THE NEW APPELLATE RULES -- AT LAST!

JIMMY VAUGHT
Zelle & Larson, L.L.P.
Austin, Texas

The author thanks E. Lee Parsley for permission to use substantial portions of
"The Ten Things You Need to Know About the New Appellate Rules,"
7th Annual Conference on State and Federal Appeals (University of Texas June 1997).

STATE BAR OF TEXAS
ELEVENTH ANNUAL ADVANCED CIVIL APPELLATE PRACTICE COURSE
Dallas, Texas
September 11-12, 1997

Table of Contents

THE NEW APPELLATE RULES — AT LAST!

by Jimmy Vaught

INTRODUCTION

This article gives an overview of the new rules of appellate procedure and will focus on the most important substantive changes. In addition, the article will include some practical suggestions and also identify recent legislation which will effect appellate procedure and practice. The Rules of Appellate Procedure including a table of contents, the appendix to the Texas Rules of Appellate Procedure including an order regarding fees charged in civil cases in the Supreme Court and the Court of Appeals, an order regarding disposition of court papers in civil cases, and an order directing the form of the appellate record in civil cases, disposition and derivation tables, and final approval of revisions to the Texas Rules of Appellate Procedure (the transition order) are attached.

I. EFFECTIVE DATE AND TRANSITION

The amended rules "take effect" September 1, 1997.

A. Perfection of Appeal/Proceeding Initiated in an Appellate Court

The amended rules "apply fully to any appeal perfected on or after that date [September 1, 1997] and any proceeding [such as an original proceeding] initiated in an appellate court on or after that date." "In an appeal perfected before September 1, 1997, any cross-appeal may be brought in accordance with either the rules and law in effect before that date or [the] amended rules."

B. Record Not Timely Filed

"Beginning September 1, 1997, no case can be disposed of or issue decided on the grounds that the record was not timely filed, before or after that date, except under these amended rules."

C. Initial Briefs, Petitions or Applications

"If the initial brief, petition or application is filed before September 1, 1997, all other briefs in that case in that court may comply with the former rules in all respects, including format and timetables, but if the initial brief, petition or application is filed on or after September 1, 1997, that filing, and all other filings in that case in that court, must comply with [the] amended rules."

D. Supreme Court

Beginning September 1, 1997, "no application to the Supreme Court for writ of error may be filed except a successive application under former Appellate Rule 130(c)." In addition, "Appellate Rule 49.9 [eliminating the requirement of motion for rehearing in court of appeals] applies only to a petition for review and not to an application to the Supreme Court for writ of error."

E. Miscellaneous

Except the filing of the initial brief, petition or application discussed above, "the timeliness of an act done on or after September 1, 1997, must be determined under [the] amended rules unless it was determined untimely by written order before September 1, 1997." In addition, "[t]o facilitate the complete transition to [the] amended rules and to further the resolution of appeals on their merits, the courts of appeals are authorized and directed to suspend these amended rules in a particular case as necessary and as provided in Appellate Rule 2."

New Rules Apply To:

(1) any appeal perfected on or after September 1, 1997

(2) any proceeding (such as an original proceeding) initiated in an appellate court on or after September 1, 1997

(3) initial briefs, petitions or applications filed on or after September 1, 1997

(4) Supreme Court practice (i.e., no applications for writ of error may be filed on or after September 1, 1997 except a successive application under former Appellate Rule 130(c))

(5) eliminating the requirement of motion for rehearing in court of appeals applies only to a petition for review and not to an application for writ of error

(6) the timeliness of an act done on or after September 1, 1997

(7) no case can be disposed of or issue decided on the grounds that the record was not timely filed, before or after September 1, 1997, except under the amended rules

II. SUSPENSION OF THE RULES -- RULE 2

This rule is intriguing. The Supreme Court completely amends the rules of appellate procedure and then permits the courts to suspend the rules. The rule permits any party by motion or the court "[to] suspend a rule's operation in a particular case and order a different procedure...to expedite a decision or for other good cause...." In civil cases, the only restriction is that the courts may not "alter the time for perfecting an appeal in a civil case." Apparently everything else is available. The possibilities seem endless -- problem with the record, file a motion to suspend the rules; problem with timely filing (except time for perfecting appeal), file a motion to suspend the rules; problem with a lengthy brief, file a motion to suspend the rules. Although the courts have probably already seen the first wave of motions to suspend the rules, relatively few motions will probably be granted.

III. BANKRUPTCY IN CIVIL CASES -- RULE 8

This new rule codifies much of the existing "common law" bankruptcy procedure.

A. Notice of Bankruptcy

The rule specifically describes the following requirements of a notice of bankruptcy: (1) the bankrupt party's name; (2) the court in which the bankruptcy proceeding is pending; (3) the bankruptcy proceeding's style and case number; (4) the date when the bankruptcy petition was filed; and (5) an authenticated copy of the page or pages of the bankruptcy petition that show when the petition was filed. In addition, any party may file a notice of bankruptcy. TRAP 8.1.

B. Automatic Stay

If the bankrupt party was the defendant in the trial court, the automatic stay applies and any further action against the bankrupt party is stayed. *See Freeman v. Commissioner*, 799 F.2d 1091, 1092-93 (5th Cir. 1986). When the automatic stay applies, the bankruptcy suspends the appeal and all periods from the date when the bankruptcy petition is filed. TRAP 8.2 clarifies an area of conflicting court opinions. *Compare Nautical Landings Marina v. First Nat'l Bank*, 791 S.W.2d 293, 296 (Tex. App. -- Corpus Christi 1990, writ denied) (documents filed during suspension are void) *with Chunn v. Chunn*, 929 S.W.2d 490, 493-94 (Tex. App. -- Houston [1st Dist.] 1996, no writ) (documents filed during suspension are not void but only prematurely filed).

