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DEADLINES AND EXTENSION MOTIONS IN CIVIL APPELLATE LITIGATION

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I. INTRODUCTION

Miscalculating or overlooking an appellate deadline can happen to any attorney, from a recent law school graduate to an appellate specialist having numerous cases on appeal, all with different deadlines for the bond, record and briefs. On some occasions, it is simply impossible to comply with the filing timetable. Other times, an appellate deadline might be missed due to an accident or negligence.

In recent years, the supreme court has revised the appellate rules to eliminate jurisdictional traps from Texas appellate procedure which often resulted in the disposition of appeals without any review of the

merits.[1] Despite those revisions, missed appellate deadlines remain not only potentially fatal to the client's chances of successfully overturning or preserving a judgment on appeal, but can also result in the appellate attorney incurring substantial malpractice liability.[2] To ensure that the client's interests are represented effectively on appeal and to avoid malpractice exposure, any attorney handling a civil case on appeal must be aware of significant deadlines, comply with those deadlines, or file an extension motion which is sufficient legally and factually to support the appellate court's extension of the filing timetable.

II. THE DEADLINES

A. *Calculating Deadlines*

1. In General

The date the trial judge *signs* the judgment or appealable order is the critical date for an appeal.[3] The date the judge announces the judgment from the bench,[4] sends a letter to counsel[5] or the date the

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1. Lopez v. Foremost Paving, Inc., 671 S.W.2d 614, 617-19 (Tex. App.—San Antonio 1984)(denying motions to dismiss and granting extension of time to file appeal bond); *see* B.D. Click Co. v. Safari Drilling Corp., 638 S.W.2d 860, 861 (Tex. 1982); *see also* Westergard, *Motions for Extension of Time Under Rule 21c*, 33 BAYLOR L. REV. 581, 581 (1981)(Texas Supreme Court changed rules to permit extension of deadlines because requiring strict compliance with appellate timetables often denied litigant right to appellate review).

2. *See* Irwin v. Dwight B. Heard Inv. Co, 281 P. 213, 214 (Ariz. 1929)(failure to timely file appellate brief exposes counsel to malpractice liability); Millhouse v. Wiesenthal, No. 01-87-01002-CV (Tex. App.—Houston [1st Dist.] August 18, 1988) (WESTLAW, Tx-Cs library) (malpractice action alleging attorney mishandled appeal by failing to timely request extension of time to file statement of facts); Welder v. Mercer, 448 S.W.2d 952, 954 (Ark. 1970)(attorney who negligently failed to timely file transcript held liable for client's out-of-pocket expenses); Daugert v. Pappas, 704 P.2d 600, 602 (Wash. 1985)(en banc)(discussing law firm's liability for adverse judgment against client when firm missed deadline for supreme court review by single day). As emphasized by the director of a legal clinic specifically designed to alert law students to their malpractice exposure, "we highlight danger points, like missing appeal deadlines." Tabac, *Crossfire at the Bar*, N.Y. Times, May 3, 1987, at 30, col. 1 (quoting Professor of Law Gary H. Palm, Cleveland State University).

3. *See* Goff v. Tuchscherer, 627 S.W.2d 397, 398 (Tex. 1982). The Supreme Court in *Goff* stressed "[t]he time from which one counts days from the appellate steps is that day on which the judge reduces to writing the judgment, decision or order that is the official, formal and authentic adjudication of the court upon the respective rights and claims of the parties." *Id.* at 398; *see also* Keltner, *Post-Judgment Remedies,* in STATE BAR OF TEXAS, ADVANCED PERSONAL INJURY COURSE BB-3 (1987)("judge's signature is single most important act in the appellate process").

4. *See Foremost Paving, Inc.*, 671 S.W.2d at 617-19 (appellate timetable runs from written, signed orders and not from oral pronouncements).

clerk enters the judgment[6] is immaterial to appellate deadlines. All appellate deadlines in the court of appeals, other than briefing deadlines or deadlines altered by the court when granting an extension motion, are based on the date the judge signs the judgment or order.[7]

Since the date the judgment or appealable order is signed determines the beginning of the periods specified in the appellate rules for filing in trial and appellate courts documents connected with an appeal, there should be no confusion in the record concerning the date the judgment was signed.[8] For that reason, appellate rule 5(b)(2) directs: "Judges, attorneys and clerks . . . 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."[9] Rule 5 is designed to fulfill the Supreme Court's mandate in *Burrell v. Cornelius* that all judgments should include the following line:

"SIGNED this _____ day of _____, 19__."[10]

If no date is shown on the face of the appealable order or judgment, despite the trial court's and counsel's "best efforts," the date of signing may be shown in the appellate record through a certificate of the judge or by other methods of proof.[11] Conversely, if the date of the signature on the judgment is incorrect, that defect can be corrected through a *nunc pro tunc* order.[12]

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5. *Goff*, 627 S.W.2d at 398-99 (letter to counsel announcing ruling on venue motion did not constitute judgment or order for appellate purposes); *accord* Mays v. Foremost Ins. Co., 627 S.W.2d 230, 232 (Tex. App.—San Antonio 1981, no writ)(trial judge's letter to counsel does not begin period for filing of cost bond or transcript).

6. *See* Burrell v. Cornelius, 559 S.W.2d 96, 98 (Tex. Civ. App.—Tyler 1977)(filing of judgment by clerk does not establish date of judgment), *rev'd on other grounds*, 570 S.W.2d 382 (Tex. 1978).

7. *See* Keltner, *Post-Judgment Remedies*, in STATE BAR OF TEXAS, ADVANCED PERSONAL INJURY COURSE BB-3 (1987); O'Connor, *Perfecting the Appeal*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE C-7 (1988).

8. *Burrell*, 570 S.W.2d at 383 (criticizing bench and bar for carelessness in adhering to rule that all judgments should reflect date signed); Ortiz v. O.J. Beck & Sons, Inc., 611 S.W.2d 860, 863 (Tex. Civ. App.—Corpus Christi 1980, no writ)(imprecise use of terms such as rendition, filing, entry and signing of judgments causes confusion and should be avoided).

9. TEX. R. APP. P. 5(b)(2). All textual references are to the Texas Rules of Appellate Procedure unless otherwise indicated.

10. *See Burrell*, 570 S.W.2d at 384; *see also* Storey, *The Appellate Process*, in SOUTH TEXAS COLLEGE OF LAW, APPELLATE PRACTICE INSTITUTE E-1 (1988).

11. *See* TEX. R. APP. P. 5(b)(2).

12. *See* Cyrus v. State, 601 S.W.2d 776, 777 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.)(omission of date clerical error correctable by *nunc pro tunc* order); *see also* O'Connor,

While the date the judgment was signed is the starting point for the appellate schedule, that date is not included when calculating appellate deadlines.[13] Nor is the last day of an appellate filing period included if that day is a Saturday, Sunday or legal holiday, "as defined by Article 4591."[14] In that situation, the period for filing is extended to the next day which is not a Saturday, Sunday or legal holiday.[15]

Several writers have correctly recognized that the dates which qualify as "legal holidays" for appellate deadline purposes are unsettled.[16] Prior to the adoption of the appellate rules, rule 4 of the Texas Rules of Civil Procedure governed deadline calculation.[17] While rule 5 limits legal holidays to those defined by Article 4591, civil procedure rule 4 simply provided, and still provides, that the last day of a period is not counted if falling on a "legal holiday."[18] In construing civil procedure rule 4, the supreme court has held that a "legal holiday," for purposes of computing time limits, includes not only those days designated officially as holidays by Article 4591 but also those dates recognized by "legislative declaration as being general holidays by popular acceptance."[19] To illustrate, banking statutes which provide that a Friday or Monday constitutes a holiday when the designated holiday falls on a weekend create "legal holidays" for deadline purposes under civil procedure rule 4.[20]

Since legal holidays under the appellate rules are apparently limited to those found in Article 4591, it is questionable whether those holidays recognized by the legislature as being general holidays by popu-

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Perfecting the Appeal, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE C-7 (1988).

13. *See* TEX. R. APP. P. 5(a).

14. *See id.*

15. *See id.*

16. *See* Davis, *When is the Next Day the Last Day*, 51 TEX. BAR J. 451, 454 (1988); O'Connor, *Perfecting the Appeal*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE C-3 (1988).

17. *See* Davis, *When is the Next Day the Last Day*, 51 TEX. BAR J. 451, 451 (1988).

18. *Compare* TEX. R. APP. P. 5(a) *with* TEX. R. CIV. P. 4.

19. *See* Blackman v. Housing Auth. of City of Dallas, 254 S.W.2d 103, 106 (Tex. 1953)(day after Texas Independence Day, a Monday, qualified as legal holiday so record timely filed on Tuesday); *see also* Johnson v. Texas Employers Ins. Ass'n, 674 S.W.2d 761, 762 (Tex. 1984)(reaffirming *Blackman* rule).

20. *See Johnson*, 674 S.W.2d at 762. Holidays for state employees declared pursuant to the Appropriations Act similarly qualify as general holidays by popular acceptance. Freeman v. Del Mar College, 716 S.W.2d 729, 731 (Tex. App.—Corpus Christi 1981, no writ); *see generally* O'Connor, *Perfecting the Appeal*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE C-3 (1988).

lar acceptance can be used to enlarge appellate time periods. There is no reason for the "legal holidays" to differ depending on whether a litigant is in trial or appellate court;[21] yet, until the issue is clearly resolved, appellate counsel should rely solely on holidays listed in Article 4591.[22]

In some counties, the courthouse may be closed for a local holiday even though the date does not qualify as a legal holiday or general holiday by popular acceptance. Local holidays are not legal holidays; therefore the appellate deadline is not extended to the following day.[23] If counsel knows that the courthouse will be closed on the last day for filing an appellate document and is uncertain whether it is a legal holiday, contact the clerk prior to the due date and make arrangements for the clerk to open the courthouse or accept the document for filing at the clerk's home.[24] If the clerk cannot be located, then find a judge and take it to his or her home.[25] If neither a clerk nor a judge can be located who is willing to accept the document for filing, it will be necessary to file an extension motion reasonably explaining why the document was not filed on time and proving that you attempted to meet the deadline.[26]

The appellate filing timetable differs when the mails are used instead of hand delivery. Unfortunately, as several Texas commentators have observed, there is a conflict between the two appellate rules which discuss filing by mail.[27] Under rule 4(b), if any matter concerning an appeal, writ of error, or application for writ of error is sent to

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21. *See* Davis, *When is the Next Day the Last Day*, 51 TEX. BAR J. 451, 454 (1988).

22. O'Connor, *Perfecting the Appeal*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE C-3 (1988); *see* Story, *The Appellate Process*, in STATE BAR OF TEXAS, APPELLATE PRACTICE INSTITUTE E-2 (1988)(only holidays in Article 4591 should be used when calculating appellate deadlines).

23. Del Castillo v. Lowry, 698 S.W.2d 367, 368-69 (Tex. App.—Houston [14th Dist.] 1985, orig. proc.)(though Harris County Courthouse was closed in recognition of San Jacinto Day, deadline for filing contest to affidavit in lieu of appeal bond not extended to following day); *see generally* Bracken, *Mechanics of Appeal*, in STATE BAR OF TEXAS, PROCEDURAL INSTITUTE: APPELLATE PRACTICE D-3 (1986).

24. O'Connor, *Perfecting the Appeal*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE G-2 (1987).

25. *Id.*

26. *See* Ziddell v. NHP Real Estate Co., 643 S.W.2d 199, 200 (Tex. App.—Austin 1982, no writ)(refusing to hold that closing of courthouse by commissioner's court constituted legal holiday and emphasizing absence of proof in record showing courthouse actually closed).

27. *See* Davis, *When is the Next Day the Last Day*, 51 TEX. BAR J. 451, 452 (1988); 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 563 (Tex. Practice Supp. 1987).

the proper clerk by United States Mail, First Class, in a properly addressed envelope, stamped and deposited in the mail "one day or more before the last day" for filing, it is deemed timely filed if received by the clerk no more than ten days after the due date.[28] In contrast, appellate rule 5(a) states that any paper filed by mail as provided in rule 4 is mailed on time when it is mailed "on the last day" of the period.[29] So, rule 5 permits mailing on the last day while rule 4 does not.[30] Until the conflict is resolved, appellate matters should be mailed at least one day early.[31]

The relationship between the rules permitting filing by mail and the final sentence of rule 5 which provides that the last day of an appellate period is not counted if it is a Saturday, Sunday or legal holiday is also unclear.[32] Most courts have concluded; however, that a party filing appellate documents by mail cannot rely on rule 5.[33] Consequently, if the due date falls on a Monday, the last day for mailing is Sunday.[34] If the due date falls on a Sunday, then the appellate document should be mailed on Saturday, even though the document could

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28. TEX. R. APP. P. 4(b).

29. TEX. R. APP. P. 5(a).

30. In addition, while rule 4(b) requires the clerk to receive the paper within ten days of mailing, rule 5(a) contains no such limitation. *See* 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 563 (Tex. Practice Supp. 1987).

31. Davis, *When is the Next Day the Last Day*, 51 TEX. BAR J. 451, 454 (1988).

32. *See id.*

33. *See* Fellowship Missionary Baptist Church of Dallas, Inc. v. Sigel, 749 S.W.2d 186, 187-89 (Tex. App.—Dallas 1988, no writ)(dismissing appeal for want of jurisdiction and discussing authorities).

34. *See, e.g., Fellowship Missionary Baptist Church*, 749 S.W.2d at 187 (compliance with rule 4 by depositing document in mail one day prior to last day of period to timely file is prerequisite to trigger extension period of rule 5(a)); Walkup v. Thompson, 704 S.W.2d 938, 938 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.)(per curiam)(rule 4 cannot extend last day to file cost bond under rule 5 from Sunday to Monday); Martin Hedrick Co. v. Gotches, 656 S.W.2d 509, 510-11 (Tex. App.—Waco 1983, writ ref'd n.r.e.)(rule 4 not available to allow party to deposit statement of facts in mail on same day statement of facts due in appellate court). The courts in *Sigel*, *Walkup* and *Gotches* rejected the reasoning of the lone court to reach the opposite conclusion. Ector County Indep. School Dist. v. Hopkins, 518 S.W.2d 576, 583 (Tex. Civ. App.—El Paso 1974, no writ)(rule 4 negates specific provision of rule 5 requiring information relating to appeal to be deposited in mail one day or more prior to last day for timely filing). The fact that the post office might not postmark mail deposited on Sunday does not justify an untimely mailing since a postmark is merely *prima facie* proof of the date of mailing. In the absence of a postmark, the date of mailing can be proven by affidavit. *See Fellowship Missionary Baptist Church*, 749 S.W.2d at 189 (dismissing appeal for want of jurisdiction due to untimely cash deposit and absent sworn proof to contrary); *see also* TEX. R. APP. P. 4(b), 19(d). To avoid an unnecessary dispute over mailing dates, it is preferable to mail the document on Saturday when it can be postmarked.

be filed by hand two days later on Monday.[35]

Under the rule governing the impact of mailing on appellate schedules, *prima facie* proof of the date of mailing is provided by a certificate of mailing by the United States Postal Service or a legible postmark affixed by the postal service.[36] Counsel should not rely on the law firm's postage meter as proof of mailing. Texas courts have recognized that a postmark affixed by a law firm postal meter does not satisfy the evidentiary requirements of rule 4 and is not *prima facie* proof of timely mailing.[37] At best, such a postmark is merely some evidence of the date of mailing, in contrast to the essentially conclusive effect of a postal service postmark.[38]

2. Motions for New Trial

Under civil procedure rule 329b, appellate deadlines are enlarged by a timely filed motion for new trial or motion to modify, correct or reform the judgment.[39] An untimely rule 329b motion is a nullity.[40] Only the initial motion for new trial filed by any party affects the appellate timetable as the subsequent filing of an amended motion or a motion by another party does not additionally enlarge appellate due

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35. *See* Davis, *When is the Next Day the Last Day*, 51 TEX. BAR J. 451, 454 (1988)(caution dictates mailing at least one day before last day as originally computed without regard to whether last day is holiday).

36. *See* TEX. R. APP. P. 4(b).

37. *See* Perez v. State, 629 S.W.2d 834, 838 n.3 (Tex. App.—Austin 1982, no writ); *Hopkins*, 518 S.W.2d at 583.

38. *See Hopkins*, 518 S.W.2d at 583 (better practice is to use official postal service postmark).

39. *See* 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 360 (Tex. Practice 1985). A motion for new trial and motions to correct, modify or reform judgments have identical impact on the appellate timetable and must be filed within thirty days after the signing of the judgment. *See* TEX. R. CIV. P. 329(b). Under Texas Rule of Civil Procedure 5, a party is entitled to mail a motion for new trial to the clerk for filing and it will be deemed timely filed if deposited in the mail one day or more before the due date and received by the clerk no later than ten days after the filing deadline. *See* TEX. R. CIV. P. 5.

40. Pampell v. Pampell, 699 S.W.2d 355, 357 (Tex. App.—Austin 1985, no writ). The due date for a motion for new trial cannot be extended by agreement by the trial judge or by an appellate court. Gomez v. Bryant, 750 S.W.2d 810, 811 (Tex. App.—El Paso 1988, no writ)(parties cannot agree to extension of trial court's jurisdiction over new trial motion); Lind v. Gresham, 672 S.W.2d 20, 22 (Tex. App.—Houston [14th Dist.] 1984, no writ)(trial court has no power to permit late filing of new trial motion); TEX. R. CIV. P. 5 (trial court may not enlarge period for taking action relating to new trials "except as stated in their rules"). *See generally* Keltner, *Post-Judgment Remedies,* in STATE BAR OF TEXAS, ADVANCED PERSONAL INJURY COURSE BB-11 (1987)(time period for filing new trial motion essentially absolute).

dates.[41] The date the motion is overruled has no affect on deadlines; it is the filing of a timely motion alone which automatically enlarges the timetable.[42]

A premature motion for new trial, i.e., one filed prior to the rendition of judgment, is effective to enlarge the timetable. The motion will be viewed as having been filed on the day of, but subsequent to, the judgment.[43]

Determining the impact of a post-judgment motion on the appellate timetable can be confusing when the trial court renders multiple judgments. If the judgment is corrected, modified or reformed "in *any* respect" while the trial court has plenary jurisdiction, the time for appeal runs from the time the corrected, modified or reformed judgment is signed.[44] On the other hand, if the change in the judgment is made after the expiration of plenary jurisdiction and involves a correction of a clerical mistake, the appellate timetable runs from the date of the signing of the order to correct the clerical error, i.e., the *nunc pro tunc* order, *only* as to those matters not litigated in the origi-

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41. 4 R. McDONALD, TEXAS CIVIL PRACTICE § 18.06.2 (revised 1984); 6 W. DORSANEO, TEXAS LITIGATION GUIDE § 140.03[1] (1988); *see* TEX. R. CIV. P. 329b(e).

42. *See* 6 W. DORSANEO, TEXAS LITIGATION GUIDE § 140.03[2] (1988)(trial court's action or inaction on new trial motion generally has no effect on time to perfect appeal). To extend filing deadlines, it is only necessary to timely file the motion. The fact that the movant failed to give proper notice to opposing counsel or pay the filing fee at the time of filing the motion does not invalidate the motion. *See* Arndt v. Arndt, 709 S.W.2d 281, 232-33 (Tex. App.—Houston [14th Dist.] 1986, no writ)(motion timely filed although fee not paid until 32nd day after judgment signed); Zephyr v. Zephyr, 683 S.W.2d 18, 19 (Tex. App.—Houston [14th Dist.] 1984, no writ)(failure to notify opponent of filing of new trial motion). Motions for new trial are not permitted in certain types of litigation. *See* TEX. R. APP. P. 42(a)(1) (in appeals from interlocutory orders, no motion for new trial shall be filed).

43. *See* TEX. R. CIV. P. 306c (premature new trial motion deemed filed on date of but "subsequent to" signing of judgment). *But see* Reitmeyer v. Clawson, 634 S.W.2d 379, 382 (Tex. App.—Austin 1982, no writ)(Rule 306c inapplicable to motion which attacked nonappealable order and not referable to final judgment eventually rendered). In contrast, a premature motion to reinstate from a dismissal for want of prosecution is ineffective to enlarge deadlines. *See* Hales v. Chubb & Son, Inc., 708 S.W.2d 597, 599 (Tex. App.—Houston [1st Dist.] 1986, no writ).

44. TEX. R. CIV. P. 329b(h); *see also* Miller v. Hernandez, 708 S.W.2d 25, 26 (Tex. App.—Dallas 1986, no writ); Garza v. Serrato, 671 S.W.2d 713, 714 (Tex. App.—San Antonio 1984)(denying motion to dismiss). During the period of plenary jurisdiction, the trial court's power to modify its judgment is essentially absolute. *Garza*, 671 S.W.2d at 714. Moreover, any change in the judgment need not be material to restart the appellate timetable. *Id.* at 715 (litigant's right to appellate review no longer turns on whether second judgment made material change in original). *See generally* 6 W. DORSANEO, TEXAS LITIGATION GUIDE § 140.04 (1988)(law remains unsettled concerning need for judgment to be materially altered to restart appellate timetable).

nal judgment.[45] In other words, a litigant cannot evade the penalty for missing the deadline for the appeal from the judgment on the merits by obtaining a *nunc pro tunc* order and then starting anew the appellate deadlines for appealing from the entire judgment.[46]

A critical question arises when counsel for the losing party files a motion for new trial complaining of the first judgment, but not the second. Does that prior motion enlarge the appellate deadlines for the appeal from the second judgment? If the motion complaining about the first judgment involves a matter which remained unchanged in the second judgment, then a second motion for new trial should not be necessary to enlarge the deadlines for an appeal from the second judgment[47] or to preserve error.[48] For purposes of calculating deadlines, the motion for new trial attacking the first judgment will be treated as if it had also attacked the second judgment.[49] There is authority, however, that if the initial motion for new trial was overruled prior to rendition of the second judgment, it is necessary to file a sec-

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45. *See* TEX. R. CIV. P. 329b(h); TEX. R. APP. P. 5(c); *see also* Pruet v. Coastal States Trading, Inc., 715 S.W.2d 702, 704 (Tex. App.—Houston [1st Dist.] 1986, no writ)(refusing to review complaints about *nunc pro tunc* judgment which could have been raised in appeal from first judgment).

46. *See* 6 W. DORSANEO, TEXAS LITIGATION GUIDE § 140.04 (1988); Bracken, *Mechanics of Appeal*, in STATE BAR OF TEXAS, PROCEDURAL INSTITUTE: APPELLATE PRACTICE D-2, D-3 (1986); *see also* Cavalier Corp. v. Store Enter., Inc., 742 S.W.2d 785, 787 (Tex. App.—Dallas 1987, no writ)(dismissing appeal due to untimely filed bond and holding correction of appellant's name by *nunc pro tunc* order did not restart appellate timetable).

