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A PRACTITIONER'S REVIEW OF CIVIL APPEALS UNDER THE 1997 TEXAS RULES OF APPELLATE PROCEDURE

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Articles about new procedural rules often compare and contrast new rules with old rules on a rule-by-rule basis.[1] This approach is useful in reviewing the new Texas Rules of Appellate Procedure, but fails to guide the practitioner through the appellate process. This Review provides such guidance and highlights changes in the civil appellate process created by the new rules. Articles about new procedural rules often provide lists, which include items that must appear in a pleading and the necessary steps to accomplish a specific result.[2] Although this Review contains a number of lists, it also incorporates these lists into form pleadings that are more useful to the practitioner. These forms appear in the Appendix to this Review.

The purpose of this Review is to help the practitioner feel comfortable with the new appellate rules and recognize certain changes in procedure. Thus, the practitioner can concentrate on what should be the appellate lawyer's main task: the efficient, effective, and even eloquent communication of ideas as distinguished from mere technical proficiency. Indeed, the new appellate rules are partly based on the Texas Supreme Court's goal of deciding cases on the merits rather than on procedural technicalities.[3] This Review further attempts to clarify the relatively few circumstances in which ambiguity exists in this largely well-written body of rules.

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1. *See generally* Claude R. Bowels & Jessica B. Allman, *What the Bankruptcy Code Giveth, Congress Taketh Away: The Dischargeability of Domestic Obligations After the Bankruptcy Reform Act of 1994*, 34 U. LOUISVILLE J. FAM. L. 521 (1996) (addressing the Bankruptcy Code on a rule-by-rule review); Katherine Shaw Spaht, *Co-ownership of Former Community Property: A Primer on the New Law*, 56 LA. L. REV. 677 (1996) (analyzing the new rules on a rule-by-rule basis); Jeffrey A. Parness, *The New Federal Rule 11: Different Sanctions, Second Thoughts*, ILL. B.J., Mar. 1995, at 126 (comparing the new and old federal rules).

2. *See generally* Warren F. Grienenberger, *Company Compliance with New Section 16 Rules* (listing the required steps for compliance with Section 16), *in* PREPARATION OF ANNUAL DISCLOSURE DOCUMENTS 1997, at 321 (PLI Corp. Law & Practice Course Handbook Series No. B4-7173, 1997).

3. *Cf.* Gallagher v. Fire Ins. Exch., 950 S.W.2d 370, 371 (Tex. 1997) (per curiam) (asserting that court decisions should be made on substantive grounds rather than on procedural technicalities); Silk v. Terrill, 898 S.W.2d 764, 766 (Tex. 1995) (per curiam) (advocating decisions based on the merits); City of San Antonio v. Rodriguez, 828 S.W.2d 417, 418 (Tex. 1992) (per curiam) (stating that court decisions should be based on the merits of the case).

The arrangement of topics in this Review generally follows the order in which the topics would be encountered in the appellate process:

- trial-court motions and pleadings that preserve claims of error on appeal;
- counsel of record on appeal;
- calculating and complying with appellate deadlines;
- perfecting an appeal;
- suspending enforcement of a judgment or order;
- the appellate record;
- briefing in the appellate courts;
- oral argument and submission; and
- disqualification and recusal of judges.

Additional topics covered at the end of this Review include mandamus actions, procedural defects, settlements during appeal, and appellate sanctions. Further, it is noted—but not discussed elsewhere—that the supreme court instituted new filing fees with the adoption of the new appellate rules.[4] The practitioner should note,

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4. The fees for nonexempt parties were adopted by supreme court order effective September 1, 1997 by order of August 15, 1997 as amended on August 19, 1997. *See* 948 S.W.2d CLXVIII, *amended* by 950 S.W.2d XXXV. The order recites in part as follows:

A. The following fees have been set by statute and will be collected by the clerk except from parties who are exempt by statute:

1. In the Supreme Court.

(a)	petition for review	$75
(b)	additional fee if petition for review is granted	$75
(c)	original proceeding	$75
(d)	additional fee if Court requests additional briefing in an original proceeding	$75
(e)	certified question from a federal court	$125
(f)	direct appeals to the Supreme Court	$125
(g)	any other proceeding filed in the Supreme Court	$100
(h)	administering an oath with sealed certificate of oath	$5
(i)	photocopying	$.50 per page $5 minimum

TEX. GOV'T CODE § 51.005(b)-(c).

2. In the courts of appeals.

(a)	appeals to the court of appeals from the district and county courts	$125
(b)	original proceeding	$75
	additional fee if court requests additional briefing in an original proceeding	$75

however, that this Review focuses solely on the aforementioned topics, rendering a number of issues that arise on appeal beyond the scope of this Review.[5]

Because this Review is written as a guide to practitioners, the focus will be on what the new rules require of appellate counsel. Therefore, this Review does not attempt to explain what the new rules require of clerks, reporters, or judges, nor does it address issues that are not a result of the changes in the Texas Rules of Appellate Procedure.

I. TRIAL COURT PRESERVATION OF APPELLATE COMPLAINTS

A crucial step in the appellate process is to preserve claims of error. Before the case reaches the appellate level, an attorney

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(c) administering an oath with sealed certificate of oath	$5
(d) photocopying for certification or comparing documents for certification	$.50 per page $5 minimum

TEX. GOV'T CODE § 51.207(b)-(c).

Additionally, the following fees are set:

1. In the Supreme Court, the clerk will collect the following fees:

(a) Certifying or comparisons of documents	$.50 per page $5 minimum
(b) Motions for rehearing	$15
(c) Motions not otherwise listed	$10
(d) Responses/replies	$10
(e) Exhibits tendered for oral argument	$25
(f) Document search fee	$10 per hour ($5 minimum)
(g) Audio tape of oral argument	$5 per tape
(h) Video tape of oral argument	$40 per tape

2. In the courts of appeals, the clerk will collect the following fees:

(a) Motions not otherwise listed	$10
(b) Responses/replies	$10
(c) Exhibits tendered for oral argument	$25
(d) Audio tape of oral argument	$5 per tape
(e) Video tape of oral argument	$40 per tape

948 S.W.2d CLXVIII, *amended by* 950 S.W.2d XXXV (Tex. 1997). Because fees are subject to change, the attorney should check with the clerk on filing fees.

5. Not covered in this Review are the following topics: (1) direct appeals to the Texas Supreme Court, as to which the new rules make no substantive change; (2) the effect of bankruptcy on appeals, which is governed by new Rule 8; (3) recording and broadcasting of court proceedings under new Rule 14; (4) the procedure established by Rule 17 for the situations in which a court of appeals cannot take immediate action because it cannot assemble a panel; and (5) original proceedings other than mandamus actions.

must make certain objections, requests, or motions in order to preserve a complaint for appellate review.[6] Failure to do so usually results in a waiver of the point of error.

A. *Motion to Disregard and for Judgment Notwithstanding the Verdict*

Typically, after the jury verdict, the prevailing party moves for judgment on the verdict. Ordinarily, the losing party should file a combined motion to disregard all adverse jury findings and for judgment notwithstanding the verdict ("judgment n.o.v.") as provided by Texas Rule of Civil Procedure 301.[7] Rule 301 specifies no deadline for a motion to disregard or for judgment n.o.v., but it is usually filed before the trial court renders judgment and is heard at the same time as the prevailing party's motion for judgment. The motion can also be filed after the judgment is signed and before it becomes final.[8] One court of appeals has held that a motion to disregard and for judgment n.o.v. must be filed within thirty days after the judgment is signed,[9] and another has stated that the motion must be ruled upon before any motion for new trial has been overruled by signed order or by operation of law.[10] Thus, if the combined motion to disregard and for judgment n.o.v. is not filed

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6. *See* TEX. R. APP. P. 33.1(a).

7. *See* TEX. R. CIV. P. 301 (stating that a court may, upon motion and notice, grant a judgment notwithstanding the verdict "if a directed verdict would have been proper" and may disregard jury findings).

8. *See* City of Garland v. Vasquez, 734 S.W.2d 92, 98 (Tex. App.—Dallas 1987, writ ref'd n.r.e.); Cleaver v. Dresser Indus., 570 S.W.2d 479, 483 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.); Needville Indep. Sch. Dist. v. S.P.J.S.T. Rest Home, 566 S.W.2d 40, 42 (Tex. Civ. App.—Beaumont 1978, no writ).

9. *See* Commonwealth Lloyd's Ins. Co. v. Thomas, 825 S.W.2d 135, 141 (Tex. App.—Dallas 1992), *judgment vacated by agreement*, 843 S.W.2d 486 (Tex. 1993) (equating motion to disregard and for judgment n.o.v. with motion to modify, which must be filed within 30 days after judgment under Texas Rule of Civil Procedure 329b(g)). This decision is questionable. *See* MICHOL O'CONNOR, O'CONNOR'S TEXAS RULES: CIVIL TRIALS 506 (Michol O'Connor & Bryon P. Davis eds., 1998). While citing *Commonwealth Lloyd's v. Thomas*, the same court of appeals has stated that a complaint about a judgment is timely if brought any time within the trial court's plenary power. *See* Keene Corp. v. Gardner, 837 S.W.2d 224, 231 (Tex. App.—Dallas 1992, writ denied).

10. *See* Spiller v. Lyons, 737 S.W.2d 29, 29 (Tex. App.—Houston [14th Dist.] 1987, no writ). This dicta in *Spiller* was questioned by another court of appeals, which noted that *Spiller* relied on authority interpreting an earlier and substantially different version of Texas Rule of Civil Procedure 329b. *See Commonwealth Lloyd's Ins. Co.*, 825 S.W.2d at 141.

before judgment is rendered, the safest procedure is to file a motion to disregard and for judgment n.o.v. within the same thirty days allotted for a motion for new trial and a motion to modify the judgment.[11]

The losing party should consider filing a motion to disregard all adverse jury findings on the ground that each finding is supported by "legally insufficient evidence."[12] When the adverse finding or failure to find is a question on which the losing party had the burden of proof, the party should move to disregard on the ground that the evidence presented conclusively established the fact in question as a matter of law.[13] Further, the losing party should consider moving to disregard each adverse finding on the ground that each adverse finding is "immaterial."[14] The potential appellant should consider all other possible grounds for disregarding adverse jury findings, such as affirmative defenses, statutory grounds, and limitations on damages.

As amended, the appellate rules no longer require a signed order to preserve a claim of error.[15] At the same time, however, a motion to disregard or motion for judgment n.o.v. is not overruled by operation of law in the absence of a signed order, as is a motion for new trial or a motion to modify a judgment.[16] Thus, a ruling on a motion to disregard must appear somewhere in the record.[17] A signed and dated order is still the safest way to preserve a claim that the trial court erred in denying a motion to disregard or a motion for judgment n.o.v. An oral pronouncement appearing in the

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11. *See* TEX. R. CIV. P. 329b(b) & (g) (allowing the filing of a motion for new trial or a motion to modify within 30 days after the judgment is signed).

12. A ruling on a motion to disregard and for judgment n.o.v. is one way to preserve a complaint that a jury finding was supported by legally insufficient evidence. *See* Cecil v. Smith, 804 S.W.2d 509, 510–11 (Tex. 1991).

13. *See id.* at 510 n.2 (discussing that a "no evidence" complaint includes a claim that the evidence conclusively establishes the opposite); Eubanks v. Winn, 420 S.W.2d 698, 701 (Tex. 1967) (stating that a motion to disregard is proper if a finding has no support in the evidence).

14. *See Eubanks*, 420 S.W.2d at 701 (stating that immateriality is a ground for disregarding a jury finding).

15. *See* TEX. R. APP. P. 33.1(c) (providing that "[n]either a formal exception nor a signed, separate order is required to preserve a complaint for appeal").

16. *See* TEX. R. APP. P. 33.1(b) (allowing a motion for new trial or a motion to modify to be overruled by operation of law and still preserve a claim of error).

17. *See* TEX. R. APP. P. 33.1(a) (articulating what the record must show in order for a party to preserve an appellate complaint).

court reporter's record would also be sufficient, as would be a recitation in the judgment.[18] If the ruling does not appear in those places in the record, it is probably sufficient for the record to show a presentment of the motion to the court because the judgment on the verdict should itself be implicit proof that the court overruled a previously filed motion.[19] As for the time to obtain a ruling on a motion to disregard and for judgment n.o.v., the court must rule while it still retains plenary jurisdiction—that is, thirty days after the judgment is signed absent the filing of a motion for new trial.[20] Further, as noted above, one court of appeals has stated that, if a motion for new trial has been filed, then the motion to disregard and for judgment n.o.v. must be ruled upon before the motion for new trial is overruled by signed order or by operation of law.[21]

B. *Motion for New Trial and Motion to Modify the Judgment*

A motion for new trial and a motion to modify the judgment serve more than one purpose. Both are required to preserve certain complaints on appeal,[22] both motions extend the trial court's jurisdiction over the judgment,[23] and both motions extend the deadline for appeal.[24] After a judgment based on a jury verdict is signed, the party adversely affected by the judgment should typi-

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18. *See* TEX. R. APP. P. 33.1(a)(1) & (c) (mandating that the record contain a timely request, objection, or motion that the trial court ruled on or refused to rule on over a party's objection without a requirement of a signed order).

19. *See* TEX. R. APP. P. 33.1(a)(2) (stating that a ruling may appear "expressly or implicitly" in the record); *cf.* Salinas v. Rafati, 948 S.W.2d 286, 288 (Tex. 1997) (denying motion for judgment on verdict implicitly when trial court granted motion to disregard and, thus, claim of error was preserved); Acord v. General Motors Corp., 669 S.W.2d 111, 114 (Tex. 1984) (overruling charge objections implicitly by submitting of charge). If, however, the combined motion to disregard and for judgment notwithstanding the verdict is filed after the judgment is signed, no such implicit overruling is possible merely by virtue of the judgment itself.

20. *See* TEX. R. CIV. P. 329b(d) (stating that a court has plenary power to vacate or modify a judgment or grant a new trial within 30 days after signing the judgment).

21. *See* Spiller v. Lyons, 737 S.W.2d 29, 29 (Tex. App.—Houston [14th Dist.] 1987, no writ). For criticism of this dicta in *Spiller* see *supra* note 10.

22. *See* TEX. R. CIV. P. 324(b) (requiring certain points to be raised in a motion for new trial).

23. *See* TEX. R. CIV. P. 329b (providing for motions to modify a judgment and further providing that the trial court's power to vacate or modify a judgment or to grant a new trial is extended by the filing of a motion for new trial or a motion to modify the judgment).

24. *See* TEX. R. APP. P. 26.1(a) (extending the deadline for appeal upon the timely filing of a motion for new trial or a motion to modify the judgment).

cally file a motion for new trial and, in some cases, a motion to modify the judgment.[25] Both motions must be filed within thirty days after the trial court signs the judgment.[26] The time to file either a motion for new trial or a motion to modify may not be extended because the trial court loses its plenary power over the judgment thirty days after the judgment is signed; consequently, the trial court loses jurisdiction to rule on the motions,[27] unless an adversely affected party is entitled to relief under Texas Rule of Civil Procedure 306a(4) because neither the party nor its counsel received notice of the judgment.[28]

A motion for new trial is required to preserve certain points of error.[29] Texas Rule of Civil Procedure 324(b) lists the following points that must be asserted by a motion for new trial:

> (1) [a] complaint on which evidence must be heard such as one of jury misconduct or newly discovered evidence or failure to set aside a judgment by default; (2) [a] complaint of factual insufficiency of the evidence to support a jury finding; (3) [a] complaint that a jury finding is against the overwhelming weight of the evidence; (4) [a] complaint of inadequacy or excessiveness of the damages found by the jury; or (5) [i]ncurable jury argument if not otherwise ruled on by the trial court.[30]

It is often advisable for the losing party to file a motion for new trial attacking the factual sufficiency of each adverse jury finding.

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25. Texas Rule of Civil Procedure 329 refers to a "motion to modify, correct or reform," whereas the Texas Rules of Appellate Procedure prefer the shorter term "motion to modify." *Compare* TEX. R. APP. P. 26.1(a)(2) (calling the instrument a "motion to modify the judgment"), *and* TEX. R. APP. P. 33.1(b) (addressing the overruling of a "motion to modify the judgment"), *with* TEX. R. CIV. P. 329b (discussing the rules governing a "motion to modify, correct, or reform judgments").

26. *See* TEX. R. CIV. P. 329b(b)-(g) (imposing deadline of 30 days after the judgment or other order complained of is signed and establishing the same deadline for both a motion for new trial and a motion to modify).

27. *See* TEX. R. CIV. P. 5 (denying any extension of time for filing a motion for new trial). While the Rule does not mention a motion to modify, the trial court cannot enlarge time or grant relief after its jurisdiction ends. *See* TEX. R. APP. P. 329b(d) (stating that the trial court has, regardless of any appeal, plenary power to grant a new trial or vacate or modify a judgment within 30 days after signing the judgment); *see also* South Main Bank v. Wittig, 909 S.W.2d 243, 244 (Tex. App.—Houston [14th Dist.] 1995, no writ) (holding that the trial court's action was void in attempting to grant relief after the expiration of its plenary power).

28. *See* TEX. R. CIV. P. 306a(4).

29. *See* TEX. R. CIV. P. 324(b).

30. *Id.*

As with the motion to disregard, the reason for filing such a motion is to preserve any potential claim of error while appellate counsel is analyzing the case prior to appeal. Additionally, if the moving party had the burden to prove a fact that the jury failed to find, then the motion for new trial should recite that the jury's failure to find the fact is against the overwhelming weight of the evidence.[31] That is true because it is awkward—and almost a double negative—to complain that the jury's failure to find a fact asserted by the moving party is supported by factually insufficient evidence. A complaint that the jury's answer is against the overwhelming weight of the evidence can also be made when the opposing party had the burden of proof,[32] although a complaint of factual insufficiency is much more common.[33]

A motion to modify the judgment is proper when some error in the judgment exists.[34] These errors may include a miscalculation of prejudgment interest[35] or a failure to award attorney's fees[36] or costs.[37]

Unlike a motion to disregard and for judgment n.o.v., a motion for new trial and a motion to modify can be overruled by operation of law—that is, without any ruling by the trial court.[38] If the trial court does not rule in writing on the motions within seventy-five days after the judgment is signed, then the motions are deemed

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31. *See* TEX. R. CIV. P. 324(b)(3) (listing that point of error as being required in a motion for new trial).

32. *See, e.g.*, Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam) (noting complaint by plaintiff that "yes" answer to constructive-notice question submitted by defendant was against the great weight of the evidence).

33. For a thorough discussion of this subject, see W. Wendell Hall, *Standards of Review in Texas*, 29 ST. MARY'S L.J. 351 (1998).

34. *See* TEX. R. CIV. P. 329b(g) (implying that a motion to modify is a method for correcting a judgment); *cf.* TEX. R. CIV. P. 316 (explaining the method of correcting "clerical mistakes").

35. *See* Bulgerin v. Bulgerin, 724 S.W.2d 943, 946 (Tex. App.—San Antonio 1987, no writ).

36. *See* American Bank v. Waco Airmotive, Inc., 818 S.W.2d 163, 178 (Tex. App.—Waco 1991, writ denied).

37. *See* Portland Sav. & Loan Ass'n v. Bernstein, 716 S.W.2d 532, 541 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).

38. *See* TEX. R. APP. P. 33.1(b) (noting that motions, if not acted upon, are overruled by operation of law after 75 days); TEX. R. CIV. P. 329b(c) (providing expressly that motion for new trial and motion to modify are overruled by operation of law if not acted on within the expiration of 75 days after the judgment is signed).

overruled by operation of law.[39] Case law indicates that the court must decide a motion for new trial and a motion to modify the judgment within seventy-five days after the judgment is signed.[40] Thus, the lawyer intending to schedule a hearing on either a motion to modify the judgment or a motion for a new trial should set the hearing within that time frame.

One advantage of filing a motion for new trial is that it extends the time for execution on the judgment because execution may not take place, with certain exceptions, until thirty days after the motion is denied by written order or overruled by operation of law.[41] Thus, if a motion for new trial is filed and overruled quickly by written order, the time for superseding the judgment comes more quickly than when the motion is allowed to be overruled by operation of law. By contrast, if the motion for new trial is overruled by operation of law on the seventy-fifth day, then execution cannot be issued until the one-hundred-and-fifth day after the judgment is

39. *See* TEX. R. APP. P. 33.1(b); TEX. R. CIV. P. 329b(c). Overruling by operation of law does not occur when it is necessary to take evidence in order to present a proper complaint to the trial court, such as an allegation of jury misconduct or a complaint about new evidence. *See* TEX. R. APP. P. 33.1(b). The prior rules did not have such language and, as a consequence, some confusion arose regarding the need for objections against a judge's refusal to rule on other objections. *See* Cecil v. Smith, 804 S.W.2d 509, 513 (Tex. 1991) (Cornyn, J., dissenting) (commenting on the requirements for preservation of a claim of error on an evidentiary point). However, the majority in *Cecil* established the rule, which is now codified as Rule 33.1(b). *Cf. Cecil*, 804 S.W.2d at 511–12 (allowing a motion for new trial to preserve error without any ruling by the trial court).

40. *See* L.M. Healthcare, Inc. v. Childs, 929 S.W.2d 442, 444 (Tex. 1996) (per curiam) (referring to "the [75] day plenary power in which a trial court can determine a motion to modify a judgment," which suggests that the court cannot grant a motion to modify after 75 days); Fruehauf Corp. v. Carrillo, 848 S.W.2d 83, 84 (Tex. 1993) (per curiam) (stating that the court can vacate an order for a new trial on the 75th day after the judgment, which intimates that the 75th day is the deadline). *See generally* Fulton v. Finch, 162 Tex. 351, 352, 346 S.W.2d 823, 825 (1961) (discussing the different time period for keeping plenary power under the prior rule). The following cases have been cited for the proposition that a new trial order cannot be vacated more than 75 days after the judgment. *See* Alvarez v. Brasch, 747 S.W.2d 551, 552 (Tex. App.—Corpus Christi 1987, orig. proceeding); Smith v. Caney Creeks Estate Club, Inc., 631 S.W.2d 233, 235 (Tex. App.—Corpus Christi 1982, no writ); *see also* Homart Dev. Co. v. Blanton, 755 S.W.2d 158, 159-60 (Tex. App.—Houston [1st Dist.] 1988, orig. proceeding) (noting that a trial court retains plenary power over a judgment for 30 days after overruling a motion for new trial but not after granting a new trial, so that reconsideration of an order granting a new trial must occur within 75 days after signing of the judgment).

41. *See* TEX. R. CIV. P. 329b; TEX. R. CIV. P. 627; *cf. L.M. Healthcare, Inc.*, 929 S.W.2d at 444 (explaining the limits to the trial court's plenary jurisdiction).

signed.[42] Furthermore, once the motion for new trial is overruled by operation of law, any subsequent written order denying the motion is a nullity and does not restart the thirty-day period.[43] Consequently, a belated denial of a motion for new trial or motion to modify the judgment will not delay the plaintiff's right to execute beyond 105 days after judgment. However, nothing prevents the judge from denying a motion for new trial as soon as it is filed. For that reason, the lawyer should regularly monitor the status of a motion for new trial that has not been set for hearing.

Another benefit of filing a motion for new trial is the extension of the appellate timetable.[44] In the absence of a motion for new trial or a motion to modify, the time for perfecting appeal is thirty days after the signing of the judgment.[45] If either motion is filed, the time for perfecting an appeal extends to ninety days after the judgment is signed.[46] Texas courts recognize a party's right to file a

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42. *See L.M. Healthcare, Inc.*, 929 S.W.2d at 444 (explaining the need for the running of the entire time period as "these rules do not reduce" the plenary jurisdiction time period).

43. *Cf. id.* (referring to "the seventy-five day plenary power in which a trial court can determine a motion to modify a judgment"). A number of cases hold that a new trial order cannot be vacated after the motion has been overruled by operation of law on the 75th day after the judgment, and these holdings support the argument that the 75th day is a real deadline that cannot be extended. *See* Fruehauf Corp. v. Carrillo, 848 S.W.2d 83, 84 (Tex. 1993) (per curiam) (holding that the trial court retains plenary power during the 75-day period); *Homart Dev. Co.*, 755 S.W.2d at 159 (noting that any reconsideration of an order granting a new trial must be done within the 75-day period); *Alvarez*, 747 S.W.2d at 552 (explaining that the "trial court had no power to vacate its new trial order after seventy-five days had elapsed from the entry of the original judgment"); *Smith*, 631 S.W.2d at 234–35 (holding that no provision extends the trial court's authority beyond 75 days for granting a motion for new trial); *cf.* Mackie v. McKenzie, 890 S.W.2d 807, 808 (Tex. 1994) (commenting that a judgment modified solely to extend the appellate timetable is a nullity).

44. *See* TEX. R. APP. P. 26.1. Rule 26.1(a) provides that the appellate timetable is extended if any party files any of the following:

> (1) a motion for new trial; (2) a motion to modify the judgment; (3) a motion to reinstate under Texas Rule of Civil Procedure 165a; or (4) a request for findings of fact and conclusions of law if findings and conclusions either are required by the Rules of Civil Procedure or, if not required, could properly be considered by the appellate court.

TEX. R. APP. P. 26.1(a).

45. *See* TEX. R. APP. P. 26.1(a).

46. *See* TEX. R. APP. P. 26.1(a)(1); TEX. R. APP. P. 26.1(a)(2).

motion for new trial or to modify the judgment for the purpose of extending the appellate timetable.[47]

Attorneys should also be aware that a filing fee must be paid with a motion for new trial.[48] If the fee is not tendered with the motion, payment of the fee before the trial court loses jurisdiction is sufficient to extend appellate deadlines.[49] If a motion for new trial has been overruled in writing or by operation of law before the filing fee is paid, the motion does not extend the appellate timetable and may not preserve any claim of error.[50] Therefore, paying the fee in a timely manner is important because deadlines may not be extended if the filing fee is paid after the trial court loses jurisdiction.[51]

C. *Post-Trial Motions in Nonjury Trials*

While the new rules are generally not ambiguous, a question arises regarding the proper manner of preserving legal and factual insufficiency points in a nonjury trial. Former Rule 52 dealt with the preservation of appellate complaints.[52] Subdivision (d) of Rule 52 specifically addressed both jury and nonjury cases as follows:

> A point in a motion for new trial is prerequisite to appellate complaint in those instances provided in Rule 324(b) of the Texas Rules

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47. *See* Old Republic Ins. Co. v. Scott, 846 S.W.2d 832, 833 (Tex. 1993) (stating that filing a motion for new trial to extend the appellate timetable is a matter of right); *cf.* Stoner v. Massey, 586 S.W.2d 843, 846 (Tex. 1979) (asserting that filing a motion for rehearing is a matter of right).

48. *See* TEX. R. APP. P. 5 (providing that fees are required by order of the Texas Supreme Court unless the party is excused by statute or the appellate rules).

49. *See* Tate v. E.I. Du Pont de Nemours & Co., 934 S.W.2d 83, 84 (Tex. 1996) (holding that payment of fee is sufficient before trial court loses plenary jurisdiction). It should be noted that a conditional acceptance of a filing should be sufficient to extend the time to file the appeal bond even where the fee is not paid within the 30-day period. *See* Jamar v. Patterson, 868 S.W.2d 318, 319 (Tex. 1993) (per curiam) (allowing an extension of time to file an appeal bond when a motion for new trial was conditionally accepted 29 days after the judgment, but the fee was not paid until 47 days after the judgment).

50. *See Tate*, 934 S.W.2d at 84 (allowing that failure to pay a fee before a motion is overruled by operation of law might remove the appellate court's opportunity to consider the motion).

51. *See id.* at 83–84 (holding that the appellate timetable is extended by a timely filed motion for new trial with or without a filing fee); *see also* Polley v. Odom, 937 S.W.2d 623, 625 (Tex. App.—Waco 1997, no writ) (per curiam) (differentiating between the ability of a trial court to rule on a motion and the extension of the appellate timetable and holding that the appellate timetable is extended when a motion is filed but no fee is paid).

52. *See* TEX. R. APP. P. 52 (Vernon 1997, repealed Sept. 1, 1997).

> of Civil Procedure. A party desiring to complain on appeal in a nonjury case that the evidence was legally or factually insufficient to support a finding of fact, that a finding of fact was established as a matter of law or was against the overwhelming weight of the evidence, or of the inadequacy or excessiveness of the damages found by the court should not be required to comply with paragraph (a) of this rule [which states the requirements for preserving error in the trial court].[53]

The Supreme Court Advisory Committee on Appellate Rules proposed a more succinct version of Rule 52(d),[54] which was not adopted. Instead, former Rule 52(d) was entirely omitted from the new rules because the supreme court viewed it as "unnecessary" in light of the fact that the Texas Rules of Civil Procedure identify when a motion for new trial is required.[55]

The omission of former Rule 52(d) from the new rules was probably not meant to change the prior practice of preserving claims of error in nonjury cases. According to the supreme court, former Rule 52(d) is embodied in Texas Rule of Civil Procedure 324,

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53. *Id.*

54. In 1996, the Supreme Court Advisory Committee on Appellate Rules in revising the Texas Rules of Appellate Procedure, attempted to retain and refine the intent of former Rule 52(d). As of May 9, 1996, the Advisory Committee proposed a more succinct version of former Rule 52(d) as follows:

> (d) Complaints of Legal and Factual Sufficiency [of] Evidence in Civil Nonjury Cases. In a nonjury case, a complaint regarding the legal or factual sufficiency evidence, including the complaint that the damages found by the court are excessive or inadequate, as distinguished from a request that the judge amend the fact finding or make an additional finding of fact, may be made for the first time on appeal in the complaining party's brief.

Sarah B. Duncan & Rose Kanusky, *Proposed TRAP Amendments: Variations on a Theme*, *in* UNIVERSITY OF TEXAS SCHOOL OF LAW 6TH ANNUAL CONFERENCE ON STATE AND FEDERAL APPEALS, 2-APPENDIX 2, at 27 (June 6–7, 1996).

55. *See* TEX. R. APP. P. 33 notes & cmts.; TEX. R. CIV. P. 324(b). Under Rule 324(a), a motion for new trial "is not a prerequisite to a complaint on appeal in either a jury or nonjury case," except as provided in subsection b, including:

> (1) a complaint on which evidence must be heard such as one of jury misconduct or newly discovered evidence or failure to set aside a judgment by default; (2) a complaint of factual insufficiency of the evidence to support a jury finding; (3) a complaint that a jury finding is against the overwhelming weight of the evidence; (4) a complaint of inadequacy or excessiveness of the damages found by the jury; or (5) incurable jury argument if not otherwise ruled on by the trial court.

Id. The note to Rule 33 is consistent with *Cecil v. Smith*. *See* Cecil v. Smith, 804 S.W.2d 509, 511–12 (Tex. 1991) (discussing how the preservation of error is controlled by the civil rules and not the appellate rules, and that the appellant should not be required to follow seemingly conflicting rules).

which requires a post-trial motion only to preserve a complaint about a "jury finding."[56] However, because Rule 324 does not address the issue of legal or factual insufficiency in a nonjury trial, the new rules do not afford the safe harbor found in former Rule 52(d). Because of the gap left by the new rules, the cautious appellate lawyer should consider raising both legal and factual sufficiency points in a nonjury case by the methods listed in Rule 33, specifically: by request, objection, or motion.[57] For example, a party to a nonjury trial could raise legal and factual insufficiency issues by objecting to a proposed or signed judgment, by filing a motion requesting a take-nothing judgment, or by filing a motion to modify a judgment. Moreover, Rule 33 requires the complaining party to: (1) state the grounds for the request, objection, or motion with "sufficient specificity to make the trial court aware of the complaint"[58] unless the grounds are apparent from the context; (2) comply with the requirements of the Texas Rules of Civil Evidence or the Texas Rules of Civil Procedure; and (3) obtain a ruling or object to the court's refusal to rule.[59]

D. *Findings of Fact and Conclusions of Law*

An attorney may need to consider findings of fact and conclusions of law under Rules 296 and 297.[60] Following a nonjury trial, including a default judgment proceeding, the losing party should request findings of fact and conclusions of law on or before the twentieth day after the court signs the judgment.[61] By the twenti-

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56. *See* TEX. R. APP. P. 33 notes & cmts. (discussing that former Rule 52(b) is unnecessary because of provisions in the rules of evidence, which moot the need for a procedural rule regarding jury findings).

57. *See* TEX. R. APP. P. 33.1(a)(1) (articulating the methods to preserve error).

58. TEX. R. APP. P. 33.1(a)(1)(A).

59. *See* TEX. R. APP. P. 33.1(a).

60. *See* TEX. R. CIV. P. 296; TEX. R. CIV. P. 297.

61. *See* TEX. R. CIV. P. 296. There is no reason for the winning party to file requests. The absence of findings and conclusions is to the advantage of the winning party. If findings of fact and conclusions of law are neither filed nor requested, the judgment of the trial court implies all necessary findings and fact to support it. *See* Burnett v. Motyka, 610 S.W.2d 735, 736 (Tex. 1980) (stating that in the absence of findings and conclusions, such findings and conclusions necessary to support the trial court's judgment are implied); *see also* Holt Atherton Indus., Inc. v. Heine, 835 S.W.2d 80, 83 (Tex. 1992) (following the *Burnett* decision, holding that findings of fact and conclusions of law necessary to support a trial court's judgment are implied in the absence of such findings and conclusions). This procedure of implying all necessary findings is followed as long as (1) "the proposition is

eth day after the losing party's request, the court must file findings of facts and conclusions of law.[62] If the court has not done so by the twentieth day, the requesting party must file a notice of past-due findings of facts and conclusions of law.[63] This notice is due on the thirtieth day after the original request for findings and conclusions of law.[64] A prematurely filed notice of past-due findings of facts is ineffective.[65] These findings of fact and conclusions of law must be in a document separate from the judgment.[66]

Once the trial court has filed its findings and conclusions, either party may ask the court to make additional findings of a specific nature. The requesting attorney must make a request within ten days of the date the court files the original findings of fact,[67] giving the trial court ten more days to file the additional amended findings.[68]

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one raised by the pleadings and supported by the evidence" and (2) "the trial judge's decision can be sustained on any reasonable theory that is consistent with the evidence and the applicable law, considering only the evidence favorable to the decision." Austin Area Teachers Fed. Credit Union v. First City Bank-Northwest Hills, N.A., 825 S.W.2d 795, 801 (Tex. App.—Austin 1992, writ denied); *see* TEX. R. CIV. P. 299 (stating that the court's judgment can be supported upon appeal only if the elements supporting the judgment are included in the findings of fact); Friedman v. New Westbury Village Assoc., 787 S.W.2d 154, 158 (Tex. App.—Houston [1st Dist.] 1990, no writ) (holding that the judgment of the trial court should only be affirmed if supported by the pleadings and evidence). To prevail in the absence of requested or filed findings and conclusions, the appellant must show that the undisputed evidence negates one or more of the elements essential to the decision or that the appellee's pleadings omit one or more of the essential elements and that the trial court was confined to the pleadings. *See* Brodhead v. Dodgin, 824 S.W.2d 616, 620 (Tex. App.—Austin 1991, writ denied). Nevertheless, when a statement of facts (now, the court reporter's record) is part of the record, the sufficiency of the evidence to support implied findings may be challenged on appeal, the same as jury findings or a trial court's findings of fact. *See Holt Atherton*, 835 S.W.2d at 84; Roberson v. Robinson, 768 S.W.2d 280, 281 (Tex. 1989). The applicable standard of review is the same as applied in the review of jury findings or a trial court's findings of fact.

62. *See* TEX. R. CIV. P. 297.

