for a decision. The court may do this if no statement of facts has been filed because: (A) the appellant failed to request a statement of facts; or (B) (i) appellant failed to pay or make arrangements to pay the reporter's or recorder's fee to prepare the statement of facts; and (ii) the appellant is not entitled to proceed without payment of costs.
	Notes and Comments Comment to 1997 change: Subdivision (a) is new. The provisions of subdivision (b) are moved here from former Rule 57(a). Subdivision (c) is new. The provisions of subdivision (d) are taken from former subdivisions (a) and (b). Subdivision (c) is new.

CURRENT RULE	PROPOSED RULE
RULE 57. DOCKETING THE APPEAL	RULE 57. DOCKETING STATEMENT
(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.	(a) **Civil Cases.** Upon perfecting the appeal in a civil case, the appellant must file in the court of appeals a docketing statement that includes the following information: (1) (A) if the appellant filing the statement has counsel, the name of that appellant and the name, address, telephone and fax numbers, and State Bar of Texas identification number of the appellant's lead counsel; or (B) if the appellant filing the statement is *pro se*, the name, address, and telephone number of that appellant; (2) the date the notice of appeal was filed in the trial court and, if mailed to the trial court clerk, the date of mailing; (3) the trial court's name and county, the name of the judge who tried the case, and the date the judgment or order appealed from was signed; (4) the date of filing of any motion for new trial, motion to modify the judgment, request for findings of fact, motion to reinstate, or other filing that affects the time for perfecting the appeal; (5) the names of all other parties to the trial court's judgment or the order appealed from, and: (A) if represented by counsel, their lead counsel's names, addresses, and telephone and fax numbers; or

CURRENT RULE	PROPOSED RULE
	(B) if not represented by counsel, the name, address, and telephone number of the party, or a statement that the appellant diligently inquired but could not discover that information; (7) the general nature of the case — for example, personal injury, breach of contract, or temporary injunction; (8) whether the appeal's submission should be given priority or whether the appeal is an accelerated one under Rule 42 or another rule or statute; (9) whether the appellant has requested or will request a statement of facts, and whether the trial was electronically recorded; (10) the name of the court reporter or recorder; (11) whether the appellant intends to seek temporary or ancillary relief while the appeal is pending; (12) (A) the date of filing of any affidavit of indigency; (B) the date of filing of any contest; (C) the date of any order on the contest; and (D) whether the contest was sustained or overruled; (13) whether the appellant has filed or will file a supersedeas bond; and (14) any other information the court of appeals requires.

CURRENT RULE	PROPOSED RULE
(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.	(b) **Criminal Cases.** Upon perfecting the appeal in a criminal case, the appellant must file in the court of appeals a docketing statement that includes the following information: (1) (A) if the appellant has counsel, the name of the appellant and the name, address, telephone and fax numbers, and State Bar of Texas identification number of the appellant's counsel, and whether the counsel is appointed or retained; or (B) if the appellant is *pro se*, that party's name, address, and telephone number; (2) the date the notice of appeal was filed in the trial court and, if mailed to the trial court clerk, the date of mailing; (3) the trial court's name and county, and the name of the judge who tried the case; (4) the date the trial court imposed or suspended sentence in open court, or the date the judgment or order appealed from was signed; (5) the date of filing any motion for new trial, motion in arrest of judgment, or any other filing that affects the time for perfecting the appeal; (6) the offense charged and the date of the offense; (7) the defendant's plea; (8) whether the trial was jury or nonjury; (9) the punishment assessed; (10) whether the appeal is from a pretrial order; (11) whether the appeal involves the validity of a statute, ordinance, or rule;

CURRENT RULE	PROPOSED RULE
	(12) whether a statement of facts has been or will be requested, and whether the trial was electronically recorded; (13) the name of the court reporter or recorder; (14) (A) the dates of filing of any affidavit of indigency; (B) the date of filing of any contest; (C) the date of any order on the contest; and (D) whether the contest was sustained or overruled; and (15) any other information the court of appeals requires.
	(c) **Supplemental Statements.** Any party may file a statement supplementing or correcting the docketing statement.
	(d) **Purpose of Statement.** The docketing statement is for administrative purposes and does not affect the appellate court's jurisdiction.
	Notes and Comments Comment to 1997 change: The rule is new. The provisions of former subdivision (a) regarding docketing numbers are moved to Rule 56(b). The provisions of former subdivision (b) regarding appearances by attorneys are moved to Rule 7.

CURRENT RULE	PROPOSED RULE
RULE 58. PREMATURE APPEAL	
(a) Proceedings relating to an appeal need not be considered ineffective because of prematurity if a subsequent appealable order has been signed to which the premature proceeding may properly be applied.	
(b) If the appellate court finds that the appeal is premature because the order appealed from is not final, it may permit the defect to be cured and any subsequent proceedings to be shown in a supplemental record.	
(c) In civil cases, if the trial court has signed an order modifying, correcting, or reforming the order appealed from, or has vacated that order and signed another, any proceedings relating to an appeal of the first order may be considered applicable to the second, but shall not prevent any party from appealing from the second order pursuant to Rule 329b(h) of the Texas Rules of Civil Procedure. The second order and any proceedings concerning it may be included in either the original or a supplemental record.	
	Notes and Comments Comment to 1997 change: The provisions of former Rule 58 regarding premature filing of documents are moved to Rule 46.

CURRENT RULE	PROPOSED RULE
RULE 59. VOLUNTARY DISMISSAL	D. DISMISSAL RULE 59. VOLUNTARY DISMISSAL
(a) Civil Cases. (1) The appellate court may finally dispose of an appeal or writ of error as follows: (A) In accordance with an agreement signed by all parties or their attorneys and filed with the clerk; or (B) On motion of appellant to dismiss the appeal or affirm the judgment appealed from, with notice to all other parties; provided, that no other party shall be prevented from seeking any appellate relief it would otherwise be entitled to. (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) A severable portion of the appeal may be disposed of in like manner without prejudice to the parties remaining.	(a) Civil Cases. (1) The appellate court may dispose of an appeal as follows: (A) in accordance with an agreement signed by all parties or their attorneys and filed with the clerk; or (B) in accordance with a motion of appellant to dismiss the appeal or affirm the appealed judgment or order; but no party may be prevented from seeking any relief to which it would otherwise be entitled. (2) A severable portion of the proceeding may be disposed of under (a) without prejudice to the remaining parties. (3) In dismissing a proceeding the appellate court will determine whether to withdraw any opinion it has already issued. An agreement or motion for dismissal cannot be conditioned on withdrawal of the opinion.
(b) Criminal Cases. The appeal may be dismissed if the appellant withdraws his notice of appeal at any time prior to the decision of the appellate court. The withdrawal shall be in writing signed by the appellant and his counsel and filed in duplicate with the clerk of the court of appeals in which the appeal is pending, who shall immediately forward the duplicate copy to the clerk of the trial court in which the notice of appeal was filed. Notice of appeal may not be withdrawn after the decision of the court of appeals is delivered without the consent of the State and approval of the court of appeals. If consent and approval are obtained, the opinion of the court of appeals shall be withdrawn and the appeal shall be dismissed. Notice of the dismissal shall be sent to the clerk of the trial court in which notice of appeal was filed.	(b) Criminal Cases. (1) At any time before the appellate court's decision, the appellate court may dismiss the appeal if the appellant withdraws his or her notice of appeal. The appellant and his or her attorney must sign the written withdrawal and file it in duplicate with the appellate clerk, who must immediately send the duplicate copy to the trial court clerk. (2) After the court of appeals hands down its opinion, an appellant may not withdraw the notice of appeal unless the State consents and the court of appeals approves the withdrawal. If consent and approval are obtained, the appellate opinion must be withdrawn and the appeal dismissed. The appellate clerk must send notice of the dismissal to the trial court clerk.
	Notes and Comments Comment to 1997 change: The rule is revised without substantive change. Paragraph (a)(3), allowing a court of appeals to withdraw its opinion, is new.

CURRENT RULE	PROPOSED RULE
RULE 60. INVOLUNTARY DISMISSAL	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 appears 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.	(a) **Civil Cases.** Under the following circumstances, on any party's motion — or on its own initiative after giving ten days' notice to all parties — the appellate court may dismiss the appeal or affirm the appealed judgment or order. Dismissal or affirmance may occur if the appeal is subject to dismissal: (1) for want of jurisdiction; (2) for want of prosecution; or (3) because the appellant has failed to comply with a requirement of these rules, a court order, or a notice from the clerk requiring a response or other action within a specified time.
(b) **Criminal Cases.** An appeal shall be dismissed on the State's motion, supported by affidavit, showing that appellant has escaped from custody pending the appeal and that to the affiant's knowledge, has not voluntarily returned to lawful custody within the State within ten days after escaping. The appeal shall not be dismissed, or, if dismissed, shall be reinstated, on filing of an affidavit of an officer or other credible person showing that appellant voluntarily returned to lawful custody within the State within ten days after escaping. If the appellant received a life sentence and is recaptured or voluntarily surrenders within thirty days after escaping, the appellate court, in its discretion, may overrule the motion to dismiss, or, if the motion has previously been granted, may reinstate the appeal.	(b) **Criminal Cases.** The appellate court must dismiss an appeal on the State's motion, supported by affidavit, showing that the appellant has escaped from custody pending the appeal and that to the affiant's knowledge, the appellant has not, within ten days after escaping, voluntarily returned to lawful custody within the state. (1) *Timely return to custody; reinstatement.* The appeal may not be dismissed — or, if dismissed, must be reinstated — if an affidavit of an officer or other credible person is filed showing that the appellant, within ten days after escaping, voluntarily returned to lawful custody within the state. (2) *Life sentence.* The appellate court may overrule the motion to dismiss — or, if the motion was granted, may reinstate the appeal — if: (A) the appellant received a life sentence; and (B) the appellant is recaptured or voluntarily surrenders within 30 days after escaping.
	Notes and Comments Comment to 1997 change: The rule is revised without substantive change except provision is made in paragraph (a)(3) for dismissal of an appeal for failure to comply with a notice from the clerk.

CURRENT RULE	PROPOSED RULE
RULE 61. DISPOSITION OF PAPERS WHEN APPEAL DISMISSED IN CIVIL CASES	RULE 61 [Repealed]
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.	
	Notes and Comments Comment to 1997 change: The rule is repealed. *See* the Supreme Court Order on disposition of papers.

	ORDER OF THE SUPREME COURT REGARDING DISPOSITION OF COURT PAPERS IN CIVIL CASES
	(a) Definitions. (1) *Court records* or *records* means: (A) the transcript, (B) the statement of facts; and (C) any other documents or items filed, or presented for filing and received in an appellate court in a particular case. (2) *Appellate record* means the transcript and the statement of facts and any supplement.

CURRENT RULE	PROPOSED RULE
	(b) **In the Courts of Appeals.** The following paragraphs govern disposing of court records by the courts of appeals: (1) *Determination of permanent preservation.* Before any court records are destroyed, the court of appeals must — under Section 51.205 of the Government Code and State Archives guidelines — determine whether the records should be permanently preserved. (2) *Initial determination.* Immediately after final disposition of an appeal or other proceeding, the panel that decided the case must determine whether the case's records should be permanently preserved and must file with the records a statement declaring that the records should or should not be permanently preserved. (3) *Later determination.* After its initial determination, but before any court records are destroyed, the court of appeals may reexamine its initial determination under (2) and may change its designation. (4) *Original papers and exhibits in appeals.* Whatever the court determines concerning permanent preservation of a case's records, any original documents or exhibits must, within 30 days after final disposition of an appeal or other proceeding, be returned to the trial court in accordance with any trial court order entered under Rules 51(f) and 53(g). The court of appeals may, but need not, copy those documents and exhibits before returning them to the trial court. (5) *All other papers and exhibits.* Subject to paragraph (4), the court of appeals must keep and preserve all records of a case (except duplicates) until they are ultimately disposed of under this rule.
	(6) *Ultimate disposition.* After the period prescribed by Section 51.204 of the Government Code or other applicable statute has expired, the court of appeals must: (A) destroy those records the court has determined need not be permanently preserved; and (B) turn over to the State Archives those records the court has determined should be permanently preserved.

CURRENT RULE	PROPOSED RULE
	(c) **In the Supreme Court.** The following paragraphs govern disposing of court records by the Supreme Court: (1) *If case reversed and remanded to court of appeals.* If the Supreme Court grants a petition for review and remands the case to the court of appeals, the Supreme Court will return the appellate record to the court of appeals. The court of appeals will then dispose of the court records in accordance with subdivision (b). The Supreme Court will keep and preserve all other items (except duplicates) until they are turned over to the State Archives as provided by law. (2) *If case affirmed or reversed and remanded to trial court.* If the Supreme Court grants a petition for review and either affirms the court of appeals or reverses and remands to the trial court, the Supreme Court will not return the appellate record but will keep and preserve all records of the case (except duplicates) until those records are turned over to the State Archives as provided by law. (3) *In all other cases.* In all other cases, the Supreme court will return the appellate record to the court of appeals and keep and preserve all other records of the case (except duplicates) until they are turned over to the State Archives as provided by law.

CURRENT RULE	PROPOSED RULE
RULE 70. MOTIONS TO POSTPONE ARGUMENT	RULE 70 [Repealed]
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.	
	Notes and Comments Comment on 1997 change. The rule is repealed. *See* Rule 19(e)(3).

CURRENT RULE	PROPOSED RULE
RULE 71. MOTIONS RELATING TO INFORMALITIES IN THE RECORD	**RULE 71** [Repealed]
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.	
	Notes and Comments Comment to 1997 change: The rule is repealed. *See* Rule 19(e)(1).

CURRENT RULE	PROPOSED RULE
RULE 72. MOTIONS TO DISMISS FOR WANT OF JURISDICTION	**RULE 72** [Repealed]
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.	
	Notes and Comments Comment to 1997 change: The rule is repealed.

CURRENT RULE	PROPOSED RULE
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.	**RULE 73** [Repealed]
	Notes and Comments Comment to 1997 change: The rule is repealed. *See* Rule 19(e)(2).

CURRENT RULE	PROPOSED RULE
B. BRIEFS AND ARGUMENT IN THE COURTS OF APPEALS	E. BRIEFS AND ARGUMENT IN THE COURTS OF APPEALS
RULE 74. REQUISITES OF BRIEFS	RULE 74. REQUISITES OF BRIEFS
Text as approved by the Supreme Court: Briefs shall be brief. Briefs shall be filed with the Clerk of the Court of Appeals. They shall be addressed to 'The Court of Appeals' of the correct district. In civil cases the parties shall be designated as 'Appellant' and 'Appellee,' and in criminal cases as 'Appellant' and 'Appellee'. Text as approved by the Court of Criminal Appeals: Briefs shall be brief. Briefs shall be filed with the Clerk of the Court of Appeals. They shall be addressed to 'The Court of Appeals' of the correct district. In civil cases the parties shall be designated as 'Appellant' and 'Appellee,' and in criminal cases as 'State' and 'Appellant' unless the State has appealed pursuant to Article 44.01, C.C.P., in which event the defendant is 'Appellee.' (a) **Names of All Parties to the Trial Court's Final Judgment.** A complete list of the names and addresses of all parties to the trial court's final judgment and their counsel in the trial court, if any, shall be listed at the beginning of the appellant's brief, so the members of the court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision of the case and so the clerk of the court of appeals may properly notify the parties to the trial court's final judgment or their counsel, if any, of the judgment and all orders of the court of appeals.	(a) **Appellant's Brief.** The appellant's brief must, under appropriate headings and in the order here indicated, contain the following: (1) *Identity of parties and counsel.* The brief must give a complete list of all parties to the trial court's judgment or order appealed from, and the names and addresses of all trial and appellate counsel.
(b) **Table of Contents and Index of Authorities.** The brief shall contain at the front thereof a table of contents with page references where the discussion of each point relied upon may be found and also an index of authorities alphabetically arranged, together with reference to the pages of the brief where the same are cited. The subject matter of each point or group of points shall be indicated in the table of contents.	(2) *Table of contents.* The brief must have a table of contents with references to the pages of the brief. The table of contents must indicate the subject matter of each issue or point, or group of issues or points. (3) *Index of authorities.* The brief must have an index of authorities arranged alphabetically and indicating the pages of the brief where the authorities are cited.

CURRENT RULE	PROPOSED RULE
(c) **Preliminary Statement.** The brief should contain a brief general statement of the nature of the cause or offense, i.e., whether it is suit for damages on a note, or a prosecution for murder, and the result in the court. Such statement should seldom exceed one-half page. The details should be reserved and stated in connection with the points to which they are pertinent.	(4) *Statement of the case*. The brief must state concisely the nature of the case (e.g., whether it is a suit for damages, on a note, or involving a murder prosecution), the course of proceedings, and the trial court's disposition of the case. The statement should be supported by record references, should seldom exceed one-half page, andshould not discuss the facts.
(d) Points of Error. A statement of the points upon which an appeal is predicated shall be stated in short form without argument and be separately numbered. In parentheses after each point, reference shall be made to the page of the record where the matter complained of is to be found. A point is sufficient if it directs the attention of the appellate court to the error about which complaint is made. In civil cases, complaints that the evidence is legally or factually insufficient to support a particular issue or finding, and challenges directed against any conclusions of law of the trial court based upon such issues or findings, may be combined under a single point of error raising both contentions if the record references and the argument under the point sufficiently direct the court's attention to the nature of the complaint made regarding each such issue or finding or legal conclusion based thereon. Complaints made as to several issues or findings relating to one ground of recovery or defense may be combined in one point, if separate record references are made.	(5) *Issues presented.* The brief must state concisely all issues or points presented for review. The statement of an issue or point will be treated as covering every subsidiary question that is fairly included. (6) *Statement of the facts.* The brief must state concisely and without argument the facts pertinent to the issues or points presented. The statement must be supported by record references. (7) *Summary of the argument.* The brief must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief. This summary must not merely repeat the issues or points presented for review.

CURRENT RULE	PROPOSED RULE
	(8) *Argument.* The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record. (9) *Prayer.* The brief must contain a short conclusion that clearly states the nature of the relief sought. (10) *Appendix.* (A) *Necessary contents.* The appendix must contain a copy of: (i) the judgment or other appealable order of the trial court from which relief is sought; (ii) the jury charge and verdict, if any, or the trial court's findings of fact and conclusions of law, if any; and (iii) the text of any rule, regulation, ordinance, statute, constitutional provision, or other law on which the argument is based, and the text of any contract or other document that is central to the argument.
(e) **Brief of Appellee.** The brief of the appellee shall reply to the points relied upon by the appellant in due order when practicable; and in civil cases, if the appellee desires to complain of any ruling or action of the trial court, his brief in regard to such matters shall follow substantially the form of the brief for appellant.	(B) *Optional contents.* The appendix may contain any other items pertinent to the issues or points presented for review, including copies or excerpts of relevant court opinions, laws, documents on which the suit was based, pleadings, and similar material. Items should not be included in the appendix to attempt to avoid the page limits for the brief. **(b) Appellee's Brief.** (1) *Form of brief.* (A) An appellee's brief must conform to the requirements of subdivision (a), except that: (i) the list of parties and counsel is not required unless necessary to supplement or correct the appellant's list; and (ii) the appellee need not include a statement of the case, a statement of the issues presented, or a statement of the facts, unless the appellee is dissatisfied with that portion of the appellant's brief. (B) When practicable, the appellee's brief should respond to the appellant's issues or points in the order the appellant presented those issues or points.

CURRENT RULE	PROPOSED RULE
	(2) *Cross-points.* (A) *In general.* In a civil case, an appellee may complain of any trial court ruling or action by including cross-points in the appellee's brief. But the appellate court will not grant the party more favorable relief than did the trial court — except for just cause — unless the party filed a notice of appeal. (B) *Judgment notwithstanding the verdict.* When the trial court renders judgment notwithstanding the verdict on one or more questions, the appellee must bring forward by cross-point any issue or point that would have vitiated the verdict or that would have prevented an affirmance of the judgment if the trial court had entered judgment on the verdict. Failure to bring forward by cross-point an issue or point that would vitiate the verdict or prevent an affirmance of the judgment waives that complaint. Included in this requirement is a point that: (i) the verdict or one or more jury findings have insufficient evidentiary support or are against the overwhelming preponderance of the evidence as a matter of fact; or (ii) the verdict should be set aside because of improper argument of counsel.
	(D) *When evidentiary hearing needed.* The appellate court must remand a case to the trial court to take evidence and render another judgment — which is then appealable like any other judgment — if: (i) the appellate court has sustained a point raised by the appellant; and (ii) the appellee raised a cross-point to vitiate the verdict or prevent affirmance of the judgment that requires the taking of additional evidence.
	(c) Appellant's Reply Brief. An appellant may file a reply brief addressing any matter in appellee's brief.

CURRENT RULE	PROPOSED RULE
(f) **Argument.** A brief of the argument may present separately or grouped the points relied upon for reversal. The argument shall include: (1) a fair, condensed statement of the facts pertinent to such points, with reference to the pages in the record where the same may be found; and (2) such discussion of the facts and the authorities relied upon as may be requisite to maintain the point at issue. If complaint is made of any part of the charge given or refused, such part of the charge shall be set out in full. If complaint is made of the improper admission or rejection of evidence, the substance of such evidence so admitted or rejected shall be set out with references to the pages of the record where the same may be found. Repetition or prolixity of statement or argument must be avoided. Any statement made by appellant in his original brief as to the facts or the record may be accepted by the court as correct unless challenged by the opposing party. (g) **Prayer for Relief.** The nature of the relief sought should be clearly stated.	
(h) **Length of Briefs.** Except as specified by local rule of the court of appeals, appellate briefs in civil cases shall not exceed 50 pages, exclusive of pages containing the 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.	(d) **Length of Briefs in Civil Cases.** Appellant's brief and appellee's brief must be no longer than 50 pages each, exclusive of pages containing the identity of parties and counsel, the table of contents, the index of authorities, the statement of the case, the issues presented, and any appendix. A reply brief may be no longer than 25 pages, exclusive of the items stated above. The court may, on mottion, permit a longer brief.
(i) **Number of Copies.** Each party shall file six copies of his brief in the court of appeals in which the case is pending. Any court of appeals may by rule authorize the filing therein of fewer or more copies of briefs. (j) **Briefs Typewritten or Printed.** The brief of either party may be typewritten, or printed. If typewritten, it must be double spaced.	

CURRENT RULE	PROPOSED RULE
	(c) **Appendix for Cases Recorded Electronically.** In cases where the proceedings were electronically recorded, the following rules apply: (1) *Appendix.* (A) *In general.* At or before the time a party's brief is due, the party must file one copy of an appendix containing a transcription of all portions of the recorded statement of facts that the party considers relevant to the appellate issues or points. A copy of all relevant exhibits must be included. Unless another party objects, the transcription will be presumed accurate. (B) *Repetition not required.* A party's appendix need not repeat evidence included in any previously filed appendix. (C) *Form.* The form of the appendix and transcription must conform to any specifications of the Supreme Court and Court of Criminal Appeals concerning the form of the statement of facts. (D) *Notice.* At the time the appendix is filed, the party must give written notice of the filing to all parties to the trial court's judgment or order. The notice must specify, by referring to the index numbers in the court recorder's logs, those parts of the recorded statement of facts that are included in the appendix. The filing party need not serve a copy of the appendix. (2) *Presumptions.* The same presumptions that apply to a partial statement of facts under Rule 53(c)(4) apply to the parties' appendixes. The appellate court need not review any part of the electronic recording. (3) *Supplemental appendix.* The appellate court may direct or allow a party to file a supplemental appendix containing additional portions of the recorded statement of facts.

CURRENT RULE	PROPOSED RULE
	(4) *Inability to pay.* A party who cannot pay the cost of an appendix must file the affidavit provided for by Rule 46. The party must also state in the affidavit or a supplemental affidavit that the affiant has neither the access to the necessary equipment nor the skill necessary to prepare the appendix. If a contest to the affidavit is not sustained by written order, the court recorder must transcribe or have transcribed those portions of the recorded statement of facts that the party designates and must file the transcription as that party's appendix, along with all exhibits. (5) *Inaccuracies.* (A) *Correction by agreement.* The parties may agree to correct an inaccuracy in the transcription of the recorded statement of facts. (B) *Correction by appellate or trial court.* If, after the statement of facts or an appendix is filed, the parties dispute whether an electronic recording or transcription accurately discloses what occurred in the trial court but cannot agree on corrections to the statement of facts or transcription, the appellate court may: (i) settle the dispute by reviewing the recording; or (ii) submit the dispute to the trial court, which must — after notice and hearing — settle the dispute and ensure that the statement of facts or transcription is made to conform to what occurred in the trial court. (6) *Costs.* The actual expense of preparing the appendixes or the amount prescribed for official reporters, whichever is less, is taxed as costs. The appellate court may disallow the cost of any portion of the appendixes that it considers surplusage or that does not conform to any specifications prescribed by the Supreme Court or Court of Criminal Appeals.
(k) **Appellant's Filing Date.** Appellant shall file his brief within thirty days after the filing of the transcript and statement of facts, if any, except that in accelerated appeals and habeas corpus appeals appellant shall file his brief within the time prescribed by Rule 42 or Rule 44.	(f) **Time to File Briefs; Effect of Failure to File.** (1) *Appellant's filing date.* Except in a habeas corpus appeal, which is governed by Rule 44, the appellant must file a brief within 30 days — 20 days in an accelerated appeal — after the later of: (A) the date the transcript is filed; or (B) the date the statement of facts is filed.

CURRENT RULE	PROPOSED RULE
(l) Failure of Appellant to File Brief. (1) *Civil Cases.* In civil cases, when the appellant has failed to file his brief in the time prescribed, the appellate court may dismiss the appeal for want of prosecution, unless reasonable explanation is shown for such failure and that appellee has not suffered material injury thereby. The court may, however, decline to dismiss the appeal, whereupon it shall give such direction to the cause as it may deem proper.	(2) *Failure of appellant to file brief.* (A) *Civil cases.* If an appellant fails to timely file a brief, the appellate court may: (i) dismiss the appeal for want of prosecution, unless the appellant reasonably explains the failure and the appellee is not significantly injured by the appellant's failure to timely file a brief; or (ii) decline to dismiss the appeal and give further direction to the case as it considers proper.
(2) *Criminal Cases.* In criminal cases, appellant's failure to file a brief in the time prescribed shall not authorize dismissal of the appeal or, except as herein provided, consideration of the appeal without briefs. When the appellant's brief has not been filed within such time, the clerk of the appellate court shall notify counsel for the parties and the trial judge that appellant's brief has not been filed. If no satisfactory response is received within ten days, the appellate court shall order the trial judge to immediately conduct a hearing to determine whether the appellant desires to prosecute his appeal, whether the appellant is indigent, or if not indigent, whether retained counsel has abandoned the appeal, and to make appropriate findings and recommendations. For this purpose the trial judge shall conduct such hearings as may be necessary, make appropriate findings and recommendations, and prepare a record of the proceedings. If the appellant is indigent, the judge shall take such measures as may be necessary to assure effective representation of counsel, which may include the appointment of new counsel. The record so made, including any orders and findings of the trial judge, shall be sent to the appellate court, which may take appropriate action to insure that the appellant's rights are protected, including contempt proceedings against counsel. If the trial judge finds that the appellant no longer desires to prosecute the appeal, or that he is not indigent but has failed to make necessary arrangements for filing a brief, the appellate court may consider the appeal without briefs, as justice may require.	(B) *Criminal cases.* (i) *Effect.* An appellant's failure to timely file a brief does not authorize either dismissal of the appeal or, except as provided in (iv), consideration of the appeal without briefs. (ii) *Notice.* If the appellant's brief is not timely filed, the appellate clerk must notify counsel for the parties and the trial court of that fact. If the appellate court does not receive a satisfactory response within ten days, the court must order the trial court to immediately conduct a hearing to determine whether the appellant desires to prosecute his appeal, whether the appellant is indigent, or, if not indigent, whether retained counsel has abandoned the appeal, and to make appropriate findings and recommendations. (iii) *Hearing.* In accordance with (ii), the trial court must conduct any necessary hearings, make appropriate findings and recommendations, and have a record of the proceedings prepared, which record — including any order and findings — must be sent to the appellate court. (iv) *Appellate court action.* Based on the trial court's record, the appellate court may act appropriately to ensure that the appellant's rights are protected, including initiating contempt proceedings against appellant's counsel. If the trial court has found that the appellant no longer desires to prosecute the appeal, or that the appellant is not indigent but has not made the necessary arrangements for filing a brief, the appellate court may consider the appeal without briefs, as justice may require.

CURRENT RULE	PROPOSED RULE
(m) **Appellee's Filing Dates.** Appellee shall file his brief within twenty-five days after the filing of appellant's brief. In civil cases, when appellant has failed to file his brief as provided in this rule, the appellee may, prior to the call of the case, file his brief, which the court may in its discretion regard as a correct presentation of the case, and upon which it may, in its discretion, affirm the judgment of the court below without examining the record. (n) **Modifications of Filing Time.** Upon written motion showing a reasonable explanation of the need for more time, the court may grant either or both parties further time for filing their respective briefs, and may extend the time for submission of the case. The court may also shorten the time for filing briefs and the submission of the cause in case of emergency, when in its opinion the needs of justice require it.	(3) *Appellee's filing date.* The appellee's brief must be filed within 30 days — 20 days in an accelerated appeal — after the date the appellant's brief was filed. In a civil case, if the appellant has not filed a brief as provided in this rule, an appellee may file a brief within 30 days — 20 days in an accelerated appeal — after the date the appellant's brief was due. The court of appeals may regard that brief as correctly presenting the case and may affirm the trial court's judgment upon that brief without examining the record. (4) *Appellant's filing date for reply brief.* The appellant's reply brief, if any, must be filed within 15 days after the date the appellee's brief was filed. (5) *Modifications of filing time.* On written motion complying with Rule 19(e)(2), the court may extend the time for filing briefs and may postpone submission of the case. A motion to extend the time to file a brief may be filed before or after the date the brief is due. The court may also, in the interests of justice, shorten the time for filing briefs and for submission of the case.
(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.	(g) **Amendment or Supplementation.** A brief may be amended or supplemented whenever justice requires, on whatever reasonable terms the court may prescribe.
(p) **Briefing Rules to Be Construed Liberally.** The purpose of briefs being to acquaint the court with the points relied upon, the manner in which they arose, together with such argument of facts and law as will enable the court to decide the same, a substantial compliance with these rules will suffice in the interest of justice; but for a flagrant violation of this rule the court may require the case to be rebriefed.	(h) **Briefing Rules to be Construed Liberally.** Because briefs are meant to acquaint the court with the issues in a case and to present argument that will enable the court to decide the case, substantial compliance with this rule is sufficient, subject to the following. (1) *Formal defects.* If the court determines that this rule has been flagrantly violated, it may require a brief to be amended, supplemented, or redrawn. If another brief that does not comply with this rule is filed, the court may strike the brief, prohibit the party from filing another, and proceed as if the party had failed to file a brief. (2) *Substantive defects.* If the court determines, either before for after submission, that the case has not been properly presented in the briefs, or that the law and authorities have not been properly cited in the briefs, the court may postpone submission, require additional briefing, and make any other order necessary for a satisfactory submission of the case.

CURRENT RULE	PROPOSED RULE
(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.	
	Notes and Comments Comment to 1997 change: The rule is substantially rewritten. Paragraph (a)(5) now specifically allows a party to either present issues or points of error. Paragraphs (a)(6) & (7) are new and require a brief to include a statement of facts and summary of the argument. Paragraph (b)(2) is new and gives specific requirements for cross-points. *See also* TEX. R. CIV. P. 324(c). Subdivision (c) is new and provides for a reply by the appellant. Subdivision (e) is new and provides for an appendix in cases recorded electronically in the trial court. Paragraph (f)(3) now provides that the appellee has 30 — rather than 25 — days to file a brief. The provisions of former subdivisions (i) (Number of Copies), (j) (Briefs Typewritten or Printed), and (q) (Service of Briefs) are moved to Rule 4.

CURRENT RULE	PROPOSED RULE
RULE 75. ARGUMENT	RULE 75. ORAL ARGUMENT; SUBMISSION WITHOUT ARGUMENT
(a) Right to Argument. When a case is properly prepared for submission, any party who has filed briefs in accordance with the rules prescribed therefor and who has made a timely request for oral argument under (f) hereof may, upon the call of the case for submission, submit an oral argument to the court.	(a) **Right to Oral Argument.** Except as provided in (i), when a case is properly prepared for submission any party who has filed a brief and who has timely requested oral argument may argue the case to the court when the case is called for argument.
(b) **Subject Matter.** The arguments must be upon the disputed points, whether of law or fact, in support of the points relied on, on one side, and objections and counter-points on the other, and it must be confined to them, avoiding any reference or comment upon matters not involved in or pertaining to that which is found in the record.	(b) **Purpose of Argument.** Oral argument should emphasize and clarify the written arguments in the briefs. Counsel should not merely read from prepared text. Counsel should assume that all justices have read the briefs before oral argument and should be prepared to respond to the justices' questions. A party should not refer to or comment on matters not involved in or pertaining to what is in the record.
(c) **Requirement to Answer Questions.** Counsel will be expected to answer questions propounded by members of the court relating to the matter in the record and to the law or authorities cited by counsel in the argument.	
(d) **Time Allowed.** In the argument of cases in the court of appeals, each side may be allowed thirty minutes in the argument at the bar, with fifteen minutes more in conclusion by the appellant. In cases involving difficult questions, the time allotted may be extended by the court, provided application is made before argument begins. The court may, in its discretion, shorten the time allowed for oral argument. Not more than two counsel on each side will be heard, except on leave of the court. Counsel for amicus curiae shall not be permitted to argue except that an amicus may share time allotted to one of the counsel who consents and with leave of the court obtained prior to argument.	(c) **Time Allowed.** The court will set the time that will be allowed for argument. Counsel must complete argument in the time allotted and may continue after the expiration of the allotted time only with permission of the court. Counsel is not required to use all the allotted time. The appellant must be allowed to conclude the argument.
	(d) **Number of Counsel.** Generally, only one counsel should argue for each side. Except on leave of court, no more than two counsel on each side may argue. Only one counsel may argue in rebuttal.
	(e) **Argument by Amicus.** With leave of court obtained before the argument and with a parrty's consent, an amicus may share allotted time with that party. Otherwise, counsel for amicus curiae may not argue.

CURRENT RULE	PROPOSED RULE
(e) **When Only One Party Files a Brief.** If counsel for but one party has filed briefs, an argument by him may be allowed, conformably to the preceding provisions as nearly as practicable, under the direction of the court.	(f) **When Only One Party Files a Brief.** If counsel for only one party has filed a brief, the court may allow that party to argue.
(f) A party to the appeal desiring oral argument shall file a request therefor at the time he files his brief in the case. Failure of a party to file a request shall be deemed a waiver of his right to oral argument in the case. Although a party waives his right to oral argument under this rule, the court of appeals may nevertheless direct such party to appear and submit oral argument on the submission date of the case.	(g) **Request and Waiver.** A party desiring oral argument must note that request on the front cover of the party's brief. A party's failure to request oral argument waives the party's right to argue. But even if a party has waived oral argument, the court may direct the party to appear and argue.
The court of appeals may, in its discretion, advance civil 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. Notice of the submission date of cases without oral argument shall be given by the clerk in writing to all attorneys of record, and to any party to the appeal not presented by counsel, at least twenty-one days prior to the submission date. The date of the notice shall be deemed to be the date such notice is delivered into the custody of the United States Postal Services in a properly addressed post-paid wrapper (envelope).	(h) **Cases Advanced Without Oral Argument.** In its discretion, the court of appeals may decide a case without oral argument if argument would not significantly aid the court in determining the legal and factual issues presented in the appeal.
	(i) Clerk's Notice. The clerk must send to the parties — at least 21 days before the date the case is set for argument or submission without argument — a notice telling the parties: (1) whether the court will allow oral argument or will submit the case without argument; (2) the date of argument or submission without argument; and (3) if argument is allowed, the time allotted for argument. A party's failure to receive the notice does not prevent a case's argument or submission on the scheduled date.
	Notes and Comments Comment to 1997 change: The rule is revised without substantive change, except only one — not two — counsel may argue for each side without leave of court.

CURRENT RULE	PROPOSED RULE
C. SUBMISSION IN THE COURTS OF APPEALS	
RULE 76. SUBMISSION IN ORDER OF FILING; SERVICE OF NOTICE	RULE 76. ORDER OF SUBMISSION AND DECISION
Causes not advanced as otherwise provided shall be submitted in the order of filing or in such other order as the court shall determine by rule. The clerk shall notify by letter the attorney and any party not represented by an attorney the date of submission and oral argument, but failure to receive notice will not necessarily prevent the submission of a case on the day on which it is set.	(a) **Civil Cases.** The court of appeals may determine the order in which civil cases will be submitted and decided. But the following types of cases have precedence over all others: (1) a case given precedence by law; (2) an accelerated appeal; and (3) a case that the court determines should be given precedence in the interests of justice.
	(b) **Criminal Cases.** The court of appeals must hear and determine a criminal appeal at the earliest possible time, having due regard for the parties' rights and for the proper administration of justice.
	Notes and Comments Comment on 1997 change: The provisions of former Rules 76, 77 and 78 are merged into this rule. Civil cases involving the Railroad Commission, the State, and "cases submitted on oral argument for all parties" are no longer given preference.

CURRENT RULE	PROPOSED RULE
RULE 77. ORDER OF HEARING AND DECIDING CIVIL CASES	**RULE 77. NOTICE OF DATE OF SUBMISSION**
(a) Civil cases which have not been advanced shall be set for submission at least two weeks ahead of the date of submission. The clerk shall notify by letter the attorneys and any party not represented by an attorney of the date of submission and oral argument. (b) Civil cases shall be decided in the order in which they are filed, but the following cases shall have precedence of all others: (1) Cases in which the Railroad Commission is a party. (2) Cases in which the State is a party. (3) Cases given precedence by law or these rules. (4) Cases submitted on oral argument for all parties to the cause. (5) Appeals from interlocutory orders. (6) Such other cases as the court, by order or rule, may direct.	[Repealed]
	Notes and Comments Comment to 1997 change: The rule is repealed. *See* Rule 76(a).

CURRENT RULE	PROPOSED RULE
RULE 78. ORDER OF HEARING AND DECIDING CRIMINAL CASES	**RULE 78** [Repealed]
The courts of appeals shall hear and determine appeals in criminal actions at the earliest time it may be done, with due regard to the rights of parties and proper administration of justice.	
	Notes and Comments Comment to 1997 change: The rule is repealed. *See* Rule 76(a).

CURRENT RULE	PROPOSED RULE
RULE 79. PANEL AND EN BANC SUBMISSION	**RULE 79. PANEL AND EN BANC SUBMISSION**
(a) Except as provided in section 22.223 of the Government Code and these rules, original submissions of civil and criminal cases in a court of appeals shall be to a panel of the court consisting of three justices. A majority of the panel shall constitute a quorum and the concurrence of a majority of the panel shall be necessary for a decision. Except as otherwise provided in these rules, the decision of a panel of a court of appeals shall constitute the final decision of the court.	(a) **Submission to Panel.** (1) *Constitution of panel.* Except as provided in Section 22.223 of the Government Code and these rules, an original submission of a civil or criminal case in a court of appeals must be to a panel of the court consisting of three justices. A majority of the panel, which constitutes a quorum, must agree on the judgment. Except as otherwise provided in these rules, a panel's opinion constitutes the court's opinion, and the court must render a judgment in accordance with the panel opinion. (2) *When panel cannot agree on judgment.* If for any reason after an original submission only two justices participate in considering a case and they cannot agree on a judgment, the chief justice of the court of appeals must either designate another justice of the court to sit on the panel to consider the case or convene the court en banc to consider the case. The reconstituted panel or the en banc court may order the case reargued. (3) *When court cannot agree on judgment.* If a court of appeals consists of only three justices, and if for any reason after an original submission only two justices participate in considering a case and they cannot agree on a judgment, that fact must be certified to the chief justice of the Supreme Court. The chief justice may then temporarily assign a justice of another court of appeals or a qualified retired justice to sit with the court of appeals to consider the case. The reconstituted court may order the case reargued.

CURRENT RULE	PROPOSED RULE
(b) If for any reason only two justices participate in the decision of a panel of a court of appeals consisting of more than three justices and they cannot concur in a decision because they are equally divided, the Chief Justice of the Court of Appeals shall designate another justice of the court to participate in the decision of the case. After such justice is designated, the panel may order the case reargued, at its discretion. In the alternative, the Chief Justice of the Court of Appeals may convene the court en banc for the purpose of deciding the case. The en banc court may order the case reargued at its discretion. (c) If a court of appeals consists of only three justices and for any reason only two justices participate in the decision and they cannot concur in a decision because they are equally divided, such fact shall be certified to the Chief Justice of the Supreme Court who may temporarily assign a justice of another court of appeals or a qualified retired justice to participate in the decision of the case pursuant to law. The reconstituted panel may order the case reargued, at its discretion. (d) Where a case is submitted to an en banc court, whether on motion for rehearing or otherwise, a majority of the membership of the court shall constitute a quorum and the concurrence of a majority of the court sitting en banc shall be necessary to a decision. If a majority of the justices of the court sitting en banc cannot concur in a decision because they are equally divided, such fact shall be certified to the Chief Justice of the Supreme Court who may temporarily assign a justice of another court of appeals or a qualified retired justice to participate in the decision of the case pursuant to law. The reconstituted en banc court may order the case reargued, at its discretion. (e) A hearing or rehearing en banc is not favored and should not be ordered unless consideration by the full court is necessary to secure or maintain uniformity of its decisions or in extraordinary circumstances. A vote need not be taken to determine whether a cause shall be heard or reheard en banc unless a justice of the en banc court requests a vote. If a vote is requested and a majority of the membership of the en banc court vote to hear or rehear the case en banc, the case will be heard or reheard en banc; otherwise, it will be decided by a panel of the court.	(b) **Submission to En Banc Court.** (1) *Constitution of en banc court.* An en banc court consists of all members of the court who are not disqualified or recused and — if the case was originally submitted to a panel — any members of the panel who are not members of the court. A majority of the en banc court constitute a quorum. A majority of the en banc court must agree on a judgment. (2) *When en banc court cannot agree on judgment.* If a majority of an en banc court cannot agree on a judgment, that fact must be certified to the chief justice of the Supreme Court. The chief justice may then temporarily assign a justice of another court of appeals or a qualified retired justice to sit with the court of appeals to consider the case. The reconstituted court may order the case reargued. (3) *En banc consideration disfavored.* En banc consideration of a case is not favored and should not be ordered unless necessary to secure or maintain uniformity of the court's decisions or unless extraordinary circumstances require en banc consideration. A vote to determine whether a case will be heard or reheard en banc need not be taken unless a justice of the court requests a vote. If a vote is requested and a majority of the court's members vote to hear or rehear the case en banc, the en banc court will hear or rehear the case. Otherwise, a panel of the court will consider the case.