47. 6 W. DORSANEO, TEXAS LITIGATION GUIDE § 142.01[3] (Supp. 1988)(when judgment modified on basis of motion to modify and further motion not filed then initial motion inapplicable to second judgment because movant already received all relief requested).

48. A second motion will be necessary to preserve error if the modified judgment raises an issue not found in the first judgment. *See* TEX. R. CIV. P. 324(b) (setting out complaints for which new trial motion prerequisite to appellate review).

49. *See* Miller v. Hernandez, 708 S.W.2d 25, 25-27 (Tex. App.—Dallas 1986)(denying motion to dismiss); *see also* A.G. Solar & Co. v. Nordyke, 744 S.W.2d 646, 647-48 (Tex. App.— Dallas 1988, no writ). This result is supported by the plain language of rule 58 which provides that if the trial judge has corrected or reformed the order being appealed from, or has vacated that order and signed another, then "any proceedings relating to an appeal of the first order may be considered applicable to the second." TEX. R. APP. P. 58(c); *see also* TEX. R. CIV. P. 306c (premature motion for new trial deemed filed on date of but subsequent to signing of judgment assailed by motion); TEX. R. APP. P. 58(a) (proceedings relating to appeal not considered ineffective due to prematurity if "subsequent appealable order has been signed to which premature proceeding may properly be applied"). Several courts, however, in cursory opinions have apparently held that the extension of time provided by a new trial motion applies only to the judgment actually assailed by that motion. *See* American Home Assurance v. Faglie, 747 S.W.2d 5, 6 (Tex. App.—El Paso 1988, no writ); Kitchens v. Kitchens, 737 S.W.2d 101, 102 (Tex. App.—Waco 1987, no writ).

ond motion identical to the first.[50]

There is controversy over whether a procedurally deficient or misnamed post-judgment motion operates to extend appellate deadlines. In *First Freeport National Bank v. Brazoswood National Bank*,[51] the court of appeals ruled that a post-judgment motion entitled, "Motion to Disregard Special Issue Findings and to Modify and Enter Judgment," was actually a motion for judgment n.o.v., did not qualify as a civil procedure rule 329b motion and, therefore, did not enlarge the timetable.[52] However, other courts have reasoned that *any* post-judgment motion regardless of the motion's title or prayer, which if granted would result in a substantive change in the judgment, extends the time for perfecting appeal.[53] Even if the motion is skeletal or ineffective to preserve anything for appellate review, deadlines are extended.[54]

Another peculiar area of motion for new trial practice involves the lack of notice to the litigant of an adverse judgment. Despite mandatory appellate and trial rules requiring court clerks to promptly notify all parties of the entry of a judgment,[55] most litigators have experienced the case where the judgment debtor complains he or she had no notice of entry of judgment. Appellate rule 5(b)(4) and civil procedure rule 306a(4) might provide a remedy in that situation. Under those rules, if neither counsel nor his client received the statutorily required notice, nor acquired actual knowledge of the judgment or appealable order within twenty days after it was signed, then the appellate timetable begins from the date the party or his attorney re-

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50. *A.G. Solar & Co.*, 744 S.W.2d at 647-48 (if initial motion overruled before trial court renders reformed judgment then second motion for new trial needed to enlarge deadlines from appeal of second judgment).

51. 712 S.W.2d 168, 169-70 (Tex. App.—Houston [14th Dist.] 1986, no writ).

52. *See id.* at 169-70.

53. *See* Taylor v. Trans-Continental Properties, Ltd., 739 S.W.2d 873, 876-77 (Tex. App.—Tyler 1987, no writ); Brazos Elec. Power Coop., Inc. v. Callejo, 734 S.W.2d 126, 128 (Tex. App.—Dallas 1987)(denying motion to dismiss), *writ granted*, 31 Tex. Sup. Ct. J. 326 (April 20, 1988).

54. Neily v. Aaron, 724 S.W.2d 908, 910-11 (Tex. App.—Fort Worth 1987, no writ)(timely filed but impermissible general motion for new trial failed to preserve error for appellate review but extended time to perfect appeal). In contrast, a defective motion to reinstate a cause following dismissal for lack of prosecution does not extend the time for perfecting appeal. *See* Butts v. Capitol City Nursing Home, Inc., 705 S.W.2d 696, 697 (Tex. 1986).

55. *See* TEX. R. CIV. P. 239a (default judgments); TEX. R. CIV. P. 306a(3) (final judgments and appealable orders); TEX. R. APP. P. 5(b)(3) (final judgments and other appealable orders); TEX. R. APP. P. 5(e) (appellate court judgments).

ceived the notice or acquired actual knowledge.[56]

To expand deadlines based on lack of notice, the movant must file a sworn motion in the trial court alleging: (1) the date the party or his attorney first either received notice of the judgment or acquired actual knowledge of the signing, and (2) that this date was more than twenty days after the judgment was signed.[57] The movant should request a hearing before the trial court and prove the sworn allegations.[58] Furthermore, the movant should obtain a finding of fact from the trial court establishing the date of receipt of the notice or acquisition of actual knowledge. That finding will be the starting point for the calculation of the appellate schedule.[59]

There is one significant limitation on the availability of the "no-notice" relief. That rule provides that in no event shall the appellate timetable begin more than ninety days after the original judgment or appealable order is signed.[60] Consequently, a party who learns of a judgment ninety-one days after rendition will be unable to pursue a regular appeal but will be forced to challenge the judgment by writ of error or bill of review.[61]

B. *Perfecting the Appeal: The Appeal Bond or Substitute*

Timely perfection of appeal is an indispensable prerequisite to invoking the jurisdiction of the appellate court. An appeal is perfected by filing the cost bond on appeal or a substitute for the bond, such as a cash deposit or affidavit of inability to pay costs of appeal, or notice

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56. TEX. R. CIV. P. 306a(5); TEX. R. APP. P. 5(b)(5).

57. *See* TEX. R. CIV. P. 306a(4); TEX. R. APP. P. 5(b)(4).

58. *See* Olvera v. Olvera, 705 S.W.2d 283, 284 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.)(sworn motion claiming no notice of judgment which was not presented for evidentiary hearing and was overruled by operation of law did not extend time for perfecting appeal). For examples of litigants who failed to comply with the procedural and evidentiary rules governing motions for new trial alleging no notice of the judgment, see *Memorial Hosp. v. Gillis*, 741 S.W.2d 364, 365 (Tex. 1987), *Sabine Towing and Transp. Co. v. Evans*, 709 S.W.2d 783, 784-85 (Tex. App.—Beaumont 1986, writ ref'd n.r.e.), and *Olvera*, 705 S.W.2d at 284 (opinion on motion for rehearing).

59. *See* Payne & Keller Co. v. Word, 732 S.W.2d 38, 41 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.)(without fact finding appellate court cannot determine if movant met burden under rule 306a(4)); *see also* TEX. R. APP. P. 5(b)(4).

60. *See* TEX. R. APP. P. 5(b)(4).

61. *See* KELTNER, *Post-Judgment Remedies*, in STATE BAR OF TEXAS, ADVANCE PERSONAL INJURY COURSE BB-3 (1987)(no notice rule available to litigant discovering judgment on 21st day but not on 20th day).

of appeal.[62] If the deadline for perfecting the appeal is missed and not extended by the appellate court, then the right to appeal is irretrievably lost.[63]

The appeal bond must be filed with the clerk of the trial court — not the court of appeals[64] — no later than thirty days after the signing of the judgment if a motion for new trial has not been filed.[65] If a motion for new trial or a motion to vacate, modify, reform or correct the judgment has been timely filed *by any party*,[66] then the bond must be filed within ninety days after the signing of the judgment.[67] The deadline for perfecting an appeal is identical whether appellant relies on a bond, cash deposit, notice of appeal or affidavit of inability.[68]

A premature attempt to perfect an appeal, such as by filing a cost bond or its substitute before the judgment is signed, is effective to preserve the right to appeal.[69] The prematurely filed bond or substi-

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62. TEX. R. APP. P. 40(a)(1). A discussion of the parties required to file a bond to perfect an appeal, as well as the requisites of an appeal bond, is beyond the scope of this article. Certain individuals and entities are exempt by statute from filing a bond and, instead, perfect an appeal by filing a notice of appeal. *See generally* 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 561 (Tex. Practice 1985). Also, if the party primarily prevailing in the trial court is not entirely satisfied with the judgment, it may be necessary for that party to perfect a separate appeal in order to invoke appellate jurisdiction over its complaints. *See generally* Hecht, *Limited & Cross Appeals*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PROCEDURE COURSE (1987); Patrick & Watkins, *Limited and Cross Appeals*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE (1988).

63. In literally hundreds of cases, appeals have been dismissed for want of jurisdiction due to the absence of a timely filed bond or substitute. *See, e.g.*, Gilbert v. Huber, Hunt & Nichols, Inc., 672 S.W.2d 9, 10 (Tex. App.—San Antonio), *writ ref'd n.r.e. per curiam*, 671 S.W.2d 869 (Tex. 1984); Ziddell v. NHP Real Estate, 643 S.W.2d 199, 199-200 (Tex. App.—Austin 1982, no writ); First Nat'l Bank in Dallas v. Dyes, 638 S.W.2d 957, 960 (Tex. App.—Eastland 1982, no writ).

64. *See* Alvarado v. State, 656 S.W.2d 611, 612 (Tex. App.— San Antonio 1983, no writ)(dismissing appeal because appeal bond filed in appellate rather than trial court).

65. TEX. R. APP. P. 41(a)(1).

66. The inclusion of the phrase "by any party" in rule 40 was intended to eliminate the rule of *Neuhoff Bros. Packers v. Acosta*, 327 S.W.2d 434, 436 (Tex. 1959) which prohibited reliance on motions filed by another party in calculating appellate deadlines. 6 W. DORSANEO, TEXAS CIVIL LITIGATION § 142.01[3] (1988).

67. TEX. R. APP. P. 41(a)(1). In an appeal from an interlocutory order, the bond or substitute must be filed no later than 20 days after the order is signed by the trial court. TEX. R. APP. P. 41(a)(2). Motions for new trial are not permitted on appeals from interlocutory orders; thus, such a motion would not enlarge deadlines. *See* TEX. R. APP. P. 42(a)(1).

68. 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 563 (Tex. Practice 1985).

69. TEX. R. APP. P. 41(c) (no appeal bond or affidavit in lieu thereof, notice of appeal, or notice of limitation of appeal shall be held ineffective because prematurely filed); *see* TEX. R. APP. P. 58(a) (proceedings relating to appeal not ineffective because of prematurity if subsequent appellate order signed to which premature proceeding is applicable); *see also* Ragsdale v.

tute is not a nullity; it is considered to have been filed on the day of but subsequent to the date of the signing of the judgment or the order overruling a motion for new trial.[70]

The Texas Supreme Court has stressed that virtually any sort of instrument filed by the appellant which is intended to act as a cost bond or deposit will invoke appellate jurisdiction and perfect the appeal.[71] Rule 46 provides that when there is a defect of substance or form in the bond or deposit, then on motion to dismiss the appeal based on such defects, the appellate court may allow the filing of a new bond or deposit.[72] The rule providing for defective bonds and deposits to be amended is liberally construed in favor of the perfection of appeals[73] and the assumption of appellate jurisdiction.[74] The appellate court's jurisdiction is invoked by the timely filing of the bond or deposit even though the instrument is defective.[75] Only if the appellant fails to remedy the defects should the appeal be dismissed.[76]

The initial due date for filing an affidavit in lieu of cost bond on appeal is the same as for other documents used to perfect an appeal.[77] Involvement in an appeal in which such an affidavit is filed, however, requires counsel to face one of the more confusing aspects of appellate deadline calculations with a variety of "short fuse" mandatory time constraints imposed on both appellant and appellee.

Progressive Voters League, 730 S.W.2d 176, 177-78 (Tex. App.—Dallas 1987)(granting motion to apply cost bond filed on premature appeal of interlocutory nonappealable order to subsequent appeal of appealable order). *See generally* 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 563 (Tex. Practice 1985).

70. TEX. R. APP. P. 41(c).

71. *See* Woods Exploration & Producing Co. v. Arkla Equip. Co., 528 S.W.2d 568, 570 (Tex. 1975).

72. TEX. R. APP. P. 46(f).

73. *Woods Exploration & Producing Co.*, 528 S.W.2d at 570; *see* Jinkins v. Bryan, 733 S.W.2d 268, 268-69 (Tex. App.—Amarillo 1987)(denying motion to dismiss and discussing Texas cases indicative of liberal construction of defective bonds and deposits).

74. *See Jinkins*, 733 S.W.2d at 268-69 (denying motion to dismiss and observing under rule 46(f) "appellate court is not easily denied").

75. *See* Pollak v. Metroplex Consumer Center, Inc., 722 S.W.2d 512, 514 (Tex. App.—Dallas 1986)(vacating order of dismissal and reinstating appeal); *see also* Smith v. Valdez, 737 S.W.2d 141, 142 (Tex. App.—San Antonio 1987)(conditionally granting motion to dismiss but holding even if bond defective, dismissal of appeal not required).

76. *See Valdez*, 737 S.W.2d at 142-43 (conditionally granting motion to dismiss).

77. *See* TEX. R. APP. P. 40(a)(1). While the rule indicates that notice must be given after filing, the Texas Supreme Court has indicated that advance notification of an intent to perfect an appeal by affidavit will suffice. *See* Jones v. Stayman, 747 S.W.2d 369, 370 (Tex. 1987). *See generally* O'Connor, *Perfecting the Appeal*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE C-36 (1988).

Not only must the affidavit be filed within the time period specified for filing a cost bond, but notice must be given of that filing to opposing parties and the court reporter within two days after filing.[78] As numerous appellants have discovered to their dismay, the failure to comply with the two-day notice provision renders the affidavit a nullity and requires the appellant to pay costs on appeal or post security.[79] Since the usual reason for filing the affidavit in the first place is because appellant is too poor to pay for appellate costs, non-compliance with the mandatory two-day notice provision generally terminates the litigant's attempt to obtain the appellate relief.[80]

On the other hand, once the affidavit has been timely filed and proper notice provided, the appellee is faced with a number of strict deadlines. Rule 40(a)(3)(C) requires any contest to be filed within ten days after the contestant receives notice of the filing of the affidavit of inability.[81] If no contest is filed within that ten-day period, "the allegations of the affidavit shall be taken as true" and the appellant shall be permitted to appeal as an indigent.[82]

Rule 40(a)(3)(E) also states if no ruling is made on a timely filed contest within ten days after its filing, "the allegations of the affidavit shall be taken as true."[83] Texas courts have uniformly held that when

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78. TEX. R. APP. P. 40(a)(3)(B). If service by mail is being used, the notice must be mailed the day before the due date, not on the due date. *See* Fellowship Missionary Baptist Church v. Sigel, 749 S.W.2d 186, 187 (Tex. App.—Dallas 1988, no writ)(dismissing appeal for inadequate notice to court reporter).

79. *See, e.g., In re* V.G., 746 S.W.2d 500, 501 (Tex. App.—Houston [1st Dist.] 1988, no writ)(dismissing appeal); Villareal v. H.E. Butt Grocery Co., 742 S.W.2d 725, 726 (Tex. App.—Corpus Christi 1987, no writ)(appeal dismissed); Furr v. Furr, 721 S.W.2d 565, 566 (Tex. App.—Amarillo 1986, no writ)(overruling motion to extend deadline for filing affidavit). Timely notice must be given to both the opposing party and the court reporter. *See* Matlock v. Allstate Ins. Co., 729 S.W.2d 960, 960 (Tex. App.—Corpus Christi 1987, no writ)(court of appeals lacked jurisdiction where appellant notified appellee's attorney of affidavit but failed to notify court reporter).

80. The Texas Supreme Court has emphasized recently that the indigency notice provisions should be liberally construed in favor of the right to appeal. *See* Jones v. Stayman, 747 S.W.2d 369, 370 (Tex. 1987). The appellant's failure to comply with rule 40 may be waived by a court reporter or opposing party who has the opportunity to object to deficient notice but fails to do so. *See id.*

81. Any interested officer of the court, such as the clerk, and not just the reporter or opposing party, has standing to file a contest. *See* 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 559 (Tex. Practice 1985); O'Connor, *Perfecting the Appeal*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE C-36 (1988).

82. TEX. R. APP. P. 40(a)(3)(E).

83. TEX. R. APP. P. 40(a)(3)(E). The trial judge, however, is authorized to extend the time for a hearing and ruling by filing a signed written order within the ten day period. *Id.*

the contestant fails to obtain a ruling within a ten-day period, a contest is automatically and irrevocably overruled by operation of law.[84] In *Beatty v. Martin*,[85] after describing that ten-day rule as having "no exceptions and is in the nature of a jurisdictional requirement,"[86] the court held:

> In summary, the trial court was without authority to act on the contest to the affidavit of inability to pay costs any time after the ten day period of Rule 355(e) [now appellate rule 40] has expired. Therefore, the order sustaining the contest to the affidavit is a nullity and Relator is entitled to Mandamus relief.[87]

Simply stated, a contestant loses "the contest automatically if it is not ruled on in ten days."[88] Rule 40(a)(3) is drawn by the supreme court in mandatory terms and does not provide the trial court with any discretion whatsoever; if the court does not rule on the contest within ten days after the contest is filed, the allegations of the affidavit must be taken as true.[89] If the trial judge attempts to rule on the contest after the expiration of the ten day period, that ruling is void.[90]

Moreover, an oral pronouncement that the contest is sustained or a docket entry within the ten-day period is not valid as an order sustaining the contest.[91] In the absence of a *written* order sustaining the contest signed within ten days of the filing of the contest, it is conclusively presumed that the affidavit of inability was sustained.[92]

That strict ten-day period for obtaining a rule governs cases in

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The judge may not extend the time for more than twenty additional days after the extension order. *Id.*

84. *See, e.g.*, Alvarez v. Penfold, 699 S.W.2d 619, 620 (Tex. App.—Dallas 1985, orig. proc.); Beatty v. Martin, 690 S.W.2d 94, 95 (Tex. App.—Dallas 1985, orig. proc); Guetersloh Grain, Inc. v. Wright, 618 S.W.2d 135, 136 (Tex. App.—Amarillo 1981, no writ).

85. 690 S.W.2d 94 (Tex. App.—Dallas 1985, orig. proc.).

86. *Id.* at 95.

87. *Id.*

88. *Guetersloh Grain*, 618 S.W.2d at 136 n.3.

89. *Id.*; *accord Beatty*, 690 S.W.2d at 95; *Alvarez*, 699 S.W.2d at 620.

90. *See Alvarez*, 699 S.W.2d at 629; Lopez v. Foremost Paving, Inc., 671 S.W.2d 614, 615-16 (Tex. App.—San Antonio 1984)(granting extension motion, denying dismissal motions).

91. *See* Modern Living, Inc. v. Alworth, 730 S.W.2d 444, 446 (Tex. App.—Beaumont 1987, orig. proc.)(neither oral pronouncement nor docket entry sufficient as "[o]nly a written signed order is effective").

92. *See, e.g., id.* at 446; *Alvarez*, 699 S.W.2d at 620; *Beatty*, 690 S.W.2d at 95; Guetersloh Grain, Inc. v. Wright, 618 S.W.2d 135, 136 (Tex. App.—Amarillo 1981, no writ).

which multiple contests are filed.[93] As one court concluded, "the filing of the first contest fixes the time within which the trial court must rule by written order."[94] In other words, any contest filed after the initial contest does not trigger an additional ten-day period.

Thus, it is critical for counsel seeking to contest an affidavit of inability: (1) to verify that appellant complied with the two-day notice provision; (2) to file a contest within ten days after notice of filing of the affidavit; and (3) to have the contest heard and sustained by written order within ten days of filing of the contest or within the time period as timely extended by the court.

When a contest is filed, it delays the perfection of the appeal until the contest is overruled. If the court overrules the contest, then the appeal is viewed as having been perfected at the time the affidavit was filed.[95] If the court sustains the contest, the appellant has ten days from that date to file a bond or cash deposit and the appeal is perfected when the bond or deposit is filed.[96] If the trial court finds that the affidavit was not made in good faith, however, then appellant may be denied the right to file a bond.[97]

The use of short absolute deadlines when an affidavit of inability is filed is justified on policy grounds. When an appellant is attempting to proceed as a pauper, other appellate deadlines continue to run during the time the right to a free appeal is being contested.[98] A prompt resolution of the right to appeal as an indigent is a primary policy underlying rule 40(a)(3). As the Dallas Court of Appeals has observed:

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93. *See* Del Castillo v. Lowry, 698 S.W.2d 367, 368 (Tex. App.—Houston [14th Dist.] 1985, orig. proc.).

94. *Id.* at 368.

95. O'Connor, *Perfecting the Appeal*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE C-38 (1988).

96. TEX. R. APP. P. 41(a)(2). Mandamus is the appropriate remedy to challenge sustaining of affidavit of inability to pay appellate costs. Allred v. Lowrey, 597 S.W.2d 353, 354 n.2 (Tex. 1980).

97. TEX. R. APP. P. 41(a)(2); *see* Marshall v. Miller, 707 S.W.2d 231, 233 (Tex. App.—Dallas 1986, orig. proc.)(upholding trial court's finding of lack of good faith based on proof that appellant owned assets worth hundreds of thousands of dollars).

98. *See* Howell v. Dallas County Child Welfare Unit, 710 S.W.2d 729, 732 (Tex. App.—Dallas 1986, writ ref'd n.r.e.)(rules governing timetable for filing record operate independently of those rules governing the pauper's affidavit contest), *cert. denied*, __ U.S. __, 107 S. Ct. 1898, 95 L. Ed. 2d 505 (1987); Garrity v. Holiday Inns, Inc., 664 S.W.2d 854, 857 (Tex. App.—Amarillo 1984, writ ref'd n.r.e.)(although contest to pauper's affidavit prevented clerk from preparing transcript until after hearing, appellant still required to seek extension of time).

> It appears, however, that the supreme court, by its use of mandatory language in Rule 355(e), has cast the balance in favor of assuring that an indigent who desires to appeal, and must therefore always be mindful of the various appellate timetables which are prerequisite to appellate jurisdiction, quickly learn whether he may appeal as a pauper or pay costs. The supreme court has put an absolute limit on the time for which an indigent must await a final decision on his affidavit while the appellate time tables [sic] continue to run against him.[99]

C. *Supersedeas Bond: Preventing Execution or Enforcement of the Judgment*

Texas law does not provide a deadline for filing a supersedeas bond.[100] It may be filed at any time during the pendency of the appeal.[101]

The appellant may file a supersedeas bond or deposit which includes an amount sufficient to not only stay enforcement of the judgment but to cover the amount of the cost bond.[102] When the supersedeas bond is designed to fulfill the dual function of staying execution of the judgment and perfecting the appeal,[103] however, it must be filed within the deadline for filing the cost bond on appeal. Even in situations where the supersedeas bond was probably not intended by appellant's counsel to act as an appeal bond, courts have

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99. Beatty v. Martin, 690 S.W.2d 94, 95 (Tex. App.—Dallas 1985, orig. proc.).