A document which is filed during the time when the appeal is suspended by bankruptcy is not void, but is considered a "prematurely-filed document" which is deemed filed on the day the court reinstates or severs the appeal. For example, the defendant files a bankruptcy petition after judgment and the filing of a motion for new trial but before the notice of appeal is filed. The nonbankrupt party files an notice of appeal while the appeal is suspended by bankruptcy. The notice of appeal is not void and becomes effective when the court reinstates the appeal or severs the bankrupt party. TRAP 8.2.

C. Calculation of Time Periods

The new rule also clarifies the calculation of time periods. A time period that began to run but had not expired when the appeal was suspended by bankruptcy begins over when the appellate court reinstates or severs the appeal. For example, during the ninety day period for filing the notice of appeal after the judgment and the filing of a motion for new trial, the defendant files a bankruptcy petition which suspends the appeal. The ninety day period for filing the notice of appeal "starts over" or "begins anew" when the court reinstates the appeal or severs the bankrupt party. TRAP 8.2.

D. Motions to Sever and Reinstate

A motion to sever permits the non-bankrupt parties to continue the appeal without the bankrupt party. A party may move the court of appeals to sever that portion of the appeal concerning the bankrupt party and reinstate that portion of the appeal concerning the non-bankrupt parties. In addition, the motion must show that the case is severable and must comply with applicable federal law

regarding severance of a bankrupt party. *See, e.g., Greenberg v. Fincher & Son Real Estate, Inc.*, 753 S.W.2d 506, 507 (Tex. App. -- Houston [1st Dist.] 1988, no writ). Even if the parties don't file a motion to sever, the court may act on its own initiative. TRAP 8.3(b).

A party may move the appellate court to reinstate a case which has been suspended by bankruptcy if permitted by federal law or the bankruptcy court. If the bankruptcy court has lifted or terminated the automatic stay, the motion must include a certified copy of the order. TRAP 8.3(a).

IV. PAPERS GENERALLY -- RULE 9

A. Timely Filing

This rule retains timely filing through the U.S. Postal Service if the document is received within 10 days after the filing deadline and the document was mailed on or before the last day for filing. TRAP 9.2(b). Don't try this method of filing with Federal Express or UPS -- your document absolutely, positively will not be timely. *See, e.g., Carpenter v. Town and Country Bank*, 806 S.W.2d 959, 960 (Tex. App. -- Eastland 1991, writ denied) (UPS); *Fountain Parkway, Ltd. v. Tarrant Appraisal Dist.*, 920 S.W.2d 799, 802-03 (Tex. App. -- Fort Worth 1996, writ denied) (Federal Express). A court of appeals by local rules may permit documents to be filed, signed or verified by electronic means. TRAP 9.2(c).

B. Form of Documents

The rule describes in great detail the form for documents filed in an appellate court. TRAP 9.4. Documents must

- be on 8½ by 11 inch paper with at least one-inch margins all around,
- be double-spaced although footnotes, block quotations, short lists, and issues or points may be single-spaced,
- be printed in standard 10-character-per-inch (cpi) nonproportionally spaced Courier typeface or in 13-point or larger proportionally spaced typeface; however, if the document is printed in a proportionally spaced typeface, footnotes may be printed in typeface no smaller than 10-point,
- be bound so that it will lie flat when opened, but covers must not be plastic or be red, black or dark blue,
- the front cover must contain (i) the case style, (ii) the case number, (iii) the title of the document being filed, (iv) the name of the party filing the document, and (v) the name, mailing address, telephone number, fax number, and State Bar of Texas number of the lead counsel for the filing party, and
- if a party requests oral argument in the court of appeals, the request must appear on the front cover of the party's first brief.

C. Certificate of Service

The rule also states the specific requirements for a certificate of service. The certificate must be signed by the person who made the service, the date and manner of service, the name and address of each person served, and if the person served is a party's attorney, the name of the party represented by the attorney. TRAP 9.5(e).

V. MOTIONS IN THE APPELLATE COURTS -- RULE 10

This rule explains most of the common requirements for motions in the appellate courts. *It also adds a certificate of conference requirement to all motions in civil cases.* TRAP 10.1(a)(5). The rule permits a party to file a response to a motion at any time before the court rules on the motion without leave of court. TRAP 10.1(b). It explains when a motion (and apparently a response) needs to be verified. TRAP 10.2. The rule addresses specific motions including motions relating to informalities in the record, motions to extend time and motions to postpone oral argument. TRAP 10.5.

> Although not specifically mentioned, other motions -- such as motions to dismiss for want of jurisdiction, motions to strike, motions to dispose by per curiam opinion, motions to consolidate, motions to appear or withdraw as counsel, uncontested motions to dismiss and motions to expedite -- apparently are still permitted.

VI. AMICUS CURIAE BRIEFS -- RULE 11

Amicus curiae practice is materially altered. The new rule requires that the brief disclose the identity of the person or entity on whose behalf the brief is filed and the source of any fee paid or to be paid for preparing the brief. This requirement effectively injects a "truth in advertising" component in amicus curiae practice and addresses several troubling ethical considerations. For example, a party may no longer pay the costs of preparing an amicus brief without the amicus brief identifying the source of the fee. *See* Pamela Stanton Baron, "The Civil Amicus Brief," Ninth Annual Advanced Civil Appellate Practice Course J-11 (State Bar of Texas 1995).

However, several ethical loopholes in amicus practice remain such as a lawyer signing an amicus brief prepared or endorsed by a party's attorney or permitting a party's attorney to review and revise an amicus brief before it is filed. *See* Pamela Stanton Baron, "The Civil

Amicus Brief," Ninth Annual Advanced Civil Appellate Practice Course J-11 (State Bar of Texas 1995).

VII. PERFECTING APPEAL -- RULE 25

A. Notice of Appeal

Under the new rules you perfect an appeal by filing a notice of appeal. No cost bond is required. An affidavit of inability to pay (now called an affidavit of indigence) does not perfect the appeal. No distinction is made between parties who are not obliged to pay costs (the State and political subdivisions) and those who are obliged to pay costs.