CURRENT RULE	PROPOSED RULE
	Notes and Comments Comment to 1997 change: The rule is reorganized. Former subdivision (a) is now paragraph (a)(1); former subdivision (b) is now paragraph (a)(2); former subdivision (c) is now paragraph (a)(3); former subdivision (d) is now paragraphs (b)(1) and (2); and former subdivision (e) is now paragraph (b)(3). Paragraphs (a)(2) and (3) are amended to make clear that a three judge panel must hear the case; only if a member of a panel is lost after submission do the provisions for appointment of another justice to break a deadlock come into play. Paragraph (b)(1) is amended to define an en banc court.

CURRENT RULE	PROPOSED RULE
SECTION SIX. JUDGMENTS, OPINIONS AND REHEARING	
A. JUDGMENT	F. JUDGMENT
RULE 80. JUDGMENT OF COURT OF APPEALS	RULE 80. JUDGMENT OF THE COURT OF APPEALS
(a) **Time.** When a case has been submitted, the court of appeals shall render its judgment promptly.	(a) **Time.** The court of appeals should render its judgment promptly after submission of a case.
(b) **Types of Judgment.** The court of appeals may: (1) affirm the judgment of the court below, (2) modify the judgment of the court below by correcting or reforming it, (3) reverse the judgment of the court below and dismiss the case or render the judgment or decree that the court below should have rendered, or (4) reverse the judgment of the court below and remand the case for further proceedings.	(b) **Types of Judgment.** The court of appeals may: (1) affirm the trial court's judgment in whole or in part; (2) modify the trial court's judgment and affirm it as modified; (3) reverse the trial court's judgment in whole or in part and render the judgment that the trial court should have rendered; (4) reverse the trial court's judgment and remand the case for further proceedings; (5) vacate the trial court's judgment and dismiss the case; or (6) dismiss the appeal.
	(c) **Rendition Appropriate Unless Remand Necessary.** When reversing a trial court's judgment, the court must render the judgment that the trial court should have rendered, except when: (1) a remand is necessary for further proceedings; or (2) the interests of justice require a remand for another trial.
(c) **Other Orders.** In addition, the court of appeals may make any other appropriate order, as the law and the nature of the case may require.	(d) **Other Orders.** The court of appeals may make any other appropriate order that the law and the nature of the case require.

CURRENT RULE	PROPOSED RULE
(d) **Presumptions in Criminal Cases.** The court of appeals shall presume that the venue was proved in the court below; that the jury was properly impaneled and sworn; that the defendant was arraigned; that he pleaded to the indictment or other charging instrument; that the court's charge was certified by the judge and filed by the clerk before it was read to the jury, unless such matters were made an issue in the court below, or it otherwise affirmatively appears to the contrary from the record.	(e) **Presumptions in Criminal Cases.** Unless the following matters were disputed in the trial court, or unless the record affirmatively shows the contrary, the court of appeals must presume: (1) that venue was proved in the trial court; (2) that the jury was properly impaneled and sworn; (3) that the defendant was arraigned; (4) that the defendant pleaded to the indictment or other charging instrument; and (5) that the court's charge was certified by the trial court and filed by the clerk before it was read to the jury.
	Notes and Comments Comment to 1997 changes: Paragraph (b)(5) allows the court of appeals to vacate the trial court's judgment and dismiss the case; paragraph (b)(6) allows the court of appeals to dismiss the appeal. Both provisions are new but codify current practice. Paragraph (c)(1) is moved here from former Rule 81(c). Paragraph (c)(2), allowing a remand in the interest of justice, is new.

CURRENT RULE	PROPOSED RULE
RULE 81. REVERSAL IN CIVIL AND CRIMINAL CASES	RULE 81. REVERSIBLE ERROR
(a) **No Reversal if Error Remediable.** If the erroneous action or failure or refusal of the trial judge to act shall prevent the proper presentation of a cause to the court of appeals, and be such as may be corrected by the judge of the trial court, then the judgment shall not be reversed for such error, but the appellate court shall direct the said judge to correct the error, and thereafter the court of appeals shall proceed as if such erroneous action or failure to act had not occurred.	
(b) Reversible Error. (1) *Civil Cases.* No judgment shall be reversed on appeal and a new trial ordered in any cause on the ground that the trial court has committed an error of law in the course of the trial, unless the appellate court shall be of the opinion that the error complained of amounted to such a denial of the rights of the appellant as was reasonably calculated to cause and probably did cause rendition of an improper judgment in the case, or was such as probably prevented the appellant from making a proper presentation of the case to the appellate court; and if it appears to the court that the error affects a part only of the matter in controversy and that such part is clearly separable without unfairness to the parties, the judgment shall only be reversed and a new trial ordered as to that part affected by such error, provided that a separate trial on unliquidated damages alone shall not be ordered if liability issues are contested. (2) *Criminal Cases.* If the appellate record in a criminal case reveals error in the proceedings below, the appellate court shall reverse the judgment under review, unless the appellate court determines beyond a reasonable doubt that the error made no contribution to the conviction or to the punishment.	**(a) Civil Cases.** (1) *Standard for reversible error.* No judgment may be reversed on appeal on the ground that the trial court made an error of law unless the court of appeals concludes that the error complained of: (A) probably caused the rendition of an improper judgment; or (B) probably prevented the appellant from properly presenting the case to the court of appeals. (2) *Error affecting only part of case.* If the error affects part of, but not all, the matter in controversy, and that part is separable without unfairness to the parties, the judgment must be reversed and a new trial ordered only as to the party affected by the error. The court may not order a separate trial solely on unliquidated damages if liability is contested. (b) **Criminal Cases.** If the appellate record in a criminal case reveals error in the proceedings below, the court of appeals must reverse the judgment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment.
(c) Rendition Appropriate Unless Remand Necessary. When the judgment or decree of the court below shall be reversed, the court shall proceed to render such judgment or decree as the court below should have rendered, except when it is necessary to remand to the court below for further proceedings.	

CURRENT RULE	PROPOSED RULE
	Notes and Comments Comment to 1997 change: Former subdivision (a) regarding remedial errors is moved to Rule 83(b). The reversible error standard is amended to omit the reference to an action "reasonably calculated to cause" an improper judgment, but no substantive change is intended. Former subdivision (c) regarding rendition of judgment is moved to Rule 80(c).

CURRENT RULE	PROPOSED RULE
RULE 82. JUDGMENT ON AFFIRMANCE OR RENDITION IN A CIVIL CASE	**RULE 82. ALLOCATION OF COSTS IN CIVIL CASES; JUDGMENT AGAINST SURETIES**
When a court of appeals affirms the judgment or decree of the court below, or proceeds to modify the judgment and to render such judgment or decree against the appellant as should have been rendered by the court below, it shall render judgment against the appellant and the sureties on his supersedeas bond, if any, for the performance of said judgment or decree, and shall make such disposition of the costs as the court shall deem proper, rendering judgment against the appellant and the sureties on his appeal or supersedeas bond, if any, for such costs as are taxed against him.	(a) **Judgment for Costs.** In a civil case, the court of appeals judgment should award to the prevailing party the appellate costs — including preparation costs for the transcript and the statement of facts — that were incurred by that party. But the court of appeals may tax costs otherwise as required by law or for good cause.
	(b) Statement of Costs; Collection of Costs. (1) *Preparation.* The appellate clerk must prepare, and send to the trial court clerk with the mandate, a statement of costs showing: (A) the preparation costs for the transcript and the statement of facts, and any court of appeals filing fees, with a notation of those items that have been paid and those that are owing; and (B) the party or parties against whom costs have been adjudged. (2) *Procedure after preparation.* Appellate court costs must be included with the trial court costs in any process to enforce the judgment. If all or part of the costs are collected, the trial court clerk must immediately remit to the appellate court clerk any amount due to that clerk.
	(c) **Judgment Against Sureties.** When a court of appeals affirms the trial court judgment, or modifies that judgment and renders judgment against the appellant, the court of appeals must render judgment against the sureties on the appellant's supersedeas bond, if any, for the performance of the judgment and for any costs taxed against the appellant.
	Notes and Comments Comment to 1997 change: In subdivision, the reference to costs in tax suits is deleted. Subdivision (b) is moved here from former Rules 88 and 89.

CURRENT RULE	PROPOSED RULE
RULE 83. NO AFFIRMANCE, REVERSAL OR DISMISSAL FOR WANT OF FORM OR SUBSTANCE	RULE 83. NO AFFIRMANCE, REVERSAL, OR DISMISSAL FOR PROCEDURAL DEFECTS OR IF ERROR REMEDIAL
A judgment shall not be affirmed or reversed or an appeal dismissed for defects or irregularities, in appellate procedure, either of form or substance, without allowing a reasonable time to correct or amend such defects or irregularities provided the court may make no enlargement of the time for filing the transcript and statement of facts except pursuant to paragraph (c) of Rule 54 and except that in criminal cases late filing of the transcript or statement of facts may be permitted on a showing that otherwise the appellant may be deprived of effective assistance of counsel.	(a) **Defects in Procedure.** A court of appeals must not affirm or reverse a judgment or dismiss an appeal for defects or irregularities in appellate procedure without allowing a reasonable time to correct or amend the defects or irregularities.
	(b) Remediable Error of the Trial Court. (1) *Generally.* A court of appeals must not affirm or reverse a judgment or dismiss an appeal if: (A) the trial court's erroneous action or failure or refusal to act prevents the proper presentation of a case to the court of appeals; and (B) the trial court can correct its action or failure to act. (2) *Court of appeals direction if error remediable.* If the circumstances described in (1) exist, the court of appeals must direct the trial court to correct the error. The court of appeals will then proceed as if the erroneous action or failure to act had not occurred.
	Notes and Comments Comment to 1997 change: Subdivision (a) is amended to delete "form or substance" and to delete the provisions regarding the late filing of the record. Subdivision (b) is moved here from former Rule 81(a).

CURRENT RULE	PROPOSED RULE
RULE 84. DAMAGES FOR DELAY IN CIVIL CASES	**RULE 84. DAMAGES FOR FRIVOLOUS APPEALS IN CIVIL CASES**
In civil cases where the court of appeals shall determine that an appellant has taken an appeal for delay and without sufficient cause, then the court may, as part of its judgment, award each prevailing appellee an amount not to exceed ten percent of the amount of damages awarded to such appellee as damages against such appellant. If there is no amount awarded to the prevailing appellee as money damages, then the court may award, as part of its judgment, each prevailing appellee an amount not to exceed ten times the total taxable costs as damages against such appellant. 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.	If the court of appeals determines that an appeal is frivolous, it may — on motion of any party or on its own initiative, after notice and a reasonable opportunity for response — award each prevailing party just damages. But the court must not consider allegations of error that have not otherwise been properly preserved or presented.
	Notes and Comments Comment to 1997 change: The limit on the amount of the sanction that may be imposed is repealed. A requirement of notice and opportunity to respond is added.

CURRENT RULE	PROPOSED RULE
RULE 85. REMITTITUR IN CIVIL CASES	RULE 85. REMITTITUR IN CIVIL CASES
(a) **After Appeal Perfected.** If, in any judgment rendered in a civil case in the district or county court, the court below determines that an excess of damages has been allowed, and before the plaintiff has remitted the excess as provided by Rule 315 of the Texas Rules of Civil Procedure, such judgment shall be removed to the court of appeals, it shall be lawful for the party in whose favor such excess of damages has been rendered to make a remittitur in the court of appeals in the same manner as in the district or county court. After revising the judgment, the court of appeals shall proceed to render the judgment that the court below should have rendered if the remittitur had been made in the court below.	(a) **Remittitur After Appeal Perfected.** If the trial court suggests a remittitur but the case is appealed before the remittitur is filed, the party who would make the remittitur may do so in the court of appeals in the same manner as in the trial court. The court of appeals must then render the judgment that the trial court should have rendered if the remittitur had been made in the trial court.
(b) **Cross Point on Remittitur.** Whenever the trial court shall direct a remittitur in any action, and the same is made, and the party for whose benefit it is made shall appeal in said action, then the party remitting shall not be barred from contending in the appellate court that said remittitur should not have been required either in whole or in part, and if the appellate court sustains such contention it shall render such judgment as the trial court should have rendered without respect to said remittitur.	(b) **Cross-Point on Remittitur.** If a party makes the remittitur at the trial judge's suggestion under Texas Rule of Civil Procedure 327(e), and the party benefiting from the remittitur appeals, the remitting party is not barred from contending in the court of appeals that all or part of the remittitur should not have been required. If the court of appeals sustains the remitting party's contention that remittitur should not have been required, the court must render the judgment that the trial court should have rendered.
(c) **Suggestion of Remittitur by Court of Appeals.** In civil cases appealed to the court of appeals, if such court is of the opinion that the trial court erred in refusing to suggest a remittitur and that said cause should be reversed for that reason only, then said appellate court shall indicate to such party, or his attorney, within what time he may file a remittitur of such excess. If such remittitur is so filed, then the court shall reform and affirm such judgment in accordance therewith; if not filed as indicated then the judgment shall be reversed.	(c) **Suggestion of Remittitur by Court of Appeals.** The court of appeals may suggest a remittitur. If the remittitur is timely filed, the court must reform and affirm the trial court's judgment in accordance with the remittitur. If the remittitur is not timely filed, the court must reverse the trial court's judgment.
(d) **Refusal to Remit Not to Be Mentioned in Subsequent Trial.** Whenever a court of appeals shall indicate that a verdict is excessive, and no remittitur shall be filed, no evidence shall be allowed, nor allusion made in a subsequent trial to the action of such appellate court in reference to the amount of excess of such verdict.	(d) **Refusal to Remit Must Not Be Mentioned in Later Trial.** If the court of appeals suggests a remittitur, but no remittitur is filed, evidence of the court's determination regarding remittitur is inadmissible in a later trial of the case.

CURRENT RULE	PROPOSED RULE
(c) **Voluntary Remittitur.** If a case appealed to the court of appeals is reversed because of an error of law that affects only part of the damages or judgment, the affected party may voluntarily remit such amount within 15 days after the court's opinion or judgment. If such remittitur is filed and the court of appeals is of the opinion that such voluntary remittitur cures the reversible error, then such remittitur shall be accepted and the cause affirmed.	(c) **Voluntary Remittitur.** If a court of appeals reverses the trial court's judgment because of a legal error that affects only part of the damages awarded by the judgment, the affected party may — within 15 days after the court of appeals' judgment — voluntarily remit the amount that the court of appeals determined should not have been awarded by the judgment. If the remittitur is timely filed and the court of appeals determines that the voluntary remittitur cures the reversible error, then the remittitur must be accepted and the trial court judgment affirmed.
	Notes and Comments Comment to 1997 change: The rule is revised without substantive change.

CURRENT RULE	PROPOSED RULE
SECTION SIX. JUDGMENTS, OPINIONS AND REHEARING A. JUDGMENT	
RULE 86. MANDATE	RULE 86 [Repealed]

CURRENT RULE	PROPOSED RULE
(a) Issuance of Mandate. The clerk shall issue a mandate in accordance with the judgment and shall deliver it to the clerk of the trial court without waiting for the payment of costs upon expiration of one of the following periods: (1) Forty-five days after the judgment, if no timely motion for rehearing or petition for discretionary review has been filed, and no timely motion has been filed to extend the time for filing petition for discretionary review and no discretionary review has been granted by the Court of Criminal Appeals on its own motion; (2) Forty-five days after the last timely motion for rehearing has been overruled, if no timely application for writ of error or petition for discretionary review has been filed and no timely motion has been filed to extend the time for filing application for writ of error or petition for discretionary review and no discretionary review has been granted by the Court of Criminal Appeals on its own motion; (3) Fifteen days after any timely motion to extend the time for filing an application for writ of error or petition for discretionary review has been overruled; (4) Fifteen days after receipt by the clerk of an order of the Supreme Court denying writ of error or an order of the Court of Criminal Appeals refusing discretionary review. (b) The mandate may be issued earlier by agreement of the parties, or on motion showing good cause. (c) If a writ of error has been denied by the Supreme Court or discretionary review has been refused by the Court of Criminal Appeals, the petitioner may move for a stay of mandate pending disposition by the Supreme Court of the United States of a petition for writ of certiorari. The motion shall show the grounds for such petition and the circumstances requiring a stay of the mandate. The court of appeals may grant such a stay if it finds that the grounds are substantial and that serious hardship would result to the petitioner or others from issuance of the mandate in the event of reversal by the Supreme Court of the United States. (d) The mandate shall contain the file number of the case in the trial court. When the mandate of the court of appeals is received by the proper clerk, he shall	

CURRENT RULE	PROPOSED RULE
file it with the papers of the cause, and note it upon the docket. (c) **Recall of Mandate.** If a court of appeals vacates, modifies, corrects or reforms its judgment after the mandate has been issued, the mandate shall have no further effect and a new mandate may be issued. The clerk shall at once give notice of such act to the clerk of the trial court and to all parties.	
	Notes and Comments Comment to 1997 change: The rule is repealed and its contents moved to Rule 23.

CURRENT RULE	PROPOSED RULE
RULE 87. ENFORCEMENT OF JUDGMENTS AFTER MANDATE	**RULE 87. ENFORCEMENT OF JUDGMENTS AFTER MANDATE**
On receipt of the mandate by the clerk of the trial court, the judgment of the appellate court shall be enforced as follows: **(a) In Civil Cases.** When the judgment of the appellate court affirms the judgment of the trial court or modifies the judgment of the trial court as is contemplated by Rule 80(b), or renders such judgment as the court below should have rendered as contemplated by Rule 81(c), the trial court need not make any further order or decree and the clerk of the trial court shall proceed to issue execution thereon as in other cases. (2) *Judgment of Reversal.* When the judgment of the appellate court reverses the judgment of the trial court and grants a new trial to the defendant, the cause shall stand as it would have stood in case the new trial had been granted by the trial court, and if in custody and entitled to bail the defendant shall be released upon his giving bail. When the judgment of the appellate court reverses a judgment and orders the case to be dismissed, the defendant, if in custody, must be discharged. (3) *Judgment of Acquittal.* When the judgment of the appellate court reverses a judgment and orders the acquittal of the defendant, the defendant, if in custody, must be discharged and no further order or judgment of the court below shall be necessary.	When the trial court clerk receives the mandate, the appellate court's judgment must be enforced as follows: (a) **In Civil Cases.** In the following circumstances, the trial court need not make any further order in the case, and the the appellate court's judgment may be enforced as in other cases when the appellate judgment: (1) affirms the trial court's judgment; (2) modifies the trial court's judgment and, as so modified, affirms that judgment; or (3) renders the judgment the trial court should have rendered.

CURRENT RULE	PROPOSED RULE
(b) In Criminal Cases. (1) *Judgment of Affirmance.* When the judgment of the appellate court affirms the judgment of the court below in a case in which bail has been allowed, the clerk of the trial court shall send an acknowledgement to the clerk of the appellate court of the receipt of the mandate and immediately file the same and forthwith issue a capias for the arrest of the defendant for the execution of the sentence of the court, which shall recite the fact of conviction, setting forth the offense and the judgment and sentence of the court, the appeal from and affirmance of such judgment and the filing of such mandate, and shall command the sheriff to arrest and take into his custody the defendant and place him in jail and therein keep him until delivered to the proper authorities, as directed by said sentence. Such capias may issue to any county of this State, and shall be executed and returned as in felony cases, except that no bail shall be taken in such cases. The sheriff shall forthwith execute such capias as directed. The sheriff shall notify the clerk of the trial court and the clerk of the appellate court when the mandate has been carried out and executed.	**(b) In Criminal Cases.** (1) *Judgment of affirmance; defendant not in custody.* (A) *Clerk's duties.* When the appellate court affirms the trial court's judgment in a case in which bail has been allowed, the trial court clerk must: (i) send an acknowledgment to the appellate clerk of the mandate's receipt; (ii) immediately file the mandate; and (iii) promptly issue a capias for the defendant's arrest so that the court's sentence can be executed. (B) *Capias.* The capias may issue to any county of this state and must be executed and returned as in felony cases, except that no bail may be taken. The capias must: (i) recite the fact of conviction; (ii) set forth the offense and the court's judgment and sentence; (iii) state that the judgment was appealed from and affirmed, and that the mandate has been filed; and (iv) command the sheriff to arrest and take the defendant into his custody, and to place and keep the defendant in jail until delivered to the proper authorities as directed by the sentence. (C) *Sheriff's duties.* The sheriff must promptly execute the capias as directed. The sheriff must notify the trial court clerk and the appellate clerk when the mandate has been carried out and executed.

CURRENT RULE	PROPOSED RULE
	(2) *Judgment of reversal.* (A) *When new trial ordered.* When the appellate court reverses the trial court's judgment and grants the defendant a new trial, the case stands as it would have stood if the trial court had granted the new trial. If the defendant is in custody and entitled to bail, the defendant must be released upon giving bail. (B) *When case dismissed.* When the appellate court reverses the trial court's judgment and orders the case to be dismissed, the defendant — if in custody — must be discharged. (3) *Judgment of acquittal.* When the appellate court reverses a judgment and orders the defendant's acquittal, the defendant — if in custody — must be discharged, and no further order or judgment of the trial court is necessary.
	Notes and Comments Comment to 1997 change: The rule is revised without substantive change.

CURRENT RULE	PROPOSED RULE
SECTION SIX. JUDGMENTS, OPINIONS AND REHEARING A. JUDGMENT	
RULE 88. EXECUTION ON FAILURE TO PAY COSTS IN CIVIL CASES	RULE 88 [Repealed]
If neither party to a civil case pays the costs before the time prescribed for issuance of the mandate, the clerk of the appellate court shall prepare a bill of costs showing the party or parties against whom such costs have been adjudged and shall transmit it to the clerk of the trial court, who shall issue execution for same as for costs in the trial court. On collection, any costs due to the clerk of the appellate court shall be remitted to such clerk.	
	Notes and Comments Comment to 1997 change: The rule is repealed and its contents moved to Rule 82(b).

CURRENT RULE	PROPOSED RULE
RULE 89. APPELLANT TO RECOVER COSTS IN CIVIL CASES	**RULE 89** [Repealed]
In any civil cause reversed by the court of appeals, the appellant shall be entitled to an execution in the trial court against the appellee for costs occasioned by such appeal, including costs for the transcript and statement of facts. Nothing herein shall be construed to affect the present law with reference to the accrual and taxing of costs in tax suits, and nothing herein shall be construed to limit or impair the power of the court of appeals to otherwise tax the costs for good cause.	
	Notes and Comments Comment to 1997 change: The rule is repealed and its contents moved to Rule 82(b).

CURRENT RULE	PROPOSED RULE
B. OPINIONS	G. OPINIONS
RULE 90. OPINIONS, PUBLICATION AND CITATION	RULE 90. OPINIONS, PUBLICATION, AND CITATION
(a) Decision and Opinion. The court of appeals shall hand down a written opinion which shall be as brief as practicable but which shall address every issue raised and necessary to final disposition of the appeal. Where the issues are clearly settled, the court shall write a brief memorandum opinion.	(a) **Written Opinions.** The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal. Where the issues are settled, the court should write a brief memorandum opinion no longer than necessary to advise the parties of the court's decision and the basic reasons for it.
(b) Signing of Opinions. A majority of the justices participating in the decision of the case shall determine whether the opinion shall be signed by a justice or issued per curiam. The names of the justices participating in the decision shall be noted on all written opinions or orders handed down by a panel.	(b) **Signing of Opinions.** A majority of the justices who participate in considering the case must determine whether the opinion will be signed by a justice or issued *per curiam*. The names of the participating justices must be noted on all written opinions or orders issued by the court or a panel of the court.
(c) Determination to Publish. A majority of the justices participating in the decision of a case shall determine, prior to the time it is issued, whether an opinion meets the criteria for publishing, and if it does not meet the criteria for publication, the opinion shall be distributed only to the persons specified in Rule 91, but a copy may be furnished to any interested person. On each opinion a notation shall be made to 'publish' or 'do not publish.' Any party may move the appellate court to reconsider the determination whether to publish an opinion. The justices participating in the decision of a case may reconsider their determination whether to publish an opinion after it has issued. However, the appellate court shall not order any unpublished opinion to be published after the Supreme Court or Court of Criminal Appeals has acted on any party's application for writ of error, discretionary review, or any other relief. The Supreme Court or the Court of Criminal Appeals may on request of any party or non-party to a court of appeals decision order a court of appeals opinion published at any time.	(c) **Publication of Opinions.** (1) *The initial decision.* A majority of the justices who participate in considering a case must determine — before the opinion is handed down — whether the opinion meets the criteria stated in (d) for publication. If those criteria are not met, the opinion will be distributed only to the persons specified in Rule 91, but a copy may be furnished to any person on request by that person. (2) *Notation on opinions.* A notation stating "publish" or "do not publish" must be made on each opinion. (3) *Reconsideration of decision on whether to publish.* Any party may move the appellate court to reconsider its decision regarding publication of an opinion but the court of appeals must not order any unpublished opinion to be published after the Supreme Court or Court of Criminal Appeals has acted on any party's petition for review, petition for discretionary review, or other request for relief. (4) *High-court order.* The Supreme Court or the Court of Criminal Appeals may, at any time, order a court of appeals' opinion published.

CURRENT RULE	PROPOSED RULE
(d) **Standards for Publication.** An opinion by a court of appeals shall be published only if, in the judgment of a majority of the justices participating in the decision, it is one that (1) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (2) involves a legal issue of continuing public interest; (3) criticizes existing law; or (4) resolves an apparent conflict of authority.	(d) **Standards for Publication.** An opinion should be published only if it does any of the following: (1) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (2) involves a legal issue of continuing public interest; (3) criticizes existing law; or (4) resolves an apparent conflict of authority.
(e) **Concurring and Dissenting Opinions.** Any justice may file an opinion concurring in or dissenting from the decision of the court of appeals. A concurring or dissenting opinion may be published if, in the judgment of its author, it meets one of the criteria established in paragraph (c), but in such event the majority opinion shall be published as well.	(e) **Concurring and Dissenting Opinions.** Any justice who participated in the decision of a case may file an opinion concurring in or dissenting from the judgment of the court of appeals. Any justice on the court may file an opinion in connection with a denial of a hearing or rehearing en banc. A concurring or dissenting opinion may be published if, in the judgment of its author, it meets one of the criteria established in (d). If a concurrence or dissent is to be published, the majority opinion must be published as well.
(f) **Rehearing.** If a rehearing is granted, no opinion shall be published until after the decision on rehearing is issued.	(f) **Rehearing.** If a motion for rehearing is pending, no opinion may be published until after the court decides the motion.
(g) **Action of Court En Banc.** The court en banc may modify or overrule a panel's decision with regard to the signing or publication of the panel's opinion or opinions in a particular case. A majority of justices shall determine whether written opinions handed down by the court en banc shall be signed by a justice or issued per curiam, and whether they shall be published. However, the appellate court shall not order any unpublished opinion to be published after the Supreme Court or Court of Criminal Appeals has acted on any party's application for writ of error, discretionary review, or any other relief.	(g) **Action of En Banc Court.** Sitting en banc, the court may modify or overrule a panel's decision regarding the signing or publication of the panel's opinion or opinions.
(h) **Order of the Supreme Court.** Upon the grant or refusal of an application for writ of error, an opinion previously unpublished shall forthwith be released by the clerk of the court of appeals for publication. Upon the denial or dismissal of an application for writ of error, an opinion previously unpublished shall forthwith be released by the clerk of the court of appeals for publication, if the Supreme Court so orders.	
(i) **Unpublished Opinions.** Unpublished opinions shall not be cited as authority by counsel or by a court.	(h) **Unpublished Opinions.** Opinions not designated for publication by the court of appeals must not be cited as authority by counsel or by a court.

CURRENT RULE	PROPOSED RULE
	Notes and Comments Comment to 1997 change: Subdivision (e) is amended to make clear that only justices who participated in the decision may file an opinion in the case. Judges who are not on a panel may file an opinion only in respect to a hearing or rehearing en banc. Former subdivision (h) regarding publication of opinions after the Supreme Court grants review is repealed.

CURRENT RULE	PROPOSED RULE
RULE 91. COPY OF OPINION AND JUDGMENT TO INTERESTED PARTIES AND OTHER COURTS	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 to each of the parties to the trial court's final judgment 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 one to whom the copies of the opinion and judgment shall be mailed. 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.	(a) **Mailing Opinion and Judgment in All Cases.** On the date when an appellate court's opinion is handed down, the appellate clerk must mail or deliver copies of the opinion, judgment, and mandate, to the following persons: (1) the trial judge; (2) the trial court clerk; and (3) all parties to the appeal. (b) **Additional Recipients in Criminal Cases.** In criminal cases, copies of the opinion and judgment will also be mailed or delivered to the State, the State Prosecuting Attorney, and the Clerk of the Court of Criminal Appeals. (c) **Filing Opinion and Judgment.** The trial court clerk must file a copy of the opinion, judgment, and mandate among the papers of the case in that court.
	Notes and Comments Comment to 1997 change: The mandate is added to the list of items to be sent by the clerk to the parties. Other non-substantive changes are made.

CURRENT RULE	PROPOSED RULE
C. REHEARING RULE 100. MOTION AND FURTHER MOTION FOR REHEARING	H. REHEARING RULE 100. MOTION AND FURTHER MOTION FOR REHEARING
(a) **Motion for Rehearing.** Any party desiring a rehearing of any matter determined by a court of appeals or any panel thereof must, within fifteen days after the date of rendition of the judgment or decision of the court, file with the clerk of the court a motion in writing for a rehearing, in which the points relied upon for the rehearing shall be distinctly specified.	(a) **Motion for Rehearing.** A motion for rehearing may be filed within 15 days after the judgment or order is rendered The motion must clearly state the points relied on for the rehearing.
(b) **Reply.** No reply to a motion for rehearing need be filed unless requested by the court.	(b) **Reply.** No reply to a motion for rehearing need be filed unless the court so requests.
(c) **Decision on Motion.** If a majority of the justices of the court of appeals or of the panel that was assigned the case are of the opinion that the case should be reheard, the motion shall be granted and the case shall be resubmitted. If a majority of the court of appeals or of the panel that was assigned the case are of the opinion that the case should not be reheard, the motion for rehearing shall be overruled. If a motion for rehearing is granted, the court or panel may make final disposition of the cause with or without rebriefing and oral argument, and may make such orders as are deemed appropriate under the circumstances of the particular case.	(c) **Decision on Motion.** A motion for rehearing must be decided by a majority of the justices who participated in the decision of the case. If rehearing is granted, the court or panel may dispose of the case with or without rebriefing and oral argument.
	(d) **Accelerated Appeals.** In an accelerated appeal, the appellate court may deny the right to file a motion for rehearing or shorten the time to file such a motion.
(d) **Further Motion for Rehearing.** If on rehearing the court of appeals or any panel thereof modifies its judgment, or vacates its judgment and renders a new judgment, or hands down an opinion in connection with the overruling of a motion for rehearing, a further motion for rehearing may, if a party desires to complain of the action taken, be filed within fifteen days after such action occurs. However, in civil cases, a further motion for rehearing shall not be required or necessary as a predicate for a point in the application for writ of error if the asserted point of error was overruled by the court of appeals in a prior motion for rehearing.	(e) **Further Motion for Rehearing.** After a court rehears a case, a further motion for rehearing may be filed within 15 days of the court's action if the court: (1) modifies its judgment; (2) vacates its judgment and renders a new judgment; or (3) issues an opinion in overruling a motion for rehearing.

CURRENT RULE	PROPOSED RULE
(e) **Amendments.** Any motion for rehearing may be amended as a matter of right any time before the expiration of the fifteen-day period allowed for filing it, and with leave of the court any time before its final disposition.	(f) **Amendments.** A motion for rehearing may be amended as a matter of right anytime before the 15-day period allowed for filing the motion expires, and with leave of the court, anytime before the court of appeals decides the motion.
(f) **En Banc Reconsideration.** A majority of the justices of the court en banc may order an en banc reconsideration of any decision of a panel within the period of the court's plenary jurisdiction with or without a motion for reconsideration en banc. A majority of the justices may call for an en banc review by (1) notifying the clerk in writing within said period, or (2) issuing a written order within said period, either with or without en banc conference. In such event, the panel decision shall not become final, and the case shall be resubmitted to the court for an en banc review and disposition.	(g) **En Banc Reconsideration.** While the court of appeals has plenary jurisdiction, a majority of the en banc court may, with or without a motion, order en banc reconsideration of a panel's decision. If a majority orders reconsideration, the panel's judgment or order does not become final, and the case will be resubmitted to the court for en banc review and disposition.
(g) **Extensions of Time.** An extension of time may be granted for late filing in a court of appeals of a motion or a second motion for rehearing, if a motion reasonably explaining the need therefor is filed with the court of appeals not later than fifteen days after the last date for filing the motion. Any order of the court of appeals denying a motion for an extension of time to file a motion for rehearing in a civil case shall be reviewable by the Supreme Court.	(h) **Extensions of Time.** A court of appeals may extend the time for filing a motion or a further motion for rehearing if a party files a motion complying with Rule 19(e)(2) no later than 15 days after the last date for filing the motion for rehearing.
	(i) **Not Required for Petition for Review.** A motion for rehearing is not a prerequisite to filing a petition for review in the Supreme Court.
	Notes and Comments Comment to 1997 change: Subdivision (a) is amended to omit the reference to a party filing for a rehearing. Subdivision (d) is moved here from former Rule 43(g). Subdivision (i) is added.

CURRENT RULE	PROPOSED RULE
RULE 101. RECONSIDERATION ON PETITION FOR DISCRETIONARY REVIEW	**RULE 101. RECONSIDERATION ON PETITION FOR DISCRETIONARY REVIEW**
Text as approved by the Supreme Court: Within fifteen days after a petition for discretionary review to the Court of Criminal Appeals has been filed with the Clerk of the Court of Appeals which delivered the decision, a majority of justices who participated in the decision may summarily reconsider and correct or modify the opinion and judgment of the court and shall cause the clerk to certify a copy thereof and include it among the materials forwarded to the Clerk of the Court of Criminal Appeals in accordance with Rule 202(f). Text as approved by the Court of Criminal Appeals: Within fifteen days after a petition for discretionary review to the Court of Criminal Appeals has been filed with the Clerk of the Court of Appeals which delivered the decision, a majority of justices who participated in the decision may summarily reconsider and correct or modify the opinion or judgment of the court and shall cause the clerk to certify a copy thereof and include it among the materials forwarded to the Clerk of the Court of Criminal Appeals in accordance with Rule 202(f). See Rule 202(j).	Within 15 days after a petition for discretionary review has been filed with the clerk of the court of appeals that delivered the decision, a majority of the justices who participated in the decision may summarily reconsider and correct or modify the court's opinion or judgment. The clerk will then certify a copy of the corrected or modified opinion or judgment and include it with the materials sent to the clerk of the Court of Criminal Appeals in accordance with Rule 202(h). See Rule 202(l).
	Notes and Comments Comment to 1997 change: The rule is amended without substantive change.

CURRENT RULE	PROPOSED RULE
SECTION SEVEN. CERTIFIED QUESTIONS IN CIVIL CASES	SECTION FIVE. CERTIFIED QUESTIONS IN CIVIL CASES
RULE 110. CERTIFIED QUESTIONS IN CIVIL CASES	RULE 110 [Repealed]
(a) Questions of Law Certified. In exceptional cases urgently requiring accelerated disposition of the appeal, the court of appeals may certify one or more controlling questions of law to the Supreme Court for decision, but the Supreme Court may decline to decide the questions if it decides that the case should be presented by application for writ of error. After certification of such questions, the cause shall be retained for judgment in harmony with the decision of the Supreme Court on the question certified. **(b) Motion to Certify.** At any time within fifteen days after judgment in the court of appeals, either party may file a motion asking the court to certify a question to the Supreme Court. **(c) Certification Procedure.** When any court of appeals shall certify to the Supreme Court any question of law for determination, either upon its own motion or that of any party, the certificate shall be accompanied by the briefs filed in the court of appeals. Also, the court of appeals may accompany such certificate with the entire record in the case, or any part thereof that it deems advisable. The court of appeals shall also accompany the certificate with all or any part of the record that any party to the suit may request. All cases certified to the Supreme Court shall be accompanied by a proposed or tentative opinion of the court of appeals, which proposed or tentative opinion shall set forth the views and tentative opinion of the court of appeals on the questions certified.	
	Notes and Comments Comment to 1997 change: The rule is repealed.

CURRENT RULE	PROPOSED RULE
RULE 111. PROCEEDINGS ON CERTIFIED QUESTIONS When a certified question from a court of appeals is presented to the Clerk of the Supreme Court, he will file and docket it and send it at once to the consultation room. If the court should determine that the question is not properly certified under the statute and these rules so as to give jurisdiction to answer it, it will be dismissed without a hearing. Otherwise, it will be set down for argument on a day to be fixed by the court in regular session. The clerk shall issue notices to the attorneys whose names appear of record in the case of the day on which the question or questions shall be submitted, at least fifteen days before the said date set for hearing.	**RULE 111** [Repealed]
	Notes and Comments Comment to 1997 change: The rule is repealed.

CURRENT RULE	PROPOSED RULE
RULE 112. ANSWER TO QUESTION The Supreme Court, on receiving such record, and certified question of law, from the court of appeals transmitting the same, shall examine such record and certified question of law, and render an opinion as in other cases; which opinion, when so rendered by the Supreme Court on the record and question of law presented therein, shall be final and shall be the law on the question involved until said opinion shall have been overruled by the Supreme Court or abrogated by legislative enactment, and the court of appeals shall be governed thereby. After the question is decided, the Supreme Court shall immediately notify the lower court of its decision.	**RULE 112** [Repealed]
	Notes and Comments Comment to 1997 change: The rule is repealed.

CURRENT RULE	PROPOSED RULE
RULE 113. DECISION OF SUPREME COURT	**RULE 113** [Repealed]
When the Supreme Court decides a question certified to it by a court of appeals, such decision shall be binding upon the court of appeals.	
	Notes and Comments Comment to 1997 change: The rule is repealed.

CURRENT RULE	PROPOSED RULE
RULE 114. CERTIFICATION OF QUESTIONS OF LAW BY UNITED STATES COURTS	**RULE 114. CERTIFICATION OF QUESTIONS OF LAW BY UNITED STATES COURTS**
(a) **Certification of Questions of Law.** The Supreme Court of Texas may answer questions of law certified to it by the Supreme Court of the United States or a Court of Appeals of the United States when requested by the certifying court, if there are involved in any proceedings before the certifying court questions of law of this state which may be determinative of the cause then pending and as to which it appears to the certifying court that there is no controlling precedent in the decisions of the Supreme Court of Texas. The Supreme Court may, in its discretion, decline to answer the questions certified to it.	(a) **Certification.** The Supreme Court of Texas may answer questions of law certified to it by any federal appellate court if the certifying court is presented with determinative questions of Texas law having no controlling Supreme Court precedent. The Supreme Court may decline to answer the questions certified to it.
(b) **Contents of the Certification Order.** A certification order shall set forth: (1) The questions of law to be answered; (2) A stipulated statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose. (3) The names of each party to the pending cause. (4) The names and addresses of counsel for each party.	(b) **Contents of the Certification Order.** An order from the certifying court must set forth: (1) the questions of law to be answered; and (2) a stipulated statement of all facts relevant to the questions certified, showing fully the nature of the controversy in which the questions arose.
(c) **Preparation of Certification Order.** The certification order shall be prepared by the certifying court and forwarded to the Supreme Court of Texas by the clerk of the certifying court under its official seal. The Supreme Court may require the original or copies of all or any portion of the record before the certifying court to be filed under the certification order, if in the opinion of the Supreme Court, the record or portion thereof may be necessary in answering the questions.	(c) **Transmission of Certification Order.** The clerk of the certyfing court must send to the clerk of the Supreme Court of Texas the following: (1) the certification order under the certifying court's official seal; (2) a list of the names of all parties to the pending case; and (3) a list of the names, addresses, and telephone numbers of counsel for each party. (d) **Transmission of Record.** The certifying court should not send the Supreme Court of Texas the record in the pending case with the certification order. The Supreme Court may later require the original or copies of all or part of the record before the certifying court to be filed with the Supreme Court clerk.

