

PERFECTING THE APPEAL—STATE AND FEDERAL

PAPER UPDATED AND PRESENTED BY:

KIMBERLY R. PHILLIPS

Gardere Wynne Sewell LLP
1000 Louisiana, Suite 3400
Houston, Texas 77002-5007
(713) 276-5576

ORIGINAL PAPER AUTHORED
AND PRESENTED BY:

SHARON E. CALLAWAY

MICHAEL J. MURRAY

Crofts & Callaway
A Professional Corporation
112 East Pecan, Suite 800
San Antonio, Texas 78205-1578
(210) 225-5551

State Bar of Texas
APPELLATE BOOT CAMP
September 8, 2004
Austin

CHAPTER 2

Kimberly R. Phillips

Gardere Wynne Sewell LLP
1000 Louisiana, Suite 3400
Houston, Texas 77002-5007
713-276-5576 (direct dial)
713-276-6576 (direct facsimile)
kphillips@gardere.com

BIOGRAPHICAL INFORMATION

EDUCATION

- J.D., summa cum laude, Thurgood Marshall School of Law (May 1993),
Class Valedictorian
- B.S., Criminal Justice Administration; Central Missouri State University (December 1989)

PROFESSIONAL ACTIVITIES

- Partner, Gardere Wynne Sewell LLP
- Board Certified in Civil Appellate Law by the Texas Board of Legal Specialization
- Former Briefing Attorney, Fifth District Court of Appeals at Dallas
- Admitted to practice before all Texas federal district courts, United States Courts of Appeals for the Fifth and Ninth Circuits, and United States Supreme Court
- Appointee, State Bar of Texas Court Rules Committee (2002-present)
- Council Member, Houston Bar Association, Appellate Section (2002-present)
- Editor, *"The Appellate Advocate"*, State Bar of Texas, Appellate Section (2003-present)
- Past Appointee, State Bar of Texas, Bar Journal Committee (1996-1999)
- "30 Under 30" recognition from the *Dallas Business Journal* (1998)
- Governor Appointee, Texas Board of Professional Geoscientists (2001-present)
- Director, Texas Lyceum Association, Inc. (2004)

LAW RELATED SPEECHES AND WRITINGS

- *"Evidence Update"*, State Bar of Texas, 13th Annual Advanced Personal Injury Law Course 1997, Speaker and Author
- *"Spoliation of Evidence/Computer Retention Program"*, State Bar of Texas, 21st Annual Advanced Civil Trial Course 1998, Co-Author
- *"Electronic Evidence/Spoliation of Evidence, Discovery and Admission"*, State Bar of Texas, 22nd Annual Advanced Civil Trial Course, 1999, Co-Author
- *"Electronic Evidence: Discovery and Admission"*, Intellectual Property Law 2001, Co-Author
- *"Obstacles to Obtaining Alternate Security and Meaningful Appellate Review of the Trial Court's Decision Regarding the Same"*, State Bar of Texas Appellate Section Report, Summer 2001, Co-Author
- *"Supreme Court Update"*, State Bar of Texas Appellate Section Report, Fall 2001 and 2002, Co-Author
- *"Appeals from Bankruptcy Court and Magistrate Decisions"* Advanced Civil Appellate Practice Course 2001, Author and Speaker
- Planning Committee, Speaker and Author, "The Charge and The Charge Conference", South Texas College of Law, Civil Appeals for Trial Lawyers (2003)

TABLE OF CONTENTS

- I. PERFECTING AN APPEAL IN TEXAS STATE COURT 1
 - A. WHAT IS PERFECTION?..... 1
 - B. IS MY JUDGMENT OR ORDER APPEALABLE?..... 1
 - 1. Appealable interlocutory orders..... 1
 - a. Civil Practice and Remedies Code Section 51.014. 1
 - (i) Section 51.014(d). 2
 - b. Is my order or judgment final? 2
 - C. PERFECT THE APPEAL BY FILING A NOTICE OF APPEAL..... 3
 - 1. Notice of Appeal..... 3
 - a. What must be filed?..... 3
 - b. Where is the notice of appeal filed and how is it served? 3
 - c. Who files the notice of appeal? 3
 - d. Contents of the notice of appeal..... 3
 - e. Amending the notice of appeal. 4
 - 2. The docketing statement..... 4
 - D. WHEN DO YOU PERFECT YOUR APPEAL..... 4
 - 1. The appellate deadlines run from the signing of the judgment or order. 4
 - a. General rule in appeals from final judgments is 30 days..... 4
 - b. Post-judgment motions extend the deadline to 90 days..... 4
 - (i) Motion for new trial. 4
 - (ii) Motion to modify judgment. 5
 - (iii) Motion to reinstate pursuant to Texas Rule of Civil Procedure 165a. 5
 - (iv) Request for findings of fact and conclusions of law. 5
 - (v) Effect of premature motion on time for perfecting appeal. 5
 - c. Deadline for interlocutory appeals. 5
 - (i) Interlocutory appeals based on section 51.014(a). 5
 - (ii) Interlocutory appeals based on section 51.014(d). 6
 - d. Restricted Appeals..... 6
 - 2. Extension of time to file notice of appeal..... 6
 - 3. Premature notice of appeal. 7
 - E. RECORD ON APPEAL..... 7
 - 1. Obtaining the record. 7
 - 2. Time for filing the record. 7
 - 3. Invoking the duty to file. 7
 - a. Clerk’s record. 7
 - b. Reporter’s record..... 8
 - 4. Contents of the record. 8
 - a. Mandatory contents of clerk’s record. 8
 - b. Requested contents of clerk’s record..... 8
 - c. Reporter’s record..... 8
 - 5. What if no record is filed? 9
 - a. Notice of late record. 9
 - b. Appellant’s failure to invoke duty. 9
 - (i) No request for reporter’s record..... 9
 - (ii) No request to include relevant items in clerk’s record. 9
 - 6. Avoid the Pitfalls..... 9
 - a. Clerk’s record. 9
 - (i) Non-mandatory contents..... 9
 - (ii) Lost or destroyed contents. 10
 - b. Lost or destroyed reporter’s record. 10
- II. PERFECTING THE FEDERAL APPEAL 10
 - A. REQUISITES OF NOTICE OF APPEAL — DISTRICT COURT FINAL JUDGMENT..... 10
 - 1. Appeal must be from a final judgment..... 10
 - 2. Perfect appeal by filing notice of appeal with district court. 11

- 3. Service of notice of appeal. 11
- 4. Contents of notice of appeal. 11
 - a. Must specify party appealing. 11
 - b. Must designate order or judgment being appealed and court to which appeal is taken. 12
- 5. Joint or consolidated appeals. 12
- 6. Separate notice of appeal required if you seek any modification of judgment. 12
- 7. Representation statement must be filed with court of appeals. 12
- B. TIMELINES FOR FILING NOTICE OF APPEAL. 12
 - 1. 30 days from entry of judgment if no post-trial motion. 12
 - 2. 30 days from entry of order disposing of certain post-trial motions. 13
 - 3. Extensions for filing notice of appeal. 13
 - a. Timeline for filing motion for extension. 13
 - b. Motion for extension must be filed with district clerk. 13
 - c. Standard for obtaining extension. 13
 - 4. Timeline extended if no notice of judgment. 14
 - 5. Prematurely filed notice of appeal. 14
- C. AVOID THE PITFALLS. 14
 - 1. No “mailbox” rule for notices of appeal. 14
 - 2. Be careful in your computations of deadlines. 14