> No matter what kind of appeal (an ordinary appeal, an accelerated appeal, or a restricted appeal), no matter the court to which the appeal is taken (the court of appeals or a direct appeal to the Supreme Court) -- *all appeals are perfected by filing a notice of appeal with the trial court clerk.*

B. Contents

The notice of appeal must:

(1) identify the trial court and state the case's trial court number and style;

(2) state the date of the judgment or order appealed from;

(3) state that the party desires to appeal;

(4) state the court to which the appeal is taken unless the appeal is to either the First or Fourteenth Court of Appeals, in which case the notice must state that the appeal is to either of those courts;

(5) state the name of each party filing the notice;

(6) in an accelerated appeal, state that the appeal is accelerated; and

(7) in a restricted appeal:

(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.

TRAP 25.1(d)

C. Filing Notice of Appeal

The notice of appeal must be filed in the trial court, but if it is mistakenly filed in the appellate court, it is deemed to have been filed the same day in the trial court and the appellate court clerk will send a copy of the notice to the trial court clerk. TRAP 25.1(a). Jurisdiction of the appellate court is established when the first notice of appeal is timely filed by any party. TRAP 25.1(b). Failure of any party to take any other step required by the appellate rules does not deprive the appellate court of jurisdiction, but may lead to a dismissal. TRAP 25.1(b). Normally the filing of the notice of appeal does not suspend enforcement of the judgment. TRAP 25.1(g).

D. Service

The notice of appeal must be served on all parties to the trial court's final judgment, or in an interlocutory appeal, on all parties to the trial court proceeding. TRAP 25.1(e). A copy of the notice must be filed with the appellate court, TRAP 25.1(e), but the rules do not say when that copy must be filed (although the rules imply that it must be filed immediately) and *the failure to file the copy with the appellate court is not jurisdictional.*

E. Amended Notice of Appeal

An amended notice of appeal correcting a defect or omission in an earlier filed notice may be filed in the appellate court at any time before the appellant's brief is filed. However, the amended notice may be struck for cause on the motion of any party affected by the amended notice. After the appellant's brief is filed, the notice may be amended only on leave of the appellate court. TRAP 25.1(f).

VIII. WHO MUST PERFECT AN APPEAL -- RULES 25, 26 & 46

This question is at once simpler and more difficult than one would think and is probably the biggest malpractice trap in the new rules.

> Generally you must always perfect your own appeal by filing a notice of appeal if you seek to alter the trial court's judgment or other appealable order.

A. Alter the Trial Court's Judgment

"A party who seeks to alter the trial court's judgment or other appealable order must file a notice of appeal. . . . The appellate court may not grant a party who does not file a notice of appeal more favorable relief than did the trial court except for just cause." TRAP 25.1(c).

If: (1) the trial court suggested a remittitur; (2) the winning party agrees to the suggestion; (3) the judgment reflects the lesser amount; and (4) the losing party appeals — the winning party can complain about the suggestion of a remittitur only if that party perfects his/her own appeal. *See* TRAP 46.2. Why? Because the winning (remitting) party is seeking to alter the trial court's judgment if he/she is asking the appellate court to avoid the remittitur and give him/her the full amount of the verdict. *This is a change in the law.* Formerly, you just stated a cross-point in the appellee's brief to complain about the remittitur. *See* former rule 85(b).

If one party timely perfects an appeal, any other party may perfect an appeal within 14 days of the date the appeal is perfected, or 14 days of the last day to perfect the first appeal, whichever is later. TRAP 26.1(d)

B. Reply Points

If you just want the appellate court to affirm the trial court, you simply state reply points in your (the appellee's) brief.

C. Multiparty Cases

In a multiparty case under the former rules, you needed to perfect your own appeal as to a party who was not a target of the appellant. That is, if the cross-points would not affect the interest of the appellant or bear on matters presented in the appeal (as brought by the appellant), the cross-points were insufficient to invoke the appellate court's jurisdiction over the third party who was the target of those cross-points. *Young v. Kilroy Oil Co.*, 673 S.W.2d 236, 241 (Tex. App. -- Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also Jackson v. Fontaine's Clinic, Inc.*, 499 S.W.2d 87, 91 (Tex. 1973). The effect of the new rules is the same — you must perfect your own appeal. But this is because the new rules always require you to perfect your own appeal if you seek to alter the trial court's judgment.

D. Conditional Notice of Appeal?

If you are satisfied with the trial court's judgment, but have points you would like to raise only if the appellate court reverses, it is unclear what you do under the new rules. Under the old rules, you did not need to raise those points until the motion for rehearing. *See Oak Park Townhouses v. Brazosport Bank*, 851 S.W.2d 189 (Tex. 1993). The new rules do not specifically embrace *Oak Park*, but do not disavow it either. However, caution would suggest that you file a notice of appeal, stating that you have points you will raise but only if the appellate court reverses. In addition, the new rules do not provide for conditional appeals.

E. Notice of Limitation of Appeal Abolished

Under the old law, you had to perfect your own appeal (file a "cross-appeal") if your adversary filed a notice of limitation of appeal. *See Donwerth v. Preston II Chrysler-Dodge, Inc.* 775 S.W.2d 634, 639 (Tex. 1989). Under the new rules, the notice of limitation of appeal (the "limited appeal") is abolished — you must always perfect your own appeal if you seek to alter the trial court's judgment.

IX. RESTRICTED APPEALS IN THE COURTS OF APPEALS -- RULE 30

The appeal by writ of error procedure is replaced by a procedure which is conceptually similar to normal appeals. However, statutes pertaining to writ of error appeals apply equally to restricted appeals.

A. Notice of Appeal

The appeal is perfected by filing a notice of appeal, not by filing a petition for writ of error and a cost bond or substitute with the district court clerk. However, the new "restricted appeal" retains many of the requisites of the appeal by writ of error. For example, the appealing party must perfect appeal within six months (180 days?) after the judgment or order is signed. TRAP 26.1(c).