CURRENT RULE	PROPOSED RULE
(d) **Fees and Costs.** Fees and costs shall be the same as in direct appeals docketed before the Supreme Court and shall be equally divided between the parties unless otherwise ordered by the certifying court in its order of certification.	(e) **Fees and Costs.** Unless the certifying court orders otherwise in its certification order, the parties must bear equally the fees under Rule 13.
(e) **Briefs and Oral Argument.** Upon the agreement of the Supreme Court to answer the questions certified to it, notice shall be given to all parties. The appealing party in the certifying court shall file his brief with the clerk of the Supreme Court within thirty days from the date of receipt of the notice and the opposing parties shall file an answering brief within fifteen days of service of copies of the opening brief. Briefs shall be in the manner and form of Rules 131 and 136, Texas Rules of Appellate Procedure, so far as reasonably applicable. Oral argument may be granted upon application or ordered by this court. If granted or ordered, argument shall be as provided in 172, Texas Rules of Appellate Procedure.	(f) **Notice.** (1) *Notice.* If the Supreme Court agrees to answer the questions certified to it, the Court will notify all parties and the certifying court. The Supreme Court clerk must also send a notice to the Attorney General of Texas if: (A) the constitutionality of a Texas statute is the subject of a certified question that the Supreme Court has agreed to answer; and (B) the State of Texas or an officer, agency, or employee of the state is not a party to the proceeding in the certifying court. (g) **Briefs and Oral Argument.** (1) *Briefs.* The appealing party in the certifying court must file a brief with the Supreme Court clerk within 30 days after the date of the notice. Opposing parties must file an answering brief within 15 days after receiving the opening brief. Briefs must comply with Rule 133 to the extent its provisions apply. (2) *Oral Argument.* Oral argument may be granted either on a party's request or on the court's own initiative. Argument is governed by Rule 172.
(f) **Notice to the Attorney General.** When the constitutionality of a Texas statute is the subject of a certified question to which the State of Texas or an officer, agency or employee of the state is not a party, the clerk of the Supreme Court shall notify the Attorney General and shall permit the State of Texas to intervene for presentation of briefs and oral argument on the question of constitutionality.	(h) **Intervention by the State.** If the constitutionality of a Texas statute is the subject of a certified question that the Supreme Court has agreed to answer the State of Texas may intervene at any reasonable time for briefing and oral argument (if argument is allowed), on the question of constitutionality.

CURRENT RULE	PROPOSED RULE
(g) **The Answer to the Certified Question.** After all motions for rehearing have been overruled, the written opinion of the Supreme Court stating the law governing the questions certified shall be sent by the clerk under the seal of the Supreme Court to the certifying court and to the parties.	(i) **Answering Certified Questions.** After all motions for rehearing have been overruled, the Supreme Court clerk must send to the certifying court the written opinion on the certified questions. The opinion must be under the Supreme Court's seal.
(h) All time limits shall be in accordance with the Texas Rules of Appellate Procedure, so far as reasonably applicable.	(j) **Motion for Rehearing.** Any party may file a motion for rehearing within 15 days after the final order is rendered. The motion must clearly state the points relied on for the rehearing. No reply to a motion for rehearing need be filed unless the court so requests. The court will not grant a motion for rehearing unless a response has been filed or requested.
	Notes and Comments Comment to 1997 change: The rule is substantially revised, but no substantive change in procedure is intended, except subdivision (i) now allows a motion for rehearing.

CURRENT RULE	PROPOSED RULE
SECTION EIGHT. ORIGINAL PROCEEDINGS RULE 120. HABEAS CORPUS IN CIVIL CASES	SECTION SIX. ORIGINAL PROCEEDINGS RULE 120. ORIGINAL PROCEEDINGS IN CIVIL CASES
(a) **Commencement.** A petition seeking the issuance of a writ of habeas corpus shall be presented to the clerk of the appellate court along with the appropriate deposit for costs, as provided in Rule 13.	(a) **Commencement.** An original appellate proceeding seeking extraordinary relief — such as a writ of habeas corpus, mandamus, prohibition, injunction, or quo warranto — is commenced by filing a petition with the clerk of the appropriate appellate court. The petition must be captioned "*In re* [name of relator]."
(b) **Petition.** The petition shall be in the following form and contain the following information: (1) The party seeking the writ shall be denominated relator. (2) The petition shall identify all parties whose interest would be directly affected by the proceedings and shall state the addresses of all such interested parties. (3) The petition shall contain a certificate of service upon all interested parties or a certificate explaining the absence of service. (4) The petition shall set forth in a concise and positive manner a summary of the facts necessary to establish relator's right to the relief sought. (5) The petition shall be accompanied by a brief in support of the petition. (6) The petition shall be accompanied by proof of restraint of the relator. (7) The petition shall be accompanied by a certified copy of the order, judgment or decree of which relator has been held to be in violation, a certified copy of the motion and order or judgment of contempt, a certified copy of the order or judgment of commitment, and when appropriate, a statement of facts. (8) The petition shall contain an affidavit verifying the truth of all factual allegations.	(b) **Designation of Parties.** The party seeking the relief is the relator. In original proceedings other than habeas corpus, the person against whom relief is sought — whether a judge, court, tribunal, officer, or other person — is the respondent. A person whose interest would be directly affected by the relief sought is a real party in interest and a party to the case.

CURRENT RULE	PROPOSED RULE
(c) **Concurrent Jurisdiction.** When the Supreme Court and one or more courts of appeals are authorized to exercise concurrent jurisdiction over matters of habeas corpus, the petition seeking issuance of the writ shall first be presented to a court of appeals. The petition for writ of habeas corpus filed in the Supreme Court shall state the date of any presentation to a court of appeals and that court's action on the petition.	(c) **Form and Contents of Petition.** All factual statements in the petition must be verified by affidavit made on personal knowledge by an affiant competent to testify to the matters stated. The petition must, under appropriate headings and in the order here indicated, contain the following: (1) *Identity of parties and counsel.* The petition must give a complete list of all parties, and the names, and addresses of all counsel. (2) *Table of contents.* The petition must include a table of contents with references to the pages of the petition. The table of contents must indicate the subject matter of each issue or point, or group of issues or points. (3) *Index of authorities.* The petition must include an index of authorities arranged alphabetically and indicating the pages of the petition where the authorities are cited. (4) *Statement of the case.* The petition must contain a statement of the case that should seldom exceed one page and should not discuss the facts. The statement must contain the following: (A) a concise description of the nature of any underlying proceeding (e.g., a suit for damages, a contempt proceeding for failure to pay child support, or the certification of a candidate for inclusion on an election ballot).

CURRENT RULE	PROPOSED RULE
	(B) if the respondent is a judge, the name of the judge, the designation of the court in which the judge was sitting, and the county in which the court is located; and if the respondent is an individual who is not a judge, the designation and location of the office held by the respondent; (C) a concise description of the respondent's action from which the relator seeks relief; (D) if the relator seeks a writ of habeas corpus, a statement describing how and where the relator is being deprived of liberty. (E) if the petition is filed in the Supreme Court after a petition requesting the same relief was filed in the court of appeals: (i) the date the petition was filed in the court of appeals; (ii) the designation of the court of appeals and the names of the justices who participated in the decision; (iii) the author of any opinion for the court of appeals and the author of any separate opinion; (iv) the citation of the court's opinion, if available, or a statement that the opinion was unpublished; (v) the disposition of the case by the court of appeals, and the date of the court of appeals' order. (5) *Statement of jurisdiction.* The petition must state, without argument, the basis of the court's jurisdiction. If the Supreme Court and the court of appeals have concurrent jurisdiction, the petition must be presented first to the court of appeals unless there is a compelling reason not to do

CURRENT RULE	PROPOSED RULE
	so. If the petition is filed in the Supreme Court without first being presented to the court of appeals, the petition must state the compelling reason why the petition was not first presented to the court of appeals. (6) *Issues presented.* The petition must state concisely all issues or points presented for review. The statement of an issue or point will be treated as covering every subsidiary question that is fairly included. (7) *Statement of facts.* The petition must state concisely and without argument the facts pertinent to the issues or points presented. The statement must be supported by references to the appendix. (8) *Argument.* The petition must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the appendix. (9) *Prayer.* The petition must contain a short conclusion which clearly states the nature of the relief sought.

CURRENT RULE	PROPOSED RULE
(d) **Action on Petition.** If the court is of the tentative opinion that the writ should issue, the court will set the amount of bond, order relator released and schedule the petition for oral argument. Otherwise, the court shall deny the writ without further hearing.	(10) *Appendix.* (A) *Necessary contents.* The appendix must contain: (i) a certified or sworn copy of any order complained of, or any other document showing the matter complained of; (ii) any order or opinion that the court of appeals has issued, if the petition is filed in the Supreme Court; (iii) a certified or sworn copy of every document that is material to the relator's claim for relief and that was filed in any underlying proceeding; (iv) a properly authenticated transcript of any relevant testimony from any underlying proceeding, including any exhibits offered in evidence, or a statement that no testimony was adduced in connection with the matter complained of; (v) the text of any rule, regulation, ordinance, statute, constitutional provision, or other law on which the argument is based; and (vi) if a writ of habeas corpus is sought, proof that the relator is being restrained. (B) *Optional contents.* The appendix may contain any other items pertinent to the issues or points presented for review, including copies or excerpts of relevant court opinions, statutes, constitutional provisions, documents on which the suit was based, pleadings, and similar material. Items should not be included in the appendix to attempt to avoid the page limits for the petition. The appendix should not contain any evidence or other item that is not necessary for a decision.
(e) **Notification by Clerk.** The clerk shall notify all identified parties or their attorneys of record of the action of the court and of the date set for oral argument, if oral argument is set. In the event oral argument is set, relator shall immediately make the appropriate additional deposit for costs, as provided by Rule 13.	

CURRENT RULE	PROPOSED RULE
(f) **Reply.** In the event the case is set for oral argument, any interested party may submit 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 other parties at least ten days prior to the date scheduled for oral argument, unless another time is designated by the court.	
(g) **Order of Court.** If after hearing oral argument, the court determines that the writ should be granted, it shall enter an order to that effect. Otherwise, the court shall remand relator to custody and direct the clerk to issue an order of commitment. If relator is not available for return to custody, pursuant to the order of commitment, the court may declare the bond to be forfeited.	(d) **Response.** Any party may file a response to the petition, but it is not mandatory. A petition must not be granted before a response has been filed or requested by the court. The response must conform to the requirements of (c), except that: (1) the list of parties and counsel is not required unless necessary to supplement or correct the list contained in the petition; (2) the respondent need not include a statement of the case, a statement of the issues presented, or a statement of the facts unless the respondent is dissatisfied with that portion of the petition; (3) a statement of jurisdiction should be omitted unless the petition fails to assert valid grounds for jurisdiction, in which case the reasons why the court lacks jurisdiction must be concisely stated; and (4) the respondent's argument must be confined to the issues or points presented in the petition or asserted by the respondent in the respondent's statement of issues.
(h) **Notice of Order.** When the appellate court grants, refuses or dismisses a habeas corpus proceeding or a motion for rehearing, the clerk of the court shall notify the parties or their attorneys of record by sending them a letter by first-class mail.	(e) **Petitioner's Reply to Response.** The petitioner may file a reply addressing any matter in the response. (f) **Length of Petition, Response, and Reply.** Excluding those pages containing the identity of parties and counsel, table of contents, index of authorities, statement of the case, statement of jurisdiction, issues presented, and appendix, the petition and response must not exceed 50 pages each if filed in the court of appeals, or 15 pages each if filed in the Supreme Court. A reply may be no longer than 8 pages, exclusive of the items stated above. The court may, on motion, permit a longer petition, response, or reply.

CURRENT RULE	PROPOSED RULE
	(g) **Action on Petition.** (1) *Submission.* The petition must be submitted for decision as any other case, and to the extent applicable, these rules concerning submission of cases control. In the court of appeals, the order disposing of the petition must contain the names of the justices who participated in the decision. (2) *Relief denied.* If the court determines from the petition and any response and reply that the relator is not entitled to relief sought, the court must deny the petition. If the relator in a habeas corpus proceeding has been released on bond, the court must remand the relator to custody and issue an order of commitment. If the relator is not returned to custody, the court may declare the bond to be forfeited and render judgment against the surety. (3) *Interim action.* If the court is of the tentative opinion that relator is entitled to the relief sought or that a serious question concerning the relief requires further consideration: (A) the court must request a response if one has not been filed; (B) the Supreme Court may request full briefing under Rule 133; (C) in a habeas corpus proceeding, the court may order that relator be discharged on execution and filing of a bond in an amount set by the court; and (D) the court may set the case for oral argument. (4) *Final action.* If the court determines that relator is entitled to relief, it must issue an appropriate order. The court may grant relief without hearing oral argument.

CURRENT RULE	PROPOSED RULE
	(5) *Opinion.* When denying relief, the court may issue an opinion but is not required to do so. When granting relief, the court must issue an opinion as in any other case. Rule 90 is applicable to an opinions by a court of appeals except that the court of appeals may not order an unpublished opinion published after the Supreme Court or Court of Criminal Appeals has acted on any party's petition for extraordinary relief addressing the same issues. (i) **Motion for Rehearing.** Any party may file a motion for rehearing within 15 days after the final order is rendered. The motion must clearly state the points relied on for the rehearing. No reply to a motion for rehearing need be filed unless the court so requests. The court will not grant a motion for rehearing unless a response has been filed or requested.
	(j) **Temporary Relief.** (1) *Motion for temporary relief; certificate of compliance.* The relator may file a motion to stay any underlying proceedings or for any other temporary relief pending the court's action on the petition. The relator must notify or make a diligent effort to notify all parties by expedited means (such as by telephone or fax) that a motion for temporary relief has been filed. The motion must certify that the relator has complied with this paragraph. (2) *Grant of temporary relief.* The court — on motion of any party or on its own initiative — may without notice grant any just relief pending the court's action on the petition. As a condition of granting temporary relief, the court may require a bond to protect the parties who will be affected by the relief. Unless vacated or modified, an order granting temporary relief is effective until the case is finally decided. (3) *Motion to reconsider.* Any party may move the court at any time to reconsider a grant of temporary relief.

CURRENT RULE	PROPOSED RULE
	(k) Groundless Petition or Misleading Statement or Record. On motion of any party or on its own initiative, the court may impose just sanctions on a party or attorney who does any of the following: (1) files a petition that is so clearly groundless as to indicate that the proceeding is not brought in good faith; (2) brings the petition solely for delay of an underlying proceeding; (3) grossly misstates a fact in the petition or response; (4) omits an obviously important and material fact from the petition or response; or (5) files an appendix that is clearly misleading because of the omission of obviously important and material evidence or documents.
	Notes and Comments Comment to 1997 change: The rule is rewritten. Former Rules 120, 121, and 122 are merged into this rule. The requirement of a motion for leave in original proceedings is repealed The form of the petition and response, contents of the appendix, page limits, and relief that may be granted are specifically stated. Specific provision is now made for a motion for rehearing. A sanction for filing a groundless petition or misleading record is added.

CURRENT RULE	PROPOSED RULE
SECTION EIGHT. ORIGINAL PROCEEDINGS RULE 121. MANDAMUS, PROHIBITION AND INJUNCTION IN CIVIL CASES	RULE 121 [Repealed]
(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 party against whom relief is sought shall be denominated respondent. (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 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.	

CURRENT RULE	PROPOSED RULE
(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. (5) *Deposit.* The deposit for costs shall be made as provided by Rule 13. (b) **Service.** Relator shall promptly serve upon respondent and each real party in interest a copy of the motion, petition, brief, and record. (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.	

CURRENT RULE	PROPOSED RULE
(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.** The clerk shall notify by mail all identified parties 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 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, 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 other 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 the parties or their attorneys of record by sending them a letter by first-class mail.	
	Notes and Comments Comment to 1997 change: The rule is repealed and the contents moved to Rule 120.

CURRENT RULE	PROPOSED RULE
RULE 122. ORDERS OF SUPREME COURT ON PETITION FOR MANDAMUS, HABEAS CORPUS, AND PROHIBITION	RULE 122 [Repealed]
In cases over which the Supreme Court has mandamus, habeas corpus, or prohibition jurisdiction and in which the action or order of the respondent 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 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.	
	Notes and Comments Comment to 1997 change: The rule is repealed and the contents moved to Rule 120.

CURRENT RULE	PROPOSED RULE
SECTION NINE. APPLICATION FOR WRIT OF ERROR AND BRIEF IN RESPONSE IN THE SUPREME COURT RULE 130. FILING OF APPLICATION IN COURT OF APPEALS	SECTION EIGHT. PETITION FOR REVIEW AND RESPONSE IN THE SUPREME COURT RULE 130. PETITION FOR REVIEW
(a) **Method of Review.** The Supreme Court may review final judgments of the courts of appeals upon writ of error.	(a) **Method of Review.** The Supreme Court may review a courts of appeals' final judgment on a petition for review addressed to "The Supreme Court of Texas."
(b) **Number of Copies.** Time and Place of Filing. Twelve copies of the application shall be filed with the Clerk of the Court of Appeals within thirty days after the 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.	(b) **Contents of Petition.** The petition for review must, under appropriate headings and in the order here indicated, contain the following items: (1) *Identity of parties and counsel.* The petition must give a complete list of all parties to the trial court's final judgment, and the names and addresses of all trial and appellate counsel. (2) *Table of contents.* The petition must include a table of contents with references to the pages of the petition. The table of contents must indicate the subject matter of each issue or point, or group of issues or points. (3) *Index of authorities.* The petition must include an index of authorities arranged alphabetically and indicating the pages of the petition where the authorities are cited.

CURRENT RULE	PROPOSED RULE
	(4) *Statement of the case.* The petition must contain a statement of the case that should seldom exceed one page and should not discuss the facts. The statement must contain the following: (A) a concise description of the nature of the case (e.g., whether it is a suit for damages, on a note, or in trespass to try title); (B) the name of the judge who signed the order or judgment appealed from; (C) the designation of the trial court and the county in which it is located; (D) the disposition of the case by the trial court; (E) the district of the court of appeals; (F) the names of the justices who participated in the decision in the court of appeals, the author of the opinion for the court, and the author of any separate opinion; (G) the citation for the court of appeals' opinion, if available, or a statement that the opinion was unpublished; (H) the disposition of the case by the court of appeals; and (I) an affirmation that the court of appeals correctly stated the nature of the case, except in any particulars pointed out.

CURRENT RULE	PROPOSED RULE
	(5) *Statement of jurisdiction.* The petition must state, without argument, the basis of the Court's jurisdiction. (6) *Issues presented.* The petition must state concisely all issues or points presented for review. The statement of an issue or point will be treated as covering every subsidiary question that is fairly included. The statement of issues or points must be supported by record references. If the matter complained of originated in the trial court, it should have been preserved for appellate review in the trial court and assigned as error in the court of appeals. (7) *Statement of facts.* The petition must state concisely and without argument the facts pertinent to the issues or points presented. The statement must be supported by record references. (8) *Summary of the argument.* The petition must contain a succinct, clear, and accurate statement of the arguments made in the body of the petition. This summary must not merely repeat the issues or points presented for review.

CURRENT RULE	PROPOSED RULE
	(9) *Argument.* The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record. The argument need not address every issue or point included in the statement of issues or points. Any issue or point not addressed may be addressed in the brief on the merits if one is requested by the court. The argument should state the reasons why the Supreme Court should exercise jurisdiction to hear the case with specific reference to the factors listed in Rule 134(a). The petition need not quote at length from a matter included in the appendix; a reference to the appendix is sufficient. The court will consider the court of appeals' opinion along with the petition, so statements in that opinion need not be repeated. (10) *Prayer.* The petition must contain a short conclusion which clearly states the nature of the relief sought. (11) *Appendix.* (A) *Necessary contents.* The appendix must contain a copy of: (i) the judgment or other appealable order of the trial court from which relief in the court of appeals was sought;
(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.	(ii) the jury charge and verdict, if any, or the trial court's findings of fact and conclusions of law, if any; (iii) the opinion and judgment of the court of appeals; and (iv) the text of any rule, regulation, ordinance, statute, constitutional provision, or other law on which the argument is based, and the text of any contract or other document that is central to the argument.

CURRENT RULE	PROPOSED RULE
	(B) *Optional contents.* The appendix may contain any other items pertinent to the issues or points presented for review, including copies or excerpts of relevant court opinions, laws, documents on which the suit was based, pleadings, and similar material. Items should not be included in the appendix to attempt to avoid the page limits for the petition.
	(c) **Response to Petition for Review.** Any other party to the appeal may file a response to the petition for review, but it is not mandatory. If no response is timely filed, or if a partly files a waiver of response, the court will consider the petition without a response. A petition will not be granted before a response has been filed or requested by the court. The response must conform to the requirements of (b), except that: (1) the list of parties and counsel is not required unless necessary to supplement or correct the list contained in the petition; (2) a statement of the case and a statement of the facts need not be made unless the respondent is dissatisfied with that portion of the petition; (3) a statement of the issues presented need not be made unless: (A) the respondent is dissatisfied with the statement made in the petition; (B) the respondent is asserting independent grounds for affirmance of the court of appeals' judgment; or (C) the respondent is asserting grounds that establish the respondent's right to a judgment that is less favorable to the respondent than the judgment rendered by the court of appeals but more favorable to the respondent than the judgment that might be awarded to the petitioner (e.g., a remand for a new trial rather than a rendition of judgment in favor of the petitioner); and

CURRENT RULE	PROPOSED RULE
(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.	(4) a statement of jurisdiction should be omitted unless the petition fails to assert valid grounds for jurisdiction, in which case the reasons why the Supreme Court lacks jurisdiction must be concisely stated; and (5) the respondent's argument must be confined to the issues or points presented in the petition or asserted by the respondent in the respondent's statement of issues.
	(d) **Points Not Considered in Court of Appeals.** To obtain a remand to the court of appeals for consideration of issues or points briefed in that court but not decided by that court, or to request that the Supreme Court consider such issues or points, a party may raise those issues or points in the petition, the response, the reply, any brief, or a motion for rehearing.
	(e) **Petitioner's Reply to Response.** The petitioner may file a reply addressing any matter in the response.
	(f) **Length of Petition, Response, and Reply.** The petition and any response must be no longer than 15 pages each, exclusive of pages containing the identity of parties and counsel, table of contents, index of authorities, statement of the case, statement of jurisdiction, issues presented, and appendix. A reply may be no longer than 8 pages, exclusive of the items stated above. The court may, on motion, permit a longer petition, response, or reply.

CURRENT RULE	PROPOSED RULE
	(g) **Time and Place of Filing.** (1) *Petition.* The petition must be filed with the Supreme Court clerk within 45 days after the following: (A) the date the court of appeals rendered judgment, if no motion for rehearing is timely filed; or (B) the date of the court of appeals' last ruling on all timely filed motions for rehearing. (2) *Premature filing.* A party may not file a motion for rehearing in the court of appeals after that party has filed a petition for review in the Supreme Court unless the court of appeals modifies its opinion or judgment after the petition for review is filed. The filing of a petition for review does not preclude another party from filing a motion for rehearing or the court of appeals from ruling on the motion. If a motion for rehearing is timely filed after a petition for review is filed, the petitioner must immediately notify the Supreme Court clerk of the filing of the motion, and must notify the clerk when the last timely filed motion is overruled by the court of appeals. A petition filed before the last ruling on all timely filed motions for rehearing is treated as having been filed on the date of, but after, the last ruling on any such motion. (3) *Petitions filed by other parties.* If a party files a petition for review within the time specified in (g)(1) — or within the time specified by the Supreme Court in an order granting an extension of time to file a petition — any other party entitled to file a petition may do so within 45 days after the last timely motion for rehearing is overruled or within 30 days after any preceding petition is filed, whichever date is later.

CURRENT RULE	PROPOSED RULE
	(4) *Extension of time.* On motion complying with Rule 19(e)(2), the Supreme Court may extend the time to file a petition for review. (5) *Response.* Any response must be filed with the Supreme Court clerk within 30 days after the petition is filed. (6) *Reply.* Any reply must be filed with the Supreme Court clerk within 15 days after the response is filed.
	(h) Amendment. On motion showing good cause, the court may allow the petition, response, or reply to be amended on such reasonable terms as the court may prescribe.
	(i) Court May Require Revision. If a petition, response, or reply does not conform with these rules, the Supreme Court may require the document to be revised or may return the document to the party who filed it and consider the case without allowing the document to be revised.
	Notes and Comments Comment to 1997 change: The rule is rewritten. The 50 page application for writ of error is replaced by a 15 petition for review, which is filed in the Supreme Court and should concentrate on the reasons the Court should exercise jurisdiction to hear the case. The contents of the petition and response, the length of the documents, the time for filing are all specifically stated.

CURRENT RULE	PROPOSED RULE
RULE 131. REQUISITES OF APPLICATIONS	RULE 131. DUTY OF CLERK ON RECEIPT OF PETITION
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.** A complete list of the names and addresses of all parties to the trial court's final judgment and their counsel in the trial court, if any, shall be listed on the first page of the application, so 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 the clerk of the court may properly notify the parties to the trial court's final judgment and their counsel, if any, of the judgment and all orders of the Supreme Court.	On receipt of the petition, the clerk of the Supreme Court will: (a) endorse on it the date of receipt; (b) collect the fee for filing the petition; (c) docket the petition in the order it was filed; and (d) send notice of the filing of the petition to the court of appeals clerk.
(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.	

CURRENT RULE	PROPOSED RULE
(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 parentheses 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. (f) **Brief of the Argument.** The brief of the argument may present separately, or grouped if germane, the 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 points of error complained of. 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.	

CURRENT RULE	PROPOSED RULE
(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. (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.	
	Notes and Comments Comment to 1997 change: The rule is rewritten and now deals only with the duty of the clerk on receiving the petition for review. The provisions of the former rule are moved to Rule 130.

CURRENT RULE	PROPOSED RULE
RULE 132. FILING AND DOCKETING APPLICATION IN SUPREME COURT	RULE 132. FILING THE RECORD
	(a) Request for Record. With or without granting the petition for review, the Supreme Court may request that the record from the court of appeals be filed with the clerk of the 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 Clerk of the Court of Appeals, he 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) **Duty of Court of Appeals Clerk.** (1) *Request for record.* The court of appeals clerk must not send the record to the Supreme Court unless it is requested. Upon receiving the Supreme Court clerk's request for the record, the court of appeals clerk must promptly send to the Supreme Court clerk all of the following: (A) the original record; (B) any motion filed in the court of appeals; (C) copies of any order of the court of appeals; and (D) all opinions and the judgment of the court of appeals. (2) *Nondocumentary exhibits.* The clerk should not send any nondocumentary exhibits, unless the Supreme Court specifically requests.
(b) **Expenses.** The party applying for the writ of error shall deposit with the Clerk of the Court of Appeals a sum sufficient to pay the expressage or carriage of the record to and from the Clerk of the Supreme Court.	(c) **Expenses.** The petitioner must pay to the court of appeals clerk a sum sufficient to pay the cost of mailing or shipping the record to and from the Supreme Court clerk.
(c) **Duty of the Clerk of 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, as listed on the first page of the application, by letter of the filing of the application in the Supreme Court. Notification to parties having counsel indicated of record shall be made to counsel.	(d) **Duty of Supreme Court Clerk.** Upon receiving the record, the Supreme Court clerk must file it and enter the filing upon the docket. The clerk may refuse the record if the charges for mailing or shipping have not been paid.

CURRENT RULE	PROPOSED RULE
	Notes and Comments Comment to 1997 change: Subdivision (a) is new and provides for the Supreme Court to request the filing of the record. Other changes are made.

CURRENT RULE	PROPOSED RULE
RULE 133. ORDERS ON APPLICATIONS FOR WRIT OF ERROR	RULE 133. BRIEFS ON THE MERITS
(a) **Notation on Denial of Application.** In all cases where the judgment of the court of appeals is correct and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court will refuse the application with the docket notation 'Refused.' In all cases where the Supreme Court is not satisfied that the opinion of the court of appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, or which is of such importance to the jurisprudence of the State as to require correction, the Court will deny the application with the notation 'Writ Denied.' In all cases where the Supreme Court is without jurisdiction of the case as presented in the application, it will dismiss the application with the docket notation 'Dismissed for Want of Jurisdiction.' The Court may accompany the denial of an application with such explanatory remarks as it may consider appropriate.	(a) **Request by Court.** A brief on the merits must not be filed unless requested by the court. With or without granting the petition for review, the court may request the parties to file briefs on the merits.
(b) **Moot Cases.** If a cause or an appealable portion thereof is moot, the Supreme Court may, in its discretion and after notice to the parties, upon granting writ of error and without hearing argument with reference thereto, dismiss such cause or the appealable portion thereof without reference to the merits of the appeal.	(b) **Petitioner's Brief on the Merits.** The petitioner's brief on the merits must be confined to the issues or points stated in the petition for review and must, under appropriate headings and in the order here indicated, contain the following items: (1) *Identity of parties and counsel.* The brief must give a complete list of all parties to the trial court's final judgment, and the names and addresses of all trial and appellate counsel. (2) *Table of contents.* The brief must include a table of contents with references to the pages of the brief. The table of contents must indicate the subject matter of each issue or point, or group of issues or points. (3) *Index of authorities.* The brief must include an index of authorities arranged alphabetically and indicating the pages of the brief where the authorities are cited.

CURRENT RULE	PROPOSED RULE
	(4) *Statement of the case.* The brief must contain a statement of the case that should seldom exceed one page and should not discuss the facts. The statement must contain the following: (A) a concise description of the nature of the case (e.g., whether it is a suit for damages, on a note, or in trespass to try title; (B) the name of the judge who signed the order or judgment appealed from; (C) the designation of the trial court and the county in which it is located; (D) the disposition of the case by the trial court; (E) the district of the court of appeals; (F) the names of the justices who participated in the decision in the court of appeals, the author of the opinion for the court, and the author of any separate opinion; (G) the citation for the court of appeals' opinion, if available, or a statement that the opinion was unpublished; (H) the disposition of the case by the court of appeals; and

CURRENT RULE	PROPOSED RULE
	(I) an affirmation that the court of appeals correctly stated the nature of the case, except in any particulars pointed out. (5) *Statement of jurisdiction.* The petition must state, without argument, the basis of the court's jurisdiction. (6) *Issues Presented.* The brief must state concisely all issues or points presented for review. The statement of an issue or point will be treated as covering every subsidiary question that is fairly included. The phrasing of the issues or points need not be identical to the statement of issues or points in the petition for review, but the brief may not raise additional issues or points or change the substance of the issues or points presented in the petition. (7) *Statement of facts.* The brief must state concisely and without argument the facts pertinent to the issues or points presented. The statement must be supported by record references. (8) *Summary of the argument.* The brief must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief. This summary must not merely repeat the issues or points presented for review. (9) *Argument.* The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record.
	(10) *Prayer.* The brief must contain a short conclusion which clearly states the nature of the relief sought.

CURRENT RULE	PROPOSED RULE
	(c) **Respondent's Brief.** If the petitioner files a brief on the merits, any other party to the appeal may file a brief in response, which must conform to (b), except that: (1) the list of parties and counsel is not required unless necessary to supplement or correct the list contained in the petitioner's brief; (2) a statement of the case and a statement of the facts need not be made unless the respondent is dissatisfied with that portion of the petitioner's brief; and (3) a statement of the issues presented need not be made unless: (A) the respondent is dissatisfied with the statement made in the petitioner's brief; (B) the respondent is asserting independent grounds for affirmance of the court of appeals' judgment; or (C) the respondent is asserting grounds that establish the respondent's right to a judgment that is less favorable to the respondent than the judgment rendered by the court of appeals but more favorable to the respondent than the judgment that might be awarded to the petitioner (e.g., a remand for a new trial rather than a rendition of judgment in favor of the petitioner); (4) a statement of jurisdiction should be omitted unless the petition fails to assert valid grounds for jurisdiction; and
	(5) the respondent's argument must be confined to the issues or points presented in the petitioner's brief or asserted by the respondent in the respondent's statement of issues.
	(d) **Petitioner's Brief in Reply.** The petitioner may file a reply brief addressing any matter in the brief in response.

CURRENT RULE	PROPOSED RULE
	(c) **Reliance on Prior Brief.** As a brief on the merits or a brief in response, a party may file the brief that the party filed in the court of appeals.
	(f) **Length of Briefs.** A brief on the merits or brief in response must not exceed 50 pages, exclusive of pages containing the identity of parties and counsel, table of contents, index of authorities, statement of the case, statement of jurisdiction, and issues presented . A brief in reply may be no longer than 25 pages, exclusive of the items stated above. The court may, on motion, permit a longer brief.
	(g) **Time and Place of Filing; Extension of Time.** Briefs must be filed with the Supreme Court clerk in accordance with the schedule stated in the clerk's notice that the court has requested briefs on the merits. If no schedule is stated in the notice, petitioner must file a brief on the merits within 30 days after the date of the notice, respondent must file a brief in response within 20 days after receiving petitioner's brief, and petitioner must file any reply brief within 15 days after receiving respondent's brief. On motion complying with Rule 19(e)(2), the Supreme Court may extend the time to file a brief.
	(h) **Amendment.** On motion showing good cause, the court may allow a party to amend a brief on such reasonable terms as the court may prescribe.
	(i) **Court May Require Revision.** If a brief does not conform with these rules, the Supreme Court may require the brief to be revised or may return it to the party who filed it and consider the case without further briefing by that party.
	Notes and Comments Comment to 1997 change: The rule is new and provides for a 50 page brief on the merits if requested by the Supreme Court. The provisions of the former rule are moved to Rule 134.

CURRENT RULE	PROPOSED RULE
RULE 134. WHEN APPLICATION DENIED, DISMISSED OR REFUSED	RULE 134. ORDERS ON PETITION FOR REVIEW
When the application shall have been filed for a period of ten days, if the court determines to deny, refuse or dismiss the same, whether or not the respondent has filed a brief in response, the clerk of the court will retain the application, together with the record and accompanying papers, for fifteen days from the date of rendition of the judgment denying, refusing or dismissing the writ. At the end of that time, if no motion for rehearing has been filed, or upon the overruling or dismissal of a motion for rehearing, the Clerk of the Supreme Court shall transmit to the court of appeals a certified copy of the orders denying, refusing or dismissing the application and of the order overruling the motion for rehearing and shall return all filed papers to the Clerk of the Court of Appeals, except the application for writ of error, any brief in response and any other briefs filed in the Supreme Court.	(a) Orders on Petition for Review. (1) *Standard for granting review.* Whether to grant review is a matter of judicial discretion. Among the factors the Supreme Court considers in deciding whether to grant a petition for review are the following: (A) whether the justices of the court of appeals disagree on an important point of law; (B) whether there is a conflict between the courts of appeals on an important point of law; (C) whether a case involves the construction or validity of a statute; (D) whether a case involves constitutional issues; and (E) whether the court of appeals appears to have committed an error of law of such importance to the state's jurisprudence that it should be corrected. (2) *Petition denied or dismissed.* When the petition has been on file in the Supreme Court for 30 days, the Court may deny or dismiss the petition — whether or not a response has been filed — with one of the following notations:

CURRENT RULE	PROPOSED RULE
	(A) *"Denied."* If the Supreme Court is not satisfied that the opinion of the court of appeals has correctly declared the law in all respects, but determines that the petition presents no error that requires reversal or that is of such importance to the jurisprudence of the state as to require correction, the Court will deny the petition with the notation "Denied." (B) *"Dismissed w.o.j."* If the Supreme Court lacks jurisdiction, the Court will dismiss the petition with the notation "Dismissed for Want of Jurisdiction." (3) *Petition refused.* If the Supreme Court determines — after a response has been filed or requested — that the court of appeals' judgment is correct and that the legal principles announced in the opinion are likewise correct, the Court will refuse the petition with the notation "Refused." The court of appeals' opinion in the case has the same precedential value as an opinion of the Supreme Court. (4) *Improvident grant.* If the Court has granted review but later decides that review should not have been granted, the Court may, without opinion, set aside the order granting review and dismiss the petition or deny or refuse review as though review had never been granted. (b) **Moot Cases.** If a case is moot, the Supreme Court may, after notice to the parties, grant the petition and, without hearing argument, dismiss the case or the appealable portion of it without addressing the merits of the appeal. (c) **Settled cases.** If a case is settled by agreement of the parties and all parties so move, the Supreme Court may grant the petition if it has not already been granted and, without hearing argument or considering the merits, render a judgment to effectuate the agreement. The Supreme Court's action may include setting aside the judgment of the court of appeals or the trial court and remanding the case to the trial court

CURRENT RULE	PROPOSED RULE
	for rendition of a judgment in accordance with the agreement. The Supreme Court may abate the case until the lower court's proceedings to effectuate the agreement are complete. In any event, the Supreme Court's order does not vacate the court of appeals' opinion unless the order specifically provides otherwise. (d) **Notice to Parties.** When the Supreme Court grants, denies, refuses, or dismisses a petition for review, the Supreme Court clerk must send a written notice of the disposition to the court of appeals, the trial court, and all parties to the appeal. (e) **Return of Documents to Court of Appeals.** When the Supreme Court denies, refuses, or dismisses a petition for review, the clerk will retain the petition, together with the record and accompanying papers, for 30 days after the order is rendered. If no motion for rehearing has been filed by the end of that period or when any motion for rehearing of the order has been overruled, the clerk must send a certified copy of the order to the court of appeals and return all filed papers (except for the petition and other documents filed in the Supreme Court) to the court of appeals clerk.
	Notes and Comments Comment to 1997 change: The rule from former Rule 133. In subdivision (a), the standard for granting a petition for review are stated. Subdivision (c) regarding settled cases is added.

CURRENT RULE	PROPOSED RULE
SECTION NINE. APPLICATION FOR WRIT OF ERROR AND BRIEF IN RESPONSE IN THE SUPREME COURT	
RULE 135. NOTICE OF GRANTING, ETC.	RULE 135. [Repealed]
When the Supreme Court grants, denies, refuses or dismisses an application for writ of error or a motion for rehearing, the clerk of the court shall notify the parties or their attorneys of record by letter.	
	Notes and Comments Comment to 1997 change: The rule is repealed and the contents moved to Rule 134.

CURRENT RULE	PROPOSED RULE
RULE 136. BRIEFS OF RESPONDENTS AND OTHERS	RULE 136 [Repealed]
(a) **Time and Place of Filing.** Briefs in response to the application for writ of error shall be filed with the Clerk of the Supreme Court within fifteen days after the filing of the application for writ of error in the Supreme Court unless additional time is granted. (b) **Form.** Briefs of the respondent or other party shall comply with the provisions of the rules prescribed for an application for writ of error and particularly with the provisions of Rule 131(b), (c), (e), (f), (g), and (h). (c) **Objections to Jurisdiction.** If the petitioner fails to assert valid grounds for jurisdiction by the Supreme Court, the respondent shall state in the brief the reasons that the Supreme Court has no jurisdiction. (d) **Reply and Cross-Points.** Respondent shall confine his brief to reply points that answer the points in the application for writ of error or that provide independent grounds for affirmance and to such cross-points that respondent has preserved and that establish respondent's rights. (e) **Length of Briefs.** A brief in response to the application, a brief of an amicus curiae as provided in Rule 20 and any other 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. (f) **Reliance on Prior Brief.** If respondent relies upon his brief in the court of appeals, respondent shall file with the Clerk of the Supreme Court twelve legible copies of such brief. (g) **Amendment.** The brief in response may be amended at any time when justice requires upon such reasonable notice as the court may prescribe. (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.	

CURRENT RULE	PROPOSED RULE
	Notes and Comments Comment to 1997 change: The rule is repealed and the contents moved to Rules 130 and 133.

CURRENT RULE	PROPOSED RULE
SECTION TEN. DIRECT APPEALS TO THE SUPREME COURT RULE 140. DIRECT APPEALS	SECTION TEN. DIRECT APPEALS TO THE SUPREME COURT RULE 140. DIRECT APPEALS TO THE SUPREME COURT
(a) **Application.** This rule governs direct appeals to the Supreme Court authorized by the Constitution and by statute. The rules governing appeals to the courts of appeals apply to direct appeals to the Supreme Court except when inconsistent with statute or this rule.	(a) **Application.** This rule governs direct appeals to the Supreme Court that are authorized by the Constitution and by statute. Except when inconsistent with a statute or this rule, the rules governing appeals to courts of appeals also apply to direct appeals to the Supreme Court.
(b) **Jurisdiction.** The Supreme Court may not take jurisdiction over a direct appeal from the decision of any court other than a district court or county court, or of any question of fact. The Supreme Court may decline to exercise jurisdiction over a direct appeal of an interlocutory order if the record is not adequately developed, or if its decision would be advisory, or if the case is not of such importance to the jurisprudence of the state that a direct appeal should be allowed.	(b) **Jurisdiction.** The Supreme Court may not take jurisdiction over a direct appeal from the decision of any court other than a district court or county court, or over any question of fact. The Supreme Court may decline to exercise jurisdiction over a direct appeal of an interlocutory order if the record is not adequately developed, or if its decision would be advisory, or if the case is not of such importance to the jurisprudence of the state that a direct appeal should be allowed.
(c) **Statement of Jurisdiction.** Appellant shall file with the record in the case a statement fully, clearly and plainly setting out the basis asserted for exercise of the Supreme Court's jurisdiction. Appellee may file a response to appellant's statement of jurisdiction within ten days after such statement is filed.	(c) **Statement of Jurisdiction.** Appellant must file with the record a statement fully but plainly setting out the basis asserted for exercise of the Supreme Court's jurisdiction. Appellee may file a response to appellant's statement of jurisdiction within ten days after the statement is filed.
(d) **Preliminary Ruling on Jurisdiction.** If the Supreme Court notes probable jurisdiction over a direct appeal, the parties shall file briefs as in any other case. If the Supreme Court does not note probable jurisdiction over a direct appeal, the appeal shall be dismissed.	(d) **Preliminary Ruling on Jurisdiction.** If the Supreme Court notes probable jurisdiction over a direct appeal, the parties must file briefs under Rule 74 as in any other case. If the Supreme Court does not note probable jurisdiction over a direct appeal, the appeal will be dismissed.