63. *See id.*

64. *See id.*

65. *See* Echols v. Echols, 900 S.W.2d 160, 161-62 (Tex. App.—Beaumont 1995, writ denied) (noting that a premature notice is deemed to have been filed on the date of the judgment in accordance with the Texas Rule of Civil Procedure 306c, and is thus held to be effective).

66. *See* TEX. R. CIV. P. 299a; *see, e.g.*, Sutherland v. Cobern, 843 S.W.2d 127, 131 n.7 (Tex. App.—Texarkana 1992, writ denied); Jones v. Jones, 641 S.W.2d 342, 344 (Tex. App.—Corpus Christi 1982, no writ); Edwards v. Ward Assocs., 367 S.W.2d 390, 394 (Tex. Civ. App.—Dallas 1963, writ denied).

67. *See* TEX. R. CIV. P. 298.

68. *See id.*

A judge's failure to comply with the party's proper request for findings of fact and conclusions of law raises a presumption of harm.[69] Consequently, the appellate court must reverse the judgment unless the record affirmatively shows that no injury has resulted from the trial court's failure to comply with Rule 296.[70] If the record affirmatively shows an absence of injury, the proper remedy is for the appellate court to abate the appeal and order the trial court to make the appropriate findings and conclusions, rather than to reverse the trial court's judgment.[71]

A request for findings of fact and conclusions of law may extend the appellate timetable. First, if the Texas Rules of Civil Procedure require findings of fact and conclusions of law, a request for findings and conclusions will extend the appellate timetable.[72] Second, even if the rules do not require an extension, a request will still extend the appellate timetable if the appellate court can consider the findings and conclusions.[73]

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69. *See* Wagner v. Riske, 142 Tex. 337, 342, 178 S.W.2d 117, 119 (1944) (holding that a failure to file property requested findings of fact and conclusions of law raises a presumption of harm); *see also* TEX. R. CIV. P. 299 (stating that a refusal to make a requested finding is grounds for an appeal).

70. *See Wagner*, 142 Tex. at 343, 178 S.W.2d at 120 (stating that the record must show injury because of a refusal to file findings and conclusions in order to reverse the trial court's judgment); *see also* Cherne Indus., Inc. v. Magallanes, 763 S.W.2d 768, 772 (Tex. 1989) (citing *Wagner* and concluding that a court's failure to respond to a party's request for findings and conclusions is presumed harmful, "unless 'the record before the appellate court affirmatively shows that the complaining party has suffered no injury.'").

71. *See* Brown v. McGonagill, 940 S.W.2d 178, 180 (Tex. App.—San Antonio 1996, n.w.h.) (stating that abatement is the correct response to an error in findings and conclusions); Brooks v. Housing Auth., 926 S.W.2d 316, 320–21 (Tex. App.—El Paso 1996, n.w.h.) (containing a discussion of the historical move towards abatement as the proper remedy for an error in findings and conclusions).

72. *See* TEX. R. APP. P. 26.1(a)(4).

73. *See id.*; *see also* Phillips v. Beavers, 938 S.W.2d 446, 447 (Tex. 1997) (holding that "a timely filed request for findings of fact and conclusions of law extends the deadline for filing the appellate record"); IKB Indus. (Nigeria) Ltd. v. Pro-Line Corp., 938 S.W.2d 400, 443 (Tex. 1997) (concluding that a "timely filed request for findings of fact and conclusions of law extends the time for perfecting appeal when findings and conclusions are required by Rule 296, or when they are not required by Rule 296 but are not without purpose—that is, they could properly be considered by the appellate court"); Awde v. Dabeit, 938 S.W.2d 31, 33 (Tex. 1997) (following the reasoning behind *IKB* and holding that requesting findings of fact and conclusions of law extends the deadline for perfecting appeal).

E. *Formal Bill of Exception*

When the trial court refuses to admit certain evidence, the proponent of the evidence must preserve its claim of error, through either an informal bill of exception or a formal bill of exception. Therefore, the appellate attorney must note the effect of the appellate rules on these bills of exception. Texas Rules of Appellate Procedure no longer contain procedures for informal bills of exception, usually called "offers of proof because they are now governed solely by Texas Rule of Evidence 103."[74] The appellate rules continue to govern formal bills of exception:[75] Rule 33.2 requires a formal bill in order to "complain on appeal about a matter that would not otherwise appear in the record."[76] This requirement implies that formal bills are unnecessary when the record reflects a complaint. Furthermore, case law suggests that formal bills are seldom used and rarely successful when used, even though they may be the only way to preserve an appellate point if neither the clerk's record nor the court reporter's record shows the error.[77]

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74. *See* TEX. R. APP. P. 33 notes & cmts. Rule 103 of the Texas Rules of Evidence governs offers of proof. *See* TEX. R. EVID. 103. This shift should not change prior practice because case law follows the reasoning behind the rules of evidence. *See* Cavazos v. State, 904 S.W.2d 744, 748 (Tex. App.—Corpus Christi 1995, pet. ref'd) (noting that there is nothing to review if the complaint does not show that evidence was improperly excluded); *cf.* Rodriguez v. State, 903 S.W.2d 405, 410 (Tex. App.—Texarkana 1995, pet. ref'd) (allowing that no offer of proof is necessary if the substance of the evidence is apparent from the questions asked in court).

75. *See* TEX. R. APP. P. 33.2.

76. *Id.*

77. *See, e.g.*, Womack v. First Nat'l Bank, 613 S.W.2d 548, 557 (Tex. Civ. App.—Tyler 1981, no writ) (preserving point of error by arguing challenge for cause to juror); Continental Trailways, Inc. v. McCandless, 450 S.W.2d 707, 710 (Tex. Civ. App.—Austin 1969, no writ) (determining that the court of appeals is not bound by legal conclusions in a bill of exception that are in conflict with the statement of facts); Kirkland v. Texas and Pac. Ry. Co., 372 S.W.2d 367, 369 (Tex. Civ. App.—El Paso 1963, writ ref'd n.r.e.) (jury argument) (considering and denying a bill of exception); Griffith v. Casteel, 313 S.W.2d 149, 153 (Tex. Civ. App.—Houston [1st Dist.] 1958, writ ref'd n.r.e.) (finding the facts in conformity with those stated in the bystanders bill of exception); Harris County Flood Control Dist. v. Cohen, 282 S.W.2d 917, 919 (Tex. Civ. App.—Galveston 1955, writ ref'd n.r.e) (finding appellant's bystander bill of exception, by which appellant under took to preserve error, to be invalid and consequently failed to preserve the error for appeal); Shelton v. Standard Fire Ins. Co., 816 S.W.2d 552, 553 (Tex. App.—Fort Worth 1991, writ ref'd) (failing by party to bring forward record or formal bill showing what happened at hearing gives nothing to review and therefore preserves no error). One frequent use of a formal bill is the refusal of a request for addition to the charge. *See* TEX. R. CIV. P. 276 (stating that question, instruction, or definition that the trial judge endorses as "refused" is a bill of excep-

In addition to stating the circumstances requiring a formal bill of exception, Rule 33.2 includes the requirement of form that "the objection to the court's ruling or action, and the ruling complained of, must be stated with sufficient specificity to make the trial court aware of the complaint."[78] Like its predecessor, the new rule states that the bill need not repeat evidence already in the appellate record.[79] One difference between the old and the new rule is that new Rule 33 refers to the "appellate record," whereas former Rule 52 referred to the "statement of facts."[80]

Unlike its predecessor, Rule 33 does not state that it is sufficient simply to refer to the evidence as the evidence appears in the record, providing instead that "a party may attach and incorporate a transcription of the evidence certified by the court reporter."[81] Nonetheless, under Rule 33 the parties may still refer to the evidence because the rule does not specifically require that the complaining party attach and incorporate the court reporter's record, apparently rendering the former optional.[82]

In addition, the procedure governing formal bills of exception contains a number of changes from prior practice and streamlines the former method. The procedure under Rule 33.2 requires that "[t]he complaining party must first present a formal bill of exception to the trial court clerk."[83] Furthermore, "[i]f the parties agree on the contents of the bill of exception, the judge *must* sign the bill and file it with the trial court clerk."[84] If the parties disagree about its contents, a hearing must be set and a notice of the hearing given

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tion); Dallas Market Ctr. Dev. Co. v. Liedeker, 958 S.W.2d 382, 386–87 (Tex. 1997) (per curiam) (recognizing that a request that is endorsed "refused" is a bill of exception but also holding that endorsement is not necessary if the refusal is otherwise clear from the record).

78. TEX. R. APP. P. 33.2(a).

79. *Compare* TEX. R. APP. P. 33.2(b) (allowing for the exclusion of repetitive evidence), *with* TEX. R. APP. P. 52(c)(2) (Tex. & Tex. Crim. App. 1986, amended Sept. 1, 1997) (excluding cumulative evidence).

80. *Compare* TEX. R. APP. P. 33.2 (discussing presence in "appellate record" of evidence), *with* TEX. R. APP. P. 52 (Tex. & Tex. Crim. App. 1986, amended Sept. 1, 1997) (discussing presence of evidence in the "statement of facts").

81. TEX. R. APP. P. 33.2(b).

82. *See* TEX. R. APP. P. 33 (stating that the record must show error, but declining the requirement of attaching the record to show error).

83. TEX. R. APP. P. 33.2(c)(1).

84. TEX. R. APP. P. 33.2(c)(2) (emphasis added).

in accordance with local rules or practice.[85] After the hearing, the trial judge must do one of the following:

> (A) sign the bill of exception and file it with the trial court clerk if the judge finds that it is correct; (B) suggest to the complaining party those corrections to the bill that the judge believes are necessary to make it [the bill] accurately reflect the proceedings in the trial court, and if the party agrees to the corrections, have the corrections made, sign the bill, and file it with the trial court clerk; or (C) if the complaining party will not agree to the corrections suggested by the judge, return the bill to the complaining party with the judge's refusal written on it, and prepare, sign, and file with the trial court clerk such bill as will, in the judge's opinion, accurately reflect the proceedings in the trial court.[86]

If the trial judge files a bill of exception with which the complaining party is dissatisfied, the party may file the rejected bill with the trial court clerk.[87] Along with the rejected bill, the complaining party must file affidavits of at least three people who have observed the matter to which the bill of exception is addressed[88] and who attest to the correctness of the bill as presented.[89] Further, any party may controvert matters contained in the rejected bill of exception by filing additional affidavits within ten days after the filing of this rejected bill,[90] raising the duty in the appellate court to determine the truth of the bill of exception.[91] Former Rule 52 required that the three bystanders be "respectable bystanders, citizens of this State."[92] The new rule no longer requires respectability and Texas citizenship.[93]

Another procedural change is the time allowed to file a bill of exception under Rule 33.2. In civil cases, a formal bill of exception must be filed no later than thirty days after the notice of appeal.[94]

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85. *See* TEX. R. APP. P. 33.2(c).
86. TEX. R. APP. P. 33.2(c)(2).
87. *See* TEX. R. APP. P. 33.2(c)(3).
88. *See id.*
89. *See id.*
90. *See id.*
91. *See id.*
92. TEX. R. APP. P. 52(c)(8) (Tex. & Tex. Crim. App. 1986, amended Sept. 1, 1997).
93. *Compare* TEX. R. APP. P. 33.2(c)(3) (requiring that affidavits come from "people who observed the matter"), *with* TEX. R. APP. P. 52(c)(8) (Tex. & Tex. Crim. App. 1986, amended Sept. 1, 1997) (requiring affidavits come from "three respectable bystanders, citizens of this State").
94. *See* TEX. R. APP. P. 33.2(e)(1).

Under former Rule 52, the timing was calculated as sixty days after the signing of the judgment.[95] New Rule 33 adds a subdivision providing the method of obtaining an extension of time to file a formal bill[96] under which the party seeking the extension must file a motion with the appellate court within fifteen days after the deadline.[97]

Finally, Rule 33 states that a formal bill of exception, when filed, "should be included in the appellate record."[98] Rule 33 now requires the district clerk to prepare and file the appropriate pleadings and papers constituting the clerk's record.[99]

II. Initial Issues on Appeal

One of the initial tasks of the appellate attorney is to clarify who will be lead counsel in the court of appeals. Rule 6.3 requires notices and copies of documents filed in the appellate court to be served on each party's lead counsel on appeal.[100] Lead counsel for an appellant is the counsel whose name appears on the notice of appeal, and lead counsel for an appellee is the attorney whose name "first appears on the first document filed in the appellate court on that party's behalf."[101] Nonetheless, a party may designate lead appellate counsel at any time.[102] If possible, the appellee should designate lead counsel in the trial court during proceedings preliminary to an appeal; otherwise, the appellant may serve documents on a lawyer who will not be handling the appeal for the appellee.

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95. *See* Tex. R. App. P. 52(c)(11) (Tex. & Tex. Crim. App. 1986, amended Sept. 1, 1997).

96. *Compare* Tex. R. App. P. 33.2(e)(3) (allowing for the extension of 15 days when a proper motion is filed), *with* Tex. R. App. P. 52(c)(11) (Tex. & Tex. Crim. App. 1986, amended Sept. 1, 1997) (declining to discuss any allowance of extensions of time to file a formal bill).

97. *See* Tex. R. App. P. 33.2(e)(3).

98. Tex. R. App. P. 33.2(f).

99. *See* Tex. R. App. P. 35.3(a).

100. *See* Tex. R. App. P. 6.3(a).

101. Tex. R. App. P. 6.1(b).

102. *See* Tex. R. App. P. 6.1(c). The rules contemplate changes in counsel by regulating to when communications are sent and how counsel can withdraw representation. *See* Tex. R. App. P. 6.3; Tex. R. App. P. 6.5. A notice of lead appellate counsel appears in the appendix to this Review.

In the absence of a designation of lead counsel, Rule 6.3 controls.[103] Under Rule 6.3, if a party fails to designate lead appellate counsel, service is to be made on lead trial counsel as long as counsel has not filed a non-representation notice[104] or been allowed to withdraw.[105] If lead appellate counsel changes during an appeal, the party should file a notice of new lead counsel, and Rule 6.3 requires the signatures of both the prior lead appellate lawyer and the new lead counsel.[106]

The appellate attorney must also be aware of Rule 6.4. Under Rule 6.4, lead trial counsel may prevent receiving service of notices, documents, or other communications by filing a nonrepresentation notice.[107] The purpose of this notice is to direct that all further documents be served on the party instead of the attorney who served as the lead trial counsel. Furthermore, Rule 6.3(c) provides that service shall be made on the party if the party is not represented by counsel.[108]

The rules also contemplate a party's having more than one appellate counsel.[109] Thus, the appellate clerk is to note on the docket sheet an attorney's filing an appearance as other than lead counsel.[110] The clerk must automatically note the appearance of any newly identified counsel on a brief or motion.[111] In recognition of the potential for more than one appellate counsel, Rule 9.1(a) allows any of the party's attorneys to sign a document to be filed in the appellate courts[112] and requires any counsel's signature to be

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103. *See* TEX. R. APP. P. 6.3(b)(2).

104. *See* TEX. R. APP. P. 6.4(a).

105. *See* TEX. R. APP. P. 6.3(b). It should be noted that an attorney is required to notify both the court and her client of her withdrawal and file a motion to withdraw. *See* Johnson v. State, 885 S.W.2d 641, 645 (Tex. App.—Waco 1994, no pet.) (per curiam).

106. *See* TEX. R. APP. P. 6.1(c) (requiring signatures of prior lead appellate attorney and new lead counsel for the designation of new counsel).

107. *See* TEX. R. APP. P. 6.4(a).

108. *See* TEX. R. APP. P. 6.3(c).

109. *See* TEX. R. APP. P. 6.2. Because of the use of multiple law firms in complex litigation, it is possible for a party to have multiple appellate counsel, which would lead to confusion as to service of documents.

110. *See id.* A formal notice of appearance is in the appendix.

111. *See id.*

112. *See* TEX. R. APP. P. 9.1(a) (discussing signatures on documents filed by represented parties); *see also* TEX. R. APP. P. 4(a) (Tex. & Tex. Crim. App. 1986, amended Sept. 1, 1997) (defining who may sign filed documents).

accompanied by the attorney's state bar number, mailing address, telephone number, and "fax" number.[113]

The appellate rules also address the withdrawal and substitution of counsel. Rule 6.5 provides that an appellate court may permit an attorney to withdraw from representing the party in the appellate court on appropriate terms and conditions.[114] Although Rule 6.5(d) requires a motion to withdraw when counsel is substituted, the expectation is that appellate courts will simply grant these motions to substitute.[115] If an attorney is merely withdrawing as lead appellate counsel, but not from the appeal altogether, there is no need for a motion to withdraw or substitute.[116] The notice of new lead appellate counsel suffices.

Finally, Rule 6.6 provides that agreements between appellate counsel are not enforceable unless they are "in writing and signed by the parties or their counsel."[117] These agreements no longer need to be filed in the appellate record as required by former Rule 8.[118] Nevertheless, Texas Rule of Civil Procedure 11 still requires such a filing of agreements in the trial court.[119]

III. APPEALS BY INDIGENTS

The process for an appeal by indigents has not changed significantly under the new appellate rules. Rule 20 is the general provision governing appeals by indigents.[120] Rule 20 allows an indigent

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113. *See* TEX. R. APP. P. 9.1(a).

114. *See* TEX. R. APP. P. 6.5. A discussion regarding the grounds under which an attorney may withdraw are outside the scope of this Review, but can be found in the State Bar Rules. *See* TEX. STATE BAR R., *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G App. (Vernon 1988).

115. *See* TEX. R. APP. P. 6.5(d).

116. *See* TEX. R. APP. P. 6.5 (noting withdrawal as the cessation of representation). Nothing in the new rule requires a motion to withdraw if an attorney is only no longer going to be lead counsel. *See id.*

117. TEX. R. APP. P. 6.6.

118. *Compare* TEX. R. APP. P. 6.6 (requiring only a signed writing to enforce an agreement between counsel), *with* TEX. R. APP. P. 8 (Tex. & Tex. Crim. App. 1986, amended Sept. 1, 1997) (requiring a signed writing be filed with the transcript in order to be enforceable).

119. *Compare* TEX. R. APP. P. 8 (requiring agreements between counsel to be filed with the transcript), *with* TEX. R. CIV. P. 11 (stating that an agreement will not be enforced unless in writing, signed, and "filed with the papers as part of the record").

120. *See* TEX. R. APP. P. 20; *see also* Cronen v. Smith, 812 S.W.2d 69, 70 (Tex. App.—Houston [1st Dist.] 1991, no writ) (making the test for proceeding *in forma pauperis* as a

party to appeal an adverse judgment without prepaying costs.[121] Rule 20.1 requires that an indigent party may proceed without advance payment of costs if the party "files an affidavit of indigence in compliance with this rule," and if "the claim of indigence is not contested or, if contested, the contest is not sustained by written order."[122] Nevertheless, the indigent party must still file a timely notice of appeal.[123]

In ordinary appeals, under Rule 20.1(c), the "appellant must file the affidavit of indigence in the trial court with or before the notice of appeal."[124] If an appellee required to pay part of the costs of preparing the record is indigent, the appellee "must file an affidavit of indigence in the trial court within 15 days after the date when the appellee becomes responsible for paying [those] costs."[125] Furthermore, in proceedings other than an ordinary appeal, a petitioner must file the affidavit of indigence with or before the document seeking relief, and the "respondent who requests preparation of a record in connection with . . . [the] proceeding must file an affidavit of indigence in the appellate court within 15 days after

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preponderance of the evidence, which shows the appellant is not able to pay costs, or give security, if she made a good faith effort).

121. *See* TEX. R. APP. P. 20.

122. TEX. R. APP. P. 20.1(a). Rule 20.1(b) requires very detailed allegations for the affidavit of indigence. *See* TEX. R. APP. P. 20.1(b). The affidavit "must identify the party filing the affidavit;" it must state what costs, if any, the party can in fact pay; and it must contain complete information about:

(1) the nature and amount of the party's current employment income, government-entitlement income, and other income;
(2) the income of the party's spouse and whether that income is available to the party;
(3) real and personal property the party owns;
(4) cash the party holds and amounts on deposit that the party may withdraw;
(5) the party's other assets;
(6) the number and relationship to the party of any dependents;
(7) the nature and amount of the party's debts;
(8) the nature and amount of the party's monthly expenses;
(9) the party's ability to obtain a loan for court costs;
(10) whether an attorney is providing free legal services to the party without a contingent fee; and
(11) whether an attorney has agreed to pay or advance court costs.

Id.

123. *See* TEX. R. APP. P. 20.1(a)(3).

124. TEX. R. APP. P. 20.1(c)(1).

125. *Id.* In any appellate proceeding other than a direct appeal from the trial court, "a petitioner must file the affidavit of indigence in the court in which the proceeding is filed, with or before the document seeking relief." TEX. R. APP. P. 20.1(c)(2).

the date when the respondent requests preparation of the record."[126] For the first time, an extension of time is available to the indigent to file an affidavit. Under Rule 20.1(c)(3), "[t]he appellate court may extend the time to file an affidavit of indigence if, within 15 days after the deadline for filing the affidavit, the party files in the appellate court a motion complying with Rule 10.5(b)."[127]

"If the affidavit of indigence is filed with the trial court clerk . . ., the clerk must promptly send a copy of the affidavit to the appropriate court reporter."[128] If the affidavit is filed with the appellate court clerk, "and if the filing party is requesting the preparation of a record, the appellate court clerk must send . . . a copy of the affidavit to the trial court clerk and the appropriate court reporter."[129] In addition, the appellate clerk must "send to the trial court clerk, the court reporter, and all parties, a notice stating the deadline for filing a contest to the affidavit of indigence."[130] Rule 20 does not address the situation in which a court reporter is not sent or does not receive a copy of the affidavit from the clerk and, as a consequence, fails to contest the affidavit.

Under Rule 20.1(e), "[t]he clerk, the court reporter, or any party may challenge the claim of indigence by filing . . . a contest."[131] The deadline for the contest is "on or before the date set by the clerk if the affidavit was filed in the appellate court [on], or within 10 days"[132] after the filing of the affidavit in a trial court.[133] The contest of the indigency affidavit need not be sworn to, and the party filing the affidavit has the burden of proof.[134]

When the affidavit of indigence is filed in the appellate court, and a contest is made, the appellate court may

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126. TEX. R. APP. P. 20.1(c)(2).

127. TEX. R. APP. P. 20.1(c)(3). The prior rules provided an extension of time by motion to perfect an appeal in civil cases when the appellant was indigent. *See* TEX. R. APP. P. 41(a)(2) (Tex. & Tex. Crim. App. 1986, amended Sept. 1, 1997).

128. TEX. R. APP. P. 20.1(d)(1).

129. TEX. R. APP. P. 20.1(d)(2).

130. TEX. R. APP. P. 20.1(d)(2)(B).

131. TEX. R. APP. P. 20.1(e).

132. *Id.*

133. *See id.*

134. *See* TEX. R. APP. P. 20.1(g) (placing the burden of proof on the party filing as an indigent).

> (1) conduct a hearing and decide the contest; (2) decide the contest based on the affidavit and any other timely filed documents; (3) request the written submission of additional evidence and, without conducting a hearing, decide the contest based on evidence; or (4) refer the matter to the trial court with instructions to hear evidence and grant the appropriate relief.[135]

If, however, the indigency affidavit is initially filed in the trial court, a hearing must be set within ten days after filing of the contest.[136] Furthermore, if the appellate court refers the contest, the hearing must be set within ten days after the trial court has received the referral.[137] The trial court may extend the time for conducting the hearing, but no longer than twenty days from the signing of the order of extension.[138] If, however, the court in which the contest is filed fails to act on this contest, Rule 20.1(i) establishes a default mechanism by which the party will be allowed to proceed without advance payments of costs. This default mechanism is necessary only if the trial court does not sign an order sustaining the contest within the time period required.[139]

If successful under Rule 20, the indigent party can appeal without pre-payment of costs, namely, any filing fees relating to the case and the charges for preparing the appellate record.[140] However, the new rule allows the court to require a partial payment of costs[141] and empowers the court to order payment of some or all of the costs at a later time when the party has the ability to pay.[142]

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135. TEX. R. APP. P. 20.1(h).

136. *See* TEX. R. APP. P. 20.1(i)(2)(A).

137. *See* TEX. R. APP. P. 20.1(i)(2)(B).

138. *See* TEX. R. APP. P. 20.1(i)(3).

139. *See* TEX. R. APP. P. 20.1(i)(4). This default is a codification of existing case law. *See, e.g.*, Rios v. Calhoon, 889 S.W.2d 257, 258 (Tex. 1994) (per curiam); Ramirez v. Packer, 807 S.W.2d 728, 729 (Tex. 1991, orig. proceeding); Thompson v. Garza, 809 S.W.2d 640, 641 (Tex. App.—Corpus Christi 1991, orig. proceeding). It should also be noted that once indigency is established, the trial court lacks the power to change that status. *See Rios*, 889 S.W.2d at 729.

140. *See* TEX. R. APP. P. 20.1(j); TEX. R. APP. P. 20.1(m). The prior rules, which dealt with how being indigent affects cost allocation, are substantially the same. *See* TEX. R. APP. P. 13(k) (Tex. & Tex. Crim. App. 1986, amended Sept. 1, 1997) (describing the effect of an inability to pay costs).

141. *See* TEX. R. APP. P. 20.1(k).

142. *See id.*; TEX.R. APP. P. 20.1(l). This ability to order partial cost payment by an indigent may be problematic as the exemption language in *Rios v. Calhoon* was absolute. *See Rios*, 889 S.W.2d at 259 (allowing for a party to be "absolutely entitled to the exemption from costs").

IV. PERFECTING APPEAL

A. *Deadlines for Different Appellate Proceedings*

In Texas, an ordinary appeal can be taken only from a final judgment.[143] Under the new rules, the deadline for perfecting an appeal is still measured from the date the trial court judge signs the judgment,[144] but Rule 4.3(a) restarts the appellate clock if the trial court modifies the judgment during the time it retains plenary jurisdiction.[145]

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143. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.012 (Vernon 1997) (stating that an appeal may be taken from a "final judgment"). Discussing what constitutes finality is beyond this Review's scope, but a few general comments will be made. A judgment is final if it purports to adjudicate all claims, particularly when a judgment contains a "Mother Hubbard" clause, which states that the judgment "denies all relief not expressly granted." *See* Mafrige v. Ross, 866 S.W.2d 590, 591 (Tex. 1993). If a judgment inadvertently adjudicates all claims when it should not have done so, the remedy is to either file a motion to modify the judgment or to perfect an appeal. *See* Inglish v. Union State Bank, 945 S.W.2d 810, 811 (Tex. 1997) (per curiam) (stating that one must either timely ask the court to correct its judgment or timely perfect an appeal). Finality in cases involving multiple claims and parties requires special care. Specifically, an order disposing of all the claims of one party is not a final judgment because the judgment has not disposed "of all issues in a case so that no future action by the court is necessary. . . ." North E. Indep. Sch. Dist. v. Aldridge, 400 S.W.2d 893, 895 (Tex. 1966); *see also* Cowan v. Moreno, 903 S.W.2d 119, 121 (Tex. App.—Austin 1995, no writ) (noting that a "judgment is final when it determines the rights of all parties and disposes of all issues in a case so that no future action by the court is necessary to settle the entire controversy."). However, an interlocutory judgment that expressly does not adjudicate all claims and parties *will* become final upon either a non-suit or severance of the claims remaining to be adjudicated. *See* Park Place Hosp. v. Estate of Milo, 909 S.W.2d 508, 510 (Tex. 1995) (holding that the appellate timetable deadlines begin when the severance order is signed); Farmer v. Ben E. Keith Co., 907 S.W.2d 495, 496 (Tex. 1995) (per curiam) (noting that the period to perfect an appeal commences when the parties are disposed of by dismissal or non-suit).

144. *See* TEX. R. APP. P. 26.1. Prior case law followed the same process. *See Farmer*, 907 S.W.2d at 496 (stating that the time for perfecting an appeal begins to run from the signing of the applicable order); Molina v. Kelco Tool & Die, Inc., 904 S.W.2d 857, 860 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (allowing the appellate timetable to begin running following a grant of a partial summary judgment even when the judgment was not final due to a lacking ministerial act).

145. *See* TEX. R. APP. P. 4.3(a) (modifying the judgment while the court retains plenary power will restart the running of the timetable from the time the modification was signed). Presumably, it is still true that, if the record shows that the trial court modified the judgment solely to extend the time to perfect an appeal, the timetable does not restart. *See* Mackie v. Mackie, 890 S.W.2d 807, 808 (Tex. 1994).

1. Changes in Deadlines Under the New Rules

Although the new rules alter existing appellate deadlines only slightly, the new rules add several deadlines as follows:

- Formal bills of exception must be filed on or before the thirtieth day after the notice of appeal, instead of sixty days after the judgment.[146]
- The rules now expressly authorize reply briefs by both appellants and petitioners with a deadline for the filing of these briefs twenty days after the appellee's or respondent's brief is filed.[147] This modification should eliminate the frequent practice of filing a reply brief on the eve of oral argument.
- Finally, under the petition-for-review process in the Texas Supreme Court, new deadlines exist that replace the deadlines under the former writ-of-error practice.[148] The petition for review has a deadline as do requested briefs on the merits.[149] The petition-for-review process is similar to the *certiorari* procedure in the United States Supreme Court and is explained below in Part XVI.

While new deadlines exist, some noteworthy deadlines have disappeared. The appellate lawyer no longer has the responsibility to file the appellate record.[150] Now this responsibility rests solely with the clerks and court reporters even though the appellant must arrange to pay for the record.[151] Under the new rules, appellate courts must accept a late appellate record if the appellant has not caused the delay in filing.[152] If the appellant has caused the delay,

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146. TEX. R. APP. P. 33.2(e)(1).

147. TEX. R. APP. P. 38.6(c); TEX. R. APP. P. 53.5; TEX. R. APP. P. 55.7.

148. *Compare* TEX. R. APP. P. 130(b) (Tex. & Tex. Crim. App. 1986, amended Sept. 1, 1997) (providing that the filing of writ of error be within 30 days of the ruling on all timely filed motions for rehearing), *with* TEX. R. APP. P. 53.7 (establishing a deadline of 45 days from a ruling on all timely filed motions for rehearing in the writ-of-error process).

149. *See* TEX. R. APP. P. 53.7(a) (presenting the deadline for petition filing); TEX. R. APP. P. 55.7 (stating that specific limitations exist for filing both a petition for review and briefs on the merits).

150. *See* TEX. R. APP. P. 35.3 (laying expressly the responsibility for record filing on court clerks and court reporters).

151. *See id.* The rule states that the clerk is to file the record "if notice of appeal has been filed" and the party responsible to pay for the record has paid a fee, has made arrangements to do so, or is exempt from having to pay. *Id.* The court reporter is to file the record if an appellant has requested the record and the party responsible to pay for record has done so, has made arrangements to do so, or is exempt from having to pay. *See id.*

152. *See* TEX. R. APP. P. 35.3(c) (requiring the appellate court to accept the record if an appellant is not at fault for the delinquent filing). This rule changes a somewhat draco-

for example, by not arranging to pay for the record in a timely fashion, the appellate courts may accept the late record, but are not required to do so.[153]

One deadline that has remained, but is no longer crucial, is the deadline for filing a motion for rehearing in the court of appeals.[154] Although motions for rehearing still have the same fifteen-day deadline, they are no longer a jurisdictional prerequisite to Texas Supreme Court jurisdiction.[155]

2. When a Document Is Filed

When a filing is required in the appellate courts by a certain date, four methods of filing now exist under the new appellate rules. Under the first and most frequently used method, the party files the document with the clerk in the appellate court on or before the deadline.[156] The party may also file the document with any judge or justice "who is willing to accept delivery."[157] If this second method is used, the judge or justice "must note on the document the date and time of delivery" and "must promptly send . . . [the document] to the clerk."[158] The noted date and time will be the time of filing.[159]

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nian prior practice of refusal of the appellate record, regardless of the reason if it is untimely. *See* Knight v. Sam Houston Mem'l Hosp., 907 S.W.2d 847, 848–49 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (refusing to relieve the burden on the appellants to file the transcript even when the clerk was injured, and noting that the appellate court has no authority to allow for the filing of a late transcript absent a timely filed motion for extension of time).

153. *See* TEX. R. APP. P. 35.3(c); Utley v. Marathon Oil Co., 958 S.W.2d 960, 961 (Tex. App.—Waco 1998, no pet. h.) (denying motion to extend time to file record when the appellant had not paid or made arrangements to pay for the record).

154. *Compare* TEX. R. APP. P. 49.5 (requiring a 15-day deadline), *with* TEX. R. APP. P. 100(a) (Tex. & Tex. Crim. App. 1986, amended Sept. 1, 1997) (requiring a 15-day deadline).

155. *See* TEX. R. APP. P. 49.9 (stating that a motion for rehearing is no longer a prerequisite for filing a petition of review in the Texas Supreme Court). The former practice required a motion for rehearing in the appellate court before one could appeal to the supreme court. *See* Mendoza v. Eighth Court of Appeals, 917 S.W.2d 787, 789 (Tex. 1996); Oil Field Haulers Assoc. v. Railroad Comm., 381 S.W.2d 183, 187 (Tex. 1964).

156. *See* TEX. R. APP. P. 9.2(a)(1) (stating that the document is filed by delivering it to the clerk of the court in which document is to be filed).

157. TEX. R. APP. P. 9.2(a)(2).

158. *Id.*

159. *See id.* (stating that the date and time of document delivery is considered the time of filing).

A third method of filing in the appellate court allows a party to rely on the "mailbox rule."[160] Under the mailbox rule, the document is timely filed if the court clerk receives it within ten days after the deadline, and if the following requirements are met: (1) the document was sent to the correct clerk by the United States Postal Service, via first-class, express, registered, or certified mail; (2) it was placed in an envelope or a wrapper properly addressed and stamped; and (3) it was placed in the mail within the time requirement for filing.[161] Finally, the fourth method for filing documents is electronic filing, if permitted by local rule,[162] whereby "data [are] transmitted to a . . . clerk of a court of appeals by the communication of information, displayed originally in written form, in the form of digital electronic signals transformed by computer and stored on microfilm, magnetic tape . . . or any other medium."[163]

3. Premature Filings

Several new appellate rules affect various premature filings. First, pursuant to Rule 27.1, a premature notice of appeal is automatically deemed to have been filed on the day of, and immediately after, the appealable judgment or order.[164] A second rule

160. *See* TEX. R. APP. P. 9.2(b) (filing will be considered timely if properly enveloped, stamped, and addressed, or placed in the mail prior to the deadline date); *see also* TEX. R. APP. P. 4(b) (Vernon 1997) (codifying the mailbox rule); Lofton v. Allstate Ins. Co., 895 S.W.2d 693, 693 (Tex. 1995) (per curiam) (recognizing and approving the use of the mailbox rule).

161. *See* TEX. R. APP. P. 9.2(b). Note that the use of commercial carriers does not satisfy the mailbox rule. *See* Mr. Penguin Tuxedo Rental & Sales v. NCR Corp., 777 S.W.2d 800, 801–02 (Tex. App.—Eastland 1989) (articulating that the rules specifically require the use of the United States Postal Service), *rev'd on other grounds*, 787 S.W.2d 371 (Tex. 1990). In determining compliance with the mailbox rule, the appellate court will accept as conclusive proof of compliance: "(1) a legible postmark affixed by the United States Postal Service; (2) a receipt for registered or certified mail if the receipt is endorsed by the United States Postal Service . . .; or (3) a certificate of mailing issued by the United States Postal Service." TEX. R. APP. P. 9.2(b)(2). Furthermore, appellate Rule 9.2(b)(2) expressly states that the appellate court may consider other proof as well. *See id.*; *Lofton*, 895 S.W.2d at 693 (allowing attorney's uncontroverted affidavit to be used as evidence of the mailing date).