100. *See* J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 605 (Tex. Practice 1985)(no prescribed time in statutes and rules within which cash deposit or supersedeas bond must be filed to be effective); *accord* Keltner, *Post-Judgment Remedies,* in STATE BAR OF TEXAS, ADVANCED PERSONAL INJURY COURSE BB-17 (1987)(failure to post supersedeas bond within cost bond time period not fatal to right to supersede).

101. *See* 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 605 (Tex. Practice 1985); *see also* TEX. R. APP. P. 47(a) (essentially providing for suspension of enforcement of judgments at any time after rendition of judgment). Not all judgments may be superseded. *See* Bracken, *Mechanics of Appeal,* in STATE BAR OF TEXAS, PROCEDURAL INSTITUTE: APPELLATE PRACTICE D-13 (1986); 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 604 (Tex. Practice 1985). Also, governmental entities which are exempt from cost bond requirements supersede an adverse judgment by filing a notice of appeal. *See* Ammex Warehouse Co. v. Archer, 381 S.W.2d 478, 482 (Tex. 1964). *See generally* Townsend & Duncan, *Stay of Judgment,* in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE (1987)(detailed discussion of staying enforcement of judgments).

102. *See* 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 606 (Tex. Practice 1985).

103. *See* Fort Bend Indep. School Dist. v. Weiss, 570 S.W.2d 241, 243 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ); Pope & McConnico, *Practicing Law with the 1981 Texas Rules,* 32 BAYLOR L. REV. 457, 505 (1981).

declined to dismiss appeals for want of jurisdiction, holding that the supersedeas bond was sufficient to perfect the appeal.[104] Those courts have reasoned that a supersedeas bond obligating the appellant to perform the judgment and pay all costs is in legal effect a bond for costs as well.[105]

If there is a possibility that the appellee will attempt to execute on the judgment, a supersedeas bond should be filed before the clerk is authorized to issue a writ of execution. If a motion for new trial is not filed, the clerk is entitled to issue a writ of execution within thirty days after the signing of the judgment.[106] However, if a motion for new trial is filed, the clerk cannot issue the writ for thirty days after the motion is overruled by written order or by operation of law.[107] Thus, while the law does not provide a specific due date, the practical deadline for filing a supersedeas bond usually is no later than thirty days after the last to occur of the signing of the judgment or the overruling of the motion for new trial. If a writ of execution has already been issued by the time appellant files a supersedeas bond, then the clerk must at once issue a writ of supersedeas staying all further proceedings under any execution previously issued.[108]

D. *The Record on Appeal*

1. In General

The record on appeal consists of the transcript and the statement of facts.[109] The statement of facts consists of the court reporter's tran-

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104. *See, e.g.*, Cooper v. Bowser, 583 S.W.2d 805, 807 (Tex. Civ. App.—San Antonio 1979, no writ); *Weiss*, 570 S.W.2d at 243; Durham v. Fort Worth Tent & Awning Co., 271 S.W.2d 181, 182-83 (Tex. Civ. App.—Fort Worth 1954, writ dism'd).

105. *See* Jones v. Banks, 331 S.W.2d 370, 371 (Tex. Civ. App.—Dallas 1960, no writ). As the court stated in *Garvin v. Hufft*, 243 S.W.2d 391, 392 (Tex. Civ. App.—Dallas 1951, writ ref'd n.r.e.), "a supersedeas bond is, in form and effect, an appeal bond and when . . . filed effectively stays further proceedings by the trial court and confers potential jurisdiction on the Court of Civil Appeals." *Accord* Salas v. Gonzalez, 181 S.W.2d 823, 824 (Tex. Civ. App.—San Antonio 1944, no writ).

106. *See* TEX. R. CIV. P. 627.

107. *See id.* Under certain circumstances, execution may be commenced prior to the expiration of the thirty day periods such as when the appellee proves that the appellant is about to secrete or remove property subject to execution. *See* TEX. R. CIV. P. 628.

108. *See* TEX. R. CIV. P. 634. Thus, if a cost bond on appeal was initially filed, followed by an attempt by the appellee to execute on the judgment, a supersedeas bond can then be filed to stay enforcement of the judgment. *See* Cashion v. Cashion, 239 S.W.2d 742, 743-44 (Tex. Civ. App.—Waco 1951, no writ).

109. TEX. R. APP. P. 51(a); *see* Keltner, *Post-Judgment Remedies*, in STATE BAR OF

scription of the testimony, oral trial motions, objections, rulings, exhibits, as well as the *voir dire* and jury arguments if specifically requested.[110] A transcript is composed of papers filed with the district clerk with the matters included generally being dependent upon selection by the parties.[111]

Filing the record is not a jurisdictional prerequisite to appellate review.[112] However, a transcript is essential in every appeal.[113] Without a transcript, there is no judgment for the appellate court to review.[114] In contrast to the transcript, a statement of facts is not indispensable in all appeals.[115] Certain appeals can be resolved solely on the papers in the transcript such as when the question on appeal is purely one of law, while in other cases such as summary judgment proceeding, statement of facts are not permitted.[116]

The record on appeal must be filed in the court of appeals within sixty days after signing of the judgment.[117] If a motion for new trial or motion to vacate, modify or correct the judgment is timely filed by

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TEXAS, ADVANCED PERSONAL INJURY COURSE BB-19 (1987)(appellate record consists of two separate items, transcript and statement of facts).

110. *See* TEX. R. APP. P. 52(c)(10) (anything occurring in open court or in chambers may be included in statement of facts although costs of jury arguments and voir dire to be taxed against requesting party).

111. *See* 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 633 (Tex. Practice 1985).

112. *See* TEX. R. APP. P. 54(a) (failure to timely file transcript or statement of facts does not affect appellate court's jurisdiction).

113. *See* Parks-Davis Auctioneers, Inc. v. L & W Tong Serv., Inc., 496 S.W.2d 679, 681 (Tex. Civ. App.—Corpus Christi 1973, no writ)(appeal cannot be pursued without transcript).

114. 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 632 (Tex. Practice Supp. 1987)(without transcript appellate court will dismiss the appeal or affirm the trial court's judgment); *see* 6 W. DORSANEO, TEXAS LITIGATION GUIDE § 143.08 (1988)(discussing procedure for dismissing appeal for lack of transcript). Thus, the fact that the absence of a transcript is not a jurisdictional defect does not alter the ultimate result; a party attempting to appeal without a transcript will always lose. *See* 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 632 (Tex. Practice 1985).

115. *See generally* O'Connor, *Perfecting the Appeal*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE C-46, C-64 to C-70 (1988)(discussing circumstances when statement of facts necessary).

116. *See generally id.* at C-69, C-70 (discussing when statement of facts not needed for appellate review). Without a statement of facts, appellate courts are generally limited to complaints involving errors of law, erroneous pleadings, improper jury charge, irreconcilable jury findings and fundamental error. Collins v. Williamson Printing Corp., 746 S.W.2d 489, 491 (Tex. App.—Dallas 1988, no writ).

117. TEX. R. APP. P. 54(a). The record will be deemed timely if filed on or before the due date even though the filing fee is paid late. *See* Longline v. Corpus Christi Lodge No. 189, 730 S.W.2d 208, 209 (Tex. App.—Corpus Christi 1987)(denying motion to dismiss appeal).

any party, then the record must be filed within 120 days after the judgment is signed.[118]

The failure to file the transcript or the statement of facts within the required time represents a ground for dismissing the appeal, disregarding untimely filed materials, affirming the judgment or applying presumptions against the appellant.[119] The court of appeals has no authority to consider an untimely filed transcript or statement of facts.[120]

A formal request or designation by the appellant is unnecessary to institute the preparation of the transcript.[121] Under rule 51, the filing of a cost bond on appeal or its substitute automatically imposes the burden on the clerk to prepare a transcript and transmit it directly to the court of appeals.[122] That rule, however, does not require the clerk to transmit the transcript for filing before its due date, or even to complete it on time. Thus, the ultimate burden to properly place the record before the court of appeals remains entirely with the appellant.[123]

When the appeal is perfected, rule 51 requires the clerk to include certain matters in the transcript. They are: (1) the live pleadings upon which trial was held; (2) the charge of the court and the verdict of the jury or court's findings of fact and conclusions of law; (3) the trial court's judgment or the order being appealed; (4) any motions for new trial and orders of the court thereon; (5) the cost bond on appeal or substitute; (6) any notice of limitation of appeal; (7) any bills of

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118. *See* TEX. R. APP. P. 54(a). In an appeal by writ of error, the record must be filed within 60 days after the writ of error is perfected. *See id.* While in an interlocutory appeal, the record has to be filed within 30 days after the signing of the judgment. *See* TEX. R. APP. P. 42(a)(3).

119. TEX. R. APP. P. 54(a).

120. *Id.*; *see* B.D. Click Co. v. Safari Drilling Corp., 638 S.W.2d 860, 861-62 (Tex. 1982).

121. Bracken, *Mechanics of Appeal,* in STATE BAR OF TEXAS, PROCEDURAL INSTITUTE: APPELLATE PRACTICE D-15 (1986).

122. *See* TEX. R. APP. P. 51(c). "Upon perfection of the appeal, the clerk of the trial court *shall* prepare . . . and immediately transmit the transcript to the appellate court designated by the appellant." *Id.* (emphasis added).

123. Nix v. Fraze, 752 S.W.2d 118, 120 (Tex. App.—Dallas 1988, no writ)(affirming summary judgment in clerk's favor in action based on allegedly negligent failure to timely transmit transcript to appellate court). In *Nix*, the court stressed: "[i]t is the appellant and not the clerk of the trial court, who desires to prosecute the appeal." *Id.* at 120; *accord* Attorney General of Texas v. Segree, 694 S.W.2d 383, 384 (Tex. App.—Corpus Christi 1985, no writ)(while rule places burden on clerk to prepare and transmit transcript to appellate court, appealing party still has responsibility to see that all rules prescribing time limits are followed); *see also* TEX. R. APP. P. 50(a) (burden on appellant to bring forward sufficient record to show error requiring reversal).

exception; and (8) a certified bill of costs, including the cost of the transcript and statement of facts.[124]

Unless the clerk is instructed otherwise, those papers listed in rule 51 are the *only* items that will be included in the transcript.[125] If counsel needs other documents to support or defeat an appeal, then those documents must be specifically requested by filing a written designation with the clerk before the deadline for perfecting the appeal.[126]

Unlike the clerk who has a mandatory duty to prepare the transcript upon perfection of the appeal, the court reporter is not required to begin the statement of facts simply because a cost bond or its substitute has been filed. Rather, the rules place an affirmative burden on the appellant to request the court reporter to begin work. Under rule 53, the appealing party, "at or before the time prescribed for perfecting the appeal," must make a written request to the official reporter designating those portions of the evidence and other proceedings to be included.[127] A copy of that request must be filed with the clerk of the trial court[128] and served on the appellee, who has ten days after service of the appellant's request to designate additional matters for inclusion in the statement of facts.[129]

As is the case with filing the transcript, the appealing party has sole responsibility for ensuring that the statement of facts is filed on time.[130] If the statement of facts is not timely filed and an extension of time is not timely requested and granted by the appellate court, then none of the evidence in the statement of facts can be considered

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124. TEX. R. APP. P. 51(a).

125. *See* O'Connor, *Perfecting the Appeal*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE C-4 (1988)(without instructions from parties, clerk will prepare "bare bones" transcript).

126. *See* TEX. R. APP. P. 51(b). Filing a written designation is advisable since district clerks do not interpret rule 51(c) in a consistent fashion. Also, most appeals require a more comprehensive record than the documents listed in that rule. *See* Keltner, *Post-Judgment Remedies*, in STATE BAR OF TEXAS, ADVANCED PERSONAL INJURY COURSE BB-20 (1987).

127. TEX. R. APP. P. 53(a); *see* Ameriphone, Inc. v. Tex-Net, Inc., 742 S.W.2d 777, 777-78 (Tex. App.—San Antonio 1987)(denying motion to extend deadline for filing statement of facts and holding that filing request with clerk and notifying court reporter by telephone, not in writing, did not comply with rule 53(a)).

128. *See* TEX. R. APP. P. 53(a).

129. *See* TEX. R. APP. P. 53(b).

130. *See* TEX. R. APP. P. 53(k); *see also* Olivares v. States, 693 S.W.2d 486, 489 n.1 (Tex. App.—San Antonio 1985, no writ)("it is appellant's burden to timely file a statement of facts").

on appeal.[131]

While the statement of facts is customarily prepared by the court reporter in question and answer form,[132] there are other methods of memorializing trials. Each of those methods invokes certain deadlines.

If the appellant requests the court reporter to prepare a partial statement of facts under rule 53(d), the request must include a list of the points of error on appeal.[133] Once the appellant has requested the partial statement of facts, the appellee has ten days after being served with that request to ask for additional material to be included.[134] When the appellant correctly follows the procedure for requesting a partial statement of facts, then the presumption on appeal is that nothing omitted from the record is relevant to the appeal.[135] The failure to strictly comply with the procedure for requesting a partial statement of facts can be fatal to an appeal because the appellate court will presume the omitted portions of the statement of facts supported the judgment of the trial court — a presumption virtually impossible to overcome.[136]

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131. As Justice Keltner has observed:

> The Southwestern Reporters are literally full of cases which decline to take actions on appellate points of error because the statement of facts is not included. As a result, the timely filing and proper request for the statement of facts are potential pitfalls which will wreck an appeal.

Keltner, *Post-Judgment Remedies*, in STATE BAR OF TEXAS, ADVANCED PERSONAL INJURY COURSE BB-20 (1987).

132. *See* TEX. R. APP. P. 53(i).

133. TEX. R. APP. P. 53(d). Requesting a partial statement of facts is not the same as limiting the scope of an appeal under rule 40(a). That rule permits the appellant to limit his appeal to specifically designated legal issues. *See* Storey, *The Appellate Process*, in SOUTH TEXAS COLLEGE OF LAW, THE APPELLATE PRACTICE INSTITUTE E-19 (1988)(advising counsel not to confuse limiting record under rule 53 with limiting issues under rule 40(a)). The notice of limitation of appeal must be served on adverse parties within fifteen days after the judgment is signed, or within seventy-five days thereafter, if a motion for new trial is filed. TEX. R. APP. P. 40(a)(4). The adverse party then has at least fifteen days in which to perfect a separate appeal. *See* Patrick and Watkins, *Limited & Cross Appeals*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE F-7 (1988).

134. *See* TEX. R. APP. P. 53(b), (d).

135. *See* TEX. R. APP. P. 53(d); *see also* Phaup v. Boswell, 731 S.W.2d 625, 627 (Tex. App.—Houston [1st Dist.] 1987, no writ)(rejecting argument that erroneous exclusion of evidence was harmless and stressing appellee's failure to request additional portions of evidence after appellant requested partial statement of facts).

136. Most reported decisions discussing the procedure for appealing based on a partial statement of facts involve appellants who failed to comply with rule 53(d) and lost as a result of that failure. *See, e.g.*, Ball v. Farm & Home Sav. Ass'n, 747 S.W.2d 420, 425 (Tex. App.—

Instead of requesting the usual "Q & A" statement of facts, a party is authorized to prepare and file with the clerk of the trial court a condensed statement, in narrative form, of some or all of the testimony.[137] The deadline for filing a narrative is the same as for filing a statement of facts in question and answer form. The opposing party, if dissatisfied with the narrative statement may, within ten days after receipt, require testimony be produced in question and answer form for all or part of the narrative.[138]

As an alternative to a statement of facts, the parties may agree on a brief statement of the case.[139] An agreed statement has the same filing deadline as a statement of facts.[140] That agreed statement, however, is not filed separately, but is filed as part of the transcript.[141]

If a party files a defective statement of facts or transcript, the opposing party must file a motion to strike the defective record within thirty days or any error is waived.[142] Of course, if the appellate court lacks jurisdiction due to the defect, that defect cannot be waived by a failure to file a motion to dismiss within thirty days.[143]

Fort Worth 1988, no writ); DeLeon v. Dr. Pepper Bottling Co. of Corpus Christi, 694 S.W.2d 381, 382 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.); Texas Constr. Group, Inc. v. City of Pasadena, 663 S.W.2d 102, 105 (Tex. App.—Houston [14th Dist.] 1983, writ dism'd); Dresser Indus., Inc. v. Forscan Corp., 641 S.W.2d 311, 316-17 (Tex. App.—Houston [14th Dist.] 1982, no writ); *see also* Thompson v. Trinity Universal Ins. Co., 708 S.W.2d 45, 48 (Tex. App.—Tyler 1986, writ ref'd n.r.e.)(reversing in part despite appellant's failure to comply with procedure for requesting partial statement of facts). Other than addressing the applicable deadlines, a detailed analysis of the technical and confusing procedure for requesting a partial statement of facts is not within the ambit of this article. *See generally* 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 639 (Tex. Practice 1985).

137. *See* TEX. R. APP. P. 53(i); *See generally* O'Connor, *Perfecting the Appeal*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE C-58 (1988)(recommending against appealing with narrative statement of facts because virtually impossible to successfully attack sufficiency of evidence under such record).

138. *See* TEX. R. APP. P. 53(i).

139. *See* TEX. R. APP. P. 50(c).

140. *See* TEX. R. APP. P. 54(a) (setting out filing deadline for statement of facts).

141. *See* TEX. R. APP. P. 50(c). *See generally* O'Connor, *Perfecting the Appeal*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE C-58 (1988); 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 648 (Tex. Practice 1985).

142. *See* TEX. R. APP. P. 71 (motions relating to informalities in the record shall be filed within 30 days after transcript filed).

143. *See* TEX. R. APP. P. 72 (court may entertain motions to dismiss for want of jurisdiction more than 30 days after transcript filed); *see also* Tullow v. Eaton Corp., 695 S.W.2d 568, 568 (Tex. 1985)(jurisdiction can be raised at any time).

2. Problems and Peculiarities Connected with Filing the Record

a. Timely Requesting the Record

As discussed previously, at or before the time prescribed for perfecting the appeal, the appellant must make a written request to the official court reporter to prepare the statement of facts. The dual requirement of timely requesting and filing the statement of facts often has proved troublesome for appellate counsel.

If the appellant misses the deadline for requesting the statement of facts, and the court reporter could have completed the statement of facts on time had a proper request been made, the appellate court should refuse to file the statement of facts.[144] On the other hand, the significance of an untimely request to the court reporter should become moot if the statement of facts is prepared and filed on time despite the late request.[145] Likewise, if the appellant cannot reasonably explain a delay in requesting the reporter to start work, the court should nevertheless accept the statement of facts for filing when the

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144. *See* Winston Int'l Elec., Inc. v. Rio Radio Supply, Inc., 726 S.W.2d 161, 162 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.)(dismissing appeal when delay in requesting statement of facts not reasonably explained); Monk v. Dallas Brake & Clutch Serv. Co., 683 S.W.2d 107, 109 (Tex. App.—Dallas 1984)(granting extension motion but observing that appellant who makes untimely request causing statement of facts to be late must be prepared to explain delay). *See generally* 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 644 (Tex. Practice 1985).

145. *See In re* Phillips, 691 S.W.2d 714, 716 (Tex. App.—Amarillo 1985)(refusing to dismiss appeal when statement of facts filed on time although request for preparation late); *Monk*, 683 S.W.2d at 109 (late request of no consequence if statement of facts timely filed). Prior to the adoption of the appellate rules, Texas courts had differed sharply on the impact of an untimely request to the court reporter. At least one court had held that the requirement of a timely request was absolute; therefore, a late request deprived the appellate court of the power to file a timely-tendered statement of facts. *See* Odom v. Olafson, 675 S.W.2d 581, 582 (Tex. App.—San Antonio 1984, writ dism'd). Other courts had essentially concluded that an untimely request should be considered as a ground for denying an extension motion only if the late request caused the statement of facts to be late. *See Monk*, 683 S.W.2d at 108-09; *see also* Adams v. H.R. Management and La Plaza Ltd., 696 S.W.2d 256, 257-58 (Tex. App.—San Antonio 1985)(refusing to construe rule requiring timely request to court reporter as absolute where record showed that timely request would not have resulted in timely filed statement of facts). Courts and commentators have generally concluded that rule 54(c) eliminates the controversy by permitting a motion to extend the time for filing a statement of facts to be granted despite a delay in making the written request so long as the appellant reasonably explains the delay. *See* Container Port Serv., Inc. v. Gage, 719 S.W.2d 662, 664 (Tex. App.—El Paso 1986)(granting extension of time to file record); Bracken, *Mechanics of Appeal*, in STATE BAR OF TEXAS, PROCEDURAL INSTITUTE: APPELLATE PRACTICE D-22 (1986); 6 W. DORSANEO, TEXAS LITIGATION GUIDE § 143.08 (1988).

record demonstrates that even if the request had been timely, the court reporter could not have completed the transcription on time.[146] There seems little reason to deny the appellant the right to file a statement of facts due to a late request when a timely request would not have resulted in a timely filed statement of facts.[147] On the other hand, a more harsh result is perhaps warranted if the court reporter could have completed the statement of facts within thirty days after the time for perfecting an appeal had appellant made a timely request.

The deadline for the statement of facts in the court of appeals is no later than thirty days after the deadline for perfecting the appeal. Thus, if the statement of facts is requested at the last possible moment, the court reporter will have only thirty days in which to prepare it. Unless the trial was relatively brief, or the reporter's workload is unusually light, a court reporter will rarely be able to dictate and transcribe the notes of the trial within such a short time period.[148] Even if the statement of facts cannot be completed on time because the appellant has delayed the request until the last minute allowed by the rules, any unreasonable procrastination in asking the reporter to begin work cannot be relied on by an appellate court to refuse to file the statement of facts.[149] So long as the request was made prior to the time for perfecting the appeal, that request is timely as a matter of law.[150]

b. Appeals by Indigents

Another tricky aspect of complying with record deadlines involves appeals in which the appellant's affidavit of inability to pay appellate costs has been contested.[151] The rules concerning contests of affida-

146. *See Adams*, 696 S.W.2d at 257-58 (holding that late request to court reporter did not warrant denying extension motion because delay in request was reasonably explained and did not cause late filing of statement of facts); *see also Container Port Serv.*, 719 S.W.2d at 665 (granting extension motion when court reporter's affidavit demonstrated it would have been impossible to prepare statement of facts by deadline even if appellate counsel had made timely request).

147. *See Adams*, 696 S.W.2d at 257-58 (granting motion to reconsider denial of extension of time to file statement of facts).

148. Sumner & Greener v. Carlson, 739 S.W.2d 127, 128 (Tex. App.—Fort Worth 1987)(appellate rules create time bind that has plagued courts for years).

149. *Id.* at 129.

150. *See id.* (refusing to adopt rule denying extension motion when appellant delayed requesting a record until the last possible day).