CURRENT RULE	PROPOSED RULE
(e) **Direct Appeal Exclusive While Pending.** An appellant who has attempted to perfect a direct appeal to the Supreme Court may not, during the pendency of that appeal, pursue an appeal to the court of appeals. When a direct appeal is dismissed the appellant is not precluded from pursuing any other appeal available at the time the direct appeal was filed if the other appeal is pursued within time periods prescribed by these rules exclusive of the days during which the direct appeal was pending.	(e) **Direct Appeal Exclusive While Pending.** If a direct appeal to the Supreme Court is filed, the parties to the appeal must not, while that appeal is pending, pursue an appeal to the court of appeals. But if the direct appeal is dismissed, any party may pursue any other appeal available at the time when the direct appeal was filed; the other appeal must be pursued within time periods prescribed by these rules, excluding the days during which the direct appeal was pending.
	Notes and Comments Comment to 1997 change: The rule is amended without substantive change except subdivision (e) is amended to make clear that no party to the direct appeal may pursue the appeal in the court of appeals while the direct appeal is pending.

CURRENT RULE	PROPOSED RULE
SECTION ELEVEN. MOTIONS IN THE SUPREME COURT **RULE 160. FORM AND CONTENT OF MOTIONS FOR EXTENSION OF TIME**	**RULE 160** [Repealed]
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 Comment to 1997 change: The rule is repealed and the contents moved to Rule 19(e)(2).

CURRENT RULE	PROPOSED RULE
SECTION TWELVE. SUBMISSION AND ORAL ARGUMENT IN THE SUPREME COURT RULE 170. SUBMISSION	SECTION TEN. SUBMISSION AND ORAL ARGUMENT IN THE SUPREME COURT RULE 170. SUBMISSION AND ARGUMENT
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.	
	(a) **Submission Without Argument.** If at least six members of the Court so vote, a petition will be granted and the case submitted without oral argument.
	(b) **Submission With Argument.** If the Supreme Court decides that oral argument would aid the Court, the Court will set the case for argument. The clerk will notify all parties of the submission date.
	(c) **Purpose of Argument.** Oral argument should emphasize and clarify the written arguments in the briefs. Counsel should not merely read from a prepared text. Counsel should assume that all Justices have read the briefs before oral argument and should be prepared to respond to the Justices' questions.
	(d) **Time for Argument.** Each side is allowed only as much time as the Court orders. Counsel is not required to use all the allotted time. On motion filed before the day of argument, the Court may extend the time for argument. The Court may also align the parties for purposes of presenting argument.
	(e) **Number of Counsel.** Generally, only one counsel should argue for each side. Except on leave of Court, no more than two counsel on each side may argue. Only one counsel may argue in rebuttal.
	(f) **Argument by Amicus Curiae.** With leave of Court obtained before the argument and with a party's consent, an amicus may share allotted time with that party. Otherwise, counsel for amicus curiae may not argue.

CURRENT RULE	PROPOSED RULE
	Notes and Comments Comment to 1997 change: The rule merges the provisions of former Rules 170, 171, and 172. Subdivision (b) is new and states the standard for when argument will be allowed. Subdivision (c) is new and states the purpose of argument. Subdivision (c) is amended to allow only one counsel to argue unless leave of court for more is gained. Other changes are made.

CURRENT RULE	PROPOSED RULE
SECTION TWELVE. SUBMISSION AND ORAL ARGUMENT IN THE SUPREME COURT	
RULE 171. SUBMISSION DAY	RULE 171 [Repealed]
(a) When Case Ready for Submission. A case shall stand for submission upon the first regular day of the submission of causes coming after the expiration of twenty days from the day on which the writ of error was granted; provided the notice of granting the writ shall have been given ten days before such submission day. If not so given, then the case shall be subject to submission on the first regular submission day which falls ten days after giving of notice. **(b) Regular Submission Day.** Causes in the Supreme Court will be regularly submitted on Wednesday of each week, though a case may be set down for submission upon another day by the permission or direction of the court.	
	Notes and Comments Comment to 1997 change: The rule is repealed and the contents moved to Rule 170.

CURRENT RULE	PROPOSED RULE
RULE 172. ARGUMENT (a) **Time.** In the argument of cases in the Supreme Court, each side may be allowed such time as the court orders. The court may, upon application before the day of argument, extend the time for argument, and may also align the parties for purposes of presenting oral argument. (b) **Number of Counsel.** Not more than two counsel on each side will be heard, except on leave of the court. (c) **Amicus Curiae.** Counsel for an amicus curiae shall not be permitted to argue except that he may share time allotted to one of the counsel who consents and on leave of the court obtained prior to time for argument.	**RULE 172** [Repealed]
	Notes and Comments Comment to 1997 change: The rule is repealed and the contents moved to Rule 170.

CURRENT RULE	PROPOSED RULE
SECTION THIRTEEN. DECISION, JUDGMENT AND MANDATE IN THE SUPREME COURT RULE 180. DECISION	SECTION ELEVEN. DECISION AND JUDGMENT AND MANDATE IN THE SUPREME COURT RULE 180. JUDGMENTS IN THE SUPREME COURT
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.	(a) **Types of Judgment.** The Supreme Court may: (1) affirm the lower court's judgment in whole or in part; (2) modify the lower court's judgment and affirm it as modified; (3) reverse the lower court's judgment in whole or in part and render the judgment that the lower court should have rendered; (4) reverse the lower court's judgment and remand the case for further proceedings; (5) vacate the judgments of the lower courts and dismiss the case; or (6) vacate the lower court's judgment and remand the case for further proceedings in light of changes in the law.
	(b) **Remand in the Interests of Justice.** When reversing the court of appeals' judgment, the Supreme Court may, in the interests of justice, remand the case to the trial court even if a rendition of judgment is otherwise appropriate.
	(c) **Other Orders.** The Supreme Court may make any other appropriate order required by the law and the nature of the case.
	Notes and Comments Comment to 1997 change: Paragraphs (a)(2), (a)(5), and (a)(6) are new but codify current practice. Paragraph (c) is new. Other non-substantive changes are made.

CURRENT RULE	PROPOSED RULE
RULE 181. ANNOUNCEMENT OF JUDGMENTS	**RULE 181. ANNOUNCEMENT OF JUDGMENTS**
In all cases decided by the Supreme Court, its judgments or decrees will be announced through the clerk of the court; and the opinion of the court will be reduced to writing in such cases as the court deems of sufficient importance to be reported. When the court, after the submission of a case, is of the opinion that the court of appeals has rendered a correct judgment, and that the writ should not have been granted, the court may set aside the order granting the writ, and dismiss or deny the application as though the writ had never been granted, without writing any opinion.	The Supreme Court will prepare a written opinion in all cases in which it renders a judgment. The Court's judgments will be announced by the clerk. The clerk will send a copy of the opinion, the judgment, and the mandate to the court of appeals clerk, the trial court clerk, and all parties.
	Notes and Comments Comment to 1997 change: The rule is revised without change in substance.

CURRENT RULE	PROPOSED RULE
RULE 182. JUDGMENT ON AFFIRMANCE OR RENDITION	**RULE 182. ALLOCATION OF COSTS; JUDGMENT AGAINST SURETIES**
	(a) Judgment for Costs. The Supreme Court's judgment will award to the prevailing party the costs incurred by that party in the Supreme Court. If appropriate, the judgment may also award the prevailing party the costs — including preparation costs for the transcript and the statement of facts — incurred by that party in the court of appeals and in the trial court. But the Court may tax costs otherwise as required by law or for good cause.
	(b) Statement of Costs; Collection of Costs. (1) *Preparation*. The Supreme Court clerk will prepare, and send to the clerk to whom the mandate is directed, a statement of costs showing: (A) the costs that were incurred in the Supreme Court, with a notation of those items that have been paid and those that are owing; and (B) the party or parties against whom costs have been adjudged. (2) *Procedure After Preparation*. Appellate court costs must be included with the trial court costs in any process to enforce the judgment. If all or part of the costs are collected, the trial court clerk must immediately remit to the appellate court clerk any amount due to that clerk.

CURRENT RULE	PROPOSED RULE
(a) Whenever the Supreme Court shall affirm the judgment or decree of the trial court or the court of appeals, or proceeds to modify the judgment and to render such judgment or decree against the appellant in the court of appeals as should have been rendered by the trial court or the court of appeals, it shall render judgment against the appellant and the sureties upon his supersedeas bond, if any, for the performance of said judgment or decree, and shall make such disposition of the costs as the court shall deem proper, rendering judgment against the appellant or petitioner and the sureties on his appeal or supersedeas bond, if any, for such costs as are taxed against him. (b) **Damages for Delay.** Whenever the Supreme Court shall determine that application for writ of error has been taken for delay and without sufficient cause, then the court may award each prevailing respondent an appropriate amount as damages against such petitioner. 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.	(c) **Judgment Against Sureties.** When affirming, modifying, or rendering a judgment against the party who was the appellant in the court of appeals, the Supreme Court must render judgment against the sureties on that party's supersedeas bond, if any, for the performance of the judgment. If the Supreme Court taxes costs against the party who was the appellant in the court of appeals, the Court must render judgment for those costs against the sureties on that party's supersedeas bond, if any.
	Notes and Comments Comment to 1997 change: Subdivisions (a) and (b) are new. Formmer subdivision (b) is moved to Rule 184. Other non-substantive changes are made.

CURRENT RULE	PROPOSED RULE
RULE 183. ENFORCEMENT OF JUDGMENT	**RULE 183. ENFORCEMENT OF JUDGMENT**
Upon the rendition by the Supreme Court of any such judgment or decree as is contemplated by the preceding rule, it shall not be necessary for the trial court from which the cause was removed to make any further order or decree therein, but the clerk of the trial court, on receipt of the mandate of the Supreme Court or the court of appeals, shall proceed to issue execution thereon as in other cases.	If the Supreme Court renders judgment, the trial court need not make any further order. Upon receiving the Supreme Court's mandate, the trial court clerk must proceed to enforce the judgment of the Supreme Court's as in other cases.
	Notes and Comments Comment to 1997 change: The rule is simplified without substantive change.

CURRENT RULE	PROPOSED RULE
RULE 184. REVERSAL AND REMAND	**RULE 184. REVERSIBLE ERROR**
(a) **No Reversal if Error Remediable.** If the erroneous action or failure or refusal to act by either the trial judge or any judge or official employee of the court of appeals, shall prevent the proper presentation of a cause to the Supreme Court, and be such as may be corrected by the judge or official below, then the judgment shall not be reversed for such error, but the Supreme Court will direct the said judge or official to correct the error, and thereafter the Supreme Court will proceed as if such erroneous action or failure to act had not occurred. (b) **Reversible Error.** No judgment shall be reversed on appeal and a new trial ordered in any cause on the ground that an error of law has been committed by the trial court in the course of the trial, unless the Supreme Court shall be of the opinion that the error complained of amounted to such a denial of the rights of the petitioner as was reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case, or was such as probably prevented the petitioner from making a proper presentation of his case to the appellate courts; and if it appear to the court that the error affects a part only of the matter in controversy and that such part is clearly separable without unfairness to the parties, the judgment shall only be reversed and a new trial ordered as to that part affected by such error, provided that a separate trial on unliquidated damages alone shall not be ordered if liability issues are contested. (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.	(a) **Standard for Reversible Error.** No judgment may be reversed on appeal on the ground that the trial court made an error of law unless the Supreme Court concludes that the error complained of: (1) probably caused the rendition of an improper judgment; or (2) probably prevented the petitioner from properly presenting the case to the appellate courts. (b) **Error Affecting Only Part of the Case.** If the error affects a part, but not all, of the matter in controversy, and that part is separable without unfairness to the parties, the judgment must be reversed and a new trial ordered only as to the part affected by the error. (c) **Exception.** The court may not order a separate trial solely on unliquidated damages if liability is contested.
	Notes and Comments Comment to 1997 change: Subdivision (a) regarding remedial error is moved to Rule 185(b). The reversible error standard is amended to omit the reference to an action "reasonably calculated to cause" an improper judgment, but no substantive change is intended. Subdivision (c) is incorporated in Rule 180(a).

CURRENT RULE	PROPOSED RULE
RULE 185. NO AFFIRMANCE, REVERSAL OR DISMISSAL FOR WANT OF FORM OR SUBSTANCE	**RULE 185. NO AFFIRMANCE, REVERSAL, OR DISMISSAL FOR PROCEDURAL DEFECTS OR IF ERROR REMEDIABLE**
The Supreme Court will not affirm or reverse a judgment or dismiss a writ of error for defects or irregularities in appellate procedure, either of form or substance, without allowing a reasonable time to correct or amend such defects or irregularities.	(a) **Defects in Procedure.** The Supreme Court will not affirm or reverse a judgment or dismiss a petition for review for defects or irregularities in appellate procedure without allowing a reasonable time to correct or amend the defects or irregularities.
	(b) Remediable Error of the Trial Court or Court of Appeals. (1) *Generally.* The Supreme Court will not affirm or reverse a judgment or dismiss a petition for review if: (A) the trial court's or court of appeals' erroneous action or failure or refusal to act prevents the proper presentation of a case to the Supreme Court; and (B) the trial court or court of appeals can correct its action or failure to act. (2) *Supreme Court direction if error remediable.* If the circumstances described in (1) exist, the Supreme Court will direct the trial court or court of appeals to correct the error. The Supreme Court will then proceed as if the error had not occurred.
	Notes and Comments Comment to 1997 change: The reference to "form or substance" is deleted from subdivision (a). Subdivision (b) is moved here from former Rule 184(a).

CURRENT RULE	PROPOSED RULE
RULE 186. MANDATE	RULE 186. DAMAGES FOR DELAY
(a) **Issuance of Mandate.** At the expiration of fifteen days from the rendition of judgment if no motion for rehearing has been filed, or at the expiration of fifteen days after overruling the motion for rehearing, the clerk shall issue and deliver the court's mandate in the cause to the lower court without further payment of costs. In cases in which the Supreme Court declines to grant an application for writ of error, costs of the Supreme Court shall be paid in the court of appeals and the mandate issued from that court. Every mandate issued by the Supreme Court shall contain the file number in the trial court. (b) **Motion for Stay Order.** A party may move for a stay of the mandate pending disposition by the Supreme Court of the United States of a petition for writ of certiorari. The motion shall show the grounds for such petition and the circumstances requiring a stay of the mandate. The Supreme Court may grant such a stay if it finds that the grounds are substantial and that serious hardship would result to the party or others from issuance of the mandate in the event of reversal by the Supreme Court of the United States. (c) **Recall of Mandate.** If the Supreme Court vacates, modifies, corrects, or reforms its judgment after the mandate has issued, the mandate shall have no further effect and a new mandate may be issued. The clerk shall at once give notice of such action to the clerk of the court to which the mandate was directed, and to all parties.	If the Supreme Court determines that a petition for review is frivolous, it may — on motion of any party or on its own initiative, after notice and a reasonable opportunity for response — award to each prevailing party just damages. But the Court must not consider allegations of error that have not been otherwise properly preserved or presented for review.
	Notes and Comments Comment to 1997 change: The contents of the former rule, regarding mandate in the Supreme Court, are moved to Rule 23. The provisions of former Rule 182(b) are moved here. The rule is changed from allowing a sanction when an appeal "filed for delay and without sufficient cause" to allowing a sanction when the appeal is "frivolous". A requirement for notice and an opportunity to respond is included.

CURRENT RULE	PROPOSED RULE

CURRENT RULE	PROPOSED RULE
SECTION FOURTEEN. MOTION FOR REHEARING IN THE SUPREME COURT RULE 190. MOTION FOR REHEARING	SECTION FOURTEEN. MOTION FOR REHEARING IN THE SUPREME COURT RULE 190. MOTION FOR REHEARING
(a) **Time for Filing.** A motion for rehearing may be filed with the clerk of the court within fifteen days after the date of rendition of the judgment or decision of the court or the order refusing or dismissing an application for writ of error. In exceptional cases, if the ends of justice require, the court may shorten the time within which the motion may be filed or even deny the right to file it altogether.	(a) **Time for Filing.** A motion for rehearing may be filed with the Supreme Court clerk within 15 days from the date when the Court renders judgment or issues an order disposing of a petition for review. In exceptional cases, if justice requires, the Court may shorten the time within which the motion may be filed or even deny the right to file it altogether.
(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 to the trial court's final judgment, 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.	(b) **Contents.** The motion must specify the points relied on for the rehearing.
(c) **Notice of the Motion.** Upon the filing of the motion, the clerk shall notify the attorneys of record or other parties to the trial court's final judgment by mail of the filing.	
(d) **Answer and Decision.** The parties shall have five days after notice in which to file an answer to the motion. Upon the filing of an answer or the expiration of the five-day period, the motion shall be deemed submitted to the court and ready for disposition. The court may limit the time in which a motion for rehearing or an answer may be filed, and may act upon any motion at any time after it is filed. The court for good cause may deny leave to file a motion for rehearing. The court will not entertain a second motion for rehearing.	(c) **Response and Decision.** A response to the motion may be filed under Rule 19. In exceptional cases, if justice so requires, the Court may deny the right to file a response and act on a motion any time after it is filed. The Court will not consider a second motion for rehearing.

CURRENT RULE	PROPOSED RULE
(c) **Extensions of Time.** An extension of time may be granted for late filing in the Supreme Court of a motion for rehearing, 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 the motion.	(e) **Extensions of Time.** The Court may extend the time to file a motion for rehearing in the Supreme Court, if a motion complying with Rule 19(e)(2) is filed with the Court no later than 15 days after the last date for filing a timely motion for rehearing.
	Notes and Comments Comment to 1997 change: In subdivision (b), the contents of the rule are simplified. The service and notice provisions of former subdivisions (b) and (c) are deleted as Rule 4 is applicable. Other non-substantive changes are made.

CURRENT RULE	PROPOSED RULE
RULE 200. DISCRETIONARY REVIEW IN GENERAL	**RULE 200. DISCRETIONARY REVIEW IN GENERAL**
(a) The Court of Criminal Appeals, on its own motion, with or without a petition for discretionary review being filed by the appellant or the State, may review a decision of a court of appeals in a criminal case.	(a) **With or Without Petition.** Regardless of whether a petition for discretionary review is filed, the Court of Criminal Appeals may review a court of appeals' decision in a criminal case.
(b) Discretionary review by the Court of Criminal Appeals is not a matter of right, but of sound judicial discretion.	(b) **Not a Matter of Right.** Discretionary review by the Court of Criminal Appeals is not a matter of right, but of the court's discretion.
(c) In determining whether to grant or deny discretionary review, the following, while neither controlling nor fully measuring the Court of Criminal Appeals' discretion, indicates the character of reason that will be considered: (1) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; (2) Where a court of appeals has decided an important question of state or federal law which has not been, but should be, settled by the Court of Criminal Appeals; (3) Where a court of appeals has decided an important question of state or federal law in conflict with the applicable decisions of the Court of Criminal Appeals or the Supreme Court of the United States; (4) Where a court of appeals has declared unconstitutional, or appears to have misconstrued, a statute, rule, regulation, or ordinance; (5) Where the justices of the court of appeals have disagreed upon a material question of law necessary to its decision; and (6) Where a court of appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the Court of Criminal Appeals' power of supervision.	(c) **Reasons for Granting.** The following circumstances — while neither controlling nor fully measuring the Court of Criminal Appeals' discretion — indicate the type of reason that will persuade the court to grant discretionary review: (1) when a court of appeals has rendered a decision that conflicts with another court of appeals' decision on the same matter; (2) when a court of appeals has decided an important question of state or federal law that has not been, but should be, settled by the Court of Criminal Appeals; (3) when a court of appeals has decided an important question of state or federal law in a way that conflicts with the applicable decisions of the Court of Criminal Appeals or the Supreme Court of the United States; (4) when a court of appeals has declared a statute, rule, regulation, or ordinance unconstitutional, or appears to have misconstrued legislation of this kind. (5) when the justices of a court of appeals have disagreed on a material question of law necessary to the court's decision; and (6) when a court of appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the Court of Criminal Appeals' power of supervision.
(d) A motion for rehearing in the court of appeals shall not be a prerequisite to the granting of discretionary review, with or without petition, by the Court of Criminal Appeals.	(d) **No Rehearing Motion Needed.** A motion for rehearing in the court of appeals is not a prerequisite for discretionary review.

CURRENT RULE	PROPOSED RULE
(e) The Court of Criminal Appeals or any judge thereof may enter an order requiring the clerk of the Court of Appeals to forward promptly the original record in the case, the opinions of the court of appeals, the motions filed therein, and certified copies of any judgments and orders of the court of appeals to the Court of Criminal Appeals in order to aid the court in deciding whether to grant or deny discretionary review. If discretionary review is not granted, the court will enter an order to return the appellate record to the clerk of the Court of Appeals.	(e) **Documents to Aid Decision.** (1) *Acquiring Documents.* The Court of Criminal Appeals — or any judge of the Court — may enter an order requiring the court-of-appeals clerk to promptly send the following items to the Court in order to aid it in deciding whether to grant discretionary review: (A) the original record in the case; (B) the opinions of the court of appeals; (C) the motions filed in the court of appeals; and (D) certified copies of any judgments or orders of the court of appeals. (2) *Return of Documents.* If discretionary review is not granted, the court will enter an order to return the appellate record to the court-of-appeals clerk.
	Notes and Comments Comment to 1997 change: The rule is amended without substantive change.

CURRENT RULE	PROPOSED RULE
RULE 201. DISCRETIONARY REVIEW WITHOUT PETITION	**RULE 201. DISCRETIONARY REVIEW WITHOUT PETITION**
(a) The Court of Criminal Appeals may on its own motion by a vote of any four judges or of the court grant review of a decision of a court of appeals in a criminal case at any time before the court of appeals' decision becomes final as determined by Rule 86, and this rule. An order granting review shall be filed with the Clerk of the Court of Criminal Appeals who shall send a copy to the Clerk of the Court of Appeals.	(a) **Four Judges' Vote.** By a vote of at least four judges, the Court of Criminal Appeals may grant review of a court of appeals' decision in a criminal case at any time before the decision becomes final under Rule 86 and this rule. An order granting review will be filed with the clerk of the Court of Criminal Appeals, who must send a copy to the court-of-appeals clerk.
(b) In order to provide sufficient time for the Court of Criminal Appeals to decide whether to grant or deny discretionary review, the court or a judge thereof may file an order for review with the Clerk of the Court of Criminal Appeals who shall send a copy to the Clerk of the Court of Appeals.	(b) **Order for Review.** To provide enough time for the Court of Criminal Appeals to decide whether to grant discretionary review, the court — or any judge of the court — may file an order for review with the clerk of the Court of Criminal Appeals, who must send a copy to the court-of-appeals clerk.
(c) Unless otherwise limited in the order itself, an order for review shall extend the 45 days' time before issuance of the mandate of the court of appeals for an additional 45 days. An order for review shall be signed by a judge of the Court of Criminal Appeals.	(c) **Extension of Time.** Unless otherwise limited in the order itself, an order for review will extend for an additional 45 days the time before issuance of the court of appeals' mandate. An order for review must be signed by a judge of the Court of Criminal Appeals.
(d) An order granting review prevents the issuance of the mandate of a court of appeals pending the further order of the Court of Criminal Appeals.	(d) **Mandate Won't Issue.** An order granting review prevents the issuance of the court of appeals' mandate pending the further order of the Court of Criminal Appeals.
(e) If four judges do not agree to review a decision of a court of appeals within the time as extended under (c) above, the mandate of the court of appeals shall issue.	(e) **Mandate Will Issue.** If four judges do not agree to review a court of appeals' decision within the time as extended under (c), the court of appeals' mandate will issue.
	Notes and Comments Comment to 1997 change: The rule is amended without substantive change.

CURRENT RULE	PROPOSED RULE
RULE 202. DISCRETIONARY REVIEW WITH PETITION	**RULE 202. DISCRETIONARY REVIEW WITH PETITION**
(a) The Court of Criminal Appeals may review a decision of a court of appeals in a criminal case upon petition by the appellant or the State.	(a) **Generally.** On petition by the appellant or the State, the Court of Criminal Appeals may review a court of appeals' decision in a criminal case.
(b) The original petition shall be filed with the Clerk of the Court of Appeals 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.	(b) **Deadline for Petition.** The petition must be filed with the clerk of the court of appeals within 30 days after either the day the court's judgment was entered or the day the last timely motion for rehearing was overruled. If the State files the petition, the State may file the copies of the petition — but not the original — with the clerk of the Court of Criminal Appeals instead of with the clerk of the court of appeals.
(c) Even if the time specified in paragraph (b) has expired, a party who is otherwise entitled to file a petition may do so within 10 days after the timely filing of another party's petition.	(c) **Filing After Deadline.** Even if the time specified in (b) has expired, a party who otherwise may file a petition may do so within 10 days after the timely filing of another party's petition.

CURRENT RULE	PROPOSED RULE
(d) A petition for discretionary review shall be as brief as possible. It shall be addressed to the "Court of Criminal Appeals of Texas" and shall state the name of the party or parties applying for review. The petition shall include the following: (1) *Index.* The petition should contain at the front thereof a subject index, including an abbreviated rendition of the ground or question presented for review, with page references where the discussion of each ground or question presented may be found and also a list of authorities alphabetically arranged, together with references to pages of the petition where same are cited. (2) *Statement Regarding Oral Argument.* Counsel shall include in the petition a short statement of the reasons why oral argument would be helpful in the event the petition is granted, or a statement that oral argument is waived. If a reply or cross-petition is filed, counsel shall likewise include a statement of why oral argument should or need not be had. The court will accord these statements due, not controlling, weight in determining whether oral argument will be heard in the case. (3) *Statement of the Case.* The petition shall contain a brief general statement of the nature of the case. Such statement should seldom exceed one-half page. The details of the case should be reserved to be stated in connection with the grounds or questions to which they are pertinent. (4) *Statement of the Procedural History of the Case.* The petition should state the dates of the delivery of any opinion or order of the court of appeals, the dates of filing of any motion for rehearing or a statement that none was filed, and the dates of the overruling or other disposition of any motions for rehearing.	(d) **Contents of Petition.** A petition for discretionary review must be as brief as possible. It must be addressed to the "Court of Criminal Appeals of Texas" and must state the name of the party or parties applying for review. The petition must contain the following items: (1) *Table of contents.* The petition must include a table of contents with references to the pages of the petition. The table of contents must indicate the subject matter of each ground or question presented for review. (2) *Index of authorities.* The petition must include an index of authorities arranged alphabetically and indicating the pages of the petition where the authorities are cited. (3) *Statement regarding oral argument.* The petition must include a short statement of why oral argument would be helpful, or a statement that oral argument is waived. If a reply or cross-petition is filed, it likewise must include a statement of why oral argument should or should not be heard. (4) *Statement of the case.* The petition must state briefly the nature of the case. This statement should seldom exceed half a page. The details of the case should be reserved and stated with the pertinent grounds or questions. (5) *Statement of procedural history.* The petition must state the dates of the following events: (A) the delivery of any opinion or order of the court of appeals; (B) the filing of any motion for rehearing (or a statement that none was filed); and (C) the overruling or other disposition of any motion for rehearing.

CURRENT RULE	PROPOSED RULE
(5) *Grounds for Review.* A statement of the grounds upon which the petition is predicated shall be stated in short form without argument and the grounds shall be separately numbered. Where the party filing the petition has access to the record, he shall (after each ground) refer to the page of the record where the matter complained of is found. In lieu of grounds for review, the petition may contain the questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the questions should be short and concise and should not be argumentative or repetitious. (6) *Reasons for Review.* A direct and concise argument, with supporting authorities, amplifying the reasons relied on for the granting of review. See Rule 200(c). The opinions of the court of appeals will be considered with the petition, and statements therein, if accepted by counsel as correct, need not be repeated. (7) *Prayer for Relief.* The nature of the relief sought by the petition should be clearly stated. (8) *Appendix.* A copy of any opinions delivered upon rendering the judgment by the court of appeals whose decision is sought to be reviewed shall be included. (9) The court may strike, order redrawn or summarily refuse any petition for discretionary review that is unnecessarily lengthy or is not prepared in conformity with these rules. (10) The petition for discretionary review may be typewritten or printed. If it is typewritten, it must be with a double space between the lines and on heavy white paper (8-½ inches X 11 inches) in clear type. The Clerk of the Court of Appeals shall file the original petition and forward it, together with any copies furnished by the petitioner pursuant to Rule 4(b)(2), to the Court of Criminal Appeals.	(6) *Grounds for review.* The petition must state briefly, without argument, the grounds on which the petition is based. The grounds must be separately numbered. If the petitioner has access to the record, the petitioner must (after each ground) refer to the page of the record where the matter complained of is found. Instead of listing grounds for review, the petition may contain the questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of questions should be short and concise, not argumentative or repetitious. (7) *Reasons for review.* The petition must contain a direct and concise argument, with supporting authorities, amplifying the reasons for granting review. The court of appeals' opinions will be considered with the petition, and statements in those opinions need not be repeated if counsel accepts them as correct. (8) *Prayer for relief.* The petition must state clearly the nature of the relief sought. (9) *Appendix.* The petition must contain — in an appendix — a copy of any opinions delivered in the case by the court of appeals. (e) **Form of Petition; Filing.** A petition for discretionary review may be typewritten or printed. If typewritten, it must be double-spaced and typed clearly on heavy, white, 8½-by-11 paper. (f) **Clerk's Filing of Petition.** The court-of-appeals clerk must file the original petition and send it — together with any copies furnished by the petitioner under Rule 4(b)(2) — to the Court of Criminal Appeals. (g) **Nonconforming Petition.** The court may strike, order redrawn, or summarily refuse a petition for discretionary review that is unnecessarily lengthy or that does not conform to these rules.
(e) When a petition for discretionary review is filed in the court of appeals, the petitioner shall, at the same time, cause copies of the petition to be delivered to the attorney of record for the opposing party and to the State Prosecuting Attorney, P.O. Box 12405, Austin, Texas 78711.	(g) **Sending Copies.** When a petition for discretionary review is filed in the court of appeals, the petitioner must simultaneously send copies of the petition to the opposing party's attorney of record and to the State Prosecuting Attorney, P.O. Box 12405, Austin, Texas 78711.

CURRENT RULE	PROPOSED RULE
(f) Within 15 days after the filing of the petition for discretionary review the Clerk of the Court of Appeals shall note upon his record the filing of said petition, and forward to the Clerk of the Court of Criminal Appeals the petition and any copies thereof furnished by counsel, together with the original record in the case, the motions filed therein, and certified copies of any judgments, opinions and orders of the court of appeals. The clerk need not so forward any exhibits that are not documentary in nature unless ordered to do so by the Court of Criminal Appeals.	(h) **Transmittal to Court of Criminal Appeals.** Within 15 days after the petition is filed, the court-of-appeals clerk must note the filing on the record and send to the clerk of the Court of Criminal Appeals the petition and any copies furnished by counsel, together with the original record in the case, the motions filed in the case, and certified copies of any judgments, opinions, and orders of the court of appeals. The clerk need not forward any nondocumentary exhibits unless ordered to do so by the Court of Criminal Appeals.
(g) The petition with the original record in the case, the motions filed therein, and certified copies of any judgments, opinions, and orders of the court of appeals shall be filed with the Court of Criminal Appeals.	
(h) The Clerk of the Court of Criminal Appeals shall receive all petitions for discretionary review, shall file the petition and the accompanying record from the court of appeals, shall enter the same upon the docket, and shall notify the attorneys of record by United States Mail of the filing and docketing of petitions for discretionary review in the Court of Criminal Appeals. The opposing party shall have 30 days after the timely filing of the petition in the Court of Criminal Appeals unless additional time is allowed, within which to file a reply to the petition with the Clerk of the Court of Criminal Appeals. When a reply is filed or the time for filing same has expired, the petition shall be deemed submitted to the court and ready for disposition. The court may dispense with notice and may grant or refuse the petition immediately upon the filing of the petition where, in its opinion, the circumstances require it.	(i) **Receipt and Docketing of Petition.** The clerk of the Court of Criminal Appeals will receive a petition for discretionary review, file the petition and the accompanying record from the court of appeals, enter the petition and record on the docket, and notify the attorneys of record by U.S. Mail of the filing and docketing. The court may dispense with notice and grant or refuse the petition immediately upon its filing.
	(j) **Reply.** The opposing party has 30 days after the timely filing of the petition in the Court of Criminal Appeals — unless additional time is allowed — to file a reply to the petition with the Clerk. When a reply is filed or the time for filing a reply has expired, the petition will be treated as submitted to the Court and ready for disposition.
(i) True copies of all replies, motions, and papers delivered to the Clerk of the Court of Criminal Appeals for filing shall be served on the opposing counsel and the State Prosecuting Attorney, P.O. Box 12405, Austin, Texas 78711.	(k) **Service of Copies.** Copies of all replies, motions, and other papers delivered to the clerk of the Court of Criminal Appeals for filing must be served on opposing counsel and on the State Prosecuting Attorney, P.O. Box 12405, Austin, Texas 78711.

CURRENT RULE	PROPOSED RULE
(j) The petition or any reply may be amended or supplemented within thirty days after an original petition has been filed when the court of appeals corrected or modified its opinion and judgment pursuant to Rule 101, and at any time when justice requires upon such reasonable terms as the court may prescribe. The record may be amended in the Court of Criminal Appeals under the same circumstances and on the same terms as in the court of appeals.	(l) **Amendment.** The petition or a reply may be amended or supplemented within 30 days after an original petition has been filed when the court of appeals has corrected or modified its opinion and judgment under Rule 101, or at any time when justice requires. The record may be amended in the Court of Criminal Appeals under the same circumstances as in the court of appeals.
(k) After administrative processing, a petition for discretionary review shall be assigned by the administrative staff to a judge, in rotation, and the judge to whom such assignment is made shall have the responsibility for making an initial review and of reporting on such petition to the court for a determination of whether to grant or refuse the petition for discretionary review. If four judges of the Court of Criminal Appeals do not vote to grant a petition for discretionary review, the court will refuse the petition with a docket notation "refused." If four judges vote to grant the petition for discretionary review, the court shall enter the docket notation that discretionary review is "granted" and the case shall be set for submission on oral argument. Provided, however, that the court, in its discretion, upon granting discretionary review and without hearing oral argument, may affirm, reverse, reform, correct, or modify the decision of the court of appeals, making such further orders as may be appropriate. Moreover, after the granting of discretionary review, if five judges are of the opinion that discretionary review was improvidently granted, the petition may be dismissed.	(m) **Initial Review; Granting or Refusal.** (1) *Initial review.* A petition will be assigned by the administrative staff to a judge on a rotating basis. The assigned judge is responsible for making an initial review and for reporting on the petition to the court, which will determine whether to grant or refuse the petition. (2) *Granting or refusal.* If at least four judges do not vote to grant a petition for discretionary review, the court will enter a docket notation that the petition is "refused." If at least four judges vote to grant a petition, the court will enter a docket notation that discretionary review is "granted," and the case will be set for submission on oral argument. But upon granting discretionary review and without hearing oral argument, the court may affirm, reverse, reform, correct, or modify the court of appeals' decision, as well as make further appropriate orders. Further, after the granting of discretionary review, if five judges are of the opinion that discretionary review should not have been granted, the petition may be dismissed.
(l) When the court refuses or dismisses a petition for discretionary review, whether the respondent has filed a reply or not, the clerk of the court will retain the petition, together with the record and accompanying papers, for at least 15 days from the date of rendition of the order refusing or dismissing discretionary review. At the end of that time, if no motion for rehearing has been timely filed, or upon the overruling or dismissal of such motion, in case one has been filed, the Clerk of the Court of Criminal Appeals shall transmit to the court of appeals which rendered the decision below a certified copy of the orders refusing or dismissing such petition and of any order overruling a motion for rehearing thereof, and shall return the appellate record to the clerk thereof, but shall retain the petition for discretionary review.	(n) **Clerk's Duties.** When the court refuses or dismisses a petition — regardless of whether the respondent has filed a reply — the clerk will retain the petition, together with the record and accompanying papers, for at least 15 days from the date of the refusal or dismissal. At the end of that time, if no motion for rehearing has been timely filed, or upon the overruling or dismissal of such a motion, the clerk will send to the lower court of appeals a certified copy of the orders refusing or dismissing the petition (as well as any order overruling a motion for rehearing). The clerk will then return the appellate record to the court-of-appeals clerk but will retain the petition.
	Notes and Comments Comment to 1997 change: The rule is amended without substantive change.

CURRENT RULE	PROPOSED RULE

CURRENT RULE	PROPOSED RULE
RULE 203. BRIEF ON THE MERITS	**RULE 203. BRIEF ON THE MERITS**
(a) If review is granted, the petitioning party (or, if there was no petition, the party who lost in the court of appeals) shall file a brief within 30 days after the granting of review.	(a) **Initial Brief.** If review is granted, the petitioner — or, if there was no petition, the party who lost in the court of appeals — must file a brief within 30 days after review is granted.
(b) The opposing party shall file a brief within 30 days after the filing of the petitioning party's brief.	(b) **Reply Brief.** The opposing party must file a brief within 30 days after the petitioner's brief is filed.
(c) Briefs shall comply with Rule 74. Copies shall be filed and served as required by Rule 202(i).	(c) **Brief Contents and Form.** Briefs must comply with the requirements of Rule 74. Copies must be filed and served as required by Rule 202(k).
(d) The Court of Criminal Appeals may direct that a party file a brief, or another brief, in a particular case.	(d) **Other Briefs.** The Court of Criminal Appeals may direct that a party file a brief, or an additional brief, in a particular case.
	Notes and Comments Comment to 1997 change: The rule is amended without substantive change.

CURRENT RULE	PROPOSED RULE
RULE 210. DIRECT APPEALS IN DEATH PENALTY CASES	**RULE 210. DIRECT APPEALS IN DEATH-PENALTY CASES**
(a) **Record.** Rules 50 through 55 shall govern preparation and filing of the record on appeal of a case in which the death penalty has been assessed.	(a) **Record.** Rules 50 through 55 govern the preparation and filing of the appellate record in a death-penalty case.
(b) **Briefs.** Appropriate provisions in Rule 74 shall govern preparation and filing of briefs in a case in which the death penalty has been assessed, except that the brief may exceed fifty pages and an original and ten copies of it shall be filed.	(b) **Briefs.** Rule 74 governs the preparation and filing of briefs in a death-penalty case, except that the brief may exceed 50 pages and an original plus 10 copies must be filed.
	Notes and Comments Comment to 1997 change: The rule is amended without substantive change.

CURRENT RULE	PROPOSED RULE
RULE 211. EXTRAORDINARY MATTERS	**RULE 211. EXTRAORDINARY MATTERS**
(a) **Motion for Leave.** A motion for leave to file must accompany original applications for writ of habeas corpus, mandamus, and other extraordinary writs and motions and 11 copies of such papers shall be presented to the clerk for distribution to the judges of the court.	(a) **Motion for Leave.** A motion for leave must accompany an original application for writ of habeas corpus, writ of mandamus, or other extraordinary writ or motion. The movant must file 11 copies of these papers with the clerk for distribution to the court.
(b) **Initial Review.** After administrative processing, all original applications for writ of habeas corpus, mandamus, and other extraordinary writs, shall be assigned by the administrative staff to a judge, in rotation, and the judge to whom such assignment is made shall have the responsibility for making an initial review and of reporting on such case to the court for a determination of whether to grant leave to file. Upon presentation to the court, motion for leave to file may be denied or the application may be handled in accordance with such other instructions or orders as shall be issued by the court.	(b) **Initial Review.** All original applications for writ of habeas corpus, writ of mandamus, and other extraordinary writs will be assigned by the administrative staff to a judge on a rotating basis. The assigned judge is responsible for making an initial review and for reporting on the case to the court, which will determine whether to grant leave to file. The court may grant or deny the motion for leave or order that the application be handled in some other manner.
(c) **Tentative Disposition.** In the event at least five members of the court are of the tentative opinion that the case should be filed and set for submission, motion for leave to file will be granted and the case shall then be handled and disposed of in accordance with such instructions or orders as may be issued by the court. No motions for rehearing or reconsideration will be entertained from the denial of a motion for leave to file an original application. The court, however, may reconsider such a denial of a motion for leave to file on its own motion.	(c) **Tentative Disposition.** If at least five judges tentatively believe that the case should be filed and set for submission, the motion for leave will be granted and the case will then be handled and disposed of in accordance with the court's orders or instructions. If the motion for leave is denied, no motions for rehearing or reconsideration will be entertained. But the court may, on its own initiative, reconsider a denial of a motion for leave.
	Notes and Comments Comment to 1997 change: The rule is amended without substantive change.

CURRENT RULE	PROPOSED RULE
RULE 212. SPECIAL CASES	**RULE 212. SPECIAL CASES**
(a) Presentation of Motions. Motions for extension of time and motions filed with respect to cases pending on the court's docket (e.g., to advance on the docket), after administrative processing, shall be presented by the clerk or the administrative staff to the Presiding Judge, or to a judge designated by the Presiding Judge, who may grant or deny the motion or refer it to the en banc conference for consideration.	(a) **Presentation of Motions.** Motions for extension of time and motions filed in cases pending on the court's docket (e.g., a motion to advance the case on the docket) will be presented by the clerk or the administrative staff to the presiding judge — or to a judge designated by the presiding judge — who may grant or deny the motion or refer it to the en banc conference for consideration.
(b) Disposition. The motion will be handled and disposed of in accordance with the instructions of the Presiding Judge, the designated judge, or the en banc conference.	(b) **Disposition.** The motion will be handled and disposed of in accordance with the instructions of the presiding judge, the designated judge, or the en banc conference.
	Notes and Comments Comment to 1997 change: The rule is amended without substantive change.