162. *See* TEX. R. APP. P. 9.2(c) notes & cmts. (discussing electronic filing as a method for filing documents (citing TEX. GOV'T CODE ANN. §§ 51.801–807 (Vernon's 1987))).

163. TEX. GOV'T CODE ANN. § 57.801 (Vernon 1988).

164. *See* TEX. R. APP. P. 27.1. While the rule number is new, it seems to follow the prior practice under the former Rules 41(c) and 58 which treat premature filings as filed on the date they were supposed to be filed. *Compare* TEX. R. APP. P. 27.1 (treating a prema-

affecting premature filing is Rule 27.2, which applies to any other premature action that is significant for appellate purposes, including a premature motion for new trial, a motion to modify, or a request for findings of facts and conclusions of law.[165] Like its predecessor, former Rule 58(c), Rule 27.2 provides that the appellate court "*may* treat" premature filings as "relating to [the] appeal of [the appealable] order."[166]

Rule 27.2 applies in two basic situations: (1) when a motion is premature because it has been filed prior to any judgment; and (2) when a motion becomes premature because the trial court signs another judgment or order creating a multiple-judgment problem. In multiple-judgment situations, two questions arise. The first is whether the subsequent order or judgment restarts the appellate clock or is simply a nullity. While the answer to that question is not in Rule 27.2, the Texas Supreme Court has adopted a rule mandating that courts view any subsequent judgment or order that vacates or modifies the prior judgment or order as restarting the time to appeal,[167] unless the record shows that the trial judge issued the new judgment or order for the sole purpose of extending the appellate timetable.[168] This common-law rule applies when the subse-

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turely filed appeal notice as effective and filed "on the day of, but after, the event that begins the period for perfecting the appeal"), *with* TEX. R. APP. P. 41(c) (Tex. & Tex. Crim. App. 1986, amended Sept. 1, 1997) (deeming premature filing as filed on the date of but subsequent to the time of the signing of the judgment), *and* TEX. R. APP. P. 58(c) (Tex. & Tex. Crim. App. 1986, amended Sept. 1, 1997) (providing that "proceedings relating to an appeal need not be considered ineffective because of prematurity"). Unfortunately, the effect, if any, Rule 27.1 has upon Texas Rule of Civil Procedure 306c is unclear. *See* TEX. R. CIV. P. 306c; *see also* Fredonia State Bank v. American Life Ins. Co., 881 S.W.2d 279, 282 n.3 (Tex. 1994) (noting, but not resolving, the issue of how premature filings preserve error and affect the appellate timetable with respect to Rule 306c and predecessor of new Rule 27.1, former Rule 58(c)). Texas Rule of Civil Procedure 306c recites that a premature motion for new trial, or a premature request for findings and conclusions, shall be deemed filed "on the date of but subsequent to the time of signing of the judgment." TEX. R. CIV. P. 306c. Therefore, a question remains as to the effect Rule 27.1 may have on Texas Rule of Civil Procedure 306c.

165. *See* TEX. R. APP. P. 27.2.

166. *Id.* (emphasis added). *Compare* TEX. R. APP. P. 27.2 (giving the appellate court the discretion to treat premature filings as relating to the appealable order), *with* TEX. R. APP. P. 58(c) (Tex. & Tex. Crim. App. 1986, amended Sept. 1, 1997) (including the term "may," in accepting premature filings).

167. Check v. Mitchell, 758 S.W.2d 755, 756 (Tex. 1988) (per curiam) (holding that any change in a judgment restarts the appellate timetable).

168. *See* Mackie v. McKenzie, 890 S.W.2d 807, 808 (Tex. 1994) (per curiam) (stating that only if the record shows the modification or entry of a second judgment was used to

quent judgment or order expressly vacates or modifies the prior one.[169]

The second question raised by a premature filing in a multiple-judgment situation is whether the premature motion relates to the subsequent judgment or order. Rule 27.2 answers this question, permitting the courts to treat any premature motion as relating to the final order or judgment.[170] However, the rule does not require appellate courts to give the premature motion such treatment, presumably because in certain situations the premature motion may not apply to the final order or judgment.[171]

Given the discretionary language in Rule 27.2, the safest practice is to refile and not merely rely upon a premature document, other than a premature notice of appeal, to extend the appellate timetable. Therefore, if a party has filed a premature motion for new trial, motion to modify, or a request for findings and conclusions, the party should refile the pleading in a timely manner after a final judgment has been rendered.[172] However, the courts will probably

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enlarge the appellate timetable will the second judgment or modification to the first judgment be considered null).

169. *See* Mullins v. Thomas, 136 Tex. 215, 217, 150 S.W.2d 83, 84 (1941) (holding that a second judgment is a nullity if the record does not show that the first judgment was vacated); Lawrence Sys., Inc. v. Superior Feeders, Inc., 880 S.W.2d 203, 210 (Tex. App.—Amarillo 1994, writ denied) (stating second judgment is a nullity unless it specifically vacates the first judgment); Azbill v. Dallas County Child Protective Servs., 860 S.W.2d 133, 138 (Tex. App.—Dallas 1993, no writ) (noting that a second judgment in the same case is null unless it specifically vacates the first judgment); Gainesville Oil & Gas Co., Inc. v. Farm Credit Bank, 795 S.W.2d 826, 828 (Tex. App.—Texarkana 1990, no writ) (stating that unless a second judgment vacates the first, the second judgment is null). *Mullins*, *Lawrence Systems*, *Azbill*, and *Gainesville Oil* gave no effect to a second judgment that did not purport to vacate the first. Thus, drafters of subsequent judgments should include language vacating any prior judgments.

170. *See* TEX. R. APP. P. 27.2 (discussing "other premature actions").

171. *See id.*

172. A timely refiling is necessary if the premature motion was overruled before the judgment was signed. *Compare* Harris County Hosp. Dist. v. Estrada, 831 S.W.2d 876, 877 (Tex. App.—Houston [1st Dist.] 1992, no writ) (noting that the motion extended the appellate timetable because the supreme court had enacted rules which allow for such extensions), *with* A. G. Solar & Co. v. Nordyke, 744 S.W.2d 646, 647 (Tex. App.—Dallas 1988, no writ) (stating that the motion was ineffective to extend the appellate timetable because the motion had been overruled by operation of law). In *Fredonia State Bank v. American Life Ins. Co.*, 881 S.W.2d 279, 282 & n.2 (Tex. 1994), the supreme court did not expressly resolve the conflict over what effect, if any, an overruled motion for new trial has on the time to appeal from a subsequent judgment. The court did hold that an overruled motion would, in such circumstances preserve a factual sufficiency point for review. *Fredonia State Bank*, 881 S.W.2d at 282.

be liberal in giving effect to a premature filing of one of these three documents, unless it is clear that the premature documents did not in any way relate to the judgment or order on appeal, but to some other ruling.[173]

Finally, Rule 27.3 deals with a different category of premature filing. After an order or judgment is on appeal, the trial court may still modify the order or judgment; furthermore, the court may vacate the order or judgment and replace it with another appealable order or judgment.[174] If any one of these actions occurs, Rule 27.3 commands that appellate courts review the subsequent order or judgment on appeal.[175]

B. *Extensions of Time*

1. General Provisions

Another issue addressed by the revised appellate rules is the extension of time in an appeal. Rule 4.1(b) automatically extends the time for filing an appeal when the courthouse is closed or inaccessible.[176] This extension is in addition to the automatic extension of time that occurs when the due date falls on a Saturday, Sunday, or legal holiday.[177] The amended rules also provide three new avenues of extending deadlines.

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173. *See Fredonia*, 881 S.W.2d at 282 (expressing that the goal for the courts is to hear cases whenever possible because the supreme court desires to decide cases on the merits).

174. *See* TEX. R. CIV. P. 329b(g) (discussing the limits of the trial court's power to change a decision). If an appeal has been perfected before the 30-day limit on a trial court's plenary power has run, the trial court might modify the order or judgment that is the subject of the appeal. *See id.*; *see also* TEX. R. APP. P. 4.3(a) (contemplating the modification of a judgment by the trial court after the appeal is perfected).

175. *See* TEX. R. APP. P. 27.3.

176. *See* TEX. R. APP. P. 4.1(b).

177. *See* TEX. R. APP. P. 4.1(a). Legal holidays include most, but not all, state and national holidays. *See* TEX. GOV'T CODE ANN. § 662.021 (Vernon 1994) (incorporating as legal holidays all national holidays specified in Texas Government Code Section 662.003(a) but only those state holidays listed in Sections 662.003(b)(1)–(6), thus omitting the state holidays in Section 662.003(b)(7)–(9)). The state and national holidays are listed in the Government Code. *See* TEX. GOV'T CODE ANN. § 662.003 (Vernon 1994). There are also case law extensions of the concept of "legal holiday." *See* Miller Brewing Co. v. Villareal, 829 S.W.2d 770, 772 (Tex. 1992) (per curiam) (upholding a holiday that is determined by the county commissioners' court); Dorchester Master Ltd. v. Hunt, 790 S.W.2d 552, 553 (Tex. 1990) (stating the "days recognized by legislative declaration as being general holidays by popular acceptance") (quoting Blackman v. Housing Authority of Dallas, 254 S.W.2d 103, 105 (Tex. 1953)). The rule of inaccessibility may alleviate the need to expand the concept of legal holiday beyond those dates actually listed in the Government Code.

First, Rule 26.3 allows a party to extend the time to file a notice of appeal in an accelerated appeal from an interlocutory order, as well as in an ordinary appeal.[178] This allowance is a change from the prior rules, which arguably did not allow an opportunity to extend the time to perfect an accelerated appeal from an interlocutory order.[179] In order to extend the time for filing a notice of appeal in any type of appeal under the new rules, the party has a deadline of fifteen days after the notice's due date to: (1) file with the appellate court a motion to extend time that reasonably explains the need for an extension;[180] and (2) file in the trial court the past-due notice of appeal.[181]

Second, the new rules have created two new extensions. A party may now seek a fifteen-day extension to file formal bills of excep-

178. *See* TEX. R. APP. P. 26.3. Similar to the old rules, no authorization exists for filing a motion to extend the 30-day deadline to file a motion for new trial, a motion to modify the judgment, a motion to disregard, or a motion for judgment notwithstanding the verdict. *See* TEX. R. CIV. P. 5; *see also* TEX. R. APP. P. 41(c)(2) (allowing only for extensions of time to file cost bond, notice of appeal, affidavit of inability to pay costs, or making a cost deposit). Extensions of time are void when they purport to extend the trial court's power beyond the time proscribed by the rules. *See* TEX. R. CIV. P. 329b(c),(f) (determining that the only method for extending the trial court's plenary power is by timely filing a motion for new trial or a motion to modify the judgment); Bell v. Showa Denko K.K., 899 S.W.2d 749, 757 (Tex. App.—Amarillo 1995, writ denied) (holding that motions filed after the expiration of a trial court's plenary power cannot be considered by either the appellate or trial court). An exception to this rule exists, however, when an adversely affected party does not receive notice of a judgment. *See* TEX. R. APP. P. 4.5; TEX. R. CIV. P. 306a(4).

179. *See* Rosanky v. Seal-Pac Professional Servs., Inc., 775 S.W.2d 675, 675-76 (Tex. App.—Houston [14th Dist.] 1989, writ denied); St. Louis Federal Savings & Loan Ass'n v. Summerhouse Joint Venture, 739 S.W.2d 441, 442 (Tex. App.—Corpus Christi 1987, no writ).

180. *See* TEX. R. APP. P. 26.3(b) (including a motion containing a reasonable explanation as per Rule 10.5(b)); *see also* National Union Fire Ins. Co. v. Ninth Court of Appeals, 864 S.W.2d 58, 60 (Tex. 1993) (defining that a reasonable explanation consists of demonstrating that the failure to file was the result of inadvertence, mistake, or mischance and not the result of deliberate or intentional conduct); Garcia v. Kastner Farms, Inc., 774 S.W.2d 668, 670 (Tex. 1989) (noting that even professional negligence is a reasonable explanation to extend time, as long as the conduct is not intentional noncompliance); Meshwert v. Meshwert, 549 S.W.2d 383, 384 (Tex. 1977) (any "plausible statement of circumstances" indicating that failure was not deliberate or intentional noncompliance may be reasonable to extend time for filing a notice). *But see* Verburgt v. Dorner, 959 S.W.2d 615, 617 (Tex. 1997) (stating that late cost bond filed in good faith within 15-day deadline for motion to extend time to perfect appeal implies timely motion for extension).

181. *See* TEX. R. APP. P. 26.3.

tion.[182] In addition, a party may seek a fifteen-day extension to request permission to appeal as an indigent under Rule 20.[183]

The most common time for parties to seek extensions is during the briefing process. Rule 38.6 allows extensions for filing an appellant's brief in the courts of appeal upon a motion filed before or after the brief's due date.[184] The rule suggests that an extension in the appellant's favor will postpone the submission of the case.[185] By statute, the appellant's briefing delay will also suspend accrual of post-judgment interest during the delay.[186] Curiously, the rule refers only to the appellant.[187] Although Rule 38.6 does not refer to extending the due date for an *appellee*'s brief, the import of this silence is not clear. Perhaps no extension is permitted. The new rules do give the appellee thirty days to file a reply brief instead of the twenty-five days provided under the old rules.[188] It is doubtful that the Texas Supreme Court intended to eliminate extensions for appellees simply by giving appellees five additional days to file a reply brief.

Assuming that the new rules do not deny extensions of time for the appellee's brief, counsel for an appellee should consider: (1) filing a motion for extension of time, which may be rejected because such a motion is not authorized under the rules; (2) sending a letter to the court requesting consent to file a late appellee's brief; and/or (3) filing a motion invoking Rule 2 of the Texas Rules of Appellate Procedure, which now permits appellate courts to suspend rules for "good cause."[189] Given the uncertainty over the cor-

182. *See* TEX. R. APP. P. 33.2(e)(3).

183. *See* TEX. R. APP. P. 20.1(c)(3).

184. *See* TEX. R. APP. P. 38.6(d).

185. *See id.* (stating that "the appellate court may extend the time for filing the appellant's brief and may postpone submission of the case").

186. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.05, § 3(c) (Vernon 1987).

187. *See* TEX. R. APP. P. 38.6(d) (stating that the "appellate court may extend time for filing the appellant's brief").

188. *Compare* TEX. R. APP. P. 38.6(b) (requiring brief filing within 30 days), *with* TEX. R. APP. P. 74(m) (Tex. & Tex. Crim. App. 1986, amended Sept. 1, 1997) (requiring brief filing within 25 days).

189. *See* TEX. R. APP. P. 2 (dictating when the appellate rules can be suspended). Before September 1, 1997, Rule 2 allowed for the suspension of the rules only in criminal cases. *See* Ludwig v. Ensearch Corp., 845 S.W.2d 338, 340 (Tex. App.—Houston [1st Dist.] 1992, no writ) (per curiam) (holding that time limits for filing bonds on appeal are mandatory and jurisdictional and thus cannot be modified or suspended); Krasniqi v. Dallas County Child Prot. Serv., 809 S.W.2d 927, 930 (Tex. App.—Dallas 1991, writ denied)

rect course of action, appellee's counsel should communicate with the court of appeals well in advance of the deadline for the appellee's brief to discover how the particular court will handle an appellee's request for additional briefing time.[190]

Failure to communicate with the court regarding additional briefing time could have dire consequences. Conceivably, the court of appeals could decide the case before the appellee files a responsive brief. In fact, Rule 39.8 allows the court of appeals to decide a case without oral argument.[191] Additionally, Rule 38.3 specifically contemplates that an appellate court "may consider and decide the case before a reply brief is filed."[192] Moreover, without an appellee's brief that contradicts the appellant's assertions, the court of appeals is instructed by Rule 38.1(f) to "accept as true" the contents of the statement of facts in the appellant's brief.[193]

The extensions of time addressed by the new rules of appellate procedure also relate to the petition for review process in the Texas Supreme Court.[194] The petition for review process has replaced the application for writ of error previously relied on to appeal to the supreme court. The rules allow a fifteen-day extension for the

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(finding that the provisions which allow for the suspension of the appellate rules only apply in criminal matters).

190. 3d (Tex.) Dist. Ct. (memorandum describing the court's general procedures) (on file with the *St. Mary's Law Journal*). The Third Court of Appeals in Austin provides in part as follows: "Motions for extension of time to file the appellee's brief are not permitted and will not be filed. TEX. R. APP. P. 38.6(d). The appellee's brief may be filed without leave of the Court at any time. The appellee's failure to file a brief will not delay submission or decision of an appeal." *Id.* According to the author's unofficial survey of court personnel in the clerks' offices in all 14 courts of appeals, the Fifth Court of Appeals in Dallas joins the Third Court's position that an appellee cannot obtain an extension. All other courts indicated that they would grant an extension. One court stated its preference for a motion but would treat a letter request as a motion. Some court personnel expressed confusion over: (1) whether an extension is allowed; and (2) whether a request for extension must be filed by the brief's due date or whether it can be filed within 15 days after the due date. The results of this unofficial survey underscore the need to confer with the particular court on this subject.

191. *See* TEX. R. APP. P. 39.8.

192. TEX. R. APP. P. 38.3.

193. *See* TEX. R. APP. P. 38.1(f).

194. *See* TEX. R. APP. P. 53.1 (replacing the writ-of-error practice with the petition for review process); *see also* TEX. R. APP. P. 53.7(f) (commenting that an extension may be granted to file a petition for review).

petition for review, as well as allowing an extension for a response to the petition and a reply to the response.[195]

2. Extending the Appellate Timetable

Rule 26.1, which can act to extend the appellate timetable, is one of the new rules that may create confusion. Rule 26.1 states that a party must perfect an appeal by filing a notice of appeal "within [thirty] days after the judgment is signed."[196] Rule 26.1 extends the deadline to ninety days after the trial court signs the judgment or order if *any* party, including a party other than the one attempting to perfect the appeal,[197] files any of the following:

> (1) a motion for new trial; (2) a motion to modify the judgment [or order]; (3) a motion to reinstate under Texas Rule of Civil Procedure 165a; or (4) a request for findings of fact and conclusions of law if findings and conclusions either are required . . . or . . . could properly be considered by the appellate court.[198]

The phrasing of the rule raises an issue as to whether Rule 26.1 overrules case law that holds the timetable is extended by *any* motion that assails a final judgment or order as the rule limits extensions of the appellate timetable to the specific filings noted

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195. *See* TEX. R. APP. P. 53.7(f).

196. TEX. R. APP. P. 26.1.

197. *See id.* The words "any party" in Rule 26.1 echo existing law. Before the 1981 amendments to the Texas Rules of Civil Procedure, Texas courts held that an appellant had to base his appeal on his own actions and could not rely on the acts of other parties to extend the time during which he had to take the required appellate steps. *See* Angelina County v. McFarland, 374 S.W.2d 417, 421 (Tex. 1964) (requiring an appeal to be based on appellant's own actions); Neuhoff Bros., Packers v. Acosta, 160 Tex. 124, 127, 327 S.W.2d 434, 436 (1959) (affirming that one party's motion for a new trial did not extend the time for which the other party could file an appeal bond); Peurifoy v. Wiebusch, 125 Tex. 207, 209, 82 S.W.2d 624, 625 (1935) (refusing to allow a party to perfect an appeal based on a co-party's perfection of appeal). Thus, a motion for new trial filed by one party did not extend the timetable for perfection of appeal by parties who had not filed motions for new trial. *See Neuhoff Bros.*, 160 Tex. at 127, 377 S.W.2d at 436; *Peurifoy*, 125 Tex. at 209, 82 S.W.2d at 625. In 1981, Rule 356 was rewritten to provide for an enlargement of time if "any party" filed a motion for new trial. *See* TEX. R. CIV. P. 356 (Vernon 1981). This Rule was carried forward into Texas Rule of Appellate Procedure 41(a)(1), which is now 26.1 of the current rules. *See* TEX. R. APP. P. 26.1(a). Thus, the *Peurifoy* rule died in 1981. *See* State v. Daniels, 806 S.W.2d 838, 840 (Tex. Crim. App. 1991) (en banc) (noting that the *Peurifoy* rule has been eliminated).

198. TEX. R. APP. P. 26.1(a).

above.[199] Consequently, the safest practice is to accept Rule 26.1 on its face as allowing an extension only if a party files one of the specified four documents.

Questions regarding extension of the appellate timetable will also arise in matters involving the effect of a request for findings of fact and conclusions of law. Because requests for findings of facts and conclusions of law that arise in a nonjury trial extend the appellate timetable, it is necessary to determine what types of proceedings qualify as nonjury trials. The appellate timetable will likely not be extended in a summary judgment proceeding in which findings of fact and conclusions of law are requested because a summary judgment proceeding does not qualify as a nonjury trial under the Texas Supreme Court's decision in *Linwood v. NCNB Texas*.[200] Rule 26.1, however, addresses this issue by codifying several opinions that the supreme court issued shortly before the new rules became effective.[201] In those decisions, the supreme court held that requests for findings of fact and conclusions of law extend the appellate timetable when an evidentiary hearing results in a sanction order or a dismissal.[202] Presumably, a request for findings and conclusions will extend the appellate timetable whenever a judgment is based, as a whole or in part, on an evidentiary hearing.[203] While case law tends to allow an extension of time to perfect an appeal when an evidentiary hearing is held, the new rules

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199. *See, e.g.*, Gomez v. Texas Dep't of Criminal Justice, 896 S.W.2d 176, 176-77 (Tex. 1995) (per curiam) (extending the amount of time in which a bill of review may be filed); Landmark Am. Ins. v. Pulse Ambulance Serv., 813 S.W.2d 497, 499 (Tex. 1991) (noting that time had been extended for perfecting an appeal).

200. 885 S.W.2d 102 (Tex. 1994). Some questions have arisen regarding whether or not a summary judgment proceeding qualifies as a non-jury trial. The *Linwood* case held that a summary judgment was *not* a trial. *See Linwood*, 885 S.W.2d at 103.

201. *See* Phillips v. Beavers, 938 S.W.2d 446, 447 (Tex. 1997) (per curiam) (holding that Rule 41 (now Rule 26.1) allows time for the findings to be filed when "they may be useful for appellate review"); IKB Indus. Ltd. v. Pro-Line Corp., 938 S.W.2d 440, 442–43 (Tex. 1997) (holding that a "request for findings of fact and conclusions of law extends the time for perfecting appeal" when such a request is required); Awde v. Dabeit, 938 S.W.2d 31, 33 (Tex. 1997) (per curiam) (reaffirming that a timely filed request extends the time for perfecting an appeal when such a request is required).

202. *See Phillips*, 938 S.W.2d at 447 (concluding that the appellate timetable is extended by the timely filing of findings of fact and conclusions of law); *IKB Indus. Ltd.*, 938 S.W.2d at 442-43 (discussing the effect of findings of fact and conclusions of law on the appellate timetable).

203. *See Phillips*, 938 S.W.2d at 447 (examining the effects of a request for the findings of fact as depending upon the basis for the request).

expressly state that time to perfect an appeal is extended by a request for findings of fact and conclusions of law when such a request "could be properly considered by the appellate court,"[204] even if the request is not required by the Texas Rules of Civil Procedure.

A case decided on summary judgment presents different problems regarding extending the appellate timetable. Uncertainty exists about whether a motion for new trial extends the appellate timetable in an appeal from a summary judgment. Case law holds that a motion for new trial extends the appellate timetable,[205] even though a motion for new trial in this context serves no purpose because a summary judgment is not a trial in which a motion for new trial can be made.[206]

In *Chavez v. Housing Authority*,[207] the El Paso Court of Appeals noted the conflict between the previous line of cases and the *Linwood* decision stating that a summary judgment is not a trial for the purpose of a request for findings and conclusions.[208] The court of appeals then questioned whether *Linwood* could be read as preventing a party from extending the appellate deadlines for a summary judgment.[209] The court implied that a motion to modify, rather than a motion for new trial, is the logically correct motion to

204. TEX. R. APP. P. 26.1(a)(4).

205. *See* Padilla v. LaFrance, 907 S.W.2d 454, 458 (Tex. 1995) (noting that a party's motion for rehearing was the equivalent of a motion for new trial, thus extending the appellate timetable); Stafford v. O'Neill, 902 S.W.2d 67, 68 (Tex. App.—Houston [1st Dist.] 1995, no writ) (indicating that the motion for new trial extended the period of time in which to perfect the appeal); Sewell v. Adams, 854 S.W.2d 257, 260 (Tex. App.—Houston [14th Dist.] 1993, no writ) (opining that a motion for new trial extended the time for the appellant to perfect his appeal); Mitre v. Brooks Fashion Stores, Inc., 818 S.W.2d 154, 156 (Tex. App.—Corpus Christi 1991, no writ) (holding that the motion for new trial extended the appellate timeline).

206. *See* Horlock v. Horlock, 614 S.W.2d 478, 483 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.) (distinguishing summary judgment from "a trial on the merits").

207. 897 S.W.2d 523 (Tex. App.—El Paso 1995, writ denied).

208. *See Chavez*, 897 S.W.2d at 525–26 (delineating the line of appellate court cases allowing summary judgment to act as a trial for findings and conclusions and noting *Linwood* holding by the supreme court specifying that a summary judgment is not a non-jury trial).

209. *See id.* at 526 n.1 (attempting to understand the proper method of extending the appellate timetable following a summary judgment).

file after a summary judgment.[210] The court further observed that former Rule 41, which dealt with perfecting an ordinary appeal, did not specify a motion to modify as a means of extending the appellate timetable;[211] whereas, Texas Rule of Civil Procedure 329b(g) provides that a motion to modify extends the trial court's plenary power and the appellate timetable in the same manner as a motion for new trial.[212]

Uncertainty remains as to whether the supreme court accepted the El Paso Appellate Court's reasoning. The confusion in the case law is probably due to the reference in former Rule 41 to "a case tried without a jury."[213] That language does not appear in Rule 26.1,[214] which includes a motion to modify the judgment as a valid method to extend the appellate timetable.[215] Because of the supreme court's desire to decide cases on the merits coupled with the unqualified statement in Rule 26.1 that a motion for new trial extends deadlines, a motion for new trial probably still operates to extend deadlines in a summary judgment appeal. Until the courts resolve the issue, the safest practice for a party desiring to extend the appellate timetable is to file a motion to modify or a combined motion for new trial and motion to modify after a summary judgment.

Finally, extending the appellate timetable is not the same as extending the trial court's plenary jurisdiction to modify or set aside a judgment. Extending the appellate timetable simply gives a party more time to file a notice of appeal.[216] Extension of the appellate

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210. *See id.* (indicating that a motion to modify, reform, correct, or vacate the judgment extends the appellate timeline).

211. *See id.* at 525–26. *Compare* TEX. R. APP. P. 26.1(a)(2) (expanding extension of timetable when a motion to modify is filed), *with* TEX. R. APP. P. 41 (Tex. & Tex. Crim. App. 1986, amended Sept. 1, 1997) (remaining silent regarding motions to modify).

212. *See* TEX. R. CIV. P. 329b(g).

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

214. *Compare* TEX. R. APP. P. 26.1(a)(4) (omitting reference to cases tried without a jury), *with* TEX. R. APP. P. 41(a)(1) (Tex. & Tex. Crim. App. 1986, amended Sept. 1, 1997) (referring only to cases tried without a jury).

215. *See* TEX. R. APP. P. 26.1(a)(2).

216. *See* Mesa Agro v. R.C. Dove & Sons, 584 S.W.2d 506, 509 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.) (noting that an action on a judgment by the trial court within its plenary power does not destroy a right to appeal and noting the differences between the plenary power of the trial court and the appellate timetable).

timetable does not affect the trial court's plenary power.[217] The trial court may lose power to vacate or modify the judgment before a notice of appeal is due, or it may retain that power after the appellate process is underway.[218]

3. Motions for Extension of Time

In order to extend an appellate deadline, the party usually must file a motion for extension of time. There may be two exceptions, however, under the new rules. First, a motion to extend may not be the appropriate method for extending time to file an appellee's brief, as discussed above.[219] Second, Rule 2 now allows Texas appellate courts to suspend the rules of appellate procedure, either on motion by party or by the court's own initiative.[220] Rule 2 permits suspension of the rules of appellate procedure for two reasons: (1) to expedite a decision; or (2) for good cause.[221] The only limitation to Rule 2 is that the court cannot alter the time for perfecting an appeal in a civil case.[222] Thus, Rule 2 should not apply to any extension of time to file a notice of appeal or to file a petition for review in the Texas Supreme Court. All other deadlines are conceivably subject to Rule 2, although reliance on this rule should be a last resort rather than a preferred method of procedure.

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217. *See id.* (articulating scope of Rule 5 as addressing enlargement of the appellate timetable, not a trial court's plenary power timeline).

218. Texas Rule of Civil Procedure 329b governs plenary trial-court jurisdiction, whereas Texas Rule of Appellate Procedure 26.1 governs the time for filing a notice of appeal. *Compare* TEX. R. APP. P. 26.1 (providing timeframe in which to file for an appeal), *with* TEX. R. CIV. P. 329b (stating when a court's plenary power expires). For example, if a motion for new trial and to modify the judgment is filed on the day after the trial court signs the judgment, and if the trial court overrules that motion by written and signed order on the same day as its filing, then the trial court will lose plenary jurisdiction at the end of the 30th day after signing of the judgment under the provisions of Texas Civil Procedure Rule 329b, but the losing party will still have 90 days to appeal after the signing of the judgment. *See* TEX. R. CIV. P. 329b. By contrast, if the motion for new trial and to modify the judgment is filed on the 30th day after the trial court signs the judgment, and the motion is overruled by operation of law, then the trial court's plenary jurisdiction will survive until the end of the 105th day after the signing of the judgment, which is beyond the 90-day deadline to file a notice of appeal. *See id.*

219. *See* notes 186–89 and accompanying text.

220. *See* TEX. R. APP. P. 2 (allowing for the suspension of the Texas Rules of Appellate Procedure).

221. *See id.*

222. *See id. But cf.* Verburgt v. Dorner, 959 S.W.2d 615, 617 (Tex. 1997) (holding that a motion for extension of time is implied when a party files a late cost bond, believing in good faith that it has perfected a timely appeal).

In a motion to extend time, Rule 10 governs numerous aspects of the motion, including the contents required in the motion.[223] Furthermore, the requirement that any motion be verified no longer exists, unless the motion contains facts that are: "(a) not in the record; (b) not within the court's knowledge in its official capacity; or (c) not within the personal knowledge of the attorneys signing the motion."[224]

In addition to the contents specified above, Rule 10.5(b)(1) requires that a motion to extend time contain four additional statements: (1) the applicable deadlines; (2) the length of extension requested; (3) the facts relied upon, which explain the reason for an extension; and (4) the number of extensions previously granted.[225] An exception to this rule is a motion to extend time to file a notice of appeal.

Under Rule 10.5, a motion to extend time to file a notice of appeal imposes a different set of requirements.[226] The motion must state: (1) the motion's deadline; (2) the facts relied upon as a reasonable explanation of the need for an extension; (3) the identity of the trial court; (4) the date the trial court rendered the judgment or appealable order; and (5) the trial-court case number and the style of the case.[227]

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223. *See* TEX. R. APP. P. 10. The rule states that, unless another form is prescribed by the rules, all motions must:

(1) contain or be accompanied by any matter specifically required by a rule governing such a motion;
(2) state with particularity the grounds on which it is based;
(3) set forth the order or relief sought;
(4) be served and filed with any brief, affidavit, or other paper filed in support of the motion; and
(5) in civil cases, contain or be accompanied by a certificate stating that the filing party conferred, or made a reasonable attempt to confer, with all other parties about the merits and motion and whether those parties oppose the motion.

Id.

224. TEX. R. APP. P. 10.2. Prior practice required that all motions which were dependant on facts be verified unless the facts were apparent in the record, or known by the court *ex officio*. *See* TEX. R. APP. P. 19(d) (Tex. & Tex. Crim. App. 1986, amended Sept. 1, 1997).

225. *See* TEX. R. APP. P. 10.5(b)(1).

226. *See* TEX. R. APP. P. 10.5(b)(2).

227. *See id.* It should also be noted that Rule 10.5 contemplates motions to extend time. *See id.* Rule 10.5(c) governs motions to postpone oral argument by stating that, "[u]nless all parties agree, or unless sufficient cause is apparent to the court, a motion to postpone argument of a case must be supported by sufficient cause." TEX. R. APP. P. 10.5(c).

Finally, Rule 10.5 applies to a motion to extend time to file a petition for review.[228] In addition to the requirements of Rule 10.5(b)(1), such a motion must state the following: (1) the identity of the court of appeals; (2) the date of the judgment by the court of appeals; and (3) the style of the case and the case number in the court of appeals.[229]

4. Extending Time—No Notice of Appellate Court Judgment

Rule 4.5 now provides a means for extending time to obtain review by the Texas Supreme Court when a party does not receive notice of the judgment of the appellate court.[230] Rule 4.5(a) allows a party to move for additional time to file a motion for rehearing or a petition for review.[231] This extension is permitted if the moving party did not receive notice of the judgment from the clerk or acquire actual knowledge that the court had rendered judgment until after the time expired for filing the document.[232]

Rule 4.5(b) establishes filing of a motion as the proper procedure to obtain the extension of time.[233] The rule states,

> The motion must state the earliest date when the party or the party's attorney received notice or acquired actual knowledge that the judgment had been rendered. The motion must be filed within 15 days of that date but in no event more than 90 days after the date of the judgment.[234]

Rule 4.5 also designates *where* a motion should be filed. This rule requires that "[a] motion for additional time to file a motion for rehearing" be "filed in and ruled on by the court of appeals in

228. *See* TEX. R. APP. P. 10.5(b)(3).

229. *See id.* (articulating the elements contained in a motion to extend time). The appendix to this Review contains sample motions that serve as a guide to preparing the various types of motions to extend time that are now available.

230. *See* TEX. R. APP. P. 4.5; *see also* Montalvo v. Rio Nat'l Bank, 885 S.W.2d 235, 238 (Tex. App.—Corpus Christi 1994, no writ) (per curiam) (looking to the motion to note that the appellant had no notice of the judgment in enlarging the appellate timetable); Vineyard Bay Dev. Co., Inc. v. Vineyard on Lake Travis, 864 S.W.2d 170, 172 (Tex. App.—Austin 1993, no writ) (per curiam) (allowing for the enlargement of the appellate timetable when the appellant had no notice of the judgment).

231. *See* TEX. R. APP. P. 4.5(a).

232. *See id.* (adopting the mode of time extension in which no notice of judgment comes from appellate court).

233. *See* TEX. R. APP. P. 4.5(b).

234. *Id.*

which the case is pending."[235] Furthermore, "[a] motion for additional time to file a petition for review must be filed in and ruled on by the [Texas] Supreme Court."[236]

Under Rule 4.5(d), "[i]f the court finds that the motion for additional time was timely filed and the party did not—within the time for filing the motion for rehearing, petition for review, or petition for discretionary review . . .—receive the notice or have actual knowledge of the judgment, the court must grant the motion."[237] "If the court grants the motion, the time for filing the document will begin to run on the date when the court grants the motion."[238]

5. Accelerating the Briefing Schedule and Order of Submission

Most appellate lawyers are concerned about extending time to file briefs and pleadings, but they should also be aware that the parties can accelerate the briefing and submission period. First, filing the appellant's brief begins the clock for the appellee's brief, so an early filing of the appellant's brief accelerates the briefing process under Rule 38.6.[239] Second, Rule 40.1(c) allows the court of appeals to give precedence to "a case that the court determines should be given precedence in the interest of justice" as well as accelerated appeals and "a case given precedence by law."[240] Rules 40.1 and 38.6 replace the former procedure for a discretionary accelerated appeal.[241] No similar acceleration or precedence provisions concerning briefing and submission exist in the Texas Supreme Court. Appeals from interlocutory orders continue to be

235. TEX. R. APP. P. 4.5(c)(1).

236. TEX. R. APP. P. 4.5(c)(2).

237. TEX. R. APP. P. 4.5(d).

238. *Id.*

239. *See* TEX. R. APP. P. 38.6 (specifying the time framework to file briefs).