The notice of appeal must 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 or order in question and that the appellant did not timely file either a postjudgment motion, request for findings of fact and conclusions of law, or notice of appeal. TRAP 25.1(d)(7). However, TRAP 30 does not address appellate review (i.e., error apparent from the face of the record). *See DSC Finance Corp. v. Moffitt*, 815 S.W.2d 551 (Tex. 1990) (reviewing courts may review all papers on file at the time of judgment including the statement of facts).

B. Participation in Hearing

The restricted appeal has altered what constitutes "participation." Former rule 45 allowed parties who "did not participate in the actual trial of the case in the trial court" to proceed by appeal by writ of error. In *Texaco v. Central Power & Light Co.*, 925 S.W.2d 586, 589-90 (Tex. 1996), the Supreme Court held that this phrase meant that the party did not participate in the decision-making event that results in the judgment adjudicating the party's rights. The new rule codifies *Texaco*; it requires that the appealing party may not have participated either in person or through counsel in the hearing that resulted in the judgment or order in question.

The new rule also extends "participation" to include timely filing a postjudgment motion, timely filing a request for findings of fact and conclusions of law, or filing a notice of appeal within the time permitted by Rule 26.1(a) (90 days after judgment signed if certain conditions are met). This extension overrules several

cases. *See, e.g., Lawyers Lloyds of Texas v. Webb*, 152 S.W.2d 1096, 1098 (Tex. 1941) (filing motion for new trial not participation); *Bonewitz v. Bonewitz*, 726 S.W.2d 227, 228-29 (Tex. App. -- Austin 1987, writ ref'd n.r.e.) (filing special appearance, motion to quash citation, motion to withdraw and substitute counsel and motion to set aside default judgment not participation); *Noriega v. Cueves*, 879 S.W.2d 192, 193 (Tex. App. -- Houston [14th Dist.] 1994, writ denied) (filing motion for new trial or motion to reinstate not participation).

X. FILING THE RECORD -- RULES 34, 35 & 37

The appellate record now consists of the "clerk's record" (formerly the transcript) and the "reporter's record" (formerly the statement of facts). TRAP 34.1. Only one appellate record will be filed in a case, even if more than one notice of appeal is filed. TRAP 34.1

A. Agreed Record/Statement of the Case

As in the old rules, the parties may file an agreed record. *See* TRAP 34.2. The new rules provide that the agreed record will be presumed to contain all evidence and filings relevant to the appeal, so this should be a more useful tool. TRAP 34.2 To request matters to be included in the agreed record, the parties file a joint request for preparation of the record with the clerk and reporter, designating the items to be included in the record. TRAP 34.2.

Like the old rules, the new rules provide that an agreed statement of the case may be filed in lieu of the reporter's record (formerly the statement of facts). TRAP 34.3. The statement must be filed with the trial court clerk and included in the appellate record. However, the agreed statement of the case will not be included in the clerk's record unless a specific request is made under TRAP 34.5(b).

B. Clerk's Record

Unless the parties designate the filings in the appellate record by agreement under TRAP 34.2 (an agreed record), the clerk is to include copies of the following items in the clerk's record:

(1) all pleadings on which the trial was held;

(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 other order that is being appealed;

(5) any request for findings of fact and conclusions of law, any post-judgment motion, and the court's order on the motion;

(6) the notice of appeal;

(7) any formal bill of exception;

(8) any request for a reporter's record, including any statement of points or issues under TRAP 34.6(c);

(9) any request for preparation of the clerk's record;

(10) a certified bill of costs, including the cost of preparing the clerk's record, showing credits for payments made; and

(11) any filing that a party designates to have included in the record.

TRAP 34.5(a)

The clerk must include these items in the clerk's record even if the appellant does not request the inclusion of the items — the filing of the notice of appeal triggers the duty to include them. But the appellant must pay (or make arrangements with the clerk to pay) for the record before the clerk has an obligation to prepare it. TRAP 35.3(a)(2). This is a change in the law. Formerly, the clerk could not refuse to prepare the record until payment was made because the cost bond secured the cost of preparing the record. *See Click v. Tyra*, 867 S.W.2d 406, 407-08 (Tex. App. -- Houston [14th Dist.] 1993, orig. proceeding). Since the requirement of a cost bond is abolished, the rules allow the clerk to refuse to prepare the record until paid.

Any party may request that other items be included in the clerk's record. TRAP 34.5(b). The request may be made "at any time before the clerk's record is prepared." This too is a change in the law. Formerly, the request had to be filed on or before the time for perfecting the appeal. *See* former rule 51(b). Since the clerk might prepare the record at any time, the cautious attorney will check with the clerk to determine when the record will be prepared and will timely file a request for inclusion of additional items. However, the consequences of the failure to timely request inclusion of additional items is not clear. The rule provides that "An appellate court must not refuse to file the clerk's record or a supplemental clerk's record because of a failure to timely request items to be included in the clerk's record." TRAP 34.5(b)(4). But it does not say that the appellate court has to consider the late filed items.

The request to the trial court clerk must be in writing and must be specific (the party must "specifically describe the item so the clerk can readily identify it"). The clerk will disregard a general request. TRAP 34.5(b)(2). The clerk is specifically authorized to consult with the parties concerning items to be included in the clerk's record. TRAP 34.5(h). If a party requests more items than necessary be included in the clerk's record or

any supplement, the appellate court may -- regardless of the appeal's outcome -- require that party to pay the costs for the preparation of the unnecessary portion. TRAP 34.5(b)(3).

C. Reporter's Record

The reporter's record (formerly the statement of facts) still must be requested "at or before the time for perfecting the appeal." TRAP 34.6(b)(1). Again, the consequences for failing to timely request the reporter's record is not altogether clear. The rules simply provide that "An appellate court must not refuse to file a reporter's record or a supplemental reporter's record because of a failure to timely request it." TRAP 34.6(b)(3). The request must be in writing and a copy must be filed with the trial court clerk. TRAP 34.6(b)(1) and (2).