CURRENT RULE	PROPOSED RULE
RULE 213. POSTCONVICTION APPLICATIONS FOR WRITS OF HABEAS CORPUS	**RULE 213. POSTCONVICTION APPLICATIONS FOR WRITS OF HABEAS CORPUS**
(a) **Initial Review.** After administrative processing, post-conviction applications for writ of habeas corpus pursuant to Article 11.07 of the Code of Criminal Procedure shall be assigned by the administrative staff to a judge, in rotation, and the judge to whom such an assignment is made shall have the responsibility of making an initial review and reporting on such case to the court. The court may deny relief upon findings and conclusions of the trial court with or without an evidentiary hearing. The court may likewise deny relief based upon its own review of the application or may issue such other instructions or orders as may be appropriate.	(a) Initial Review. All postconviction applications for writ of habeas corpus under Article 11.07 of the Code of Criminal Procedure will be assigned by the administrative staff to a judge on a rotating basis. The assigned judge is responsible for making an initial review and for reporting on the case to the Court. The Court may deny relief based on the trial court's findings and conclusions, with or without an evidentiary hearing. The Court may likewise deny relief based on its own review of the application, or may issue other appropriate orders or instructions.
(b) **Tentative Disposition.** In the event that at least five members of the court are of the tentative opinion that the case should be filed and set for submission to the court, the cause will be docketed and heard as though originally presented to the court or as an appeal. No motions for rehearing or reconsideration will be entertained from a denial of relief without docketing of the cause. The court, however, may on its own motion reconsider such initial disposition.	(b) **Tentative Disposition.** If at least five judges tentatively believe that the case should be filed and set for submission, the case will be docketed and heard as if it were originally presented to the Court or as if it were an appeal. If relief is denied without docketing of the case, no motions for rehearing or reconsideration will be entertained. But the Court may, on its own initiative, reconsider the initial disposition.
	Notes and Comments Comment to 1997 change: The rule is amended without substantive change.

CURRENT RULE	PROPOSED RULE
RULE 214. REVIEW OF CERTIFIED STATE CRIMINAL LAW QUESTIONS	**RULE 214. REVIEW OF CERTIFIED STATE CRIMINAL-LAW QUESTIONS**
(a) **Certification of Questions of Law.** The Court of Criminal Appeals may answer questions of state criminal law certified to it by the Supreme Court of the United States or a United States Court of Appeals when requested by the certifying court, if there are involved in any proceedings before the certifying court questions of criminal law of this state which may be determinative of the cause then pending as to which it appears to the certifying court that there is no controlling precedent in the decisions of the Court of Criminal Appeals. The Court of Criminal Appeals may, in its discretion, decline to answer the questions certified to it.	(a) **Certification of Questions of Law.** The Court of Criminal Appeals may answer questions of Texas criminal law certified to it by any federal appellate court if the certifying court is presented with determinative questions of Texas criminal law having no controlling Court of Criminal Appeals precedent. The court may decline to answer the questions certified to it.
(b) **Courts Who May Certify.** This Rule may be invoked by an order of any of the courts named in section (a).	
(c) **Contents of the Certification Order.** A certification order shall set forth: (1) The questions of law to be answered; (2) A stipulated statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose; (3) The names of each party to the pending cause; and (4) The names and addresses of counsel for each party.	(c) **Contents of the Certification Order.** A certification order must set forth the following: (1) the questions of law to be answered; (2) a stipulated statement of all facts relevant to the questions certified, showing fully the nature of the controversy in which the questions arose; (3) the names of each party to the pending case; and (4) the names and addresses of counsel for each party.
(d) **Preparation of the Certification Order.** The certification order shall be prepared by the certifying court and forwarded to the Court of Criminal Appeals by the clerk of the certifying court under its official seal. The Court of Criminal Appeals may require the original or copies of all or any portion of the record before the certifying court to be filed under the certification order, if in the opinion of the Court of Criminal Appeals the record or portion thereof may be necessary in answering the questions.	(d) **Preparation of the Certification Order.** The certification order must be prepared by the certifying court and sent to the Court of Criminal Appeals by the clerk of the certifying court under the court's official seal. The Court of Criminal Appeals may require the original or copies of all or part of the record before the certifying court to be filed with the certification order.

CURRENT RULE	PROPOSED RULE
(e) **Briefs and Oral Argument.** Upon agreement of the Court of Criminal Appeals to answer the questions certified to it, notice shall be given to all parties. The appealing party in the certifying court shall file his brief with the Clerk of the Court of Criminal Appeals within thirty days from the date the notice is mailed and the opposing parties shall file an answering brief within fifteen days from the date the opening brief is received. Briefs shall be in the manner and form of Rule 74, Texas Rules of Appellate Procedure, so far as reasonably applicable. Oral argument may be granted upon application or ordered by this Court. If granted or ordered, argument shall be as provided in Rule 75, Texas Rules of Appellate Procedure.	(e) **Notice; Briefs and Oral Argument.** (1) *Notice.* If the Court of Criminal Appeals agrees to answer the certified questions, the court will notify all parties. (2) *Briefs.* The appealing party in the certifying court must file a brief with the clerk of the Court of Criminal Appeals within 30 days after the notice is mailed. Opposing parties must file an answering brief within 15 days of receiving the opening brief. Briefs must comply with Rule 74 to the extent that its provisions apply. (3) *Oral Argument.* Oral argument may be granted either on a party's request or on the court's own initiative. Rule 75 governs oral argument.
(f) **Notice to the Attorney General.** When the constitutionality of a Texas penal statute is drawn in issue by certified question in a cause to which the State of Texas or an officer, agency or employee of the state is not a party, the Clerk of the Court of Criminal Appeals shall notify the Attorney General and shall permit the State of Texas to intervene for presentation of briefs and oral argument on the question of constitutionality.	(f) **Notice to the Attorney General; Intervention.** (1) *Notice.* The clerk of the Court of Criminal Appeals must send notice to the Attorney General of Texas if: (A) the constitutionality of a Texas penal statute is the subject of a certified question that the court has agreed to answer; and (B) the State of Texas or an officer, agency, or employee of the state is not a party to the proceeding in the certifying court. (2) *Intervention.* If the circumstances of (1) are met, the State of Texas may intervene for briefing and oral argument on the question of constitutionality.
(g) **The Answer to the Certified Question.** After all motions for rehearing have been overruled, the written opinion of the Court of Criminal Appeals stating the law governing the questions certified shall be sent by the clerk under the seal of the Court of Criminal Appeals to the certifying court and to the parties.	(g) **Answering Certified Questions.** After all motions for rehearing have been overruled, the clerk must send to the certifying court the written opinion on the certified questions. The opinion must be under the court's seal.
	Notes and Comments Comment to 1997 change: The rule is amended without substantive change.

CURRENT RULE	PROPOSED RULE
RULE 220. NOTIFICATION	**RULE 220. NOTIFICATION; ORAL ARGUMENT**
Oral argument will be permitted only on those causes designated by the Court of Criminal Appeals. Notification of such designation will be issued by the Clerk of the Court of Criminal Appeals along with notification of submission of the cause. Should counsel in a not so designated cause desire oral argument, they may petition the Court of Criminal Appeals within 30 days of submission notification. Said petition should contain specific reasons why oral argument is desired. The clerk is directed to use all reasonable diligence to notify counsel of record of settings, but failure to receive notice will not necessarily prevent submission of the cause on the day it is set.	(a) **Notification.** Oral argument will be permitted only in cases designated by the Court of Criminal Appeals. The clerk will notify the parties of this designation when it notifies them of the case's submission. If a case is not designated for oral argument but counsel desires oral argument, counsel may petition the Court within 30 days of submission notification. This petition must contain specific reasons why oral argument is desired. The clerk must use all reasonable diligence to notify counsel of settings, but counsel's failure to receive notice will not necessarily prevent submission of the case on the day it is set.
	(b) **Oral Argument.** Unless extended in a special case, the total maximum time for oral argument is 20 minutes per side. Counsel for the appellant or petitioner is entitled to open and conclude the argument. Counsel may not read at length from the briefs, records, or authorities. Counsel may orally correct a brief, but multiple additional citations should not be given orally; instead, these citations should be filed in writing with the clerk.
	Notes and Comments Comment to 1997 change: The rule is amended without substantive change.

CURRENT RULE	PROPOSED RULE
RULE 221. ORAL ARGUMENT	**RULE 221. ORAL ARGUMENT**
Unless extended by the Court of Criminal Appeals in a special case, the total maximum time for oral argument shall be 20 minutes per side. Counsel for the appellant or petitioner is entitled to open and conclude the argument. Counsel will not be permitted to read at length from the briefs, records, or authorities. Counsel may make an oral correction to his brief, but multiple additional citations should not be made orally; they should be reduced to writing and filed with the clerk.	[Repealed]
	Notes and Comments Comment to 1997 change: The rule is repealed. The contents are moved to Rule 220(b).

CURRENT RULE	PROPOSED RULE
RULE 222. SUBMISSIONS EN BANC	**RULE 222. SUBMISSIONS EN BANC**
(a) The court shall sit en banc for hearing appeals in death penalty cases, cases of discretionary review, cases in which leave to file was granted under Rule 211(a), cases which were docketed under Rule 213(b), and rehearings under Rule 230.	(a) **Generally.** The court will sit en banc for hearing appeals in the following types of cases: (1) death-penalty cases; (2) cases of discretionary review; (3) cases in which leave to file was granted under Rule 211(a); (4) cases that were docketed under Rule 213(b); and (5) rehearings under Rule 230.
(b) The clerk, as directed by the court, shall at appropriate times in advance of submission set cases for submission en banc.	(b) **Settings.** As directed by the court, the clerk will — at appropriate times before ordinary submission — set cases for submission en banc.
(c) After they are submitted, the cases shall be arranged by the clerk in 9 separate stacks, with such stacks to be as nearly equal in terms of workload as the clerk in his judgment shall determine. The court shall then, in the presence of a majority of the judges, determine by lot which stack shall be assigned to which judge for initial study, drafting of opinion, and reporting to the en banc conference.	(c) **Division of Cases.** After submission, the cases will be arranged by the clerk in nine separate stacks, with the stacks being nearly equal in terms of workload. The court will then — in the presence of a majority of the judges — determine by lot which stack will be assigned to which judge for initial study, drafting of opinion, and reporting to the en banc conference.
	Notes and Comments Comment to 1997 change: The rule is amended without substantive change.

CURRENT RULE	PROPOSED RULE
RULE 223. OPINIONS	**RULE 223. OPINIONS**
(a) In each case decided by it the Court of Criminal Appeals will deliver a written opinion setting forth the reason for its decision and germane precedent extant. Any judge may file an opinion dissenting from or concurring in the decision of the Court.	(a) **Generally.** In each case that it decides, the Court of Criminal Appeals will deliver a written opinion setting forth the reasons for its decision and any germane precedent. Any judge may file an opinion dissenting from or concurring in the court's decision.
(b) A majority of the judges shall determine whether opinions delivered by the Court of Criminal Appeals shall be signed by a judge or be issued per curiam and whether they shall be published.	(b) **Signing; Publication.** A majority of the judges will determine whether a opinion will be signed by a judge or issued per curiam, and whether the opinion will be published.
(c) Unpublished opinions shall neither be deemed nor cited as precedent.	(c) **Unpublished Opinions.** Unpublished opinions have no precedential value and must not be cited.
(d) On the date of delivery of any opinion or order the Clerk of the Court of Criminal Appeals shall mail copies of said opinions or orders to (1) counsel of record, (2) the State Prosecuting Attorney, (3) the clerk of the trial court, and (4) the Clerk of the Court of Appeals which rendered the decision below, and (5) an appellant representing himself.	(d) **Copies.** On the date when an opinion or order is delivered, the clerk of the Court of Criminal Appeals must mail copies of the opinion or order to the following: (1) all counsel of record; (2) the State Prosecuting Attorney; (3) the trial-court clerk; (4) the clerk of the court of appeals that rendered the decision below; and (5) a pro se appellant, if there is one.
	Notes and Comments Comment to 1997 change: The rule is amended without substantive change.

CURRENT RULE	PROPOSED RULE
RULE 231. MANDATE	**RULE 231. JUDGMENTS IN THE COURT OF CRIMINAL APPEALS**
When a decision of the Court of Criminal Appeals becomes final, the clerk of the court shall issue a mandate to the court below, including the court of appeals whose decision has been reviewed on petition for discretionary review. A decision of the court shall be final at the expiration of 15 days from the ruling on the final motion for rehearing or from the rendition of the decision if no motion for rehearing is filed.	
	(a) **Types of Judgment.** The Court of Criminal Appeals may: (1) affirm the lower court's judgment in whole or in part; (2) modify the lower court's judgment and affirm it as modified; (3) reverse the court's judgment in whole or in part and render the judgment that the lower court should have rendered; (4) reverse the lower court's judgment and remand the case for further proceedings; (5) vacate the judgments of the lower courts and dismiss the case; or (6) vacate the lower court's judgment and remand the case for further proceedings in light of changes in the law.
	(b) **Remand in the Interests of Justice.** When reversing the court of appeals' judgment, the Court of Criminal Appeals may, in the interests of justice, remand the case to the trial court even if a rendition of judgment is otherwise appropriate.
	(c) **Other Orders.** The Court of Criminal Appeals may make any other appropriate order required by the law and the nature of the case.
	Notes and Comments Comment to 1997 change: The rule is new. The contents of former Rule 231 are moved to Rule 23.

CURRENT RULE	PROPOSED RULE
RULE 232. STAY OF MANDATE	**RULE 232. STAY OF MANDATE**
The Court of Criminal Appeals may stay the mandate of the court for not more than 60 days on motion of a party to permit the timely filing of an appeal or petition for writ of certiorari to the United States Supreme Court. After the expiration of the time mentioned in this rule, the mandate of the court shall issue.	[Repealed]
	Notes and Comments Comment to 1997 change: The rule is repealed. The contents of the former rule are moved to Rule 23.

CURRENT RULE	PROPOSED RULE
RULE 233. STAY OF EXECUTION IN DEATH PENALTY CASES	**RULE 233. STAY OF EXECUTION IN DEATH-PENALTY CASES**
The order of a trial court setting the date for execution in a death penalty case may be modified or withdrawn by that trial court should such court determine that an evidentiary hearing or other proceedings are necessary on an application for writ of habeas corpus filed pursuant to Article 11.07 of the Code of Criminal Procedure. In such event the warrant of execution shall be recalled.	A trial court's order setting an execution date in a death-penalty case may be modified or withdrawn by the trial court if, on a habeas corpus application filed under Article 11.07 of the Code of Criminal Procedure, the court determines that an evidentiary hearing or other proceedings are necessary. If the order is so modified or withdrawn, the warrant of execution will be recalled.
	Notes and Comments Comment to 1997 change: The rule is amended without substantive change.

RULE 234. UNDISPOSED CASES	RULE 234. UNDECIDED CASES
All cases filed in the Court of Criminal Appeals and not disposed of at the end of the term shall be automatically continued to the next succeeding term of said court.	[Repealed]
	Notes and Comments Comment to 1997 change: The rule is repealed. The contents of the former rule are moved to Rule 23.

JOINT ORDER
OF THE SUPREME COURT OF TEXAS
AND THE COURT OF CRIMINAL APPEALS OF TEXAS
DIRECTING THE FORM OF THE APPELLATE RECORD

Pursuant to Texas Rule of Appellate Procedure 50(e), the Supreme Court and the Court of Criminal Appeals jointly order that the appellate record be in the form specified below. All references in this Order to a rule are to the Texas Rules of Appellate Procedure unless otherwise stated.

(A) Transcript

(1) The trial court clerk must prepare and file an transcript in accordance with Rules 51 and 54. To prepare the transcript, the trial court clerk must:

(a) gather the documents required by Rule 51(a) and those requested by a party under Rule 51(b);

(b) make a legible copy of the documents on opaque, white, 8 ½ x 11 inch paper, if practicable;

(c) arrange the documents in ascending chronological order, by date of filing or occurrence;

(d) consecutively number the pages in the bottom right-hand corner;

(e) bind the documents together in one or more group under a heavy cover;

(f) prepare, label, and certify the transcript as required by this Order.

(2) The transcript should be in the following form:

(a) It is preferred that the transcript lie flat when opened.

(b) If the transcript will lie flat when opened, two-sided copies may be included in the transcript; otherwise, only one-sided copies may be included.

(c) Each individual document must start on a new page.

(d) Page numbering should start on the first page of the first volume of the transcript and continue to the final page of the transcript without regard for the number of volumes in the transcript.

(e) It is preferred that the transcript be tabbed to show the beginning of each document.

(f) Each document must show the date of filing.

(g) As far as practicable, each order and judgment must show the date of signing by the judge, as well as date of entry in the minutes by the clerk.

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

TRANSCRIPT

VOLUME ___ of ___

Trial Court Cause No. _____
In the _____ District (County) Court
of _____ County, Texas,
Honorable _____, Judge Presiding.

_____, Plaintiff(s)

vs.

_____, Defendant(s)

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

Attorney for Appellant(s):
Name _____
Address _____
Telephone no. _____
Fax no. _____
SBOT no. _____
Attorney for:_____, Appellant(s)

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

signature of clerk _____
name of clerk _____
title _____

Appellate Court Cause No. _____

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

_____, Clerk
By_____, Deputy

(i) The front cover of the second and subsequent volumes of the transcript must include the same information and be in substantially the same form except that second and subsequent volumes may, but need not, include statements of delivery and filing.

(j) If there is more than one volume of the transcript, the volumes of the transcript must be gathered together and filed in one or more envelopes that conform to the following specifications:

(i) extra-heavyweight stock;

(ii) one-piece construction with flaps;

(iii) congress-tie, noncollapsing-style construction with closed corners;

(iv) dimensions of 11½ or 14½ inches in width, 9 inches in height, and a thickness of 1, 1½, 2, 3, or 4 inches; and

(v) the front of the transcript's first envelope, the clerk must show the trial court style and cause number of the case.

(k) The clerk must prepare and include on the first pages of the transcript a detailed index identifying each document included in the transcript, the date of filing, and the page where it first appears. The index must be double spaced and conform to the order in which matters appear in the transcript, rather than in alphabetical order.

(l) After the index, the clerk must include the following:

The State of Texas §
County of _____ §

In the _____ (County Court or 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:

Trial Court Cause No._____

_____. Plaintiff(s)	§	IN THE _____ COURT
	§	
vs.	§	
	§	
_____ Defendant(s)	§	_____ COUNTY, TEXAS

(m) The transcript must 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 documents contained in the transcript to which this certification is attached are all of the documents specified by Texas Rule of Appellate Procedure 51(a) and all other documents timely requested by a party to this proceeding under Texas Rule of Appellate Procedure 51(b).

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

signature of clerk _____
name of clerk _____
title _____

(3) A supplemental transcript must be prepared in conformity with this Order.

(4) In the event of a flagrant violation of this Order in the preparation of a transcript, on motion of a party or on its own initiative, the appellate court may require the clerk to amend the transcript or to prepare a new transcript in proper form — and provide it to any party who has previously made a copy of the original, defective transcript — at his or her own expense.

(B) Statement of Facts

(1) The court reporter must prepare and file a statement of facts in accordance with Rules 53 and 54. The statement of facts must be in the following format:

(a) It must be typed or printed on opaque, white, 8½ by 11 inch, 13-pound or heavier paper.

(b) It may be printed on both sides of the paper if bound so that it will lie flat when opened; otherwise, it may be printed on one side only.

(c) The top and bottom margins must be 1 inch. The margin on the left-hand side of the page must not be less than 1¼ inches or more than 2 inches.

(d) It must be in readable 12-point or larger typeface, in upper and lower case.

(e) It must be double-spaced.

(f) Each separate proceeding and hearing (pretrial hearing, voir dire, trial on the merits, etc.) must be bound in a separate volume or volumes.

(g) No volume may be over two inches thick.

(h) The first page of the first volume of the statement of facts of each such proceeding or hearing must be numbered "1" and each following page relating to the same proceeding or hearing, whether in the first or a subsequent volume, must be numbered consecutively at the top right-hand corner of the page.

(i) Each volume must be securely bound on the left margin.

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

STATEMENT OF FACTS

VOLUME ___ of ___

Trial Court Cause No._____

_____. Plaintiff(s)	§	IN THE _____ COURT
	§	
vs.	§	
	§	
_____ Defendant(s)	§	_____ COUNTY, TEXAS

APPEARANCES:

Attorney for Plaintiff(s):	Attorney for Defendant(s):
Name _____	Name _____
Address _____	Address _____
Telephone no. _____	Telephone no. _____
Fax no. _____	Fax no. _____
SBOT no. _____	SBOT no. _____
Attorney for:_____	Attorney for:_____

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

(k) The court reporter must include an index of the testimony at the beginning of each volume of the statement 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		

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

(m) A index of the exhibits must be included 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	3	4	5	6

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

(o) Unless ordered otherwise, neither physical evidence nor original exhibits are to be included in the statement of facts, but each item of physical evidence must be described on a separate piece of paper in such a manner that it may be identified, including the exhibit number.

(p) When a legible copy of a photograph or any other exhibit cannot be made, the original exhibit must be included in the statement of facts under order of the trial court made pursuant to Rule 53(g).

(q) Copies of the exhibits and the descriptions of physical evidence received in each separate proceeding or hearing must 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.

(r) The statement of facts must 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:_____

(2) In the event of a flagrant violation of this Order in the preparation of a statement of facts, on motion of a party or on the court's own initiative, 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 — and provide it to any party who has previously made a copy of the original, defective statement of facts — at his or her own expense.

REPORT OF THE SUBCOMMITTEE ON TEXAS RULES OF CIVIL EVIDENCE

NOVEMBER 22, 1996

INDEX

DISPOSITION CHART
TEXAS RULES OF EVIDENCE
(AGENDA NOVEMBER 15, 1996)

RULE NO	HISTORY	THINGS RECOMMENDED BY EVIDENCE SUBCOMMITTEE	REASON
NEW RULE 1009 - CIV & CRIM	Rule was discussed at last meeting and sent back to Evidence Committee for redraft	Draft attached - also attached is (footnote) discussion by court in Arroyo Shrimp Farm v. Hung Shrimp Farm, 927 S.W.2d 146 (Tex. App. Corpus Christi 1996	Clarify rule in keeping with discussion at last meeting
509 - CIV	New matter - forwarded by Luke - consider Waco court's opinion in Buchanan v. Mayfield, 925 S.W.2d 135 (1996) - whether amend rule so that dentists are included in the physician-patient privilege	No amendment or change to rule	Although Supreme Court has power to amend Rule 509 to include dentists, it is felt this should be left up to the legislature because dentists were not so included in Dental Practice Act as originally drawn.

CIV & CRIM UNIFIED RULES	Lee and people on his staff went back and made certain corrections, some grammatical and some gender corrections and also made certain changes to show what would be applicable to civil only or criminal only	Approved as drafted except to extent modified by committee	Evidence Committee changes will be discussed - see attachments

FINAL REDRAFT

RULE 1009. TRANSLATION OF FOREIGN LANGUAGE DOCUMENTS

(a) **Translations.** A translation of foreign language documents shall be admissible upon the affidavit of a qualified translator setting forth the qualifications of the translator and certifying that the translation is fair and accurate. Such affidavit, along with the translation and the underlying foreign language documents, shall be served upon all parties at least 45 days prior to the date of trial.

(b) **Objections.** Any party may object to the accuracy of another party's translation by pointing out the specific inaccuracies of the translation and by stating with specificity what the objecting party contends is a fair and accurate translation. Such objection shall be served upon all parties at least 15 days prior to the date of trial.

(c) **Effect of Failure to Object or Offer Conflicting Translation.** If no conflicting translation or objection is timely served, the court shall admit a translation submitted under paragraph (a) without further need of proof, provided however that the underlying foreign language documents are otherwise admissible under the Texas Rules of Evidence. Failure to serve a conflicting translation under paragraph (a) or failure to timely and properly object to the accuracy of a translation under paragraph (b) shall preclude a party from attacking or offering evidence contradicting the accuracy of such translation at trial.

(d) **Effect of Objections or Conflicting Translations.** In the event of conflicting translations under paragraph (a) or if objections to another party's translation are served under paragraph (b), the court then shall determine whether there is a genuine issue as to the accuracy of a material part of the translation to be resolved by the trier of fact.

(e) **Expert Testimony of Translator.** Except as provided in paragraph (c), this Rule does not preclude the admission of a translation of foreign language documents at trial either by live testimony or by deposition testimony of a qualified expert translator.

(f) **Varying of Time Limits.** The court, upon motion of any party and for good cause shown, may enlarge or shorten the time limits set forth in this Rule.

(g) **Court Appointment.** The court, if necessary, may appoint a qualified translator, the reasonable value of whose services shall be taxed as court costs.

NOTES CONCERNING REDRAFT AND REASONS THEREFOR

First, we made both the civil and the criminal rules the same. Secondly, we considered Richard's suggestion about whether or not an expert could rely on a translation that was not admitted into evidence. At one time we put in brackets in (c) the following, (b) shall preclude a party from attacking or offering evidence [including any expert testimony] contradicting the accuracy of such translation at trial. Lastly, Tommy raised some question about drafting this so that it would appear that the jury would answer directly the question of which draft was accurate as distinguished from answering traditional issues. In other words, this is an evidentiary matter and should not be submitted as a question to the jury. We took care of that by stating that this would be resolved by the trier of fact as distinguished from being submitted to the trier of fact. Tommy wanted some clear language as to when the matter would be decided by the court as distinguished from being decided by the trier of fact. His language would read, "The court shall then determine whether there is a genuine dispute about the correctness of a material part of the translation, in which event both translations shall be admitted into evidence with any conflict to be resolved by the trier of fact." Perhaps the language that we have agreed upon might do this and it may not.

ARROYO SHRIMP FARM, INC., Chi-Ming Tao and U.S.A. Shrimp Farm Development, Inc. and Wang Hui-Chi A/K/A Michelle Huei Zei Wong, Appellants,

v.

HUNG SHRIMP FARM, INC. and Ping-Kung Hung, Appellees.

No. 13-94-344-CV.

Court of Appeals of Texas, Corpus Christi.

June 27, 1996.

Rehearing Overruled July 25, 1996.

Foreign purchaser brought action against vendor and his companies for fraud in sale of land intended to be used as commercial shrimp farms. The 103rd District Court, Cameron County, Robert Garza, J., entered judgment on verdict in favor of purchaser, and vendor appealed. The Court of Appeals, Dorsey, J., held that: (1) vendor failed to preserve his claim that evidence was both legally and factually insufficient to support jury's verdict of fraud; (2) purchaser did not ratify or waive his fraud claims; and (3) denial of vendor's proposed trial amendment raising defenses of res judicata, collateral estoppel, and judicial admission was not abuse of discretion.

Affirmed.

1. Appeal and Error ⇐209.1

Complaint that evidence is insufficient must be raised in trial court before one may complain of it on appeal. Rules App.Proc., Rule 52(a).

2. Appeal and Error ⇐213, 237(5), 238(2), 294(1)

To preserve legal sufficiency or "no evidence" complaint for appeal from jury trial, party must make motion for instructed verdict, object to submission of issue to jury, make motion to disregard jury's answer, make motion for judgment non obstante veredicto, or make motion for new trial specifically raising complaint.

3. Appeal and Error ⇐295

Party complaining of factual insufficiency of evidence to support jury finding or of excessiveness of damage award must raise complaint first in motion for new trial in order to complain of it on appeal. Vernon's Ann.Texas Rules Civ.Proc., Rule 324(b)(2, 4).

4. Appeal and Error ⇐294(1)

Motion for new trial can preserve both factual and legal insufficiency points for appeal.

5. Appeal and Error ⇐302(6)

In order to preserve insufficient evidence point for review, motion for new trial must specifically point out deficiencies in manner that adequately apprises trial judge of those deficiencies. Vernon's Ann.Texas Rules Civ.Proc., Rule 321.

6. Appeal and Error ⇐232(.5)

To preserve issue for appeal, grounds supporting objection made during trial must conform with argument supporting corresponding point of error on appeal.

7. Appeal and Error ⇐232(.5)

Objection made during trial which is not same as argument urged on appeal presents nothing for appellate review.

8. Appeal and Error ⇐302(6)

Defendant's motion for new trial failed to preserve his argument that evidence was both legally and factually insufficient to support jury's verdict of fraud, where defendant's motion argued that, due to collusion of trial lawyers, he should be given new trial, but did not state or imply that evidence was legally or factually insufficient to support jury's findings of fraud or their award of damages.

9. Trial ⇐420

Should movant offer additional evidence after his motion for instructed verdict is denied, he thereby waives motion.

10. Appeal and Error ⇐241

Defendant's filing of "Motion to Withdraw Case from Jury and Render Judgment" at close of all evidence did not preserve his

argument that evidence was both legally and factually insufficient to support jury's verdict of fraud, where motion sought directed verdict on grounds of res judicata, collateral estoppel, judicial admissions, waiver, estoppel, and ratification.

11. Fraud ⇐36

In order to prove ratification defense to fraud, opposing party had to prove that party alleging fraud had full knowledge of fraudulent acts or breach at time of ratification and nevertheless intentionally chose to ratify contract in spite of alleged fraud.

12. Fraud ⇐64(1)

If evidence of ratification of fraud is controverted, question is for trier of fact.

13. Fraud ⇐23

If party who claims to have been defrauded had means to have discovered fraud, if any existed, and undertakes to investigate for himself, and does make such investigation as he deems necessary, and is not hindered or prevented from doing so by any act of other party, it must be held as matter of law that he has knowledge of everything that proper investigation would disclose, and hence would not be justified in acting on fraudulent representations, if any were made to him, merely because they were made to him.

14. Fraud ⇐22(1)

Person must exercise reasonable ordinary care for protection of his own interests and discover existence of fraud if he has knowledge of facts that would put reasonably prudent person on inquiry.

15. Fraud ⇐35

Fact that foreign purchaser signed contract for sale of land and shrimp farming license some three months after entering letter of intent which allowed purchaser to obtain information that he thought necessary and satisfactory regarding license did not amount to waiver of purchaser's fraud claims, where there was no evidence that purchaser was aware of anything which would have put him on notice that he should have made inquiry into license, rather than simply relying on vendor's representations that license was transferable and difficult for foreign nationals to obtain.

16. Fraud ⇐10

Representations concerning law of foreign states or countries are considered to be representations of fact, and therefore can support fraud action.

17. Fraud ⇐35, 36

Fact that foreign purchaser assigned contract for purchase of land and shrimp farming license to related company and that he purchased additional land and continued to make payments on contracts did not show that he had affirmative intent to ratify contracts or to waive his claims for fraud, in view of purchaser's testimony that he did not even know he had action for fraud available to him until he conferred with American attorney, and that he purchased new land and constructed pump station on that land in futile effort to save his original investment.

18. Fraud ⇐35

Acts done in affirmance of original contract do not necessarily amount to waiver of right to sue for fraud.

19. Appeal and Error ⇐294(1)

In order to attack jury finding on appeal for being against overwhelming weight of evidence, party must first raise point of error in motion for new trial. Vernon's Ann.Texas Rules Civ.Proc., Rule 324(b)(3).

20. Pleading ⇐245(3), 258(3)

Trial court must allow trial amendment unless opposing party presents evidence of surprise or prejudice, or amendment asserts new cause of action or defense, and thus is facially prejudicial.

21. Pleading ⇐236(3, 7)

Trial court has no discretion to deny trial amendment unless opposing party presents evidence of surprise or prejudice, or amendment asserts new cause of action or defense and is thus prejudicial on its face and opposing party objects. Vernon's Ann.Texas Rules Civ.Proc., Rule 66.

22. Appeal and Error ⇐959(3)

If trial amendment is not mandatory, court's decision to allow or deny amendment may be reversed only if it is clear abuse of discretion.

23. Pleading ⇐229

Party opposing trial amendment does not have to prove prejudice or surprise if amendment is substantive one which changes nature of trial.

24. Pleading ⇐261

Newly plead affirmative defense in trial amendment substantially changes nature of trial so that party opposing amendment does not have to prove prejudice or surprise.

25. Pleading ⇐236(7)

Denial of vendor's proposed trial amendment, at close of evidence in fraud action, raising defenses of res judicata, collateral estoppel, and judicial admission was not abuse of discretion, where vendor was aware of facts that led him to seek trial amendment well before trial began, and where purchaser stated that he was surprised by attempted trial amendment and that it would be unfair to purchaser if amendment were granted, at end of lengthy trial, without notice to him.

26. Appeal and Error ⇐946

In reviewing trial court's ruling for abuse of discretion, court looks to whether trial court made its ruling without reference to any guiding rule or principle.

27. Pretrial Procedure ⇐45

In determining whether good cause exists for admitting witness' testimony regarding evidence not disclosed by offering party during discovery, court may look at inadvertence of counsel, lack of surprise, unfairness or ambush, uniqueness of excluded evidence, and whether or not witness was deposed. Vernon's Ann.Texas Rules Civ.Proc., Rule 215, subd. 5.

28. Pretrial Procedure ⇐312

Denial of vendor's motion to strike purchaser's expert's testimony regarding value of land, which was based on different set of "comparable sales" than those given during discovery in fraud action, was not abuse of discretion, in view of expert's testimony that he mistakenly listed ranch land sales rather than farmland sales when he provided answers to vendor's interrogatories and that this was his mistake, not that of attorneys, and where expert's ultimate valuations did not change significantly from his interrogatory responses to his trial testimony.

Clinard J. Hanby, Woodlands, Juan A. Guerra, Raymondville, for appellant.

Charles A. Carlson, III, Harlingen, William M. Mills, McAllen, for appellee.

Before SEERDEN, C.J., and DORSEY and HINOJOSA, JJ.

OPINION

DORSEY, Justice.

Ping-Kung Hung, a citizen and resident of Taiwan, Republic of China, and his company, Hung Shrimp Farm, Inc. ("Hung"), sued Chi-Ming Tao, an American citizen, and his companies, Arroyo Shrimp Farm, Inc., and U.S.A. Shrimp Farm Development, Inc. ("Tao"), for fraud in the sale of land in Willacy County, Texas. The intended purpose of the purchase was to install and operate commercial shrimp farms. The case was tried to a jury, which found that Tao had defrauded Hung and awarded Hung approximately $11.5 million in actual damages and an additional $10.5 million in exemplary damages. Tao appeals with nine points of error.

Sufficiency of the Evidence

Tao complains in his first two points of error that the evidence is legally and factually insufficient to support the jury's verdict of fraud. He raises the same complaint about the actual and punitive damage awards in his fifth, sixth, seventh, and eighth points of error. We hold these points of error were not preserved in the trial court and are waived on appeal, and thus we overrule them.

[1–3] A complaint that evidence is insufficient must be raised in the trial court before one may complain of it on appeal. *See* TEX. R. APP. P. 52(a). To preserve a legal sufficiency or "no evidence" complaint for appeal

from a jury trial, a party must use one of the following methods: (1) a motion for instructed verdict, (2) an objection to the submission of the issue to the jury, (3) a motion to disregard the jury's answer, (4) a motion for judgment *non obstante veredicto*, or (5) a motion for new trial specifically raising the complaint. *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 220 (Tex.1992); *Regan v. Lee*, 879 S.W.2d 133, 135 (Tex.App.-Houston [14th Dist.] 1994, no writ); *Villalpando v. De La Garza*, 793 S.W.2d 274, 277 (Tex.App.—Corpus Christi 1990, no writ). A party complaining of factual insufficiency of the evidence to support a jury finding or of the excessiveness of the damage award must raise the complaint first in a motion for new trial in order to complain of it on appeal. TEX.R. CIV. P. 324(b)(2), (4); *Cecil v. Smith*, 804 S.W.2d 509, 510 (Tex.1991).

[4] A motion for new trial can preserve both factual and legal insufficiency points for appeal, and Tao argues that his motion for new trial does so with respect to the findings of fraud and damages. Tao's motion for new trial in its entirety follows:

I.

Defendants bring this motion pursuant to Rule 320 and 324 of the Texas Rules of Civil Procedure. It is the opinion and belief of Defendants that the final judgment signed on or about the 20th of January, 1994, should be set aside for good cause. Defendants would show the Court that this rule authorizes the Court in all fairness due to the damages that were awarded are manifest[ly] too large. In the history of all the South Texas counties, never had such an amount ever been awarded.

II.

Defendants complain, by way of this their Motion For New Trial, of the conduct of the attorneys involved first as their attorneys and then the attorneys exchanging clients and ultimately their opposing counsel. If the Court would take notice of the official organ of the State Bar of Texas, *The Texas Bar Journal*, volume 57, no. 2, February 1994 issue, on p. 200, undoubtedly there is concern as to any attorney trying to serve two (2) masters.

The pertinent areas [in] such an article are the following:

Conclusion

In order to adequately safeguard those confidences, the firm must withdraw from representing any of the parties.

Therefore, such conduct may not have been abrogated by mere disclosures. The only way to attempt to cure such gross misconduct of the attorneys involved, is for this Court to grant a new trial.

III.

Defendants would show that in this case at bar, all attorneys for the parties were also players in the events that lead to the alleged causes of action, the subject matter of this lawsuit. Defendants hereby invoke the mandates of Texas Disciplinary Rules of Professional Conduct, Rule 3.08 which in its pertinent parts states the following:

LAWYER AS WITNESS

(a) A lawyer shall not accept or continue employment in a contemplated or pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client, unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered [sic] in opposition to the testimony;

(b) A lawyer shall not continue as an advocate in a pending adjudicatory proceeding if the lawyer believes that the lawyer will be compelled to furnish[ ] testimony that will be substantially adverse to the lawyer's client, unless the client consents after full disclosure.

(c) Without the client's informed consent, a lawyer may not act as advocate in an adjudicatory proceeding in which an-

other lawyer [in the] lawyer's firm is prohibited by paragraphs (a) or (b) from serving as advocate. If the lawyer to be called as a witness could not [also serve] as an advocate under this Rule, that lawyer shall not take an active role before the tribunal in the presentation of the matter.

IV.

Defendants would show the Court that fraud was never committed. Defendant's defense never included an independent expert witness on the value of the land sold. The obvious rationale for not having obtained one is the collusion between all attorneys in this case.

Defend[ants] would show the Court, through expert testimony that the land sold was not at all excessive and was only the net reasonable value of the land. Therefore, as a matter of law, if indeed, by a stretch of imagination, there was a stat[e]ment which would qualify as fraudulent, there were no damages. Damages is an element of this tort, therefore, if none, there could not have been fraud.

V.

This case represents the sad states of affairs among the legal field. There is a series of lawyers who contracted each other to represent both sides. This coupled with the ineffectiveness of counsel to bring in evidence to show the lack of facts proffered in proving the causes of action alleged.

The lack of expert testimony, the lack of having placed opposing counsel as witnesses, the lack of the amounts of monies paid for each acre from Defendant to Plaintiff's attorneys, is just a small accounting of the abuses exerted on Defendants.

Therefore, the only solution is to have a new trial ordered by this Honorable Court.

VI.

Defendants would show the Court that a corollary issue was brought about in order to divert the attention from the true and correct facts. This issue was the one that Defendants had not given clear title. One, the full price had not been paid. And second, if Defendants had deficient title it is because Plaintiff's attorneys had extended a deficient title.

Therefore, it is a miscarriage of justice to allow this verdict to stand.

WHEREFORE PREMISES CONSIDERED, Defendants pray that a hearing be held and they be allowed to present evidence that their previous attorney did not want to present. Defendants pray that this motion be granted and that a new trial be ordered.

Tao's motion [1] says "fraud was never committed" and "there were no damages," and he argues here that that is the equivalent of saying "there is no evidence of fraud or damages." However, in the context of the motion presented to the trial judge, Tao complains of collusion among the trial lawyers, argues that that collusion is the reason he presented no expert evidence on the value of the land, and insists that he will do so at the next trial. His complaints in the motion for new trial are an appeal to the equitable powers of the court to do justice, but nowhere does Tao indicate why the evidence introduced at trial is inadequate to support the verdict, or constitutes no evidence.

[5–8] In order to preserve an insufficient evidence point for review, the motion for new trial must specifically point out the deficiencies in a manner that adequately apprises the trial judge of those deficiencies. As the Texas Rules of Civil Procedure require, a point in a motion for new trial "shall briefly refer to that part of the ruling of the court ... in such a way that the objection can be clearly

1. Subsequent to filing this motion for new trial, appellants sought to file an out-of-time amended motion for new trial, but the trial court denied leave to file the amended motion. Supplemental motions for new trial, filed more than thirty days after the judgment was signed, are a nullity. TEX.R. CIV. P. 329b(b); *Davis v. Mathis*, 846 S.W.2d 84, 90 (Tex.App.—Dallas 1992, no writ); *Equinox Enterprises v. Associated Media*, 730 S.W.2d 872, 875 (Tex.App.—Dallas 1987, no writ).

identified and understood by the court." TEX.R. CIV. P. 321. Additionally, the grounds supporting an objection made during trial must conform with the argument supporting the corresponding point of error on appeal. *Borden, Inc. v. Guerra*, 860 S.W.2d 515, 525 (Tex.App.—Corpus Christi 1993, writ dism'd by agr.); *Exxon Corp. v. Allsup*, 808 S.W.2d 648, 655 (Tex.App.—Corpus Christi 1991, writ denied). An objection made during trial which is not the same as an argument urged on appeal presents nothing for appellate review. *Borden*, 860 S.W.2d at 525. Tao's motion for new trial argued that, due to the collusion of the trial lawyers, he should be given a new trial. It does not state or imply, however, that the evidence is legally or factually insufficient to support the jury's findings of fraud or their award of damages. We hold that Tao's motion for new trial failed to preserve either his legal sufficiency or his factual sufficiency arguments for our review.

Since legal sufficiency or "no evidence" points can be preserved through other motions in the trial court, we examine the other motions filed by Tao to determine if they preserved the "no evidence" argument.

[9] Tao made an oral motion for instructed verdict at the close of Hung's case, but proceeded to present evidence in his defense after the motion was denied. Should a movant offer additional evidence after his motion is denied, he thereby waives the motion. *Humes v. Hallmark*, 895 S.W.2d 475, 477 (Tex.App.—Austin 1995, no writ); *Hydro-Line Mfg. Co. v. Pulido*, 674 S.W.2d 382, 386 (Tex.App.—Corpus Christi 1984, writ ref'd n.r.e.). Since Tao did not re-urge the motion at the close of evidence, the motion was waived.