151. *See* 6 W. DORSANEO, TEXAS LITIGATION GUIDE § 143.08 (1988)(rules concerning timely filing of record create "procedural dilemma" for indigent appellants).

vits operate independently of the timetable governing the filing of the record.[152] Litigation over the right to appeal as an indigent does not toll the deadline for filing the statement of facts or the transcript.[153] Often the appellant will not know whether he will be allowed to proceed as an indigent until after the due date for filing the record. As a practical matter, the statement of facts is usually not complete and ready for filing on time when the appellant's affidavit has been contested because court reporters are understandably reluctant to work on a record which will not be used and for which they will not be paid if the contest is sustained. If the pauper's affidavit is being contested and the statement of facts or transcript will not be ready for timely filing, the appellant must file a motion to extend the deadline for filing the record although the appeal technically remains unperfected.[154]

c. Electronic Statements of Facts

By order dated January 28, 1986, the Texas Supreme Court established a pilot project for the district courts of Dallas County to study the use of electronic recording systems in civil proceedings and electronic statements of facts for appeals.[155] The avowed purpose of the order is to "determine if significant reductions can be made in the time required for appellate procedures and the cost thereof . . . ."[156]

The statement of facts on appeal from any proceeding in which an

152. Howell v. Dallas County Child Welfare Unit, 710 S.W.2d 729, 732 (Tex. App.—Dallas 1986, writ ref'd n.r.e.), *cert. denied*, __ U.S. __, 107 S. Ct. 1898, 95 L. Ed. 2d 505 (1987).

153. *See id.* "The pauper's right to a free statement of facts on appeal does not alleviate the pauper's responsibilities of moving forward in the appealing process or of complying with other requirements of appeal prescribed in the rules of civil procedure." *Id.*

154. *See id.* at 732-33; *accord* Garrity v. Holiday Inns, Inc., 664 S.W.2d 854, 857 (Tex. App.—Amarillo 1984, writ ref'd n.r.e.)(request for extension of time for record required although preparation of transcript not complete).

155. Rowlett v. Colortek, Inc., 741 S.W.2d 206, 209 (Tex. App.—Dallas 1987)(granting motion for clarification of supreme court's order). The complete text of the January 8, 1986 order is set out in the appendix to the opinion in *Darley v. Texas Uvatan, Inc.*, 741 S.W.2d 200, 204-05 (Tex. App.—Dallas 1987)(granting extension of time to file brief). On April 15, 1988, the supreme court issued an order permitting the creation of an identical pilot project in Bexar County. Tex. Sup. Ct. Order (April 15, 1988). To date, that project has not been funded by Bexar County. The court is considering a similar order throughout the state which would give trial courts the option of using a stenographic or electronic record. Baker & Smith, *Simplifying Appellate Procedure: A Proposal to Turn Management of Court Reporters Over to the Courts*, 7 THE ADVOCATE 12, 13 (State Bar of Texas 1988).

156. *See* Order of Supreme Court of Texas, January 8, 1986 (published in Appendix of *Darley v. Texas Uvatan, Inc.*, 741 S.W.2d 200, 204-06 Tex. App.—Dallas 1987).

electronic tape recording has been made consists of the audio cassette tapes of the trial court proceedings, a copy of the typewritten and original logs filed in the case certified by the court reporter, the exhibits filed with the clerk and a descriptive list of the exhibits.[157] Those items must be filed with the court of appeals within fifteen days of the perfection of the appeal;[158] therefore, the filing deadline is forty-five days after the signing of the judgment or 105 days after judgment if a motion for new trial has been filed.[159] The deadline for filing a statement of facts in an appeal under the pilot project thus is different than in a typical appeal. No other deadlines in the appellate rules were changed by the order creating the pilot project.[160]

Section V of the supreme court's order states: "[e]ach party shall file with his brief an appendix containing a written transcription of all portions of the recorded statement of facts and a copy of all exhibits relevant to the error asserted."[161] Although the appendix will contain the record of the trial proceedings which counsel are accustomed to having included in the statement of facts, that appendix *is not* the statement of facts in an appeal under the pilot project — the tapes, log, exhibits and exhibit list *are* the statement of facts.[162] The appendix is considered to be part of the appellant's brief and subject to the deadline for filing the brief, not for filing the statement of facts.[163]

At or before the time for perfecting an appeal, the appealing party should request transcription of the portions of the recorded statement of facts relevant to the error asserted.[164] The Dallas Court of Appeals

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157. *Id.* § 3(a)-(c); *see also* Darley v. Texas Uvatan, Inc., 741 S.W.2d 200, 201-02 (Tex. App.—Dallas 1987)(discussing parts comprising statement of facts for pilot project in Dallas County district courts).

158. *See* Tex. Sup. Ct. Order § 4 (January 28, 1986); *see* Darley v. Texas Uvatan, Inc., 754 S.W.2d 304, 306 (Tex. App. —Dallas 1988, no writ) (duty to timely file statement of facts under pilot project is joint obligation of court reporter and counsel).

159. *See* TEX. R. APP. P. 41(a)(1) (establishing deadlines for perfecting appeal).

160. *See* Tex. Sup. Ct. Order § 4 (January 29, 1986).

161. *See id.* § 5.

162. *See Darley*, 741 S.W.2d at 202.

163. *See id.* at 202-03. Rule 53(a) is applicable to appeals governed by the pilot project in Dallas. *See* Darley v. Texas Uvatan, Inc., 754 S.W.2d 304, 306 (Tex. App.—Dallas 1988, no writ) (appellant violated rule 53(a) by failing to make written request to official court reporter and instead making oral request to "audio librarian").

164. *See* TEX. R. APP. P. 53(a) (at or before time for perfecting appeal, appellant must make written request to the court reporter designating those matters to be included in statement of facts). Although the rules require six copies of appellant's brief to be filed in the court of appeals, six copies of the appendix are not automatically required. If the portion of the audio record which has been transcribed is lengthy, only one appendix need be filed. *See*

has observed pointedly that "nothing in the Order mandates that only the official court reporter prepare the appendix."[165] Consequently, if an appeal is based on an electronic statement of facts, the appellant may append to his brief a transcription of the electronic record prepared by someone other than the court reporter.[166] The fact that persons other than the official court reporter are permitted to transcribe the electronic record could become critical if an extension of time to file the brief is needed because the appendix is not ready. In that situation, merely proving that the workload of the presiding court reporter precluded timely filing of the appendix will be insufficient to persuade the appellate court to grant an extension without an additional showing that it was not possible for another reporter to have prepared the appendix on time.[167]

The fact that only a portion of the electronic record is transcribed does not transform the appeal into one being taken on a partial statement of facts under Rule 53(d) so long as the complete electronic statement of facts has been timely filed.[168] Under the pilot project, the court of appeals presumes that nothing omitted from the transcriptions and the appendices is relevant to the appeal.[169] If the appellee is not satisfied that the appendix filed with the appellant's brief adequately presents the appeal, then the appellee should request the transcription of those portions of the electronic record which demonstrate that appellant's points lack merit. Again, any delay associated with additional transcriptions will involve a motion to extend briefing

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Lauterbach v. Lieber Enter., Inc., 754 S.W.2d 370, 371 (Tex. App.—Dallas 1988) (granting motion to file one copy of electronic record).

165. *See Darley*, 741 S.W.2d at 203.

166. *See id.*

167. *See id.* at 203-04 (excusing appellant's failure to hire someone other than court reporter to transcribe electronic record based on parties' confusion over supreme court order). There is no provision in the rules for the time a request must be made to someone other than the official court reporter to transcribe the trial proceedings. Presumably, it would be governed by appellate rule 53(a). *See generally* TEX. R. APP. P. 53(a). Also, if the Darley court's opinion is read literally, counsel can select *anyone*, regardless of qualifications, to transcribe the recordings. The potential for inaccurate, garbled or even fraudulent transcription warrants placing limitations on the persons counsel can select to transcribe the record. *See* Pogue v. Duncan, 753 S.W.2d 255, 256-57 (Tex. App.—Tyler 1988, no writ). "It seems quite obvious to us that the legislature was aware of the necessity of providing the highest trial courts of this State with competent court reporters so that accurate recordings of trial proceedings could be made." *Id.*

168. *See* Rowlett v. Colortek, Inc., 741 S.W.2d 206, 207-08 (Tex. App.—Dallas 1987).

169. *See* Tex. Sup. Ct. Order § 6 (January 28, 1986); *see also Rowlett*, 741 S.W.2d at 208.

deadlines, not a motion to extend record deadlines or to amend or supplement the record.[170]

d. Amending and Supplementing the Record

Under Rule 55, if anything material to either party is omitted from the transcript or statement of facts, the appellate court on its own initiative, the parties by stipulation, or the trial court upon notice and hearing may direct a supplemental record to be certified and transmitted by the clerk of the trial court or the official court reporter.[171] Before submission, supplementing the record is easily accomplished.[172] The court of appeals has a mandatory duty to permit supplementation unless the disposition of the appeal would be unreasonably delayed.[173] Practically speaking, pre-submission supplementation or amendment should almost never delay an appeal unless supplementation is requested on the eve of oral argument or requires substantial work by the court reporter.[174]

The procedural provision for supplementing the record cannot be used to cover up for counsel's initial failure to file a statement of

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170. *See* Darley v. Texas Uvatan, Inc., 741 S.W.2d 200, 203 (Tex. App.—Dallas 1987)(if more time is needed to prepare appendix solution is to file motion to extend time to file brief).

171. TEX. R. APP. P. 55(b). Correcting inaccuracies or defects in the record is not the same as supplementation and involves different procedures. *See* TEX. R. APP. P. 55(a), (c); *see also* Benson v. Grayson County Child Welfare, 666 S.W.2d 166, 168-69 (Tex. Civ. App.—Dallas 1983)(directing court reporter to supplement and correct statement of facts and granting appellant's motion to extend time to file brief). *See generally* 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 659 (Tex. Practice 1985).

172. TEX. R. APP. P. 55. Rule 55 is consistent with the philosophy that courts should not deprive litigants of their right to be heard on appeal due to a defect in or omission from the record if the problem can be remedied without unduly delaying the judicial process or harming the other parties. *See* Flowers v. Bauer, 394 S.W.2d 526, 528 (Tex. Civ. App.—Corpus Christi 1965, no writ)(construing predecessor to rule 55); *see also* Gay v. City of Hillsboro, 545 S.W.2d 765, 766 (Tex. 1977)(rule providing for supplemental record should be given liberal construction).

173. TEX. R. APP. P. 55(b) (appellate court "shall permit" supplementation unless appeal would be unreasonably delayed). Of course, the court does not have to allow supplementation if the omitted matter is not "material." *See id.*; *see also* 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 659 n.28 (Tex. Practice 1985)(court of appeals not obligated to allow supplementation if it would serve no purpose other than to increase appellate costs).

174. *See* 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 659 (Tex. Practice 1985)(appellate courts "extremely lenient" in allowing pre-submission supplementing of record); *see also* Bracken, *Mechanics of Appeal*, in STATE BAR OF TEXAS, PROCEDURAL INSTITUTE: APPELLATE PRACTICE D-24 (1986)(appellate court may be less generous when supplementation will require court reporter to prepare additional transcription which delays disposition of appeal).

facts.[175] If the statement of facts was not filed on time then there is nothing to "supplement."[176]

Obtaining permission to supplement the record after submission is more difficult than during the pre-submission stage. If an omission is discovered shortly after oral argument and correction or supplementation would not delay disposition of the appeal, leave should be granted.[177] On the other hand, appellate courts have consistently refused to permit new material to be filed after the court has written its opinion and rendered its judgment in the absence of "unusual circumstances."[178] Permitting supplementation or amendment of the record at that late stage of the appellate process is viewed as interfering with the orderly administration of justice, as well as being contrary to the rules establishing appellate deadlines and placing the burden on the appellant to bring forward on appeal before submission a sufficient record to show error requiring reversal.[179] What constitutes "unusual circumstances" so as to justify post-judgment supplementation is unclear; however, it is settled that if the complaining party knew or should have known of the need to supplement or amend prior to submission, leave to supplement will be denied.[180]

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175. *See* Bracken, *Mechanics of Appeal*, in STATE BAR OF TEXAS, PROCEDURAL INSTITUTE: APPELLATE PRACTICE D-24 (1986).

176. *See* Carr v. Central Music Co., 494 S.W.2d 280, 281 (Tex. Civ. App.—Austin 1973, no writ)(supplemental record not permissible without properly filed statement of facts).

177. *See* Elkins v. Auto Recovery Bureau, 649 S.W.2d 73, 76 (Tex. App.—Dallas 1982, writ ref'd n.r.e.)(appellate courts have discretion to allow supplementation of record after submission); *see also* TEX. APP.—SAN ANTONIO LOCAL R. 4(A) (supplemental transcript may be filed at any time if all parties agree to filing).

178. *See, e.g.*, K & S Interests, Inc. v. Texas Am. Bank/Dallas, 749 S.W.2d 887, 891 (Tex. App.—Dallas 1988, no writ); Missouri—Kan.—Tex. Ry. v. Alvarez, 670 S.W.2d 338, 353 (Tex. App.—Austin 1984), *rev'd on other grounds*, 683 S.W.2d 375 (Tex. 1985); Irrigation Constr. Co. v. Motheral Contractors Inc., 599 S.W.2d 336, 344 (Tex. Civ. App.—Corpus Christi 1980, no writ).

179. *See K & S Interests*, 749 S.W.2d at 891; *Missouri-Kan.-Tex. Ry. Co.* 670 S.W.2d at 353-54; *see also* Archer v. Storm Nursery, Inc., 512 S.W.2d 82, 85 (Tex. Civ. App.—San Antonio 1974, no writ).

180. *See, e.g.*, *Missouri-Kan.-Tex. Ry.*, 670 S.W.2d at 353-54 (counsel had ample notice of failure of statement of facts to reflect trial court's rulings on objections to charge); *Elkins*, 649 S.W.2d at 76 (appellate attorney should have known in advance of opinion that amended petition omitted from record was important to outcome of appeal); *Irrigation Constr. Co.*, 599 S.W.2d at 344 (attorney who appeared for appellant as both trial and appellate counsel must have been aware that hearing on motion for judgment was not in record).

E. *Briefs and Motions for Rehearing in the Court of Appeals*

Once an appeal has reached the briefing stage, deadlines are no longer tied to the date the trial court signed the judgment. The brief of the appellant is due in the court of appeals within thirty days after the filing of the record on appeal.[181] If the transcript and the statement of facts are filed at different times, the due date for the appellant's brief is calculated from the date of the last filed portion of the record. The appellee's brief is due no later than twenty-five days after the appellant's brief is filed.[182]

There is not an absolute right to amend or supplement a brief.[183] The appellate rules are designed to create a liberal policy of permitting amended and supplemental briefs, and briefs may be amended or supplemented "at any time when justice requires."[184] Furthermore, appeals cannot be dismissed or judgments affirmed based solely on briefing defects without first providing the appellant an opportunity to rebrief.[185]

Some, but not all, courts of appeals have local rules governing the filing of amended and supplemental briefs.[186] The San Antonio and Tyler courts require all amended, supplemental or post-submission

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181. TEX. R. APP. P. 74(k). Oral argument must be requested at the time the brief is filed. TEX. R. APP. P. 75(f). The failure to timely request argument will be deemed a waiver of the right to present argument. *Id.* The best practice is to place the request for oral argument on the cover of the brief. Storey, *The Appellate Process*, in SOUTH TEXAS COLLEGE OF LAW, APPELLATE PRACTICE INSTITUTE E-37 (1988). In fact, placing the request on the brief cover is required in some jurisdictions. *See* TEX. APP.—TYLER LOCAL R. VI(A)(1)(b).

182. TEX. R. APP. P. 74(m). In accelerated appeals, the appellant's brief is due 20 days after the record is filed and the appellee's brief is due 20 days thereafter. *See* TEX. R. APP. P. 42(a)(3).

183. 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 718 (Tex. Practice 1985).

184. TEX. R. APP. P. 74(o). The rules for permitting supplementation of briefs are even more liberal for appeals involving electronic statements of facts. *See* Darley v. Texas Uvatan, Inc., 741 S.W.2d 200, 204 (Tex. App.—Dallas 1987)(granting extension of time to file brief and stressing liberal supplementation for briefs in appeals under Dallas county pilot project); *see also* TEX. R. APP. P. 74(p)("Briefing Rules to be Construed Liberally"). *But see* Keltner, *Post-Judgment Remedies*, in STATE BAR OF TEXAS, ADVANCED PERSONAL INJURY COURSE BB-26 (1987)(experience indicates some courts of appeal take restrictive approach on amended and supplemental briefs).

185. Impetco, Inc. v. Texas Am. Bank/Houston, 729 S.W.2d 300, 300 (Tex. 1987); *accord* Kaspar v. Thorne, No. 05-87-00750-CV (Tex. App.—Dallas July 29, 1988)(WESTLAW, Tx-Cs library).

186. *See, e.g.*, TEX. APP.—CORPUS CHRISTI LOCAL R. V (B); TEX. APP.—SAN ANTONIO LOCAL R. 1 (C); TEX. APP.—TYLER LOCAL R. V (F). The Texarkana, Austin, Dallas, Amarillo, Waco and Houston (Fourteenth District) appellate courts do not have printed local rules. The local rules for the courts in Eastland, Beaumont and El Paso do not

briefs to be accompanied by a motion for leave to file unless the brief is merely replying to the last brief filed.[187] Even a reply brief, at least in the San Antonio Court, must be supported by a motion for leave if not tendered by noon at least seven days prior to the date of scheduled oral argument.[188] In contrast, the Corpus Christi local rule states that reply briefs may be filed as a "matter of right" up to the date of submission,[189] but requires a motion for leave to accompany post-submission briefs.[190] If counsel is uncertain about the propriety of filing a brief, then a motion for leave should be filed with the brief explaining the need for additional briefing.[191]

In practice, courts generally decline to consider briefs in which the appellant seeks to add additional points of error;[192] although the court has the discretion to do so.[193] The closer to the date of submission a brief is filed and the greater the extent to which a brief injects new issues into an appeal, the less likely an appellate court is to accept the

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discuss amended and supplemental briefs. The Fort Worth Court is apparently in the process of updating its rules.

187. *See* TEX. APP.—SAN ANTONIO LOCAL R. 1(C); TEX. APP.—TYLER LOCAL R. V (F). Treating reply briefs differently from supplemental and amended briefs is explicit in the San Antonio rule and implicit in the Tyler rule. There is not an appellate rule specifically dealing with reply briefs. O'Connor, *Perfecting the Appeal*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE C-72 (1988).

188. *See* TEX. APP.—SAN ANTONIO LOCAL R. 1(C).

189. TEX. APP.—CORPUS CHRISTI LOCAL R. III(B).

190. *Id.* As a further contrast, the First Court of Appeals, sitting in Houston, apparently permits all briefs to be filed without leave of court unless the brief raises new points of error. *See* TEX. APP.—HOUSTON [1ST DIST.] LOCAL R. 1:74(c).

191. *See* O'Connor, *Perfecting the Appeal*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE C-76 (1988); *see also* Poole v. Missouri Pac. Ry., 638 S.W.2d 10, 13 (Tex. App.—Houston [1st dist.] 1982, writ ref'd n.r.e.)(ordering supplemental brief stricken when filed nine days before submission without leave of court and raised cross points of error not contained in original brief). Of course, a supplemental or amended brief may be filed only if the original brief was timely filed. 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 718 (Tex. Practice 1985).

192. *See* Linan v. Linan, 632 S.W.2d 155, 156-57 (Tex. App.—Corpus Christi 1982, no writ)(declining to consider brief which changed basis of appeal); Dennis Weaver Chevrolet, Inc. v. Chadwick, 575 S.W.2d 619, 620 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.)(refusing to consider constitutional argument raised in supplemental brief filed long after receipt of appellee's brief). Several courts have local rules prohibiting post-submission briefs from including new points of error or additional grounds of recovery. *See* TEX. APP.—CORPUS CHRISTI LOCAL R. III(C); TEX. APP.—TYLER LOCAL R. V(G).

193. *See* Minneapolis Moline Co. v. Purser, 361 S.W.2d 239, 246 (Tex. Civ. App.—Dallas 1962, writ ref'd n.r.e.)(court may grant leave to file amended brief with additional points of error after submission and rendition of opinion).

brief.[194]

If the appellant fails to file the brief on time, the court of appeals is entitled to dismiss the appeal, affirm the trial court's judgment or enter other orders.[195] If the appellant, however, provides a reasonable explanation for failing to timely file the brief and appellee has not suffered material injury due to the delay, the court *cannot* dismiss or affirm.[196]

In most courts, when the appellant has failed to file a brief on time, the court will issue an order directing the appellant to show cause why the appeal should not be dismissed for want of prosecution. If the appellant fails to show cause or respond within the allotted time, the appeal will be dismissed.[197]

Although the rules do not provide for sanctions against an appellee who fails to timely file a brief, the failure to file an appellee's brief can have a substantial impact on the outcome of the appeal. First, in the absence of a brief filed by the appellee, the court of appeals is entitled to accept as true all factual statements in the appellant's brief, without examining the record.[198] Second, by failing to file a brief, the appellee waives any right to assert certain types of cross-points attacking the lower court's judgment.[199]

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194. *See* 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 718 (Tex. Practice 1985)(motion to amend or supplement brief filed on eve of or after oral argument may be denied). Courts routinely accept and sometimes solicit post submission briefs, however, on issues raised at oral argument not previously briefed by the parties. *See, e.g.,* TEX. APP.—CORPUS CHRISTI LOCAL R. III(C) (rules on post submission briefs requested by court).

195. TEX. R. APP. P. 74 (l)(1); *see also* Bainbridge v. Bainbridge, 662 S.W.2d 655, 657 (Tex. App.—Dallas 1983, no writ)(where no brief is filed, court may decline to dismiss appeal and give other direction to cause as it deems proper).

196. *See* TEX. R. APP. P. 74(l)(1).

197. *See* Seminole, Inc. v. Oak Hollow Property Owners' Ass'n, 669 S.W.2d 872, 872 (Tex. App.—Corpus Christi 1984, no writ)(appeal subject to dismissal for failure to timely file brief complying with rules and for failure to respond to court's order providing appellants with ten days to file new brief).

198. TEX. R. APP. P. 74(f). Appellate courts, however, are not obligated to accept unchallenged statements as true; they simply have the discretion to do so. *See* Rocha v. Campos, 574 S.W.2d 233, 235 (Tex. Civ. App.—Corpus Christi 1978, no writ)(court of appeals has considerable discretion concerning whether to adopt uncontroverted statements in appellant's brief). *But see* Navistar Int'l Corp. v. Valles, 740 S.W.2d 4, 6 (Tex. App.—El Paso 1987, no writ)(reversing trial court's judgment and holding appellees' failure to file brief "compelled" court of appeals to accept facts alleged by appellant in its brief). *See generally* 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 711 (Tex. Practice 1985)(discussing circumstances when appellate court should not blindly adopt unchallenged statements in appellants' brief).