D. Time to File

The appellate record must be filed in the appellate court within 60 days after the judgment is signed, except

(1) the record must be filed within 120 days after the judgment is signed when TRAP 26.1(a) applies, i.e., when the notice of appeal must be filed within 90 days after the judgment is signed,

(2) within 10 days after the notice of appeal is filed in an accelerated appeal, and

(3) within 30 days after the notice of appeal is filed in a restricted appeal.

TRAP 35.1. However, if the party responsible for paying for the preparation of the clerk's record and/or the reporter's record has made satisfactory arrangements to pay the fee, the trial court clerk is responsible for preparing and timely filing the clerk's record and the reporter is responsible for preparing and timely filing the reporter's record. TRAP 35.3.

E. Partial Record

The old rules encouraged the filing of a partial record, but the case law definitely discouraged it. *See* former rule 53(d). The new rules fix the problem. Like the old rules, the appellant may request a partial record. TRAP 34.6(c). The appellant still must include a statement of the points or issues to be presented on appeal and is limited to those points or issues. TRAP 34.6(c)(1).

> The new rules clarify that the appellate court must presume that the partial reporter's record constitutes the entire record for purposes of reviewing the stated points or issues. This presumption applies even if the statement includes a point or issue complaining of the legal or factual insufficiency of the evidence to support a specific factual finding identified in that point or issue. TRAP 34.6(c)(4).

This change apparently overrules a number of cases. *See, e.g., Schafer v. Conner*, 813 S.W.2d 154, 155 (Tex. 1991); *Kwik Wash Laundries, Inc. v. McIntyre*, 840 S.W.2d 739, 741-42 (Tex. App. -- Austin 1992, no writ).

Any other party may designate additional exhibits and portions of the testimony be included in the partial record, and those items are included at the appellant's cost. TRAP 34.6(c)(3). But the rules provide for a shifting of that cost to the appellee if the appellee designates unnecessary material. TRAP 34.6(c)(3).

F. Supplementation

Supplementation of the record is simple. If anything relevant is omitted from the record, the trial court, the appellate court, or any party may by letter direct the trial court clerk or reporter to prepare, certify, and file in the appellate court a supplement containing the omitted item. The supplement is part of the appellate record. TRAP 34.6(d).

G. Lost Items, Exhibits or Notes

If an item designated for inclusion in the clerk's record has been lost or destroyed, the parties may, by written stipulation, deliver a copy of that item to the trial court clerk for inclusion in the clerk's record or a supplement. If the parties cannot agree, the trial court must -- on any party's motion or at the appellate court's request -- determine what constitutes an accurate copy of the missing item and order it to be included in the clerk's record or a supplement. TRAP 34.5(e).

If: (1) a significant exhibit or a significant portion of the court reporter's notes and records has been lost or destroyed or a significant portion of the recording has been lost or destroyed or is inaudible in a case recorded electronically, and (2) if the lost, destroyed, or inaudible portion of the reporter's record, or the lost or destroyed exhibit, is necessary to the appeal's resolution, and (3) if the parties cannot agree on a complete reporter's record, the appellant is entitled to a new trial. TRAP 34.6(f). This is a change in the law. Under the old rules, the appellant was entitled to a new trial if the statement of facts, or a part of it, was lost or destroyed, without regard to whether the missing part was material to the appeal. *See* former rule 50(e).

H. Original Documents

If the trial court determines that original documents filed with the trial court clerk should be inspected by the appellate court or sent to that court in lieu of copies, the trial court must make an order for the safekeeping, transportation, and return of those originals. A party may move to have originals sent to the appellate court, or the appellate court may request them on its own initiative. TRAP 34.5(f) and 34.6(g).

XI. BRIEFING IN THE COURT OF APPEALS -- RULE 38

While the briefing rule has been rewritten, the content is not substantially different. However, the briefing rule must be read in conjunction with TRAP 9, which dictates the form of documents filed in the appellate courts.

A. Form of Briefs

A party may state either *issues presented or points of error*. TRAP 38.1(e). The brief must have a statement of facts, stating "concisely and without argument the facts pertinent to the issues presented . . .." TRAP 38.1(f). The brief must have a summary of the argument, which should be a "succinct, clear, and accurate statement of the arguments made in the body of the brief." TRAP 38.1(g).

B. Cross -Points

The provisions of Civil Procedure Rule 324(c) regarding cross-points to vitiate the verdict are moved to TRAP 38.2(b), but the substance is not changed.

C. Reply Briefs

A reply brief is now allowed. TRAP 38.3. However, an appellate court may consider and decide the case before a reply brief is filed.

D. Appendix

The brief should have an appendix containing a copy of the trial court's judgment, the jury charge and verdict, or findings of fact and conclusions of law, and 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 other items. TRAP 38.1(j). An appendix to the appellee's brief does not need to include any item already contained in an appendix filed by the appellant. TRAP 38.2(a)(C).

E. Length

The page limit for the appellant's and the appellee's briefs remain at 50. A reply brief may not exceed 25 pages. *But the aggregate number of pages of the briefs filed by a party may not exceed 90 pages.* TRAP 38.4.

F. Time to File

In an ordinary appeal, the appellant's brief is due 30 days after the clerk's record is filed or 30 days after the reporter's record is filed, whichever is later. TRAP 38.6(a) Under the former rule, the appellant's brief was due 30 days after "the filing of the transcript and statement of facts." Former rule 74(k). The appellee's brief is now due 30 days after the appellant's brief is filed, rather than 25 days. TRAP 38.6(b); *see also* former rule 74(m). The appellant's reply brief is due 20 days after the date the appellee's brief is filed. TRAP 38.6(c)

G. Cases Recorded Electronically

Specific provisions are included for cases recorded electronically. *See* TRAP 38.5 The record in a case recorded electronically is due at the same time as the record in any other case. Formerly, the record in a case recorded electronically was due earlier than the record in other cases.

XII. PARALLEL BRIEFING

Since TRAP 25 requires perfection of appeal by any party who seeks to alter the trial court judgment, there may be multiple appellants in any case. In light of the provision requiring an *appellant* to file an appellant's brief (*see* TRAP 38.6(a) "*an* appellant must file a brief...), it is clear that each appellant must file an appellant's brief. Each appellee may then file a brief in response, to which each appellant may file a reply brief. In other words, there may be parallel briefing in the courts of appeals. This is a significant change in procedure.