TABLE OF AUTHORITIES

CASES

Allied Steel v. City of Abilene, 909 F.2d 139 (5th Cir. 1990)	13
Anderson v. Pasadena Indep. Sch. Dist., 184 F.3d 439 (5th Cir. 1999)	13
Bally Total Fitness Corp. v. Jackson, 53 S.W.3d 352 (Tex. 2001)	1
<i>Barrett v. Atlantic Richfield Co., 95 F.3d 375 (5th Cir. 1996)</i>	14
Bayoud v. North Central Inv. Corp., 751 S.W.2d 525 (Tex. App.--Dallas 1988, writ denied).....	1
Bennett v. Cochran, 96 S.W.3d 227 (Tex. 2002)	9
BMC Software Belgium, N.V. v. Marchand, 83 S.W.3d 789 (Tex. 2002)	2
Bobbitt v. Cantu, 992 S.W.2d 709 (Tex. App.--Austin 1999, no pet.).....	1
Brazos Transit Dist. v. Lozano, 72 S.W.3d 442 (Tex. App.--Beaumont 2002, no pet.).....	2
Brown v. Miss. Valley State Univ., 311 F.3d 328 (5th Cir. 2002)	14
Bryant v. United Shortline, Inc., 972 S.W.2d 26 (Tex. 1998).....	9
Buchanan v. Stanships, Inc., 485 U.S. 265 (1988)	11
Budinich v. Becton Dickinson & Co., 486 U.S. 196 (1988)	11
Butts v. Capitol City Nursing Home, Inc., 705 S.W.2d 696 (Tex. 1986)	5
Campbell v. Bowlin, 724 F.2d 484 (5th Cir. 1984)	13
Cotton v. Cotton, 57 S.W.3d 506 (Tex. App.--Waco 2001, no pet.).....	6
Crist v. Dickson Welding, Inc., 957 F.2d 1281 (5th Cir.), cert. denied, 506 U.S. 864 (1992).....	12
Davis v. Medical Evaluation Specialists, Inc., 31 S.W.3d 788 (Tex. App.--Houston [1st Dist.] 2000, pet. denied) ...	10
Dayco Prods., Inc. v. Ebrahim, 10 S.W.3d 80 (Tex. App.--Tyler 1999, no pet.).....	5
De Los Santos v. Occidental Chem. Corp., 933 S.W.2d 493 (Tex. 1996)	1
Delta Air Lines, Inc. v. Norris, 949 S.W.2d 422 (Tex. App.--Waco 1997, writ denied)	2
Denton County v. Huther, 43 S.W.3d 665 (Tex. App.--Fort Worth 2001, no pet.).....	5
Deus v. Allstate Ins. Co., 15 F.3d 506 (5th Cir.), cert. denied, 513 U.S. 1014 (1994)	11
Diana Rivera & Assocs., P.C. v. Calvillo, 986 S.W.2d 795 (Tex.App.--Corpus Christi 1999, pet. denied)	1
Dunn v. Cockrell, 302 F.3d 491 (5th Cir. 2002), cert. denied, 123 S.Ct. 1208 (2003)	13
Eastland County Co-op Dispatch v. Poyner, 64 S.W.3d 182 (Tex. App.--Eastland 2001, pet. denied).....	2
El Chico Corp. v. Poole, 732 S.W.2d 306 (Tex. 1987)	7
Elite Towing, Inc. v. LSI Fin. Group, 985 S.W.2d 635 (Tex. App.--Austin 1999, no pet.)	10
Espalin v. Children's Med. Ctr. of Dallas, 27 S.W.3d 675 (Tex. App.--Dallas 2000, no pet.).....	7
F.T.C. v. Hughes, 891 F.2d 589 (5th Cir. 1990)	12
Farmer v. Ben E. Keith Co., 907 S.W.2d 495, 496 (Tex. 1995)(per curiam)	4
FirsTier Mortgage Co. v. Investors Mortgage Ins. Co., 498 U.S. 269 (1991)	10
Ford v. City of Lubbock, 76 S.W.3d 795 (Tex. App.--Amarillo 2002, no pet.).....	5
Foster v. Williams, 74 S.W.3d 200 (Tex. App.--Texarkana 2002, pet. denied)	3, 5
Fredonia State Bank v. Gen. Am. Life Ins. Co., 881 S.W.2d 279 (Tex.1994)	5
Friou v. Phillips Petroleum Co., 948 F.2d 972 (5th Cir. 1991)	12

Ganesan v. Vallabhaneni, 96 S.W.3d 345 (Tex. App.--Austin 2002, pet. denied)	10
Garcia v. Kastner Farms, 774 S.W.2d 668 (Tex. 1989)	6
Garcia v. Wash, 20 F.3d 608 (5th Cir. 1994)	11
Gordon v. James, 95 S.W.3d 734 (Tex. App.--Houston [1st Dist.] 2003, no pet.).....	9
Gorham v. Gates, 82 S.W.3d 359 (Tex. App.--Austin 2002, pet. denied)	1
Grant v. Austin Bridge Constr. Co., 725 S.W.2d 366 (Tex. App.--Houston [14th Dist.] 1987, no writ).....	1
Guadalupe-Blanco River Auth. v. Pitonyak, 84 S.W.3d 326 (Tex. App.--Corpus Christi 2002, no pet.).....	2
Halicki v. La. Casino Cruises, Inc., 151 F.3d 465 (5th Cir. 1998), cert. denied, 526 U.S. 1005 (1999).....	14
Hamilton Plaintiffs v. Williams Plaintiffs, 147 F.3d 367 (5th Cir. 1998)	13
Harris County Flood Cont. Dist. v. Adam, 66 S.W.3d 265 (Tex. 2001)(per curiam)	3
Hays County v. Hays County Water Planning Partnership, 69 S.W.3d 253 (Tex. App.--Austin 2002, no pet.)	2
<i>Hilton v. Hillman Distrib. Co.</i> , 12 S.W.3d 846 (Tex. App.--Texarkana 2000, no pet.).....	8
Hone v. Hanafin, 104 S.W.3d 884 (Tex. 2003)	6
Houston v. Lack, 487 U.S. 266 (1988)	11
In re D.B., 80 S.W.3d 698 (Tex. App.--Dallas 2002, no pet.).....	2, 6
In re Lacey, 114 F.3d 556 (5th Cir. 1997)	11, 13
In re Marriage of Spiegel, 6 S.W.3d 643 (Tex. App.--Amarillo 1999, no pet.)	9
<i>In re R.C.</i> , 45 S.W.3d 146 (Tex. App.--Fort Worth 2000, no pet.).....	8
In re R.M.M., 2002 WL 199733 (Tex. App.--Tyler 2002, no pet.)(per curiam)	9
Inman's Corp. v. TransAmerica Comm. Fin. Corp., 825 S.W.2d 473 (Tex. App.--Dallas 1991, no writ)	7
Iron Mountain Bison Ranch, Inc. v. Easley Trailer Mfg., Inc., 964 S.W.2d 762 (Tex. App.--Amarillo 1998, no pet.) .	5
Jack B. Anglin Co., Inc. v. Tipps, 842 S.W.2d 266 (Tex. 1992)	1
Johnson v. Tom Thumb Stores, Inc., 771 S.W.2d 582 (Tex.App.--Dallas 1989, writ denied)	5
Jones v. City of Houston, 976 S.W.2d 676 (Tex. 1998)	6
Kaplan v. Tiffany Dev. Corp., 69 S.W.3d 212 (Tex. App.--Corpus Christi 2001, no pet.).....	1
Kelly v. Demoss Owners Ass'n, 71 S.W.3d 419 (Tex. App.--Amarillo 2002, no pet.).....	7
Kidd v. Paxton, 1 S.W.3d 309 (Tex. App.--Amarillo 1999, pet. denied)	7
Koch Gathering Sys., Inc. v. Harms, 946 S.W.2d 453 (Tex. App.--Corpus Christi 1997, writ denied)	1
Lane Bank Equip. Co. v. Smith Southern Equip., Inc., 10 S.W.3d 308 (Tex. 2000)	5
Latham v. Wells Fargo Bank, N.A., 987 F.2d 1199 (5th Cir. 1993)	13, 14
Lehmann v. Har-Con Corp., 39 S.W.3d 191 (Tex. 2001).....	1, 2, 3
Long v. Simmons, 77 F.3d 878 (5th Cir. 1996).....	14
Longmire v. Guste, 921 F.2d 620 (5th Cir. 1991)	11
Lubbock County, Texas v. Trammel's Lubbock Bail Bonds, 80 S.W.3d 580 (Tex. 2002)	3
Ludgood v. Apex Marine Corp. Ship Mgt., 311 F.3d 364 (5th Cir. 2002)	10, 12, 14
Maddox v. Cosper, 25 S.W.3d 767 (Tex.App.--Waco 2000, no pet.).....	5
Maiz v. Virani, 311 F.3d 334 (5th Cir. 2002).....	12
Maldonado v. Maldonado, 100 S.W.3d 345 (Tex. App.--San Antonio 2002, no pet.)	6