240. TEX. R. APP P. 40.1(c).

241. *See* TEX. R. APP. P. 28 notes & cmts. (acknowledging replacement of the old rules with Rules 40.1 and 38.6); *cf.* TEX. R. APP. P. 42 (Tex. & Tex. Crim. App. 1986, amended Sept. 1, 1997) (establishing mode of accelerating appeals).

accelerated under the new rules.[242] In addition, an appeal in a quo warranto proceeding remains as an accelerated appeal.[243]

C. *Notice of Appeal*

The new rules streamline the perfecting of an appeal. Instead of an appeal bond or cash deposit to perfect appeal, a notice of appeal now perfects an appeal.[244] To perfect an appeal, the notice of appeal must be filed with the trial court clerk. However, if a party mistakenly files the notice of appeal with the appellate clerk, the notice is still effective.[245] Nevertheless, if notice is filed with the appellate clerk, the clerk must send a copy of the notice to the district clerk.[246] This "notice of appeal must be filed within 30 days after the judgment is signed,"[247] unless a motion for new trial or motion to modify is timely filed.[248] In such a case, the date for perfection is ninety days after the trial court signs the judgment.[249] However, a motion for extension of time to perfect appeal can be filed in the appellate court within fifteen days after the due date for the notice of appeal.[250] Unless a party takes appropriate action within that fifteen days, the appeal cannot be perfected or resurrected.[251] However, when one party files a notice of appeal, any other party may file its own notice of appeal either with the usual

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242. *See* TEX. R. APP. P. 26.1(b) (stipulating that there are 20 days to file a notice of appeal in an accelerated appeal); TEX. R. APP. P. 28.1 (stating the general rule on accelerated appeal from interlocutory order); TEX. R. APP. P. 35.1(b) (requiring appellate record to be filed 10 days after notice of appeal); TEX. R. APP. P. 38.6(a) (stating that the appellant's brief is due 20 days after the record is filed); TEX. R. APP. P. 38.6(b) (stipulating that the appellee's brief is due 20 days "after the appellant's brief was filed").

243. *See* TEX. R. APP. P. 28.2.

244. *See* TEX. R. APP. P. 25.1(a); *cf.* Maxfield v. Terry, 888 S.W.2d 809, 811 (Tex. 1994) (per curiam) (establishing the need to file a cost bond in order to invoke appellate jurisdiction).

245. *See* TEX. R. APP. P. 25.1(a).

246. *See id.*

247. TEX. R. APP. P. 26.1.

248. *See id.*

249. *See id.*

250. *See* TEX. R. APP. P. 26.3.

251. *See* Verburgt v. Dorner, 959 S.W.2d 615, 617 (Tex. 1997) (noting that a party must file a timely motion for extension or file a perfecting instrument in good faith within a 15-day period, which implies a timely motion for extension); Chavez v. Housing Auth., 897 S.W.2d 523, 527 (Tex. App.—El Paso 1995, writ denied) (holding that errors to timing of an appeal perfection deprive the court of jurisdiction).

thirty-day period or fourteen days after the first party filed notice of appeal, whichever time is later.[252]

A notice of appeal must be filed by any party seeking to modify the trial court's judgment or order,[253] a significant rule change resulting in a very narrow scope for cross-appeals. Cross-appeals are now limited to situations in which a judgment n.o.v. has been granted.[254] When a losing party perfects an appeal, the party prevailing in the trial court may assert by cross-point any additional ground that would vitiate the verdict besides the one accepted by the trial court in rendering a judgment n.o.v.[255] Any party wanting more relief than the judgment grants must file its own notice of appeal.[256] Regardless, a party who has not filed a notice of appeal may obtain a more favorable judgment on a showing of just cause,[257] but that will probably be a rare event.

Each appellant must serve its notice of appeal "on all parties to the trial court's final judgment."[258] In addition, the appellant must file a copy of the notice of appeal with the appellate clerk under Rule 25.1(e).[259]

In addition, Rule 25.1(f) states that "[a]n amended notice of appeal correcting a defect or omission in an earlier filed notice may be filed in the appellate court" before the appellant's brief is due.[260] However, an amended notice may be "struck for cause on the motion of any party affected by the amended notice."[261] Thus, "[a]fter the appellant's brief is filed, the notice may be amended

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252. *See* TEX. R. APP. P. 26.1(d).

253. *See* TEX. R. APP. P. 25.1(c) (establishing who must file notice). This process removes the cross-point from the practice of successful appellants. Now the cross point is only used to further support a verdict. *See* TEX. R. APP. P. 38.2(b)(1). If a verdict is challenged, the party who is objecting to the judgment must file their own notice of appeal. *See* TEX. R. APP. P. 25.1(c).

254. *See* TEX. R. APP. P. 25.1(c).

255. *See* TEX. R. APP. P. 38.2(b) (requiring the forwarding of cross-points which would support the lower court's action).

256. *See* TEX. R. APP. P. 25.1(c).

257. *See id.* It should be noted that the prior rules contained no language similar to the "just cause" language in rule 25.1(c) and, as a consequence, a party who won could appeal the judgment for any reason. *See generally* TEX. R. APP. P. 40 (Tex. & Tex. Crim. App. 1986, amended Sept. 1, 1997).

258. TEX. R. APP. P. 25.1(e).

259. *See id.*

260. TEX. R. APP. P. 25.1(f).

261. *Id.*

only on leave of the appellate court and on such terms as the court may prescribe."[262]

A special type of notice of appeal is a notice of a restricted appeal. A restricted appeal is the new term for what was formerly called an appeal by writ of error under former Rule 45.[263] The nature of a restricted appeal should be the same as under the former writ-of-error practice.[264] Under prior case law, the four elements necessary for a review by writ of error were the following: (1) the petition must be brought within six months of the date of judgment; (2) it must be brought by a party to the suit; (3) the party seeking writ of error review must not have participated in the trial; and (4) the error must be apparent from the face of the record.[265] New Rules 25 and 26 expressly incorporate the first, second, and third elements.[266] Rules 25 and 26 do not specifically require that the error appear "on the face of the record," but neither did former Rule 45 governing writs of error.[267]

In a restricted appeal, the notice of appeal must:

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262. *Id.* Because the method of perfecting appeal is different, some consideration needs to be given to the parties who are affected by the amendment. Because the notice of appeal is now the mode of perfecting an appeal, if an amendment to the notice is allowed, parties can be affected differently than they would have been under the old practice of simply filing a cost bond. Nothing in the prior practice is similar.

263. *See* TEX. R. APP. P. 45 (Tex. & Tex. Crim. App. 1986, amended Sept. 1, 1997).

264. *See* TEX. R. APP. P. 30 notes & cmts. (stating that statutes relating to writ-of-error appeals apply equally to the restricted appeal); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 51.012 (setting the jurisdictional amount); *id.* § 51.013 (establishing the six-month time limit).

265. *See* TEX. R. APP. P. 30; Texaco v. Central Power & Light Co., 925 S.W.2d 586, 589 (Tex. 1996); General Elec. Co. v. Falcon Ridge Apartments Joint Venture, 811 S.W.2d 942, 943 (Tex. 1991); Stubbs v. Stubbs, 685 S.W.2d 643, 645 (Tex. 1985); Brown v. McClennan County Children's Protective Servs., 627 S.W.2d 390, 392 (Tex. 1982); Zuyus v. No'Mis Communications, Inc. 930 S.W.2d 743, 745 (Tex. App.—Corpus Christi 1996, no writ); South Mill Mushrooms Sales v. Weenick, 851 S.W.2d 346, 349 (Tex. App.—Dallas 1993, writ denied); *see also* DSC Fin. Corp. v. Moffitt, 815 S.W.2d 551, 551 (Tex. 1991) (per curiam) (stating that in determining whether the appellant met the requirement that error appear on the face of the record, the "court of appeals . . . may consider all of the papers on file in the appeal including the statement of facts"); *cf.* McDonough v. Williamson, 742 S.W.2d 737, 739 (Tex. App.—Houston [14th Dist.] 1987, no writ) (collecting cases holding that evidentiary sufficiency challenges can be made in an appeal by writ of error to satisfy the element that error must be apparent from the face of the record).

266. *See* TEX. R. APP. P. 25; TEX. R. APP. P. 26.

267. *See* TEX. R. APP. P. 25; TEX. R. APP. P. 26; TEX. R. APP. P. 45 (Tex. & Tex. Crim. App. 1986, amended Sept. 1, 1997).

> (A) state that the appellant is a party affected by the trial court's judgment but did not participate—either in person or through counsel—in the hearing that resulted in the judgment complained of; (B) state that the appellant did not timely file either a postjudgment motion, request for findings of fact and conclusions of law, or notice of appeal; and (C) be verified by the appellant if the appellant does not have counsel.[268]

D. *Multiple Appellants*

Multiple appellants increase the potential for multiple briefs. This increase triggers Rule 38.4, which discusses the aggregate page limits for all briefs filed by a party.[269] When an appeal involves multiple appellants, confusion may arise regarding: (1) who pays for the record; (2) the style of the case;[270] and (3) which party is entitled to rebuttal argument in light of the requirement that "the appellant must be allowed to conclude [oral] argument."[271]

E. *Docketing Statement*

The new rules require a practice that some courts of appeals had already adopted: the parties file a docketing statement in the courts of appeals.[272] The docketing statement[273] is an administra-

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268. *See* TEX. R. APP. P. 25.1(d)(7).

269. *See* TEX. R. APP. P. 38.4 (discussing that the aggregate number of pages filed by a party may not exceed 90).

270. *See* TEX. R. APP. P. 39.8. Rule 39.8 now allows the courts of appeals to advance cases without oral argument if "argument would not significantly aid the court." *Id.* In an appropriate case, an appellate lawyer could file a motion under Rule 39.8 and request a disposition without argument. *See id.*

271. TEX. R. APP. P. 39.3.

272. *See* TEX. R. APP. P. 32 (requiring appellants to file docketing statements in the appellate court after perfecting appeals in civil or criminal cases).

273. *See* TEX. R. APP. P. 32.1. While each court is likely to develop its own docketing statement, Rule 32.1 requires the docketing statement to request the following information:

- the name of the trial court and the judge who tried the case;
- the names of all parties to the judgment;
- the names and other identifying information about the parties' counsel;
- the date the trial court signed the judgment;
- the dates of notice of appeal;
- dates of certain post-trial motions and other instruments filed in the trial court;
- general nature of the case;
- whether the appeal is accelerated or one that should be given priority submission;
- whether the appellant seeks temporary ancillary relief;

tive tool and not a jurisdictional instrument,[274] its purpose being to summarize information pertinent to the case on appeal, including party names, specific dates, and other information about the case.[275] It is important to note that the appellant's failure to file a docketing statement may be grounds for the court of appeals to dismiss the appellant's appeal.[276]

V. Suspending Enforcement of a Judgment or Order

A. *Suspending a Judgment*

While an appeal is pending, the appellate lawyer's duty to the client should also include acting to enforce the trial court's judgment. For example, despite the appeal of a judgment debtor, a judgment creditor is ordinarily entitled to execute on the judgment.[277] An exception entitles the State of Texas and its subdivisions to stay execution of the judgment merely by perfecting appeal.[278] Non-exempt parties must supersede the judgment by posting security.[279] Under Rule 24.1, the following four methods may be used to suspend enforcement of a judgment:

(1) filing with the trial court clerk a written agreement with the judgment creditor for suspending enforcement of the judgment;

(2) filing with the trial court clerk a good and sufficient [supersedeas] bond;

- whether supersedeas bond has or will be filed;
- whether a recorder's record has been or will be ordered;
- the name of the court reporter;
- if the trial was electronically recorded and the name of the recorder; and
- any other information the court of appeals requires.

See id.

274. *See* Tex. R. App. P. 32.4. Generally a jurisdictional tool is a prerequisite for a court's power to be invoked. Prior to the new rules, a motion for rehearing was a jurisdictional tool to trigger the supreme court's ability to hear an appeal from the courts of appeal. *See* Mendoza v. Eighth Court of Appeals, 917 S.W.2d 787, 789 (Tex. 1996).

275. *See* Tex. R. App. P. 32.1.

276. *See* Tex. R. App. P. 42.3(c) (granting the appellate court power to dismiss appeals because of an appellant's failure to comply with requirement of the rules).

277. *See* Tex. R. Civ. P. 634 (providing for stay of execution only when supersedeas bond is filed properly).

278. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 6.001–.003 (Vernon Supp. 1997); *see also* Ammex Warehouse Co. v. Archer, 381 S.W.2d 478, 480–81 (Tex. 1964) (upholding the constitutionality of the exception for the State of Texas and its subdivisions).

279. *See* Tex. R. Civ. P. 634.

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(3) making a deposit of cash with the trial court clerk in lieu of a bond; or

(4) providing alternate security ordered by the court.[280]

Of the four methods mentioned above, the supersedeas bond is by far the most common.

The judgment debtor's counsel must promptly select the best method for suspending enforcement. Numerous timing considerations exist in this area of appellate practice, and the applicable deadlines for suspension of execution run independently of other appellate deadlines. Thus, the judgment debtor's counsel should promptly evaluate and advise the client what effect the pending adverse judgment may have on the client.

Because most judgment debtors rely on the supersedeas bond, few complications arise during the post-judgment process.[281] The

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280. TEX. R. APP. P. 24.1.

281. It is possible, but not likely, that a judge will sign a judgment as soon as the jury verdict is returned. The prevailing party can then abstract the judgment within minutes. Once abstracted, the filing of the abstract would automatically create a judgment lien, which could trigger a default under the financing agreements of a corporate judgment debtor. *See* Venrice R. Palmer, *Negotiating and Drafting Bank Credit Agreements* (recognizing judgments might trigger defaults and recommending language limiting such), *in* DOING DEALS 1997: UNDERSTANDING THE NUTS AND BOLTS OF TRANSACTIONAL PRACTICE 1997, at 831, 884 (PLI Corporate Law and Practice Handbook Series B4–7168, 1997). It should be noted that the judgment lien attaches to all real property owned by the defendant in each county where the abstract or certified copy of the judgment is filed. *See* TEX. PROP. CODE ANN. § 52.001 (Vernon 1995). Under Section 52.0011 of the Texas Property Code, the trial court may preclude the filing and recordation of a judgment lien on real property. *See* TEX. PROP. CODE ANN. § 52.0011 (Vernon 1995). The trial court can also remove a perfected lien, upon proof that: (1) the defendant has posted security or is excused from doing so, and (2) the creation of the lien would not substantially increase the judgment creditor's security in collecting the judgment when balanced against the cost to the defendant. *See id.* § 52.0011(a). The trial court has broad discretion to either deny or grant a motion under Section 52.0011(a). If the motion is granted, a certified copy of the court's order must be filed "in the real property records in each county in which the abstract of judgment or a certified copy of the judgment is filed." *Id.* § 52.0011(b). Thus, merely filing a supersedeas bond will not remove a judgment lien.

Another remedy provided by the Texas Civil Practice and Remedies Code allows the judgment creditor to obtain a turnover order. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(b)(1) (Vernon 1986). However, the turnover statute is limited to property that cannot readily be levied upon and that is not exempt from execution. *See id.* § 31.002(a). Property subject to turnover relief includes property outside the State of Texas, secreted property, and intangible property rights (*e.g.*, interests in limited partnerships, future rights in property, and causes of action). *See* Charles v. Tamez, 878 S.W.2d 201, 205 (Tex. App.—Corpus Christi 1994, writ denied) (finding a cause of action as property subject to a turnover order and commenting that turnover orders are designed to attach property that is not

judgment creditor expects the defendant to post a supersedeas bond and is satisfied with the prospect of executing on the judgment and the bond after the appeal is over. Moreover, the judgment creditor has an incentive to be cautious in executing on a judgment. The judgment creditor, who wrongfully seizes the debtor's property, will have to return the property or reimburse the defendant for its fair market value.[282] In some cases, the judgment creditor must pay damages as a result of wrongful execution or garnishment.[283]

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otherwise susceptible to normal attachment). Turnover relief is available any time thirty days after a final judgment is signed, but before a supersedeas bond is posted. *See* TEX. R. CIV. P. 627 (announcing the time when an execution can be issued); Graham v. Thomas D. Murphy Co., 497 S.W.2d 639, 641 (Tex. Civ. App.—Amarillo 1973, no writ) (holding that in an absence of a supersedeas bond, the judgment may be executed).

Another remedy available to a judgment creditor is a writ of garnishment. A prerequisite to a garnishment action is an affidavit by the creditor stating that, to the creditor's knowledge, the judgment debtor "does not have assets in Texas subject to execution that are sufficient to pay the judgment." TEX. CIV. PRAC. & REM. CODE ANN. § 63.001(2)(B) (Vernon 1997). Note, however, that once a writ of garnishment has been issued, the later filing of a supersedeas bond may not prevent delivery of the seized property to the judgment creditor. *See* Texas Employers' Ins. Ass'n v. Engelke, 790 S.W.2d 93, 95 (Tex. App.—Houston [1st Dist.] 1990, orig. proceeding [leave denied]) (stating that later filing of a supersedeas bond could not cause a judge to vacate a judgment creditor's right to seized proceeds). However, under Rule 657, a writ of garnishment cannot be instituted if a supersedeas bond has been filed. *See* TEX. R. CIV. P. 657 (limiting the finality of judgment for the purposes of garnishment when a supersedeas bond is filed).

Execution on the judgment under Rules 621 through 656 of the Texas Rules of Civil Procedure (*i.e.*, seizure of property belonging to the judgment debtor by a constable or other officer) cannot occur until thirty days after a motion for new trial is overruled by either a written and signed order or operation of law. *See* TEX. R. CIV. P. 627 (establishing the time frame for issuing an execution on a judgment). However, issuance of writ of execution may occur before the thirty day limit if the judgment creditor files an affidavit stating that the defendant is about to transfer or hide property in order to defraud creditors. *See* TEX. R. CIV. P. 628. Once again, note that after a writ of execution has been issued, a subsequent supersedeas bond may not prevent delivery of property to the judgment creditor. *See* TEX. PROP. CODE ANN. § 52.0011(b) (Vernon 1995) (requiring the filing of a judgment withdrawal in each county where a judgment is abstracted); TEX. R. APP. P. 24.1(f) (stating the effect of a supersedeas bond); TEX. R. APP. P. 25.1(g) (noting that filing a notice of appeal does not suspend the execution of a judgment); TEX. R. CIV. P. 634 (superseding execution of a judgment).

282. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 34.022 (Vernon 1986).

283. *See, e.g.*, Southwestern Bell Tel. Co. v. Wilson, 768 S.W.2d 755, 763–64 (Tex. App.—Corpus Christi 1988, writ denied) (granting damages for tortious collection practices); Beutel v. Paul, 741 S.W.2d 510, 514 (Tex. App.—Houston [14th Dist.] 1987, no writ) (granting damages for wrongful garnishment). *See generally* Glenn Jarvis, Comment, *Creditors's Liability in Texas for Wrongful Attachment, Garnishment, or Execution*, 41 TEX. L.

Thus for fear of liability, rarely does a judgment creditor seek a turnover order, initiate a garnishment action, or seek early execution. Filing the motion for new trial near the deadline of thirty days after the judgment extends the plenary power of the trial court, and a defendant typically has approximately 30 to 105 days after signing of the judgment before a supersedeas bond must be posted in order to prevent execution on the judgment.[284]

A supersedeas bond becomes effective when the judgment debtor files the bond and obtains the district clerk's approval of the bond.[285] The bond must be in the full amount of the judgment plus interest and costs.[286] The clerk of the court must approve the bond and usually requires the interest component of the supersedeas bond to be one or two years of interest on the judgment.

The new Texas Rules of Appellate Procedure set forth additional specific provisions in Rule 24 for the security necessary to suspend the enforcement of judgments for other than monetary recovery.[287] Such judgments could include judgments for the recovery of land or property, for foreclosure on real estate, or for foreclosure on other judgments.[288] When the judgment is for other than money, property, or foreclosure, the court may decline to permit the appellant to post a supersedeas bond if the judgment creditor files a bond to secure the judgment debtor for loss or damage in case of reversal of the judgment on appeal.[289]

It is possible to obtain a decrease in the amount of the supersedeas bond upon motion in the trial court, regardless of the type of

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REV. 692, 711–15 (1963) (discussing damages that are recoverable in a wrongful execution action).

284. *See* TEX. R. CIV. P. 329b (allowing 30 days to file motions for a new trial or modification of a judgment and allowing 75 days for the court to act on such motions).

285. *See* TEX. R. APP. P. 24.1(a); TEX. R. APP. P. 24.1(b)(2).

286. *See* TEX. R. APP. P. 24.2(a); *see also* Gullo-Haas Toyota, Inc. v. Davidson, Eagleson & Co., 832 S.W.2d 418, 419 (Tex. App.—Houston [1st Dist.] 1992, no writ) (per curiam) (noting that a deposit which is not the full amount of the judgment and includes costs and post-judgment interest should not supersede an executed judgment).

287. *See* TEX. R. APP. P. 24.2(a) (including provisions for judgments other than money).

288. *See* TEX. R. APP. P. 24.2(a)(2) (defining the provisions dealing with property); TEX. R. APP. P. 24.2(a)(3) (discussing "other judgment" where the judgment is for something other than money or interest in property).

289. *See* TEX. R. APP. P. 24.2(a)(3).

judgment.[290] In order to succeed in lowering the supersedeas amount, the moving party must show that: (1) security in the full amount of the judgment, plus costs and interest, will cause irreparable harm; and (2) a lower supersedeas will not substantially decrease the degree to which the judgment-creditor recovery will be secured after exhaustion of all appeals.[291]

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290. *See* TEX. R. APP. P. 24.2(b); *see also* Isern v. Ninth Court of Appeals, 925 S.W.2d 604, 605 (Tex. 1996) (orig. proceeding) (explaining the reasoning for allowing a lesser supersedeas bond), *cert. denied sub nom.* Watson v. Isern, 117 S. Ct. 612 (1996); *Gullo-Haas Toyota, Inc.*, 832 S.W.2d at 419 (noting the trial court's power to modify supersedeas bond (citing TEX. R. APP. P. 47(k)). The party seeking modification gives all other parties notice of the motion and of the hearing thereon. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 52.002 (Vernon Supp. 1997); TEX. R. APP. P. 24.2(b). The court must conduct a hearing on the motion. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 52.002 (Vernon Supp. 1997). Former Appellate Rule 47(b) offered this procedure but applied it to money judgments only. *See* TEX. R. APP. P. 47(b) (Tex. & Tex. Crim. App. 1986, amended Sept. 1, 1997). New Rule 24.2 expressly covers all types of judgments. *See* TEX. R. APP. P. 24.2(a).

291. *See* TEX. R. APP. P. 24.2(b) (restating the requirements in TEX. CIV. PRAC. & REM. CODE ANN. § 52.002); *see also Isern*, 925 S.W.2d at 606 (orig. proceeding) (holding that the district court had discretion to reduce bond to the amount of the malpractice defendant's insurance in light of the irreparable harm that the defendant would suffer if required to file bankruptcy); Harvey v. Stanley, 783 S.W.2d 217, 219–20 (Tex. App.—Fort Worth 1989, no writ) (stating that an inability to pay is not irreparable harm). It is questionable whether the *Harvey* decision retains vitality after *Isern*.

In a proceeding to decrease the bond amount, the judgment debtor should consider submitting the following evidence when attempting to have the court "deviate" from the general rule set by Rule 47(a), or to reduce the amount of a supersedeas bond:

- The process of obtaining a supersedeas bond, including the financial requirements for obtaining a supersedeas bond.
- The judgment debtor's diligent efforts to obtain the supersedeas bond in the full amount of the judgment, interest, and costs.
- The judgment debtor's inability to obtain the supersedeas bond in the full amount of the judgment, interest, and costs.
- If applicable, the amount less than the full amount of supersedeas bond that the judgment debtor is able to obtain.
- Explanations from officers of the surety companies refusing to issue the judgment debtor a supersedeas bond in the full amount of the judgment, interest, and costs as to the reasons the sureties are unwilling to issue the judgment debtor a supersedeas bond in the full amount.
- The judgment debtor's inability to obtain a letter of credit to act as collateral for the supersedeas bond, even at a higher than ordinary interest rate, and explanations from lending institutions (if possible) regarding why they refuse to issue a letter of credit.
- The debtor's past, current, and projected financial condition.
- Existence and acceleration clauses or similar provisions in the judgment debtor's financing agreements that might be triggered by a judgment lien against the judgment debtor's real property or by the issuance of a letter of credit needed to acquire supersedeas bond, thereby precipitating the judgment debtor's insolvency.

Even after the trial court's plenary power expires, the trial court retains jurisdiction to: "(1) order the amount and type of security and decide the sufficiency of sureties; and (2) if circumstances change, modify the amount or the type of security required to continue the suspension of a judgment's execution."[292] The rules require that "the judgment debtor must notify the appellate court of the trial court's action."[293]

If the trial court does not reduce the supersedeas bond before the time for execution, the judgment debtor should still seek appellate review under Rule 24.4, which allows appellate review of: "(1) the sufficiency or excessiveness of the amount of security; (2) the sureties on any bond; (3) the type of security; (4) the determination whether to permit suspension of enforcement; and (5) the trial court's exercise of discretion under 24.3(a),"[294] which is to grant or

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- The likely realizable net liquidation value of the judgment debtor's assets.
- The irreparable harm to the judgment debtor of having to post a supersedeas bond in the full amount of the judgment, interest, and costs. This guideline could include, if applicable, the requirement that the judgment debtor sell assets at a fraction of the market value in order to raise the amount of cash necessary to post a full bond, the inability of the corporation to continue in business if required to post the full bond the amount, and the probability that the judgment debtor will be forced to take bankruptcy if it is unable to post alternate securities to suspend execution of the judgment.
- The total value of assets that the judgment debtor could reach to satisfy the judgment if the judgment were not superseded.
- Alternative security arrangements that would guarantee the judgment creditor's recovery upon exhaustion of all appellate remedies, or at least a total value of the assets that they could reach to satisfy the judgment if the judgment were not superseded.

See Marie Yeates, *Perfecting the Appeal and Supersedeas, in* UNIV. OF TEXAS 4TH ANNUAL CONFERENCE ON TECHNIQUES FOR HANDLING CIVIL APPEALS IN STATE AND FEDERAL COURTS 30 (1994).

If possible, it is also advisable to show that the judgment debtor can eventually pay the judgment, but the debtor cannot do so if required to post a full supersedeas bond. Proof that the alternate security is adequate to protect the judgment creditor and the judgment creditor can easily satisfy the judgment by means of such an alternate security should also be shown. *See* Stephen L. Tatum & Jennifer Pettijohn Henry, *Supersedeas & Stays—Holding the Fort* (discussing the "no substantial harm to judgment creditor" prong of the test, which the court uses to allow supersedeas reduction), *in* STATE BAR OF TEXAS ADVANCED CIVIL APPELLATE PRACTICE COURSE, G-6 (Sept. 10–11, 1992).

292. TEX. R. APP. P. 24.3.

293. TEX. R. APP. P. 24.3(b).

294. TEX. R. APP. P. 24.4(a); *see also* TEX. R. APP. P. 24.3(a) (discussing the continuing jurisdiction to reduce the amount of security as intended by TEX. R. APP. P. 24.2(b)); Chrysler First Fin. Serv. Corp. v. Kimbrough, Carson & Woods, 801 S.W.2d 213, 214 (Tex.

deny a lesser amount of security under Rule 24.2(b). Under Rule 24.4(c), the debtor may be able to obtain a stay pending the resolution of the motion to reduce the bond.[295] Obtaining a stay is possible in light of the appellate court's authority to "issue any temporary orders necessary to preserve the parties' rights," pending the appellate court's review of the items listed above.[296]

The new rules change the form for the supersedeas bond. Previously under Rule 47, the proper notice was to "prosecute [the] appeal or writ of error with effect."[297] This method has been replaced with a promise by the surety to pay the judgment if the "debtor does not perfect an appeal,"[298] a change making it clear that a supersedeas bond is an effective suspension of execution even before an appeal is perfected.

B. *Superseding an Interlocutory Order*

Rule 29 deals with the enforcement and suspension of orders pending an interlocutory, accelerated appeal.[299] Under this rule, an appeal does not suspend the order unless: "(1) the order is superseded in accordance with 29.2;" or "(2) the appellant is entitled to supersede the order without security by filing a notice of appeal."[300] Rule 29.2 provides the trial court discretion to allow the appellant to supersede the interlocutory order by following the procedure set forth in Rule 24 with a right to appellate review if the trial court denies a request to supersede.[301] Furthermore, the trial court has discretion to make any temporary orders necessary to preserve the parties' right during the appeal.[302] The trial court must not suspend the order altogether, however, if the appellant's

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App.—Houston [1st Dist.] 1990, writ denied) (per curiam) (recognizing the trial court's continued ability to determine security that is afforded to the judgment debtor).

295. *See* TEX. R. APP. P. 24.4(c).

296. *Id.*

297. TEX. R. APP. P. 47(a) (Tex. & Tex. Crim. App. 1986, amended Sept. 1, 1987).

298. TEX. R. APP. P. 24.1(d)(1).

299. *See* TEX. R. APP. P. 29; *see also* TEX. R. APP. P. 28.1 (defining an interlocutory appeal as an accelerated appeal).

300. TEX. R. APP. P. 29.1. Generally, the State and its subdivisions are exempt from having to supersede an adverse judgment. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 6.001–.003 (Vernon 1986); Ammex Warehouse Co. v. Archer, 381 S.W.2d 478, 480-81 (Tex. 1964) (orig. proceeding) (stating that neither Texas nor any subdivision must post bond on an appeal when acting within its official capacity).

301. *See* TEX. R. APP. P. 29.2.

302. *See* TEX. R. APP. P. 29.3.

rights would be adequately protected by a supersedeas bond or another order allowed under the general rule on suspending execution.[303]

During pendency of an interlocutory appeal, the objected-to order can be enforced only by the appellate court considering the appeal.[304] Rule 29.5 allows the trial court to issue additional orders, and even to dissolve the order appealed from, while the interlocutory appeal is pending.[305] Rule 29.6 provides for appellate review of any additional trial court orders.[306]

However, there could be a conflict between Rule 29 and Section 51.014 of the Texas Civil Practice and Remedies Code, as amended effective June 20, 1997. That code section provides that an interlocutory appeal of certain orders "shall have the effect of staying the commencement of a trial in the trial court pending resolution of the appeal."[307] The automatic stay applies to the orders specified in subsection (a) of Section 51.014—namely, orders: (1) appointing a receiver or trustee; (2) overruling "a motion to vacate an order that appoints a receiver or trustee;" (3) certifying or refusing to certify a class in a suit brought under Texas Rule of Civil Procedure 42; (4) granting or refusing a temporary injunction or granting or refusing "a motion to dissolve a temporary injunction as provided by chapter 65" of the Code; (5) denying "a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or political subdivision of the state;" (6) denying a motion for summary judgment based on a claim or defense arising under the constitutional guarantees of free speech or press in a case involving a media defendant; (7) granting or denying a special appearance; or (8) granting or denying a governmental unit's plea to the jurisdiction.[308]

The resolution of any conflict between Texas Rule of Appellate Procedure 29 and Section 51.014 of the Texas Civil Practices and Remedies Code implicates the constitutional doctrine of separation

303. *See id.*

304. *See* TEX. R. APP. P. 29.4.

305. *See* TEX. R. APP. P. 29.5.

306. *See* TEX. R. APP. P. 29.6.

307. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(b) (Vernon Supp. 1998).

308. *See id.*

of powers and is beyond the scope of this paper. The scant case law on Section 51.014 has not addressed such issues.[309]

VI. The Record on Appeal

Many changes have been made in the rules governing the appellate record, including changes in the terminology. The full record on appeal is now called the appellate record,[310] and the pleadings and papers filed with the trial court, formerly known as the "transcript" (this often confused federal court practitioners) are now known as the "clerk's record."[311] The court reporter's transcription of testimony and proceedings is no longer the "statement of facts," but is now the "court reporter's record."[312] In the case of an electronic record, the new terminology is the "court recorder's record."[313]

One of the most significant changes in the new rules is the method by which the appellate record is brought before the court. The burden of filing the record now rests upon the clerk and the court reporter,[314] as it is in federal court.[315] The appellant must arrange for the payment of the preparation of the record, but has

309. *See* Allied Erectors Corp. v. Barbara's Bakery, 954 S.W.2d 197, 197–98 (Tex. App.—Waco 1997, n.w.h.) (per curiam) (failing to discuss Texas Rule of Appellate Procedure 29 in conjunction with Texas Civil Practice and Remedies Code Section 51.014); Tarrant Regional Water Dist. v. Gragg, No. 10–98–043–CV, 1998 WL 83770, at *1 (granting emergency relief of partial stay based on Texas Civil Practice and Remedies Section 51.014(a)(8) & (b) (Vernon Supp. 1998)).

310. *Compare* Tex. R. App. P. 34.1 (defining the appellate record as the reporter's record and the clerk's record), *with* Tex. R. App. P. 50(a) (Tex. & Tex. Crim. App. 1986, amended Sept. 1, 1997) (dividing the record on appeal into the statement of facts and the transcript).

311. *See* Tex. R. App. P. 34.5.

312. *See* Tex. R. App. P. 34.6.

313. *See* Tex. R. App. P. 34.6(a). Indeed, new Rule 33.2(b) refers to the court reporter's "transcription" of evidence. *See* Tex. R. App. P. 33.2(b).

314. *See* Tex. R. App. P. 35.3(a) (mandating the preparation of the clerk's record by the clerk); Tex. R. App. P. 35.3(b) (requiring the preparation of the reporter's record by the reporter). Prior practice placed the burden of producing the transcript on the parties, not the clerk. *See* Tex. R. App. P. 53(k) (Tex. & Tex. Crim. App. 1986, amended Sept. 1, 1997); Knight v. Sam Houston Mem'l Hosp., 907 S.W.2d 847, 849 (Tex. App.—Houston [1st Dist.] 1995, writ denied). While an extension is available to the appellants, it is still up to them to request an extension. *See Knight*, 907 S.W.2d at 849.

315. *See* Fed. R. App. P. 11(b).

no responsibility to file the record.[316] Appellants will no longer be forced to file mandamus actions against court reporters to complete a record for appeal.[317] Instead, the appellate court may issue any order necessary to ensure a timely filing of the record.[318]

The record now consists of the clerk's record and the court reporter or recorder's record.[319] Supplementation of the record has been simplified so that it is unnecessary to file motions for leave to file a supplemental record. To supplement the record, the rule now requires the requesting attorney asking for supplementation to send a timely letter to either the court clerk or reporter.[320] Presumably, post-decision supplementation will still be difficult, even under the new rules.[321]

Even with these two changes, the parties still have certain obligations with respect to the record. Parties still must request the court reporter's record.[322] Likewise, they must request additional items for inclusion in the clerk's record if the specified mandatory items

316. *See* TEX. R. APP. P. 35.3 (noting that the duty of filing the record is dependent on notice of an appeal and the satisfactory arrangement for the payment or preparation of the record unless the party is permitted to appeal without paying for the record).