As previously noted, a party is limited to 90 pages of briefing. TRAP 38.4. Thus, if a party is an appellant, he or she is entitled to file a 50 page brief and an 25 page reply. If that party also is an appellee, he or she is normally entitled to file a 50 page response to the appellant's brief. Taken together, that party is entitled to file a total of 125 pages of briefing — except for the provision limiting the party to 90 pages.

XIII. DISMISSAL -- RULE 42

When dismissing an appeal either by agreement of the parties or on motion by appellant, a court of appeals now has discretion to determine whether to withdraw an opinion it has already issued. TRAP 42.1. Although the new rule provides that an agreement or motion for dismissal may not be conditioned on withdrawal of an opinion, practitioners who want the opinion withdrawn should request, if not insist, that the opinion be withdrawn based upon creative yet arguably legitimate reasons. TRAP 42.1.

XIV. OPINIONS, PUBLICATION AND CITATION -- RULE 47

The new rules retained the prohibition against counsel and courts citing unpublished court of appeals' opinions as authority. In addition, the rules explicitly state that unpublished opinions "have no precedential value." TRAP 47.7. However, a court of appeals sitting en banc may modify or overrule a panel's decision concerning the signing or publication of a panel's opinion. TRAP 47.6. The new rule also limits concurring and dissenting opinions in the courts of appeal. Now only a justice who participated in the decision of a case may file an opinion concurring in or dissenting from the judgment of the court of appeals. TRAP 47.5. However, any justice on the court may file an opinion in connection with a denial of a hearing or rehearing en banc.

Since the petitioner's chances of a grant of the petition for review will likely be greatly increased if the court of appeals' opinion is published, either party in the court of appeals should consider filing a motion asking the court of appeals to reconsider its decision to publish or not publish the opinion. TRAP 47.3. However, the court of appeals is prohibited from ordering an unpublished opinion to be published after the Supreme Court has acted on any party's petition for review, or other request for relief. TRAP 47.3.

The Supreme Court may order a court of appeals' opinion published at any time with or without a motion. TRAP 47.3. In addition, the new rule eliminates the requirement that court of appeals' opinions be published after the Supreme Court grants or refuses an application for writ of error (now petition for review).

XV. ORIGINAL PROCEEDINGS -- RULE 52

All original proceedings in the Courts of Appeals (both civil and criminal) and in the Supreme Court are governed by TRAP 52 and are treated alike.

A. Motion for Leave Abolished

The biggest change is that the motion for leave is no longer required. Under the former rules, a party was required to file both a motion for leave and a petition. *See* former rule 121(a)(1) and (2). They were both presented to the clerk at the same time. The motion for leave was filed by the clerk, but the petition was only received by the clerk, pending the granting of the motion for leave. This legal fiction is no longer necessary under the new rules — the party simply files a petition and the court acts on that petition.

B. Style

The style is changed. Formerly, the case was styled as the relator v. the respondent — usually a judge or court of appeals. The judges were not enchanted with having their names on cases since they had no interest in the action. So the new rule provides that the petition will be styled *In re [name of relator]*. TRAP 52.1.

C. Petition --Length

The petition will generally follow the form of a brief to the court of appeals, or a petition for review to the Supreme Court. In the court of appeals, the petition is limited to 50 pages. TRAP 52.6. In the Supreme Court, the petition is limited to 15 pages, TRAP 52.6, but the Court may request further briefing as it would in a petition for review. TRAP 52.8(b)(2).

> The limitation of 15 pages on petitions filed in the Supreme Court may indicate that courts of appeal will be acting as "gatekeepers" on original proceedings.

D. Response -- Length

A party may file a response to the petition, but it is not required. TRAP 52.4. The length of the response is limited 50 or 15 pages as well. TRAP 52.6 If a response is filed, the petitioner may file a reply. TRAP 52.5 The reply may be no more than 8 pages. TRAP 52.6

> Although not specifically permitted or prohibited by TRAP 52, a party might consider filing a persuasive motion for leave to file a brief on the merits in the Supreme Court. This is one way to "expand" the 15 page limit.

The court will not grant relief -- other than temporary relief -- without first receiving a response (or at least asking for one and not getting it). TRAP 52.4. Furthermore, if the court is of the tentative opinion that relator is entitled to the relief sought or that a serious question concerning the relief requires further consideration, the court (1) must request a response if one has not been filed, (2) may request full briefing, and (3) may set the case for oral argument. TRAP 52.8(b).

E. Appendix and Record

TRAP 52.3(j) and 52.7 seem to create an artificial distinction between an "appendix" and a "record." An "appendix" is required and must contain (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 Supreme Court, and (3) the text of any rule, regulation, ordinance, statute, constitutional provision, or other law on which the argument is based. TRAP 52.3(j)

A "record" is required and must contain (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. TRAP 52.7(a). After the record is filed, the relator or any other party to the proceeding may file additional materials for inclusion in the record. TRAP 52.7(b).

F. Temporary Relief

The relator may file a motion for temporary relief requesting that the underlying proceeding be stayed or for any other temporary relief while the petition is pending. *However, the relator must notify or make a diligent effort to notify all parties by expedited means (i.e., by telephone or fax) that a motion for temporary relief has been or will be filed and must certify to the court that relator has compiled with this requirement before temporary relief will be granted.* TRAP 52.10(a).

> Do not just include the motion for temporary relief in the petition or request temporary relief in the prayer. Always file a separate motion for temporary relief.

G. Motion for Rehearing

The new rules specifically allow a motion for rehearing in an original proceeding. TRAP 52.9. The former rule neither permitted nor prohibited a motion for rehearing, but it was common practice to file it. A motion for rehearing may not be longer than 15 pages. TRAP 52.9.