National Western Life Ins. Co. v. Rowe, 86 S.W.3d 285, 292-93 (Tex. App.--Austin 2002, pet. filed)	1
Old Republic Ins. v. Scott, 846 S.W.2d 832 (Tex. 1993)	4
Osterberger v. Relocation Realty Service Corp., 921 F.2d 72 (5th Cir. 1991)	12
Padilla v. LaFrance, 907 S.W.2d 454 (Tex. 1995)	5
Pierce Mortuary Colleges, Inc. v. Bjerke, 841 S.W.2d 878 (Tex. App.--Dallas 1992, writ denied)	1
Piotrowski v. Minns, 873 S.W.2d 368 (Tex. 1993)	10
Qwest Comm. Corp. v. AT&T Corp., 24 S.W.3d 334 (Tex. 2000)	1
Ramsey v. Colonial Life Ins. Co. of America, 12 F.3d 472 (5th Cir. 1994)	12
Richardson v. Oldham, 12 F.3d 1373 (5th Cir. 1994)	13
S&A Rest. Corp. v. Leal, 892 S.W.2d 855 (Tex. 1995)(per curiam)	4
Samaad v. City of Dallas, 922 F.2d 216 (5th Cir. 1991)	11
Sclafani v. Sclafani, 870 S.W.2d 608 (Tex. App.--Houston [1st Dist.] 1993, writ denied)	1
Segrest v. Segrest, 649 S.W.2d 610 (Tex.), cert. denied, 464 U.S. 894 (1983)	7
Sheppard v. Thomas, 101 S.W.3d 577 (Tex. App.--Houston [1st Dist.] 2003, pet. denied)	7
Simmons v. Reliance Standard Life Ins. Co. of Tex., 310 F.3d 865 (5th Cir. 2002)	13
Smith v. Adair, 96 S.W.3d 700 (Tex. App.--Texarkana 2003, pet. filed)	2
Smith v. Barry, 502 U.S. 244 (1992)	10, 11
Songer v. Archer, 23 S.W.3d 139 (Tex. App.--Texarkana 2000, no pet.)	3
Stephens v. Dallas Area Rapid Transit, 50 S.W.3d 621 (Tex. App.--Dallas 2001, pet. denied)	3
Tijerina v. Plentl, 984 F.2d 148 (5th Cir. 1993)	12
Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988)	11
Transit Mgmt. of S.E. La., Inc. v. Group Ins. Admin., Inc., 226 F.3d 376 (5th Cir. 2000)	10, 12
Treuter v. Kaufman County, 864 F.2d 1139 (5th Cir. 1989)	11
United States ex rel. Russell v. Epic Healthcare Mgt. Group, 193 F.3d 304 (5th Cir. 1999)	12
United States v. Coscarelli, 149 F.3d 342 (5th Cir. 1998)	12
United States v. Doyle, 854 F.2d 771 (5th Cir. 1988)	13
United States v. O'Keefe, 128 F.3d 885 (5th Cir. 1997), cert. denied, 523 U.S. 1078 (1998)	12
United States v. Truesdale, 211 F.3d 898 (5th Cir. 2000)	13
Urso v. Lyon Fin. Serv., 93 S.W.3d 276 (Tex. App.--Houston [14th Dist.] 2002, no pet.)	1
Utley v. Marathon Oil Co., 958 S.W.2d 960 (Tex. App.--Waco 1998, no writ)	7
Vansteen Marine Supply, Inc. v. Twin City Fire Ins. Co., 93 S.W.3d 516 (Tex. App.--Houston [14th Dist.] 2002, pet. denied)	1
Verburgt v. Dorner, 959 S.W.2d 615 (Tex. 1997)	6
Vincent v. Consol. Operating Co., 17 F.3d 782 (5th Cir. 1994)	13
Waite v. Waite, 76 S.W.3d 222 (Tex. App.--Houston [14th Dist.] 2002, no pet.)	1
Ware v. Miller, 82 S.W.3d 795 (Tex. App.--Amarillo 2002, pet. denied)	2
Warfield v. Fidelity and Deposit Co., 904 F.2d 322 (5th Cir. 1990)	12
Wells v. Breton Mill Apartments, 85 S.W.3d 823 (Tex. App.--Amarillo 2001, no pet.)	3
Whacep, Inc. v. Congress Fin. Corp., 2003 WL 21087997, (Tex.App.--Austin, May 15, 2003, no pet.)	5

Wilkens v. Johnson, 238 F.3d 328 (5th Cir.), cert. denied, 533 U.S. 956 (2001) 13, 14

Williams v. Flores, 88 S.W.3d 631 (Tex. 2002)(per curiam) 6

Wood v. Victoria Bank & Trust Co., N.A., 69 S.W.3d 235 (Tex. App.--Corpus Christi 2001, no pet.) 1

Wu v. Star Houston, Inc., 2002 WL 830733 (Tex. App.--Waco 2002, no pet.)(per curiam) 9

STATUTES

28 U.S.C.A. § 1291 (West 1993)..... 10

28 U.S.C.A. § 1292(b) (West 1993)..... 10

Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a) (Vernon Supp. 2003) 1

Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(1) (Vernon Supp. 2003) 1

Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(2) (Vernon Supp. 2003) 1

Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(3) (Vernon Supp. 2003) 1

Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(4) (Vernon Supp. 2003) 1

Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(5) (Vernon Supp. 2003) 2

Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(6) (Vernon Supp. 2003) 2

Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(7) (Vernon Supp. 2003) 2

Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(8) (Vernon Supp. 2003) 2

Tex. Civ. Prac. & Rem. Code Ann. § 51.014(d) (Vernon Supp. 2003) 2, 6

Tex. Civ. Prac. & Rem. Code Ann. § 51.014(f) (Vernon Supp. 2003) 6

Tex. Gov’t Code Ann. § 52.046(a)(4) (Vernon 1998) 10

RULES

5th Cir. R. 12 12

5th Cir. R. 26.1 14

Fed. R. App. P. 12 12

Fed. R. App. P. 12(b) 12

Fed. R. App. P. 26(a) 14

Fed. R. App. P. 26(c) 14

Fed. R. App. P. 3 11

FED. R. APP. P. 3(A) 11

Fed. R. App. P. 3(a)(1) 10

Fed. R. App. P. 3(a)(3) 11

Fed. R. App. P. 3(a)(4) 10

Fed. R. App. P. 3(b)(1) 12

Fed. R. App. P. 3(b)(2) 12

Fed. R. App. P. 3(c) 11, 12

Fed. R. App. P. 3(d) 11

Fed. R. App. P. 4(a) 13

Fed. R. App. P. 4(a)(1) 12

Fed. R. App. P. 4(a)(2) 14

Fed. R. App. P. 4(a)(3)	12
Fed. R. App. P. 4(a)(4)	13
Fed. R. App. P. 4(a)(4)(B)(i)	14
FED. R. APP. P. 4(A)(6).....	14
Fed. R. App. P. 4(a)(7)	12
Fed. R. App. P. 4(d)	11
Fed. R. App. P. 5.....	10
Fed. R. App. P. 6.....	10
Fed. R. Civ. P. 54.....	13
Fed. R. Civ. P. 54(b).....	11
Fed. R. Civ. P. 58.....	12, 13
Fed. R. Civ. P. 59(3).....	13
Fed. R. Civ. P. 59(e).....	13
Fed. R. Civ. P. 6.....	14
Fed. R. Civ. P. 60.....	13
Fed. R. Civ. P. 60(b).....	13
Fed. R. Civ. P. 77(d).....	14
Fed. R. Civ. P. 79(a).....	12
TEX. R. APP. P. 10.1(a)(5)	6
Tex. R. App. P. 10.2.....	6
Tex. R. App. P. 10.5(b).....	6
Tex. R. App. P. 24.....	3
Tex. R. App. P. 25.1.....	1, 3
Tex. R. App. P. 25.1(a).....	1, 3
Tex. R. App. P. 25.1(b).....	1, 3
Tex. R. App. P. 25.1(c).....	3
Tex. R. App. P. 25.1(d)(1)-(5).....	3
Tex. R. App. P. 25.1(e).....	3
Tex. R. App. P. 25.1(f).....	4
Tex. R. App. P. 26.1.....	4, 5, 6
Tex. R. App. P. 26.1(a).....	4, 5
Tex. R. App. P. 26.1(a)(4).....	5
Tex. R. App. P. 26.1(c).....	6
Tex. R. App. P. 26.3.....	6
Tex. R. App. P. 27.1.....	7
Tex. R. App. P. 30.....	6
Tex. R. App. P. 32.1.....	4
Tex. R. App. P. 32.1(a).....	4