317. *See, e.g.*, Wolters v. Wright, 623 S.W.2d 301, 305 (Tex. 1981) (requiring a writ of mandamus to compel production of the statement of facts by the court reporter); Click v. Tyra, 867 S.W.2d 406, 409 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding) (granting the petitioner's writ of mandamus against the clerk, thereby providing a copy of the transcript); Palacio v. Johnson, 663 S.W.2d 490, 491–92 (Tex. App.—Houston [1st Dist.] 1983, orig. proceeding) (issuing a writ of mandamus and directing the respondent to prepare a statement of facts).

318. *See* TEX. R. APP. P. 35.3(c) notes & cmts. (stating that the reporter and the clerk should make arrangements with the court of appeals whenever additional time is needed to prepare the record); TEX. R. APP. P. 37.3 (designating the procedures the appellate clerk should follow if the record is late).

319. *See* TEX. R. APP. P. 34.1 (articulating that the "appellate record consists of the clerk's record and, if necessary to the appeal, the reporter's record").

320. *See* TEX. R. APP. P. 34.5(c) (providing the procedures for requesting a clerk's record); TEX. R. APP. P. 34.6(d) (specifying the procedures for requesting a reporter's record).

321. *See* Chapman v. Mitsui Eng'g & Shipbuilding Co., Ltd., 781 S.W.2d 312, 318 (Tex. App.—Houston [1st Dist.] 1989, writ denied) (stating that "unusual circumstances" are required for the appellate court to permit such late supplementation); *cf.* Baker v. Trand, Inc., 931 S.W.2d 405, 407 (Tex. App.—Waco 1996, orig. proceeding) (allowing post-briefing supplementation). While the process of supplementation may be easier, the evaluation by the judge, presumably, will not change.

322. *See* TEX. R. APP. P. 34.6(b) (stating that the appellant must request at or before the time that the reporter prepares the reporter's record). This procedure is not adverse to the prior practice. *See In re* C.M.G. 883 S.W.2d 411, 413 (Tex. App.—Austin 1994, no writ).

will not suffice.[323] Finally, the appellant must arrange to pay for the record.[324]

If no record is filed because a party fails to make a proper request or fails to pay for the record, the appellate court must give the parties a reasonable opportunity to cure the problem before dismissing the appeal.[325] Further, if only the clerk's record is filed because a party has failed to request or pay for the court reporter's record, the appellate court may rule on those issues for which a reporter's record is not necessary instead of dismissing the appeal altogether.[326] Motions relating to informalities or defects in the record must be filed within thirty days after the record is filed; otherwise, any objection is waived.[327]

Under the new rules, a lost or destroyed record does not automatically result in a new trial.[328] If part of the clerk's record is missing, the parties should attempt to agree on a substitute item for the missing portion.[329] If no agreement is reached, any party or the appellate court may make a motion and determine what constitutes the missing portion.[330] When part of the court reporter's or court recorder's record is missing, a new trial may be granted only if: (1) the appellant timely requested the record; (2) a significant exhibit, a significant portion of the reporter's notes, or a significant portion

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323. *See* TEX. R. APP. P. 34.5(b) (requiring the request for additional items to be made before the clerk prepares the record). The mandatory items, which are specified in Rule 34.5(a), are in the appendix.

324. *See* TEX. R. APP. P. 35.3(a)(2), (b)(3).

325. *See* TEX. R. APP. P. 37.3(b)–(c); *see also* Linwood v. NCNB Texas, 885 S.W.2d 102, 103 (Tex. 1994) (noting that while the improper instrument was used to perfect the appeal, once the jurisdiction of the appellate court was invoked by an improper instrument, the appellate court should provide an opportunity to correct the error before dismissing the appeal).

326. *See* TEX. R. APP. P. 37.3(c).

327. *See* TEX. R. APP. P. 10.5(a).

328. Former rule 50(e) provided: "If the appellant has made a timely request for a statement of facts, but the court reporter's notes and records have been lost or destroyed without appellant's fault, the appellant is entitled to a new trial unless the parties agree on a statement of facts." TEX. R. APP. P. 50(e) (Tex. & Tex. Crim. App. 1986, amended Sept. 1, 1997). *Compare* TEX. R. APP. P. 34.5(e) (providing for the inclusion of items that were lost or destroyed in the clerk's record), *with* TEX. R. APP. P. 50(e) (Tex. & Tex. Crim. App. 1986, amended Sept. 1, 1997) (granting the appellant a new trial for lost or destroyed records). *See* Hidalgo, Chambers & Co. v. Federal Deposit Ins. Corp., 790 S.W.2d 700, 702 (Tex. App.—Waco 1990, writ denied) (finding that if a plaintiff is not at fault for the court reporter's records or notes being destroyed, the plaintiff is entitled to a new trial).

329. *See* TEX. R. APP. P. 34.5(e).

330. *See id.*

of the recorder's electronic recording has been lost or destroyed through no fault of the appellant; and (3) the parties cannot agree on a complete record.[331]

Finally, the new rules give parties the option to agree to a record by filing a written stipulation in the trial court.[332] The parties may also stipulate to an agreed statement of the case in lieu of a reporter's record by filing a statement in the trial court.[333]

A. *Clerk's Record*

Under the new rules, the clerk must prepare the record when a notice of appeal is filed.[334] However, absent a party's request for additional items, the clerk will include only the items mandated by Rule 34.5.[335] At any time before the record is prepared, a party may request additional items.[336] Ordinarily, the clerk will calendar the record as being due thirty days after the notice of appeal, or, in the case of an accelerated appeal, ten days after the notice.[337] However, the failure to make a timely request for the clerk's record is not a reason for the appellate court to refuse the clerk's record or a supplemental record.[338]

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331. *See* TEX. R. APP. P. 34.6(f) (providing the requirements the appellant must meet to be entitled to a new trial).

332. *See* TEX. R. APP. P. 34.2.

333. *See* TEX. R. APP. P. 34.3.

334. *See* TEX. R. APP. P. 35.3(a) (stating that if the payment requirement is satisfied by a responsible party, the clerk is responsible for preparing the record). This rule may exclude court responses similar to *Knight v. Sam Houston Memorial Hospital*, in which it is up to the appellant to either file a timely transcript or a motion for extension of time. *See* Knight v. Sam Houston Mem'l Hosp., 907 S.W.2d 847, 848 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (requiring a dismissal when the appellant did not file a timely motion for extension when the appellee had filed such a motion).

335. *See* TEX. R. APP. P. 34.5(b)(2) (requiring that an item be specifically described to be included in the clerk's record). Those items appear in the appendix with the form for requesting the clerk's record.

336. *See* TEX. R. APP. P. 34.5(b)(1).

337. *See* TEX. R. APP. P. 35.1 (requiring the filing of the record 60 days after the judgment is signed by the trial judge). Because the notice of appeal is due 30 days after the judgment is signed, that 30 days added to the plenary power timeline of 30 days, is 60 days after signing of the judgment. *See also* TEX. R. APP. P. 35.1(b) (addressing accelerated appeals).

338. *See* TEX. R. APP. P. 34.5(b)(4) (mandating that the appellate court cannot refuse the filing of the clerk's record because of a failure to request items timely). The prior practice left the filing up to the court's discretion. *See* Inman's Corp. v. Transamerica Commercial Fin. Corp., 825 S.W.2d 473, 483 (Tex. App.—Dallas 1991, no writ) (requiring that the party's failure to timely request a statement of facts is due to a mistake and not

Even if the appellant needs only the mandatory items in the record—a rare situation—the appellant must make arrangements to pay the clerk's fee for preparing the record.[339] Thus, the appellant should simultaneously file the notice of appeal and a request for the clerk's record and make arrangements to pay for the record.

The party who prevailed in the trial court should likewise designate any additional items for inclusion in the clerk's record before the record is prepared.[340] Usually, the clerk will not finish the record until shortly before or on the due date. Nevertheless, because the appellee cannot be sure when the clerk will prepare the record, the appellee should monitor the clerk's efforts in preparing the record and should file its request for additional items promptly, even though supplementation is available later. Rule 34.5(b) specifically authorizes the parties to confer with the clerk concerning the contents of the record.[341] This rule is particularly useful when the record is voluminous causing the clerk difficulty in locating some of the requested items.

Parties do not have to wait until the deadlines to request the record. The notice of appeal, which triggers the clerk to prepare the record, can be filed early,[342] as can the request for additional items in the clerk's record.[343] However, meeting appellate deadlines is no longer a reason to make an early request of the record because the burden of preparing the record is now on the clerk, not the lawyer. Unless it is clear that the case will be appealed, the request for the court reporter's record should not be made early because the court reporter's record is usually expensive, and no reason exists to incur these expenses unless an appeal is actually taken.

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because of an intentional or deliberate action); Newding v. GECO Geophysical Co., Inc., 817 S.W.2d 146, 147 (Tex. App.—Houston [1st Dist.] 1991, no writ) (per curiam) (allowing for the court to decide whether or not to permit an untimely request when there is a reasonable explanation).

339. *See* TEX. R. APP. P. 35.3(a)(2) (declaring that the appellant make payment or payment arrangements before requiring the clerk to prepare the record).

340. *See* TEX. R. APP. P. 34.5(b)(1) (authorizing any party to designate items to be included in the record).

341. *See* TEX. R. APP. P. 34.5(b).

342. *See* TEX. R. APP. P. 26.1 (stating that "the notice of appeal must be filed *within* thirty days") (emphasis added).

343. *See* TEX. R. APP. P. 34.5(b)(1) (noting that a request for additional items can be made "[a]t any time" before preparation of the record).

B. *Court Reporter's Record*

The duties of the court reporter and court recorder are to:

> (a) attend court sessions and make a full record of the proceedings unless excused by agreement of the parties; (b) take all exhibits offered into evidence during a proceeding and ensure that they are marked; (c) file all exhibits with the trial court clerk after a proceeding ends; (d) perform the duties prescribed by Rules 34.6 and 35; and (e) perform other acts relating to the reporter's or recorder's official duties, as the trial court directs.[344]

The court reporter's obligations under Rule 34.6(a)(1) relate to making stenographic recordings and replying to requests to prepare the reporter's record from counsel.[345] Under Rule 35.3(b), the reporter has the duty to prepare, certify, and file the record in a timely fashion if:

> (1) a notice of appeal has been filed; (2) the appellant has requested that the reporter's record be prepared; and (3) the party responsible for paying for the preparation of the reporter's record has paid the reporter's fee, or has made satisfactory arrangements with the reporter to pay the fee, or is entitled to appeal without paying the fee.[346]

When the court reporter's record is necessary to the appeal, the appellant must make a request for the record to the court reporter.[347] This request must be made on or before the date for perfecting the appeal,[348] and the party responsible must make arrangements to pay for the record.[349]

In some cases, original exhibits may be preferable to copies in the appellate record, especially with respect to oversized or unique exhibits. When these original exhibits are to be a part of the appellate record, a motion to transfer original exhibits is necessary.[350]

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344. TEX. R. APP. P. 13.1.

345. *See* TEX. R. APP. P. 34.6(a)(1).

346. TEX. R. APP. P. 35.3(b).

347. *See* TEX. R. APP. P. 34.6(b)(1) (stating that "[a]t or before the time for perfecting the appeal, the appellant must request in writing that the official reporter prepare the reporter's record").

348. *See id.*

349. *See* TEX. R. APP. P. 35.3(b)(3). A form request appears in the appendix.

350. *See* TEX. R. APP. P. 34.6(g)(2). A form motion appears in the appendix.

C. *Electronically Recorded Trials*

With advances in technology, the old, hard-copy transcript may not be available. The new rules contemplate this change in courtroom procedure by adding Rule 34.6(a)(2), which deals with electronic recordings.[351] Under this new rule:

> If the proceedings were electronically recorded, the reporter's record consists of certified copies of all tapes or other audio-storage devices on which the proceedings were recorded, any of the exhibits that the parties to the appeal designate, and certified copies of the logs prepared by the court recorder under Rule 13.2.[352]

Under Rule 13.2, the court recorder has certain specific duties that are different from the classic duties of the court reporter. The court recorder must "ensure that the recording system functions properly throughout the proceedings and that a complete, clear, and transcribable recording is made."[353] In addition, the court recorder must "make a detailed, legible log of all proceedings being recorded."[354]

After a proceeding ends, the court recorder must then file with the clerk the original log and also must "have the original recording stored to ensure that it is preserved and accessible."[355] Finally, the court recorder should "ensure that no one gains access to the original recording without the court's written order."[356]

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351. *See* TEX. R. APP. P. 34.6(a)(2).

352. *Id.*; *see also* TEX. R. APP. P. 13.2 (describing the additional duties of the court reporter). Note that the appellate timetables are not affected by the electronic recording of the record. *See* TEX. R. APP. P. 34.6(a)(2) (addressing the content of electronically recorded proceeding, but not changing the filing time for such records).

353. TEX. R. APP. P. 13.2(a).

354. TEX. R. APP. P. 13.2(b). The record should show the following:

(1) the number and style of the case before the court;
(2) the name of each person speaking;
(3) the event being recorded such as the voir dire, the opening statement, direct and cross-examinations, and bench conferences;
(4) each exhibit offered, admitted, or excluded;
(5) the time of day of each event; and
(6) the index number on the recording device showing where each event is recorded.

Id.

355. TEX. R. APP. P. 13.2(d).

356. TEX. R. APP. P. 13.2(e); *see* TEX. R. APP. P. 13.2(d) (dealing with the original recording storage).

The main distinguishing feature of an electronic record in an appeal is the newly required special appendix.[357] Rule 38.5(a) states that a party must file one copy of an appendix upon or before the date the party's brief is due.[358] The appendix must contain "a transcription of all portions of the recording that the party considers relevant to the appellate issues or points."[359] The rule does not require the court recorder to prepare the transcription, allowing a party to do so.[360] The party's appendix does not have to "repeat evidence included in any previously filed appendix."[361]

Like the reporter's record, the appendix and transcription "must conform to any specifications of the [Texas] Supreme Court . . . concerning the form of the reporter's record except that it need not have the reporter's certificate."[362] The rule further requires that when the appendix is filed, "the party must give written notice of the filing to all parties to the trial court's judgment or order" and "must make a copy [of the appendix] available to all parties for inspection and copying."[363] In addition, "[t]he notice must specify, by referring to the index numbers in the court recorder's logs, those parts of the recording that are included in the appendix."[364] The transcription is presumed accurate unless a party objects.[365]

The same presumptions that apply to the partial reporter's record apply to the appendices containing transcripts of electronically recorded proceedings.[366] Thus, the appellate court can presume

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357. *See* TEX. R. APP. P. 38.5 (listing details for the appendix in an electronic recording).

358. *See* TEX. R. APP. P. 38.5(a)(1).

359. *Id.*

360. *Cf.* TEX. R. APP. P. 38.5(d) (providing for the affidavit of inability to pay for transcription of electronically recorded appendix, which also must include a statement that the party has neither access to the equipment nor skills necessary to prepare such appendix). A court recorder can prepare the transcription for a party who states in an affidavit that he has neither access to equipment nor the skills necessary to prepare the appendix, providing any contest to such affidavit fails. *See id.* If, however, a contest to the affidavit is successful, the party must prepare the transcription. *See id.*

361. TEX. R. APP. P. 38.5(a)(2).

362. TEX. R. APP. P. 38.5(a)(3).

363. TEX. R. APP. P. 38.5(a)(4).

364. *Id.*

365. *See* TEX. R. APP. P. 38.5(a)(1).

366. *See* TEX. R. APP. P. 34.6(c)(4) (requiring the appellate court to presume that a partial reporter's record comprises the entire record for the purpose of reviewing the asserted points or issues); TEX. R. APP. P. 38.5(b) (providing that the same presumptions apply to the parties' appendixes).

that the appendices contain all relevant information, even when the court is reviewing factual and legal sufficiency points.[367] Consequently, the appellate court is relieved of the duty of reviewing the entire electronic recording.[368] In addition, "[t]he appellate court may direct or allow a party to file a supplemental appendix containing a transcription of additional portions of the recording."[369]

While new technology may improve the accuracy of the recording, the rules contemplate that electronic recordings may contain inaccuracies. Rule 38.5(e) states that "[t]he parties may agree to correct an inaccuracy in the transcription of the recording."[370] If the parties dispute the accuracy of the electronic recording and cannot agree on the correction, the appellate court has two choices: the appellate court may "settle the dispute by reviewing the recording,"[371] or the appellate court may "submit the dispute to the trial court. . . ."[372] After notice and hearing, the trial court must, "settle the dispute and ensure that the recording or transcription is made to conform to what occurred in the trial court."[373]

Even though an electronic record may be less expensive than the old form of a court reporter's transcript, the indigent appellate may not be able to afford the required appendix. Rule 38.5(d) provides for an indigency affidavit with respect to preparing the transcription of the electronically recorded record.[374] In addition to complying with the other requirements of Rule 20, the indigent party must further recite in the affidavit, or a supplemental affidavit, that

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367. *See* TEX. R. APP. P. 34.6(c)(4) (discussing the presumptions present in partial record regarding factual and legal sufficiency points); TEX. R. APP. P. 38.5(b) (providing that the same presumptions under 34.6(c)(4), requiring the appellate court to presume that a partial reporter's record comprises the entire record, apply to the parties' appendixes); *cf.* Polanco v. Pan American Univ., 818 S.W.2d 97, 99 (Tex. App.—Corpus Christi 1991, no writ) (presuming the omitted portions of the record support a judgment). It should also be noted that prior practice did not allow for the determination of harmful error on a partial record. *See id.* at 100; *see also* Christiansen v. Prezelski, 782 S.W.2d 824, 843 (Tex. 1990) (requiring a full record to establish harmful error under old Texas Rule of Appellate Procedure 81(b)(1)).

368. *See* TEX. R. APP. P. 38.5(b).

369. TEX. R. APP. P. 38.5(c).

370. TEX. R. APP. P. 38.5(e)(1).

371. TEX. R. APP. P. 38.5(e)(2)(A).

372. TEX. R. APP. P. 38.5(e)(2)(B).

373. *Id.*

374. *See* TEX. R. APP. P. 38.5(d).

"the party has neither the access to the equipment necessary nor the skill necessary to prepare the appendix."[375] If the trial court does not sustain the contest and the affidavit by written order, "the court recorder must transcribe or have transcribed those portions of the recording that the party designates and must file the transcription as that party's appendix, along with all exhibits."[376]

D. *Appeal on Partial Record*

When desired, a party may appeal on a partial court reporter's record[377] in order to save the expense of obtaining a full reporter's record. When a partial record is requested, a statement of the issues or points to be presented on appeal must be included.[378] The appeal will be limited to those issues or points.[379] Under the prior rules, when a party chose the partial-record route, the stated points of error were strictly construed.[380] The same practice can be expected under the new rules.

While any party may include additional exhibits and segments of testimony in the reporter's record,[381] these additions "must be included in the reporter's record at the appellant's cost."[382] The new rules expressly authorize the trial court to tax the cost of unneces-

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375. *Id.*

376. *Id.*

377. *See* TEX. R. APP. P. 34.6(c) (allowing a party to appeal with a partial reporter's record). Note that the language of the rule limits the party able to request a partial record to the appellant. *See* TEX. R. APP. P. 34.6(c)(1) (allowing the *appellant* to request a partial record) (emphasis added). Prior practice seemed to require an entire statement of facts (now known as the reporter's record) to allow for an insufficiency challenge. *See* Fisher v. Evans, 853 S.W.2d 839, 841 (Tex. App.—Waco 1993, writ denied).

378. *See* TEX. R. APP. P. 34.6(c)(1).

379. *See id.*; *see also* Steger & Bizzell, Inc. v. Vandewater Constr., Inc., 811 S.W.2d 687, 692 (Tex. App.—Austin 1991, writ denied) (limiting points to those included in the statement of facts and presuming that the omitted portions were irrelevant).

380. *See, e.g.*, Birran v. Don Wetzel & Assoc., 894 S.W.2d 552, 554 (Tex. App.—Beaumont 1995, writ denied) (overruling appellants' numerous points of error for failure to designate specific points of error being relied upon for appeal); Mathews v. Land Tool Co., 868 S.W.2d 25, 26 (Tex. App.—Houston [14th Dist.] 1993, no writ) (requiring a designation of the intended points be asserted when a partial statement of facts is filed); Alford v. Whaley, 794 S.W.2d 920, 923 (Tex. App.—Houston [1st Dist.] 1990, no writ) (requiring the inclusion of a statement designating the points to be asserted when a partial statement of facts is filed on appeal).

381. *See* TEX. R. APP. P. 34.6(c)(2).

382. TEX. R. APP. P. 34.6 (c)(3).

sary additions to the requesting party when requested additions are irrelevant to the appeal.[383]

Previously, a limited appeal on a partial statement of facts was not possible when factual sufficiency was challenged because the appellate court was obligated to review the entire record.[384] Now, under Rule 34.6(c)(4), the presumption is that the partial record constitutes the entire record for purposes of the stated points or issues, including a point or issue concerning the legal or factual sufficiency of the evidence in supporting specific factual findings.[385]

Because of the presumption that the partial record contains everything relevant, the appellate lawyer should not select a partial record unless the lawyer is willing to exercise great care and is prepared for adverse consequences. In most cases, the appellate lawyer should make all the facts in the record subject to the appeal. The appeal on a partial record allowed under the new rules is not the same as a limited appeal under former Rule 40(a)(4).[386] The former rule allowed a party to limit the scope of an appeal to a severable part of a judgment.[387] No such procedure exists under the new rules.

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383. *See id.* This rule does not affect the appellate court's ability to tax costs differently. *See id.*; TEX. R. APP. P. 89 (Vernon 1997) (granting the appellate court discretion to tax costs how it sees fit); Lopez v. Central Plains Reg'l Hosp., 859 S.W.2d 600, 607 (Tex. App.—Amarillo 1993, no writ) (assessing costs based on unnecessary materials included in the statement of facts).

384. *See, e.g.*, Schafer v. Conner, 813 S.W.2d 154, 155 (Tex. 1991) (disallowing factual sufficiency appeals on a partial record); Englander Co. v. Kennedy, 428 S.W.2d 806, 806 (Tex. 1968) (per curiam) (requiring a complete record when factual sufficiency is a point of error); Superior Packing, Inc. v. Worldwide Leasing & Fin., Inc., 880 S.W.2d 67, 70-71 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (asserting the need for a full record when factual sufficiency is at issue on appeal).

385. *See* TEX. R. APP. P. 34.6(c)(4). Prior practice did not allow for an appeal on factual or legal sufficiency points with a partial statement of facts. *See* Schafer v. Conner, 813 S.W.2d 154, 155 (Tex. 1991) (concluding that "when an appellant complains of the factual or legal sufficiency of the evidence, the appellant's burden to show that the judgment is erroneous cannot be discharged in the absence of a complete . . . statement of facts.").

386. *Compare* TEX. R. APP. P. 25 notes & cmts. (expressing repeal of notice of limitation of appeal), *with* TEX. R. APP. P. 40(a)(4) (Tex. & Tex. Crim. App. 1986, amended Sept. 1, 1997) (allowing the limitation of an appeal to the severable part of a judgment so that appellee cannot raise cross-points without perfecting her own appeal).

387. *See* TEX. R. APP. P. 40(a)(4) (Tex. & Tex. Crim. App. 1986, amended Sept. 1, 1997).

VII. BRIEFING

A. *General Provisions*

The new appellate rules have made changes to the form and contents of briefs.[388] One major change in form is that each party to the trial court proceeding who wishes to complain about the judgment must file a notice of appeal.[389] Those parties who file a notice

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388. *See* TEX. R. APP. P. 9.4. Rule 9.4 applies to all documents filed in Texas appellate courts. The following form requirements appear in that rule:

- Distinct black image by any standard typographic or duplicating method;
- White, or nearly white, letter-size paper;
- All margins must be at least 1 inch;
- Double-spacing required, except that single-spacing is permissible in footnotes, block quotations, short lists, and statements of issues and points or error;
- If a proportionally spaced typeface is used, font in text must be no smaller than 13 point and font in footnotes must be no smaller than 10 point;
- If typeface is not proportionally spaced, 10-character-per-inch Courier font is required;
- Staples in top left corner for documents not bound;
- Durable front and back covers; no plastic covers; no red, black, or dark blue covers;
- Binding must permit brief or document to lie flat when opened;
- Any appendix may be bound separately or with the document to which it relates. If bound separately, the appendix must comply with binding and covering requirements stated above;
- An appendix should be tabbed and indexed; and
- A front cover, if used, must contain;
  —case style
  —case number
  —title of document
  —name of party
  —lead counsel's name, mailing address, telephone and fax numbers, and state-bar number
  —any request for oral argument

See id.

For filing in courts of appeal, a party must file the original and three copies of all documents in an original proceeding; the original and three copies of all motions; and the original and five copies of all other documents. *See* TEX. R. APP. P. 9.3(a)(1). However, a court of appeals may, by local rule, require the filing of more or fewer copies of any document. *See* TEX. R. APP. P. 9.3(a)(2); *see also* Lauterbach v. Lieber Enter., Inc., 754 S.W.2d 370, 371 (Tex. App.—Dallas 1988, writ denied) (per curiam) (allowing for the appellate court to change the number of copies required for filing). In the supreme court, a party must file the original and eleven copies of any document addressed to the supreme court. *See* TEX. R. APP. P. 9.3(b). Rule 9.3(c) does have an exception for the trial court record, which states that only the original should be filed in any proceeding. *See* TEX. R. APP. P. 9.3(c).

389. *See* TEX. R. APP. P. 38.6(a) notes & cmts.

of appeal must file a brief as an appellant.[390] Thus, multiple briefs for appellants and appellees may be submitted.[391] In such appeals, the lawyers should not simply designate a brief as "Brief for Appellant." Each brief should have a different title, such as "Brief for [Name(s)] as Appellant(s)."

Another change in the briefing framework is the option to use a statement of issues instead of the traditional points of error.[392] The rules also expressly provide that the courts of appeals are to follow a rule of liberal construction so that issues or points "will be treated as covering every subsidiary question that is fairly included."[393] Therefore, the appellate courts are likely to prefer statements of issues rather than points of error. In any event, no reason exists to follow the previous practice of tying the argument to points of error, or to state "reply points" that are "germane" to points of error. While it is no longer necessary for the appellee's brief to follow the appellant's brief point by point, Rule 38.2(a)(2) does state that the appellee's brief must respond to the appellant's issues in order of their presentation in the appellant's brief[394] unless the response is not "practicable."[395] Finally, no record references need accompany the statement of issues or points.[396]

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390. *See* TEX. R. APP. P. 38.6(a) (stating that "an appellant must file a brief"); *see also* TEX. R. APP. P. 38 notes & cmts. (noting that "if more than one party has filed a notice of appeal, there will be multiple appellant's, appellee's and reply briefs").

391. *See* TEX. R. APP. P. 38.6 notes & cmts.

392. *See* TEX. R. APP. P. 38.1(e) (requiring that "issues or points" are stated in the appellant's brief); TEX. R. APP. P. 52.3(f) (indicating that the petition must note all "issues or points" in the mandamus petition); TEX. R. APP. P. 53.2(f) (stating that "issues or points" must be noted in the petition for review); TEX. R. APP. P. 55.2(f) (requiring that "issues or points" be stated in the petitioner's brief). Rules dealing with responsive briefs refer only to the "statement of issues presented." *See* TEX. R. APP. P. 38.2(a)(1)(B); TEX. R. APP. P. 52.4(b); TEX. R. APP. P. 53.3(c); TEX. R. APP. P. 55.3(c). Only "points" are mentioned with respect to motions for rehearing under Rule 49 and in regard to an appellee's cross-points under Rule 38.2(b). *See* TEX. R. APP. P. 38.2(b); TEX. R. APP. P. 49.1.

393. TEX. R. APP. P. 38.1(e); TEX. R. APP. P. 52.3(f); TEX. R. APP. P. 53.2(f); TEX. R. APP. P. 55.2(f); *cf.* Anderson v. Gilbert, 897 S.W.2d 783, 784 (Tex. 1995) (per curiam) (reasoning that a point of error directing the attention of the appellate court to the error about which the complaint is made is sufficient, and that the appellate court should consider the argument which supports each point of error, not simply wording of points).

394. *See* TEX. R. APP. P. 38.2(a)(2).

395. *See id.*

396. *See* TEX. R. APP. P. 53.2(f) (requiring no record references). The March 20, 1997 version of the new rules contained a requirement of record references with respect to the statement of issues in the petition for review. *See* STATE BAR OF TEXAS, GUIDE TO THE NEW TEXAS RULES OF APPELLATE PROCEDURE 111 (1997) (referencing TEX. R. APP. P.

Another change in the briefing process is that the rules now expressly authorize a reply brief.[397] Nevertheless, the appellate court may decide the case before a reply brief is filed.[398]

1. Amending or Supplementing Briefs

Under Rule 38.7, limited situations exist for amendment or supplementation of briefs. A party may amend or supplement a brief when justice requires and on any reasonable terms that the court may impose.[399] Rules 53.8 and 55.8 allow the parties an opportunity to amend or supplement briefs.[400] Indeed, on a showing of good cause, the Texas Supreme Court may allow a party to amend these instruments: petitions for review, response, reply briefs and briefs on the merits "on such reasonable terms as the [c]ourt may prescribe."[401]

2. Contents of Briefs

The rules now specify the proper contents of all briefs, except reply briefs.[402] The required contents differ depending on the court and the type of proceeding. The required contents of the various types are described below and are illustrated in the appendix.

53.2(f)). Record references were not required as to any other briefs. *See id.* at 92-93, 108, 115 (referencing TEX. R. APP. P. 38.1(e), TEX. R. APP. P. 55.2(f), TEX. R. APP. P. 52.3(f)). The final version of the rules deleted the requirement from Rule 53.2 of record references even as to the statement of issues in the petition for review, suggesting that the record-reference requirement in the petition for review had been merely an oversight rather than an intentional requirement. *See* TEX. R. APP. P. 53.2.

397. *See* TEX. R. APP. P. 38.3; TEX. R. APP. P. 52.5; TEX. R. APP. P. 53.5; TEX. R. APP. P. 55.4.

398. *See* TEX. R. APP. P. 38.3; TEX. R. APP. P. 52.5; TEX. R. APP. P. 53.5; TEX. R. APP. P. 55.4.

399. *See* TEX. R. APP. P. 38.7; Costley v. State Farm Fire & Cas. Co., 894 S.W.2d 380, 389 (Tex. App.—Amarillo 1994, writ denied).

400. *See* TEX. R. APP. P. 53.8; TEX. R. APP. P. 55.8.

401. TEX. R. APP. P. 53.8; *see also* TEX. R. APP. P. 55.8 (stating that "the [c]ourt may allow a party to amend a brief on such reasonable terms as the [c]ourt may prescribe").

402. *See* TEX. R. APP. P. 38.1 (specifying contents of appellant's brief); TEX. R. APP. P. 38.2 (articulating form and content of appellee's brief); TEX. R. APP. P. 38.3 (allowing the reply brief to address any matter raised by the appellee brief).

B. *Briefs in Courts of Appeals*

1. Appellant's Brief

Rule 38 sets forth the required contents of the appellant's brief.[403] Sections that are not required, but that should be considered by appellate practitioners, include a section on the applicable standard of review and a section stating how record references will be made.

One of the more obvious changes in the new rules is the treatment of the brief's appendix. Prior to the new rules, no rules existed specifically addressing the appendix.[404] Now, unless impractical and voluminous, the appendix must include:

> (A) the trial court's judgment or other appealable order from which relief is sought; (B) the jury charge and verdict, if any, or the trial court's findings of facts and conclusions of law, if any; and (C) the text of any rule, regulation, ordinance, statute, constitutional provision, or other law (excluding case law) on which the argument is based, and the text of any contract or other document that is central to the argument.[405]

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403. *See* TEX. R. APP. P. 38.1 requiring:

(a) Identity of Parties and Counsel
(b) Table of Contents
(c) Index of Authorities
(d) Statement of the Case
(e) Issues Presented
(f) Statement of Facts
(g) Summary of the Argument
(h) Argument
(i) Prayer
(j) Appendix

Id. An appellant's brief may not exceed 50 pages, "exclusive of the pages containing the identity of the parties and counsel, the table of contents, the index of authorities, the statement of the case, the issues presented, the signature, the proof of service, and the appendix." TEX. R. APP. P. 38.4. The appellee's brief has the same page limit. *See id.* A reply brief may not exceed 25 pages, exclusive of the pages containing the same items listed above. *See id.* "The aggregate number of pages of all briefs filed by a party must not exceed 90, exclusive of the items state above." *Id.* "The court may, on motion, permit a longer brief," but it is unlikely to do so. *Id.* The aggregate page limit is given because, as noted earlier, some appeals have two or more appellants and some parties may act as both appellant and appellee in the same proceeding.

404. *See generally* Tex. R. App. P. 74 (Tex. & Tex. Crim. App. 1986, amended Sept. 1, 1997) (defining requirements of briefs and not discussing an appendix to a brief).

405. TEX. R. APP. P. 38.1(j).

The appendix may also include "any other item pertinent to the issues or points presented for review, including copies or excerpts of relevant court opinions, laws, documents on which the suit was based, pleadings, excerpts from the reporter's record, and similar material."[406] However, the appendix should not contain items that are included for the purpose of avoiding page limits.[407]

2. Appellee's Brief

Although Rule 38.3 requires the appellee's brief to contain the sections listed above, with certain exceptions, the appellee's brief need not list the parties and counsel unless it is necessary to supplement or correct the appellant's list.[408] Furthermore, "the appellee's brief need not include a statement of the case, a statement of the issues presented, or a statement of facts, unless the appellee is dissatisfied with that portion of the appellant's brief."[409] If the appellee is dissatisfied with the statement of facts in the appellant's brief, the appellee bears the burden to challenge any misstatements of fact in the appellant's brief. Otherwise the appellate court is free to accept as true the statement of facts contained in the appellant's brief.[410]

Cross-points available under the new rules are of limited use to the appellee. The appellee wishing to modify the trial court's judgment must file a notice of appeal and file a brief as an appellant.[411] A cross-point is necessary when the trial court has rendered a full or partial judgment n.o.v.[412] In this situation, "the appellee must bring forward by cross-point any issue or point that would have vitiated the verdict or that would have prevented an affirmance of the judgment if the trial court had rendered judgment on the verdict."[413] "Failure to bring forward by cross-point an issue or point

406. TEX. R. APP. P. 38.1(j)(2).

407. *See id.*

408. *See* TEX. R. APP. P. 38.2(a)(1)(A).

409. TEX. R. APP. P. 38.2(a)(1)(B).

410. *See* TEX. R. APP. P. 38.1(f) (addressing the statement of facts and how the court may accept the fact as true "unless another party contradicts the facts"); Spaulding v. State, 896 S.W.2d 587, 588 (Tex. App.—Houston [1st Dist.] 1995, no pet.) (allowing the appellate court to accept as true, uncontroverted statements of fact contained in the appellant's brief).

411. *See* TEX. R. APP. P. 38.2(b).

412. *See* TEX. R. APP. P. 38.2(b)(1).

413. *Id.*

that would vitiate the verdict or prevent an affirmance of the judgment waives that complaint."[414] Included in that requirement are these points: "(A) [that] the verdict or one or more jury findings have insufficient evidentiary support or are against the overwhelming preponderance of the evidence as a matter of fact; or (B) [that] the verdict should be set aside because of improper argument of counsel."[415]

3. Motions for Rehearing

Changes in the appellate rules also affect the use of a motion for rehearing. A motion for rehearing in the court of appeals is no longer required for supreme court jurisdiction.[416] If an error exists in the opinion or judgment issued by the court of appeals that the court might correct, the appellate lawyer should seriously consider filing a motion for rehearing. However, the practitioner who files a motion for rehearing may assume from the lack of requirement of a motion for rehearing that a motion for rehearing, when filed, does not have to cover all issues or points that will be included in the supreme court petition for review.