XVI. APPEALING TO THE SUPREME COURT -- RULES 53-55, 64

A. Conceptual Differences

Supreme Court practice has radically changed. The application for writ of error is replaced by a 15 page petition for review focused predominantly if not exclusively on why the Court should exercise discretion to hear the case. Although most of the discussion of the petition for review has focused on how to squeeze an application for writ of error into a 15 page petition for review, the most significant change is conceptual: "[t]he argument should state the reasons why the Supreme Court should exercise jurisdiction to hear the case with specific reference to the [following] factors...." TRAP 53.2(I).

- Whether the justices of the court of appeals disagree on an *important* point of law.
- Whether there is a conflict between the courts of appeals on an *important* point of law.
- Whether a case involves the construction or validity of a statute.
- Whether a case involves constitutional issues.
- 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.
- 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.

TRAP 56.1(a). These factors are very similar to the following current jurisdictional requirements in section 22.001(a) of the Government Code:

- A case in which the justices of a court of appeals disagree on a question of law material to the decision;
- A case in which one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court on a question of law material to a decision of the case;
- A case involving the construction or validity of a statute necessary to a determination of the case;
- A case involving state revenue;
- A case in which the railroad commission is a party; and
- any other case in which it appears that an error of law has been committed by the court of appeals, and that error is of such importance to the jurisprudence of the state that, in the opinion of the supreme court, it requires correction....

Tex. Gov. Code § 22.001(a)(1)-(6).

B. Procedural Differences

The major procedural differences in practice in the Supreme Court under the new rules include

1. Filing the Petition

- The petition for review must be filed *in the Supreme Court* rather than the court of appeals. *Compare* TRAP 53.7(a) with former rule 130(b).
- If the petition for review is mistakenly filed in the court of appeals, the petition is deemed to have been timely filed the same day with the Supreme Court clerk, and the court of appeals clerk must immediately send the petition to the Supreme Court. TRAP 53.7(g).

- The petition must be filed within 45 days after the date of the court of appeals judgment or within 45 days after the date of the court of appeals' last ruling on all timely filed motions for rehearing. TRAP 53.7(a). Currently, the application for writ of error must be filed within 30 days after the ruling on all timely filed motions for rehearing. See former rule 130(b).

2. Petition for Review

- The petition must state, without argument, the basis of the Court's jurisdiction. TRAP 53.2(e).

- The petitioner may state either issues presented or points of error. TRAP 53.2(f).

- The petition must have a statement of facts including the procedural background and a summary of the argument. TRAP 53.2(g) & (h).

- The petitioner is not required to argue all issues included in the statement of issues presented. TRAP 53.2(I).

- A party who seeks to alter the court of appeals' judgment must file a petition for review. TRAP 53.1.

- The rule incorporates the holding of *McKelvy v. Barber*, 381 S.W.2d 59 (Tex. 1964), and its progeny, regarding grounds for lesser relief not addressed by the court of appeals. TRAP 53.3(c)(3) & 53.4.

3. Appendix and Record

- The petition must be accompanied by an appendix containing the judgment of the trial court, the jury charge and verdict or the findings of fact and conclusions of law, the opinion and judgment of the court of appeals, and the text of any relevant rule, regulation, ordinance, statute, or constitutional provision on which the suit is based. TRAP 53.2(k)(1). Other items may be included.

- The record is not sent to the Supreme Court unless requested by the Court (although the statement of facts and argument must be supported by "record references"). The record may be requested by the Supreme Court at any time (before or after granting the petition); but it is not automatically filed as was the case in current practice. TRAP 54.1.

4. Response and Reply

- The response is filed in the Supreme Court within 30 days after the petition is filed. TRAP 53.7(d). Under current practice, the response is filed within 15 days after the application for writ of error is filed *in the Supreme Court* (that is, 15 days after it is received by the Supreme Court from the court of appeals). *See* former rule 136(a).

- A party may file a waiver of response. Even if a waiver is filed, the petition will not be granted until a response has been filed or requested. TRAP 53.3.

- A reply to the response is permitted. However, the Court may consider and decide the case before a reply brief is filed. TRAP 53.5. The reply must be filed within 15 days after the response is filed. TRAP 53.7(e).

5. Length -- Petition, Response and Reply

- The petition and response are limited to 15 pages. The reply is limited to 8 pages. TRAP 53.6.

6. Extension of Time

- An extension of time is available to file a petition, response, or reply. TRAP 53.7(f).

7. Briefs on the Merits

- The Court may, with or without granting the petition, request briefs on the merits. TRAP 55.1

- The petitioner's brief on the merits is limited to 50 pages, as is the response. A reply to the response is limited to 25 pages. TRAP 55.6.

- The Court may set a briefing schedule. If it doesn't, the petitioner's brief on the merits is due 30 days after the Court's request; the respondent's brief is due "20 days after receiving the petitioner's brief"; and the reply is due "15 days after receiving the respondent's brief." TRAP 55.7.

Although not specifically permitted or prohibited by TRAPS 53-55, a party might consider filing a persuasive motion for leave to file the record or a brief on the merits. This is one way to "expand" the 15 page limit.

8. Motions for Rehearing

A motion for rehearing may be filed with the Supreme Court within 15 days from the date when the Court renders judgment or makes an order disposing of a petition for review. TRAP 64.1. A motion for rehearing or response may not be longer than 15 pages. TRAP 64.6.

XVII. ORDERS ON PETITION FOR REVIEW -- RULE 56

A. Writ Histories

The Court may grant, deny, dismiss, or refuse the petition. TRAP 56.1. Although the writ histories have not changed, their significance may and probably will in the future because of the conceptual change in the petition for review.

B. Settlement

TRAP 56.3 concerning settled cases codifies the procedure to allow parties to resolve their disputes during the pendency of the appeal in the Supreme Court. TRAP 56.3 gives the Supreme Court more options to assist parties in effectuating a settlement. For example, upon the agreement and motion of all parties, the Supreme Court may grant the petition and, without hearing argument or considering the merits, render a judgment to effectuate the agreement. In addition, the Supreme Court may abate a case until necessary action to effectuate the settlement in the lower court is completed.