Tex. R. App. P. 32.3..... 4

Tex. R. App. P. 32.4..... 4

Tex. R. App. P. 34.1..... 7

Tex. R. App. P. 34.5..... 7, 8

Tex. R. App. P. 34.5(a)..... 8

Tex. R. App. P. 34.5(b)(1) 8

Tex. R. App. P. 34.5(b)(2) 8

Tex. R. App. P. 34.5(b)(3) 8

Tex. R. App. P. 34.5(c)(1)..... 8

Tex. R. App. P. 34.5(c)(3)..... 8

Tex. R. App. P. 34.5(e)..... 10

Tex. R. App. P. 34.6..... 7, 8

Tex. R. App. P. 34.6(b)..... 8

Tex. R. App. P. 34.6(b)(1) 8

Tex. R. App. P. 34.6(b)(2) 8

Tex. R. App. P. 34.6(b)(3) 8

Tex. R. App. P. 34.6(c)..... 8

Tex. R. App. P. 34.6(d)..... 9

Tex. R. App. P. 34.6(f)..... 10

Tex. R. App. P. 35.1..... 4

Tex. R. App. P. 35.1(a)..... 7

Tex. R. App. P. 35.1(b)..... 7

Tex. R. App. P. 35.1(c)..... 7

Tex. R. App. P. 35.3..... 7

Tex. R. App. P. 35.3(a)..... 7

Tex. R. App. P. 35.3(b)..... 7

Tex. R. App. P. 35.3(b)(3) 8

Tex. R. App. P. 37.1..... 4

Tex. R. App. P. 37.3..... 9

Tex. R. App. P. 37.3(a)(1)..... 9

Tex. R. App. P. 37.3(b)..... 9

Tex. R. App. P. 38.1(e)..... 4

Tex. R. App. P. 4.2(a)(2) 6

Tex. R. App. P. 42.3(c)..... 4

Tex. R. Civ. P. 120a 2

Tex. R. Civ. P. 165a 4, 7

Tex. R. Civ. P. 306a(1)..... 4

Tex. R. Civ. P. 329b(a)..... 4

PERFECTING THE APPEAL IN STATE AND FEDERAL COURT

I. PERFECTING AN APPEAL IN TEXAS STATE COURT

A. WHAT IS PERFECTION?

“Perfecting” an appeal is the process of invoking the jurisdiction of the appellate court over the parties to the trial court’s action. TEX. R. APP. P. 25.1(b). An appeal is “perfected” upon the filing of a timely and proper notice of appeal. TEX. R. APP. P. 25.1(a). The filing of a notice of appeal by any party invokes the appellate court’s jurisdiction over all parties to the trial court’s judgment or order appealed from.

B. IS MY JUDGMENT OR ORDER APPEALABLE?

Generally, only final orders and judgments can be appealed. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001). However, certain interlocutory orders are appealable. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (Vernon Supp. 2004)¹; *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992)(orig. proceeding). If the order or judgment is not final, and if there is no provision permitting an interlocutory appeal, the court of appeals cannot review the matter until a final judgment is rendered regardless of whether an appeal is properly perfected or not. *See Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 355 (Tex. 2001).

1. Appealable interlocutory orders.

An interlocutory order is any order that does not dispose of all parties or all issues in a particular case. *Vansteen Marine Supply, Inc. v. Twin City Fire Ins. Co.*, 93 S.W.3d 516, 518 (Tex. App.—Houston [14th Dist.] 2002, pet. denied). If the court’s order leaves something further to be determined, that order is interlocutory. *See Kaplan v. Tiffany Dev. Corp.*, 69 S.W.3d 212, 217 (Tex. App.—Corpus Christi 2001, no pet.)(citing *Bobbitt v. Cantu*, 992 S.W.2d 709, 711 (Tex. App.—Austin 1999, no pet.)). Appellate review in an interlocutory appeal is limited to complaints related to the appealable interlocutory order. *See Urso v. Lyon Fin. Serv.*, 93 S.W.3d 276, 278 (Tex. App.—Houston [14th Dist.] 2002, no pet.)(citing *Gorham v. Gates*, 82 S.W.3d 359, 363 (Tex. App.—Austin 2002, pet. denied); *see also Diana Rivera & Assocs., P.C. v. Calvillo*, 986 S.W.2d 795, 797 (Tex. App.—Corpus

Christi 1999, pet. denied)(attack on interlocutory order is limited to issues related to that order; party cannot attack an allegedly void judgment in interlocutory appeal).

a. Civil Practice and Remedies Code Section 51.014.

TCPRC § 51.014(a) makes the following interlocutory orders appealable:

(1) **Orders appointing receivers or trustees.** TCPRC § 51.014(a)(1); *see Bayoud v. North Central Inv. Corp.*, 751 S.W.2d 525, 526-27 (Tex. App.—Dallas 1988, writ denied); *but see Waite v. Waite*, 76 S.W.3d 222, 223 (Tex. App.—Houston [14th Dist.] 2002, no pet.)(no appeal from order dissolving receivership).

(2) **Orders overruling a motion to vacate an order that appoints a receiver or trustee.** TCPRC § 51.014(a)(2); *see Sclafani v. Sclafani*, 870 S.W.2d 608, 613 (Tex. App.—Houston [1st Dist.] 1993, writ denied)(Mirabal, J., dissenting).

(3) **Orders certifying or refusing to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure.** TCPRC § 51.014(a)(3); *see, e.g., National Western Life Ins. Co. v. Rowe*, 86 S.W.3d 285, 292-93 (Tex. App.—Austin 2002, pet. filed)(order certifying class). This provision also extends to: (a) orders decertifying classes, *Wood v. Victoria Bank & Trust Co., N.A.*, 69 S.W.3d 235, 238 (Tex. App.—Corpus Christi 2001, no pet.); *Grant v. Austin Bridge Constr. Co.*, 725 S.W.2d 366, 368 (Tex. App.—Houston [14th Dist.] 1987, no writ); and (b) orders changing the characterization of a class, *De Los Santos v. Occidental Chem. Corp.*, 933 S.W.2d 493, 495 (Tex. 1996)(per curiam).²

(4) **Orders granting or refusing to grant a temporary injunction or granting or overruling a motion to dissolve a temporary injunction pursuant to TCPRC Chapter 65.** TCPRC § 51.014(a)(4); *see Qwest Comm. Corp. v. AT&T Corp.*, 24 S.W.3d 334, 336-38 (Tex. 2000). Whether an order is appealable based on this provision depends on

² This section does not apply, however, to orders that (a) refuse to decertify a class, *Bally Total Fitness*, 53 S.W.3d at 356; or (b) make insubstantial modifications to an order certifying a class, *Koch Gathering Sys., Inc. v. Harms*, 946 S.W.2d 453, 456 (Tex. App.—Corpus Christi 1997, writ denied); *Pierce Mortuary Colleges, Inc. v. Bjerke*, 841 S.W.2d 878, 880 (Tex. App.—Dallas 1992, writ denied).

¹ Hereinafter short cited as TCPRC.

the character and function of the order regardless of the order's title. *Id.*

(5) Orders denying motions for summary judgment based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state. TCPRC § 51.014(a)(5); *see Ware v. Miller*, 82 S.W.3d 795, 800 (Tex. App.—Amarillo 2002, pet. denied); *Hays County v. Hays County Water Planning P'ship*, 69 S.W.3d 253, 260-61 (Tex. App.—Austin 2002, no pet.). This applies to assertions of sovereign immunity, official immunity, and qualified immunity, so long as those defenses are raised by an officer or employee of the state or a political subdivision of the state. *See Brazos Transit Dist. v. Lozano*, 72 S.W.3d 442, 444-45 (Tex. App.—Beaumont 2002, no pet.).

(6) Orders denying motions for summary judgment based on the free speech or free press rights of a member of the electronic or print media. TCPRC § 51.014(a)(6); *Delta Air Lines, Inc. v. Norris*, 949 S.W.2d 422, 428 (Tex. App.—Waco 1997, writ denied). On appeal, the appellate court may consider any claim raised in the media defendant's motion and denied by the trial court, so long as the motion was based at least in part on free-speech grounds. *Id.* at 429.

(7) Orders granting or denying the special appearance of a defendant under Texas Rule of Civil Procedure 120a (unless the suit is brought under the Family Code). TCPRC § 51.014(a)(7); *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 793 (Tex. 2002).