[10] Tao filed a "Motion to Withdraw Case from Jury and Render Judgment" at the close of all evidence. That motion sought a directed verdict on the grounds of *res judicata*, collateral estoppel, judicial admissions, waiver, estoppel, and ratification. None of these grounds argued that the evidence was legally insufficient to support a finding of fraud or of damages, and so did not preserve Tao's legal sufficiency arguments.

Tao objected to various portions of the jury charge, but these objections did not raise legal sufficiency arguments, and therefore did not preserve such arguments for our review. Finally, Tao did not file a motion for judgment *non obstante veredicto* or a motion to disregard the jury's answer to a vital fact issue. Tao failed to preserve his legal and factual sufficiency arguments for our review. Accordingly, we overrule points of error one, two, five, six, seven, and eight.

Waiver and Ratification

By his third point of error, Tao argues that the trial court erred in denying his motion for directed verdict because waiver and ratification were established as a matter of law. In his "Motion to Withdraw Case from Jury and Render Judgment," Tao argued that Hung assigned the contract for sale of the land to his company, Hung Shrimp Farm, Inc., and that such assignment amounted to a bar or waiver of his fraud claim as a matter of law. The motion also argued that "[t]he evidence before the Court at this point in the trial conclusively proves all facts necessary to establish the defense of ratification."[2] Tao argued that, since Hung assigned the contract for sale of the land to Hung Shrimp Farm *after* any alleged misrepresentations by Tao were made, and since Hung had full knowledge of the alleged misrepresentations at the time he assigned the contract, he effectively accepted the conditions of the contract and waived any fraud claims he might have had as a result of the misrepresentations. Tao cited *Russell v. French & Associates, Inc.*, 709 S.W.2d 312, 317 (Tex.App.—Texarkana 1986, writ ref'd n.r.e.), in his motion as authority for this argument.

On appeal, Tao notes that, in order to prove ratification or waiver, he must show that Hung, after obtaining full knowledge of the fraud, either (1) continued to accept ben-

2. Tao's oral motion for directed verdict similarly asserted that "the evidence presented by plaintiffs has conclusively established ratification by the plaintiffs of the 'E' and 'F' transaction . . ." and "that the evidence conclusively establishes a waiver of the—any right to complain about the 'E' and 'F' transaction."

efits under the transaction or (2) conducted himself so as to recognize the transaction as binding. *LSR Joint Venture No. 2 v. Calleavit*, 837 S.W.2d 693, 699 (Tex.App.—Dallas 1992, writ denied); *see Spangler v. Jones*, 797 S.W.2d 125, 131 (Tex.App.—Dallas 1990, writ denied). Tao also notes that ratification or waiver of fraud has been found where a plaintiff undertook to investigate a matter himself and was able to investigate without hinderance from the defendant. *Laughlin v. FDIC*, 657 S.W.2d 477, 483 (Tex.App.—Tyler 1983, no writ); *Mann v. Rugel*, 228 S.W.2d 585, 587 (Tex.Civ.App.—Dallas 1950, no writ).

When they first entered negotiations for the purchase of land, Hung and Tao signed a "Letter of Intention," which recited the terms of the sale, including a purchase price of $1500 per acre and an additional $1000 per acre for a "Shellfish Culture License."[3] Hung claimed that Tao told him the license was costly and difficult for foreign nationals to obtain. Hung later learned that the license, for which he had paid a total of $2.6 million, was non-transferable and therefore worthless to him. He also learned that foreign nationals could obtain the license for themselves, and that the license cost only $50.

Tao argues that the Letter of Intent provided for investigation into the appropriate shrimp farming licenses by Hung, and that he had three months in which to conduct this investigation before the contract for sale was signed. The fact that Hung signed the contract after this investigation period, Tao claims, amounted to a waiver on his part of any claims of fraud regarding the license.

Hung also based his fraud allegations on Tao's alleged representation that a water pumping station located on Tao's property fronting the Arroyo Colorado[4] could supply sufficient water to the land Hung purchased (which had no direct access to the Arroyo Colorado) to allow him to operate a shrimp farm. After purchasing the land, Hung learned that the pumping station could not supply adequate water. He therefore purchased land from Tao that fronted the Arroyo Colorado, for $4600 per acre, and constructed a new pumping station in an attempt to save his investment. He also traded a portion of his original purchase for a third tract of land that connected the waterfront property with the originally purchased property, to facilitate transporting the water back to the shrimp farm ponds he intended to construct.

Tao argues that Hung was already aware of the claimed misrepresentations concerning the capacity of the original water pumping station when he purchased the waterfront acreage and the land connecting the waterfront tract with the original tract. He notes that Hung continued to make payments on the initial contract and exchanged a portion of the land covered under the original contract for new land even after becoming aware of the pump station misrepresentations. Finally, Tao argues that even after Hung claimed he learned of the misrepresentation regarding the shrimp license, he continued to make payments under the contract, assigned all the contracts to his company, filed an answer to a suit in Federal Court admitting continuing indebtedness to Tao, and attempted to get title to the land from Tao. Tao argues that these actions by Hung show that he continued to accept benefits under the transaction and conducted himself so as to recognize the transaction as binding.

Hung responds that he was not even aware that he had a claim for fraud against Tao until December, 1992, shortly before the suit was filed, and that he never had any intention of waiving his rights to such action.

3. The original "Letter of Intention" and "Contract for Sale" were drafted in Chinese and later translated into English. The actual terms of the Chinese letter and the contract are disputed, with Tao claiming the $1000 per acre was designated for commissions and finders fees for middlemen, rather than solely for the Shellfish Culture License. At trial, the plaintiff's translator testified that an addendum to the Chinese-language Contract for Sale stated that the $1000 per acre was for "rights and interest fee." Tao testified that the literal translation of the Chinese is "the man who holds the hog," a Chinese figure of speech meaning "middleman."

4. The Arroyo Colorado is a body of water that opens and flows into the Laguna Madre, which is separated from the Gulf of Mexico by Padre Island.

Hung argues that the defense of waiver requires a showing that the waiving party both knew that he had a right to the action and that he intended to relinquish that right. Hung cites for support *Sun Exploration & Prod. v. Benton*, 728 S.W.2d 35, 37 (Tex. 1987), *Trinity Nat. Life & Accident Ins. Co. v. Bomar*, 572 S.W.2d 790 (Tex.Civ.App.—Tyler 1978), *rev'd on other grounds*, 579 S.W.2d 464 (Tex.1979), and *Braugh v. Phillips*, 557 S.W.2d 155 (Tex.Civ.App.—Corpus Christi 1977, writ ref'd n.r.e.). Hung also notes that making payments in an effort to obtain title to land does not establish that he intended to waive his right to sue Tao for fraud, citing *Smallwood v. Singer*, 823 S.W.2d 319 (Tex.App.—Texarkana 1991, no writ).

[11, 12] In order to prove the ratification defense, Tao had to prove that Hung (1) had full knowledge of the fraudulent acts or breach at the time of ratification and (2) nevertheless intentionally chose to ratify the contract in spite of the alleged fraud. *Texacadian Fuels, Inc. v. Lone Star Energy Storage, Inc.*, 896 S.W.2d 233, 237 (Tex.App.—Houston [1st Dist.] 1995, writ denied); *LSR Joint Venture*, 837 S.W.2d at 699; *see also Spangler*, 797 S.W.2d at 131; *Wise v. Pena*, 552 S.W.2d 196, 200 (Tex.Civ.App.—Corpus Christi 1977, writ dism'd). The burden is on Tao to prove that Hung had full knowledge of the fraud and to prove that he made a voluntary, intentional choice to ratify the transaction in light of that knowledge. *Spangler*, 797 S.W.2d at 131. If the evidence of ratification is controverted, the question is for the trier of fact. *Id.*

> The "Letter of Intention" provided that
>
> Upon obtaining all information deemed necessary and satisfactory to the undersigned regarding Shellfish Culture License (No. 204–00053–0), the undersigned agrees to pay U.S. $2,643,900 (1,000 per acre) for the purchase of the License. You, the owner of the License, is [sic] obliged to disclose all information upon the request by the undersigned.

Hung testified that, while the letter of intent gave him the right to research the license, he did not have the ability to do so since he does not speak English well, he lives in Taiwan, and he does not understand "the legalities of this license." He stated that he trusted Tao regarding the license, and, although there are lawyers in Texas who could have researched the licensing requirements for him, he did not know any at the time. He acknowledged that he never asked to see a copy of the license or checked with any of the regulatory authorities that oversee such licenses.

[13] Tao's reliance on *Laughlin v. FDIC* and *Mann v. Rugel* is misplaced. Both of these cases stand for the proposition that, once a party has done some independent investigation of the facts, he can not thereafter complain that he relied on the misrepresentations of others regarding those same facts. As stated in *Mann*,

> Where a party who claims to have been defrauded had the means to have discovered the fraud, if any existed, *and undertakes to investigate for himself, and does make such investigation as he deems necessary*, and is not hindered or prevented from doing so by any act of the other party, it must be held as a matter of law that he has knowledge of everything that a proper investigation would disclose, and hence would not be justified in acting on fraudulent representations, if any were made to him, merely because they were made to him.

Mann v. Rugel, 228 S.W.2d 585, 587 (Tex.Civ.App.—Dallas 1950, no writ) (emphasis added). In *Laughlin*, the court determined that the plaintiff had relied upon his own information regarding the value of certain stock, rather than on the representations of others. As the court stated, "Texas courts have consistently held that *when a person makes his own investigation of the facts*, he cannot, as a matter of law, be said to have relied upon the misrepresentations of others." *Laughlin*, 657 S.W.2d at 483 (emphasis added) (citations omitted).

[14–16] In the present case, Hung made no independent inquiries into the shrimp license he purchased. A person must exercise reasonable ordinary care for the protection of his own interests and discover the existence of fraud if he has knowledge of facts that

would put a reasonably prudent person on inquiry. *Id.* at 482 (citing *Thigpen v. Locke*, 363 S.W.2d 247 (Tex.1962)). The court in *Laughlin* determined that the unusual nature of the transaction at issue put Laughlin on notice and should have required him to make further investigation. *Laughlin*, 657 S.W.2d at 482. In the present case, however, there is no evidence that Hung was aware of anything which would have put him on notice that he should make inquiry into the shrimp farming license, rather than simply relying on Tao's representations that the license was transferable and difficult for foreign nationals to obtain.[5] The fact that the letter of intent allowed Hung to obtain information he "deemed necessary and satisfactory" did not place any affirmative burden of investigation on him regarding the license. The fact that he signed the contract for sale some three months later, therefore, did not amount to a waiver of his fraud claims.

[17, 18] Furthermore, the fact that Hung assigned the contract to Hung Shrimp Farm and that he purchased additional land and continued to make payments on the contracts does not show that he had an affirmative intent to ratify the contracts or to waive his claims for fraud. Hung testified that he did not even know he had an action for fraud available to him until he conferred with an American attorney in late 1992. Shortly after learning that he had a claim for fraud, Hung sued Tao. He testified that he purchased the new land and constructed a pump station on that land in a futile effort to save his original investment. This action does not show an intent on his part to waive the fraud claim. Finally, continuing with the payments due under the contract does not show that Hung intended to waive his claims or ratify the contract. Acts done in affirmance of the original contract do not necessarily amount to a waiver of the right to sue for fraud. *Andrews v. Powell*, 242 S.W.2d 656, 661 (Tex. Civ.App.—Texarkana 1951, no writ). Tao did not show conclusively that Hung intended to waive his claims and ratify the contract in spite of his knowledge of the alleged misrepresentations. As the evidence regarding waiver and ratification was in dispute, it was appropriately a question for the fact finder. *Spangler*, 797 S.W.2d at 131. The trial court did not abuse its discretion in denying the motion for directed verdict on these grounds.

[19] Tao argues in the alternative that the failure of the jury to find waiver and ratification was against the great weight of the evidence. In order to attack a jury finding on appeal for being against the overwhelming weight of the evidence, a party must first raise the point of error in a motion for new trial. TEX.R. CIV. P. 324(b)(3). Tao's motion for new trial did not argue that the jury's failure to find waiver and ratification was against the great weight of the evidence. Point of error three is overruled.

Trial Amendment

By his fourth point of error, Tao claims that the trial court erred in denying leave to file a trial amendment raising the defenses of *res judicata*, collateral estoppel, and judicial admission and in denying his motion for directed verdict on these grounds.

Tao and Hung were parties to a garnishment suit in Federal Court prior to the suit at bar. In the federal case, certain third parties with claims against Tao sued Hung seeking garnishment of money he owed Tao pursuant to the sale of land. In that case, Hung admitted indebtedness to Tao under the Contract for Sale in the amount of $2,365,850. The federal court issued orders denying the garnishment.

Tao sought a trial amendment at the close of evidence in the trial, but before the jury charge was read, in order to raise the issues of *res judicata*, collateral estoppel, and judicial admission based on the federal proceedings. Hung's counsel argued against the tri-

5. Tao argues that any representations he might have made about the shrimp farming license were non-actionable opinions of law. Although we held that this argument was waived, we would note that representations concerning the law of foreign states or countries, which Tao's representations about Texas law certainly would be to Hung, are considered to be representations of fact, and therefore can support a fraud action. *Askew v. Smith*, 246 S.W.2d 920, 922–23 (Tex. Civ.App.—Dallas 1952, no writ); 41 TEX. JUR.3D. *Fraud and Deceit* § 19 (1985); 37 AM.JUR.2D. *Fraud and Deceit* § 80 (1968); 37 C.J.S., *Fraud* § 55 (1943).

al amendment, complaining that it would work an injustice to allow the trial amendment "at the very end of this lengthy trial ... and for the first time, with absolutely no notice to us." The trial court denied the motion.

[20] A trial court must allow a trial amendment unless the opposing party presents evidence of surprise or prejudice, or the amendment asserts a new cause of action or defense, and thus is facially prejudicial. *State Bar of Texas v. Kilpatrick*, 874 S.W.2d 656 (Tex.1994). While Tao's desired trial amendment did raise a new defense, Tao argues that such trial amendments should be allowed anyway when the new defense is purely legal in nature and does not require any factual development during discovery. Tao cites *Vermillion v. Haynes*, 147 Tex. 139, 215 S.W.2d 605, 609 (1948), where the Court determined that it was an abuse of discretion for the trial court to refuse a trial amendment raising the defense of limitations. Tao argues that the defenses he raised would have required no further fact development, and that Hung did not present any evidence of prejudice that would have been caused had the amendment been allowed.

Hung responds to this point of error by noting that the defenses in Tao's desired trial amendment were entirely new and offered only after the close of evidence on both sides. Hung argues that he had no prior notice of these defenses and indicated as much to the trial court. Hung claimed that allowing the trial amendment would subject him to unfair surprise. Hung also notes that in Tao's last filed pleading, filed just seven days before trial began, Tao did not raise these defenses, although he was aware of the facts upon which he sought the trial amendment well before that time. Hung alleges that the desired trial amendment amounted to an ambush, and that the trial court does not err in disallowing a trial amendment when the record reflects a lack of diligence on the part of the requesting party. *Sanchez v. Matthews*, 636 S.W.2d 455 (Tex.App.—San Antonio 1982, writ ref'd n.r.e.).

[21-24] Rule 94 requires that affirmative defenses such as estoppel, *res judicata* and "any other matter constituting an avoidance or affirmative defense" be pleaded. TEX.R. CIV. P. 94. A trial court has no discretion to deny a trial amendment unless: (1) the opposing party presents evidence of surprise or prejudice, or (2) the amendment asserts a new cause of action or defense and is thus prejudicial on its face and the opposing party objects. *See* TEX.R. CIV. P. 66; *Chapin & Chapin, Inc. v. Texas Sand & Gravel Co.*, 844 S.W.2d 664, 665 (Tex.1992); *White v. Sullins*, 917 S.W.2d 158, 161 (Tex.App.—Beaumont 1996, writ requested). If the amendment is not mandatory, the court's decision to allow or deny the trial amendment may be reversed only if it is a clear abuse of discretion. *Hardin v. Hardin*, 597 S.W.2d 347, 349–50 (Tex.1980). A party opposing a trial amendment does not have to prove prejudice or surprise if the amendment is a substantive one which changes the nature of the trial. *Chapin & Chapin*, 844 S.W.2d at 665. A newly plead affirmative defense substantially changes the nature of a trial. *White*, 917 S.W.2d at 161.

[25] Tao was aware of the facts that led him to seek the trial amendment well before the trial began, yet he chose to wait until the close of evidence to attempt to raise the affirmative defenses. Regardless of whether or not Hung presented sufficient evidence in the trial court that the amendment would work a surprise on him, the amendment raised a new affirmative defense, and was therefore prejudicial on its face. *Id.* The trial court therefore had discretion in allowing or disallowing the amendment. In this case, Hung noted for the trial court that he was surprised by the attempted trial amendment, and that it would be "a great injustice for them at the very end of this lengthy trial, to ask for a trial amendment, and for the first time, with absolutely no notice to us." Under the circumstances of this case, we cannot say that the trial court abused its discretion in disallowing the trial amendment at that late point in the trial. Tao's fourth point of error is overruled.

Expert's Testimony

In his ninth and final point of error, Tao complains of the trial court's denial of his

motion to strike the testimony of Mr. Robin Moore, a real estate appraiser called by Hung to testify regarding the value of the land. Tao argues that Hung provided him with one set of "comparable sales" figures during discovery, but that Mr. Moore testified concerning a completely different set of comparable sales at trial. Tao claims that this change was material and, since Mr. Moore's testimony was the only testimony that might have supported the amount of damages awarded by the jury, the testimony was harmful and should have been excluded.

Hung responds that the trial court did not abuse its discretion in denying Tao's motion to strike Mr. Moore's testimony. Mr. Moore's ultimate testimony regarding the value of the land did not change substantially from the amounts noted in Hung's answers to Tao's interrogatories,[6] so Hung argues that there was no surprise to Tao. Hung argues that the change from one set of comparable sales data to another (farm land to ranch land) was an inadvertent mistake on Mr. Moore's part, did not come to Hung's counsel's attention until Mr. Moore took the witness stand, and that Tao's counsel was given ample time to examine the new data and conducted a very thorough cross-examination of Mr. Moore. Hung also notes that the evidence of comparable sales was denied admission.

[26] We review the trial court's denial of the motion to strike Mr. Moore's testimony for an abuse of discretion. In such a review, we look to whether the trial court made its ruling without reference to any guiding rule or principle. *McDaniel v. Yarbrough*, 898 S.W.2d 251, 253 (Tex.1995).

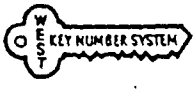
[27] Rule of Civil Procedure 215(5) provides that:

> A party who fails to respond to or supplement his response to a request for discovery shall not be entitled to present evidence which the party was under a duty to provide in a response or supplemental response or to offer the testimony of an expert witness or of any other person having knowledge of discoverable matter, *unless the trial court finds that good cause sufficient to require admission exists.* The burden of establishing good cause is upon the party offering the evidence and good cause must be shown in the record.

TEX.R. CIV. P. 215(5) (emphasis added). In determining whether good cause exists, the court may look at: 1) inadvertence of counsel, 2) lack of surprise, unfairness or ambush, 3) uniqueness of excluded evidence, and 4) whether or not the witness was deposed. *Patton v. Saint Joseph's Hosp.*, 887 S.W.2d 233, 239 (Tex.App.—Fort Worth 1994, writ denied) (citing *Alvarado v. Farah Mfg. Co.*, 830 S.W.2d 911, 915 (Tex.1992)).

[28] In the present case, these factors all favor the trial court's decision to allow Mr. Moore to testify. Mr. Moore testified that he mistakenly listed ranch land sales rather than farm land sales when he provided the answers to Tao's interrogatories. He stated that this was his mistake, not that of the attorneys. Additionally, Mr. Moore's ultimate valuations did not change significantly from his interrogatory responses to his trial testimony: his valuation changed from $475—$500 per acre to $450—$500 per acre. His valuation testimony was unique, in that he was the only expert to testify regarding the value of the land. Finally, although Mr. Moore was designated in Hung's discovery responses, Tao did not depose him. Under these circumstances, we cannot say that the trial court abused its discretion in overruling Tao's motion to strike Mr. Moore's testimony. Point of error nine is overruled.

The judgment of the trial court is AFFIRMED.



6. Mr. Moore valued the land at $475 to $500 per acre in the appellees' answers to interrogatories. At trial, Mr. Moore testified that the land had a value of $450 to $500 per acre.

Pamela K. BUCHANAN, Relator.

v.

Honorable Alan MAYFIELD, Judge, 74th District Court, McLennan County, Texas, Respondent.

No. 10-95-313-CV.

Court of Appeals of Texas, Waco.

June 12, 1996.

Patient, who brought negligence action against dentist claiming that due to his assistant's negligence she drank out of first patient's "spit cup," filed petition for mandamus relief from order of the 74th District Court, McLennan County, Alan Mayfield, J., which denied her motion to compel discovery of first patient's identity. The Court of Appeals, Cummings, J., held that: (1) dentist properly raised physician-patient privilege in answer to interrogatory; but (2) dentist was not "physician" under Texas law, and thus could not claim statutory privilege; and (3) mandamus relief was warranted.

Writ conditionally granted.

1. Pretrial Procedure ⇐251.1

Failure to timely object to interrogatories requesting privileged information constitutes waiver of privilege.

2. Pretrial Procedure ⇐251.1

Dentist's raising of physician-patient privilege in response to interrogatory specifically inquiring into identity of patient who allegedly used "spit cup" was sufficient to raise and preserve issue in action against dentist by another patient who claimed she mistakenly drank from that cup; fact that dentist did not raise privilege in response to general inquiry into identity of people who had knowledge of cause, in anther interrogatory, did not eviscerate effect of raising privilege in prior answer.

3. Witnesses ⇐208(3)

Dentist was not "physician", under Texas law, and thus could not invoke statutory claim of physician-patient privilege to keep communications between him and his patients confidential, notwithstanding fact that some functions performed by dentist were common to both dentists and medical doctors. Rules of Civ.Evid., Rule 509(a)(2).

See publication Words and Phrases for other judicial constructions and definitions.

4. Physicians and Surgeons ⇐15(9)

Dentist's obligation under Dental Practice Act to maintain confidences did not permit dentist to withhold identity of patient in action by another patient who claimed that, due to negligence of dentist and his assistant, she mistakenly drank out of first patient's "spit cup" since plaintiff patient was not seeking records of diagnosis made or treatment performed for and on first patient. Vernon's Ann.Texas Civ.St. art. 4549-2.

5. Physicians and Surgeons ⇐15(9)

Confidentiality provisions of Health and Safety Code, designed to protect as much as possible identity and other information provided to blood bank by blood donor, was inapplicable to case in which dental patient sought to discover identity of prior patient who had allegedly used "spit cup" prior to her; first dental patient could not expect same privilege of confidentiality. V.T.C.A., Health & Safety Code § 162.003.

6. Physicians and Surgeons ⇐15(9)

Communicable Disease Prevention and Control Act provision, allowing any person to require another person to undergo human immunodeficiency virus (HIV) test whenever person is accidentally exposed to blood or other bodily fluids of another, did not allow dentist to keep patient's identity secret in action by another patient claiming that, due to dentist's negligence, she drank from first patient's "spit cup." V.T.C.A., Health & Safety Code § 81.102(a)(5)(D), (c).

7. Physicians and Surgeons ⇐15(9)

Communicable Disease Prevention and Control Act reporting requirement for dentists when they either know or suspect that patient has "reportable disease" did not allow dentist to protect identity of patient from another patient who brought action against

dentist claiming she drank from first patient's "spit cup" because of dentist's negligence where there was no particularized suspicion that first patient was infected with human immunodeficiency virus (HIV). V.T.C.A., Health & Safety Code §§ 81.041, 81.042, 81.046, 81.052.

8. Pretrial Procedure ⇐40

Trial court did not act within its discretion, "in the interest of justice," in refusing to order dentist to disclose patient's identity in action by another patient who claimed she drank from first patient's "spit cup" due to dentist's negligence. Vernon's Ann.Texas Rules Civ.Proc., Rule 166b, subd. 5.

9. Mandamus ⇐4(3), 12

Mandamus will issue only to correct clear abuse of discretion for which there is no other adequate remedy by appeal; appeal will not be adequate where party's ability to present viable claim or defense at trial is vitiated or severely compromised by trial court's erroneous discovery ruling, including denial of discovery.

10. Mandamus ⇐32

Mandamus will properly lie when trial court has denied party's discovery request for evidence that goes to heart of his case.

11. Mandamus ⇐32

Mandamus relief was warranted with respect to trial court order that denied patient's motion to compel dentist to disclose identity of first patient, in patient's action against dentist claiming that, due to his negligence, patient drank from first patient's "spit cup" since identity of first patient was essential to patient's action.

Matthew C. Witt, Cowles & Thompson, Dallas, for relator.

Alan Mayfield, Waco, for respondent.

Thomas J. Blankenship, Waco, for real parties in interest.

Before CUMMINGS and VANCE, JJ.

OPINION

CUMMINGS, Justice.

This is an original mandamus proceeding instituted by Pamela K. Buchanan, relator, against respondent, Alan Mayfield, Judge of the 74th District Court in McLennan County. Buchanan seeks a writ of mandamus directing Judge Mayfield to rescind his order of October 23, 1995, and further directing Judge Mayfield to allow Buchanan to obtain from the real party in interest, W. Russell Ross, D.D.S., the name of a patient (hereafter referred to anonymously as "Jane Doe") who allegedly used a "spit cup" from which Buchanan later drank. We conditionally grant the writ.

I. Procedural and Factual Background

According to Buchanan, she visited Dr. Ross, a dentist, on October 7, 1993, to have her teeth cleaned and her braces removed. During the course of her visit Buchanan was attended to in two different examination rooms. As a result of her changing rooms, Buchanan mistakenly drank from a cup that, according to Buchanan, was used by Jane Doe. Dr. Ross denies that Buchanan used any cup but her own.

Buchanan sued Dr. Ross under a vicarious liability theory for the allegedly negligent acts of his assistant in failing to make certain that Buchanan did not drink from anyone else's cup. She also alleged that Dr. Ross was directly negligent in failing to have a policy in place to ensure that patients do not drink from another patient's cup, in hiring his assistant, in failing to discipline his assistant for previous careless behavior, and in failing to provide Buchanan with promised information apparently on the possibility of contracting the human immunodeficiency virus (HIV), the virus which causes AIDS, by drinking the saliva and blood of a person who has tested negative for the presence of HIV in his system.[1]

Buchanan's petition before the trial court demonstrates that she is primarily concerned

1. We express no opinion on whether Buchanan sued Dr. Ross for any intentional torts committed either by him or an employee.

with the possibility of having contracted HIV. The record indicates that Jane Doe has twice been tested for HIV and Hepatitis B, on October 12, 1993, and on August 11, 1995. She tested negative each time.

II. Buchanan's Waiver Argument

Buchanan first argues that Dr. Ross waived his objection to her discovery request. She contends that she propounded two different interrogatories to Dr. Ross on the identity of Jane Doe but Dr. Ross only claimed the physician-patient privilege in response to one of them, thereby waiving the privilege. The two interrogatories along with Dr. Ross's answers are indicated below.

Interrogatory Number Eight

> Provide the name, address, and telephone number of the patient that you had tested for the HIV virus and Hepatitis B in conjunction with Plaintiff's episode at your offices which occurred on October 7, 1993. Explain why you believed such testing to be necessary.
>
> Answer: Defendant objects to Interrogatory No. 8 for the reason that it seeks confidential information and such a request violates the Physician/Patient Privilege. Without waiving that objection, the testing was done to ease any concerns on the part of Pamela Buchanan, i.e. to show that even if we assumed she had drunk from someone else's cup, she hadn't been exposed to any communicable diseases.

Interrogatory Number Ten

> Provide the names, addresses, and telephone numbers of all persons with knowledge of facts relevant to this cause. Provide a brief statement with regard to each of these persons giving what knowledge that person has.
>
> Answer: Defendant objects to Interrogatory No. 10 to the extent it requires this Defendant to state with specificity the particular knowledge each person possesses and any opinions of the person inquired about in Interrogatory No. 10. Such a request exceeds the scope of discovery allowed for and permissible under the Texas Rules of Civil Procedure. Moreover, such request calls for the production of information protected by the work product privilege, witness statements privilege, party communications privilege, post-accident investigation privilege and attorney-client privilege....

Dr. Ross in his answer to Interrogatory Number 10 then listed the requested information on a number of people who might have information about Buchanan's complaint, but information on Jane Doe was not included.

[1, 2] The failure to timely object to interrogatories requesting privileged information constitutes a waiver of the privilege. *Hobson v. Moore*, 734 S.W.2d 340, 341 (Tex. 1987) (orig. proceeding). Buchanan contends that Dr. Ross's failure to raise the physician-patient privilege in his answer to Interrogatory Number 10 waived the privilege. We disagree. Without question, Dr. Ross's raising of the privilege in response to the specific inquiry into the identity of Jane Doe in Interrogatory Number 8 was sufficient to raise and preserve the complaint. Dr. Ross's failure to again raise the privilege in response to the general inquiry in Interrogatory Number 10 into the identity of people who had knowledge of the cause did not eviscerate the effect of Dr. Ross's raising of the privilege in his answer to Interrogatory Number 8. Buchanan's waiver argument is without merit.

III. Whether a Dentist-Patient Privilege Exists Under Rule of Civil Evidence 509

The issue to be addressed at this juncture is whether Dr. Ross may properly invoke the physician-patient privilege on the behalf of Jane Doe to prevent the disclosure of her identity. Rule 509 of the Rules of Civil Evidence provides that "[c]onfidential communications between a physician and a patient, relative to or in connection with any professional services rendered by a physician to the patient are privileged and may not be disclosed." Tex.R. Civ. Evid. 509(b)(1). Rule 509(c)(2) allows physicians to invoke the privilege on the behalf of their patients.

TEX.R. CIV. EVID. 509(c)(2). The parties agree that Dr. Ross invoked the privilege on the behalf of Jane Doe and that the identity of Jane Doe would be confidential information under the rule. *See* TEX.R. CIV. EVID. 509(b)(2). The only disputed question is whether Dr. Ross, as a dentist, is entitled to this privilege expressly reserved by the rule to "physicians."

[3] A physician is defined in rule 509 as "a person licensed to practice medicine in any state or nation, or reasonably believed by the patient so to be." TEX.R. CIV. EVID. 509(a)(2). The Medical Practice Act is the statutory scheme that governs the licensing of physicians in Texas. *See* TEX.REV.CIV. STAT. ANN. art. 4495b (Vernon Pamph.1996). Dentists who confine their practice strictly to dentistry are specifically excluded from application of the Medical Practice Act. *Id.* at § 3.06(b)(1). Dr. Ross is licensed to practice dentistry under the Dental Practice Act, and the record indicates that Dr. Ross's practice is exclusively in dentistry. *See* TEX.REV.CIV. STAT. ANN. arts. 4543–4551o (Vernon 1976 & Pamph.1996). Therefore, Dr. Ross is not a physician under Texas law, and consequently, he may not claim a privilege under rule 509 to keep any communications between him and his patients confidential.

a. Dr. Ross's Performance of Physician-Like Procedures

Nevertheless, Dr. Ross argues that he should be considered a physician for rule 509 purposes because (1) he, while not a medical doctor, is a doctor of dental surgery, (2) he can prescribe drugs, and (3) he can perform oral surgery. All of these functions are properly within the province of dentistry. *See* TEX.REV.CIV. STAT. ANN. arts. 4551a(1), 4551a(7) (Vernon Pamph.1996). The fact that these functions may be common to both dentists and medical doctors, however, does not make Dr. Ross a physician. Dr. Ross's arguments that he should be considered a physician under rule 509 because he performs some of the functions of a medical doctor are without merit.

b. A Dentist's Obligations Under the Dental Practice Act to Maintain Confidences

[4] Dr. Ross next argues that he is obliged by article 4549–2 of the Dental Practice Act not to disclose the identity of Jane Doe. *Id.* art. 4549–2. Article 4549–2 reads:

> Records of the diagnosis made and the treatment performed for and on a dental patient shall be the property of the dentist who performs the dental service and may not be sold, pledged as collateral, or otherwise transferred to any person other than the patient unless the other person is a dentist licensed by the Board and the transfer is made in compliance with rules relating to the transfer of records as may be adopted by the Board. Nothing herein shall prevent the voluntary submission of records to insurance companies for the purpose of determining benefits.

Id. Buchanan, however, is not seeking the "[r]ecords of the diagnosis made and the treatment performed for and on" Jane Doe. Buchanan is seeking only the identity of Jane Doe so that she may depose her on what knowledge she may possess in the cause. Dr. Ross's argument that article 4549–2 applies is without merit.

c. Dr. Ross's Other Statutory Arguments

Dr. Ross makes several arguments based upon three different statutory units of the Health & Safety Code. The first argument is based upon chapter 162 of the Code which provides for the confidentiality of blood donors. *See* TEX. HEALTH & SAFETY CODE ANN. § 162.001–.015 (Vernon 1992 & Supp.1996). Chapter 162 requires blood banks to test each potential donor for the presence of HIV, AIDS, hepatitis, and other infectious diseases. *See* TEX. HEALTH & SAFETY CODE ANN. § 162.002(a) (Vernon 1992). The test results, however, are confidential, and they, along with the identity of the blood donor, generally cannot be disclosed. *See id.* §§ 162.004–.011. His second argument is derived from subchapter F of the Communicable Disease Prevention and Control Act. *See* TEX. HEALTH & SAFETY CODE ANN. § 81.101–.109 (Vernon 1992 & Supp.1996). Subchapter F provides for instances when one person may

compel another person to undergo testing for the presence of HIV in that person's system. *See id.* And the third argument is based upon subchapter C of the Communicable Disease Prevention and Control Act which requires dentists, physicians, and veterinarians to report to designated authorities their suspicions that a patient might have a communicable disease, such as AIDS. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 81.041–.052 (Vernon 1992 & Supp.1996). Both subchapters F and C have confidentiality provisions. *See id.* §§ 81.046, .103. We disagree with each of Dr. Ross's arguments.

1. CHAPTER 162 OF THE HEALTH & SAFETY CODE

[5] Dr. Ross argues that if chapter 162 of the Health & Safety Code allows a blood donor to keep his name confidential then Jane Doe should be allowed to keep her name confidential as well. The flaw in Dr. Ross's argument is that blood donors arrive at the blood bank under a cloak of confidentiality. *See* TEX. HEALTH & SAFETY CODE ANN. § 162.003. This cloak may only be pierced in limited situations and only to the extent provided by chapter 162. *Id.* As we held above, a dental patient is not covered by the same cloak of confidentiality when he walks into his dentist's office. Therefore, the confidentiality provisions of chapter 162, designed to protect as much as possible the identity and other information provided to the blood bank by the blood donor, is inapplicable to the case before us where the dental patient cannot expect the same privilege of confidentiality. Dr. Ross's reliance upon chapter 162 is misplaced, and therefore his argument in this vein is without merit.[2]

2. SUBCHAPTER F OF THE COMMUNICABLE DISEASE PREVENTION AND CONTROL ACT

Subchapter F of the Communicable Disease Prevention and Control Act is also inapposite to the case before us. Section 81.102(a)(5)(D) of the Act appears to allow any person at any time in any situation to require another person to undergo an HIV-test whenever the person is accidentally exposed to the blood or other bodily fluids of another, notwithstanding any suspicion that the other person is infected with HIV. TEX. HEALTH & SAFETY CODE ANN. § 81.102(a)(5)(D) (Vernon Supp.1996).[3] Dr. Ross argues that when section 81.102(a)(5)(D) is invoked, the person requesting the test is entitled only to the test results and not to the identity of the person being tested. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 81.102(c), .107 (Vernon 1992). Dr. Ross concludes, therefore, that Buchanan is entitled only to Jane Doe's test results and not Jane Doe's identity.

[6] We disagree. Section 81.102(a)(5)(D) presumes that the person requesting the test already knows the identity of the person to whose bodily fluids he has been exposed. *See* TEX. HEALTH & SAFETY CODE ANN. § 81.102(a)(5)(D). Subchapter F provides a mechanism by which the person who fears contagion may require the other to undergo a test to determine whether that person is infected with HIV. *Id.* There is a reason that identity is mentioned only rarely throughout

2. Interestingly, chapter 162 of the Health & Safety Code provides for the taking of discovery from these anonymous donors in a manner that preserves the donors' anonymity. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 162.010(e), .011(e) (Vernon 1992).

3. Section 81.102(a)(5)(D) is worded as follows: "A person may not require another person to undergo a medical procedure or test designed to determine or help determine if a person has AIDS or HIV infection, antibodies to HIV, or infection with any other probable causative agent of AIDS unless ... the medical procedure or test is necessary ... to manage accidental exposure to blood or other bodily fluids, but only if the test is conducted under written infectious disease control protocols adopted by the health care agency or facility[.]" TEX. HEALTH & SAFETY CODE ANN. § 81.102(a)(5)(D) (Vernon Supp.1996). The wording of section 81.102(a)(5)(D) suggests that its scope may not be as wide-reaching as Dr. Ross argues but may be restricted to situations where a management system is in place at medical facilities where the accidental exposure to another's bodily fluids is likely. *See id.*; *see also* Julie Edwards, Note, *Controlling the Epidemic: The Texas AIDS Reporting Statute*, 41 BAYLOR L. REV. 399, 408–09 nn. 68–69 (1989). For the purposes of this opinion, we will assume, without deciding, that section 81.102(a)(5)(D) applies to everyone who, in any situation, may have accidentally been exposed to the bodily fluids of another.

subchapter F, and that is because subchapter F addresses situations where the person fearing contagion already knows the identity of the person to whose bodily fluids he has been exposed. That person is only concerned thereafter with whether the other person was infected with HIV. This is the reason subchapter F provides that the identifying information of the test results, although not the test results themselves, will be destroyed only *after* the test results have been disclosed *to the person requesting the test. See id.* § 81.107(b)(2).

Of course, we can envision a scenario, such as the one before us, where the identity of the other person to be tested is not known to the person who fears contagion and the person fearing contagion must then go through an intermediary, such as Dr. Ross, to learn the identity of the person to be tested. But the fact that subchapter F provides only for the disclosure of HIV-test results and not the identity of the person being tested does not mean the intermediary can keep the identity of the person to be tested a secret. *See id.* Under the facts in this case, Dr. Ross has denied that Buchanan drank from Jane Doe's cup. Jane Doe possesses information directly relevant to this issue, and subchapter F does not operate to allow Dr. Ross to keep Jane Doe's identity from Buchanan. Moreover, we are aware of no other relationship between Dr. Ross and Jane Doe or obligation imposed upon Dr. Ross that will serve to keep the identifying information confidential, and neither has Dr. Ross plead any. Dr. Ross's argument under subchapter F of the Communicable Disease Prevention and Control act is without merit.

3. SUBCHAPTER C OF THE COMMUNICABLE DISEASE PREVENTION AND CONTROL ACT

[7] In his third statutory argument Dr. Ross contends that subchapter C of the Communicable Disease Prevention and Control Act can be read to preclude him from disclosing Jane Doe's identity. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 81.041–.052. Subchapter C, however, has no application to this case. Subchapter C lists reporting requirements for dentists, physicians, and veterinarians when they either know or suspect that a patient (or an animal in the case of a veterinarian) has a "reportable disease," as determined by the Texas Board of Health. TEX. HEALTH & SAFETY CODE ANN. §§ 81.041–.042 (Vernon 1992). The reports are confidential and the information contained therein, including any identifying information, may only be disclosed in a few limited circumstances and then only to a limited list of people. TEX. HEALTH & SAFETY CODE ANN. § 81.046 (Vernon 1992 & Supp.1996). There is no particularized suspicion on the part of Buchanan that Jane Doe is infected with HIV. Indeed, Jane Doe has twice tested negative for the presence of HIV in her body. The obligations of dentists, physicians, and veterinarians to make confidential reports on their patients (or animals) who either have or are suspected of having certain communicable diseases are simply irrelevant to the case before us where a third party is trying to learn whether a dentist's patient may be infected with a contagious disease. Dr. Ross's argument based upon subchapter C of the Communicable Disease Prevention and Control Act is without merit.

d. Public Policy Considerations

Dr. Ross argues at length that there is no meaningful distinction between a dentist and a physician for rule 509 purposes because both are in the profession of healing and the purpose of rule 509 is to encourage patients to be completely open in discussing their medical conditions with their physicians so that they may be properly treated. *See* 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2380a (1961). Our holding, however, is demanded by the wording of rule 509 and the statutory provisions of the Medical Practice Act and the Dental Practice Act. Dr. Ross may be correct in his assessment of the public policy considerations at issue, but his recourse is not with this court but with the Supreme Court as the author of the Texas Rules of Civil Evidence or with the legislature. His public policy argument is misdirected.

e. Refusal to Disclose in the Interest of Justice

[8] As a final argument, Dr. Ross contends the trial court did not err in refusing to

order Dr. Ross to disclose Jane Doe's identity because his decision was made in the interest of justice. Rule of Civil Procedure 166b(5) provides the rule on protective orders for discovery:

> On motion specifying the grounds and made by any person against or from whom discovery is sought under these rules, the court may make any order in the interest of justice necessary to protect the movant from undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights. Motions or responses made under this rule may have exhibits attached including affidavits, discovery pleadings, or any other documents. Specifically, the court's authority as to such orders extends to, although it is not necessarily limited by, any of the following:
>
> a. ordering that requested discovery not be sought in whole or in part, or that the extent or subject matter of discovery be limited, or that it not be undertaken at the time or place specified.
>
> b. ordering that the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court.
>
> c. ordering that for good cause shown results of discovery be sealed or otherwise adequately protected, that its distribution be limited, or that its disclosure be restricted....

TEX.R. CIV. PROC. 166b(5). We decline to conclude that the trial court was within its discretion, "in the interest of justice," to completely preclude Buchanan from learning the identity of Jane Doe. If the trial court should hereafter decide to issue a protective order to prevent Buchanan from disclosing Jane Doe's identity to anyone else, rule 166b(5) provides him that authority. But the rule does not allow the trial court to keep Jane Doe's identity from Buchanan. Dr. Ross's argument is without merit.