Furthermore, the Supreme Court now has discretion to vacate a court of appeals' opinion by specific order when a case is settled by the parties. TRAP 56.3. This change effectively limits if not overrules *Houston Cable TV v. Inwood West Civic Ass'n*, 860 S.W.2d 72, 73 (Tex. 1993) ("[A] private agreement between litigants should not operate to vacate a court's writing on matters of public importance."). However, this new discretionary authority to vacate court of appeals' opinions does not extend beyond settlement by the parties. Furthermore, an agreement or motion for dismissal may not be conditioned on vacating the court of appeals' opinion. TRAP 56.3. However, although the new rule provides that an agreement or motion for dismissal may not be conditioned on vacating a court of appeals' opinion, practitioners who want the opinion withdrawn should request, if not insist, that the opinion be withdrawn based upon creative yet arguably legitimate reasons.

XVIII. MOTIONS FOR REHEARING -- RULES 49 & 53

The motion for rehearing is no longer a jurisdictional prerequisite to Supreme Court review and is not required to preserve error. TRAP 49.9. However, a preservation concept is included in the petition for review rule.

> If the matter complained of originated in the trial court, it should have been preserved for appellate review in the trial court and assigned as error in the court of appeals.

TRAP 53.2(f).

A motion for rehearing may be filed in the court of appeals and, if filed, will affect the time for filing a petition for review. *See* TRAP 53.7(a)(2). A party who files a petition for review may not later file a motion for rehearing in the court of appeals. But any other party may file a motion for rehearing even if a petition for review has already been filed. TRAP 53.7(b). If a motion for rehearing is filed after a petition for review was filed, the petitioner must inform the Supreme Court of the filing of the motion for rehearing. TRAP 53.7(b). A motion for rehearing may not be longer than 15 pages. TRAP 49.10.

XIX. SANCTIONS -- RULES 45, 52 & 62

Formerly, a party might be sanctioned if the appeal was "taken for delay and without sufficient cause." Former rules 84 & 182(b). The court of appeals was limited to imposing a sanction of ten percent of the judgment or ten times costs. *See* former rule 84. The Supreme Court could impose any amount of damages. Former rule 182(b). The sanction was awarded to "each prevailing appellee." Former rule 84.

A. Appeals and Petitions for Review

TRAPS 45 and 62 govern sanctions for petitions for review in the Supreme Court and appeals in the courts of appeal. Under these rules, the court can award a sanction if the "appeal is frivolous." The sanction is awarded to "each prevailing party" and there is no limit on the amount of the sanction. The new rules do impose a requirement of "notice and a reasonable opportunity for response." TRAPS 45 & 62.

B. Original Proceedings

The new rules add a sanction applicable to original proceedings. The standard is whether *the party or attorney* is "not acting in good faith." TRAP 52.11. The rule sets out several criteria for determining whether the person was acting in good faith. They include whether the petition is "clearly groundless"; whether the petition was filed "solely for delay of an underlying proceeding"; whether the petition or appendix "grossly misstat[es] or omit[s] an obviously material fact" or if the appendix or record is "clearly misleading because of the omission of obviously important and material evidence or documents". TRAP 52.11.

XX. LEGISLATIVE "AMENDMENTS"

A. Appeal from Interlocutory Order

The Legislature amended section 51.014 of the Civil Practice and Remedies Code to add several appealable interlocutory orders including (1) granting or denying a special appearance under Rule of Civil Procedure 120a (except in a suit brought under the Family Code), and (2) granting or denying a plea to the jurisdiction by a governmental unit as defined in section 101.001. An

appeal stays the commencement of a trial in the trial court pending resolution of the appeal.

The amendment was motivated by a recent Supreme Court mandamus involving a special appearance. The Court "issued a writ of mandamus to dismiss an improperly subjected party to the Texas legal system whose special appearance had been denied. The writ was issued because Texas law does not allow an interlocutory appeal for a special appearance. This bill provides a solution [to "appeal" by mandamus] by allowing interlocutory appeals from an order granting or denying a special appearance." HOUSE COMM. ON CIVIL PRACTICES, BILL ANALYSIS, S.B. 453, 75th Leg., R.S. The amendments apply to actions commenced on or after the effective date (June 20, 1997), commenced before June 20, 1997 but pending on the effective date and in which "the trial, or any new trial or retrial following motion, or appeal, or otherwise, begins on or after that date [June 20, 1997]." S. B. 453.

B. Objection to Justice Assigned to Appellate Court

The Legislature added section 75.551 to the Government Code to provide a mechanism for parties to object to judges assigned to an appellate court. The amendment prevents a judge assigned to an appellate court from hearing a civil case if a party files a timely objection to the assignment. Each party is entitled to only one objection for that case in the appellate court. In addition, a former judge who was not a retired judge may not sit in an appellate case if either party objects to the judge. The legislation is effective September 1, 1997 and applies only to an objection to a judge assigned on or after that date. S. B. 1563.

C. Filing Fees

The Legislature enacted a bill for an additional filing fee for basic civil legal services for indigents. Section 51.901 of the Government Code provides that "[i]n addition to other fees authorized or required by law, the clerk of each court shall collect the following fees on the filing of any civil action or proceeding requiring fee, including an appeal...(1) supreme court and courts of appeal .....$25...." S. B. 1534. Although it is unclear, apparently the additional filing fee will only apply to appeals to the courts of appeal, original proceedings and petitions for review in the Supreme Court and not to every fee charged by the courts. The legislation is effective September 1, 1997 and applies only to appeals filed on or after that date.

D. Teleconferencing

The Legislature added section 22.302 to the Government Code and amended section 73.003 of the Government Code to permit appellate courts to hear oral argument through the use of teleconferencing technology at the discretion of the chief justice and with the consent of the parties or their attorneys. One of the considerations for the changes was the substantial travel expenses for the parties and attorneys, and the expenditures by the state for the travel of justices and court personnel for cases heard after transfer. The legislation is effective September 1, 1997. H. B. 784.