(8) Orders granting or denying a plea to the jurisdiction by a governmental unit. TCPRC § 51.014(a)(8); *Guadalupe-Blanco River Auth. v. Pitonyak*, 84 S.W.3d 326, 333 (Tex. App.—Corpus Christi 2002, no pet.); *Eastland County Co-op Dispatch v. Poyner*, 64 S.W.3d 182, 187 (Tex. App.—Eastland 2001, pet. denied).

(9) Denies all or part of the relief sought by a motion under Section 74.351(b) (concerning sanctions for failure to file expert reports in health care liability claims), except that an appeal may not be taken from an order granting an extension under Section 74.351. TCPRC § 51.014(a)(9); *In re Schneider*, 134 S.W.3d 866, 869 (Tex. App.—Houston [14th Dist.] 2004, no pet. h.).

(10) Grants relief sought by a motion under Section 74.351(l) (concerning adequacy of expert

report in health care liability claim). TCPRC § 51.014(a)(10).

(i) Section 51.014(d).

TCPRC § 51.014(d) permits an interlocutory appeal of any order where the district court issues a written order for interlocutory appeal and if: (1) the parties agree the order involves a controlling question of law as to which there is a substantial ground for difference of opinion; (2) an immediate appeal may materially advance the ultimate termination of the litigation; and (3) the parties agree to the order allowing interlocutory appeal. *Id.* The parties must apply to the court of appeals to take the case within 10 days of the date of the trial court's order. *Id.*; *see Smith v. Adair*, 96 S.W.3d 700, 703-04 (Tex. App.—Texarkana 2003, pet. denied); *In re D.B.*, 80 S.W.3d 698, 701-02 (Tex. App.—Dallas 2002, no pet.).

All interlocutory appeals are accelerated appeals. TEX. R. APP. P. 28.1; *see*, Section D.1.c., *infra*.

b. Is my order or judgment final?

Generally speaking, a court of appeals has jurisdiction only to hear appeals from final judgments. “[A]n order or judgment is not final for purposes of appeal unless it actually disposes of every pending claim and party or unless it clearly and unequivocally states that it finally disposes of all claims and all parties.” *Lehmann*, 39 S.W.3d at 205.

Determining whether an order or judgment is final is largely a matter of comparison. *Id.* at 195. The Texas Supreme Court has explained that “[b]ecause the law does not require that a final judgment be in any particular form, whether a judicial decree is a final judgment must be determined from its language and the record in the case.” *Id.*

For a period of time, Texas courts held that the inclusion of a Mother Hubbard clause — a statement that “all relief not granted is denied” — was sufficient to make final an otherwise interlocutory decree. *See id.* at 202-03. But with the supreme court's holding in *Lehmann*, this rule is no longer iron-clad: the use of Mother Hubbard language will generally be dispositive on the issue of finality if there has been a full trial on the merits of either the bench or a jury, but a Mother Hubbard clause has no such effect as to judgments rendered without a conventional trial (such as summary judgments). *Id.* at 204.

As *Lehmann* demonstrates, there is a presumption that all parties and claims have been disposed of if a case goes to a jury verdict or completed bench trial.

The same presumption, however, does not apply to judgments rendered before trial. On judgments that purport to grant summary judgment as to all claims and parties, the decree will be final only if it actually disposes of all claims and parties. *Lehmann*, 39 S.W.3d at 205. To this end, in *Lehmann*, the Texas Supreme Court encouraged parties to include specific, express language in the decree indicating that the “judgment finally disposes of all parties and all claims and is appealable.” *Id.* at 206. With very few exceptions, when the movant actually seeks summary judgment as to all claims against all parties, such language will make the decree final. *Id.*

The issue becomes far less clear when the basis for the decree is the grant of a motion for partial summary judgment. As a general rule, a summary judgment that, on its face, amounts to only a partial disposition as to the parties or the claims, is not appealable unless, by its subject matter, it falls within one of the categories of appealable interlocutory orders.

A partial summary judgment can become final when (1) the trial court signs a final judgment that actually disposes of all claims and parties thereby merging the partial summary judgment into the final judgment; and (2) the trial court severs the parties and claims involved in the partial summary judgment, and there are no unresolved claims against the parties to the severed cause. *See Harris County Flood Cont. Dist. v. Adam*, 66 S.W.3d 265, 266 (Tex. 2001)(per curiam); *see Stephens v. Dallas Area Rapid Transit*, 50 S.W.3d 621, 625 n.1 (Tex. App.—Dallas 2001, pet. denied).

C. PERFECT THE APPEAL BY FILING A NOTICE OF APPEAL

1. Notice of Appeal

a. What must be filed?

All appeals in state court are perfected by the filing of a written notice of appeal. TEX. R. APP. P. 25.1(a); *see Wells v. Breton Mill Apartments*, 85 S.W.3d 823, 824 (Tex. App.—Amarillo 2001, no pet.) (“it is clear that perfecting an appeal merely entails the filing of a timely notice of appeal.”). Filing of the notice of appeal invokes the appellate court’s jurisdiction over all parties to the trial court’s judgment or order from which the appeal is taken. TEX. R. APP. P. 25.1(b); *Wells*, 85 S.W.3d at 824.

b. Where is the notice of appeal filed and how is it served?

The notice of appeal should be filed with the trial court clerk. TEX. R. APP. P. 25.1(a); *see Foster v. Williams*, 74 S.W.3d 200, 202 (Tex. App.—Texarkana 2002, pet. denied).³ If you mistakenly file your notice of appeal with the court of appeals, it will be deemed as having been filed on the same day with the trial court clerk. TEX. R. APP. P. 25.1(a).

The notice of appeal must be served on all parties. TEX. R. APP. P. 25.1(e).

c. Who files the notice of appeal?

Any party who seeks to alter the trial court’s judgment or appealable order must file a timely notice of appeal. TEX. R. APP. P. 25.1(c). This requirement extends even to an appellee. Thus, an appellee cannot rely on asserting a cross-point to seek an alteration of the trial court’s judgment; rather, he must independently perfect an appeal by filing his own timely notice of appeal. A party’s failure to file a timely notice of appeal deprives it of any right to complain of the trial court’s judgment, and the appellate court may not grant such a party any “more favorable relief than did the trial court except for just cause.” TEX. R. APP. P. 25.1(c); *see also Lubbock County, Texas v. Trammel’s Lubbock Bail Bonds*, 80 S.W.3d 580, 584 (Tex. 2002). Parties whose interests are aligned are permitted to file a joint notice of appeal. TEX. R. APP. P. 25.1(c).

d. Contents of the notice of appeal.

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 signing 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 — if the appeal is to either of the Houston courts, the party cannot specify the court to which the appeal is taken, so the notice of appeal must state that the appeal is to either of the courts; and (5) state the name of each party filing the notice. TEX. R. APP. P. 25.1(d)(1)-(5).

The notice of appeal need not specify the grounds for the appeal. *Songer v. Archer*, 23 S.W.3d 139, 143 (Tex. App.—Texarkana 2000, no pet.). The appealing

³ The filing of the notice of appeal does not suspend a party’s ability to enforce the judgment. The judgment remains enforceable unless the judgment is superseded pursuant to Rule 24, or the appellant is entitled to supersede the judgment without security by filing a notice of appeal.

party need not set forth the appellate issues until the appellate brief is filed. *See* TEX. R. APP. P. 38.1(e).

e. Amending the notice of appeal.

A party may file an amended notice of appeal to correct a defect or omission in an earlier-filed notice, and may do so at any time before the appellant's brief is filed. TEX. R. APP. P. 25.1(f). Though amendment is allowed, an amendment may be challenged and can be struck for cause on the motion of any party affected by the amended notice. *Id.* Once the appellant's brief is filed, amendment is allowed only upon receiving leave of the appellate court and only on such terms as the court determines to be appropriate. *Id.*

Note that Rule 25.1(f) dovetails with Rule 37.1, which requires the appellate clerk to notify the parties of any defect in a notice of appeal so that the defect can be remedied, if possible. Compare TEX. R. APP. P. 25.1(f) with TEX. R. APP. P. 37.1.

2. The docketing statement.

Though not required to perfect the appeal, Rule 32 requires the appellant to file a "docketing statement" in the appellate court. TEX. R. APP. P. 32.1. Unlike the notice of appeal, which is filed in the trial court, the docketing statement is filed in the court of appeals. *Id.*

The docketing statement is an administrative tool. TEX. R. APP. P. 32.4. The docketing statement does not affect the appellate court's jurisdiction, but the failure to file the docketing statement could result in the court of appeals' dismissing the appeal. TEX. R. APP. P. 42.3(c)(permitting involuntary dismissal when "the appellant has failed to comply with a requirement of [the Texas Rules of Appellate Procedure] . . .").