199. *See* 31 J.WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 712 (Tex. Practice

If the appellee intends to raise cross-points asking for greater relief than awarded by the court below, the appellee should file a brief even though the appellant has missed the briefing deadline. The due date for filing the appellee's brief in that situation is "prior to the call of the case."[200] While it is unclear when an appeal has been "called" for purposes of this rule, appellee cannot wait until the appeal has been dismissed for want of prosecution to file the brief with cross-points.[201]

A motion for rehearing is a jurisdictional prerequisite to challenging the judgment of the court of appeals in the Texas Supreme Court.[202] Whether the matter complained of originated in the trial court or the court of appeals, it must be assigned as error in the motion for rehearing.[203] Under Rule 100, the motion for rehearing must be filed in the court of appeals within fifteen days after the date of rendition of the judgment or decision.[204] Within fifteen days after the appellate court judgment, the motion for rehearing may be amended without leave of court.[205] After that time, the motion may only be amended with leave of the court.[206]

Rule 100 provides that a reply to the motion is unnecessary unless requested by the appellate court.[207] While that rule does not impose a deadline for filing a reply, at least one court of appeals requires replies to be filed within five days of the filing of the motion.[208]

If the motion for rehearing is granted and the judgment of the court of appeals is changed, a party seeking to complain about that judg-

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1985). *See generally* Patrick & Watkins, *Limited and Cross-Appeals*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE (1988).

200. *See* TEX. R. APP. P. 74(m).

201. *See* Yellow Checker Cab Co. v. Nilhas, 711 S.W.2d 741, 741 (Tex. App.—Austin 1986, no writ).

202. *See* City of Denton v. Van Page, 701 S.W.2d 831, 833 n.2 (Tex. 1986); *see also* Dawkins v. Van Winkle, 377 S.W.2d 830, 830 (Tex. 1964).

203. *See* 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 778(3) (Tex. Practice 1985).

204. TEX. R. APP. P. 100(a).

205. *See* TEX. R. APP. P. 100(e).

206. *See id.*

207. TEX. R. APP. P. 100(b). *But see* TEX. APP.—CORPUS CHRISTI LOCAL R. C ("strongly advising" parties to respond to motions for rehearing to provide court with comments on motion and court's opinion).

208. For instance, when the San Antonio Court of Appeals notifies counsel by postcard of the filing of a motion for rehearing, that notice states that replies must be filed within five days of the motion. The deadline for replies to motions for rehearing is not found in the local rules for the San Antonio court but apparently represents an informal internal operating procedure.

ment must file a second motion for rehearing.[209] Under rule 100, a second motion for rehearing may be filed if, in response to the first motion for rehearing, the court modifies or vacates its judgment or hands down an opinion in connection with overruling the motion.[210] A second motion is not permitted if the court overrules the first motion without an opinion.[211] A second motion for rehearing must be filed within fifteen days of the new judgment or opinion.[212]

F. *Briefs and Motions for Rehearing in the Supreme Court*

Any party seeking to complain of the judgment of the court of appeals must file an application for writ of error within thirty days after the last timely motion for rehearing filed by any party is overruled.[213] The application is filed with *the clerk of the court of appeals, not the supreme court.*[214] Once one party files an application, any party who was entitled to, but did not file an application, may do so within ten days after the date the previous application was filed.[215] This ten day grace period ensures that the right of an opposing party to file an application for writ of error cannot be cut off by waiting until the last possible moment and filing an application on the thirtieth day.[216]

The respondent to the application for writ of error has fifteen days from the filing of the application *in the supreme court* to file an an-

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209. *See* Oil Field Haulers Ass'n v. Railroad Comm'n, 301 S.W.2d 183, 188 (Tex. 1964)(second motion needed whenever prior motion granted, prior judgment vacated and new judgment entered). *See generally* Scott, *Motions for Rehearing & Applications for Writs of Error*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE (1987).

210. *See* TEX. R. APP. P. 100(d). When a party may file a second motion for rehearing is clear. When a party has to file a second motion for rehearing to invoke the supreme court's writ of error jurisdiction over the appealing party's complaints, however, represents a complex and unsettled issue. *See generally* Scott, *Motions for Rehearing & Applications for Writs of Error*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE (1987); 32 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 852 (Tex. Practice 1985).

211. Scott, *Motions for Rehearing & Applications for Writs of Error*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE N-6 (1987).

212. TEX. R. APP. P. 100(d).

213. TEX. R. APP. P. 130(b).

214. *Id.*; *see also* Storey, *The Appellate Process*, in SOUTH TEXAS COLLEGE OF LAW, APPELLATE PRACTICE INSTITUTE E-42 (1988). Filing an application cannot be used to cut off the court of appeals' jurisdiction over other parties' motions for rehearing. The court of appeals retains jurisdiction over the appeal until all motions have been decided. Doctors Hosp. Facilities v. Fifth Court of Appeals, 750 S.W.2d 177, 178-79 (Tex. 1988).

215. TEX. R. APP. P. 130(c).

216. *See id.*

swer.[217] The deadline for the respondent's brief does not run from the time of filing of the application in the court of appeals, but begins once the clerk of the court of appeals has transmitted the record and application to the supreme court where it is filed.[218] The clerk of the supreme court will forward a postcard to all parties informing them of the date of filing of the application.[219] At that point, respondent's fifteen days to reply to the application begins.

As is the case with briefs in the courts of appeals, the application for and answer to the writ of error may be amended or supplemented when justice requires.[220] A motion for leave should accompany the amended or supplemental briefing, setting out the reasons additional briefing is needed.[221]

The motion for rehearing is due in the supreme court within 15 days of the date the supreme court rendered its judgment, decision or order refusing, denying or dismissing an application.[222] The parties have five days after notice from the supreme court clerk in which to file an answer to the motion for rehearing.[223]

The supreme court may shorten the time for filing or responding to a motion for rehearing if the ends of justice require.[224] While the court of appeals cannot prohibit the filing of a motion for rehearing,[225] the supreme court can "deny the right to file it altogether."[226]

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217. *See* TEX. R. APP. P. 136(a). Any cross-points the respondent wishes to raise in the supreme court should be included in its reply brief or those points may be deemed to have been waived. *See* Davis v. City of San Antonio, 752 S.W.2d 518, 521-22 (Tex. 1988).

218. *See* TEX. R. APP. P. 136(a). *See generally* O'Connor, *Perfecting the Appeal*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE C-87 (1988).

219. *See* O'Connor, *Perfecting the Appeal*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE C-87 (1988).

220. *See* TEX. R. APP. P. 131(h), 136(g). A sharply divided supreme court recently applied a restrictive interpretation of the rule permitting amendments. *See Davis*, 752 S.W.2d at 521-23.

221. *See* text and accompanying notes 183 - 194, *supra*.

222. TEX. R. APP. P. 190(a).

223. TEX. R. APP. P. 190(d).

224. *See id.*

225. *See* Cowan v. Fourth Court of Appeals, 722 S.W.2d 843, 846-47 (Tex. 1987); Stoner v. Massey, 586 S.W.2d 843, 846-47 (Tex. 1979).

226. *See* TEX. R. APP. P. 190(a). Second motions for rehearing are barred by appellate rule 190(d). Presumably that rule does not bar second motions when the court has vacated a prior judgment.

III. MOTIONS FOR EXTENSION: IN GENERAL

A. *Extensions in the Court of Appeals*

In the court of appeals, rule 73 designates the information which must be included in a motion for extension of time. Each extension motion must contain the following:

> (1) The court below, the date of judgment, and the number and style of the case;
> (2) the date the appeal was perfected, if an appeal has been perfected;
> (3) if the extension of time is being sought for filing the appellate record, the filing dates of any motions for new trial and the date any motions were overruled;
> (4) the deadline for filing the item in question;
> (5) the length of time requested for the extension;
> (6) the number of extensions granted previously concerning the item in question;
> (7) the facts relied upon to reasonably explain the need for an extension; and,
> (8) if an extension is being requested for filing the statement of facts, the facts relied upon as a reasonable explanation for the need for an extension must be supported by a court reporter's affidavit or the trial judge's certificate, and the court reporter's estimate of the earliest date when the statement of facts will be available for filing.[227]

Rule 73 applies to all extension motions, even motions to extend time to file a brief.[228] Furnishing such information as the date the appeal was perfected and the record was filed seems unnecessary when the appeal has already reached the briefing stage, particularly when one is representing the appellee; yet, compliance with rule 73 is mandatory.[229]

Without a proper extension motion on file, the court of appeals has no authority to consider the untimely filed item.[230] The party seeking the extension of an appellate filing deadline has the burden of ensur-

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227. *See* TEX. R. APP. P. 73(a) - (i). Several courts of appeal have local rules requiring information in addition to that required by rule 73. *See* TEX. APP.—CORPUS CHRISTI LOCAL R. V (A); TEX. APP.—SAN ANTONIO LOCAL R. 3(B), (C).

228. 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 716 (Tex. Practice Supp. 1987)(rule 73 governs the content and form of all motions for extension of time filed in the court of appeals).

229. *See* O'CONNOR, *Perfecting the Appeal*, in STATE BAR OF TEXAS ADVANCED APPELLATE PRACTICE COURSE G-54 (1987)(requiring appellee to furnish all information required by rule 73 seems superfluous).

230. *E.g.*, B.D. Click Co. v. Safari Drilling Corp., 638 S.W.2d 860, 862 (Tex. 1982); Vil-

ing that his motion complies with all substantive and procedural requirements.[231] If the motion is supported by briefs, affidavits or other proof or papers, they must be served and filed with the motion.[232] A response to a motion for extension of time is not required by the appellate rules,[233] but is permitted.[234] It is advisable to file a response if the extension motion is factually or legally incorrect.[235] If no response is filed, the court of appeals will generally take the factual averments in the motion and supporting proof as true.[236]

The motion to extend an appellate deadline must be filed in the appropriate court.[237] While this requirement would seem obvious, there are numerous instances of extension motions filed in the wrong court with the more prominent examples involving appeal bonds.[238] Despite the fact that an appellate court has not yet acquired jurisdiction, a motion to extend the deadline for filing the cost bond must be filed in the court of appeals, not the trial court.[239] If the extension

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lareal v. H.E. Butt Grocery Co., 742 S.W.2d 725, 726 (Tex. App.—Corpus Christi 1987); Moore v. Wallace, 663 S.W.2d 903, 904 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.).

231. Westergard, *Motions for Extension of Time Under Rule 21c*, 33 BAYLOR L. REV. 581, 589 (1981)(construing predecessor rules to current appellate rules).

232. *See* TEX. R. APP. P. 19(a).

233. Rule 73 does not discuss responses to extension motions. *See* TEX. R. APP. P. 73.

234. *See* TEX. R. APP. P. 19(a) (any party entitled to respond to motions in appellate court within 10 days after service of the motion).

235. *See* text and accompanying notes 299 - 301, *infra*; *see also* Westergard, *Motions for Extension of Time Under Rule 21c*, 33 BAYLOR L. REV. 581, 590 n.38 (1981)(courts are more likely to grant uncontested motion for extension than contested motion because, due to the failure to contest the motion, appellee waives error). The Tyler court even has local rules providing that unopposed motions for extension of time to file the statement of facts, supported by affidavit, and unopposed extension motions for briefs will be granted "as a matter of course." TEX. APP.—TYLER LOCAL R. III (2), (3). The Corpus Christi Court of Appeals requires any opposition to a motion to be accompanied by a short brief. *See* TEX. APP.—CORPUS CHRISTI LOCAL R. V.

236. Moore v. Davis, 644 S.W.2d 40, 43-44 (Tex. App.—Dallas 1982)(in absence of challenge by appellee to movant's statement that parties were negotiating settlement at time of deadline for statement of facts, court held that settlement talks represented reasonable explanation for untimely filing); Scheffer v. Chron, 560 S.W.2d 419, 420 (Tex. Civ. App.—Beaumont 1977, writ ref'd n.r.e.)(granting extension after accepting at "face value" appellant's statement that delay was due to deadline miscalculations); *see also* TEX. R. APP. P. 74(f) (court authorized to accept unchallenged statements in appellant's brief as true).

237. Westergard, *Motions for Extension of Time Under Rule 21c*, 33 BAYLOR L. REV. 581, 590 (1981); *see also* TEX. R. APP. P. 73.

238. *See generally* Westergard, *Motions for Extension of Time Under Rule 21c*, 33 BAYLOR L. REV. 581 (1981).

239. *See* Fite v. Johnson, 654 S.W.2d 51, 52 (Tex. App.—Dallas 1983, no writ). Not only must the appellant file in the court of appeals a motion "reasonably explaining" the need for an

motion is filed in the trial court, that motion has no effect and jurisdiction of the appellate court will not be invoked.[240]

For almost every appellate filing deadline, the motion to extend must be filed in the court of appeals no later than fifteen days after the original due date.[241] The fifteen-day period is absolute and may not be enlarged.[242] If the extension motion is filed after the fifteen-day period, the motion cannot be considered by the appellate court; that court has no authority to permit the late filing of the item in question no matter how justifiable the delay.[243] The failure of an appellant to comply with the fifteen-day period cannot be waived by appellee's failure to object,[244] nor can appellee agree to an untimely motion.[245] In

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extension, but the appellant must also file the bond or the substitute within the same 15-day period in the trial court. If either the cost bond or the motion is filed late or in the wrong court, an extension cannot be granted and the appeal must be dismissed for lack of jurisdiction. *See* Alvarado v. State, 656 S.W.2d 611, 612 (Tex. App.—San Antonio 1983, no writ)(dismissing appeal when both bond and extension motion filed in appellate court); Palmire v. Pickett, 645 S.W.2d 328, 328 (Tex. App.—Corpus Christi 1982, no writ)(court had no authority to consider motion to extend filing deadline for bond because motion was untimely despite timely bond).

240. *See Fite*, 654 S.W.2d at 52; *see also* McPherson v. Sawyers, 565 S.W.2d 123, 123-24 (Tex. Civ. App.—Waco 1978) (trial court's order extending time to file record held nullity). A second likely area for filing extension motions in the wrong court involves applications for writ of error. While an application for writ of error is filed in the court of appeals, an extension motion regarding that application is filed in both the court of appeals and the supreme court. *See* TEX. R. APP. P. 130(d) (extension of time to file application for writ of error must be filed in both court of appeals and supreme court). A motion for extension of time filed only in the court of appeals would not authorize an extension of the filing deadline. *Id.*

241. *See* TEX. R. APP. P. 41(a)(2) (cost bond or substitute); TEX. R. APP. P. 54(c) (record); TEX. R. APP. P. 100(g) (motions for rehearing in court of appeals); TEX. R. APP. P. 130(d) (application for writ of error). The First Court of Appeals in Houston has a local rule which apparently eliminates the 15 day grace period by requiring all extension motions to be filed on or before the item in question is due to be filed. *See* TEX. APP.—HOUSTON [1ST DIST.] LOCAL R. 1.73(a).

242. B.D. Click Co. v. Safari Drilling Corp., 638 S.W.2d 860, 862 (Tex. 1982). In holding that the 15 day limit is inflexible, the court emphasized the importance of certainty and finality in the appellate process. *See id.* Rule 54(a) essentially codifies the holding in *Click*, stating: "[t]he court . . . shall have no authority to consider a late filed transcript or statement of facts, except as permitted by this rule." *See* TEX. R. APP. P. 54(a).

243. *See* Westergard, *Motions for Extension of Time Under Rule 21c*, 33 BAYLOR L. REV. 581, 585 (1981)(regardless of validity of excuse for late filing, courts will not consider untimely extension motion). Even if the appellate court clerk marks an untimely transcript as "filed," the court lacks authority to consider it without a timely extension motion. Migura v. Migura, 730 S.W.2d 18, 19 (Tex. App.—Corpus Christi 1987, no writ).

244. J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 652 (Tex. Practice 1985).

245. Carrao v. Committee of Unauthorized Practice, 638 S.W.2d 183, 184 (Tex. App.—Dallas 1982, no writ)(appellee sent letter to court stating he had no objection to late statement of facts). While filing in the wrong court or complying with the 15 day deadline is not waiv-

other words, if you miss the original filing deadline, and then miss the fifteen day extension deadline, you are out of luck.[246]

The fifteen-day period applies to successive extension motions.[247] A motion to extend a filing deadline established by the court of appeals in response to a previous extension motion must be filed within fifteen days after the extended filing date.[248] If the first extension motion is overruled, the second motion must be filed within fifteen days of the original filing deadline — not within fifteen days of the overruling of the initial motion.[249]

Calculating the fifteen-day period is essentially identical to determining other appellate deadlines.[250] The original due date for the

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able, the movant's failure to comply with the technical requirements of rule 73 can be waived if the nonmovant fails to object to the defects. *See* Sifuentes v. Texas Employers' Ins. Ass'n, 754 S.W.2d 784 (Tex. App.—Dallas 1988). In addition, while counsel cannot waive fundamental defects, he can agree to an extension which has been properly requested. Some courts have local rules encouraging agreed motions for extension. *See* TEX. APP.—HOUSTON [1ST DIST.] LOCAL R. 1:55(b); TEX. APP.—CORPUS CHRISTI LOCAL R. V. Seeking opposing counsel's agreement particularly should be considered when counsel for the appellant has missed the filing deadline for his brief by a wide margin or needs a lengthy extension. Rule 74(l)(1) states that the court is entitled to dismiss the appeal for want of prosecution when appellant fails to file a brief, unless both a reasonable explanation is shown for the failure and that "appellee has not suffered material injury thereby." *See* TEX. R. APP. P. 74(l)(1). Any concern over the existence of a "material injury" can be obviated through obtaining apppellee's agreement to filing a late brief.

246. As succinctly described in one article:

> Fifteen is the magic number. For the cost bond, transcript, statement of facts, or motion for rehearing, the court loses the authority to grant an extension 15 days after a deadline. This is true no matter how good the cause or how badly the court wishes to grant the extension. This situation usually means the end of the appeal. Suffice it to say, do not be late with your motion, but if you are, do not be more than 15 days late.

Liberato & Peveto, *The Nuts and Bolts of Civil Appellate Practice: Lessons Learned at the Court of Appeals*, 50 TEX. BAR J. 642, 643 (1987); *accord* Westergard, *Motions for Extension for Time Under Rule 21c*, 33 BAYLOR L. REV. 581, 585 (1981).

247. Chojnacki v. First Court of Appeals, 699 S.W.2d 193, 193 (Tex. 1985)(disapproving intermediate appellate court's holding that 15 day limit inapplicable to second extension motion).

248. *Id.*

249. Sifuentes v. Texas Employers' Ins. Ass'n, 754 S.W.2d 784 (Tex. App.—Dallas 1988) (defective extension motion does not extend time to file proper motion). There is no limit on the number of extension motions which can be granted. Presumably, so long as a reasonable explanation is shown and the motion otherwise complies with procedural and substantive requirements, an extension can be granted. *See* 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 716 (Tex. Practice 1985)(rules do not place limit on number of extensions which may be granted for filing brief).

250. *See* Westergard, *Motions for Extension of Time Under Rule 21c*, 33 BAYLOR L. REV. 581, 585-86 (1981)(discussing calculating appellate deadlines under former rules which were

item is not counted but the last day of the fifteen-day period is counted, unless that day is a Saturday, Sunday or legal holiday.[251] If the original deadline for filing the statement of facts and transcript falls on a Saturday, Sunday or legal holiday, the fifteen-day period for filing the motion to extend begins on the next day that is not a Saturday, Sunday or legal holiday.[252] If counsel inadvertently obtains the extension of a deadline to a Saturday, Sunday or legal holiday, the fifteen-day period for filing the item in question or the next extension motion should also begin on the next day that is not a Saturday, Sunday or legal holiday.

Counsel need not wait until the passage of the filing deadline to file an extension motion.[253] It may be obvious before the perfection of the appeal that it will be impossible for the court reporter to complete a lengthy statement of facts on time.[254] Although it might be difficult to actually prove a reasonable explanation for the need for an extension when filing a motion several weeks or months in advance of the due date, there is no procedural or substantive bar to filing the extension motion before expiration of the deadline.[255]

One deadline in the court of appeals can be enlarged even if the extension motion is not filed within fifteen days after the original filing deadline. Either the appellant or the appellee may request an extension of time to file a brief by filing a sworn motion showing a reasonable explanation of the need for more time.[256] That motion is not

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essentially identical to current appellate rules). *See generally* text and accompanying notes 3-61, *supra*.

251. *See id.*

252. *See* TEX. R. APP. P. 4; *see also* Phoenix v. John F. Scott & Co., 676 S.W.2d 441, 442-43 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.)(rule 4 applies to appellate timetables).

253. *See* Westergard, *Motions for Extension of Time Under Rule 21c*, 33 BAYLOR L. REV. 581, 586 (1981)(no proscription in rules against filing extension motion prior to date of required filing). In fact, some local rules prohibit filing a motion for extension after deadline. TEX. APP.—HOUSTON [1ST DIST.] LOCAL R. 1:73(a).

254. *See* Westergard, *Motions for Extension of Time Under the Rule 21c*, 33 BAYLOR L. REV. 581, 586-87 (1981).

255. *See id.* at 587.

256. *See* TEX. R. APP. P. 74(n). The San Antonio Court allows its clerk to authorize extensions of briefing deadlines for up to 14 calendar days. *See* TEX. APP.—SAN ANTONIO LOCAL R. 3(c)(2). That local rule, however, requires the extension request to be made prior to the due date for the brief. There is no 15 day grace period. *See id.* Both the San Antonio court and the Corpus Christi court have local rules governing the information to be included in a motion requesting an extension for a brief. *See* TEX. APP.—CORPUS CHRISTI LOCAL R. V(B); TEX. APP.—SAN ANTONIO LOCAL R. 3(c)(1).

subject to the fifteen-day deadline governing other appellate filings;[257] however, if the appellant has failed to file its brief on time, the appellate court may dismiss the appeal for want of prosecution, unless a reasonable explanation is shown for such failure and appellee has not suffered material injury due to the delay in filing.[258]

Rule 73 does not explicitly require a sworn motion.[259] A sworn motion is, however, required by some courts of appeal.[260] As a practical matter, to satisfy rule 73, verification will probably be necessary.[261]

Rule 73 requires the length of the extension request to be specified in the motion.[262] For that reason, requesting an extension of unspecified length, or globally requesting one for "as long as needed," will result in the court of appeals requesting counsel to furnish a specific date or length of time or arbitrarily selecting the due date.[263]

Extension motions are disposed of by the court of appeals without argument.[264] Under rule 19(e), an extension motion is generally not

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257. Bracken, *Mechanics of Appeal*, in STATE BAR OF TEXAS PROCEDURAL INSTITUTE: APPELLATE PRACTICE D-27 (1986); *see* 6 W. DORSANEO, TEXAS LITIGATION GUIDE § 151.05 (1987)(rules do not set deadlines for filing extension motions concerning briefs). Not only are briefing deadlines not subject to the 15 day limit, but at least one court has concluded that a strict showing of reasonable explanation is not required for late briefs. *See* Castillo v. Sears Roebuck & Co., 663 S.W.2d 60, 62 (Tex. App.—San Antonio 1983, no writ).