IV. WHETHER MANDAMUS RELIEF IS PROPER

[9, 10] We will now address the question of whether mandamus will properly lie in this case. Mandamus will issue only to correct a clear abuse of discretion for which there is no other adequate remedy by appeal. *Walker v. Packer*, 827 S.W.2d 833, 839–40 (Tex.1992) (orig. proceeding). An appeal will not be adequate where a party's ability to present a viable claim or defense at trial is vitiated or severely compromised by the trial court's erroneous discovery ruling, including the denial of discovery. *Montalvo v. Fourth Court of Appeals*, 917 S.W.2d 1, 2 (Tex.1995) (orig. proceeding); *Able Supply Co. v. Moye*, 898 S.W.2d 766, 772 (Tex.1995) (orig. proceeding); *Walker*, 827 S.W.2d at 843. In other words, mandamus will properly lie when the trial court has denied a party's discovery request for evidence that goes to the heart of his case. *Able Supply*, 898 S.W.2d at 772.

[11] Essential to Buchanan's cause of action is the identity of the person who used the "spit cup" prior to her, whether Jane Doe, some other party, or Buchanan herself. Dr. Ross has affirmatively denied that the cup at issue was used by Jane Doe. Buchanan has sought the identity of Jane Doe to learn from her facts relevant to the issue of whether she used the cup, such as, the physical characteristics of the cup, whether she left any blood on the cup (Buchanan contends there was blood on the cup she used), and whether she saw Dr. Ross's assistant dispose of the cup after she used it. The information sought by Buchanan directly impacts her ability to demonstrate that Jane Doe was the party who used the same cup from which she drank. We find that Buchanan's inquiry into the identity of Jane Doe was reasonably calculated to lead to the discovery of admissible evidence. *See* TEX.R. CIV. P. 166b(2)(a). Because Buchanan has been denied the discovery of information that goes to the heart of her case, she does not have an adequate remedy by appeal. Therefore, mandamus will properly lie.

V. ATTORNEY'S FEES AND COSTS

As a final matter, Buchanan argues that the trial court erred in failing to award her expenses, including attorney's fees, for the prosecution of her Motion to Compel Discovery and for Sanctions. Rule of Civil Procedure 215(1)(d), however, restricts the review of such orders to appeals from the final

judgment. *See* TEX.R. CIV. P. 215(1)(d). Therefore, we will not consider Buchanan's complaint.

We conclude the trial court's denial of Buchanan's Motion to Compel Discovery was a clear abuse of discretion that left Buchanan with no adequate remedy by appeal. Therefore, mandamus is an appropriate remedy. We are confident that the trial court will promptly set aside its order denying Buchanan's motion and will enter an alternative order allowing Buchanan to learn Jane Doe's identity or provide some other suitable relief.[4] The writ will issue only upon its failure to do so.

The writ is conditionally granted.

STATE of Texas, Appellant

v.

Bryon Autry PRESTON and Glenda Preston, Appellees.

Nos. 11-95-321-CR, 11-95-322-CR.

Court of Appeals of Texas, Eastland.

June 13, 1996.

Defendants charged with hindering apprehension of third party who was arrested inside their home filed motion to suppress. The District Court, Comanche County, James E. Morgan, J., granted motion, and State appealed. The Court of Appeals, Wright, J., held that: (1) plain view exception to warrant requirement did not apply to police officers' warrantless entry into defendants' home while trying to execute arrest warrant for third party, but (2) suppression order was overly broad.

Affirmed as reformed.

1. Criminal Law ⇐394.6(5), 1158(4)

At hearing on motion to suppress, trial court is sole and exclusive trier of fact and is judge of credibility of witnesses and weight to be given to their testimony; if they are supported by the record, trial court's findings will not be disturbed.

2. Criminal Law ⇐1153(1)

Absent abuse of discretion, trial court's ruling on motion to suppress will be upheld if it is correct on any theory of law applicable to case.

3. Criminal Law ⇐394.4(3)
Searches and Seizures ⇐24

Searches without warrants are per se unreasonable, and objects seized are inadmissible absent certain well-recognized exceptions. U.S.C.A. Const.Amend. 4.

4. Arrest ⇐68(10)

Absent consent or exigent circumstances, officers who are seeking to arrest suspect in home of third parties must obtain search warrant. U.S.C.A. Const.Amend. 4.

5. Searches and Seizures ⇐47.1

Exception to search warrant requirement exists in those situations in which evidence sought to be suppressed is in plain view. U.S.C.A. Const.Amend. 4.

6. Searches and Seizures ⇐47.1

Under "plain view" doctrine, if officers are lawfully present at place from which they observed evidence which is sought to be suppressed, then there was no search. U.S.C.A. Const.Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

4. This opinion should not read to mandate that the disclosure of Jane Doe's identity to Buchanan is the only solution to Buchanan's problem. In her mandamus petition, Buchanan asserts that she only wants to know Jane Doe's identity so that she can learn from her information about the cup and whether she had ever been told the reason she was tested for HIV. Deposing Jane Doe, or conducting some other form of discovery, in a manner that allows her to continue to conceal her identity may be a workable solution agreeable to both parties. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 161.010(e), .011(e).

CHART SHOWING ACTION TAKEN
BY SUPREME COURT ADVISORY COMMITTEE
AT MEETING OF SEPTEMBER 20, 1996
NO. 3

RULE NO.	ACTION TAKEN BY SUPREME COURT ADVISORY COMMITTEE
606 - CIV & CRIM	RCP 327 had previously been amended to conform to draft suggested by Evidence Committee so that rules read the same - rule as presented by Evidence Committee adopted
702 - CIV	Prepared no rule on this
503(a)(2) - CIV	Made no change in existing rule
504 - CRIM	Rule as drafted by Evidence Committee adopted
New Rule 1009 - CIV & CRIM	Sent back to Evidence Committee for redraft
CIV & CRIM UNIFIED RULES	To be discussed at next meeting

REVISED 4-15-96 - CONSISTENT WITH FRCP 327

RULE 606 OF THE RULES OF PROCEDURE (BOTH CRIMINAL AND CIVIL)

RULE 606. COMPETENCY OF JUROR AS A WITNESS

(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting as a juror. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the jury's deliberations, or on any juror's mind or emotions or mental processes, as influencing any ~~other~~* juror's assent to or dissent from the verdict. Nor may a juror's affidavit or any statement by a juror concerning any matter about which the juror would be precluded from testifying be admitted in evidence for any of these purposes. However, a juror may testify whether: (i) any outside influence was improperly brought to bear upon any juror; or (ii) the juror was qualified to serve.

* Change from Rule 327 recommended by Evidence Subcommittee

(APPROVED BY SUPREME COURT ADVISORY COMMITTEE SEPTEMBER 20, 1996)

RULE 606 OF THE RULES OF PROCEDURE
(BOTH CRIMINAL AND CIVIL)

RULE 606. COMPETENCY OF JUROR AS A WITNESS

(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting as a juror. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) **Inquiry into validity of verdict or indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the jury's deliberations, or on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict. Nor may a juror's affidavit or any statement by a juror concerning any matter about which the juror would be precluded from testifying be admitted in evidence for any of these purposes. However, a juror may testify whether: (i) any outside influence was improperly brought to bear upon any juror; or (ii) the juror was qualified to serve.

3-19-96

The following is a redraft of Rule 504 and the part that is amended to be consistent with the latest Legislative Act and with Article 38.10 of the Code of Criminal Procedure.

(b) Exceptions. The privilege of a person's spouse not to be called as a witness for the state does not apply (1) in any proceeding in which the person is charged with a crime committed against the person's spouse, a minor child, or a member of the household of either spouse; or (2) as to matters occurring prior to the marriage.

REDLINED VERSION

(b) Exceptions. ~~Except in a proceeding where the accused is charged with a crime committed during the marriage against the spouse, there is no privilege under this rule~~ The privilege of a person's spouse not to be called as a witness for the state does not apply (1) in ~~a~~ any proceeding in which ~~an accused~~ the person is charged with a crime committed against the person's spouse, ~~the person of any~~ a minor child or ~~any~~ a member of the household of either spouse; or (2) as to matters occurring prior to the marriage.

(b) Exceptions. The privilege of a person's spouse not to be called as a witness for the state does not apply (1) in any proceeding in which the person is charged with a crime committed against the person's spouse, a minor child, or a member of the household of either spouse; or (2) as to matters occurring prior to the marriage.

NOTE - O AROUND AN ITEM MEANS NOT MADE IN M. PRINCE DRAFT OF 8-6-96

CONFIDENTIAL MEMORANDUM

TO: Lee Parsley

FROM: Paula Krause

DATE: 6/21/96

RE: Review of Proposed Unified Texas Rules of Evidence

****

Lee, following is a list of the broad topics I think need to be addressed, a list of small, mostly typographical recommended corrections, and some questions.

BROAD TOPICS STILL TO BE ADDRESSED:

1. Rule 503(a)(2) Lawyer-Client Privilege. The proposal regarding non-natural clients was not included in the 6/13/96 draft received from Mike Prince.

2. Gender Neutrality. There are many places where the words "him," "his," etc. were not changed as recommended:

510(a)(3)(C)
604
609(a)
615(f)(1)
705(a) and (b)
801, Note (4).
803(18), (19), (21) and (24)
806
902(2) and (3)

3. Convention Regarding Styles of Subparagraphs. To be consistent with the Federal Rules and the prior Texas Rules, the first level of subparagraphs (i.e., (a), (b), (c), etc.) should be in bold-face type; the second level (i.e., (1), (2), (3), etc.) should be in italics; the third level (i.e., (A), (B), (C), etc.) should just be plain. The 6/13/96 draft received from Mike Prince has all levels in bold-face type:

101(3)	601(a)
103(a)	801(e)
404(a)	803
503(d)	804(b)
504(b), (d)	901
508(c)	902

4. Convention Regarding Capitalization of Subparagraphs. If a subparagraph has a title, it is appropriate for the subparagraph to start with a capital letter. If it does not have a title and is one of a list, it should not begin with a capital. The following subparagraphs begin with capitals when they should not:

101(c)(2)(A)-(E)
101(c)(3)(C)(i)-(vi)
501(1)-(4)
503(b)(6)

drop Ann.

5. Convention Regarding Citations to Rules. When citing to a rule, the proper form is in small caps: TEX. REV. CIV. STAT. ~~ANN.~~, not Tex. Rev. Civ. Stat. Ann. All such cites need to be changed. Also, such cite should be to: TEX. R. CIV. PRO. 166b, not to Rule 166b of the Texas Rules of Civil Procedure.

Tex. R. Civ. P.

I think it should be Texas Rule of Civil Procedure 166b if in text. Abbreviate only if a citation:

503, Notes and Comments
509(c)(3), (e)(5), (e)(7), (e)(8), (f)(1), and Notes and Comments
510(b)(4), (d)(7), and Notes and Comments
706 (not sure if this one needs to be changed)
801(e)(3) (not sure about this one)
902, Notes and Comments
1009(a) and (b) (either the separate or combined versions)

6. Usage of - or /.

Rule 503 is entitled "LAWYER-CLIENT PRIVILEGE." In the notes, it is typed as "lawyer/client privilege."

I prefer the hyphen

Rule 504 is entitled "HUSBAND-WIFE PRIVILEGES." Also, why the S on privileges?

Rule 509 is entitled "PHYSICIAN/PATIENT PRIVILEGE." In 509(b) and the notes, it is typed as "physician-patient privilege."

Rule 510 in the notes refers to "patient/professional communications."

This should be referred to CCA. (7)

Rule 508(c)(2) — Exceptions to the Identity of Informer Rule. The 6/13/96 draft changed language from "the court may direct that testimony be taken" to "the court shall direct...."

It came from Tex. R. Civ. E. 513(c). There is no civil counterpart. (8)

Rule 513(d) — Jury Instruction regarding Comment or Inference From Claim of Privilege. The 6/13/96 draft added "In criminal cases" before the rule. Is this subparagraph to be limited solely to criminal cases?

(9)

Rule 705(d) — Balancing Test regarding Disclosure of Facts or Data Underlying Expert Opinion. The 6/13/96 draft added "In criminal cases" before the rule. Is this subparagraph to be limited solely to criminal cases?

It came from the criminal rule. Note that the civil rule follows the criminal rule (but does not duplicate it).

TYPOGRAPHICAL COMMENTS

1. Rule 106, Notes and Comments.
The following sentence should have "party's", not "parties'":

> This rule does not in any way circumscribe the right of a party to develop fully the matter on cross-examination or as part of the parties' own case.

yes

Also, the Committee has added to the Notes and Comments.

(2) Rule 405(a).
The following sentence sounds very awkward:

> In all cases in which evidence of a person's character or character trait of a person is admissible...

Fed Rule: In all cases in which evidence of character or a trait of character of a person is admissible...

Maybe we should follow the federal rule.

It would sound better and be more clear this way:

> In all cases in which evidence of a person's character or character trait(s) is admissible...

(3) Rule 405(b).
This sentence also sounds awkward:

> In cases in which character or character trait of a person is an essential element...

Fed Rule: In cases in which character or a trait of character of a person is an essential element

same

It would sound better:

> In cases in which a person's character or character trait(s) is an essential element...

(4) Rule 410(4).
Verb in wrong tense:

> any statement made...which do not result in a plea...or which do result in a plea...

Should be:

> any statement made...which does not result in a plea...or which does result [or perhaps "which results"] in a plea...

yes - for CCA

5. Rule 501(4): Needs to have a period at the end.

OK

6. Rule 503(b) General Rule of Privilege.

Rule uses "the" throughout

The words "the client's lawyer" were changed to "a" or "the" in (b)(1) and (3):

(1) between the client or a representative of the client and the lawyer or a representative of the lawyer

(3) by the client or a representative of the client or a lawyer or a representative of the lawyer to a lawyer

It is much clear with "the client's lawyer":

yes

(1) between the client or a representative of the client and the client's lawyer or a representative of the lawyer [~~or "the lawyer's representative"~~]

would commas help?

(3) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, [~~or "the lawyer's representative"~~] to a lawyer

7. Rule 503, Notes and Comments.

yes

The cite is to Tex. Crim. R. Evid. Should be to TEX. R. CRIM. EVID.

8. Rule 504(d) Exceptions to the Husband-Wife Confidential Communication Privilege. The Committee did not include the "Certain Criminal Offense" subsection. Though it is basically the same wording as what is in the (e)(1) exception to the privilege not to testify in a criminal case, one could waive the privilege not to testify in a criminal case, but still want to invoke the confidential communication privilege regarding crimes against the spouse or a minor child while on the stand. Shouldn't we be clear that the spouse can both be required to be called as a witness in such a proceeding and be required to reveal confidential communications while on the stand?

this sounds correct to me, but we need to refer it to the CCA.

For example, Wife is called to testify against Husband in a criminal charge of sexually abusing a child. Wife did not see the abuse happen, but Husband told her about it. Given the exception in (e)(2), Wife cannot refuse to be called as a witness. But when asked on the stand about the abuse, Wife could invoke the confidential communication privilege because there is no exception in (d) removing the protection of the privilege in such a proceeding.

Maybe we should prepare a list of items we are referring to the CCA. Should we make any recommendations?

9. Rule 505(c).

The section currently reads:

> The privilege may be claimed by the person, by the person's guardian or conservator, or by the personal representative of the person if the person is deceased. The person who was the clergyman at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the communicant.

All of the references to "the person" get a bit confusing. Also, there is still a reference to "clergyman." The section sounds better like this:

> The privilege may be claimed by the person, by the person's guardian or conservator, or by the personal representative of the person if the person is deceased. The member of the clergy at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the communicant.

Alternative: "the member of the clergy to whom the communication was made is presumed to have authority..."

Or:

> ... The individual who was a member of the clergy at the time...

I don't know. We need to be uniform. (10.) Rule 508(c)(3). Should "The judge" be changed to "The court"?

11. Rule 509(a)(3) and 510(a)(4):

The wording is confusing:

> A communication is "confidential" if not intended to be disclosed to third <u>persons</u> other than those present to further the interest of the patient in the consultation, examination or interview, or <u>persons</u> reasonably necessary for the transmission of the communication, or <u>persons</u> who are participating in the diagnosis and treatment under the direction of the physician...

The other two reference to "persons" seems like the communication was not intended to be disclosed to them. But the opposite is true. It would be clearer like this:

I agree

> A communication is "confidential" if not intended to be disclosed to third persons other than <u>those</u> present to further the interest of the patient in consultation, examination or interview, or <u>those</u> reasonably necessary for the transmission of the communication, or <u>those</u> who are participating in the diagnosis and treatment under the direction of the physician...

12. Rule 509(e)(3). There are too many spaces between the words "services" and "rendered."

OK

13. Rule 509(e)(5). The Committee's version refers to Tex. Rev. Civ. Stat. Ann. arts. 4526..., while yours refers to arts. 4525.... Which is correct?

14. Rule 509(e)(7)(C). The Committee has a period after Chapter 411, but it should be a comma.

15. Rule 509(e)(7)(D). The Committee refers to Section 2, Chapter 643, while your version refers to Section 2, Chapter 543. Which is correct?

16. Rule 509(f)(1). In the first sentence, there needs to be a space after the comma: "...if the patient is a minor,or a...".

17. Rule 510(b)(4): Indent so it lines up with subsections (1)-(3); it is currently lined up with (b).

18. Rule 510(d)(2): Starts with a capital W, but should be lower case.

19. Rule 511(2) uses the terms "as to the person's character or a trait of the person's character," whereas in all other instances of such terminology the Committee changed it to: "as to the person's character or character trait." I don't prefer one over the other, but the usage should be standard. Also, if changed to the latter, I think it should be "character trait(s)" or just "character traits." "As to the person's character trait" sounds like the person only has one trait.

20. Rule 601(a)(1): "Court" should not be capitalized.

21. Rule 601(b)
"part" should be "party" in the first sentence:
In civil actions...neither party shall be allowed to testify...

In the third sentence, the period between "testifying" and "instruct" should be a comma:
The trial court shall...where this rule prohibit an interested party or witness from testifying,instruct..."

22. Rule 608(b): I think "a" should be added in the phrase "conviction of crime":
Specific instances of the conduct of a witness...other than conviction of a crime..."

23. Rule 613(b).
The punctuation seems messed up:

I think this is correct. The Fed. Rule is very different.

> In impeaching a witness by proof of circumstances or statements showing bias or interest on the part of such witness, and before further cross-examination concerning, extrinsic evidence of, such bias or interest may be allowed, ...

I think it should be:

> In impeaching a witness by proof of circumstances or statements showing bias or interest on the part of such witness, and before further cross-examination concerning extrinsic evidence of such bias or interest may be allowed, ...

agree - 1) Applicability: this rule applies only in criminal cases. 2) Motion for Production

24. Rule 615. I think the first sentence in subsection (a): "This rule ~~abies~~ applies only in criminal cases." is unnecessary given the title of the rule says the same thing. If it is kept, I think it should precede all subsections under the rule, i.e., it should come before (a), not be the first sentence in (a).

25. Rule 703, Notes and Comments.
The reference to "T.R.C.P., Rule 166b" should be to TEX. R. CIV. PRO. 166b.

I think this is a good suggestion

26. Rule 705. Subparagraphs (b), (c) & (d) apply only to criminal cases. Maybe (b) should be entitled "Special Rules in Criminal Cases" and change the current (b), (c) and (d) to (1), (2) and (3) under (b), like is done in Rule 101.

27. Rule 706. Is footnote 10 necessary? No - It is not part of the final text.

28. Rule 801(e)(1)(A).
Comma usage is confusing:

> inconsistent with declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding except in a criminal case, a grand jury proceeding, or in a deposition;

re federal rule is better

Would be more clear this way:

> inconsistent with declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, except a grand jury proceeding in a criminal case, ~~or in a deposition~~;

deposition

29. Rule 801(e)(1)(D). The "or" following subparagraph (D) is not necessary.
I think it should end with a period.

30. Rule 801(e)(3). The reference is to "Rule 207, Texas Rules of Civil Procedure." Why not "TEX. R. CIV. PRO. 207"? Texas Rule of Civil Procedure 207

No - not in text

31. Rule 801, Notes and Comments.
In the four examples, shouldn't "Illustration." have a colon, not a period? yes

yes, this is unclear.

In Examples (2) and (3), this phrase is unclear:

> The testimony is to a statement because it was a verbal expression.

How about: "The witness is testifying to a statement because..."

yes

In Example (3), the period after "rape" and before "W" should be a comma.

In Example (4), this sentence sounds odd:

> This nonverbal conduct of declarant was intended by him as a substitute for verbal expression and so is a statement.

agree

On first reading, it seems to say that nonverbal conduct was intended as a substitution and a statement was intended as a substitute. It would be more clear this way:

> This nonverbal conduct of declarant was intended as a substitute for verbal expression, so it is a statement.

Also in Example (4), there should be a comma where noted in the following sentence:

agree

> The matter asserted is that X went north because that is implied from the statement, and the probative value of the statement offered flows from declarant's belief that X went north.

32. Rule 803(7): There should be a comma where noted, as in (6) and (8):

agree

> Evidence that a matter is not included in memoranda, reports, records, or data compilation...

33. Rule 803(8)(B): The "but" should be taken out:

agree

> matters observed pursuant to duty imposed by law as to which matters there was a duty to report, ~~but~~ excluding in criminal cases matters observed by police...

34. Rule 804(b)(1): The comma after "offered" should be taken out:

agree

> In criminal cases, testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, had an opportunity and similar motive to develop the testimony...

35. Rule 804(b)(3)(B): Should start with a capital "A".

I think Tracy Does ... in footnotes ... above

36. Rule 804. The Notes and Comments was taken out.

37. Rule 901(b)(2): Take the hyphen out of "non-expert."

38. Rule 901(b)(5): There should be a comma after "recording":

> Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice...

OK

OK 39. Rule 902(10)(B): The reference to "paragraph (a)" should be to "paragraph (A)."

OK 40. Rule 902(l) — lower case L — on page 45 of the Committee's draft should be Rule 902(11) — eleven.

41. Rule 1006. There should be an "a" before "reasonable time and place":

> The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place...

OK

DRAFT - NOVEMBER 5, 1996

PROPOSED UNIFIED "TEXAS RULES OF EVIDENCE" COMBINING PREVIOUS CIVIL AND CRIMINAL RULES

Table of Rules

ARTICLE I. GENERAL PROVISIONS

ARTICLE II. JUDICIAL NOTICE

ARTICLE III. PRESUMPTIONS

[No Rules Adopted at This Time]

ARTICLE IV. RELEVANCY AND ITS LIMITS

ARTICLE V. PRIVILEGES

ARTICLE VI. WITNESSES

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

ARTICLE VIII. HEARSAY

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

(3) these rules, except with respect to privileges, do not apply in the following situations:[4]

(A) *preliminary issues of fact.* The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104;

(B) *grand jury.* Proceedings before grand juries;

(C) *these miscellaneous proceedings.*

(i) application for habeas corpus in extradition, rendition, or interstate detainer proceedings;

(ii) a hearing under Texas Code of Criminal Procedure article 46.02, by the court out of the presence of a jury, to determine whether there is sufficient evidence of incompetency to require a jury determination of the question of incompetency;

(iii) proceedings regarding bail except hearings to deny, revoke or increase bail;

(iv) a hearing on justification for pretrial detention not involving bail;

(v) issuance of search or arrest warrant; or

(vi) Direct contempt determination.

(4) these rules with respect to privileges apply at all stages of all actions, cases, and proceedings.[5]

(5) evidence in hearings under the Texas Code of Military Justice, article 5788, shall be governed by that Code.[6]

---

[4]All of subparagraph (3) is from TEX. R. CRIM. EVID. 1101(c), except that the same conventions on capitalization and punctuation referenced in fn. 3 are also followed here.

In addition, this is the only instance of paragraph titles at this third level in the proposed rules and of italics being used at this third level. They are left this way because italicized and titled in the prior Criminal Rule 1101(c). Should we recommend deletion of the titles altogether? Deleting the titles is really a matter for the Court of Criminal Appeals.

[5]This provision is from TEX. R. CRIM. EVID. 1101(b).

[6]This provision is from TEX. R. CRIM. EVID. 1101(e).

(d) **Fundamental Error in Criminal Cases.** In criminal cases, nothing in these rules precludes taking notice of fundamental errors affecting substantial rights although they were not brought to the attention of the court.

Notes and Comments

This rule is not meant to change the harmless error doctrines in Texas civil or criminal cases as specified in the Texas Rules of Appellate Procedure. No substantive change in the law is intended.

RULE 104. PRELIMINARY QUESTIONS

(a) **Questions of Admissibility Generally.** Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination the court is not bound by the rules of evidence except those with respect to privileges.

(b) **Relevancy Conditioned on Fact.** When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) **Hearing of Jury.** In criminal cases, hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. All other civil or criminal hearings on preliminary matters shall be conducted out of the hearing of the jury when the interests of justice so require or when an accused who is a witness in a criminal case so requests.

(d) **Testimony by Accused Out of the Hearing of the Jury.** The accused in a criminal case does not, by testifying upon a preliminary matter out of the hearing of the jury, become subject to cross-examination as to other issues in the case.

(e) **Weight and Credibility.** This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

RULE 105. LIMITED ADMISSIBILITY

(a) When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly; but, in the absence of such request the court's action in admitting such evidence without limitation shall not be a ground for complaint on appeal.

(b) When evidence referred to in paragraph (a) is excluded, such exclusion shall not be a ground for complaint on appeal unless the proponent expressly offers the evidence for its limited, admissible purpose or limits its offer to the party against whom it is admissible.

RULE 106. REMAINDER OF OR RELATED WRITINGS OR RECORDED STATEMENTS

When a writing or recorded statement or part there of is introduced by a party, an adverse party may at that time introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. "Writing or recorded statement" includes depositions.

Notes and Comments

This rule is the federal rule with one modification. Under the federal rule, a party may require an opponent to introduce evidence contrary to the latter's own case. The Committee believes the better practice is to permit the party, rather than the opponent, to introduce such evidence contemporaneously with the introduction of the incomplete evidence. This rule does not in any way circumscribe the right of a party to develop fully the matter on cross-examination or as part of the party's own case. *Cf.* Tex. Code Crim. Proc. art. 38.24. Nor does it alter the common law doctrine that the rule of optional completeness, as to writings, oral conversations, or other matters, may take precedence over exclusionary doctrines such as the hearsay or best evidence rule or the first-hand knowledge requirements. *See also* Tex. R. Evid. 611(a).

RULE 107. RULE OF OPTIONAL COMPLETENESS

When part of an act, declaration, conversation, writing or recorded statement is given in evidence by one party, the whole on the same subject may be inquired into by the other, and any other act, declaration, writing or recorded statement which is necessary to make it fully understood or to explain the same may also be given in evidence, as when a letter is read, all letters on the same subject between the same parties may be given. "Writing or recorded statement" includes depositions.

Notes and Comments

This rule is the former Rule 107, Tex. R. Crim. Evid., except that the example regarding "when a letter is read" has been relocated so as to more accurately indicate the provision it explains. While this rule appeared only in the prior criminal rules, it is not so limited because it accurately reflects the common law rule of optional completeness in civil cases.

ARTICLE IV. RELEVANCY AND ITS LIMITS

RULE 401. DEFINITION OF "RELEVANT EVIDENCE"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

RULE 402. RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE

All relevant evidence is admissible, except as otherwise provided by Constitution, by statute, by these rules, or by other rules prescribed pursuant to statutory authority. Evidence which is not relevant is inadmissible.

RULE 403. EXCLUSION OF RELEVANT EVIDENCE ON SPECIAL GROUNDS

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

(a) **Character Evidence Generally.** Evidence of a person's character or character trait is not admissible for the purpose of proving action conformity therewith on a particular occasion, except:

(1) *Character of Accused in a Criminal Case and of a Party Accused in a Civil Case of Conduct Involving Moral Turpitude.* Evidence of a pertinent character trait offered:

(A) by an accused in a criminal case, or by the prosecution to rebut the same, or

(B) by a party accused in a civil case of conduct involving moral turpitude, or by the accusing party to rebut the same;

(2) *Character of Victim in a Criminal Case and of Alleged Victim of Assaultive Conduct in a Civil Case.* In a criminal case and subject to Rule 412, evidence of a pertinent character trait of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of peaceable character of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor; or in a civil case, evidence of character for violence of the alleged victim of assaultive conduct offered on the

issue of self-defense by a party accused of the assaultive conduct, or evidence of peaceable character to rebut the same;

(3) *Character of Witness.* Evidence of the character of a witness, as provided in rules 607, 608 and 609.

(b) **Other Crimes, Wrongs or Acts.** Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon timely request by the accused in a criminal case, reasonable notice is given in advance of trial of intent to introduce in the State's case-in-chief such evidence other than that arising in the same transaction.

(c) **Character Relevant to Punishment in Criminal Cases.** In the penalty phase of a criminal trial, evidence may be offered by an accused or by the prosecution as to the prior criminal record of the accused. Other evidence of the accused's character may be offered by an accused or by the prosecution. Nothing herein limits the provisions of Article 37.071, Code of Criminal Procedure.

RULE 405. METHODS OF PROVING CHARACTER

(a) **Reputation or Opinion.** In all cases in which evidence of a person's character or character trait is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. In a criminal case, to be qualified to testify concerning the character or character trait of an accused, a witness must have been familiar with the reputation, or with the underlying facts or information upon which the opinion is based, prior to the day of the offense. In all cases where testimony is admitted under this rule, on cross-examination inquiry is allowable into relevant specific instances of conduct.

(b) **Specific Instances of Conduct.** In cases in which a person's character or character trait is an essential element of a charge, claim or defense, proof may also be made of specific instances of that person's conduct.

RULE 406. HABIT; ROUTINE PRACTICE

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

RULE 407. SUBSEQUENT REMEDIAL MEASURES; NOTIFICATION OF DEFECT

(a) **Subsequent Remedial Measures.** When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent remedial measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent remedial measures when offered for another purpose, such as proving ownership, control or feasibility of precautionary measures, if controverted, or impeachment. Nothing in this rule shall preclude admissibility in products liability cases based on strict liability.

(b) **Notification of Defect.** A written notification by a manufacturer of any defect in a product produced by such manufacturer to purchasers thereof is admissible against the manufacturer on the issue of existence of the defect to the extent that it is relevant.

RULE 408. COMPROMISE AND OFFERS TO COMPROMISE

Evidence of (1) furnishing or offering or promising to furnish or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice or interest of a witness or a party, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

RULE 409. PAYMENT OF MEDICAL AND SIMILAR EXPENSES

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

RULE 410. INADMISSIBILITY OF PLEAS, PLEA DISCUSSIONS AND RELATED STATEMENTS

Except as otherwise provided in this rule, evidence of the following is not admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty which was later withdrawn;

(2) in civil cases, a plea of *nolo contendere,* and in criminal cases, a plea of *nolo contendere* which was later withdrawn;

(3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding, in a civil case, either a plea of guilty which was later withdrawn or a plea of *nolo contendere*, or in a criminal case, either a plea of guilty which was later withdrawn or a plea of *nolo contendere* which was later withdrawn; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which does not result in a plea of guilty or a plea of *nolo contendere* or which results in a plea, later withdrawn, of guilty or *nolo contendere*. However, such a statement is admissible in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it.[7]

RULE 411. LIABILITY INSURANCE

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another issue, such as proof of agency, ownership, or control, if disputed, or bias or prejudice of a witness.

RULE 412. EVIDENCE OF PREVIOUS SEXUAL CONDUCT IN CRIMINAL CASES

(a) **Reputation or Opinion Evidence.** In a prosecution for sexual assault or aggravated sexual assault, or attempt to commit sexual assault or aggravated sexual assault, reputation or opinion evidence of the past sexual behavior of an alleged victim of such crime is not admissible.

(b) **Evidence of Specific Instances.** In a prosecution for sexual assault or aggravated sexual assault, or attempt to commit sexual assault or aggravated sexual assault, evidence of specific instances of an alleged victim's past sexual behavior is also not admissible, unless:

(1) such evidence is admitted in accordance with paragraphs (c) and (d) of this rule;

(2) it is evidence:

---

[7]The SBOT Evidence Committee has included this sentence as part of paragraph (4). It is not part of paragraph (4) in the current rules and arguably applies to paragraphs (1), (2), (3) and (4). If included as part of paragraph (4), I think it clearly only applies to paragraph (4). The SBOT Evidence Committee debated the matter and was of the opinion that the sentence was never intended to apply to paragraphs (1) through (3), but was supposed to apply only to paragraph (4).

(A) that is necessary to rebut or explain scientific or medical evidence offered by the State;

(B) of past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior which is the basis of the offense charged;

(C) that relates to the motive or bias of the alleged victim;

(D) is admissible under Rule 609; or

(E) that is constitutionally required to be admitted; and

(3) its probative value outweighs the danger of unfair prejudice.

(c) **Procedure for Offering Evidence.** If the defendant proposes to introduce any documentary evidence or to ask any question, either by direct examination or cross-examination of any witness, concerning specific instances of the alleged victim's past sexual behavior, the defendant must inform the court out of the hearing of the jury prior to introducing any such evidence or asking any such question. After this notice, the court shall conduct an in camera hearing, recorded by the court reporter, to determine whether the proposed evidence is admissible under paragraph (b) of this rule. The court shall determine what evidence is admissible and shall accordingly limit the questioning. The defendant shall not go outside these limits or refer to any evidence ruled inadmissible in camera without prior approval of the court without the presence of the jury.

(d) **Record Sealed.** The court shall seal the record of the in camera hearing required in paragraph (c) of this rule for delivery to the appellate court in the event of an appeal.

Notes and Comments

Section (e) relating to the admissibility of evidence of promiscuous conduct of a child 14 years old or older has been deleted since the 1994 Texas Penal Code eliminated the former defense of promiscuity of a child.

ARTICLE V. PRIVILEGES

RULE 501. PRIVILEGES RECOGNIZED ONLY AS PROVIDED

Except as otherwise provided by Constitution, by statute, by these rules or by other rules prescribed pursuant to statutory authority, no person has a privilege to:

(1) refuse to be a witness;

(2) refuse to disclose any matter;

(3) refuse to produce any object or writing; or

(4) prevent another from being a witness or disclosing any matter or producing any object or writing.

RULE 502. REQUIRED REPORTS PRIVILEGED BY STATUTE

A person, corporation, association, or other organization or entity, either public or private, making a return or report required by law to be made has a privilege to refuse to disclose and to prevent any other person from disclosing the return or report, if the law requiring it to be made so provides. A public officer or agency to whom a return or report is required by law to be made has a privilege to refuse to disclose the return or report if the law requiring it to be made so provides. No privilege exists under this rule in actions involving perjury, false statements, fraud in the return or report, or other failure to comply with the law in question.

RULE 503. LAWYER-CLIENT PRIVILEGE

(a) **Definitions.** As used in this rule:

(1) A "client" is a person, public officer, or corporation, association, or other organization or entity either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from that lawyer.

(2) A representative of a client is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client.

(3) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.

(4) A "representative of the lawyer" is:

(A) one employed by the lawyer to assist the lawyer in the rendition of professional legal services; or

(B) an accountant who is reasonably necessary for the lawyer's rendition of professional legal services.

(5) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) **General Rule of Privilege.** A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(1) between the client or a representative of the client and the client's lawyer or a representative of the lawyer,

(2) between the lawyer and the lawyer's representative;

(3) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(4) between representatives of the client or between the client and a representative of the client;

(5) among lawyers and their representatives representing the same client; or

(6) in criminal cases, a client has a privilege to prevent the lawyer or lawyer's representative from disclosing any other fact which came to the knowledge of the lawyer or the lawyer's representative by reason of the attorney-client relationship.

(c) **Who May Claim the Privilege.** The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

(d) **Exceptions.** There is no privilege under this rule:

(1) *Furtherance of Crime or Fraud.* If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) *Claimants Through Same Deceased Client.* As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by *inter vivos* transactions;

(3) *Breach of Duty by a Lawyer or Client.* As to a communication relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer;

(4) *Document Attested by a Lawyer.* As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness: or

(5) *Joint Clients.* As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

Notes and Comments

This rule contains the language used in both the prior civil and prior criminal rules. Court decisions, both before and after the adoption of the Tex. R. Crim. Evid. in 1986, indicate that the scope of the lawyer-client privilege is the same in civil and criminal cases. *See, e.g., Ballew v. State*, 640 S.W.2d 237 (Tex. Cr. App. 1980) and *Manning v. State*, 766 S.W.2d 551 (Tex. App. -- Dallas 1989), *aff'd.*, 773 S.W.2d 568 (Tex. Crim. App. 1989). To avoid confusion, the vestigial language of the last sentence of the prior Criminal Rule 503(b) is omitted.

This rule governs only the lawyer-client privilege. It does not restrict the scope of the work product doctrine. *See* Tex. R. Civ. P. 166b. The language of former paragraph (d) was deleted because it was deemed unnecessary. This deletion was not intended to change the common law rule that communications privileged under this rule do not lose their privileged status by reason of the termination of the lawyer/client relationship.

RULE 504. HUSBAND-WIFE PRIVILEGE

(a) **Definition.** A communication is confidential if it is made privately by any person to the person's spouse and it is not intended for disclosure to any other person.

(b) **General Rules.**

(1) *Confidential Communication Privilege.* A person, whether or not a party, or the guardian or representative of an incompetent or deceased person, has a privilege during marriage and afterwards to refuse to disclose and to prevent another from disclosing a confidential communication made to the person's spouse while they were married.

(2) *Privilege Not to Testify in Criminal Cases.* In criminal cases:

(A) The spouse of the accused has a privilege not to be called as a witness for the state. This rule does not prohibit the spouse from testifying voluntarily for the state, even over objection by the accused. A spouse who testifies on behalf of an accused is subject to cross-examination as provided in rule 610(b).

(B) Failure by an accused to call the accused's spouse as a witness, where other evidence indicates that the spouse could testify to relevant matters, is a proper subject of comment by counsel.

(c) **Who May Claim the Privilege.** The confidential communication privilege may be claimed by the person or the person's guardian or representative, or by the spouse on the person's behalf. The authority of the spouse to do is presumed. The privilege not to testify may be claimed by the person or the person's guardian or representative but not by that person's spouse.

(d) **Exceptions to the Confidential Communication Privilege.** There is no confidential communication privilege:

(1) *Furtherance of Crime or Fraud.* If the communication was made, in whole or in part, to enable or aid anyone to commit or plan to commit a crime or fraud.

(2) *Proceeding Between Spouses in Civil Cases.* In (A) a proceeding brought by or on behalf of one spouse against the other spouse, or (B) a proceeding between a surviving spouse and a person who claims through the deceased spouse, regardless of whether the claim is by testate or intestate succession or by *inter vivos* transaction.

(3) *Certain Criminal Offenses.* In a proceeding in which the accused is charged with a crime against the person of the spouse, any minor child or any member of the household of either spouse.

(4) *Commitment or Similar Proceeding.* In a proceeding to commit either spouse or otherwise to place that person or that person's property, or both, under the control of another because of an alleged mental or physical condition.

(5) *Proceeding to Establish Competence.* In a proceeding brought by or on behalf of either spouse to establish competence.

(e) **Exceptions.** The privilege of a person's spouse not to be called as a witness for the state does not apply (1) in any proceeding in which the person is charged with a crime against the person's spouse, a minor child or a member of the household of either spouse; or (2) as to matters occurring prior to the marriage.

Notes and Comments

The present rule eliminates the spousal testimonial privilege for prosecutions in which the spouse is the alleged victim of a crime by the spouse. This is intended to be consistent with Article 38.10 of the Code of Criminal Procedure, effective September 1, 1995.

RULE 505. COMMUNICATIONS TO MEMBERS OF THE CLERGY

(a) **Definitions.** As used in this rule:

(1) A "member of the clergy" is a minister, priest, rabbi, accredited Christian Science Practitioner, or other similar functionary of a religious organization or an individual reasonably believed so to be by the person consulting with such individual.

(c) **Who May Claim the Privilege.** The confidential communication privilege may be claimed by the person or the person's guardian or representative, or by the spouse on the person's behalf. The authority of the spouse to do is presumed. The privilege not to testify may be claimed by the person or the person's guardian or representative but not by that person's spouse.

(d) **Exceptions to the Confidential Communication Privilege.** There is no confidential communication privilege:

(1) *Furtherance of Crime or Fraud.* If the communication was made, in whole or in part, to enable or aid anyone to commit or plan to commit a crime or fraud.

(2) *Proceeding Between Spouses in Civil Cases.* In (A) a proceeding brought by or on behalf of one spouse against the other spouse, or (B) a proceeding between a surviving spouse and a person who claims through the deceased spouse, regardless of whether the claim is by testate or intestate succession or by *inter vivos* transaction.

(3) *Commitment or Similar Proceeding.* In a proceeding to commit either spouse or otherwise to place that person or that person's property, or both, under the control of another because of an alleged mental or physical condition.

(4) *Proceeding to Establish Competence.* In a proceeding brought by or on behalf of either spouse to establish competence.

(e) **Exceptions.** The privilege of a person's spouse not be called as a witness for the state does not apply (1) in any proceeding in which the person is charged with a crime against the person's spouse, a minor child or a member of the household of either spouse; or (2) as to matters occurring prior to the marriage.

Notes and Comments

The present rule eliminates the spousal testimonial privilege for prosecutions in which the spouse is the alleged victim of a crime by the spouse. This is intended to be consistent with Article 38.10 of the Code of Criminal Procedure, effective September 1, 1995.

RULE 505. COMMUNICATIONS TO MEMBERS OF THE CLERGY

(a) **Definitions.** As used in this rule:

(1) A "member of the clergy" is a minister, priest, rabbi, accredited Christian Science Practitioner, or other similar functionary of a religious organization or an individual reasonably believed so to be by the person consulting with such individual.