Most of the courts of appeals have developed unique docketing statements that are available on the court's website. If, however, such a form is not available, Rule 32 specifies what information should be included in the docketing statement. TEX. R. APP. P. 32.1(a). Any party may supplement or amend the docketing statement. TEX. R. APP. P. 32.3.

D. WHEN DO YOU PERFECT YOUR APPEAL

While the type of decree that forms the basis for the appeal has no bearing on how the appeal is perfected, it has a significant impact upon calculating the deadlines that determine when the appeal must be perfected. TEX. R. APP. P. 26.1.

1. The appellate deadlines run from the signing of the judgment or order.

In Texas state court, all appellate deadlines begin running from the date that the trial court *signs* an appealable order. TEX. R. CIV. P. 306a(1), 329b(a); TEX. R. APP. P. 26.1, 35.1 (emphasis added). The rules specifically tie the deadlines to the signing of an appealable order, and not the rendition or entry of such an order.⁴ *See, e.g., Farmer v. Ben E. Keith Co.*, 907 S.W.2d 495, 496 (Tex. 1995)(per curiam).

a. General rule in appeals from final judgments is 30 days.

Generally, the notice of appeal "must be filed within 30 days after the judgment is signed." TEX. R. APP. P. 26.1. There are, however, several exceptions to this general rule.

b. Post-judgment motions extend the deadline to 90 days.

Upon filing a motion for new trial, a motion to modify the judgment, a motion to reinstate (pursuant to TEX. R. CIV. P. 165a), or a proper request for findings of fact and conclusions of law, a party has up to 90 days after the judgment is signed to file its notice of appeal. TEX. R. APP. P. 26.1(a).

(i) Motion for new trial.

A motion for new trial is a matter of right and extends the appellate timetable regardless of whether there is any sound or reasonable basis for the motion. *Old Republic Ins. v. Scott*, 846 S.W.2d 832, 833 (Tex. 1993). Thus, a party may file a motion for new trial for the sole purpose of extending its time to file a notice of appeal. *Old Republic Ins. Co. v. Scott*, 846 S.W.2d 832, 833 (Tex. 1993). A motion for new trial extends the appellate deadlines for all parties,

⁴ "Signed," "rendered" and "entered" are not synonymous terms. A judge "renders" a judgment; a clerk "enters" a judgment.

"Rendition" of a judgment or order is the judicial act by which the court settles and declares the decision of law on the matters at issue. Thus, judgment is "rendered" when the decision is officially announced — this may be done orally in open court or by memorandum filed with the clerk. *S&A Rest. Corp. v. Leal*, 892 S.W.2d 855, 857 (Tex. 1995)(per curiam).

By contrast, "entry" of the judgment is a "ministerial act of the clerk by which enduring evidence of the judicial act of rendering judgment is afforded." *Knox v. Long*, 257 S.W.2d 289, 291 (Tex. 1953).

regardless of which party files the motion. *See* TEX. R. APP. P. 26.1(a)(1).⁵

(ii) Motion to modify judgment.

A motion to modify, correct, or reform the judgment extends the deadlines for perfection in the same fashion that a motion for new trial does. Unlike the extension resulting from the filing of a motion for new trial, the filing of a motion to modify extends the deadlines only if the motion seeks a substantive change in the judgment. *Lane Bank Equip. Co. v. Smith Southern Equip., Inc.*, 10 S.W.3d 308, 313 (Tex. 2000).⁶

(iii) Motion to reinstate pursuant to Texas Rule of Civil Procedure 165a.

A timely motion to reinstate a case dismissed for want of prosecution extends the time for perfecting the appeal. *See Butts v. Capitol City Nursing Home, Inc.*, 705 S.W.2d 696, 697 (Tex. 1986). A motion to reinstate must be verified; an unverified motion will not extend the deadline. *Dardari v. Texas Commerce Bank Nat'l Ass'n*, 961 S.W.2d 466, 469 (Tex. App.—Houston [1st Dist.] 1997, no pet.) (citing *McConnell v. May*, 800 S.W.2d 194, 194 (Tex. 1990)).

(iv) Request for findings of fact and conclusions of law.

A timely-filed request for findings of fact and conclusions of law extends the deadline for perfection if the findings and conclusions are required by Rule 296, or if such findings and conclusions could be considered by the appellate court. TEX. R. APP. P. 26.1; *Gene Duke Builders, Inc. v. Abilene Housing Authority*, 138 S.W.3d 907, 908 (Tex. 2004) (per curiam). If a party seeks findings of fact and conclusions of law in an instance where they are not proper, the deadline will not be extended. TEX. R. APP. P. 26.1(a)(4).

Requests for findings of fact and conclusions of law will not extend the appellate timetables for appealing matters such as: (1) summary judgment orders; (2) judgment after directed verdict; (3) judgment n.o.v.; (4) default judgment awarding liquidated damage; (5) dismissal for want of prosecution action without an

⁵ A document that is not titled “motion for new trial,” may nevertheless be treated as a motion for new trial and extend the deadline. *See Padilla v. LaFrance*, 907 S.W.2d 454, 458 (Tex. 1995) (“motion for reconsideration”).

⁶ Note, however, that this enlargement of time does not apply to accelerated appeals. TEX. R. APP. P. 26.1(b).

evidentiary hearing; (6) dismissal based on the pleadings or special exceptions; and (7) any judgment rendered without an evidentiary hearing. *See generally Ford v. City of Lubbock*, 76 S.W.3d 795, 796 (Tex. App.—Amarillo 2002, no pet.); *Foster*, 74 S.W.3d at 204; *Lane v. Burkett*, No. 13-04-290-CV, 2004 WL 1687913 (Tex. App.—Corpus Christi, July 29, 2004 n. pet. h.) (memorandum opinion).

(v) Effect of premature motion on time for perfecting appeal.

A prematurely filed motion for new trial or a request for findings of fact and conclusions of law still extends the time for perfection of an appeal from a subsequently corrected judgment. *Whacep, Inc. v. Congress Fin. Corp.*, No. 03-02-00111-CV, 2003 WL 21087997, at *13-14 (Tex. App.—Austin, May 15, 2003, no pet.) (memorandum opinion); *see also Fredonia State Bank v. Gen. Am. Life Ins. Co.*, 881 S.W.2d 279, 282 (Tex. 1994); *Maddox v. Cosper*, 25 S.W.3d 767, 770-71 n.3 (Tex. App.—Waco 2000, no pet.) (holding motion to modify filed before corrected judgment extended time for perfection as long as substance of motion could be properly raised in connection with corrected judgment); *Johnson v. Tom Thumb Stores, Inc.*, 771 S.W.2d 582, 585-86 (Tex. App.—Dallas 1989, writ denied) (no rebuttal of presumption that premature motion for new trial is deemed filed on the date of, but subsequent to, the signing of the judgment when there is only one written judgment).

c. Deadline for interlocutory appeals.

(i) Interlocutory appeals based on section 51.014(a).

Rule 26.1(b) provides that, in accelerated appeals, the notice of appeal must be filed within 20 days of the signing of the interlocutory order. TEX. R. APP. P. 26.1(b); *Iron Mountain Bison Ranch, Inc. v. Easley Trailer Mfg., Inc.*, 964 S.W.2d 762, 763 (Tex. App.—Amarillo 1998, no pet.). Motions for new trial do not extend the time to file an interlocutory appeal. TEX. R. APP. P. 28.1; *Sosa v. Texas Dept. of Protective and Regulatory Services*, 03-04-00351-CV, 2004 WL 1686625, at *1 (Tex. App.—Austin July 29, 2004, no pet. h.) (memorandum opinion); *Denton County v. Huther*, 43 S.W.3d 665, 666-67 (Tex. App.—Fort Worth 2001, no pet.); *Dayco Prods., Inc. v. Ebrahim*, 10 S.W.3d 80, 83 (Tex. App.—Tyler 1999, no pet.). There is no language in Rule 26 to suggest that the types of motions designated in Rule 26.1(a) will extend the time to file a notice of appeal in an interlocutory appeal. *But see Hone v. Hanafin*, 104

S.W.3d 884, 888 (Tex. 2003)(reversing dismissal of interlocutory appeal when party “could have plausibly assumed” that its request for findings of fact and conclusions of law would extend the time for filing a notice of appeal).