The rules impose a fifteen-page limit on a motion or response.[417] This page limitation contains no exclusions for pages containing the issues presented, the signature, the proof of service, or the like.[418] A motion for rehearing is due fifteen days after the appellate court's judgment.[419] One may obtain an extension in the court of appeals by filing a proper motion under Rule 10.5(b) "no later than [fifteen] days after the last date for filing the motion for rehearing."[420] Finally, a response to a motion for rehearing is not required as a motion for rehearing "will not be granted unless a response has been filed or requested by the court."[421]

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414. *Id.*

415. TEX. R. APP. P. 38.2(b)(1)(A)–(B).

416. *See* TEX. R. APP. P. 49.9 (stating that a motion for rehearing is not a "prerequisite to filing a petition for review"). Prior practice required a motion for rehearing as a prerequisite for appeal to the supreme court. *See* Mendoza v. Eighth Court of Appeals, 917 S.W.2d 787, 789 (Tex. 1996) (mandating a motion for rehearing in the appellate court before allowing an appeal to the supreme court).

417. *See* TEX. R. APP. P. 49.10.

418. *See id.*

419. *See* TEX. R. APP. P. 49.1.

420. TEX. R. APP. P. 49.8.

421. TEX. R. APP. P. 49.2.

C. *Texas Supreme Court Briefs*

1. Petition for Review Process

Under Rule 53.6, the Texas Supreme Court has adopted a petition for review process similar to the *certiorari* procedure used by the United States Supreme Court.[422] Any party seeking alteration of a judgment from the court of appeals must file a petition for review,[423] and the petitioner must persuade the supreme court to accept review within an allotted fifteen pages.[424] Although a petition for review must list all issues or points that the petitioner intends to assert, the argument section of the petition for review does not have to cover every issue or point.[425] The petition should be written to pique the court's interest so as to obtain review on the merits. Typically, the supreme court will order briefing on the merits if it decides to grant review, but can also order briefing on the merits even before it decides whether to grant review.[426]

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422. *See* TEX. R. APP. P. 53.6.

423. *See* TEX. R. APP. P. 53.1.

424. *See* TEX. R. APP. P. 53.6. Under the new petition for review process, severe page limits exist for briefs submitted to the supreme court. The petition itself cannot exceed 15 pages, "exclusive of the pages containing the identity of parties and counsel, the table of contents, the index of authorities, the statement of the case, the statement of jurisdiction, the issues presented, the signature, the proof of service, and the appendix." *Id.* A response to the petition has the same page limit, and the reply petition has a limit of eight pages, exclusive of pages containing those same items. *See id.* Upon motion, the court may permit a longer petition, response, or reply. *See id.*

Once a petition is granted and briefs are requested, "[a] brief on the merits or brief in response must not exceed 50 pages, exclusive of pages containing the identity of parties and counsel, the table of contents, the index of authorities, the statement of the case, the statement of jurisdiction, the issues presented, the signature, and the proof of service." TEX. R. APP. P. 55.6. The appendix is not mentioned in the list of pages excluded because no appendix is required to accompany a brief on the merits. *See* TEX. R. APP. P. 55.2. A brief in reply may not exceed 25 pages, exclusive of pages containing those same items but, "the [c]ourt may, on motion, permit a longer brief." TEX. R. APP. P. 55.6.

425. *See* TEX. R. APP. P. 53.2(i) (stating that "[t]he argument need not address every issue or point included in the statement of issues or points").

426. *See* TEX. R. APP. P. 55.1 (emphasizing that a brief on the merits must not be filed unless requested by the court). The new rules provide the required contents of a petition for review. *See* TEX. R. APP. P. 53.2. Other sections may be added by the petitioner's counsel, but the 15 page limit will discourage any unnecessary additional contents. *See* TEX. R. APP. P. 53.6 (setting page limits on a petition, response, and reply). A format of a petition for review is in the appendix, together with a brief description of what should appear under each heading.

"The petitioner's brief on the merits must be confined to the issues or points stated in the petition for review. . . ."[427] Rule 53.3(e) states that "the respondent's argument must be confined to the issues or points presented in the petition or asserted by the respondent in [its own] statement of issues. . . ."[428] An exception to these limitations on the issues presented exists as follows:

> To obtain a remand to the court of appeals for consideration of issues or points briefed in that court but not decided by that court, or to request that the [Texas] Supreme Court consider such issues or points, a party may raise those issues or points in the petition, the response, the reply, any brief, or a motion for rehearing.[429]

Unlike prior practice, a party must file the petition for review in the supreme court.[430] If it is mistakenly filed in the court of appeals, the petition for review is "deemed to have been filed the same day with the [Texas] Supreme Court clerk and the court of appeals clerk must immediately send the petition to the [Texas] Supreme Court clerk."[431] Furthermore, a response to the petition for review is not required unless the court requests it.[432]

Rule 53.3 expressly states that a "petition [for review] will not be granted before a response has been filed or requested by the [c]ourt."[433] Thus, the respondent may decide to withhold the filing of a response in order to save expense. Conversely, the respondent's counsel may decide to oppose the petition for review vigorously, fearing that if the court requests a response the court will then be more likely to grant the petition for review.

The due date for the response, when not requested by the court, is thirty days after the petition is filed.[434] If no response is filed, the court will consider the petition without a response.[435] Nonetheless, the court will not grant the petition without requesting a response

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427. TEX. R. APP. P. 55.2.

428. TEX. R. APP. P. 53.3(e).

429. TEX. R. APP. P. 53.4.

430. *See* TEX. R. APP. P. 53.7. The prior practice required filing in the court of appeals. *See* TEX. R. APP. P. 130(b) (Tex. & Tex. Crim. App. 1986, amended Sept. 1, 1997).

431. TEX. R. APP. P. 53.7(g).

432. *See* TEX. R. APP. P. 53.3 (specifying that the court may consider the petition without a response).

433. *Id.*

434. *See* TEX. R. APP. P. 53.7(d).

435. *See* TEX. R. APP. P. 53.3.

and therefore giving the respondent the opportunity to file a response to the petition.[436] The party who still does not wish to respond may file a waiver of response, which will remove the thirty-day period before the court can begin considering the petition.[437]

Rule 56 addresses orders on petition for review, and Rule 56.1(a) lists what the supreme court considers for granting review.[438] As the rule states, granting review is a matter of the supreme court's judicial discretion.[439] Although the court may consider various issues in granting the petition for review, the attorney's objective is to persuade the court to look further into the legal issues presented in the petition.[440] Conversely, the respondent's goal in its response should be to persuade the court to believe that granting review will be wasting judicial resources on the appeal.

2. Briefing on the Merits

a. Petitioner's Brief

With or without granting the petition for review, the supreme court may request briefs on the merits[441] by issuing a notice, which may or may not set forth a briefing schedule.[442] If the notice of request for briefs on the merits does not contain a schedule, the petitioner's brief will be due thirty days after the date of the no-

436. *See id.*

437. *See id.*

438. *See* TEX. R. APP. P. 56.1(a). *See generally* TEX. R. APP. P. 56 (discussing the types of orders that deal with a petition for review).

439. *See* TEX. R. APP. P. 56.1(a).

440. *See id.* Among the factors that the court will consider are:

(1) whether the justices of the court of appeals disagree on an important point of law;
(2) whether there is a conflict between the courts of appeal on an important point of law;
(3) whether the case involves the construction or validity of a statute;
(4) whether a case involves constitutional issues;
(5) whether the court of appeals appears to have committed an error of law of such importance to the state's jurisprudence that it should be corrected; and
(6) whether the court of appeals has decided an important question of state law that should be, but has not been, resolved by the [Texas] Supreme Court.

Id.

441. *See* TEX. R. APP. P. 55.1. Prior practice required all applications for writ of error to the supreme court to include a brief on the merits. *See* TEX. R. APP. P. 131(f) (Tex. & Tex. Crim. App. 1986, amended Sept. 1, 1997).

442. *See* TEX. R. APP. P. 55.7.

tice.[443] The respondent's brief will be due twenty days after the petitioner's brief, and the petitioner's reply brief will be due fifteen-days after the respondent's brief.[444]

Rule 55.2 states the required contents of a petitioner's brief on the merits.[445] Other sections may be added by the petitioner's counsel.[446]

b. Respondent's Brief

Rule 55.3 states that the respondent's brief should have the same sections as the petitioner's brief, with certain exceptions.[447] First, "a list of parties and counsel is not required unless necessary to supplement or correct the list contained in the petitioner's brief."[448] Second, the respondent's brief need not contain a statement of the case or statement of the facts unless the respondent is dissatisfied with that portion of the petitioner's brief.[449] The respondent should, however, contradict any misstatements of facts that are in the petitioner's brief.[450]

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443. *See id.*

444. *See id.*

445. *See* TEX. R. APP. P. 55.2.

446. *See id.* The required contents are quite similar to the petition for review. The requirements for the petitioner's brief are:

(a) Identity of Parties and Counsel
(b) Table of Contents
(c) Index of Authorities
(d) Statement of the Case
(e) Statement of Jurisdiction
(f) Issues Presented (with record references)
(g) Statement of Facts
(h) Summary of the Argument
(i) Argument
(j) Prayer

Id. A format of a petitioner's brief on the merits is in the appendix, together with a brief description of what should be under each heading.

447. *See* TEX. R. APP. P. 55.3.

448. TEX. R. APP. P. 55.3(a).

449. *See* TEX. R. APP. P. 55.3(b).

450. *Cf.* TEX. R. APP. P. Rule 38.1(f) (noting that "[i]n a civil case [pending in a court of appeal], the court will accept as true the facts stated unless another party contradicts them"). Presumably, however, any such factual misstatements will be corrected by the time of supreme-court briefing. In addition, facts are not as important at the supreme-court level because the Texas Supreme Court has no jurisdiction to decide facts. *See* TEX. CONST. art. V, § 6; *see also* Pool v. Ford Motor Co., 715 S.W.2d 629, 633–35 (Tex. 1986) (recognizing its limited role in a factual insufficiency appeal to be that of determining whether the court of appeals used the correct standard of review); E-Z Mart Stores, Inc. v.

It is not necessary that a statement of the issues be made in the respondent's brief unless:[451]

> (1) the respondent is dissatisfied with the statement made in the petitioner's brief; (2) the respondent is asserting independent grounds for affirmance of the court of appeals' judgment; or (3) the respondent is asserting grounds that establish the respondent's right to a judgment that is less favorable to the respondent than the judgment rendered by the court of appeals but more favorable to the respondent than the judgment that might be awarded to the petitioner.[452]

The respondent's brief does not have to contain a statement of jurisdiction "[u]nless the petition fails to assert valid grounds for jurisdiction."[453] The respondent's argument must be confined to the issues or points presented in the petitioner's brief or asserted by the respondent in the respondent's statement of issues.[454] Finally, Rule 55.5 allows a party to file the same brief filed in the court of appeals as a brief on the merits in the supreme court.[455]

3. Motions for Rehearing

The procedure for rehearing in the supreme court is very similar to that in the courts of appeal. Pursuant to Rule 64, a party may seek rehearing of the denial of a petition for review, as well as a rehearing of a judgment.[456] Like the motion in the court of appeals, a supreme court motion for rehearing must be no longer than fifteen pages.[457] The page limit on motions for rehearing contains no exclusions for pages containing issues presented, the signature, the proof of service, or the like.[458] A motion for rehearing is due fifteen-days after the supreme court's ruling.[459]

Havner, 832 S.W.2d 368, 369 (Tex. App.—Texarkana 1992, writ denied) (noting that Article V, Section 6 of the Texas Constitution confines the supreme court's authority to questions of law).

451. *See* TEX. R. APP. P. 55.3(c).

452. TEX. R. APP. P. 55.3(c)(1)–(3).

453. TEX. R. APP. P. 55.3(d).

454. *See* TEX. R. APP. P. 55.3(e).

455. *See* TEX. R. APP. P. 55.5.

456. *See generally* TEX. R. APP. P. 64.1 (stating that "[a] motion for rehearing may be filed with the [Texas] Supreme Court clerk within 15 days from the date when the [c]ourt renders judgment or makes an order disposing of a petition for review").

457. *See* TEX. R. APP. P. 64.6.

458. *See id.*

459. *See* TEX. R. APP. P. 64.1.

An extension may be obtained in the supreme court if a proper motion under Rule 10(5)(b) is filed no later than fifteen days after the last date for filing a motion for rehearing.[460] No response is required to a motion for rehearing.[461] A motion for rehearing will not be granted unless a response has been filed or requested by the court.[462] Finally, Rule 64.4 advises that the supreme court will not hear a second motion for rehearing.[463]

D. *Amicus Curiae Briefs*

Rule 11 deals with amicus briefs.[464] The most important change to amicus practice is in Rule 11(c), which requires the amicus brief to "disclose the source of any fee paid or to be paid for preparing the brief."[465] Presumably, the appellate courts are concerned about parties who may attempt to evade the page limits by hiring an amicus who is a closer friend of the litigant than of the court.

VIII. ORAL ARGUMENT, SUBMISSION, AND DISMISSAL

The court of appeals now has the discretion to decide a case without oral argument "if argument would not significantly aid the court,"[466] whereas the prior rule allowed the court to dispense with oral argument if argument would not "materially aid"[467] the court—a change in standard that may lead to a reduction in argument. Because of the possible increase in the discretionary power of the courts of appeals to deny oral argument,[468] appellate counsel may initially request oral argument in response to the other party's request or expected request, but then ask the court, within the brief

460. *See* TEX. R. APP. P. 64.5; *see also* TEX. R. APP. P. 12.5(b) (addressing motions for an extension of time).

461. *See* TEX. R. APP. P. 64.3.

462. *See id.*

463. *See* TEX. R. APP. P. 64.4.

464. *See generally* TEX. R. APP. P. 11 (specifying the requirements of an amicus curiae brief). The appellate clerk may receive but is not to file the brief of an amicus curiae. *See id.* The amicus curiae brief "must comply with the briefing rules for parties." *Id.* The amicus brief must also "identify the person or entity on whose behalf the brief is tendered" and "certify that copies have been served on all parties." *Id.*

465. TEX. R. APP. P. 11(c).

466. TEX. R. APP. P. 39.8. Prior practice allowed an appellate court to decide a case without oral argument upon the agreement of six judges. *See* TEX. R. APP. P. 170 (Tex. & Tex. Crim. App. 1986, amended Sept. 1, 1997).

467. TEX. R. APP. P. 75(f) (Tex. & Tex. Crim. App. 1986, amended Sept. 1, 1997).

468. *See* TEX. R. APP. P. 39.8.

or by subsequent communication, to deny oral argument because it would not "significantly" aid the court.[469] The request for oral argument must appear on the front cover of the party's brief; otherwise, it is waived unless the court directs the party to appear and argue before the court.[470] An amicus curiae may share argument time with a party with leave of the court if such leave is obtained before argument and with the party's consent.[471]

Rule 39.2 states that the purpose of oral argument is to emphasize and clarify the arguments in the briefs.[472] Therefore, the rule cautions appellate counsel to refrain from relying on the briefs and referring to matters outside the record.[473] The rule further instructs counsel to assume that the court has read the briefs and that counsel should be ready to respond to questions from the panel.[474]

Generally, only one counsel should argue for a side, but two attorneys can split argument without obtaining leave of court.[475] If only one party files a brief, "the court may allow that party to argue."[476]

Furthermore, Rule 39.9 requires the appellate clerk to provide the parties twenty-one days' notice of submission.[477] The notice must set forth the following information: (1) whether oral argument will be permitted; (2) the date of argument or submission; (3) the time allotted for argument, if allowed; and (4) the names of all members of the panel who will decide the case.[478] Ostensibly, the purpose for providing the names of the panel members is so a party may determine whether to attempt to recuse a justice or judge under Rule 16.

Rule 40 establishes the order in which the courts of appeals are to decide cases.[479] Precedence is to be given to certain cases if re-

469. *See id.*
470. *See* TEX. R. APP. P. 39.7.
471. *See* TEX. R. APP. P. 39.5.
472. *See* TEX. R. APP. P. 39.2.
473. *See id.*
474. *See id.*
475. *See* TEX. R. APP. P. 39.4.
476. TEX. R. APP. P. 39.6.
477. *See* TEX. R. APP. P. 39.9.
478. *See id.*
479. *See generally* TEX. R. APP. P. 40 (denoting that the "court of appeals may determine the order in which civil cases will be decided.").

quired by law,[480] as well as to accelerated appeals.[481] Furthermore, the courts of appeals have the discretion to give precedence "in the interest of justice."[482] Thus, a party may request discretionary precedence either in the brief or by separate communication to the court of appeals. In some situations, counsel may request that the court not only give precedence, but decide the case without argument under Rule 39.8.[483]

Rule 41 establishes procedures for panel and en banc decisions by the court of appeals.[484] The rule is designed to structure procedures within the court, including the constitution of the panel, the procedure to follow when the panel or court cannot agree, and when a justice cannot participate in deciding a case.[485] Furthermore, the rules expressly discourage en banc consideration.[486]

Finally, Rule 42 governs voluntary and involuntary dismissals.[487] Involuntary dismissals can be granted on these grounds: (1) no jurisdiction; (2) want of prosecution; and (3) failure to comply with the appellate rules, a court order, or a notice from the appellate clerk.[488]

IX. MANDAMUS PROCEEDINGS

Mandamus relief exists in extraordinary circumstances, which necessitate the relator's request for emergency relief.[489] For example, a mandamus petition may attack an order requiring the relator to produce documents that are claimed to be privileged. The relator must first file a motion to stay the order of production pending

480. *See* TEX. R. APP. P. 40.1(a).

481. *See* TEX. R. APP. P. 40.1(b).

482. TEX. R. APP. P. 40.1(c).

483. *See* TEX. R. APP. P. 39.8 (noting when the appellate court can decide cases without oral argument).

484. *See generally* TEX. R. APP. P. 41 (addressing panel and en banc decisions).

485. *See* TEX. R. APP. P. 41.1.

486. *See* TEX. R. APP. P. 41.2(c).

487. *See generally* TEX. R. APP. P. 42 (discussing the dismissal of civil and criminal cases).

488. *See* TEX. R. APP. P. 42.3 (describing involuntary dismissal in civil cases).

489. *See* Deloitte & Touche, L.L.P. v. Fourteenth Court of Appeals, 951 S.W.2d 394, 400 (Tex. 1997) (establishing that mandamus relief is reserved for extraordinary circumstances).

the mandamus proceedings; otherwise, the issue will become moot upon compliance with the production order.[490]

To receive the relief requested, the relator must file the mandamus petition with the appropriate court.[491] The Texas Supreme Court and the courts of appeals have constitutional and statutory authority to issue all necessary writs.[492] A writ of mandamus operates to (1) nullify an act that has already been performed by some officer or (2) require an official to perform a clear, non-discretionary duty.[493]

In mandamus proceedings, the petition should indicate the style of the case as "*In re* [name of relator]," with the relator being the party seeking relief.[494] As with appeals, the rules specify the contents of the mandamus petition and response.[495] Additionally, the

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490. Forms for those motions appear in the appendix.

491. Under Rule 52.6, the maximum length for the mandamus petition and response is 50 pages for each in the court of appeals, and 15 pages for each in the supreme court. *See* TEX. R. APP. P. 52.6. The relator's reply to the response is limited to eight pages in either court. *See id.* These page limits are exclusive of "the identity of parties and counsel, the table of contents, the index of authorities, the statement of the case, the statement of jurisdiction, the issues presented, the signature, the proof of service, and the appendix." *Id.* Under Rule 52.4, a response is not mandatory unless requested by the court. *See* TEX. R. APP. P. 52.4. However, no permanent relief can be granted unless a response has been filed or requested. *See id.* The severe page limitation in the supreme court for the petition and response is ameliorated by the supreme court's authority to order full briefing on the merits. *See* TEX. R. APP. P. 55.1; *see also* TEX. R. APP. P. 55.6 (stating that briefs, whether on merits or in response, cannot exceed 50 pages, exclusive of certain tables and indexes). Additionally, a reply brief is limited to 25 pages. *See id.* Thus, the party seeking relief may file a mandamus petition in the supreme court that, like the petition for review, seeks to obtain full review of the issues.

492. *See* TEX. CONST. art. V, §§ 3, 6 (authorizing the Texas Supreme Court to issue writs and granting the Texas Courts of Appeals jurisdiction as prescribed by law); TEX. GOV'T CODE ANN. §§ 22.002, 22.221 (Vernon 1988 & Supp. 1997) (granting the Texas Supreme Court and the Texas Courts of Appeals authority to issue writs).

493. *See* Grant v. Wood, 916 S.W.2d 42, 46 (Tex. App.—Houston [1st Dist.] 1995, orig. proceeding) (ordering the trial court to rule on a motion for summary judgment); Shelvin v. Lykos, 741 S.W.2d 178, 182 (Tex. App.—Houston [1st Dist.] 1987, orig. proceeding) (describing a writ of mandamus as a method to nullify a performed act). A writ of prohibition, in contrast, prevents an official from committing an act in the future. *See* Amanda v. Montgomery, 877 S.W.2d 482, 485 n.2 (Tex. App.—Houston [1st Dist.] 1994, orig. proceeding).

494. *See* TEX. R. APP. P. 52.1.

495. *See* TEX. R. APP. P. 52.3 (establishing the form and content of any petition for an original proceeding in the Texas Supreme Court or the Texas Courts of Appeals). The rules, however, do *not* specify the contents of a petitioner's reply. A format of a petition for mandamus is in the appendix, together with a short description of what should appear under each heading. The required contents are:

relator must file with the petition a "record," as defined by Rule 52.7 which consists of:

> (1) a certified or sworn copy of every document that is material to the relator's claim for relief and that was filed in any underlying proceeding; and (2) a properly authenticated transcript of any relevant testimony from any underlying proceeding, including any exhibits offered in evidence, or a statement that no testimony was adduced. . . . After the record is filed, [the] relator or any other party to the proceeding may file additional materials for inclusion in the record.[496]

Filing a response to the petition for mandamus is permissible, but not mandatory.[497] However, "[t]he court must not grant relief—other than temporary relief—before a response has been filed or requested by the court."[498] The list of counsel and parties is not required in the response to the petition for mandamus "unless necessary to supplement or correct the list contained in the

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(a) Identity of Parties and Counsel
(b) Table of Contents
(c) Index of Authorities
(d) Statement of the Case
(e) Statement of Jurisdiction
(f) Issues Presented
(g) Statement of Facts
(h) Argument
(i) Prayer
(j) Appendix

Id.

> The Appendix must contain: (A) a certified or sworn copy of any order complained of, or any other document showing the matter complained of; (B) any order or opinion of the court of appeals, if the petition is filed in the [Texas] Supreme Court; and (C) unless voluminous or impractical, the text of a rule, regulation, ordinance, statute, constitutional provision, or other law (excluding case law) on which the argument is based.

TEX. R. APP. P. 52.3(j)(l).

> The Appendix may include other items pertinent to the points presented, including copies or excerpts of opinions, laws, documents on which the suit was based, pleadings, and similar material. *See* TEX. R. APP. P. 52.3(j)(2). Do not include items for the purpose of avoiding page limits or any item that is not necessary for a decision. *See id.* (stating that items should not be included to avoid page limits and also appendix should not include unnecessary items).

496. TEX. R. APP. P. 52.7. One copy of the record must be filed with the court. *See* TEX. R. APP. P. 9.3(c) (requiring that only the original copy of the record be filed).

497. *See* TEX. R. APP. P. 52.4.

498. *Id.* The response must have the same sections identified above with certain exceptions. *See id.*

petition."[499] Furthermore, "the response need not include a statement of the case, a statement of the issues presented, or a statement of the facts unless the responding party is dissatisfied with that portion of the petition."[500] Any factual misstatements should be corrected in the respondent's statement of facts.[501] The response to the petition for mandamus should omit a statement of jurisdiction "unless the petition fails to assert valid grounds for jurisdiction."[502] In the event of this failure, the respondent should concisely state why the court lacks jurisdiction. The respondent must confine argument to the issues in the petition.[503] The respondent's appendix need not contain any item already in the relator's appendix.[504]

After a final order is rendered in a mandamus proceeding, Rule 52.9 permits a motion for rehearing to be filed within fifteen days after the final order is rendered.[505] The motion for rehearing must not exceed fifteen pages in length.[506] This page limit contains no exclusions for pages containing the statement of issues, the signature, the proof of service, or the like.[507] No response need be filed to the motion; however, the court must not grant the motion unless a response is filed or requested by the court.[508] This procedure for

499. TEX. R. APP. P. 52.4(a).

500. TEX. R. APP. P. 52.4(b).

501. *Cf.* TEX. R. APP. P. 38.1(f) (imposing a requirement to correct factual misstatements in the respondent's statement of facts to a response to a brief on the merits in an ordinary appeal before the court of appeals). Of course, factual disputes should not arise in a mandamus proceeding. If facts need to be resolved, then mandamus relief is not appropriate. *See* Davenport v. Garcia, 834 S.W.2d 4, 24 (Tex. 1992) (orig. proceeding) (refusing to resolve a fact issue on a writ of mandamus); Brady v. Fourteenth Court of Appeals, 795 S.W.2d 712, 714, 716 (Tex. 1990) (orig. proceeding) (holding that the court of appeals abused its discretion by resolving a fact issue in a mandamus proceeding); West v. Solito, 563 S.W.2d 240, 245 (Tex. 1978) (orig. proceeding) (declining to deal with a fact dispute in a mandamus proceeding); *see also* Grant v. Thirteenth Court of Appeals, 888 S.W.2d 466, 468 (Tex. 1994) (orig. proceeding) (granting mandamus relief when the facts were undisputed). Thus, the relator should confine the statement of facts to undisputed facts.

502. TEX. R. APP. P. 52.4(c).

503. *See* TEX. R. APP. P. 52.4(d) (limiting the content of the response to "issues or points presented in the petition").

504. *See* TEX. R. APP. P. 52.4(e).

505. *See* TEX. R. APP. P. 52.9 (setting forth procedure for filing motion for rehearing).

506. *See id.*

507. *See id.* (failing to mention any exceptions to the page limit).

508. *See id.* (requiring a response or a request for a response for the court to grant a motion for rehearing).

rehearing is the same as that prescribed in other proceedings in the courts of appeal and supreme court.

X. SETTLEMENTS DURING APPEAL

Appellate courts have several options when a case is settled on appeal. First, the court may simply dismiss the appeal and leave the judgment below intact for all purposes, including all preclusive effects under the principles of res judicata and collateral estoppel.[509] Second, the appellate court may vacate or reverse all judgments below—without reference to the merits—dismissing the cause in its entirety, which leaves nothing intact.[510] Third, the appellate court may vacate or reverse all prior judgments—again, without reference to the merits—and remand to the trial court or the lower appellate court for rendition of an agreed judgment.[511] Finally, the appellate court may simply affirm the judgment below.[512]

Previously, Rules 59 and 133(b) controlled settlement on appeal. Former Rule 59 dealt with voluntary dismissals in both the courts of appeals and the supreme court.[513] Rule 133(b) dealt with moot cases in the supreme court.[514] Rule 59 allowed appellate courts to dispose of an appeal or writ of error: (1) in accord with the parties' written agreement filed with the court; or (2) by granting the appellant's motion to dismiss the appeal or affirm the judgment below.[515]

Under the new rules, while Rule 133(b) has been substantially retained in new Rule 56.2, Rule 42.1 has replaced former Rule 59 and makes the following changes: first, Rule 59 no longer requires filing certified copies of the judgment and perfection instrument if the dismissal is requested before the filing of the clerk's record (formerly, the transcript); second, an express provision grants the appellate court the discretion to withdraw a prior opinion, but this

509. *See* TEX. R. APP. P. 43.2(f).
510. *See* TEX. R. APP. P. 43.2(e).
511. *See* TEX. R. APP. P. 43.2(d).
512. *See* TEX. R. APP. P. 43.2(a).
513. *See* TEX. R. APP. P. 59 (Tex. & Tex. Crim. App. 1986, amended Sept. 1, 1997).
514. *See* TEX. R. APP. P. 133(b) (Tex. & Tex. Crim. App. 1986, amended Sept. 1, 1997).
515. *See* TEX. R. APP. P. 59(a)(1) (Tex. & Tex. Crim. App. 1986, amended Sept. 1, 1997).

vacatur is entirely discretionary and the parties must not condition a settlement on the withdrawal of an opinion.[516]

The new rules add a provision regarding the supreme court's disposition of a settled case. Rule 56.3 provides that, in the event of a settlement, the supreme court may grant the petition for review—if it has not already done so—and render a judgment to effectuate the settlement without hearing argument or considering the merits.[517] In doing so, the court may: (1) set aside the judgments below and remand to the trial court for rendition of a judgment in accord with the settlement; (2) abate the case pending lower court proceedings necessary to effectuate the settlement; and/or (3) vacate the opinion of the court of appeals, which occurs only by specific order of the supreme court.[518] Rule 56.3 also makes it clear that no settlement may be conditioned on vacating an opinion of the court of appeals.[519]

Because appellate courts do not always enforce the parties' requested disposition, parties should consider this issue when structuring the settlement of an appeal.[520] In *Panterra Corp. v. American Dairy Queen*,[521] the court of appeals held that a settlement on appeal requires the court to vacate all previous orders and judgments and then dismiss the case as moot.[522] In *Dunn v. Canadian Oil & Gas Corp.*,[523] another court of appeals rejected *Panterra*; instead, the appellate court reversed the trial court's judgment and remanded the case for rendition of an agreed judgment.[524] Furthermore, as previously held by the supreme court—and as the new rules expressly provide—the parties may not effect

516. *See* TEX. R. APP. P. 42 notes & cmts. (delineating changes made in prior Rule 59).

517. *See* TEX. R. APP. P. 56.3.

518. *See id.*

519. *See id.*

520. For a discussion of vacatur and settlement on appeal, see generally Brandon T. Allen, Note, *A New Rationale for an Old Practice: Vacatur and the Rules of Professional Responsibility*, 76 TEX. L. REV. 661 (1998).

521. 908 S.W.2d 300 (Tex. App.—San Antonio 1995, no writ).

522. *See Panterra*, 908 S.W.2d at 303.

523. 908 S.W.2d 323 (Tex. App.— El Paso 1995, n.w.h.).

524. *See Dunn*, 908 S.W.2d at 324.

a withdrawal of an appellate opinion absent the appellate court's express assent.[525]

XI. MISCELLANEOUS ISSUES

A. *Rule of Procedural Defects*

The new rules specifically address defects with form and indicate the minute role these defects play in deciding a case on appeal. Rule 44.3 states that "[a] court of appeals must *not* affirm or reverse a judgment or dismiss an appeal for formal defects or irregularities in appellate procedure without allowing a reasonable time to correct or amend the defects or irregularities."[526] Furthermore, Rule 61.3 follows the same logic and states that "the [Texas] Supreme Court will not affirm or reverse a judgment or dismiss a petition for review for formal defects or irregularities in appellate procedure without allowing a reasonable time to correct or amend the defects or irregularities."[527]

B. *Sanctions*

The new appellate rules provide sanctions for certain types of conduct. For example, Rule 62 permits damages for "frivolous appeals" in the supreme court.[528] If the supreme court decides "that a direct appeal or a petition for review is frivolous, it may—on motion of any party or on its own initiative, after notice and a reasonable opportunity for response—award to each prevailing party just

525. *See* TEX. R. APP. P. 56.3; *see also* Houston Cable TV, Inc. v. Inwood West Civic Ass'n, 860 S.W.2d 72, 73 (Tex. 1993) (per curiam) (explaining that appellate opinions have implications larger than merely resolving the parties' disputes).

526. TEX. R. APP. P. 44.3 (emphasis added); *see also* Grand Prairie Indep. Sch. Dist. v. Southern Parts Imports, Inc., 813 S.W.2d 499, 500 (Tex. 1991) (per curiam) (requiring the appellate court to give parties an opportunity to correct any procedural defects before dismissing an appeal); Inpetco, Inc. v. Texas Am. Bank/Houston, N.A., 729 S.W.2d 300, 300 (Tex. 1987) (per curiam) (finding an error when the appellate court affirmed the trial court's judgment without first ordering the party to rebrief the issues).

527. TEX. R. APP. P. 61.3.

528. *See* TEX. R. APP. P. 62; *see also* Beckham v. City Wide Air Conditioning Co., Inc., 695 S.W.2d 660, 663 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (looking to the advocate's point of view to see if there was a real belief that the case would be reversed in determining frivolity); Charter Oak Fire Ins. Co. v. Adams, 488 S.W.2d 548, 550–51 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.) (determining frivolity by looking at the case from the advocate's point of view).

damages."[529] Unlike former Rule 84, there is no express limit on the amount of damages imposed as sanctions by Rule 62.[530] In determining whether to award damages, "the [c]ourt must not consider any matter that does not appear in the record, briefs, or other papers filed in the court of appeals or the [Texas] Supreme Court."[531]

Furthermore, Rule 45 gives the courts of appeals the same power to assess damages for a frivolous appeal.[532] This rule contains the identical language found in the supreme court rule.[533]

Finally, Rule 52.11 permits sanctions in mandamus actions.[534] Pursuant to this rule, a court may act on its own motion or on the motion of a party, "after notice and a reasonable opportunity to respond."[535] The appellate court may impose sanctions on a party or an attorney for filing a groundless petition for mandamus or for filing a mandamus petition solely for the purpose of delay.[536] In addition, the court may impose sanctions for making misleading statements, or for filing a misleading record.[537]

C. *Disqualification or Recusal of Appellate Judges*

The appellate rules also address the disqualification or recusal of appellate judges.[538] Rule 16.1 states that the grounds for disqualifying an appellate court justice or judge are determined by the Texas Constitution and laws of Texas.[539] The Rule also states that

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529. TEX. R. APP. P. 62.

530. *Compare* TEX. R. APP. P. 62 (imposing no limits on damages), *with* TEX. R. APP. P. 84 (Tex. & Tex. Crim. App. 1986, amended Sept. 1, 1997) (setting limits on the amount of damages).

531. TEX. R. APP. P. 62.

532. *See* TEX. R. APP. P. 45 (allowing the court of appeals to award damages for frivolous appeals upon a party's motion or the court's initiative).

533. *Compare* TEX. R. APP. P. 45 (addressing frivolous appeals in the court of appeals), *with* TEX. R. APP. P. 62 (addressing frivolous supreme court appeals).

534. *See* TEX. R. APP. P. 52.11.

535. *Id.*

536. *See* TEX. R. APP. P. 52.11(b).

537. *See* TEX. R. APP. P. 52.11(c) (addressing gross misstatements or omissions); TEX. R. APP. P. 52.11(d) (allowing sanctions for filing a clearly misleading appendix or record).

538. *See* TEX. R. APP. P. 16.

539. *See* TEX. R. APP. P. 16.1. Texas Rule of Civil Procedure 18b(1) restates the three constitutional grounds for disqualifying a judge: (1) the judge served as a lawyer in the case, or a lawyer with whom the judge previously practiced law served as a lawyer in the case during the time the two practiced together; (2) the judge knows that he has an interest in the case either individually or as a fiduciary; or (3) a party to the case is related to the

the grounds for recusing an appellate justice or judge are the same as those provided in the Texas Rules of Civil Procedure.[540] Finally, Rule 16.2 states that a justice or judge must recuse himself or herself in a proceeding that presents a material issue which the justice or judge participated in deciding while serving on another court in which the proceeding was pending.[541]

Additionally, if a party files a motion to recuse, the challenged justice or judge must either withdraw from the case or certify the matter to the entire court,[542] and the judge must select one of these options before any further proceeding in the case. If the recusal issue is certified, then the remaining justices, sitting en banc, will decide the motion by majority without participation by the challenged justice or judge.[543]

An order recusing a judge is not reviewable, but an order denying recusal is reviewable.[544] A party losing a motion to recuse

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judge by affinity or three degrees of consanguinity. TEX. R. CIV. P. 18b(1)(a)-(c); *see* TEX. CONST. art. V, § 11.