(2) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) **General Rule of Privilege.** A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a member of the clergy in the member's professional character as spiritual adviser.

(c) **Who May Claim the Privilege.** The privilege may be claimed by the person, by the person's guardian or conservator, or by the personal representative of the person if the person is deceased. The member of the clergy to whom the communication was made is presumed to have authority to claim the privilege but only on behalf of the communicant.

RULE 506. POLITICAL VOTE

Every person has a privilege to refuse to disclose the tenor of the person's vote at a political election conducted by secret ballot unless the vote was cast illegally.

RULE 507. TRADE SECRETS

A person has a privilege, which may be claimed by the person or the person's agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the judge shall take such protective measure as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.

RULE 508. IDENTITY OF INFORMER

(a) **Rule of Privilege.** The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assist in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) **Who May Claim.** The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished, except the privilege shall not be allowed in criminal cases if the state objects.

(c) **Exceptions.**

(1) *Voluntary Disclosure; Informer a Witness.* No privilege exists under this rule if the identity of the informer or the informer's interest in the subject matter of the communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the public entity.

(2) *Testimony on Merits.* If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of a material issue on the merits in a civil case to which the public entity is a party, or on guilt or innocence in a criminal case, and the public entity invokes the privilege, the court shall give the public entity an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the court may direct that testimony be taken if it finds that the matter cannot be resolved satisfactorily upon affidavit. If the court finds that there is a reasonable probability that the informer can give the testimony, and the public entity elects not to disclose the informer's identity, the court in a civil case may make any order that justice requires, and in a criminal case shall, on motion of the defendant, and may, on the court's own motion, dismiss the charges as to which the testimony would relate. Evidence submitted to the court shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the public entity. All counsel and parties shall be permitted to be present at every stage of proceedings under this subdivision except a showing in camera, at which no counsel or party shall be permitted to be present.

(3) *Legality of Obtaining Evidence.* If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the court is not satisfied that the information was received from an informer reasonably believed to be reliable or credible, it may require the identity of the informer to be disclosed. The court shall, on request of the public entity, direct that the disclosure be made in camera. All counsel and parties concerned with the issue of legality shall be permitted to be present at every stage of proceedings under this subdivision except a disclosure in camera, at which no counsel or party shall be permitted to be present. If disclosure of the identity of the informer is made in camera, the record thereof shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the public entity.

RULE 509. PHYSICIAN-PATIENT PRIVILEGE

(a) **Definitions.** As used in this rule:

(1) A "patient" means any person who consults or is seen by a physician to receive medical care.

(2) A "physician" means a person licensed to practice medicine in any state or nation, or reasonably believed by the patient so to be.

(3) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or those reasonably necessary for the transmission of the communication, or those who are participating in the diagnosis and treatment under the direction of the physician, including members of the patient's family.

(b) **Limited Privilege in Criminal Proceedings.** There is no physician-patient privilege in criminal proceedings. However, a communication to any person involved in the treatment or examination of alcohol or drug abuse by a person being treated voluntarily or being examined for admission to treatment for alcohol or drug abuse is not admissible in a criminal proceeding.

(c) **General Rule of Privilege in Civil Proceedings.** In a civil proceeding:

(1) Confidential communications between a physician and a patient, relative to or in connection with any professional services rendered by a physician to the patient are privileged and may not be disclosed.

(2) Records of the identity, diagnosis, evaluation,or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed.

(3) The provisions of this rule apply even if the patient received the services of a physician prior to the enactment of the Medical Liability and Insurance Improvement Act, TEX REV. CIV. STAT. art. 4590i (Vernon Supp. 1984).

(d) **Who May Claim the Privilege in a Civil Proceeding.** In a civil proceeding:

(1) The privilege of confidentiality may be claimed by the patient or by a representative of the patient acting on the patient's behalf.

(2) The physician may claim the privilege of confidentiality, but only on behalf of the patient. The authority to do so is presumed in the absence of evidence to the contrary.

(e) **Exceptions in a Civil Proceeding.** Exceptions to confidentiality or privilege in administrative proceedings or in civil proceedings in court exist:

(1) when the proceedings are brought by the patient against a physician, including but not limited to malpractice proceedings, and in any license revocation proceeding in which the patient is a complaining witness and in which disclosure is relevant to the claims or defense of a physician;

(2) when the patient or someone authorized to act on the patient's behalf submits a written consent to the release of any privileged information, as provided in paragraph (f);

(3) when the purpose of the proceedings is to substantiate and collect on a claim for medical services rendered to the patient;

(4) as to a communication or record relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which any party relies upon the condition as a part of the party's claim or defense;

(5) in any disciplinary investigation or proceeding of a physician conducted under or pursuant to the Medical Practice Act, TEX. REV. CIV. STAT. art. 4495b, or of a registered nurse under or pursuant to TEX. REV. CIV. STAT. arts. 4525, 4527a, 4527b, and 4527c, provided that the board shall protect the identity of any patient whose medical records are examined, except for those patients covered under subparagraph (e)(1) or those patients who have submitted written consent to the release of their medical records as provided by paragraph (f);

[5](6) in an involuntary civil commitment proceeding, proceeding for court-ordered treatment, or probable cause hearing under

(A) the Texas Mental Health Code, TEX. REV. CIV. STAT. art. 5547-1 *et seq.*;

(B) the Mentally Retarded Persons Act of 1977, TEX. REV. CIV. STAT. art. 5547-300;

(C) Section 9, Chapter 411, Acts of the 53rd Legislature, Regular Session, 1953 (TEX. REV. CIV. STAT. art. 5561c);

(D) Section 2, Chapter 543, Acts of the 61st Legislature, Regular Session, 1969 (TEX. REV. CIV. STAT. art. 5561c-1);

(7) in any proceeding regarding the abuse or neglect, or the cause of any abuse or neglect, of the resident of an "institution" as defined in Sec. 1, Ch. 684, Acts of the 67th Legislature, Regular Session, 1981 (TEX. REV. CIV. STAT. art. 4442c, Sec. 2).

(f) **Consent.**

(1) Consent for the release of privileged information must be in writing and signed by the patient, or a parent or legal guardian if the patient is a minor, or a legal guardian if the patient has been adjudicated incompetent to manage personal affairs, or an attorney ad litem appointed for the patient, as authorized by the Texas Mental Health Code (TEX. REV. CIV. STAT. art. 5547-1 *et seq.*); the Mentally Retarded Persons Act of 1977 (TEX. REV. CIV. STAT. art. 5547-300); Section 9, Chapter 411, Acts of the 53rd Legislature, Regular Session, 1953 (TEX. REV. CIV. STAT. art. 5561c); Section 2, Chapter 543, Acts of the 61st Legislature, Regular Session, 1969 (TEX. REV. CIV. STAT. art. 5561c-1); Chapter 5, Texas Probate Code; and Chapter 11, Family Code; or a personal representative if the patient is deceased, provided that the written consent specifies the following:

(A) the information or medical records to be covered by the release;

(B) the reasons or purposes for the release; and

---

[5]The Supreme Court Advisory Committee in 1996 recommended deletion of prior subparagraph (e)(6) from the prior TEX. R. CIV. EVID. 509(e)(6). Prior subparagraph (e)(6) said "when the disclosure is relevant in any suit affecting the parent-child relationship."

(C) the person to whom the information is to be released.

(2) The patient, or other person authorized to consent, has the right to withdraw consent to the release of any information. Withdrawal of consent does not affect any information disclosed prior to the written notice of the withdrawal.

(3) Any person who received information made privileged by this rule may disclose the information to others only to the extent consistent with the authorized purposes for which consent to release the information was obtained.

Notes and Comments

This rule only governs disclosures of patient-physician communications in judicial or administrative proceedings. Whether a physician may or must disclose such communications in other circumstances is governed by TEX. REV. CIV. STAT. art 4495b, Sec. 5.08. Prior Criminal Rules of Evidence 509 and 510 are now in subparagraph (b) of this Rule.

RULE 510. CONFIDENTIALITY OF MENTAL HEALTH INFORMATION IN CIVIL CASES

(a) **Definitions.** As used in this rule:

(1) "Professional" means any person:

(A) authorized to practice medicine in any state or nation;

(B) licensed or certified by the State of Texas in the diagnosis, evaluation or treatment of any mental or emotional disorder;

(C) involved in the treatment or examination of drug abusers; or

(D) reasonably believed by the patient to be included in any of the preceding categories.

(2) "Patient" means any person who:

(A) consults, or is interviewed by, a professional for purposes of diagnosis, evaluation, or treatment of any mental or emotional condition or disorder, including alcoholism and drug addiction; or
(B) is being treated voluntarily or being examined for admission to voluntary treatment for drug abuse.

(3) A representative of the patient is:

(A) any person bearing the written consent of the patient;

(B) a parent if the patient is a minor;

(C) a guardian if the patient has been adjudicated incompetent to manage the patient's personal affairs; or

(D) the patient's personal representative if the patient is deceased.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the diagnosis, examination, evaluation, or treatment, or those reasonably necessary for the transmission of the communication, or those who are participating in the diagnosis, examination, evaluation, or treatment under the direction of the professional, including members of the patient's family

(b) **General Rule of Privilege.**

(1) Communication between a patient and a professional is confidential and shall not be disclosed in civil cases.

(2) Records of the identity, diagnosis, evaluation,or treatment of a patient which are created or maintained by a professional are confidential and shall not be disclosed in civil cases.

(3) Any person who received information from confidential communications or records as defined herein, other than a representative of the patient acting on the patient's behalf, shall not disclose in civil cases the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

(4) The provisions of this rule apply even if the patient received the services of a professional prior to the enactment of TEX. REV. CIV. STAT. art. 5561h (Vernon Supp. 1984).

(c) **Who May Claim the Privilege.**

(1) The privilege of confidentiality may be claimed by the patient or by a representative of the patient acting on the patient's behalf.

(2) The professional may claim the privilege of confidentiality but only on behalf of the patient. The authority to do so is presumed in the absence of evidence to the contrary.

(d) **Exceptions.** Exceptions to the privilege in court or administrative proceedings exist:

(1) when the proceedings are brought by the patient against a professional, including but not limited to malpractice proceedings, and in any license revocation proceedings in which the patient is a complaining witness and in which disclosure is relevant to the claim or defense of a professional;

(2) when the patient waives the right in writing to the privilege of confidentiality of any information, or when a representative of the patient acting on the patient's behalf submits a written waiver to the confidentiality privilege;

(3) when the purpose of the proceeding is to substantiate and collect on a claim for mental or emotional health services rendered to the patient;

(4) when the judge finds that the patient after having been previously informed that communications would not be privileged, has made communications to a professional in the course of a court-ordered examination relating to the patient's mental or emotional condition or disorder, providing that such communications shall not be privileged only with respect to issues involving the patient's mental or emotional health. On granting of the order, the court, in determining the extent to which any disclosure of all or any part of any communication is necessary, shall impose appropriate safeguards against unauthorized disclosure;

(5) as to a communication or record relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which any party relies upon the condition as a part of the party's claim or defense;

[9](6) in any proceeding regarding the abuse or neglect, or the cause of any abuse or neglect, of the resident of an institution as defined in TEX. REV. CIV. STAT. art. 4442c, Sec. 2 (Vernon Supp. 1984).

Notes and Comments

This rule only governs disclosures of patient-professional communications in judicial or administrative proceedings. Whether a professional may or must disclose such communications in other circumstances is governed by TEX. REV. CIV. STAT. art. 5561h (Vernon Supp. 1984).

RULE 511. WAIVER OF PRIVILEGE BY VOLUNTARY DISCLOSURE

A person upon whom these rules confer a privilege against disclosure waives the privilege if:

(1) the person or a predecessor of the person while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged; or

(2) the person or a representative of the person calls a person to whom privileged communications have been made to testify as to the person's character or character trait insofar as such communications are relevant to such character or character trait.

---

[9]The Supreme Court Advisory Committee in 1996 recommended deletion of prior subparagraph (d)(6) from the prior TEX. R. CIV. EVID. 510(d)(6). Prior subparagraph (d)(6) said "when the disclosure is relevant in any suit affecting the parent-child relationship; or".

RULE 512. PRIVILEGED MATTER DISCLOSED UNDER COMPULSION OR WITHOUT OPPORTUNITY TO CLAIM PRIVILEGE

A claim of privilege is not defeated by a disclosure which was (1) compelled erroneously or (2) made without opportunity to claim the privilege.

RULE 513. COMMENT UPON OR INFERENCE FROM CLAIM OF PRIVILEGE; INSTRUCTION

(a) **Comment or Inference Not Permitted.** Except as permitted in Rule 504(b)(2)(B), the claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel, and no inference may be drawn therefrom.

(b) **Claiming Privilege Without Knowledge of Jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(c) **Claim of Privilege Against Self-Incrimination in Civil Cases.** Paragraphs (a) and (b) shall not apply with respect to a party's claim, in the present civil proceeding, of the privilege against self-incrimination.

(d) **Jury Instruction.** In criminal cases, except as provided in Rule 504(b)(2)(B) and in paragraph (c) of this Rule, upon request any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

ARTICLE VI. WITNESSES

RULE 601. COMPETENCY AND INCOMPETENCY OF WITNESSES

(a) **General Rule.** Every person is competent to be a witness except as otherwise provided in these rules. The following witnesses shall be incompetent to testify in any proceeding subject to these rules:

(1) *Insane Persons.* Insane persons who, in the opinion of the court, are in an insane condition of mind at the time when they are offered as a witness, or who, in the opinion of the court, were in that condition when the events happened of which they are called to testify.

(2) *Children.* Children or other persons who, after being examined by the court, appear not to possess sufficient intellect to relate transactions with respect to which they are interrogated.

(b) **"Dead Man Rule" in Civil actions.** In civil actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any oral statement by the testator, intestate or ward, unless that testimony to the oral statement is corroborated or unless the witness is called at the trial to testify thereto by the opposite party; and, the provisions of this article shall extend to and include all actions by or against the heirs or legal representatives of a decedent based in whole or in part on such oral statement. Except for the foregoing, a witness is not precluded from giving evidence of or concerning any transaction with, any conversations with, any admissions of, or statement by, a deceased or insane party or person merely because the witness is a party to the action or a person interested in the event thereof. The trial court shall, in a proper case, where this rule prohibits an interested party or witness from testifying, instruct the jury that such person is not permitted by the law to give evidence relating to any oral statement by the deceased or ward unless the oral statement is corroborated or unless the party or witness is called at the trial by the opposite party.

RULE 602. LACK OF PERSONAL KNOWLEDGE

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

RULE 603. OATH OR AFFIRMATION

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

RULE 604. INTERPRETERS

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.

Notes and Comments

See Rule 183, Texas Rules of Civil Procedure, regarding appointment and compensation of interpreters.

RULE 605. COMPETENCY OF JUDGE AS A WITNESS

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

RULE 606. COMPETENCY OF JUROR AS A WITNESS

(a) **At the Trial.** A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting as a juror. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) **Inquiry Into Validity of Verdict or Indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the jury's deliberations, or on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict. Nor may a juror's affidavit or any statement by a juror concerning any matter about which the juror would be precluded from testifying be admitted in evidence for any of these purposes. However, a juror may testify whether: (1) any outside influence was improperly brought to bear upon any juror; or (2) the juror was qualified to serve.

RULE 607. WHO MAY IMPEACH

The credibility of a witness may be attacked by any party, including the party calling the witness.

RULE 608. EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS

(a) **Opinion and Reputation Evidence of Character.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:

(1) the evidence may refer only to character for truthfulness or untruthfulness; and

(2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) **Specific Instances of Conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be inquired into on cross-examination of the witness nor proved by extrinsic evidence.

RULE 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

(a) **General Rule.** For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record but only if the crime was a felony or involved moral turpitude, regardless of punishment, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party.

(b) **Time Limit.** Evidence of a conviction under this rule is not admissible if a period of more than ten (10) years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

(c) **Effect of Pardon, Annulment, or Certificate of Rehabilitation.** Evidence of a conviction is not admissible under this rule if:

(1) based on the finding of the rehabilitation of the person convicted, the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure, and that person has not been convicted of a subsequent crime which was classified as a felony or involved moral turpitude, regardless of punishment;

(2) probation has been satisfactorily completed for the crime for which the person was convicted, and that person has not been convicted of a subsequent crime which was classified as a felony or involved moral turpitude, regardless of punishment; or

(3) based on a finding of innocence, the conviction has been the subject of a pardon, annulment, or other equivalent procedure.

(d) **Juvenile Adjudications.** Evidence of juvenile adjudications is not admissible under this rule unless required to be admitted by the Constitution of the United States or Texas.

(e) **Pendency of Appeal.** Pendency of an appeal renders evidence of a conviction inadmissible.

(f) **Notice.** Evidence of a conviction is not admissible if after timely written request by the adverse party specifying the witness or witnesses, the proponent fails to give to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

RULE 610. RELIGIOUS BELIEFS OR OPINIONS

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

Notes and Comments

While the rule forecloses inquiry into the religious beliefs or opinions of a witness for the purpose of showing that the witness' character for truthfulness is affected by their nature, an inquiry for the purpose of showing interest or bias because of them is not within the prohibition. Thus disclosure of affiliation with a church which is a party to the litigation would be allowable under the rule. This is prior Rule of Criminal Evidence 615.

RULE 611. MODE AND ORDER OF INTERROGATION AND PRESENTATION

(a) **Control by Court.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) **Scope of Cross-Examination.** A witness may be cross-examined on any matter relevant to any issue in the case, including credibility.

(c) **Leading Questions.** Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the testimony of the witness. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Notes and Comments

The purpose of the 1988 amendment is to permit, in the court's discretion, the use of leading questions on preliminary or introductory matters, refreshing memory, questions to ignorant or illiterate persons or children, all as permitted by prior Texas practice and the common law.

The rule also conforms to tradition in making the use of leading questions on cross-examination a matter of right. The purpose of the qualification ordinarily is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact, as for example the cross-examination of a party by the party's own counsel after being called by the opponent (savoring more of re-direct) or of an insured defendant who proves to be friendly to the plaintiff.

RULE 612. WRITING USED TO REFRESH MEMORY

If a witness uses a writing to refresh memory for the purpose of testifying either

(1) while testifying;

(2) before testifying, in civil cases, if the court in its discretion determines it is necessary in the interests of justice; or

(3) before testifying, in criminal cases;

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portion not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

RULE 613. PRIOR STATEMENTS OF WITNESSES: IMPEACHMENT AND SUPPORT

(a) **Examining Witness Concerning Prior Inconsistent Statement.** In examining a witness concerning a prior inconsistent statement made by the witness, whether oral or written, and before further cross-examination concerning, or extrinsic evidence of such statement may be allowed, the witness must be told the contents of such statement and the time and place and the person to whom it was made, and must be afforded an opportunity to explain or deny such statement. If written, the writing need not be shown to the witness at that time, but on request the same shall be shown to opposing counsel. If the witness unequivocally admits having made such statement, extrinsic evidence of same shall not be admitted. This provision does not apply to admissions of a party-opponent as defined in Rule 801(e)(2).

(b) **Examining Witness Concerning Bias or Interest.** In impeaching a witness by proof of circumstances or statements showing bias or interest on the part of such witness, and before further cross-examination concerning, or extrinsic evidence of, such bias or interest may be allowed, the circumstances supporting such claim or the details of such statement, including the contents and where, when and to whom made, must be made known to the witness, and the witness must be given an opportunity to explain or to deny such circumstances or statement. If written, the writing need not be shown to the witness at that time, but on request the same shall be shown to opposing counsel. If the witness unequivocally admits such bias or interest, extrinsic evidence of same shall not be admitted.

A party shall be permitted to present evidence rebutting any evidence impeaching one of said party's witnesses on grounds of bias or interest.

(c) **Prior Consistent Statements of Witnesses.** A prior statement of a witness which is consistent with the testimony of the witness is inadmissible except as provided in Rule 801(e)(1)(B).

RULE 614. EXCLUSION OF WITNESSES

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of:

(1) a party who is a natural person or in civil cases the spouse of such natural person;

(2) an officer or employee of a party in a civil case or a defendant in a criminal case that is not a natural person designated as its representative by its attorney;

(3) a person whose presence is shown by a party to be essential to the presentation of the party's cause; or

(4) the victim in a criminal case, unless the victim is to testify and the court determines that the victim's testimony would be materially affected if the victim hears other testimony at the trial.

RULE 615. PRODUCTION OF STATEMENTS OF WITNESSES IN CRIMINAL CASES

(a) **Motion for Production.** After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the state or the defendant and defendant's attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.

(b) **Production of Entire Statement.** If the entire contents of the statement relate to the subject matter concerning which the witness has testified, the court shall order that the statement be delivered to the moving party.

(c) **Production of Excised statement.** If the other party claims that the statement contains matter that does not relate to the subject matter concerning which the witness has testified, the court shall order that it be delivered to the court in camera. Upon inspection, the court shall excise the portions of the statement that do not relate to the subject matter

concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion withheld over objection shall be preserved and made available to the appellate court in the event of appeal.

(d) **Recess for Examination of Statement.** Upon delivery of the statement to the moving party, the court, upon application of that party, shall recess proceedings in the trial for a reasonable examination of such statement and for preparation for its use in the trial.

(e) **Sanction for Failure to Produce Statement.** If the other party elects not to comply with an order to deliver a statement to the moving party, the court shall order that the testimony of the witness be stricken from the record and that the trial proceed, or, if it is the attorney for the state who elects not to comply, shall declare a mistrial if required by the interest of justice.

(f) **Definition.** As used in this rule, a "statement" of a witness means:

(1) a written statement made by the witness that is signed or otherwise adopted or approved by the witness;

(2) a substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof; or

(3) a statement, however taken or recorded, or a transcription thereof, made by the witness to a grand jury.

(g) **Applicability.** This rule applies only in criminal cases.

Notes and Comments

This is verbatim from prior Texas Criminal Rule of Evidence 614, except for the title and subparagraph (g) to make clear it only applies to criminal cases.

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

RULE 701. OPINION TESTIMONY BY LAY WITNESSES

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

which the opinion is based. This examination shall be conducted out of the hearing of the jury.

(2) *Admissibility of Opinion.* If the court determines that the expert does not have a sufficient basis for the expert's opinion, the opinion is inadmissible unless the party offering the testimony first establishes sufficient underlying facts or data.

(3) *Balancing Test; Limiting Instructions.* When the underlying facts or data would be inadmissible in evidence, the court shall exclude the underlying facts or data if the danger that they will be used for a purpose other than as explanation or support for the expert's opinion outweighs their value as explanation or support or are unfairly prejudicial. If the facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.

Notes and Comments

This rule does not preclude a party in any case from conducting a *voir dire* examination into the qualifications of an expert or into the bases of the expert's opinion under Rule 703. This rule does not preclude the application of Rule 403.[10]

RULE 706. AUDIT IN CIVIL CASES

Despite any other evidence rule to the contrary, verified reports of auditors prepared pursuant to Texas Rule of Civil Procedure 172, whether in the form of summaries, opinions, or otherwise, shall be admitted in evidence when offered by any party whether or not the facts or data in the reports are otherwise admissible and whether or not the reports embrace the ultimate issues to be decided by the trier of fact. Where exceptions to the reports have been filed, a party may contradict the reports by evidence supporting the exceptions.

ARTICLE VIII. HEARSAY

RULE 801. DEFINITIONS

The following definitions apply under this article:

(a) **Statement.** A "statement" is (1) an oral or written verbal expression or (2) nonverbal conduct of a person, if it is intended by the person as a substitute for verbal expression.

(b) **Declarant.** A "declarant" is a person who makes a statement

[10]The prior Criminal Evidence Rule comment provided "This rule does not preclude a party from conducting a *voir dire* examination into the qualifications of an expert."

Notes and Comments

Comment: The definitions in Rule 801(a), (b), (c) and (d) combined bring within the hearsay rule four categories of conduct. These are described and illustrated below.

(1) A verbal (oral or written) explicit assertion. Illustration: Witness testifies that declarant said "A shot B." Declarant's conduct is a statement because it is an oral expression. Because it is an explicit assertion, the matter asserted is that A shot B. Finally, the statement is hearsay because it was not made while testifying at the trial and is offered to prove the truth of the matter asserted.

(2) A verbal (oral or written) explicit assertion, not offered to prove the matter explicitly asserted, but offered for the truth of a matter implied by the statement, the probative value of the statement flowing from declarant's belief as to the matter. Illustration: The only known remedy for X disease is medicine Y and the only known use of medicine Y is to cure X disease. To prove that Oglethorpe had X disease witness testifies that declarant, a doctor, stated, "The best medicine for Oglethorpe is Y." The witness is testifying concerning a statement because it was a verbal expression. The matter asserted was that Oglethorpe had X disease because that matter is implied from the statement, the probative value of the statement as offered flowing from declarant's belief as to the matter. Finally, the statement is hearsay because it was not made while testifying at the trial and is offered to prove the truth of the matter asserted.

(3) Non-assertive verbal conduct offered for the truth of a matter implied by the statement, the probative value of the statement flowing from declarant's belief as to the matter. Illustration: In a rape prosecution to prove that Richard, the defendant was in the room at the time of the rape, W testifies that declarant knocked on the door to the room and shouted, "Open the door, Richard." The testimony is to a statement because it was a verbal expression. The matter asserted was that Richard was in the room because that matter is implied from the statement, the probative value of the statement as offered flowing from declarant's belief as to the matter. Finally, the statement is hearsay because it was not made while testifying at the trial and is offered to prove the truth of the matter asserted.

(4) Nonverbal assertive conduct intended as a substitute for verbal expression. Illustration. W testifies that A asked declarant "Which way did X go?" and declarant pointed north. This nonverbal conduct was intended by the declarant as a substitute for verbal expression and so is a statement. The matter asserted is that X went north because that is implied from the statement, and the probative value of the statement offered flows from declarant's belief that X went north. Finally, the statement is hearsay because it was not made at trial and is offered to prove the truth of the matter asserted.

RULE 802. HEARSAY RULE

Hearsay is not admissible except as provided by statute or these rules or by other rules prescribed pursuant to statutory authority. Inadmissible hearsay admitted without objection shall not be denied probative value merely because it is hearsay.

RULE 803. HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) **Present Sense Impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) **Excited Utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) **Then Existing Mental, Emotional, or Physical Condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) **Statements for Purposes of Medical Diagnosis or Treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) **Recorded Recollection.** A memorandum or record concerning a matter about which a witness once had personal knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly, unless the circumstances of preparation cast doubt on the document's trustworthiness. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) **Records of Regularly Conducted Activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by affidavit that complies with Rule 902(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. "Business" as used in this paragraph includes any and every kind of regular organized activity whether conducted for profit or not.

(7) **Absence of Entry in Records Kept in Accordance With the Provisions of Paragraph (6).** Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to

prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) **Public Records and Reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies setting forth:

(A) the activities of the office or agency;

(B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding in criminal cases matters observed by police officers and other law enforcement personnel; or

(C) in civil cases as to any party and in criminal cases as against the state, factual findings resulting from an investigation made pursuant to authority granted by law;

unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) **Records of Vital Statistics.** Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) **Absence of Public Record or Entry.** To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and presented by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report statement, or data compilation, or entry.

(11) **Records of Religious Organizations.** Statement of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) **Marriage, Baptismal, and Similar Certificates.** Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a member of the clergy, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) **Family Records.** Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) **Records of Documents Affecting an Interest in Property.** The record of a document purporting to establish or affect an interest in property, as proof of the content of

the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) **Statements in Documents Affecting an Interest in Property.** A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) **Statements in Ancient Documents.** Statements in a document in existence twenty years or more the authenticity of which is established.

(17) **Market Reports, Commercial Publications.** Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) **Learned Treatises.** To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or an established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) **Reputation Concerning Personal or Family History.** Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) **Reputation Concerning Boundaries or General History.** Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) **Reputation as to Character.** Reputation of a person's character among associates or in the community.

(22) **Judgment of Previous Conviction.** In civil cases, evidence of a judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), judging a person guilty of a felony, to prove any fact essential to sustain the judgment of conviction. In criminal cases, evidence of a judgment, entered after a trial or upon a plea of guilty or nolo contendere, adjudging a person guilty of a criminal offense, to prove any fact essential to sustain the judgment of conviction, but not including, when offered by the state for purposes other than impeachment, judgments against persons other than the accused. In all cases, the pendency of an appeal renders such evidence inadmissible.

(23) **Judgment as to Personal, Family, or General History, or Boundaries.** Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) **Statement Against Interest.** A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in declarant's position would not have made the statement unless believing it to be true. In criminal cases, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Notes and Comments

Comment on Paragraph (6): This provision rejects the doctrine of *Loper v. Andrews*, 404 S.W.2d 300, 305 (Tex. 1966), which required that an entry of a medical opinion or diagnosis meet a test of "reasonable medical certainty."

RULE 804. HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

(a) **Definition of Unavailability.** "Unavailability as a witness" includes situations in which the declarant:

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;

(3) testifies to a lack of memory of the subject matter of the declarant's statement;

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance or testimony by process or other reasonable means.

A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrong-doing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) **Hearsay Exceptions.** The following are not excluded if the declarant is unavailable as a witness:

(1) *Former Testimony.* In civil cases, testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in the course of another proceeding, if the party against whom the testimony is now offered, or a person with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. In criminal cases, testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. In criminal cases the use of depositions is controlled by Chapter 39 of the Texas Code of Criminal Procedure.

(2) *Dying Declarations.* A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) *Statement of Personal or Family History.*

(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history even though declarant had no means of acquiring personal knowledge of the matter stated; or

(B) A statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

RULE 805. HEARSAY WITHIN HEARSAY

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

RULE 806. ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT

When a hearsay statement, or a statement defined in Rule 801(e)(2) (C), (D), or (E), or in civil cases a statement defined in Rule 801(e)(3), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, offered to impeach the declarant, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

RULE 901. REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION

(a) **General Provision.** The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) **Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) *Testimony of Witness With Knowledge.* Testimony that a matter is what it is claimed to be.

(2) *Nonexpert Opinion on Handwriting.* Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) *Comparison by Trier or Expert Witness.* Comparison by the trier of fact or by expert witness with specimens which have been found by the court to be genuine.

(4) *Distinctive Characteristics and the Like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) *Voice Identification.* Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at anytime under circumstances connecting it with the alleged speaker.

(6) *Telephone Conversations.* Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if:

(A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called; or

(B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) *Public Records or Reports.* Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) *Ancient Documents or Data Compilation.* Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its

authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence twenty years or more at the time it is offered.

(9) *Process or System.* Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) *Methods Provided by Statute or Rule.* Any method of authentication or identification provided by statute or by other rule prescribed pursuant to statutory authority.

RULE 902. SELF-AUTHENTICATION

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) **Domestic Public Documents Under Seal.** A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) **Domestic Public Documents Not Under Seal.** A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) **Foreign Public Documents.** A document purporting to be executed or attested in an official capacity by a person, authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification. The final certification shall be dispensed with whenever both the United States and the foreign country in which the official record is located are parties to a treaty or convention that abolishes or displaces such requirement, in which case the record and the attestation shall be certified by the means provided in the treaty or convention.

(4) **Certified Copies of Public Records.** A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2) or (3) of this rule or complying with any statute or other rule prescribed pursuant to statutory authority.

(5) **Official Publications.** Books, pamphlets, or other publications purporting to be issued by public authority.

(6) **Newspapers and Periodicals.** Printed materials purporting to be newspapers or periodicals.

(7) **Trade Inscriptions and the Like.** Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) **Acknowledged Documents.** Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) **Commercial Paper and Related Documents.** Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) **Business Records Accompanied by Affidavit.**

a. *Records or Photocopies; Admissibility; Affidavit; Filing.* Any record or set of records or photographically reproduced copies of such records, which would be admissible under Rule 803(6) or (7) shall be admissible in evidence in any court in this state upon the affidavit of the person who would otherwise provide the prerequisites of Rule 803(6) or (7), that such records attached to such affidavit were in fact so kept as required by Rule 803(6) or (7), provided further, that such record or records along with such affidavit are filed with the clerk of the court for inclusion with the papers in the cause in which the record or records are sought to be used as evidence at least fourteen days prior to the day upon which trial of said cause commences, and provided the other parties to said cause are given prompt notice by the party filing same of the filing of such record or records and affidavit, which notice shall identify the name and employer, if any, of the person making the affidavit and such records shall be made available to the counsel for other parties to the action or litigation for inspection and copying. The expense for copying shall be borne by the party, parties or persons who desire copies and not by the party or parties who file the records and serve notice of said filing, in compliance with this rule. Notice shall be deemed to have been promptly given if it is served in the manner contemplated by Rule 21a, Texas Rules of Civil Procedure, fourteen days prior to commencement of trial in said cause.

b. *Form of Affidavit.* A form for the affidavit of such person as shall make such affidavit as is permitted in paragraph (a) above shall be sufficient if it follows this form

though this form shall not be exclusive, and an affidavit which substantially complies with the provisions of this rule shall suffice, to-wit:

No _____

John Doe (Name of Plaintiff)	§	IN THE _____
	§	
v.	§	COURT IN AND FOR
	§	
	§	
John Roe (Name of Defendant)	§	_____ COUNTY, TEXAS

AFFIDAVIT

Before me, the undersigned authority, personally appeared _____, who, being by me duly sworn, deposed as follows:

My name is _____, I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

I am the custodian of the records of _____. Attached hereto are _____ pages of records from _____. These said ____ pages of records are kept by _____ in the regular course of business, and it was the regular course of business of _____ for an employee or representative of _____, with knowledge of the act, event, condition, opinion, or diagnosis, recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The records attached hereto are the original or exact duplicates of the original.

_____
Affiant

SWORN TO AND SUBSCRIBED before me on the _____ day of _____, 19 ____.

_____
Notary Public, State of Texas
Notary's printed name:

_____

My commission expires:

_____

(11) **Presumptions Under Statutes or Other Rules.** Any signature, document, or other matter declared by statute or by other rules prescribed pursuant to statutory authority to be presumptively or prima facie genuine or authentic.
(Amended Nov. 10, 1986, eff. Jan. 1, 1988.)

Notes and Comments

Paragraph (10) is based on portions of the affidavit authentication provisions of TEX. REV. CIV. STAT. art. 3737e. The most general and comprehensive language from those provisions was chosen. It is intended that this method of authentication shall be available for any kind of regularly kept record that satisfies the requirements of Rule 803(6) and (7), including X-ray, hospital records, or any other kind of regularly kept medical record.

RULE 903. SUBSCRIBING WITNESS' TESTIMONY UNNECESSARY

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

RULE 1001. DEFINITIONS

For purposes of this article the following definitions are applicable:

(a) **Writings and Recordings.** "Writings" and "recordings" consist of letters, words, or numbers or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(b) **Photographs.** "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

(c) **Original.** An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an"original."

(d) **Duplicate.** A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.

RULE 1002. REQUIREMENT OF ORIGINALS

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required except as otherwise provided in these rules or by law.

RULE 1003. ADMISSIBILITY OF DUPLICATES

A duplicate is admissible to the same extent as an original unless (1) a question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

RULE 1004. ADMISSIBILITY OF OTHER EVIDENCE OF CONTENTS

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

(a) **Originals Lost or Destroyed.** All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith;

(b) **Original Not Obtainable.** No original can be obtained by any available judicial process or procedure;

(c) **Original Outside the State.** No original is located in Texas;

(d) **Original in Possession of Opponent.** At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the content would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(e) **Collateral Matters.** The writing, recording or photograph is not closely related to a controlling issue.

RULE 1005. PUBLIC RECORDS

The contents of an official record or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

RULE 1006. SUMMARIES

The contents of voluminous writings, recordings, or photographs, otherwise admissible, which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

RULE 1007. TESTIMONY OR WRITTEN ADMISSION OF PARTY

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.

RULE 1008. FUNCTIONS OF COURT AND JURY

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

RULE 1009. TRANSLATION OF FOREIGN LANGUAGE RECORDS

(a) **Translation, Affidavit, and Filing.** An accurate translation of a foreign language record or set of records or photographically reproduced copies of such records which would otherwise be admissible shall be admissible in any court in this state upon the affidavit of a qualified translator setting forth the qualifications of such translator and certifying that the translation is a fair and accurate translation of such foreign language record or records.

In civil cases, such affidavit, translation, and the record or records in the foreign language shall be promptly served upon all parties at least sixty days prior to the day upon which the trial of said cause commences.

In criminal cases, such affidavit, translation, and the record or records in the foreign language shall be filed with the clerk of the court for inclusion with the papers in the cause in which the record or records are sought to be used as evidence at least thirty days prior to the

day upon which trial of said cause commences, and the other parties to said cause shall be given prompt notice by the party filing the foreign language records and their translation.

(b) **Objections.** Any party may object to the accuracy of the translation.

In civil cases, an objection shall be served upon all parties thirty days prior to the commencement of the trial. The objection shall point out the specific inaccuracies of the original translation and what the objecting party contends would be an accurate translation.

In criminal cases, an objection shall be filed with the court at least ten days prior to the commencement of trial, pointing out the specific inaccuracies of the original translation and what the objecting party contends would be an accurate translation.

(c) **Admissibility and Failure to Object.** In a civil case, if no objection is timely served, or if no conflicting translation has been timely served in accordance with paragraph (a), the court shall admit a translation submitted under paragraph (a) without further need of proof provided that the underlying records are otherwise admissible under the Texas Rules of Evidence. The time limits set forth herein may be varied by order of the court. Failure to serve a conflicting translation in accordance with paragraph (a) or failure to timely and properly object to the accuracy of a translation in accordance with paragraph (b) shall preclude a party from attacking or offering evidence contradicting the accuracy of such translation.

In a criminal case, if no objection is timely filed or if an objection is made and the trial judge after notice to all parties and a hearing has determined that the translation is accurate, the court shall admit that translation without further need of proof at trial if the foreign language record is otherwise admissible under the Texas Rules of Evidence. The time limits set forth herein may be varied by order of the court.

(d) **Expert Testimony of Translator.** Except as provided in paragraph (c), this Rule does not prohibit the admission of an accurate translation of a foreign language record or records during trial by the testimony of a qualified translator as an expert. In a civil case, the testimony may be either live or by deposition.

(e) **Court Appointment.** The court may when necessary appoint a qualified translator, the reasonable value of whose services shall be taxed as court costs.

(f) **Objections or Conflicting Translations.** When there are either conflicting translations filed by more than one party under subparagraph (a) OR objection(s) to another party's translation filed under subparagraph (b), nothing in this rule requires or precludes the automatic admission into evidence of the conflicting translations OR requires that the issue of the correctness of a translation is an issue for the finder of fact rather than the court or for the court rather than the finder of fact.

UNIFIED RULES (CIVIL AND CRIMINAL)

WORK DONE BY LEE PARSLEY AND STAFF

Attached is memorandum reflecting changes that were either made or recommended with regard to unification of the rules. The following action was taken by the Evidence Committee of SCAC:

Page 1 #1 - This was taken care of by committee vote - that no change be made in the rule.

Page 1 #2 - These gender changes were made.

Page 1 #3 - These changes were made.

Page 2 #4 - These changes were made.

Page 2 #5 - Consistent wording was adopted.

Page 2 #6 - Noted recommended change was made.

Page 2 #7 - Refer to Court of Criminal Appeals.

Page 2 #8 - No change was recommended. Civil and criminal rules were combined.

Page 2 #9 - Civil and criminal rules were drafted as drawn. Note was added referring to right of conducting voir dire examination with regard to other Rules of Evidence.

TYPOGRAPHICAL COMMENTS

Many of these are self-explanatory. The following were specifically considered by Evidence Subcommittee:

Page 3 #3 - Change recommended from "character or a trait of character" to "character or character trait." Change was made here as reflected above.

Page 3 #4 - Change made as reflected.

Page 4 #6 - Rule as drawn speaks in terms of the client and "his" lawyer and "himself." Changes were made as recommended.

Page 4 #8 - It is felt that rule should stay as is and as amended takes care of itself with the last section (e).

Page 5 #10 - Recommended change this to "court."

Page 6 #13 - Correct statutes given.

Page 6 #15 - Correct citations given.

Page 6 #19 - Involves person's character trait or trait of person's character. Change made as consistent with prior changes.

Page 8 #31 - "Testifying to a statement" was changed to "testifying concerning a statement."

Page 9 #36 - Notes and Comments should be deleted.

ADDITIONAL WORK NEEDED, OR TO BE DONE, AND CHANGES TO BE MADE

1. Check on all matters that have been changed by the Supreme Court Advisory Committee to see that rule amendments are reflected in the Unified Rules and keep that current.

2. Check notes, comments and the body of the rules wherein reference is made to statutes or codes to be sure that the proper statute or code is given and that the current statute or code is given. Some statutes have been amended and codes have been changed.

3. The following items have been referred to the Texas State Bar Civil Evidence Committee:

   (1) Whether Rules 106 and 107 should be modified and are combined;

   (2) Whether, under Rules 202 and 204 the court should have the duty to take judicial notice on its own, or mandatorily upon motion of either party, in both civil and criminal cases;

   (3) Whether the last sentence of Rule 410 does, or should, apply only to Section 4 of that rule;

   (4) Whether Rule 513(d) ought to be limited to criminal cases;

   (5) Whether Rule 705(d) ought to be limited solely to criminal cases;

(6) Whether Rule 802 ought to be changed to make hearsay "no evidence" as it is believed to be in federal court, without objection as the civil rule was prior to the adoption of the Civil Rules of Evidence in 1983;

4. Evidence Rule 606 was voted on by the Supreme Court Advisory Committee and approved, following Rule 327 of the Rules of Civil Procedure. However, in combining the civil and criminal rules we should make one more amendment. After "assent to or dissent from the verdict" should appear the words, "or indictment." In other words, it should apply equally as to verdict or indictment.

AGENDA - VOLUME 2
NOVEMBER 22-23, 1996
SCAC MEETING