(ii) Interlocutory appeals based on section 51.014(d).

If a party is pursuing an “agreed” interlocutory appeal based on section 51.014(d), an “application” for permission to appeal must be filed in the trial court within 10 days of the trial court’s order. See TCPRC § 51.014(f). See *In re D.B.*, 80 S.W.3d at 702-03 (holding that 10-day deadline in section 51.014(f) controlled and not the 20-day deadline found in Rule 26.1(b), and that 10-day deadline cannot be extended pursuant to Rule 26.3).

d. Restricted Appeals.

Rule 30 permits an appeal for parties that: (1) did not participate in person or by counsel in the hearing that resulted in the judgment complained of; (2) did not file a timely post-judgment motion or request for findings of fact and conclusions of law; and (3) did not file a notice of appeal within 30 days of the judgment’s signing. TEX. R. APP. P. 30. Such appeals must be perfected by filing a notice of appeal within 6 months after the judgment or order is signed. TEX. R. APP. P. 26.1(c). The extension of time allowed by Rule 4.2(a)(2) does not apply in restricted appeals. See *Maldonado v. Maldonado*, 100 S.W.3d 345, 346 (Tex. App.—San Antonio 2002, no pet.)

Note that this deadline runs from the date the judgment or order is signed, and not the date the absent party receives notice of that decree. See, e.g., *Cotton v. Cotton*, 57 S.W.3d 506, 509 (Tex. App.—Waco 2001, no pet.).

2. Extension of time to file notice of appeal.

As distinguished from an extension of the deadline to file a notice of appeal, an extension of time permits a party to have additional time to file its notice, even after the deadline has expired. TEX. R. APP. P. 26.3. The court of appeals may grant an extension for the late filing of a notice of appeal if: (1) the notice of appeal is filed with the trial court clerk not later than 15 days after the deadline for filing the notice of appeal; and (2) a motion for extension of time

complying with Rule 10.5(b)7 is filed in the court of appeals within the 15-day period, reasonably explaining the need for the extension. TEX. R. APP. P. 26.3; *Williams v. Flores*, 88 S.W.3d 631, 632 (Tex. 2002)(per curiam); *In re M.E.P.*, No. 01-03-00796-CV, 2004 WL 440929, at *2-3 (Tex. App.—Houston [1st Dist.] March 11, 2004, no pet. h.)(memorandum opinion) (court of appeals lacked jurisdiction where appealing party failed to file a document constituting a bona fide attempt to perfect so that a motion for extension of time could be implied); *Parker v. Bowes*, No. 07-04-0047-CV, 2004 WL 595421 (Tex. App.—Amarillo, March 25, 2004, no pet. h.) (memorandum opinion) (in explaining the need for an extension, pro se appellant filed letter from former counsel that erroneously listed deadline as February 4 instead of February 2).

As a general rule, the motion for extension need not be verified; however, if the motion depends on facts not in the record, not within the court’s knowledge in its official capacity, or not within the personal knowledge of the attorney signing the motion, it may be necessary to supply affidavits or other evidence. TEX. R. APP. P. 10.2. Also note that the local rules of some courts may require that motions be verified.

Texas courts liberally construe the rules of procedure related to the acquisition of appellate jurisdiction. See *Verburgt v. Dorner*, 959 S.W.2d 615, 616-17 (Tex. 1997). The party whose notice is late must provide the court with a reasonable explanation for the delay in filing. See *Jones v. City of Houston*, 976 S.W.2d 676, 677 (Tex. 1998).

Satisfaction of this requirement generally requires some statement indicating that the failure to file was not deliberate or intentional. See *Garcia v. Kastner Farms*, 774 S.W.2d 668, 669-70 (Tex. 1989). As the supreme court put it: “any plausible statement of circumstances indicatin g that the failure to file within the [required] period was not deliberate or intentional, but was the result of inadvertence, mistake, or

⁷ Rule 10.5(b) requires that the motion to extend the time to file the notice of appeal must: (1) state the deadline for filing the item in question and the length of the extension sought; (2) identify the trial court; (3) state the date of the trial court’s judgment or appealable order; and (4) state the case number and style of the case in the trial court. TEX. R. APP. P. 10.5(b). In addition, as with all other appellate motions, the motion to extend time to file the notice of appeal must contain or be accompanied by a certificate that certifies that the filing party has conferred, or made a reasonable effort to confer, with all other parties about the substance of the motion and to determine if the other parties oppose the motion. TEX. R. APP. P. 10.1(a)(5).

mischance . . . even if that conduct can also be characterized as professional negligence” will suffice as a reasonable explanation for the late filing of the document. *See id.*; *but see Kidd v. Paxton*, 1 S.W.3d 309, 310-11 (Tex. App.—Amarillo 1999, pet. denied)(“too busy,” without showing that busy schedule contributed to the missed deadline is not sufficient excuse); *Inman’s Corp. v. TransAmerica Comm. Fin. Corp.*, 825 S.W.2d 473, 482 (Tex. App.—Dallas 1991, no writ)(involvement in settlement negotiations not sufficient reason to miss deadline).

3. Premature notice of appeal.

On occasion, such as when an order believed to be final is discovered to be an unappealable interlocutory order, a party may have prematurely filed its notice of appeal. *See Espalin v. Children’s Med. Ctr. of Dallas*, 27 S.W.3d 675, 681 (Tex. App.—Dallas 2000, no pet.). Rule 27.1 accounts for this possibility, and provides that “a prematurely filed notice of appeal is effective and deemed filed on the day of, but after, the event that begins the period for perfecting the appeal.” TEX. R. APP. P. 27.1; *see Sheppard v. Thomas*, 101 S.W.3d 577, 581 (Tex. App.—Houston [1st Dist.] 2003, pet. denied). Thus, once the notice of appeal is on file with the trial court, an appeal will be perfected (assuming the notice of appeal satisfies all requirements) upon the signing of an appealable judgment or order. *See Kelly v. Demoss Owners Ass’n*, 71 S.W.3d 419, 422 n.3 (Tex. App.—Amarillo 2002, no pet.).

E. RECORD ON APPEAL

Having filed a timely notice of appeal and a docketing statement, the next step is to properly request the appellate record. The record on appeal will always include the clerk’s record, which consists of the pleadings and other documents filed with the trial court clerk. TEX. R. APP. P. 34.1, 34.5. The record on appeal also includes the reporter’s record, which is a transcription of the proceedings (testimony of witnesses and arguments of counsel) and the exhibits that the parties introduced. TEX. R. APP. P. 34.1, 34.6. Even when more than one notice of appeal has been filed, there should only be one appellate record. TEX. R. APP. P. 34.1. However, a reporter’s record is not always necessary to the disposition of an appeal as, for example, when the appeal is from a summary judgment, *see El Chico Corp. v. Poole*, 732 S.W.2d 306, 308 (Tex. 1987), or involves an issue that is purely a question of law, *see Segrest v. Segrest*, 649 S.W.2d 610, 611 (Tex. 1983), *cert. denied*, 464 U.S. 894 (1983).

1. Obtaining the record.

The parties to the appeal bear no responsibility for the actual filing of the record on appeal. *See* TEX. R. APP. P. 35.3. The trial court clerk “is responsible for preparing, certifying, and timely filing the clerk’s record,” upon the satisfaction of certain conditions. TEX. R. APP. P. 35.3(a). Likewise, if a reporter’s record is necessary and is properly requested, “the official or deputy reporter is responsible for preparing, certifying, and timely filing the reporter’s record.” TEX. R. APP. P. 35.3(b); *Utley v. Marathon Oil Co.*, 958 S.W.2d 960, 961 (Tex. App.—Waco 1998, no writ).

2. Time for filing the record.

The deadlines for filing the record are similar to the deadlines for filing the notice of appeal. As a general rule, the appellate record must be filed in the appellate court within 60 days after the judgment is signed. TEX. R. APP. P. 35.1. As with the deadline for the notice of appeal, the deadline for filing the record is extended to 120 days after the judgment is signed if any party files a motion for new trial, a motion to modify the judgment, a motion to reinstate pursuant to TEX. R. CIV. P. 165a, or a proper request for findings of fact and conclusions of law. TEX. R. APP. P. 35.1(a). In an accelerated appeal, the deadline is shorter, and the record must be filed within 10 days after the notice of appeal is filed. TEX. R. APP. P. 35.1(b). Finally, if the appeal is a restricted appeal, the record must be filed within 30 days after the notice of appeal is filed. TEX. R. APP. P. 35.1(c).