258. *See* TEX. R. APP. P. 74(l)(1).

259. *See* TEX. R. APP. P. 73. *But see* O'Connor, *Perfecting the Appeal*, in STATE BAR OF TEXAS ADVANCED APPELLATE PRACTICE COURSE C-73 (1988)(rule 73 requires sworn motion).

260. *See* TEX. APP.—CORPUS CHRISTI LOCAL R. V (all motions containing factual allegations must be sworn to); TEX. APP.—SAN ANTONIO LOCAL R. 3(A) (mandating that all motions, not just extension motions, be verified).

261. *See* Westergard, *Motions for Extension of Time Under Rule 21c*, 33 BAYLOR L. REV. 581, 592 (1981)(verification will be required if motion contains disputable factual allegations); *see also* TEX. R. APP. P. 19(d) (motions dependent on facts not in record and not known to court must be supported by affidavits or other evidence).

262. *See* TEX. R. APP. P. 73(f). Neither the appellate rules nor case law limits the duration of the extension which may be granted. *See* 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 716 (Tex. Practice 1985). *See generally* Westergard, *Motions for Extension of Time Under Rule 21c*, 33 BAYLOR L. REV. 581, 593-94 (1981)(discussing permissible length of extensions and problem of excessive extensions). One court has a local rule prohibiting extending briefing deadlines for more than 45 days. *See* TEX. APP.—TYLER LOCAL R. III(3).

263. *See* Westergard, *Motions for Extension of Time Under Rule 21c*, 33 BAYLOR L. REV. 581, 591 (1981)(general prayers for vague time period should be avoided since lack of specificity may indicate to court that extension being requested to obtain mere continuance).

264. Bracken, *Mechanics of Appeal*, in STATE BAR OF TEXAS PROCEDURAL INSTITUTE: APPELLATE PRACTICE D-25 (1986); *see* TEX. APP.—CORPUS CHRISTI LOCAL R. V ("only in rare instances will the court permit a hearing on a motion").

submitted for determination until the other parties have had ten days after service of the motion in which to file a response;[265] but, the court is entitled to shorten or extend the time for responding to any motion.[266] In most courts of appeals, counsel receive notice of the court's disposition of the extension motion by postcard or one-sentence letter. In cases involving complicated facts or novel legal issues, courts will issue a written opinion in connection with the grant or denial of an extension.[267]

An extension motion for one appellate matter, if granted, does not result in the extension of other appellate filing deadlines. For example, a timely filed motion for extension concerning the statement of facts does not automatically extend the deadline for filing the transcript or vice versa.[268] If the filing deadlines for both parts of the record on appeal need to be extended, separate extension motions will be necessary, or the motion for extension should expressly refer to both the statement of facts and the transcript, and provide reasonable explanations for filing both late.[269] An extension motion, however, concerning the "record" has been viewed as encompassing both the transcript and the statement of facts.[270]

Similarly, filing a motion to extend the time for filing the cost bond on appeal, even if granted, does not automatically extend the filing deadlines for filing the record.[271] If the court of appeals extends the

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265. *See* TEX. R. APP. P. 19(e). In cases of emergency, the motion can be acted upon without awaiting response. *Id.*

266. *See id.*; *see also* TEX. APP.—CORPUS CHRISTI LOCAL R. V (court will not decide motions for ten days after service unless motion agreed to).

267. *See, e.g.*, Chojnacki v. Court of Appeals, 699 S.W.2d 193 (Tex. 1985); B.D. Click Co. v. Safari Drilling Corp., 638 S.W.2d 860 (Tex. 1982); Meshwert v. Meshwert, 549 S.W.2d 383 (Tex. 1977).

268. *See, e.g.*, Tickle v. Thaman, 674 S.W.2d 322, 323 (Tex. App.—Houston [1st Dist.] 1983, no writ); Escamillo v. Strong, 582 S.W.2d 605, 606 (Tex. Civ. App.—Corpus Christi 1979, no writ); Cook v. Hudson, 558 S.W.2d 522, 523 (Tex. Civ. App.—Eastland 1977, no writ). *See generally* 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 652 (Tex. Practice 1985).

269. *See* Embry v. Bel-Aire Corp., 502 S.W.2d 543, 544 (Tex. 1973); *Escamillo*, 582 S.W.2d at 606. The appellee, as well as the appellant, is entitled to move for an extension of the time to file the record. *See* Kobdish v. Kobdish, 741 S.W.2d 597, 598 (Tex. App.—Austin 1987)(granting appellee's extension motion based on appellee's need for statement of facts to support cross-points despite fact rule 54(c) only mentions appellant's right to extensions).

270. *See* McDonald v. Brennan, 704 S.W.2d 136, 139 (Tex. App.—El Paso 1986, writ ref'd n.r.e.).

271. Collins v. Williamson Printing Corp. 746 S.W.2d 489, 491 (Tex. App.—Dallas 1988, no writ); Pierson v. Josef Mfg., Inc., 665 S.W.2d 193, 193 (Tex. App.—Dallas 1984, no writ).

due date for the bond, then the appellant must file a separate motion to extend the deadline for filing the record.[272]

Not all appellate deadlines can be extended. The deadline for filing a motion for new trial within thirty days after the signing of the judgment is absolute and not subject to extension.[273] Similarly, there apparently is no provision for extending the deadline for perfecting appeals by writ of error[274] or in accelerated appeals.[275]

B. *Extensions in the Supreme Court*

The rules governing extension motion practice in the supreme court are relatively simple and infrequently litigated since the only appellate matters generally filed in the supreme court are the application, the answer, additional briefs, the motion for rehearing and the response. Rule 160 governs the contents of the motion for extension of time for filing an application for writ of error and requires:

> (1) the court of appeals and the date of its judgment, together with the number and style of the case;
> (2) the date upon which the last timely motion for rehearing was overruled;
> (3) the deadline for filing the application; and,
> (4) the facts relied upon to reasonably explain the need for an extension.[276]

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272. *See Pierson*, 665 S.W.2d at 193.

273. *See* Thomas v. Davis, 553 S.W.2d 624, 626 (Tex. 1977).

274. *See* 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 565 (Tex. Practice Supp. 1987)(since rule governing perfection of appeal by writ of error does not provide for extending deadlines, it would appear that such extension motions are prohibited).

275. *See* St. Louis Federal Sav. & Loan Ass'n v. Summerhouse Joint Venture, 739 S.W.2d 441, 442 (Tex. App.—Corpus Christi 1987, no writ)(time to file bond in accelerated appeal cannot be extended since rule 42 has no provision for extending that deadline). *But see* Turner v. H.E. Butt Grocery Co., 645 S.W.2d 936, 936 (Tex. App.—Austin 1983, no writ)(rules governing extension motions apply to interlocutory appeal); O'Connor, *Perfecting the Appeal*, in STATE BAR OF TEXAS ADVANCED APPELLATE PRACTICE COURSE C-29 (1988)(some Texas appellate courts grant extensions to file bond or substitute in accelerated appeals); 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 652 (Tex. Practice Supp. 1987)(due date for filing bond in accelerated appeals can be extended under rule 54(c) but there is no 15 day grace period for extension motions).

276. TEX. R. APP. P. 160(a)—(d). In addition to the usual extension motion focused on a reasonable explanation of the delay in filing an application, an extension may be granted by the supreme court upon the filing of a sworn motion showing that neither the petitioner nor his counsel had notice or actual knowledge of the order overruling the period for filing the application. TEX. R. APP. P. 130(d). Analogous to the procedure for motions for new trial alleging a lack of notice of a judgment, the motion in the supreme court must specify the earliest date

While the application for writ of error is originally filed in the court of appeals[277] and subsequently transmitted to the supreme court, the motion to extend time to file the application is not filed in the court of appeals, but in the supreme court.[278] A copy of the extension motion, however, is filed with the court of appeals.[279] Since a fifteen-day grace period also governs applications, the extension motion must be filed not later than fifteen days after the due date for the application.[280] An untimely application for writ of error will be dismissed for want of jurisdiction if an extension request is not timely filed and then granted.[281]

Rule 136, which governs responses to the application of writ of error, does not directly discuss extending the deadline for filing a response.[282] As a practical matter, the supreme court will rule on extension motions concerning respondent's briefs, but it will not delay submission of the case until the respondent files a brief.[283] Generally, the court will inform respondent's counsel that the brief will be considered when filed but, in the meantime, the court might act on the writ of error.[284] If the application presents only one or two clear-cut legal issues and the record is insubstantial, there is a significant possibility that the court may act on the application, before receiving respondent's brief. On the other hand, counsel is probably safe in assuming that the supreme court will not act immediately on an appli-

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that the petitioner or its attorney received notice or acquired actual knowledge of the order on the motion for rehearing. *See id.*; *see also* text and accompanying notes 202 - 212, *supra*. The extension motion must be filed within 15 days of the date that notice or knowledge was acquired, but not more than 90 days after the inception of the timetable for filing the application. TEX. R. APP. P. 130(d). If the motion for extension is granted, the timetable for filing the application starts from the date the extension motion was granted. *See* 32 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 857 (Tex. Practice Supp. 1987); *see also* Novsco Serv. Div. v. Lassman, 686 S.W.2d 197, 201-03 (Tex. App.—Houston [14th Dist.] 1984, no writ)(granting extension of time to file untimely motion for rehearing on due process grounds when movant failed to receive notice of overruling of first motion).

277. *See* TEX. R. APP. P. 130(b).

278. *See* TEX. R. APP. P. 130(d); TEX. R. APP. P. 160.

279. *See* TEX. R. APP. P. 160.

280. *See* TEX. R. APP. P. 130(d).

281. *See* City of Denton v. Van Page, 701 S.W.2d 831, 833 n.2 (Tex. 1986).

282. *See* TEX. R. APP. P. 136. The rule simply states that the answer is due within fifteen days of the filing of the application "unless additional time is granted." *See id.*

283. O'CONNOR, *Perfecting the Appeal*, in STATE BAR OF TEXAS ADVANCED APPELLATE PRACTICE COURSE C-87 (1988).

284. *Id.*

cation which presents numerous diverse points of error arising from a lengthy trial which generated a mammoth record.

With respect to motions for rehearing in the supreme court, there is nothing in the appellate rules concerning the procedure for extension motions for the motion for rehearing or response.[285] The supreme court nevertheless grants such motions. It is, however, an open question whether there is a fifteen-day grace period for motions requesting an extension of time to file a motion for rehearing. Until the issue is resolved, the extension motion should be filed before the motion is due.

IV. EXTENSION MOTIONS: THE REASONABLE EXPLANATION

A. *In General*

The central component of every motion for extension filed in an appellate court is the "reasonable explanation." Whether appellate counsel is attempting to enlarge the filing deadline for the cost bond, record or a brief, the motion for extension must reasonably explain the necessity for an extension by alleging and proving grounds which are factually and legally sufficient. Since the viability of an extension motion is invariably predicated upon the adequacy of the "reasonable explanation," a substantial body of case law has evolved concerning procedural and substantive requirements on this issue.

In *Meshwert v. Meshwert*,[286] the leading case interpreting the "reasonable explanation" requirement, the supreme court concluded that the term "means any plausible statement of circumstances indicating that the failure to file within the [appellate deadline] was not deliberate or intentional, but was the result of inadvertence, mistake or mischance."[287] While the definition of reasonable explanation is settled, Texas courts have not applied that definition consistently. Courts vary regarding the harshness with which they evaluate reasonable explanations and have reached different results in seemingly indistinguishable situations.[288]

In most instances, the reasonableness of the explanation is not really in issue because the extension request is based on a delay in the

285. *See id.* at C-90.
286. 549 S.W.2d 383 (Tex. 1977).
287. *Id.* at 384.
288. *See* text and accompanying notes 304 - 387, *infra*.

preparation of the statement of facts due to the court reporter's workload, and, that type of extension is granted as a matter of course.[289] When the reasonableness of the explanation is a serious issue, the courts appear to decide those motions on a case-by-case basis, subjectively weighing the evidence in light of the *Meshwert* test.

The movant for the extension of the appellate deadline has the burden to prove the "reasonable explanation."[290] As previously discussed, although rule 73 does not specifically require extension motions to be sworn, several courts of appeals have local rules requiring verified extension motions.[291] Moreover, rule 19(d) states:

> 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.[292]

Consequently, the movant generally will need to file an affidavit or sworn motion since the facts comprising the alleged reasonable explanation will almost never be in the appellate record or known *ex officio* to the court.[293]

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289. *See* text and accompanying notes 304 - 320, *infra*. At one time, a showing of "good cause" was the standard for obtaining an extension of an appellate deadline. 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 716 n.1 (Tex. Practice 1985). The good cause standard is more onerous than the "reasonable explanation" criteria. *Id.* Consequently, appellate opinions on extension requests construing the good cause standard and denying an extension are no longer sound precedent. *Id.* Conversely, opinions granting an extension because the movant satisfied the "good cause" test remain persuasive authority for demonstrating that the movant has satisfied the less stringent "reasonable explanation" standard. *Id.*; *see also* Coulson v. Lake LBJ Mun. Util. Dist., 678 S.W.2d 943, 944 (Tex. 1984)(good cause more stringent standard than reasonable explanation).

290. Westergard, *Motions for Extension of Time Under Rule 21c*, 33 BAYLOR L. REV. 581, 589 (1981)(construing predecessor rules to current appellate rules).

291. *See* text and accompanying notes 260 - 262, *supra*; *see also* Escamillo v. Strong, 582 S.W.2d 605, 606 (Tex. Civ. App.—Corpus Christi 1979, no writ)(dismissing appeal and denying extension motion when movant filed unverified motion in violation of local rule).

292. *See* TEX. R. APP. P. 19(d).

293. *See, e.g.*, Byars v. Steel, 625 S.W.2d 391, 392 (Tex. App.—Fort Worth 1981)(denying extension motion which contained no verification of facts reported to exist and conduct allegedly constituting inadvertence); Carter v. Goldberg, 598 S.W.2d 908, 909 (Tex. Civ. App.—Dallas 1980)(denying extension motion and stressing that appellant had burden to produce "sworn statement"); Martin v. Russell, 590 S.W.2d 155, 156 (Tex. Civ. App.—Fort Worth 1979)(denying motion to extend record deadline since movant failed to produce any verified proof). "It is the opinion of the court that the facts alleged in the motions and relied upon by movants as constituting a reasonable explanation . . . must be proved by affidavit or by some legitimate form of evidence that can be considered by an appellate court." Hutcheson v. Hinson, 543 S.W.2d 719, 720 (Tex. Civ. App.—Tyler 1976)(overruling motion for extension of time to file transcript).

Any testimony, whether encompassed in an affidavit or a sworn motion, should set forth facts which would be admissible into evidence and demonstrate that affiant has personal knowledge of the subject matter of his testimony.[294] The proof supporting the motion should contain as much detail as possible. Framing the affidavit or motion in terms of factual or legal conclusions should be avoided[295] and relying on broad assertions of "inadvertence, mistake or mischance" can be fatal to the movant.[296] The greater the detail in the supporting proof and the less conclusory, the more likely the appellate court is to grant the extension.

If the party files more than one motion for extension, the reasonable explanation proffered in each motion must stand on its own facts.[297] Appellate courts tend to question the credibility of successive extension motions which simply reiterate allegations of inadvertence and mischance previously used as an excuse for a missed deadline.[298]

The non-movant is entitled to submit proof to rebut the reasonableness of the proffered explanation or to otherwise establish that the requested extension should be denied.[299] In numerous cases, the non-movant has successfully persuaded the appellate court that the rea-

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294. *Hutcheson*, 543 S.W.2d at 720 (extension motion must be supported by legitimate proof). The summary judgment rule outlines the characteristics of competent affidavit testimony. *See* TEX. R. CIV. P. 166a(e) (affidavits shall set forth such facts as would be admissible in testimony and establish that affiant is competent to testify on subject matter of affidavit). If documents are submitted with the motion, that proof should be in the form of certified copies. *See id.*

295. "Flimsy or rote excuses will not provide a 'reasonable explanation' which entitles the movant to an extension of time." Wolters v. Wright, 623 S.W.2d 301, 303 (Tex. 1981). In the following cases, extensions were denied because the movant's proof was insufficiently detailed or conclusory. *See* Sonfield v. Sonfield, 709 S.W.2d 326, 328 (Tex App.—Houston [1st Dist.] 1986, no writ)(broad allegations concerning confusion of deadlines by counsel); Splawn v. Zavala, 652 S.W.2d 578, 579 (Tex. App.—Austin 1983, no writ)(claim that settlement negotiations prevented timely filing of bond unsupported by facts showing how settlement talks caused late filing); Southern Pac. Transp. Co. v. Yendrey, 605 S.W.2d 676, 677-78 (Tex. Civ. App.—Corpus Christi 1980, no writ)(court reporter's conclusory affidavit about more time); Carter v. Goldberg, 598 S.W.2d 903, 909-10 (Tex. Civ. App.—Dallas 1980, no writ)(facts stated in appellant's motion insufficient for court to determine whether good cause existed).

296. *See* Byars v. Steel, 625 S.W.2d 391, 392 (Tex. App.—Fort Worth 1981)(extension request based on global assertion of inadvertence denied).

297. *Wolters*, 623 S.W.2d at 303.

298. *See* Home Ins. Co. v. Espinoza, 644 S.W.2d 44, 45 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.).

299. *See* Wiggington v. Parker Square State Bank, 321 S.W.2d 334, 336 (Tex. Civ. App.—Fort Worth 1959, no writ)(appellee successfully contested appellant's motion for extension).

sonable explanation, as alleged and proven by the movant, was factually inaccurate or based on an incomplete version of the facts.[300] In addition to relying on affidavits to challenge the movant's reasonable explanation, the non-movant should consider using other types of proof. To illustrate, evidence that the movant had been guilty of dilatory behavior and discovery abuse throughout the course of the litigation led one appellate court to conclude that appellant's reasonable explanation was not credible.[301]

In many instances, it is pointless to contest a motion for extension unless the reasonable explanation claimed is facially specious, untrue or legally insufficient. Most courts routinely extend the filing deadline for the appellant's or appellee's brief at least once for thirty days or even longer.[302] Likewise, courts customarily grant multiple extension for filing the statement of facts based on the court reporter's workload.[303] To ensure that counsel does not damage his credibility with the appellate court by repeated opposition to meritorious motions, the better practice is to contest only those extension requests which are truly questionable.

B. *Reasonable Explanations: Acceptable and Unacceptable*

1. Delays Attributable to the Court Reporter

Each month, appellate courts grant hundreds of motions for extensions of time to file the statement of facts based upon affidavits by court reporters that they are busy with other official duties, such as their day-to-day attendance at judicial proceedings or the preparation of other statements of facts.[304] While the court reporter's workload does not literally qualify as "inadvertence, mistake or mischance" as required by *Meshwert*, appellate courts uniformly accept that situation as a reasonable explanation for the necessity of an extension.[305]

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300. *See, e.g.*, Winston Int'l Elec., Inc. v. Rio Radio Supply Inc., 726 S.W.2d 161, 161-62 (Tex. App.—Corpus Christi 1986, no writ)(affidavits of court reporter and deputy clerk submitted to prove record not timely requested); Pena v. Petroleum Cas. Co. 441 S.W.2d 657, 658 (Tex. Civ. App.—Beaumont 1969, no writ)(appellee denied appellant's claim that parties had discussed settlement); *Wiggington*, 321 S.W.2d at 336 (extension motion overruled when appellee filed affidavit of clerk which contradicted appellant's motion).

301. *See Winston Int'l Elec.*, 726 S.W.2d at 161-62.

302. *See* text and accompanying notes 289 - 290, *supra*.

303. *See* text and accompanying notes 304 - 320, *infra*.

304. Zimmerman v. Boyce, 660 S.W.2d 837, 839-40 (Tex. App.—El Paso 1983)(granting motion to extend filing due date for cost bond).

305. *Id. See, e.g.*, Sumner & Greener v. Carlson, 739 S.W.2d 127, 130 (Tex. App.—Fort

Rule 73 specifically requires a motion for extension of time which is based upon the court reporter's workload to "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."[306] While rule 73 does not directly require proof of the reporter's workload, that type of proof is nonetheless required by some local rules.[307] If not procedurally required, it should be included since it bolsters the validity of the movant's reasonable explanation.[308] The court reporter's affidavit should describe the statements of facts required to be prepared along with their anticipated length and completion date, the court reporter's daily responsibilities in the trial court and any other activities or duties which would prevent the reporter from working on the statement of facts on which an extension is being requested.[309]

An appellate court is not bound to accept conclusory affidavits of court reporters which globally allege that the reporter is "too busy" to meet the deadline.[310] Nor are courts required to automatically adopt the court reporter's estimated completion date as the due date for the statement of facts in the court of appeals. If numerous extensions

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Worth 1987)(granting request to extend deadline for filing statement of facts); Monk v. Dallas Brake & Clutch Serv. Co., 683 S.W.2d 107, 108 (Tex. App.—Dallas 1984)(granting motion to extend time for filing statement of facts); Briarcroft Sav. & Loan Ass'n v. Foster Fin. Corp., 533 S.W.2d 898, 903 (Tex. Civ. App.—Eastland 1976, writ ref'd n.r.e.)(good cause test); *see also* O'Neal v. County of San Saba, 577 S.W.2d 795, 796 (Tex. Civ. App.—Austin 1979, no writ)(granting fourth motion to extend time for filing statement of facts stating "[t]his Court is conscious of the need for extensions of time when a court reporter has conflicting duties"). In like fashion, the workload of the district clerk is a reasonable explanation in support of a motion to extend the deadline for filing the transcript. *See* Hildyard v. Fannel Studio, Inc., 547 S.W.2d 332, 336 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.)(granting extension and overruling motion to affirm).

306. *See* TEX. R. APP. P. 73(i).

307. *See* TEX. APP.—CORPUS CHRISTI LOCAL R. V(A); TEX. APP.—SAN ANTONIO LOCAL R. 3(B)(5).

308. *See Sumner & Greener*, 739 S.W.2d at 128-29 (granting extension when reporter's affidavits discussed other duties); *see also* Southern Pac. Transp. Co. v. Yendrey, 605 S.W.2d 676, 677 (Tex. Civ. App.—Corpus Christi 1980, no writ)(denying extension when reporter's affidavit did not detail workload).

309. *See* TEX. APP.—SAN ANTONIO LOCAL R. 3(B)(5).