540. *See* TEX. R. APP. P. 16.1. Texas Rule of Civil Procedure 18b(2) sets out seven grounds for recusing a judge. *See* TEX. R. CIV. P. 18b(2). Texas Rule of Appellate Procedure 16.2 does not incorporate Section 74.053 of the Texas Government Code, which allows a party to object to a regular or retired judge who has been assigned as a visiting judge to a particular court. *See* TEX. R. APP. P. 16.2; *see also* Flores v. Banner, 932 S.W.2d 500, 502 (Tex. 1996) (orig. proceeding) (holding that a visiting judge abused his discretion when he refused to disqualify himself following a timely objection).

541. *See* TEX. R. APP. P. 16.2. Rule 16 does not provide any specific procedure for disqualification. The rule probably does not do so because, unlike recusal, constitutional disqualification can be raised by any party, or on the court's own motion, at any time, even in a collateral attack on the judgment. *See, e.g.*, Buckholts Indep. Sch. Dist. v. Glaser, 632 S.W.2d 146, 148 (Tex. 1982) (describing the difference between recusal and constitutional disqualification); McElwee v. McElwee, 911 S.W.2d 182, 186 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (noting that the disqualification of a judge cannot be waived by a party); Gulf Maritime Warehouse Co. v. Towers, 858 S.W.2d 556, 560 (Tex. App.—Beaumont 1993, writ denied) (reviewing the aspects of disqualification that demonstrate how it cannot be waived and how anyone can raise it as an issue). Thus, there is no one procedure for asserting judicial disqualification. Rule 16 only provides a procedure for recusing an appellate judge. *See* TEX. R. APP. P. 16.3. A party must file a motion for recusal promptly after the party has reason to believe that the justice or judge should not participate. *See* TEX. R. APP. P. 16.3(a).

542. *See* TEX. R. APP. P. 16.3(b).

543. *See id.*

544. *See* TEX. R. APP. P. 16.3(c). An earlier version of Rule 16.3(c) stated that the denial of recusal was "reviewable on appeal from the court of appeals' judgment." *Compare* STATE BAR OF TEXAS, GUIDE TO THE NEW TEXAS RULES OF APPELLATE PROCEDURE 65 (1997) (reprinting the new rules as promulgated by orders of March 20, 1997 and before the final orders on August 15, 1997, which requires recusal to be "on appeal from

should consider including recusal as an issue in its petition for review to the supreme court. However, that requirement could cause space problems in the petition for review, which is now limited to fifteen pages.[545]

XII. CONCLUSION

Numerous changes have been made to the Texas Rules of Appellate Procedure. These changes vary from minor amendments in terminology to more substantial changes regarding the proper manner for proceeding through the court system. Familiarity with the rules of appellate procedure is essential for successful appellate attorneys. Although practitioners may be able to rely on practices they have used in the past, the changes to the rules have streamlined certain procedures and now require different actions on the part of the attorneys. Therefore, a thorough understanding of the changes in the rules will allow the appellate practitioner to represent his client in a more efficient and effective manner. Moreover, practitioners need to be familiar with all of the procedural changes to ensure that substantive law will be the deciding factor in an appeal. By utilizing this knowledge, practitioners should be able to negotiate the appellate procedure with ease.

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the Court of Appeals' judgment"), *with* TEX. R. APP. P. 16.3(c) (delineating the rule as ultimately adopted with no such requirement). Whether that change was intended to allow for obtaining review by another method such as a mandamus action besides appeal is not clear.

545. *See* TEX. R. APP. P. 53.6 (limiting the page length for a petition for review).

APPENDIX[1]

1. Because the Appendix to this Review contains model forms, conventional Bluebook Rules have not been followed.

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I. NOTICE OF COUNSEL

[Trial-Court or Appellate-Court Caption]

NOTICE OF [NEW] LEAD APPELLATE COUNSEL

Under Texas Rule of Appellate Procedure 6.1, [new] lead counsel for [Name(s)] is as follows:

[Name]
State Bar No. [ ]
[Address]
Telephone:
Telecopier:

All communications that are required to be served on [Name(s)] should be sent to the lead counsel designated above.

[Signature(s)][2]

CERTIFICATE OF SERVICE[3]

On _____, _____, a copy of [name of document] was served, in compliance with Texas Rule of Appellate Procedure 9.5, on the following:

[Name]
[Address]
Counsel for [Name(s)]
Service via: [describe method]

_____
[Attorney's Name]
[Appellate-Court Caption]

2. If a new lead counsel is being designated, this notice must be signed both by new lead counsel and either the party or the former lead counsel. *See* TEX. R. APP. P. 6.1(c).

3. The certificate of service shown above may differ from what appellate counsel have previously used. Rule 9.5(e) requires the certificate to state: "(1) the date and manner of service; (2) the name and address of each person served; and (3) if the person served is a party's attorney, the name of the party represented by that attorney." TEX. R. APP. P. 9.5(e).

II. Nonrepresentation Notice

NONREPRESENTATION NOTICE

Under Texas Rule of Appellate Procedure 6.4, [Name] states that [he/she] is not representing [Name(s)] on appeal. Therefore, the Court and all counsel should communicate directly with [Name of Party] with regard to the appeal. Communications should be directed to:

[Name(s) of Party/Parties]
[Address]
Telephone:
Telecopier:[4]

[Signature(s)][5]

[Certificate of Service]

III. Notice of Appearance of Counsel

[Appellate-Court Caption]

NOTICE OF APPEARANCE OF APPELLATE COUNSEL

Under Texas Rule of Appellate Procedure 6.2, the following appears as counsel, other than lead counsel, for [Name(s)]:

[Name]
State Bar No. [ ]
[Address]
Telephone:
Telecopier:

[Signature & Certificate of Service]

IV. Certificate of Conference for All Motions

Unless the appellate rules prescribe a different form, all motions must contain the following certificate of conference:

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4. Rule 6.4(a)(3) requires the nonrepresentation notice to list the party's telephone number but not a telecopier number. *See* Tex. R. App. P. 6.4(a)(3). Nevertheless, if the party has a telecopier number, then it would be advisable to list the number.

5. The party must sign the nonrepresentation notice. *See* Tex. R. App. P. 6.4(a)(4).

CERTIFICATE OF CONFERENCE UNDER RULE 10.1

As required by Texas Rule of Appellate Procedure 10.1, the filing party [conferred/made a reasonable attempt to confer] with all other parties about this motion and its merits. [If a conference was only attempted, the certificate could include a description of the attempt made, although the rule does not expressly require that.] The other parties [oppose/agree to/ [describe other position]] this motion.

[Signature]

V. VERIFICATION FOR MOTIONS

Under Texas Rule of Appellate Procedure 10.2, a motion need not be verified unless it alleges facts that are not: (1) in the record; (2) within the knowledge of the court in its official capacity; or (3) within the signing attorney's personal knowledge. If required, the following form may be used:

VERIFICATION

THE STATE OF TEXAS §
§
COUNTY OF _____ §

On [Date], [Name] (the affiant) appeared in person before me, a notary public, who knows the affiant to be the person whose signature appears below. According to the affiant's statements under oath, the affiant is counsel for [Name], a party to this appeal; the affiant has read the above motion; and the information in the motion is correct according to affiant's personal knowledge.

[Signature]

SUBSCRIBED AND SWORN TO before me on [Date].

_____
Notary Public in and for
The State of Texas

_____
Printed Name of Notary

My Commission Expires:_____

VI. MOTION FOR SUBSTITUTION OF COUNSEL

[Appellate-Court Caption]

MOTION FOR SUBSTITUTION OF COUNSEL

1. [Name] seeks the Court's permission to withdraw as an attorney representing [Name(s) of Party/Parties] in this appeal. Further, [Name of Other Counsel] seeks leave of court to appear as lead appellate counsel for [Name(s) of Party/Parties].

2. As Rule 6.5 requires, the withdrawing counsel delivered a copy of this motion to [Name(s) of Party/Parties] [in person/or mailed] by both certified mail and first-class mail to the proper address.

[Name of Withdrawing Counsel] prays that the Court grant this motion to permit [him/her] to withdraw as lead appellate counsel for [Name(s) of Party/Parties], and [Name of Substituting Counsel] prays that the Court grant this motion to permit [him/her] to serve as lead appellate counsel for [Name(s) of Party/Parties].

[Signature(s)][6]

CERTIFICATE OF SERVICE

On _____, _____, a copy of [name of document] was served, in compliance with Texas Rule of Appellate Procedure 9.5, on the following:

[Name(s) of Party/Parties Whose Counsel is being substituted]

[Address]
Service via: Certified Mail - RRR & First-Class Mail
[Name]
[Address]
Counsel for [Name(s)]
Service via: [describe method]

_____
[Attorney's Name]

VII. MOTION FOR LEAVE TO WITHDRAW

[Appellate-Court Caption]

MOTION FOR LEAVE TO WITHDRAW AS COUNSEL

1. [Name(s)] seek(s) the Court's permission to withdraw as an attorney representing [Name(s) of Party/Parties] in this appeal.

2. [Explain circumstances surrounding request for withdrawal.]

6. Although not required, both the withdrawing and substituting counsel should sign. *Cf.* TEX. R. APP. P. 6.1(c) (stating that the designation of new lead counsel must be signed by the new counsel and either the party or the former lead counsel).

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3. In compliance with Texas Rule of Appellate Procedure 6.5, a list of current deadlines and settings in this case appears below:

[Insert List]

4. In further compliance with Texas Rule of Appellate Procedure 6.5, the last known address of [Name(s) of Party/Parties] [is/are]: [address(es)]. The telephone number(s) for [Name(s) of Party/Parties] [is/are]: [phone number(s)]. [The current telecopier number(s) for [Name(s) of Party/Parties] [is/are]: [telecopier numbers].

5. As Rule 6.5 requires, the withdrawing counsel delivered a copy of this motion to [Name(s) of Party/Parties] by both certified mail and first-class mail at the address listed above. If the Court grants this motion, withdrawing counsel will immediately notify [Name(s) of Party/Parties] in writing of any deadlines or settings that the withdrawing attorney knows about at the time of the withdrawal but that were not previously disclosed to the party. Withdrawing attorney will file a copy of that notice with the court clerk.

[Name of Withdrawing Counsel] prays that the Court grant this motion in all respects.

[Signature]

CERTIFICATE OF SERVICE

On _____, _____, a copy of [name of document] was served, in compliance with Texas Rule of Appellate Procedure 9.5, on the following:

[Name(s) of Party/Parties Whose Counsel Is Seeking Withdrawal]
[Address]
Service via: Certified Mail - RRR & First-Class Mail
[Name]
[Address]
Counsel for [Name(s)]
Service via: [describe method]

_____
[Attorney's Name]

VIII. Schedules of Deadlines

Appearing below are several schedules of deadlines for various types of appellate proceedings. A separate schedule is given for appeals from the court of appeals to the supreme court because the deadlines are the same regardless of the type of case that is on appeal. The appellate lawyer will be accustomed to most of these deadlines.

a. APPEAL TO THE COURT OF APPEALS FROM A SUMMARY JUDGMENT

_____: Date judgment was signed.
_____: Motion to modify and/or motion for new trial[7] (30th day after signing of the judgment; no extension of time possible; filing fee required to be paid with motion for new trial) [TEX. R. CIV. P. 329b].
_____: Scheduled hearing date on motion to modify and/or motion for new trial (hearing unnecessary but, if scheduled, should be held within 75 days of judgment) [TEX. R. CIV. P. 329b].
_____: Motion to modify and/or motion for new trial overruled by operation of law (75th day after signing of judgment) [TEX. R. CIV. P. 329b].
_____: Motion to modify and/or motion for new trial is denied by signed order, if not overruled by operation of law [TEX. R. CIV. P. 329b].
_____: End of trial court's plenary jurisdiction (30 days after signing of judgment in absence of motion to modify and/or motion for new trial; if any party files either or both of those motions, then plenary jurisdiction extends to 30 days after the earlier of the following: (1) signing of order(s) denying the motion(s); or (2) overruling of the motion(s) by operation of law on 75th day after judgment)[8] [TEX. R. CIV. P. 329b].

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7. *See* discussion *supra* notes 205-11 and accompanying text. A motion to modify extends the timetable. A motion for new trial probably does too, but it is safer to file a combined motion for new trial/motion to modify rather than to file only a motion for new trial.

8. Successive motions can affect the end of plenary jurisdiction. *See* L.M. Healthcare, Inc. v. Childs, 929 S.W.2d 442, 444 (Tex. 1996) (per curiam). The trial court denied a motion for new trial at same time it signed the judgment. *See id.* at 443. The appealing party filed a motion to modify within 30 days after the judgment. *See id.* The supreme court held that the trial court "possessed plenary power to modify the judgment." *Id.* at 444. Thus, the motion to modify extended the trial court's plenary power of court. *See id.*

_____: Notice of appeal by each party wishing to alter the trial court's judgment (30th day after signing of judgment or 90th day after judgment if any party files timely motion to modify, motion for new trial, or motion to reinstate under TEX. R. CIV. P. 165a, or request for findings of fact and conclusions of law (if findings and conclusions are required or could be considered), or 14 days after first filed notice of appeal). [TEX. R. APP. P. 26.1].

_____: Formal bills of exception (30th day after notice of appeal in a civil case) [TEX. R. APP. P. 33.2].

_____: Request for additional items in clerk's record (clerk automatically prepares record; appellant must arrange to pay for record; request for additional items should be made before clerk's record is prepared) [TEX. R. APP. P. 34.5(b)].

_____: Request for court reporter's record, if any exists and is necessary (on or before due date for notice of appeal; appellant must arrange to pay for record) [TEX. R. APP. P. 34.6(b)].

_____: Supersedeas bond (no later than 30th day after signing of judgment, or 30th day after court overrules motion for new trial by signed order, or 105th day after judgment if motion for new trial is overruled by operation of law; only motion for new trial postpones time for execution under TEX. R. CIV. P. 627) [TEX. R. APP. P. 24].

_____: Appellate record filed (clerk and reporter required to file record by 60th day after signing of judgment or 120 days afterwards if appellate timetable is extended by filing a motion under Rule 26.1(a)) [TEX. R. APP. P. 35.1].

_____: Appellant's brief (30th day after the later of the filing date of the clerk's record or the court reporter's record) [TEX. R. APP. P. 38.6].

_____: Appellee's brief (30th day after the filing of appellant's brief) [TEX. R. APP. P. 38.6].

_____: Reply brief (20th day after the filing of appellee's brief) [TEX. R. APP. P. 38.6].

_____: Decision by court of appeals.

b. APPEAL TO COURT OF APPEALS FROM JUDGMENT ON A JURY VERDICT

_____: Date judgment was signed.
_____: Motion to disregard jury findings and for judgment notwithstanding verdict (usually filed before judgment is signed; must be filed within court's plenary power; given absence of deadline in rules and decision by one court of appeals, safest procedure is to file within 30 days of judgment) [TEX. R. CIV. P. 301; 329b].
_____: Ruling on motion to disregard and for judgment n.o.v. (usually occurs at time judgment is signed: given no deadline in rules and dicta from one court of appeals case, safest procedure is to obtain ruling before motion for new trial is overruled) [TEX. R. CIV. P. 301; 329b].
_____: Motion for new trial and/or motion to modify (30th day after signing of the judgment; no extension of time possible; filing fee required to be paid with motion for new trial) [TEX. R. CIV. P. 329b].
_____: Scheduled hearing date on motion(s) for new trial and/or motion to modify (hearing unnecessary but, if scheduled, should be held within 75 days of judgment) [TEX. R. CIV. P. 329b].
_____: Motion for new trial and/or motion to modify overruled by operation of law (75th day after signing of judgment) [TEX. R. CIV. P. 329b].
_____: Motion for new trial and/or motion to modify is denied by signed order, if not overruled by operation of law [TEX. R. CIV. P. 329b].

_____: End of trial court's plenary jurisdiction (30 days after signing of judgment in absence of motion for new trial and/or motion to modify; if any party files either or both of those motions, then plenary jurisdiction extends to 30 days after the earlier of the following: (1) signing of order(s) denying the motion(s); or (2) overruling of the motion(s) by operation of law on 75th day after judgment)[9] [TEX. R. CIV. P. 329b].

_____: Notice of appeal by each party wishing to alter the trial court's judgment (30th day after signing of judgment or 90th day after judgment if any party files timely motion for new trial, motion to modify, motion to reinstate under TEX. R. CIV. P. 165a, or request for findings of fact and conclusions of law (if findings and conclusions are required or could be considered), or 14 days after first filed notice of appeal). [TEX. R. APP. P. 26.1].

_____: Formal bills of exception (30th day after notice of appeal in a civil case) [TEX. R. APP. P. 33.2].

_____: Request for additional items in clerk's record (clerk automatically prepares record; appellant must arrange to pay for record; request for additional items should be made before clerk's record is prepared) [TEX. R. APP. P. 34.5(b)].

_____: Request for court reporter's record, if any exists and is necessary (on or before due date for notice of appeal; appellant must arrange to pay for record) [TEX. R. APP. P. 34.6(b)].

_____: Supersedeas bond (no later than 30th day after signing of judgment, or 30th day after court overrules motion for new trial by signed order, or 105th day after judgment if motion for new trial is overruled by operation of law; only motion for new trial postpones time for execution under TEX. R. CIV. P. 627) [TEX. R. APP. P. 24].

9. *See supra* note 8.

_____: Appellate record filed (clerk and reporter required to file record by 60th day after signing of judgment or 120 days afterwards if appellate timetable is extended by filing a motion under Rule 26.1(a)) [TEX. R. APP. P. 35.1].

_____: Appellant's brief (30th day after the later of the filing date of the clerk's record or the court reporter's record) [TEX. R. APP. P. 38.6].

_____: Appellee's brief (30th day after the filing of appellant's brief) [TEX. R. APP. P. 38.6].

_____: Reply brief (20th day after the filing of appellee's brief) [TEX. R. APP. P. 38.6.].

_____: Decision by court of appeals.

c. APPEAL TO COURT OF APPEALS FROM NONJURY TRIAL OR DEFAULT JUDGMENT

_____: Date judgment was signed (Consider Rule 306a motion if no notice of judgment within 20 days of signing).[10]

_____: Request for findings of fact and conclusions of law (20th day after signing of judgment) [TEX. R. CIV. P. 296-299a].

_____: Request for additional of amended findings of fact and conclusions of law (within 10 days after the filing of the original findings and conclusions) [TEX. R. CIV. P. 298].

_____: Due date for findings of fact and conclusions of law (20th day after filing of request) [TEX. R. CIV. P. 296-299a].

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10. The Rule 306a motion should state when notice of the judgment was first received after the judgment was signed. In order to be an effective motion, the notice must be received 20 days after the judgment is signed, but no later than 90 days following the signing of the judgment. *See* Womack-Humphreys Architects, Inc. v. Barrasso, 886 S.W.2d 809, 814 (Tex. App.—Dallas 1994, writ denied). The motion should negate any actual knowledge of the judgment before the first date of notice. *See id.* at 814–15; St. Louis Fed. Sav. & Loan Ass'n v. Summerhouse Joint Venture, 739 S.W.2d 441, 442 (Tex. App.—Corpus Christi 1987, no writ) (per curiam); A. Copeland Enters., Inc. v. Tindall, 683 S.W.2d 596, 598 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.). Further, the motion should describe how the party or its attorney received notice of the judgment, and the motion should state, if known, why the notice was late. *See* TEX. R. CIV. P. 306a; *Barrasso*, 886 S.W.2d at 815. Finally, the motion should state any other pertinent details. For a detailed discussion of the proper procedure and governing cases see MICHOL O'CONNOR, O'CONNOR'S TEXAS RULES: CIVIL TRIALS 558-62 (Michol O'Connor & Byron P. Davis eds., 1998).

_____: Motion for new trial and/or motion to modify (30th day after signing of the judgment; no extension of time possible; filing fee required to be paid with motion for new trial) [TEX. R. CIV. P. 329b].

_____: Notice of past-due findings of fact and conclusions of law (30th day after filing request) [TEX. R. CIV. P. 296-299a].

_____: Scheduled hearing date on motion(s) for new trial and/or motion to modify (hearing unnecessary but, if scheduled, should be held within 75 days of judgment) [TEX. R. CIV. P. 329b].

_____: Motion for new trial and/or motion to modify overruled by operation of law (75th day after signing of judgment) [TEX. R. CIV. P. 329b].

_____: Motion for new trial and/or motion to modify is denied by signed order, if not overruled by operation of law [TEX. R. CIV. P. 329b].

_____: End of trial court's plenary jurisdiction (30 days after signing of judgment in absence of motion for new trial and/or motion to modify; if any party files either or both of those motions, then plenary jurisdiction extends to 30 days after the earlier of the following: (1) signing of order(s) denying the motion(s); or (2) overruling of the motion(s) by operation of law on 75th day after judgment)[11] [TEX. R. CIV. P. 329b].

_____: Notice of appeal by each party wishing to alter the trial court's judgment (30th day after signing of judgment or 90th day after judgment if any party files timely motion for new trial, motion to modify, motion to reinstate under TEX. R. CIV. P. 165a, or request for findings of fact and conclusions of law (if findings and conclusions are required or could be considered), or 14 days after first filed notice of appeal, in a restricted appeal must file notice of appeal within 6 months after the judgment is signed) [TEX. R. APP. P. 26.1].

11. Successive motions can affect the end of plenary jurisdiction. *See supra* note 8.

_____: Formal bills of exception (30th day after notice of appeal in a civil case) [TEX. R. APP. P. 33.2].

_____: Request for additional items in clerk's record (clerk automatically prepares record; appellant must arrange to pay for record; request for additional items should be made before clerk's record is prepared) [TEX. R. APP. P. 34.5(b)].

_____: Request for court reporter's record, if any exists and is necessary (on or before due date for notice of appeal; appellant must arrange to pay for record) [TEX. R. APP. P. 34.6(b)].

_____: Supersedeas bond (no later than 30th day after signing of judgment, or 30th day after court overrules motion for new trial by signed order, or 105th day after judgment if motion for new trial is overruled by operation of law; only motion for new trial postpones time for execution under TEX. R. CIV. P. 627) [TEX. R. APP. P. 24].

_____: Appellate record filed (clerk and reporter required to file record by 60th day after judgment is signed or 120 days afterwards if appellate timetable is extended by filing a motion or request under Rule 26.1(a); in a restricted appeal, record is due 30 days after the notice of appeal is filed) [TEX. R. APP. P. 35.1].

_____: Appellant's brief (30th day after the later of the filing date of the clerk's record or the court reporter's record) [TEX. R. APP. P. 38.6].

_____: Appellee's brief (30th day after the filing of appellant's brief) [TEX. R. APP. P. 38.6].

_____: Reply brief (20th day after the filing of appellee's brief) [TEX. R. APP. P. 38.6].

_____: Decision by court of appeals.

d. APPEAL TO COURT OF APPEALS FROM AN INTERLOCUTORY ORDER[12]

_____: Date order was signed.

Promptly: File request for findings of fact and conclusions of law [TEX. R. CIV. P. 296-299a].

12. The right to appeal an interlocutory order is conferred by Section 51.014 of the Texas Civil Practice and Remedies Code.

Promptly: Motion for new trial and/or motion to modify (appellate timetable is not extended; filing fee required to be paid with motion for new trial) [TEX. R. APP. P. 26.1(b); 28.1].

_____: Notice of appeal by each party wishing to alter the trial court's judgment (20th day after signing of the order) [TEX. R. APP. P. 26.1].

_____: Request for clerk's record and court reporter's record (request for reporter's record due with notice of appeal; no date specified for clerk's record but should be done at the same time as request for reporter's record; due date for filing record is 10 days after notice of appeal; original or sworn and uncontroverted copies can be used in lieu of clerk's record under Rule 28.3; appellant must arrange to pay for record) [TEX. R. APP. P. 34.5(b); 34.6(b); 35.1]. Appellate court may hear an accelerated appeal on original paper or sworn and uncontroverted copies of papers [TEX. R. APP. P. 28.3].

Promptly: Supersedeas bond [TEX. R. APP. P. 29].

_____: Trial court files findings of fact and conclusions of law (30th day after order, but court need not file findings and conclusions under Rule 28.1) [TEX. R. CIV. P. 296-299a].

_____: Appellant's brief (20th day after filing of record) [TEX. R. APP. P. 38.6].

_____: Appellee's brief (20th day after the filing of appellant's brief) [TEX. R. APP. P. 38.6].

_____: Reply brief (20th day after the filing of appellee's brief) [TEX. R. APP. P. 38.6].

[Note: The appellate court may allow the case to be submitted without briefs under TEX. R. APP. P. 28.3].

_____: Decision by court of appeals.

e. APPEAL FROM COURT OF APPEALS TO THE SUPREME COURT (ANY TYPE OF CASE)

_____: Consider filing motion for rehearing within 15 days after the final order of the court of appeals (no longer required); extension of time to file motion for rehearing must be filed no later than 15 days after this date [TEX. R. APP. P. 49].

_____: End of plenary jurisdiction in court of appeals (60 days after judgment or 30 days after overruling of last timely motion for rehearing) [TEX. R. APP. P. 19.1].

_____: Petition for review required by any party that desires to alter the judgment of the court of appeals (within 45 days after the date of the judgment of the court of appeals if no motion for rehearing is timely filed or 45 days after the date of the last ruling by the court of appeals on all timely filed motions for rehearing). [Once a party files a timely petition for review — either within the 45-day period or within any extended deadline granted by court order — any other party may file a petition for review within 45 days after the last for timely motion for rehearing is overruled or within 30 days after the filing of any preceding petition that is timely.] A party may not file a motion for rehearing after it has filed a petition for review [TEX. R. APP. P. 53.7].

_____: Response to petition for review (30 days after filing of petition, but court will not grant review unless response is filed or requested; waiver of response may be filed) [TEX. R. APP. P. 53.3; 53.7].

_____: Reply to response to petition for review (15 days after filing of response) [TEX. R. APP. P. 53.5; 53.7].

_____: Petitioner's brief on the merits (30 days after date of notice that the court has requested briefs on the merits, unless another due date is specified in the court's notice) [TEX. R. APP. P. 55.7].

_____: Respondent's brief on the merits (20 days after receiving petitioner's brief on the merits, unless another date is specified in the court's notice) [TEX. R. APP. P. 55.7].

_____: Petitioner's reply brief (15 days after receiving respondent's brief on the merits, unless another date is specified in the court's notice) [TEX. R. APP. P. 55.7].

_____: Decision by the supreme court.

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_____: Motion for rehearing due 15 days after supreme court's judgment, or motion to extend time filed within 15 days after this date [TEX. R. APP. P. 64].

IX. MOTION FOR EXTENSION OF TIME

[Appellate-Court Caption]

[NAME('S/S')] MOTION FOR EXTENSION OF TIME TO FILE [NAME OF DOCUMENT]

1. [Name(s)] seek(s) an extension of time to file [name of document]. The deadline for filing [name of document] is [Date].

2. [Name(s)] seek(s) an extension through [Date]. [Name(s)] rel[y/ies] on the following facts to reasonably explain the need for the requested extension: [list].

3. [1] [Name(s)] [has/have] not requested any prior extension of time to file a [name of document]. [2] The Court has granted [one/two, etc.] extension(s) of time to file a [name of document].

4. All facts recited in this motion are within the personal knowledge of the counsel signing this motion, so that no verification is necessary under Texas Rule of Appellate Procedure 10.2.

[Name(s)] pray(s) that the Court grant this extension of time to file [name of document] and all other relief to which [Name(s)] may be entitled.

[Signature, Certificate of Conference & Certificate of Service]

X. MOTION TO EXTEND TIME TO FILE NOTICE OF APPEAL

[Appellate-Court Caption]

[NAME('S/S')] MOTION FOR EXTENSION OF TIME TO FILE NOTICE OF APPEAL

1. [Name(s)] seek(s) an extension of time to file a notice of appeal. The deadline for filing the notice of appeal was [Date]. As required by Texas Rule of Appellate Procedure 26.3, [Name(s)] [is/are] filing this motion within 15 days after that deadline. Within that same 15-day time period, [Name] filed the notice of appeal in the district court on [Date]. [Name(s)] attach(es) a copy of the notice of appeal.

2. [Name] relies on the following facts to reasonably explain the need for the requested extension: [list].

3. The trial court is the [number] District Court for [Name] County, Texas, the Honorable [Name] Presiding Judge.

4. The trial court signed the [final judgment/name of other appealable order] on [Date] in Cause No. [number], styled [case style].

5. All facts recited in this motion are within the personal knowledge of the counsel signing this motion, so that no verification is necessary under Texas Rule of Appellate Procedure 10.2.

[Name(s)] pray(s) that the Court grant this motion and all relief to which [Name(s)] may be entitled.

[Signature, Certificate of Conference & Certificate of Service]

XI. Motion to Extend Time to File Petition for Review

[Supreme-Court Caption]

[NAME('S/S')] MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR REVIEW

1. [Name(s)] seek(s) an extension of time to file a petition for review. The deadline for filing the petition for review was [Date]. As required by Texas Rule of Appellate Procedure 53.7(f), [Name(s)] [is/are] filing this motion within 15 days after that deadline.

2. [Name(s)] seek(s) an extension through [Date]. [Name(s)] rel[y/ies] on the following facts to reasonably explain the need for the requested extension: [list].

3. [1] [Name(s)] [has/have] not requested any prior extension of time to file a petition for review. [2] The Court has granted [one/two, etc.] extension(s) of time to file a petition for review. [NOTE: It is doubtful that more than one extension will be granted.]

4. The [number] Court of Appeals issued its [judgment/other appealable order] on [Date] in Case No. [number], styled [case style].

[Name(s)] pray(s) that the Court grant this motion and all relief to which [Name(s)] may be entitled.

[Signature, Certificate of Conference & Certificate of Service]

XII. Motion to Disregard Findings and for Judgment Notwithstanding Verdict

[Trial-Court Caption]

[NAME('S/S')] MOTION TO DISREGARD JURY FINDINGS AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Under Texas Rules of Civil Procedure 301, [Name(s)], request(s) that the Court render a judgment that [Name(s)] take nothing from [Name(s)].

PRELIMINARY STATEMENT

[Name(s)] [do/does] not waive, and continues to assert, all legal arguments previously urged in its prior motions and objections to the Court's Charge. [Name(s)] reserve(s) the right to assign any and all other properly preserved complaints on appeal.

JURY FINDINGS THAT SHOULD BE DISREGARDED

The following points also require that the jury findings be disregarded and a take-nothing judgment be rendered on the plaintiff's claims.

1. The evidence was legally insufficient[13] to support the jury's answer of ["Yes"/"No"/"_____"] to Question No. ____, which asked [Describe]. [There was no evidence supporting that answer to Question No.] [Further,] [T/t]he evidence conclusively showed, as a matter of law, that the only correct answer to Question No. ____ was ["Yes"/"No"/"_____"]. The jury's answer to Question No. ____ was [also] immaterial. Therefore, the Court should disregard the jury's answer to Question No. ____.

[Consider repeating for each adverse answer.]

[ ]. In addition, the Court should disregard the jury's answer(s) to Questions [No./Nos.]; and the Court should render a take-nothing judgment in favor of the defendant and notwithstanding the verdict for the following reasons:

PRAYER

[Name(s)] respectfully request(s) that the Court disregard the findings of the jury set out above, grant its motion for judgment notwithstanding the verdict, and render judgment that [Name(s)] take nothing. [Name(s)] further request(s) that the Court sign and file the attached Final Judgment. Finally, [Name(s)] request(s) all other relief to which [Name(s)] [is/are] entitled.

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13. The term "legally insufficient" should be used in the motion to disregard because it is a broad term that preserves several categories of errors. A jury answer is legally insufficient in any of four circumstances: (1) there is absolutely no evidence of a vital fact; (2) some rule of law or evidence prevents the appellate court from considering the only evidence of a vital fact; (3) the evidence offered to prove a vital fact is nothing more than a scintilla of evidence; and (4) the evidence conclusively proves the opposite of a vital fact. *See* Juliette Fowler Homes, Inc. v. Welch Assocs., Inc., 793 S.W.2d 660, 666 n.9 (Tex. 1990). *See generally* Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361 (1960).

[Signature & Certificate of Service]

[Trial-Court Caption]

ORDER ON [NAME('S/S')]

MOTION TO DISREGARD JURY FINDINGS AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT

On _____, _____, the Court heard the motion to disregard jury findings and for judgment notwithstanding the verdict filed by [Name(s)], the defendant in this case. The Court having considered the motion and all arguments of counsel, it is now ORDERED that the defendant's motion is:

_____ DENIED

_____ GRANTED

_____ DENIED IN PART AS FOLLOWS:

_____ GRANTED IN PART AS FOLLOWS:

_____

_____

_____

SIGNED on _____, _____.

_____

JUDGE PRESIDING

APPROVED AS TO FORM:

[Signature]

XIII. EXAMPLE OF COMBINED MOTION FOR NEW TRIAL, TO MODIFY, AND FOR SUGGESTION OF REMITTITUR

[Trial-Court Caption]

[NAME('S/S')] MOTION FOR NEW TRIAL; MOTION TO MODIFY THE JUDGMENT; AND MOTION FOR SUGGESTION OF REMITTITUR

[Name(s)] file(s) this motion, seeking the following relief: (1) that the Court vacate and set aside the final judgment signed on [Date] and grant a new trial pursuant to Texas Rule of Civil Procedure 329b; alternatively, that the Court modify, correct, or reform the judgment pursuant to Texas Rule of Civil Procedure 329b; or further in the alternative, that the Court

suggest a remittitur pursuant to Texas Rule of Civil Procedure 315. [Name(s)] respectfully show(s) the following in support of his/her request for relief from this Court.

PRELIMINARY STATEMENT

[Name(s)] [does/do] not waive, and continues to assert, all arguments previously urged in his/her prior motions and his/her objections to the Court's charge. [Name(s)] reserve(s) the right to assign any and all other properly preserved complaints on appeal. Further, if the Court modifies, reforms, or corrects the judgment, [Name(s)] reserve(s) the right to file an additional motion for a new trial.

A. [NAME(S)] [IS/ARE] ENTITLED TO A NEW TRIAL

[1. The evidence is factually insufficient to support the jury's answer of ["Yes"/"No"/"_____"] to Question No. _____, which asked _____. Further, the jury's answer to Question No. _____ is against the overwhelming weight of the evidence.] [If the question dealt with damages, consider adding this sentence: In addition, the damages awarded by the jury in answer to Question _____ are [excessive.] [For use in complaining about jury answer to question on which the opposing party had the burden of proof. Consider repeating these allegations for each adverse jury finding on which opponent had the burden of proof.]

[2. The jury's answer to Question No. _____, which asked _____, is against the overwhelming weight of the evidence. [If the question dealt with damages, consider adding this sentence: In addition, the damages awarded by the jury in answer to Question _____ are [inadequate.]] [For use in complaining about jury answer to question on which the party seeking the new trial had the burden of proof. Consider repeating these allegations for each adverse jury finding on which the moving party had the burden of proof.]

[3. Include any complaint that would require the taking of evidence post-judgment, including any complaint based on jury misconduct or newly discovered evidence.]

[4. Include any complaint about incurable jury argument if not otherwise ruled on by the trial court.]

[5. Include any other complaint that was not previously presented to the trial court but that may be a complaint on appeal.]