310. *See Yendrey*, 605 S.W.2d at 677 (conclusory affidavit of court reporter summarily rejected as proof of reasonable explanation); *see also* 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 652 (Tex. Practice 1985)(not uncommon for appellate court to require reporter to file detailed affidavits proving number of hours spent on case and on official matters not connected with case).

already have been granted,[311] or if the reporter's affidavit is factually weak, it is not uncommon for a court to reduce the time requested in the extension motion, direct the court reporter to complete the statement of facts by a specified date, and advise the reporter and parties that no further extension motions will be entertained.[312]

If counsel is confronted by a court reporter who refuses to complete the statement of facts, is lazy or cannot be located, that type of situation will qualify as a reasonable explanation — if adequately proven.[313] Counsel, however, will need to file a sworn motion for extension or affidavit detailing all attempts to obtain preparation of the statement of facts. If it becomes apparent early in the appellate process that counsel is going to have difficulty in obtaining a statement of facts, each contact or attempt to contact the reporter should be memorialized by a confirmatory letter and/or a memorandum to the file. That memoranda and correspondence should be attached as exhibits to the extension motion.

Once it becomes clear that the reporter is not working diligently, or even at all, on the statement of facts, counsel should file a petition for writ of mandamus in the court of appeals.[314] If the court reporter ignores the mandamus, then he risks being held in contempt by the court of appeals.[315] Particularly stubborn court reporters have been ordered confined to the county jail to work on the statement of facts.[316]

On occasion, the inability of the court reporter to timely complete

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311. *See* TEX. APP.—CORPUS CHRISTI LOCAL R. V (A)(2) (very detailed affidavit required if statement of facts not completed when initially estimated and additional extensions needed).

312. *See, e.g.*, O'Neal v. County of San Saba, 577 S.W.2d 795, 796-97 (Tex. Civ. App. - Austin 1979)(granting fourth motion to extend time for filing statement of facts); Garza v. Berlanga, 575 S.W.2d 639, 641 (Tex. Civ. App.—San Antonio 1978)(granting extension of time to file statement of facts); Modine Mfg. Co. v. Northeast Ind. School Dist., 489 S.W.2d 458, 459 (Tex. Civ. App.—San Antonio 1972)(granting motion to extend filing deadline for record).

313. *See* Wolters v. Wright, 623 S.W.2d 301, 304 (Tex. 1981).

314. *See Wolters*, 623 S.W.2d at 305 (since preparing statement of facts takes precedence over all other duties, court reporter may be forced by writ of mandamus to produce statement of facts). *See generally* Baker & Smith, *Simplifying Appellate Procedure: A Proposal to Turn Management of Court Reporters Over to the Courts*, 7 THE ADVOCATE 12 (State Bar of Texas 1988).

315. *See In re* Sanchez, 698 S.W.2d 462, 463 (Tex. App.—Corpus Christi 1985, orig. proc.). *See generally* 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 652 (Tex. Practice 1985).

316. *See Ex parte* Sanchez, 703 S.W.2d 955 (Tex. 1986). If sanctions and a writ of man-

the statement of facts is not attributable to workload. If the court reporter is dead[317] or ill,[318] of course, that qualifies as a reasonable explanation. Similarly, if the court reporter's notes or significant exhibits have been misplaced or lost, thereby preventing timely completion of the statement of facts, the extension motion should be granted.[319]

In sum, appellate courts invariably grant extension motions for the statement of facts due to a busy, lazy or ill court reporter. In those situations, counsel has little actual control over compliance with the filing deadline and "a court should not punish the innocent appellant."[320]

2. Mistakes by Court Personnel

No matter how egregious, the negligence[321] of or even fraud[322] by official court personnel does not automatically enlarge a deadline — an extension motion is still necessary. A variety of mistakes and omissions by clerks and other courthouse personnel, however, have been upheld as justification for granting an extension motion. Misplacing the appellate record,[323] and confusing the cause number for the appeal[324] or the matters to be included in the transcript[325] have

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damus are ineffective in producing an appellate record, the cause may be remanded to the trial court for a new trial. *Wolters*, 623 S.W.2d at 305-306.

317. *See* Victory v. Hamilton, 127 Tex. 203, 207, 91 S.W.2d 697, 700 (Tex. Comm'n App. 1936, opinion adopted)(reversing for new trial when reporter's death made transcription of trial impossible).

318. *See* Carmichael v. Carmichael, 432 S.W.2d 126, 128 (Tex. Civ. App.—Waco)(granting motion to extend statement of facts deadline because reporter's illness constituted good cause).

319. *See* Gallegos v. Truck Ins. Exchange, 539 S.W.2d 353, 354 (Tex. Civ. App.—San Antonio 1976)(granting extension of time to file record).

320. *See Wolters*, 623 S.W.2d at 306. Counsel simply has little actual control over the sick, busy or lazy court reporter, which is why extensions are granted in those situations. Zimmerman v. Boyce, 660 S.W.2d 837, 840 (Tex. App.—El Paso 1983)(granting motion to extend due date for filing cost bond). It is an abuse of discretion for the court of appeals to dismiss the appeal when the court reporter cannot or will not prepare it on time. 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 652 (Tex. Practice 1985).

321. *See* Nix v. Fraze, 752 S.W.2d 118, 120 (Tex. App.—Dallas 1988, no writ).

322. *See* White v. White, 700 S.W.2d 317, 318 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.)(denying extension motion as untimely despite fact court reporter allegedly lied about having filed statement of facts in court of appeals).

323. *See* Gallegos v. Truck Ins. Exchange, 539 S.W.2d 353, 354 (Tex. Civ. App.—San Antonio 1976)(granting extension of time to file record); Hooe v. Texas Fire & Casualty Underwriters, 151 S.W.2d 310, 311 (Tex. Civ. App.—Waco 1941, no writ)(good cause standard).

324. *See* Coulson v. Lake LBJ Mun. Util. Dist., 678 S.W.2d 943, 944 (Tex. 1984).

been upheld as reasonable explanations.

If counsel has been led to believe that the record has been filed by the court reporter or clerk when it has not in fact been filed, such evidence might represent a reasonable explanation for untimely filing.[326] Appellate counsel, however, cannot ignore the plain language of the appellate rules or basic principles of common sense and choose to rely on something a deputy clerk has said or done.[327] For instance, waiting to perfect an appeal until the clerk furnishes an appellate timetable is not reasonable; the clerk does not have that responsibility and there is no provision in the rules authorizing him to assume it.[328] Similarly, counsel cannot rely on a clerk's miscalculation of a deadline.[329] It is counsel's responsibility to read the appellate rules and calculate deadlines; relying on a clerk's miscalculation, which is contrary to the rules, is conscious indifference.[330]

3. Miscalculation of Deadlines by Counsel

It is well established that miscalculating an appellate deadline constitutes a reasonable explanation for an extension.[331] Texas law is unclear, however, concerning the point at which an attorney's lack of diligence in determining deadlines becomes so egregious as to warrant denying an extension.

Courts have recognized a distinction between the attorney, who is aware of the applicable rule and appellate deadline and misinterprets

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325. *See* Riewe v. Estate of Goslin, 632 S.W.2d 223, 224 (Tex. App.—Austin 1982)(granting motion to extend time to file transcript and overruling motion to affirm on certificate because delay reasonably explained by clerk's confusion over documents to be included in transcript); Hudgens v. Texas Casualty Ins. Co., 465 S.W.2d 832, 833 (Tex. Civ. App.— Amarillo 1971, writ ref'd n.r.e.)(district clerk's workload and confusion over due date for transcript was good cause for extension).

326. *See* Nix v. Fraze, 752 S.W.2d 118, 120 (Tex. App.—Dallas 1988, no writ); White v. White, 700 S.W.2d 317, 318 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.). *But see* Sears v. State, 605 S.W.2d 375, 376 (Tex. Civ. App.—Austin 1980)(relying on clerk to forward transcript did not constitute reasonable explanation and denying extension motion), *motion to review under rule 21c denied on other grounds*, 610 S.W.2d 734 (Tex. 1980).

327. *See* Brice v. Brice, 581 S.W.2d 699, 701 (Tex. Civ. App.—Dallas 1979, no writ).

328. *See* Kirkland Corrosion Control, Inc. v. Fisher, 632 S.W.2d 231, 233 (Tex. App.— Austin 1982, no writ)(denying motion to extend time to file brief).

329. *See Brice*, 581 S.W.2d at 701.

330. *See id.* at 701. *But see* Green v. City of Lubbock, 627 S.W.2d 868, 873 (Tex. App.— Amarillo 1981, writ ref'd n.r.e.)(misunderstanding between clerk and counsel was reasonable explanation for late brief).

331. Exposition Apartments Co. v. Barba, 624 S.W.2d 414, 417-18 (Tex. App.—Austin 1981)(granting extension motion and denying dismissal motion).

that rule, and the attorney who simply makes no effort to examine the rules and determine due dates.[332] As one court has observed:

> The phrase 'miscalculation of the due date' is not the talisman by which all extensions of time will be automatically granted, but rather is only the threshold fact after which the circumstances leading to the miscalculation will be closely scrutinized . . . . We believe that an attorney who intends to appeal a case is responsible for becoming familiar with the rules of appellate procedure and must determine the due dates of the various papers that are to be filed with our Court. Failure to do this will not provide a reasonable explanation.[333]

In other words, the total failure to read the applicable, easily available rules setting out the steps needed to perfect an appeal or present a sufficient record to show reversible error does not qualify as "inadvertence, mistake or mischance."[334] That type of conduct is more properly characterized as conscious indifference.[335]

There is no question that granting extensions based on counsel's miscalculations of and confusion over deadlines seemingly represents judicial toleration of malpractice. Or, at least, it shows a judicial hesitancy to punish clients with negligent counsel.[336]

One line of authority, however, has expressly rejected professional negligence as justifying an extension.[337] These courts have concluded

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332. *See* Home Ins. Co. v. Espinoza, 644 S.W.2d 44, 45 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.)(refusing to grant extension of time to file cost bond); Joslin v. Joslin, 636 S.W.2d 519, 520 (Tex. Civ. App.—Corpus Christi 1982, no writ)(denying motion for extension of time to file statement of facts).

333. *Joslin*, 636 S.W.2d at 636 (denying motion for extension of time to file statement of facts); *see also Home Ins., Co.*, 644 S.W.2d at 45-46 (refusing to grant extension of time when attorney's affidavit consisted of global allegation of mistake about filing time for bond).

334. Furr v. Furr, 721 S.W.2d 565, 567 (Tex. App.—Amarillo 1986, no writ)(overruling motion to extend deadline for filing pauper's affidavit).

335. *See id*; *see also Joslin*, 636 S.W.2d at 520 (denying motion for extension of time when attorney apparently never looked at straightforward language of rule governing due date for record requests).

336. *See* Scheffer v. Chron, 560 S.W.2d 419, 420 (Tex. Civ. App.—Beaumont 1977, writ ref'd n.r.e.)(negligence, inadvertence or mistake of counsel is imputed to client).

337. *See, e.g.*, *Furr*, 721 S.W.2d at 567 (overruling extension motion based on attorney's lack of familiarity with appellate rules in indigent appeals); Sonfield v. Sonfield, 709 S.W.2d 326, 327-28 (Tex. App.—Houston [1st Dist.] 1986, no writ)(extension denied when attorney confused about record and bond deadlines in accelerated appeals); Home Ins. Co. v. Espinoza, 644 S.W.2d 44, 45-46 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.)(refusing to grant extension of time to file cost bond); *Joslin*, 636 S.W.2d at 520 (denying motion for extension of time to file statement of facts based on counsel's mistaken impression about due date); *In re* Interest of F.F., 636 S.W.2d 444, 446-47 (Tex. App.—San Antonio 1981, no writ)(rejecting

that "reasonable explanation" under *Meshwert* means:

> The minimum conduct may be something less than diligence, but it must be greater than negligence and indifference. An error resulting from indifference, negligence or disregard is not based on a plausible explanation, and therefore cannot be considered to be reasonable.[338]

They further reason that negligence cannot excuse a missed deadline because the appellate rules would be "absurd and meaningless if any explanation would suffice."[339]

In contrast, another line of authority has concluded that counsel's negligence may well represent a reasonable explanation for the necessity of an extension.[340] The courts adopting this more liberal view of the reasonable explanation test emphasize that the focus under *Meshwert* is "on a lack of deliberate or intentional failure to comply."[341] Accordingly, they conclude that any conduct short of deliberate or intentional noncompliance qualifies as inadvertence, mistake or mischance—even if that conduct can also be characterized as professional negligence.[342]

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extension motion asserting attorney had misconception about deadlines due to revisions in appellate rules).

338. Southern Pac. Transp. Co. v. Yendrey, 605 S.W.2d 676, 678 (Tex. Civ. App.—Corpus Christi 1980, no writ); *accord Joslin*, 636 S.W.2d at 520 (denying motion for extension of time to file statement of facts).

339. *Yendrey*, 605 S.W.2d at 677; *accord* Splawn v. Zavala, 652 S.W.2d 578, 579 (Tex. App.—Austin 1983, no writ).

340. *See, e.g.*, Heritage Life Ins. Co. v. Heritage Group Holding Corp., 751 S.W.2d 229, 231-32 (Tex. App.—Dallas 1988, no writ)(attorney miscalculated due date by relying on repealed rule); Exposition Apartments Co. v. Barba, 624 S.W.2d 414, 417-18 (Tex. App.—Austin 1981)(overruling motion to dismiss or affirm and granting "motion to consider the transcript as filed" when counsel miscalculated transcript due date); Scheffer v. Chron, 560 S.W.2d 419, 420 (Tex. Civ. App.—Beaumont 1977, writ ref'd n.r.e.)(court expressed serious doubts about excuse claiming mathematical error on date to file new trial motion, nevertheless, court overruled appellee's motion to dismiss appeal); United States Fire Ins. Co. v. Strickland, 547 S.W.2d 338, 339-40 (Tex. Civ. App.—Dallas 1977)(motion to permit late filing of transcript granted when attorney miscalculated date upon which motion for new trial was overruled). Cases from the two lines of authority are often not reconcilable. In *Heritage Life*, 750 S.W.2d at 232, the court granted an extension motion based on deadline miscalculation and acknowledged its holding was directly opposite to a ruling on virtually the same facts in *Home Ins. Co. v. Espinoza*, 644 S.W.2d 44, 45 (Tex. App.—Corpus Christi 1982, no writ)(refusing to grant extension of time to file cost bond). The *Heritage* court criticized the *Espinoza* court as following a "reasonable diligence" standard instead of the *Meshwert* test of inadvertance, mistake or mischance. *See Heritage Life*, 751 S.W.2d at 232.

341. *See Heritage Life*, 751 S.W.2d at 232.

342. *See id.* at 232; *see also* Jackson v. Crawford, 715 S.W.2d 130, 132 (Tex. App.—Dallas 1986)(extending deadline for statement of facts because "diligence" not standard under

The courts adopting the liberal view of the reasonable explanation test are right because the *Meshwert* standard encompasses negligence. In *Meshwert*, the Texas Supreme Court explicitly held that extensions should be granted when the delay is attributable to mistake or inadvertence. An attorney who, after reading the appellate rules, miscalculates a deadline acts negligently, but he also acts mistakenly and inadvertently;[343] therefore, he and his client are saved by *Meshwert*. On the other hand, if counsel never looks at the rules to determine if and when a motion for rehearing should be filed, he has acted deliberately and his extension request should be denied.[344]

There are two fundamental problems with restrictive view of the reasonable explanation which describes the standard as "the minimum conduct may be something less than diligence, but it must be greater than negligence and indifference."[345] First, that viewpoint ignores the fact that an inadvertent act can also be a negligent act. Second, it erroneously implies that "negligence" means something other than lack of diligence.[346]

Furthermore, the supreme court in *Meshwert* recognized that the reasonable explanation test closely resembles one element of the test applied by Texas courts to set aside a default judgment.[347] If the

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Meshwert); Zimmerman v. Boyce, 660 S.W.2d 837, 841-42 (Tex. App.—El Paso 1983)("inadvertence" under *Meshwert* test by definition encompasses negligence).

343. Significantly, *Meshwert* is a deadline miscalculation case in which the supreme court rejected a diligence standard. *See* Meshwert v. Meshwert, 543 S.W.2d 877, 878 (Tex. App.—Beaumont 1976), *aff'd*, 549 S.W.2d 383 (Tex. 1977).

344. Banales v. Jackson, 610 S.W.2d 732, 734 (Tex. 1980).

345. *See* Southern Pac. Transp. Co. v. Yendrey, 605 S.W.2d 676, 678 (Tex. Civ. App.—Corpus Christi 1983, no writ).

346. *See* Moore v. Davis, 644 S.W.2d 40, 42 n.2 (Tex. Civ. App.—Dallas 1982)(granting motion to extend deadline for filing statement of facts).

347. *Meshwert*, 549 S.W.2d at 384 (adopting reasoning of courts which had viewed reasonable explanation test as same in principle as test used to overturn defaults); *see also* Heritage Life Ins. Co. v. Heritage Group Holding Corp., 751 S.W.2d 229, 232 (Tex. App.—Dallas 1988, no writ)(default judgment law similar to appellate extension motion law); Westergard, *Motions for Extension of Time Under Rule 21c*, 33 BAYLOR L. REV. 581, 599 (1981)(discussing applicability of default judgment precedent to extension motion litigation). In the landmark Texas case on vacating defaults, the court in *Craddock v. Sunshine Bus Lines, Inc.*, 134 Tex. 388, 133 S.W.2d 124, 126 (Tex. 1939), held:

> A default judgment should be set aside and a new trial ordered in any case *in which the failure of the defendant to answer before judgment was not intentional, or the result of conscious indifference on his part, but was due to a mistake or an accident*; provided the motion for a new trial sets up a meritorious defense and is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to the plaintiff. (*emphasis added*)

party seeking to vacate the default judgment negligently failed to answer the lawsuit, a court nonetheless may set aside the default so long as that party neither acted deliberately nor with conscious indifference.[348]

In sum, when faced with an extension motion alleging that an attorney miscalculated or was confused about deadlines, the court should grant the extension so long as the proof shows that noncompliance was not intentional nor the result of conscious indifference. No public policy interest is promoted if a litigant's constitutional right of access to an appellate court can be irretrievably lost by the ordinary negligence of his counsel.[349]

Whether counsel's appeal is in a jurisdiction adopting a strict or liberal view of the reasonable explanation test, extension motions conceding deadline miscalculations are probably more closely scrutinized by courts of appeals than any other. Consequently, the motion must contain substantially more factual detail than merely conclusorily alleging a "miscalculation of the due date." The sworn motion should describe counsel's efforts to determine appellate deadlines and the reason for the miscalculation. For instance, consider the situation where the date of judgment was entered incorrectly in the attorney's file, resulting in an untimely bond. In that case, the motion should set out who was responsible for the file entry; why the information was recorded incorrectly, such as transposition of numbers or inter-office miscommunication; any efforts to double-check the judgment date; counsel's reading of rule 41(a); and, the calculation of deadlines based on the incorrect date. If someone other than appellate counsel entered the date incorrectly, or was the recipient of erroneous information, it would be advisable to obtain an affidavit from that person as well. Finally, it might be helpful to provide proof of inter-office verification procedures designed to prevent miscalculation errors and to ensure that deadlines usually are accurately computed.

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348. *See* Dallas Heating Co. v. Pardee, 561 S.W.2d 16, 19 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.)(negligence is not test by which defaulting party's actions are measured); Farley v. Clark Equip. Co., 484 S.W.2d 142, 146 (Tex. Civ. App.—Amarillo 1972, writ ref'd n.r.e.)("[i]t has been clearly established that negligence is not the test" for appellate review of order refusing to set aside default judgment).

349. As the Texas Supreme Court recently observed: "[w]e have long recognized that the right of access to an appellate tribunal is a valuable one, constitutionally protected against arbitrary or unreasonable abrogation." Doctors Hosp. Facilities v. Fifth Court of Appeals, 750 S.W.2d 177, 179 (Tex. 1988).

4. Workload of Appellate Counsel

An extension motion cannot be used as a motion for continuance.[350] For that reason, courts (at least in reported decisions) have uniformly rejected the appellate attorney's workload[351] or preoccupation with other business[352] as a reasonable explanation for an extension.[353] The San Antonio Court of Appeals, in fact, has a local rule specifying that the court will not consider the "heavy workload of an attorney" as an acceptable explanation for failure to file a brief on time.[354]

In reality, appellate courts routinely grant motions to extend the time to file a brief based on sworn allegations of the heavy workload of appellate counsel. Some courts hesitate to permit more than a

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350. Wolters v. Wright, 623 S.W.2d 301, 303 (Tex. 1981).

351. *See, e.g.*, Bragg v. City of Dallas, 608 S.W.2d 696, 696-97 (Tex. Civ. App.—Dallas 1980)(counsel had just returned from vacation and alleged demand of other matters upon his time made timely completion of motion for rehearing impossible); Montgomery Ward & Co. v. Dalton, 602 S.W.2d 130, 131 (Tex. Civ. App.—El Paso 1980, no writ)("fact that counsel is busy, and perhaps overworked is not 'good cause'," but granting extension anyway); Dawson v. First Continental Real Estate Inv., 590 S.W.2d 560, 563 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ)(timely completion of motion for rehearing prevented by jury trial and other legal business); Brice v. Brice, 581 S.W.2d 699, 701 (Tex. Civ. App.—Dallas 1974, no writ)(counsel preoccupied with other litigation so filed record late); *see also* Garza v. State, 503 S.W.2d 415, 416 (Tex. Civ. App.—Corpus Christi 1973, no writ)(busy preparing murder trial not good cause); J.D. Lee v. J.D. Owen, 404 S.W.2d 84, 85 (Tex. Civ. App.—San Antonio 1966, no writ)(counsel was county attorney and busy doing county work as well as own law practice); Ransom v. Phillips Petroleum Co., 144 S.W.2d 921, 922 (Tex. Civ. App.—Amarillo, writ dism'd judgmt cor.)(one counsel busy with several trials while other involved in race for county judge).

352. *See* Brice v. Brice, 581 S.W.2d 699, 701 (Tex. Civ. App.—Dallas, writ dismissed)(counsel busy with sale of business, Christmas holidays and other affairs), *cert denied*, 444 U.S. 901 (1979); Breitkreutz v. Century Western, 380 S.W.2d 183, 184 (Tex. Civ. App.—Tyler 1964, writ ref'd)(counsel engaged in political campaign not good cause).

353. The reasoning underlying these decisions was stated in *Camp v. Neal*, 2 S.W.2d 473 (Tex. Civ. App.—Amarillo 1928, no writ):

> The general rule is that other professional engagements of counsel are not sufficient excuse for the failure of appellant's attorney to properly brief his case. If he finds that he will not be able, because of other professional business, to prepare and file his brief, it is the duty of his client to employ other counsel to do so.

Id. at 473.