[6. Consider including any other complaint that may be persuasive to the trial judge, even though raising the issue in a motion for new trial is not required for presenting the complaint on appeal.]

[ ]. For the reasons above, individually and collectively, the Court should grant [Name(s)] a new trial.

B. ALTERNATIVELY, THE COURT SHOULD MODIFY THE JUDGMENT

1. The judgment should be modified because [describe error in the judgment].

2. The Court should, therefore, [describe relief sought].

C. MOTION FOR SUGGESTION OF REMITTITUR

1. It is, of course, within this Court's power to suggest a remittitur to the plaintiff and to grant a new trial if the plaintiff does not remit the suggested amount. *See generally* William Powers, Jr. & Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence,"* 69 TEX. L. REV. 515, 564 (1991). In the context of a suggestion or remittitur, the proper standard for the trial court, or the court of appeals, is factual sufficiency, that is, the court should look at all the evidence and determine whether sufficient evidence exists in the record to support the jury's award of damages and remit if some portion of the award is "so factually insufficient or against the great weight and preponderance of the evidence as to be manifestly unjust." *Pope v. Moore*, 711 S.W.2d 622, 624 (Tex. 1986).

2. The jury found [describe].

[3. In cases involving more serious and more extensive injuries, juries have awarded damages that are far below what the jury found in this case. Instructive cases are summarized below:]

[4]. Based on the facts of this case, [and in comparison with the cases summarized above] it is clear that the jury awarded such excessive damages as to be "manifestly unjust." Thus, the Court should suggest a remittitur and grant a new trial if the remittitur is not accepted by the plaintiff. [Name(s)] respectfully submit(s) that any actual damages in excess of [$_____] would be manifestly unjust and excessive in this case.

PRAYER

[Name(s)] respectfully pray(s) that the Court grant this motion, vacate and set aside the final judgment signed on [Date], and grant a new trial. Alternatively, [Name(s)] pray(s) that the Court modify the judgment [describe]. Further, and in the alternative, [Name(s)] pray(s) that the Court suggest a remittitur of the actual damages and grant a new trial if the plaintiff does not accept the Court's suggestion of remittitur. Finally, [Name(s)] pray(s) for all other relief to which [he/she/it/they] [is/are] entitled in this case.

[Signature & Certificate of Service]

XIV. Request for Findings of Facts and Conclusions of Law

[Trial-Court Caption]

[NAME('S/S')] REQUEST FOR
FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Under Rule 296 of the Texas Rules of Civil Procedure, [Name(s)] request(s) this Court to file findings of fact and conclusions of law. [Name(s)] request(s) findings of fact and conclusions of law relative to the Final Judgment by Default signed in this case by the Court on [Date].

2. Under Texas Rule of Civil Procedure 297, the Court must file findings of fact and conclusions of law within 20 days of the filing date of this request (that is, before [Date]).

[This request for findings of fact and conclusions of law is not to be construed as a waiver of [Name('s/s')] right to file a motion [to set aside the default judgment and] for new trial, which [Name(s)] [does/do] intend to file.

[Signature & Certificate of Service]

XV. Notice of Past Due Findings of Fact and Conclusions of Law

[Trial-Court Caption]

NOTICE OF PAST DUE FINDINGS OF FACT &
CONCLUSIONS OF LAW

1. The Court signed a judgment on [Date].

2. [Name(s)] filed a timely request for findings of fact and conclusions of law on [Date].

3. The findings of fact and conclusions of law were due on [Date], 20 days after the request was filed. *See* Tex. R. Civ. P. 297.

4. [Name(s)] file(s) this notice of past due findings of fact and conclusions of law within 30 days of the date of its original request.

5. This notice extends the date the findings of fact and conclusions of law are due until [Date], 40 days from the date of the original request.

6. [Name(s)] request(s) the Court to file findings of fact and conclusions of law and mail copies to all parties.

[Signature & Certificate of Service]

XVI. NOTICE OF APPEAL

[Trial-Court Caption]

NOTICE OF APPEAL OF [NAME(S)]

[Name of each party filing the notice] desire(s) to appeal from the judgment/order rendered on [Date] by the [ ] District Court for [ ] County, Texas in Cause No. [ ], styled [ ]. This appeal is taken to [name of court]. [This is an accelerated appeal.]

[Signature]

CERTIFICATE OF SERVICE

On _____, _____, a copy of this notice of appeal was served, in compliance with Texas Rules of Appellate Procedure 9.5 and 25.1(e), on the following:

[Name of each party to trial court judgment or, in an accelerated appeal, to each party to the trial court proceeding]
[Address]
Counsel for [Name(s)]
Service via: [describe method]
[Name]
Appellate Court Clerk
[Name of Court of Appeals]
[Address]
Service via: [describe method]

_____
[Attorney's Name]

XVII. SUPERSEDEAS BOND

[Trial-Court Caption]

SUPERSEDEAS BOND

As acknowledged by the principal(s) on this supersedeas bond, [Name(s)], a final judgment was signed in this cause on [Date], in favor of plaintiff(s), [Name(s)] (hereinafter "the creditor(s)"), and against defendant(s), [Name(s)] (hereinafter the "debtor(s)" or "principal(s)"), for damages of [$_____], plus interest and taxable costs. The debtor(s) desire(s) to suspend execution on the judgment pending a determination of [his/her/its/their] appeal to the [_____] Court of Appeals in [City], Texas.

In compliance with Texas Rule of Appellate Procedure 24.1, [Name] (hereinafter the "surety") hereby obligates itself as surety to assume liability for all damages, interest, and costs that may be awarded against the debtor(s) under the judgment up to the amount of [$_____], which represents the sum of the following awards under the judgment described above: (1) actual damages of [$_____]; (2) prejudgment interest in the amount of [$_____]; (3) [one/two] years' post-judgment interest in the amount of [$_____]; [and] (4) [$_____], being an estimate of the creditor['s/s'] taxable costs in the trial and appellate courts [; and (5) [list any other damages awarded]].

This supersedeas bond is conditioned in compliance with Texas Rule of Appellate Procedure 24.1(d), so that the surety is subject to the assumed liability, up to the full amount of this bond, if: (1) the debtor(s) do(es) not perfect an appeal or the debtor['s/s'] appeal is dismissed, and the debtor(s) do(es) not perform the trial court's judgment; [or] (2) the debtor(s) do(es) not perform an adverse judgment on final appeal [; or (3) the judgment is for the recovery of an interest in real or personal property, and the debtor(s) do(es) not pay the creditor(s) the value of the property interest's rent or revenue during the pendency of the appeal].

SIGNED on _____, _____.

PRINCIPAL(S)
[Name(s)]
[By]_____
[As Counsel of Record/Authorized Agent Only][14]

_____
[Name, by [his/her]
[Counsel of Record, [Name]]

SURETY
[Name]
By_____
Attorney-in-Fact

14. Counsel or authorized agent should be denominated as such so that no impression will be created that they are signing as principals. The better practice is to have the principal sign.

[Certificate of Service]

XVIII. REQUEST FOR CLERK'S RECORD

[Trial-Court Caption]

[NAME('S/S')] [AMENDED] REQUEST FOR ADDITIONAL ITEMS
TO BE INCLUDED IN THE CLERK'S RECORD

Under Texas Rule of Appellate Procedure 34.5, [Name(s)] file(s) this [amended] request for items to be included in the clerk's record in the appeal of the judgment [specify other order] in the above case. [In this amended request, the newly specified items appear(s) in bold at the end of the additional items requested.]

REQUEST FOR MANDATORY ITEMS

[Name(s)] request(s) that the clerk include in the record the following mandatory items specified in Texas Rule of Appellate Procedure 34.5:

(1) all pleadings on which the trial was held (namely, [list titles of all trial pleadings]);
(2) the court's docket sheet;
(3) the court's charge and the jury's verdict, or the court's findings of fact and conclusions of law;
(4) the court's judgment or order that is being appealed (namely, [describe]);
(5) all requests for findings of fact and conclusions of law;
(6) all post-judgment motions (namely, [list titles]) and the court's orders thereon;
(7) all notices of appeal;
(8) any formal bills of exception;
(9) the request for the court reporter's record [, including any statement of points or issues if required under Rule 34.6(c)];
(10) all requests for preparation of the clerk's record; and
(11) a certified bill of costs, including the cost of preparing the clerk's record, showing credits for payments made.

REQUEST FOR ADDITIONAL ITEMS

In addition, [Name(s)] request(s) that the clerk also include in the record the additional items listed below, all of which are specifically described below to make them readily identifiable. Counsel for [Name(s)] is available to consult with the Clerk concerning the identification of any of the items listed below.

Filing Date	*Item's Title or Description*
[approximate date]	[description of item or title]

[Under Texas Rule of Appellate Procedure 35.3, [Name(s)] accept(s) responsibility to pay for the preparation of the clerk's record and has paid, or is willing to pay, the clerk's fee for the preparation of the record.]

[Signature & Certificate of Service]

XIX. Letter Request for Supplementation of Clerk's Record

[Trial-Court Caption]
[Name]
District Clerk
[Address]
[Attention Post-Judgment Department:]
[Name]:

Under Texas Rule of Appellate Procedure 34.5(c), we are sending this letter on behalf of [Name(s)]. We respectfully direct you to prepare, certify, and file in the appellate court the following item(s) that [was/were] omitted from the clerk's record, along with this letter request.

I am available to consult with you about the item(s) listed below if the description is not sufficient to enable you to identify [it/them] readily. [For your convenience, a copy of requested item(s) is attached.]

Filing Date	*Items, Title or Description*

[List items]

Certificate of Service

By my signature below, I certify that I served this letter request on the appellate clerk and on the counsel [and part[y/ies]] listed below.

[Signature]

cc: [Clerk of appellate court, with reference to cause number and style on appeal, address, and manner of service]
[Opposing counsel with address, designation of party represented, and method of service]
[If the case is not yet docketed in the appellate court, include a copy to the district clerk as well and request that the letter itself be included in the clerk's record.]

XX. Request for Court Reporter's Record

[Trial-Court Caption]

[NAME('S/S')] REQUEST FOR
COURT REPORTER'S [RECORDER'S] RECORD

TO: [Name], Official Court Reporter [Recorder], [ ] District Court, [Address].

Under Texas Rule of Appellate Procedure 34.6, [Name(s)] request(s) [Name], the official court reporter [recorder] of the above court, to prepare the reporter's record. [The portions of the testimony to be included are as follows: [describe].] [NOTE: The preceding sentence is not required in the case of an electronically recorded record.] Further, the record should also include the following: [identify any relevant pretrial hearings or conferences; jury selection; opening statements; motions for directed verdict; hearings on admissibility of expert opinions; charge conferences; charge objections; requests for additions to the charge; and final arguments; all matters relating to jury deliberations and questions; and identify all relevant post-verdict hearings]. In addition, [Name(s)] request(s) that court reporter [recorder] include the following exhibits in the record: [list].

[Under Texas Rule of Appellate Procedure 35.3, [Name(s)] accept(s) responsibility to pay for the preparation of the court reporter's [recorder's] record and is willing to pay the court reporter's [recorder's] fee for preparing the record.]

[Signature & Certificate of Service]

XXI. Letter Request for Supplementation of Court Reporter's Record

[Trial-Court Caption]
[Name]
Official Court Reporter
[Address]
Dear [Name]:

Under Texas Rule of Appellate Procedure 34.6(d), we are sending this letter on behalf of [Name(s)]. We respectfully direct you to prepare, certify, and file in the appellate court the following item(s) that [was/were] omitted from the court reporter's record. [We hereby state our willingness to pay your fee for the preparation of the requested supplement to the court reporter's record.]

CERTIFICATE OF SERVICE

By my signature below, I certify that I have served this letter request on the appellate clerk and on the counsel [and part[y/ies]] listed below.

[Signature]

cc: [Clerk of appellate court, with reference to cause number and style on appeal, address, and manner of service]
[Opposing counsel with address, designation of party represented, and method of service]
[If case is not yet docketed in the appellate court, include a copy to the district clerk as well and request that the letter be included in the clerk's record on appeal.]

XXII. MOTION TO TRANSFER ORIGINAL EXHIBITS

[Trial-Court Caption]

[JOINT] MOTION TO TRANSFER ORIGINAL EXHIBITS TO COURT OF APPEALS

Under Texas Rule of Appellate Procedure 34.6(g), [Name(s)] request(s) that this Court permit [Name], Official Court Reporter of the [_____] Judicial District Court, to transfer the original exhibits to the Court of Appeals and file them in this appeal.

1. This appeal has been perfected and will be docketed in the [_____] Court of Appeals.

2. The applicable rules and law require that the appellate court have before it all exhibits admitted at the trial or hearing appealed from. In an effort to reduce the amount of time needed for preparation of the court reporter's record, and because of the voluminous nature of the exhibits, the parties request this Court's permission to withdraw all original exhibits from this Court and file them with the appellate court.

[Name(s)] pray(s) that the Court grant this joint motion and order [Name], Official Court Reporter of the [_____] Judicial District Court, to transfer plaintiff's and defendant's original exhibits, as identified [below, on the attached Exhibit List] to the [_____] Court of Appeals by [Date].

[Signature, Certificate of Conference & Certificate of Service]

[Trial-Court Caption]

AGREED ORDER TRANSFERRING ORIGINAL EXHIBITS

On _____, 19_____, the Court considered the Agreed Motion to Transfer Original Exhibits to

Court of Appeals filed by [Name(s)]. The Agreed Motion is hereby granted.

It is, therefore, ORDERED that the original exhibits [listed below/ identified on the attached Exhibit List] be transferred to the Court of Appeals by [Name], Official Court Reporter of the [_____] Judicial District Court, [_____] County, Texas, by [Date].

SIGNED on _____, _____.

_____

JUDGE PRESIDING

AGREED TO:

[Signatures]

XXIII. APPELLANT'S BRIEF IN THE COURT OF APPEALS

[Brief Cover][15]

IDENTITY OF PARTIES AND COUNSEL

The following is a list of all parties to the trial court's [judgment/order] being appealed from:

The following are the names and addresses of all trial and appellate counsel for the parties listed above:

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[RECORD REFERENCES (Optional)]

[The Clerk's Record consists of _____ volumes and will be cited by the abbreviation "CR" (*e.g.*, 1 CR 1). The Reporter's Record consists of _____ volumes and will be cited by the abbreviation "RR" (*e.g.*, 1 RR 1). In addition, _____ Brief will be cited as ["Br. Appellant(s)/ Appellee(s)."]

15. All covers to documents must include: (1) case style; (2) case number; (3) the document's title; (4) name of filing party; (5) name of lead counsel, together with counsel's mailing address, telephone number, fax number (if any), and state bar number. *See* TEX. R. APP. P. 9.4(g). A request for oral argument should appear on the front cover, if argument is requested. *See id.* Usually, the oral argument request appears in the lower left-hand corner.

STATEMENT OF THE CASE

[State concisely, with record references, the nature of the case (e.g., suit for damages, suit on a note), the course of proceedings, and the trial court's disposition of the case. This statement should seldom exceed one-half page and should not discuss facts.]

ISSUES PRESENTED

[State concisely all issues or points presented for review. All subsidiary questions that are fairly included will be raised for appellate consideration.]

STATEMENT OF FACTS

[State concisely, with record references, the facts pertinent to the issues or points presented. In a civil case, the court will accept as true the facts stated unless another party contradicts them.]

SUMMARY OF THE ARGUMENT

[Summarize succinctly, clearly, and accurately the arguments made in the body of the brief, without repeating the issues or points presented.]

[STANDARD OF REVIEW (Optional)]

[It is advisable to state the applicable standards of review for each issue that the court must decide. This can be done in a separate section or interwoven with the argument in the brief. A discussion of the standard of review may properly include a discussion of reversible error.[16] For example, in an appeal dealing with the exclusion or admission of evidence, the following statement could be made: "The abuse-of-discretion standard applies to complaints about the admission or exclusion of evidence. *See, e.g., Tracy's v. Annie's Attic, Inc.*, 840 S.W.2d 527, 531 (Tex. App.—Tyler 1992, writ denied). Moreover, to reverse on evidentiary error, this Court must review the entire record to determine whether the error probably caused an improper verdict. *See, e.g., Gee v. Liberty Mut. Fire Ins. Co.*, 765 S.W.2d 394, 396 (Tex. 1989)." Reversible error is set forth in Rules 44 and 61. A compendium of state standards of review is available to assist the practitioner.[17]]

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16. Rule 44 and 61 state what reversible error is. *See* TEX. R. APP. P. 44 (discussing reversible error in courts of appeals). *See* TEX. R. APP. P. 61 (discussing reversible error in the supreme court).

17. *See* W. Wendell Hall, *Standards of Review in Texas*, 29 ST. MARY'S L.J. 351 (1998).

ARGUMENT

[Clear and concise argument with appropriate citations and record references.]

PRAYER

[Short conclusion of nature of relief sought.]

APPENDIX

[Unless voluminous or impractical, the Appendix *must* include: (A) trial court's judgment or order from which relief is sought; (B) the jury charge and verdict or the trial court's findings of facts and conclusions of law; (C) the text of any rule, regulation, ordinance, statute, constitutional provision, or other law (excluding case law) on which the argument is based, and the text of any contract or other document that is central to the argument.

The Appendix may include any other item pertinent to the issues or points presented, including copies of opinions, laws, documents on which the suit was based, pleadings, excerpts from the reporter's record, and similar material. Do not include items for the purpose of avoiding page limits.][18]

XXIV. MOTION FOR REHEARING

[Brief Cover]

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In accordance with Texas Rules of Appellate Procedure 49/64/52.9,[19] [Name(s)] file(s) this motion for rehearing of the judgment rendered by this Court on [Date], and its [unpublished] opinion dated [Date]. [Further, under Texas Rule of Appellate Procedure 47.3(c), [Name(s)] request(s) that the Court of Appeals reconsider its decision not to publish its opinion.]

This motion for rehearing is based on the following [points/issues]:

---

18. *See* TEX. R. APP. P. 38.1(j).

19. Rule 49 governs motions for rehearing in the courts of appeals. *See* TEX. R. APP. P. 49. Rule 64 governs motions for rehearing in the supreme court. *See* TEX. R. APP. P. 64. Rule 52.9 applies to rehearings in original proceedings. *See* TEX. R. APP. P. 52.9.

[List points or issues]

DISCUSSION

PRAYER

[Name(s)] request(s) that this Court grant rehearing, grant oral argument, modify the Court's [Date] opinion and [Date] judgment, and [affirm/reverse] the trial court's judgment [reverse/remand, etc.]. [[Name(s)] further request(s) that the Court order that its [Date] opinion, and/or any subsequent opinion in this case, be published for the benefit of practitioners and judges].

[Signature & Certificate of Service]

XXV. PETITION FOR REVIEW

[Brief Cover]

IDENTITY OF PARTIES AND COUNSEL

The following is a list of all parties to the trial court's [judgment/order] being appealed from:

The following are the names and addresses of all trial and appellate counsel for the parties listed above:

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[RECORD REFERENCES (Optional)]

[The Clerk's Record consists of _____ volumes and will be cited by the abbreviation "CR" (*e.g.*, 1 CR 1). The Reporter's Record consists of _____ volumes and will be cited by the abbreviation "RR" (*e.g.*, 1 RR 1). In addition, _____ Brief will be cited as ["Br. Appellant(s)/ Appellee(s)."]

STATEMENT OF THE CASE

[This statement should seldom exceed one page and should not discuss facts. The contents are to be as follows: (1) concise description of the nature of the case (*e.g.*, whether it is a suit for damages, on a note, etc.); (2) the name of the judge who signed the order or judgment appealed from; (3) the designation of the trial court and county in which it is located; (4) the disposition of the case by the trial court; (5) the parties in the court of appeals; (6) the district of the court of appeals; (7) the names of the justices who participated in the court of appeals, the author of the opinion of the court of appeals, and the author of any separate opinion;

(8) the citation for the court of appeals' opinion, if available, or a statement that the opinion was unpublished; and (9) the disposition by the court of appeals.

STATEMENT OF JURISDICTION

[The petition should state the basis for jurisdiction without argument.]

ISSUES PRESENTED

[State concisely all issues or points presented for review. All subsidiary questions that are fairly included will be raised for appellate consideration.]

STATEMENT OF FACTS

[The petition must affirm that the court of appeals correctly stated the nature of the case, except in any particulars pointed out. The petition must state concisely, and without argument, the facts and procedural background pertinent to the issues or points presented. The statement must be supported by record references.]

SUMMARY OF THE ARGUMENT

[Summarize succinctly, clearly, and accurately the arguments made in the body of the brief, without repeating the issues or points presented.]

[STANDARD OF REVIEW (Optional)]

[See the earlier discussion of this section with regard to the appellant's brief in the court of appeals.][20]

ARGUMENT

[State clear and concise arguments with appropriate citations and record references. The argument need not address every issue or point. The argument should state reasons why the supreme court should exercise jurisdiction to hear the case with specific reference to the factors listed in Rule 56.1(a). References to matters in the appendix are sufficient without quoting at length from the matters. Statements in the opinion of the court of appeals need not be repeated. The factors listed in Rule 56.1(a) are the following: (1) whether the justices of the court of appeals disagree on an important point of law; (2) whether there is a conflict between the courts of appeals on an important point of law; (3) whether a case

20. *See supra* note 17.

involves a construction or validity of a statute; (4) whether a case involves constitutional issues; (5) whether the court of appeals appears to have committed an error of law of such importance to the state's jurisprudence that it should be corrected; and (6) whether the court of appeals has decided an important question of state law that should be, but has not been, resolved by the supreme court.]

PRAYER

[Short conclusion of nature of relief sought.]

APPENDIX

[Unless voluminous or impractical, the Appendix must include: (1) the trial court's judgment or order from which relief was sought in the court of appeals; (2) the jury charge and verdict or the trial court's findings of fact and conclusions of law; (3) the opinion and judgment of the court of appeals; and (4) the text of any rule, regulation, ordinance, statute, constitutional provision, or other law on which the argument is based, and the text of any contract or other document that is central to the argument.

The Appendix may include any other item pertinent to the issues or points presented, including copies of opinions, laws, documents on which the suit was based, pleadings, excerpts from the reporter's record, and similar material. Do not include items for the purpose of avoiding page limits.][21]

XXVI. PETITIONER'S BRIEF ON THE MERITS

[Brief Cover]

IDENTITY OF PARTIES AND COUNSEL

The following is a list of all parties to the trial court's [judgment/order] being appealed from:

The following are the names and addresses of all trial and appellate counsel for the parties listed above:

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[RECORD REFERENCES (Optional)]

[The Clerk's Record consists of _____ volumes and will be cited by the abbreviation "CR" (*e.g.*, 1 CR 1). The Reporter's Record consists of

21. *See* TEX. R. APP. P. 53.2(k).

_____ volumes and will be cited by the abbreviation "RR" (*e.g.*, 1 RR 1). In addition, _____ Brief will be cited as ["Br. Appellant(s)/ Appellee(s)."]

STATEMENT OF THE CASE

[This statement should seldom exceed one page and should not discuss facts. The contents are to be as follows: (1) a concise description of the nature of the case (*e.g.*, whether it is a suit for damages, on a note, etc.); (2) the name of the judge who signed the order or judgment appealed from; (3) the designation of the trial court and county in which it is located; (4) the disposition of the case by the trial court; (5) the parties in the court of appeals; (6) the district of the court of appeals; (7) the names of the justices who participated in the court of appeals, the author of the opinion of the court of appeals, and the author of any separate opinion; (8) the citation for the court of appeals' opinion, if available, or a statement that the opinion was unpublished; and (9) the disposition by the court of appeals.]

STATEMENT OF JURISDICTION

State the Basis for Jurisdiction Without Argument.

ISSUES PRESENTED

[State concisely all issues or points presented for review. All subsidiary questions that are fairly included will be raised for appellate consideration. Issues need not be stated identically to those in the petition for review, but no substantive change or injection of new issues is allowed.]

STATEMENT OF FACTS

[The brief must affirm that the court of appeals stated the nature of the case, except in any particulars pointed out. The brief must state concisely and without argument the facts pertinent to the issues or points presented. The statement must be supported by record references.]

SUMMARY OF THE ARGUMENT

[Summarize succinctly, clearly, and accurately the arguments made in the body of the brief, without repeating the issues or points presented.]

[STANDARD OF REVIEW (Optional)]

[See the earlier discussion of this section with regard to the appellant's brief in the court of appeals.][22]

ARGUMENT

[Clear and concise argument with appropriate citations and record references.]

PRAYER

[Short conclusion of nature of relief sought.]

XXVII. PETITION FOR MANDAMUS

[Brief Cover with Mandamus Caption "*In re* [Relator(s)"]

IDENTITY OF PARTIES AND COUNSEL

The following is a list of all parties and the names and addresses of all counsel in this case:

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[THE RECORD (Optional)]

The Record is filed simultaneously with this petition in compliance with Texas Rule of Appellate Procedure 52.7. The Record contains the following documents from the district clerk's file:

1. [list documents]

The above documents will be cited by number (*e.g.*, R. 1, at 1).

[In addition, Relator(s) filed simultaneously a motion for leave to file under seal the following documents tendered to the district court *in camera*: Those documents will be cited as:]

STATEMENT OF THE CASE

[Name(s)], as Relator(s), file(s) this petition for writ of mandamus under Article V, Section 6 of the Texas Constitution; Section 22.221 of the Texas Government Code; and Rule 52 of the Texas Rules of Appellate Procedure. Relator(s) respectfully complain(s) of Respondent, the Honorable [Name], Judge of the [Number] Judicial District Court.

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22. *See supra* note 17.

[The Statement of the Case should seldom exceed one page and should not discuss the facts. The statement must contain the following: (1) a concise description of the nature of any underlying proceeding (*e.g.*, a suit for damages, a contempt proceeding for failure to pay child support); (2) if the respondent is a judge, the name of the judge, the designation of the court in which the judge was sitting, and the county in which the court was located; and if the respondent is an official other than a judge, the designation and location of the office held by the respondent; (3) a concise description of the respondent's action from which the relator seeks relief; (4) if the relator seeks a writ of habeas corpus, a statement describing how and where the relator is being deprived of liberty; and (5) if the petition is filed in the Texas Supreme Court after a petition requesting the same relief was filed in the court of appeals: (A) the date the petition was filed in the court of appeals; (B) the district of the court of appeals and the names of the justices who participated in the decision; (C) the author of any opinion for the court of appeals and the author of any separate opinion; (D) the citation of the court's opinion, or a statement that the opinion was unpublished; and (E) the disposition of the case by the court of appeals, and the date of the court of appeals' order.]

STATEMENT OF JURISDICTION

[The petition must state, without argument, the basis of the court's jurisdiction. If the Texas Supreme Court and the court of appeals have concurrent jurisdiction, the petition must be presented first to the court of appeals unless there is a compelling reason not to do so. If the petition is first presented to the Texas Supreme Court, then the compelling reason must be stated for not presenting the petition to the court of appeals.]

ISSUES PRESENTED

[State concisely all issues or points presented for review. All subsidiary questions that are fairly included will be raised for appellate consideration.]

STATEMENT OF FACTS

[State concisely and without argument the pertinent facts. The statement must be supported by references to the appendix record. The relator should limit the statement of facts to undisputed facts. If there is a factual dispute, then mandamus will not issue.[23]]

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23. *See* Grant v. Thirteenth Court of Appeals, 888 S.W.2d 466, 468 (Tex. 1994) (orig. proceeding) (per curiam); Davenport v. Garcia, 834 S.W.2d 4, 24 (Tex. 1992) (orig. pro-

[STANDARD OF REVIEW (Optional)]

A writ of mandamus should be granted if: (1) the trial court clearly abused its discretion or violated a duty imposed by law; and (2) the relator has no adequate remedy at law. *See* Walker v. Packer, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding).[24]

ARGUMENT

[Clear and concise argument with appropriate citations and references to the appendix.]

PRAYER

[Short conclusion of nature of relief sought.]

APPENDIX

[Unless voluminous or impractical, the Appendix must include: (1) a certified or sworn copy of any order complained of, or any other document showing the matter complained of; (2) any order or opinion of the court of appeals, if the petition is filed in the Texas Supreme Court; and (3) unless voluminous, the text of any rule, regulation, ordinance, statute, constitutional provision, or other law excluding case law on which the argument is based.

The Appendix may include any other item pertinent to the issues or points presented, including copies or excerpts of opinions, laws, documents on which the suit was based, pleadings, and similar material. Do not include items for the purpose of avoiding page limits, and do not include any other item that is not necessary for a decision.][25]

[Signature]

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF [_____] §

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ceeding); Brady v. Fourteenth Court of Appeals, 795 S.W.2d 712, 714 (Tex. 1990) (orig. proceeding).

24. The *Walker* opinion enunciates a third requirement for mandamus relief in the supreme court—namely, that the error be "of such importance to the jurisprudence of the state as to require correction." *See* Walker v. Packer, 827 S.W.2d 833, 839 n.7 (Tex. 1992) (orig. proceeding).

25. *See* TEX. R. APP. P. 52.3(j).

BEFORE ME, the undersigned notary public, on this day personally appeared [Name], who being by me duly sworn, on [his/her] oath deposed and said that [he/she] is one of the attorneys for Relator[s] in the above cause; that [he/she] has reviewed the Exhibits filed in support of the petition for writ of mandamus; that based on [personal knowledge/knowledge that was acquired in the representation of Relator(s)], the Exhibits are true and correct copies of the originals; that [he/she] has read the petition for writ of mandamus; and that based on [his/her] personal knowledge, the facts set forth in the petition are true and correct.

SIGNED on _____, _____.

_____
[Name]

SUBSCRIBED AND SWORN TO BEFORE ME on _____, _____, to certify which witness my hand and official seal.

_____
Notary Public, State of Texas

[Certificate of Service]

XXVIII. Motions That May Accompany Petition for Mandamus

a. Motion for Immediate Temporary Relief

[Mandamus Caption]

EMERGENCY MOTION FOR IMMEDIATE TEMPORARY RELIEF OF RELATOR(s), [NAME(S)]

[Name(s)], as Relator(s), present(s) this Emergency Motion for Immediate Temporary Relief pursuant to Section 22.221 of the Texas Government Code and Rule 52.10 of the Texas Rules of Appellate Procedure. Relator(s) respectfully show(s) as follows:

1. [Describe context.]

2. Relator(s) [is/are] seeking mandamus relief [describe]. This Court should stay [specify] pending its decision on the application for writ of mandamus. Otherwise, the harm that Relator(s) seek(s) to prevent will have already occurred before this Court can consider whether to grant relief.

Relator(s) [Name(s)] pray(s) that the Court grant this motion and render an order staying [specify] pending the Court's action on the petition for mandamus. Relator(s) pray(s) for all other just relief.

[Signature]

CERTIFICATE UNDER RULE 52.10

I [have notified all parties by expedited means] that this motion for temporary relief [would be/was being] filed. [If the attempt to notify was unsuccessful, it may be advisable to describe the attempts made.] I have complied with Texas Rule of Appellate Procedure 52.10(a).

_____

[Signature]

[Certificate of Conference]

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF [_____] §

BEFORE ME, the undersigned notary public, on this day personally appeared [Name], who being by me duly sworn, on [his/her] oath deposed and said that [he/she] is one of the attorneys for Relator(s) in the above cause; that [he/she] has read the above motion; and that based on [his/her] personal knowledge, every statement contained therein is true and correct.

SIGNED on _____, _____.

_____

[Name]

SUBSCRIBED AND SWORN TO BEFORE ME on _____, _____, to certify which witness my hand and official seal.

_____

Notary Public, State of Texas

[Certificate of Service]

b. MOTION TO TENDER DOCUMENTS UNDER SEAL

[Mandamus Caption]

MOTION FOR LEAVE TO TENDER DOCUMENTS *IN CAMERA* OR TO FILE DOCUMENTS UNDER SEAL OF RELATOR(s), [NAME(S)]

[Name(s)], as Relator(s), file(s) this motion for leave to tender documents for *in camera* review or, alternatively, to file documents under seal, pursuant to Section 22.002 of the Texas Government Code and Rule 10 of

the Texas Rules of Appellate Procedure. Relator(s) respectfully show(s) as follows:

1. This mandamus action concerns [Describe].

2. In order for this Court to adjudicate Relator['s/s'] application for a writ of mandamus, the Court must, of necessity, review the documents tendered *in camera* below. At the same time, however, because those documents contain [confidential/privileged information], Relator(s) seek(s) leave to file those documents under seal.

Relator(s), [Name(s)] pray(s) that the Court grant Relator leave to file the above-described documents under seal in this mandamus proceeding. Relator(s) pray(s) for all other just relief.

[Signature & Certificate of Conference]

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF [_____] §

BEFORE ME, the undersigned notary public, on this day personally appeared [Name], who being by me duly sworn, on [his/her] oath deposed and said that [he/she] is one of the attorneys for Relator(s) in the above cause; that [he/she] has read the above motion; and that based on [his/her] personal knowledge, every statement contained therein is true and correct.

SIGNED on _____, _____.

_____
[Name]

SUBSCRIBED AND SWORN TO BEFORE ME on _____, _____, to certify which witness my hand and official seal.

_____
Notary Public, State of Texas

[Certificate of Service]

XXIX. Record for a Mandamus Action

[Brief Cover]

[Mandamus Caption]

RECORD RELATING TO THE
PETITION FOR WRIT OF MANDAMUS
OF RELATOR(s), [NAME(S)]

[Name(s)], as Relator(s), submit(s) this Record in support of Relator['s/s'] petition for writ of mandamus. The Record contains the following:

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[List items]

[Under Rule 52.7(a), the Record must include: (1) a certified or sworn copy of every document that is material to the relator's claim for relief and that was filed in any underlying proceeding; and (2) a properly authenticated transcript of any relevant testimony from any underlying proceeding, including any exhibits offered in evidence or a statement that no testimony was adduced in connection with the matter complained of. Rule 52.7(b) allows for supplementation, stating that the relator or any other party may file additional materials for inclusion in the record after the original record is filed.]

[Signature]

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF [_____] §

BEFORE ME, the undersigned notary public, on this day personally appeared [Name], who being by me duly sworn, on [his/her] oath deposed and said that [he/she] is one of the attorneys for Relator(s) in the above cause; that [he/she] has reviewed the record filed in support of the petition for writ of mandamus; and that based on [his/her] personal knowledge, the contents of the record are true and correct copies of the originals.

SIGNED on _____, _____.

[Signature]

SUBSCRIBED AND SWORN TO BEFORE ME on _____, _____, to certify which witness my hand and official seal.

Notary Public, State of Texas

[Certificate of Service]

XXX. NOTICE OF RESTRICTED APPEAL

[Trial-Court Caption]

NOTICE OF RESTRICTED APPEAL OF [NAME(S)]

[Name of each party filing the notice] desire(s) to appeal from the [judgment/order] rendered on [Date] by the [ ] District Court for [ ] County, Texas in Cause No. [ ], styled [ ]. This appeal is taken to [name of court].

The appellant(s) [is/are] [a] part[y/ies] affected by the trial court's judgment but did not participate — either in person or through counsel — in the hearing that resulted in the [judgment/order] complained of.

The appellant(s) did not timely file either a postjudgment motion, request for findings of fact and conclusions of law, or notice of appeal.

[Signature]

[Verification required by appellant(s), if not represented by counsel.]

CERTIFICATE OF SERVICE

On _____, _____, a copy of this notice of restricted appeal was served, in compliance with Texas Rules of Appellate Procedure 9.5 and 25.1(e), on the following:

[Name of each party to trial court judgment].
[Address]
Counsel for [Name(s)]
Service via: [describe method]
[Name]
Appellate Court Clerk
[Name of Court of Appeals]
[Address]
Service via: [describe method]
[Attorney's Name]