354. TEX. APP.—SAN ANTONIO LOCAL R. 3(c)(1). That local rule is enforced. *See* Fox v. San Antonio Savings Ass'n, 751 S.W.2d 257, 257 (Tex. App.—San Antonio 1988, no writ)(affirming judgment and denying appellant's extension motion based on local rule). The El Paso court has acknowledged that it has granted uncontested extension motions for briefs based on workload even though that excuse did not qualify as good cause. *See* Montgomery Ward & Co. v. Dalton, 602 S.W.2d 130, 131 (Tex. Civ. App.—El Paso 1980)(conditionally denying motion to dismiss).

thirty to forty-five day extension of the deadline for filing a brief unless the case presents complex factual and legal issues or involves a mammoth appellate record.[355]

Despite case law and local practices condemning filing extension motions based on workload, filing a brief on time is sometimes impossible because of an unforeseeable increase in an attorney's trial or appellate docket. In those cases, if counsel is solely responsible for preparation of the brief, heavy workload should represent a reasonable explanation.

To avoid the risk that an appellate court will rely on law prohibiting extension motions based on workload, the motion should not be framed in terms of the routine day-to-day burden of practicing law. Instead, the motion should stress "unexpected legal work" which "unforeseeably prevented counsel from the preparation of the brief." If counsel, during the time allotted for preparation of the brief, is unexpectedly called to trial or suddenly required to file a mandamus proceeding in the appellate court, that type of circumstance should qualify as a reasonable explanation.[356] In addition, the motion should emphasize the unavailability or impracticality of any other attorney preparing the brief, particularly, if counsel is a member of a large firm.[357]

When relying on workload as the basis for an extension request, the sworn motion should include, whenever possible, the following information: (1) specific details on the other work preventing timely completion of the brief, identifying that work by case styles and numbers; (2) the nature of the other work, i.e., a factually complex products liability suit with several legal issues of first impression; (3) the unexpected and unforeseeable nature of the involvement in the other work,

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355. *See* TEX. APP.—TYLER LOCAL R. III (B)(3) (no extensions of time to file a brief for more than 45 days will be granted).

356. As discussed earlier, extension motions are granted based on delays attributable to the court reporter. *See* text and accompanying notes 304 - 320, *supra*. While that circumstance does not technically qualify as mistake, inadvertence or mischance under *Meshwert*, the extension is granted because the cause for the delay is not within the movant's control. Zimmerman v. Boyce, 660 S.W.2d 837, 840 (Tex. App.—El Paso 1983)(granting motion to extend filing due date for cost bond). An unforeseeable, overwhelming increase in workload is often completely out of counsel's control.

357. *See* Camp v. Neal, 2 S.W.2d 473, 473 (Tex. Civ. App.—Amarillo 1928, no writ)(extension motion denied because although appellate counsel was prevented from filing brief due to professional engagements, no reason shown why another attorney could not have filed brief).

i.e., a mandamus proceeding requiring immediate resolution due to an impending trial setting; (4) a general estimate of the amount of time required to complete the other work; (5) the fact that counsel is solely or primarily responsible for the preparation of the brief; and (6) that as a result of the unexpected, unforeseeable work, it was not possible to complete the brief on time.

With respect to perfecting the appeal or filing the record, it is difficult to see how an attorney's workload could ever reasonably explain a late cost bond, transcript, statement of facts, or record request, or at least justify a lengthy delay. Perfecting an appeal is a relatively routine matter for any non-indigent party, as well as being a procedure for which appellate rules provide a lengthy time period. Likewise, counsel has little control over the preparation of the transcript and the statement of facts, and the filing of the record represents a ministerial task; therefore, counsel's workload normally should be immaterial to the timely filing of the record.[358]

5. Inter-Office Administrative Errors

This category of "reasonable explanation" may well evoke a cynical judicial response and the suspicion that counsel is using a secretary or word processor as a scapegoat for his own dilatory behavior or malpractice.[359] It is essential that an extension motion of this nature be supported by factually detailed proof. For example, a conclusory claim that a lost file prevented timely perfection of an appeal should not warrant an extension. If that claim is supported by evidence describing the firm's filing procedures, efforts to locate the file and the date the file was located, an extension is justified.

Assuming the extension motion is sufficiently supported by proof, even if the clerical error causing the untimely filing is due to the negligence of appellate counsel or his staff, that type of explanation satisfies

358. Bean v. City of Arlington, 464 S.W.2d 208, 210 (Tex. Civ. App.—Fort Worth 1971)(extension motion based on attorney's illness overruled when no showing why another member of his firm could not have performed mundane task of timely requesting record).

359. *See* Castillo v. Sears Roebuck & Co., 663 S.W.2d 60, 62 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.)(reluctantly granting extension motion and describing counsel's explanation that brief was late because his office failed to record deadline on calendar as "tenuous"); Awad Tex. Enter., Inc. v. Homart Dev. Co., 589 S.W.2d 817, 819 (Tex. Civ. App—Dallas 1979, no writ)(disapproving counsel's use of "secretarial error" as excuse for late brief but granting extension because appellants not harmed by delay).

Meshwert's "inadvertence, mistake and mischance" test.[360] Only if the error was deliberate or resulted from conscious indifference should the extension be denied.[361]

Usually, an excuse alleging a clerical error will not support a lengthy extension. Allegations that the secretary temporarily misplaced the file[362] or the dictated draft of a brief, the client forgot to sign the cost bond as principal or the attorney filed the record[363] or bond[364] in the wrong court represent reasonable explanations which justify filing delays of several days, but will generally not warrant an extended delay.

Motions for extensions based on the fact that an item was timely placed in the mail for filing, yet was never received by the court or court reporter or were received late, raise reasonable explanations. This category of excuse has been upheld when the record was received late[365] and the request for preparation of the record was lost.[366] In order to rely on the "lost or delayed in the mails" excuse, the motion should be accompanied by (1) a Certificate of Mailing by the United States Postal Service or a legible postmark affixed by the Postal Service, and (2) an affidavit that the item was sent to the proper clerk by First-Class United States Mail in envelope or wrapper properly addressed and stamped and deposited in the mail one day or more

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360. *See* text and accompanying notes 340 - 349, *supra*.

361. *See* Banales v. Jackson, 610 S.W.2d 732, 734 (Tex. 1980)(affirming denial of motion for late filing of motion for rehearing when movant's only explanation was that he did not know rehearing motion was necessary); General Motors Corp. v. Ramsey, 633 S.W.2d 646, 648 (Tex. App.—Waco 1982, writ dism'd)(meager efforts of counsel to discover disposition of supposed order sent to trial judge did not constitute reasonable explanation for failure to timely file transcript).

362. *See* Gallegos v. Truck Ins. Exchange, 539 S.W.2d 353, 353 (Tex. Civ. App.—San Antonio 1976)(granting extension of time to file record); Hopper v. Hopper, 264 S.W.2d 444, 444 (Tex. Civ. App.—Dallas 1954, no writ)(overruling motion to dismiss appeal and strike transcript because good cause shown for extension).

363. *See* Gibraltar Sav. Ass'n v. Hamilton Airmart, Inc., 662 S.W.2d 632, 634 (Tex. App.—Dallas 1983)(motion to dismiss denied and motion to extend deadline of statement of facts granted).

364. *See* Omoray Davis Trucking Co. v. Lewis, 635 S.W.2d 622, 624 (Tex. App.—Houston [14th Dist.] 1982, writ dism'd).

365. *See* Duncan v. Duncan, 372 S.W.2d 564, 565-66 (Tex. Civ. App.—Eastland 1963)(setting aside affirmance on certificate and granting motion to extend time to file transcript based on "good cause" test).

366. *See* Olddaker v. Lock Constr. Co., 528 S.W.2d 71, 74 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.).

before the last day for filing.[367]

6. Illness of Counsel

The Texas Supreme Court has recognized that the reasonable explanation test is satisfied by proof that counsel's illness prevented compliance with an appellate deadline.[368] Illness does not, however, create an automatic right to a lengthy extension. A bare bones allegation that counsel is sick is inadequate to justify any extension at all.[369] Sworn proof should provide specific details on the illness of an attorney, the probable duration of the illness and how the illness prevented compliance with the filing deadline.[370] If the extension request involves an appellate brief and a lengthy extension is necessary, the motion should discuss the impossibility or impracticability of having another attorney handle briefing responsibilities.[371] Illness represents a more plausible explanation for a late brief than an untimely bond or record, which requires less attorney involvement.[372]

7. Settlement Negotiations

Reliance on settlement negotiations as the reasonable explanation for a failure to comply with a due date is risky unless it is certain that opposing counsel will not contest the motion. If counsel claims that an extension is necessary because he was under the impression the case would settle, yet lacks documentation to back up that impres-

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367. *See* TEX. R. APP. P. 4(b). *See generally* text and accompanying notes 27 - 38, *supra*.

368. *See* Anderson v. Coleman, 626 S.W.2d 301, 301-02 (Tex. 1981)(plaintiff's counsel suffered heart attack and was hospitalized at time motion for rehearing should have been filed).

369. *See* Bean v. City of Arlington, 464 S.W.2d 208, 210 (Tex. Civ. App.—Fort Worth 1971).

370. *See id.* at 210-11 (overruling extension motion which failed to detail date counsel became ill, nature of illness and date of recovery). For cases granting extensions based on attorney illness, see *Zimmerman v. Boyce*, 660 S.W.2d 837, 840 (Tex. App.—El Paso 1983)(granting motion to extend filing due date for cost bond when counsel suffered from after-effects of surgery including fatigue and depression); *American Nat'l Bank v. Petry*, 141 S.W. 1040, 1041 (Tex. Civ. App.—Austin 1911, no writ)(attorney under physician's constant care for two months and appellate brief was his first project upon returning to work).

371. *See Bean*, 464 S.W.2d at 210 (motion overruled which failed to show why someone else in the ill attorney's firm could not have requested record).

372. *See* Watson v. Sellers, 477 S.W.2d 678, 681-82 (Tex. Civ. App.—Houston [14th Dist.] 1978, no writ)(denying extension motion when counsel could have picked up completed statement of facts before due date but did not; he then became ill, and court held he assumed risk that facts would develop to prevent timely filing); *Bean*, 464 S.W.2d at 210 (although appellant's attorney ill, extension denied when motion failed to show why other member of firm could not have requested record by mail, messenger or telegram).

sion, there is a strong possibility that the extension will be denied if opposing counsel aggressively contests the motion.[373]

If it appears likely that a case will be settled on appeal and counsel would like to avoid needlessly expending additional time and expense, the more prudent approach is to have opposing counsel agree to: (1) not file a contest to the extension motion; (2) inform the appellate court in writing that he has no objection to the extension; or (3) execute an agreed motion.[374] If opposing counsel will not agree to one of those three options, the item in question should be filed, regardless of the likelihood of settlement.

Settlement negotiations should represent a better reason for an untimely brief than a late bond or record. Deciding to delay a brief because of the probability of settlement is acceptable since a compromise of the appeal would obviate expending extensive amounts of time and effort in researching and writing. On the other hand, if the record or bond is ready for filing, there is little justification for declining to take the relatively ministerial step of filing simply because of ongoing settlement talks. Even if the case settles after the filing of the record or bond, little expense has been incurred.[375] Of course, a delay in requesting the preparation of the statement of facts due to settlement talks makes sense because a compromise would avoid the expense of preparing the record.

8. Hiring New Counsel on Appeal or Discharging Trial Counsel

Changing counsel after trial or hiring new or additional counsel on appeal does not automatically entitle a party to an extension. As the court stated in *McRae Oil Corporation v. Guy*,[376]

The basic duty to exercise diligence in the timely procurement of a rec-

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373. *See* Splawn v. Zavala, 652 S.W.2d 578, 579 (Tex. App.—Austin 1983, no writ)(motion for extension denied when no facts proved to support conclusory allegation of delay caused by settlement talks); Pena v. Petroleum Casualty Co. 441 S.W.2d 657, 658 (Tex. Civ. App.—Beaumont 1969, no writ)(appeal dismissed for failure to file brief, appellee denied having led appellant to believe case would be settled); Hooe v. Texas Fire & Casualty Underwriters, 151 S.W.2d 310, 311 (Tex. Civ. App.—Waco 1941, no writ)(refusing to file transcript because appellee's counsel denied existence of serious settlement discussions).

374. *See* Moore v. Davis, 644 S.W.2d 40, 43 (Tex. App.—Dallas 1982)(granting motion to extend filing deadline for statement of facts since appellee did not contest appellant's allegation that delay was due to settlement negotiations).

375. *See Splawn*, 652 S.W.2d at 579 (dismissing appeal because no evidence showing how settlement talks precluded filing bond on time).

376. 495 S.W.2d 31 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.).

> ord for appeal rests on the litigants themselves. If they wish to select a new attorney during the process of perfecting appeal, they have, absent some special circumstances, the duty of selecting one who is in position to timely perfect the appeal. An attorney who is not in a position to timely perfect the appeal may not properly accept employment to do so .... Appellants did not discharge their duty of diligence by selecting at some time during the process of perfecting appeal a new lawyer who would require such a length of time in studying the case that the appeal would necessarily be delayed. Having selected a lawyer to represent them, the defendants should have assumed that an appeal might result and they may not delay that appeal by a belated selection of another lawyer.[377]

If recently retained counsel had ample time in which to evaluate the file and comply with appellate deadlines, the extension motion is probably unsound.[378] The proof in support of the motion must establish that retaining new counsel caused the late filing.[379] For example, when counsel for appellants filed an appearance nineteen days before the cost bond was due, a court of appeals denied an extension stating, "[i]t is not reasonable to conclude that it would take that period of time to file the cost bond, especially in view of the fact that appellants' attorney acted as surety on the bond."[380]

9. Miscellaneous Explanations

Indecision about whether to pursue an appeal is not a reasonable

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377. *Id.* at 33. McRae was decided under the "good cause" standard and probably represents a more hard line approach than most present courts would adopt. The opinion nevertheless illustrates the risk of hiring new counsel late in the appellate process.

378. *See, e.g., Splawn*, 652 S.W.2d at 579 (extension denied when new counsel had sufficient time to timely file bond after entering appearance); Taft v. Wolma, 541 S.W.2d 673, 673 (Tex. Civ. App.—San Antonio 1976)(denying motion to extend due date for statement of facts and holding insufficient conclusory assertion that counsel's delay in requesting record was due to being recently retained); Sommer v. Richardson, 420 S.W.2d 742, 743-44 (Tex. Civ. App.—Eastland 1967, no writ)(despite fact appellate counsel "just retained," extension denied when no showing trial counsel could not have taken steps to ensure record timely filed).

379. *See, e.g.*, Daniels v. Texas Alcoholic Beverage Comm'n, 528 S.W.2d 119, 120 (Tex. Civ. App.—Corpus Christi 1975, no writ)(dismissing appeal when no proof of date when new counsel on appeal hired); Jones v. El Charro Drilling Co., 405 S.W.2d 229, 230 (Tex. Civ. App.—Eastland 1966, no writ)(after having granted two extensions for time to file brief based on appellant's difficulty in securing counsel, court dismissed appeal finding no good cause for continued failure to file brief); Hopper v. Hopper, 264 S.W.2d 444, 444 (Tex. Civ. App.—Dallas 1954, no writ)(granting extension for filing record when trial counsel withdrew, appellate counsel recently retained, and portions of file lost).

380. *Splawn*, 652 S.W.2d at 579.

explanation.[381] The appellate rules provide ample time in which to evaluate the advisability of an appeal; therefore, the attorney's or client's indecisiveness cannot qualify as mistake, mischance or inadvertence.[382]

On the other hand, financial problems affecting the appellant's ability to pursue an appeal may reasonably explain the need for an extension. The inability of an appellant to locate a surety willing to provide a bond after a pauper's affidavit has been successfully contested, reasonably explains a late cost bond.[383] Similarly, if the statement of facts is late because appellant delayed requesting its preparation until he had the funds to pay for it[384] or because the court reporter improperly demanded a deposit before beginning work,[385] then the court should grant an extension. On the other hand, broad claims by a litigant concerning his financial problems[386] and filing delays caused by counsel waiting for advance payment for the record from his client,[387]

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381. Shriver v. McLennan County Children's Protective Services, 610 S.W.2d 229, 230 (Tex. Civ. App.—Waco 1980, no writ)(indecision about whether to appeal is not reasonable explanation for late transcript); *see also* Wilson v. McCracken, 713 S.W.2d 394, 396 (Tex. App.—Houston [14th Dist.] 1986, no writ)(fact that appellant saw different attorney after deadline for statement of facts who gave him different advice on merits of appeal did not reasonably explain missing deadline).

382. *See, e.g., Shriver*, 610 S.W.2d at 230; Jahart v. Ogden, 424 S.W.2d 457, 457-58 (Tex. Civ. App.—Austin 1968, no writ)(fact that appellant did not decide to appeal case until long after motion for new trial overruled not good cause for late record); Dillerman v. Trager, 327 S.W.2d 667, 668 (Tex. Civ. App.—San Antonio 1959, writ dism'd)(extension refused when counsel unable to make up mind on whether to appeal and once he did decide, clerk was on vacation).

383. Lopez v. Foremost Paving, Inc., 671 S.W.2d 614, 619 (Tex. App.—San Antonio 1984)(diligence in attempting to locate surety for bond and misfortune in not being able to do so satisfies *Meshwert* test).

384. *See* DeLeon v. Saldana, 720 S.W.2d 173, 173-74 (Tex. App.—San Antonio 1986)(divided court grants appellant's motion to extend time to file statement of facts). Chief Justice Cadena dissented on the grounds that the cost bond on file secured payment of the reporter's fees so there was no reason to delay requesting a statement of facts. *See id.* at 174 (Cadena, C. J., dissenting).

385. *See, e.g.*, Jackson v. Crawford, 715 S.W.2d 130, 131-32 (Tex. App.—Dallas 1986)(motion to extend deadline for filing statement of facts granted); Alexander v. Bowers, 581 S.W.2d 714, 716 (Tex. Civ. App.—Dallas 1979)(granting motion to extend time to file record); Caples v. Goodwin, 578 S.W.2d 529, 529 (Tex. Civ. App.—Houston [14th Dist.] 1979)(granting motion to extend time to file statement of facts).

386. *See* Sonfield v. Sonfield, 709 S.W.2d 326, 328 (Tex. App.—Houston [1st Dist.] 1986, no writ).

387. *See* Shriver v. McLennan County Children's Protective Services, 610 S.W.2d 229, 230 (Tex. Civ. App.—Waco 1980, no writ)(although attorneys received transcript one month before due date, they waited for client to advance costs and missed deadline). *But see* Manges

have been held insufficient.

V. REVIEW OF RULINGS ON EXTENSION MOTIONS

With one exception, which will be discussed below, interlocutory appeal of a court of appeals ruling on an extension motion is unavailable. In addition, a writ of mandamus is not available in the Texas Supreme Court to compel the court of appeals to grant an extension of time.[388] Mandamus relief is available only to compel a court to fulfill a mandatory duty or perform a ministerial task, and the granting or denying of an extension of time is discretionary with the court of appeals.[389]

If the court of appeals overrules a motion to extend a filing deadline, the movant's remedy is to file an application for writ of error in the supreme court after the court of appeals dismisses the appeal or affirms the trial court's judgment.[390] A motion for rehearing is a jurisdictional prerequisite to supreme court review; therefore, the movant's motion for rehearing in the court of appeals must specifically complain about the court's extension ruling.[391] Once the motion for rehearing is overruled, the appellant files an application for writ of error complaining about the extension ruling.[392]

If an extension was granted by the court of appeals over the non-movant's objection, the non-movant must wait until the final judgment is rendered by the court of appeals.[393] At that point, the non-

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v. First State Bank & Trust Co., 572 S.W.2d 104, 107 (Tex. Civ. App.—Corpus Christi 1978, no writ)(granting motion based partially on counsel's delay in filing transcript until client paid for it).

388. Pat Walker & Co. v. Johnson, 623 S.W.2d 306, 309 (Tex. 1981).

389. *Id.* Furthermore, a party whose extension motion has been denied has an adequate remedy at law, the unavailability of which is a prerequisite to mandamus relief. *See id.* The movant's legal remedy is to seek review of the extension ruling by filing an application with the supreme court. *Id.*

390. *See, e.g.*, 6 W. DORSANEO, TEXAS LITIGATION GUIDE § 143.08 (1988); 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 652 (Tex. Practice 1985); Westergard, *Motions for Extension of Time Under Rule 21c*, 33 BAYLOR L. REV. 581, 595 (1981).

391. *See* Westergard, *Motions for Extension of Time Under Rule 21c*, 33 BAYLOR L. REV. 581, 595 (1981).

392. *See id.* at 595. *Compare* Thornton v. Fenelon Funeral Home, 646 S.W.2d 934, 935 (Tex. 1983)(reviewing the merits of order denying motion to extend deadline for statement of facts raised on application for writ of error) *with* Sears v. State, 610 S.W.2d 734, 735 (Tex. 1980)(refusing to review attempted interlocutory appeal of order denying extension of time to file transcript).

393. *See* Westergard, *Motions for Extension of Time Under Rule 21c*, 33 BAYLOR L. REV. 581, 595 (1981).

movant files a motion for rehearing in the court of appeals with a point of error challenging the court's ruling on the extension motion as error.[394] If that motion for rehearing is overruled, the non-movant perfects an appeal by filing an application for writ of error to the supreme court.[395]

In one isolated instance, however, interlocutory review by the supreme court is allowed. In *Banales v. Jackson*,[396] the supreme court held that an interlocutory appeal from the denial of a motion to extend the time for filing a motion for rehearing in the court of appeals is permissible.[397] The court reasoned that when the court of appeals denies a motion for extension to file a rehearing motion, an application for writ of error is not a viable avenue of appellate review because a rehearing motion is a prerequisite to supreme court review.[398] The *Banales* court emphasized that interlocutory review is available "only in the instance of a denial of the requested extension of time to file a motion for rehearing."[399]

The standard of review in the supreme court is whether the intermediate appellate court abused its discretion in granting or denying the extension motion.[400] The court decides "whether the movant presented a reasonable explanation for inability to file the document on time, given all the facts and circumstances present."[401]

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394. *See id.*

395. *See id.* at 595-96.

396. 610 S.W.2d 732 (Tex. 1980).

397. *Id.* at 733. Oral argument on a *Banales* appeal is not permitted as the supreme court decides the cause on the record alone. Anderson v. Coleman, 626 S.W.2d 301, 301-02 (Tex. 1981).

398. *See Banales*, 610 S.W.2d at 733.

399. *Id.*; *see* Sears v. State, 610 S.W.2d 734, 735 (Tex. 1980)(refusing to extend *Banales* to denial of extension of time to file transcript).

400. Pat Walker & Co. v. Johnson, 623 S.W.2d 306, 309-10 (Tex. 1981); *see Banales*, 610 S.W.2d at 734 (court of appeals did not abuse discretion or act arbitrarily denying extension of time). *See generally* Reyna v. Reyna, 738 S.W.2d 772, 774-75 (Tex. App.—Austin 1987, no writ)(discussing abuse of discretion standard of review).

401. Thornton v. Fenelon Funeral Home, 646 S.W.2d 934, 935 (Tex. 1983); *see also Banales*, 610 S.W.2d at 733 (discussing matters to be included in record in interlocutory appeal of denial of extension of time to file motion for rehearing).