3. Invoking the duty to file.

The duty to file the record does not attach automatically upon the filing of a notice of appeal. With both the clerk’s record and the reporter’s record, invoking the duty to file the record is a multi-step process. *See* TEX. R. APP. P. 35.3.

a. Clerk’s record.

The clerk has a duty to prepare, certify, and timely file the clerk’s record once (1) a notice of appeal has been filed and (2) the party responsible for paying for the preparation of the clerk’s record: (a) has paid the clerk’s fee, (b) has made satisfactory arrangements with the clerk to pay the fee, or (c) is entitled to appeal without paying the fee. TEX. R. APP. P. 35.3(a). The duty to pay for preparation of the clerk’s record (or to make satisfactory arrangements to pay the fee) falls on the appellant. *See Utley*, 958 S.W.2d at 961; *One Thousand Three Hundred Eighty-Seven Dollars*

(\$1,387.00) v. *State*, No. 14-03-01448-CV, 2004 WL 583064, at *1 (Tex. App.—Houston [14th Dist.] March 25, 2004, no pet. h.)(memorandum opinion).

b. Reporter's record.

The official or deputy court reporter's duty to prepare, certify, and file the record arises upon the satisfaction of three conditions. If a reporter's record is sought, the party seeking to obtain the record must make a written request to the court reporter. The request should designate the portions of the proceedings to be transcribed and must designate the exhibits to be included in the record. TEX. R. APP. P. 34.6(b)(1). A copy of this request must be filed with the trial court clerk, too. TEX. R. APP. P. 34.6(b)(2). The rule provides that the request must be filed "at or before the time" for filing the notice of appeal, but further provides that "an appellate court must not refuse to file a reporter's record . . . because of a failure to timely request it." TEX. R. APP. P. 34.6(b)(3).

Additionally, the party responsible for paying for the preparation of the reporter's record must (a) pay the reporter's fee, (b) make satisfactory arrangements with the reporter to pay the fee, or (c) be entitled to appeal without paying the fee. TEX. R. APP. P. 35.3(b)(3).

4. Contents of the record.

a. Mandatory contents of clerk's record.

To an extent, the rule determining the contents of the clerk's record is self-effectuating. Rule 34.5 specifies certain pleadings that must be in the record (unless the parties stipulate to the record's contents pursuant to Rule 34.2). These pleadings include: (1) all pleadings on which the trial was held; (2) the court's docket sheet; (3) the court's charge and the jury verdict (or the court's findings of fact and conclusions of law); (4) the court's judgment or any order that is being appealed; (5) any request for findings of fact and conclusions of law; (6) any post-judgment motion (and the court's order on that motion); (7) the notice of appeal; (8) any formal bill of exception; (9) any request for a reporter's record (including an agreed statement made pursuant to Rule 34.3); (10) any request for preparation of the clerk's record; and (11) a certified bill of costs (including the cost of preparing the clerk's record). TEX. R. APP. P. 34.5(a)

b. Requested contents of clerk's record.

Rule 34.5 also permits parties "at any time before the clerk's record is prepared," to "file with the trial court clerk a written designation specifying items to be included in the record." TEX. R. APP. P. 34.5(b)(1). Such requests must specifically describe the item in a manner that allows the clerk to readily identify the requested document — the clerk may disregard any general designations such as "all papers filed in this case." TEX. R. APP. P. 34.5(b)(2). Be cautious, though, about making overbroad requests — the rule expressly provides that if a party requests the inclusion of unnecessary items in the clerk's record, the court of appeals may require that party to pay the costs for preparation of the unnecessary portion. TEX. R. APP. P. 34.5(b)(3). In addition, if it is discovered that a relevant item has been omitted from the clerk's record, the trial court, the appellate court, or any party may direct the trial court clerk to prepare, certify, and file a supplemental clerk's record in the court of appeals. TEX. R. APP. P. 34.5(c)(1). Such a request should be made by letter to the trial court clerk. *Id.* Any supplemental record automatically becomes part of the appellate record. TEX. R. APP. P. 34.5(c)(3).

c. Reporter's record.

Because the reporter's record may or may not be necessary, there are no mandatory contents specified in Rule 34.6.⁸ Upon a proper request, the parties may seek a full record of all recorded proceedings, or transcriptions of some part of those proceedings. *See* TEX. R. APP. P. 34.6(b), (c). Any other party may designate additional exhibits or portions of the testimony to be included in the reporter's record. *Id.* If the appellant requests only part of the reporter's record, the request sent to the reporter and the trial court clerk must "include . . . a statement of the points or issues to be presented on appeal and will then be limited to those points or issues." TEX. R. APP. P.

⁸ The Supreme Court has recently noted that some of the courts of appeals "require 'strict compliance' with all of Rule 34.6's provisions to preserve appellate review." *Bennett v. Cochran*, 96 S.W.3d 227, 229 (Tex. 2002)(citing *Brown v. McGuyer Homebuilders, Inc.*, 58 S.W.3d 172, 175 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (appellant's failure to file statement of points in compliance with Rule 34.6 required appellate court to presume record's omitted portions supported trial court's judgment); *In re R.C.*, 45 S.W.3d 146, 149 (Tex. App.—Fort Worth 2000, no pet.) (appellate court permitted to review only those issues properly designated in appellant's statement of points); *Hilton v. Hillman Distrib. Co.*, 12 S.W.3d 846, 847 (Tex. App.—Texarkana 2000, no pet.) (requiring both request for partial record and statement of points to be timely filed).

34.6(c)(1). Note, however, that the failure to timely file a compliant statement will not result in waiver if the failure does no harm to the appellee. *See Bennett v. Cochran*, 96 S.W.3d 227, 229 (Tex. 2002).

If anything relevant is omitted from the reporter's record, the trial court, the appellate court, or any party may, by letter, direct the court reporter to prepare, certify, and file a supplemental record containing the omitted items in the appellate court. TEX. R. APP. P. 34.6(d). A supplemental reporter's record is part of the appellate record. *Id.*

5. What if no record is filed?

a. Notice of late record.

Note that Rule 37.3 prescribes the consequences when the record is late. TEX. R. APP. P. 37.3. The rule requires the appellate court clerk, upon discovering that any part of the record is late, to send notice to whomever was responsible for filing that part of the record. TEX. R. APP. P. 37.3(a)(1). Generally, this notice will provide that the person responsible for filing the record has additional time to do so (30 days from the date of the notice in an ordinary or restricted appeal; 10 days in an accelerated appeal). The notice will also provide that the matter will be referred to the appellate court if the clerk does not receive the record within the stated time period. *Id.*

b. Appellant's failure to invoke duty.

As for the parties, the rule broadly suggests that if the appellant has complied with all of its responsibilities with regard to the record, the court of appeals must permit the record to be filed late. In fact, the courts have generally exercised broad discretion to permit late filing even when the tardiness is partially or totally the appellant's fault. *See generally Wu v. Star Houston, Inc.*, 110 S.W.3d 8, 9 (Tex. App.—Waco 2002, no pet.)(per curiam) (late record because of appellant's failure to notify the court of substituted counsel and claimed belief that notice of late clerk's record was actually notice of late reporter's record did not warrant dismissal of appeal); but *see Gordon v. James*, 95 S.W.3d 734, 736 (Tex. App.—Houston [1st Dist.] 2003, no pet.)(receipt of empty envelope from court of appeals rather than notice that appeal would be dismissed for failure to pay for clerk's record was sufficient to put appellant on notice that he should inquire about and remedy the defect).

(i) No request for reporter's record.

The consequence for the failure to file a reporter's record will result in dismissal of the appeal unless there are "issues or points that do not require a reporter's record for a decision." TEX. R. APP. P. 37.3(c).

Where a reporter's record is needed for review, but is not requested by the appellant, the court of appeals has authority to presume that the omitted portion of the reporter's record supports the trial court's judgment. *See In re Marriage of Spiegel*, 6 S.W.3d 643, 646 (Tex. App.—Amarillo 1999, no pet.)(citing *Bryant v. United Shortline, Inc.*, 972 S.W.2d 26, 31 (Tex. 1998)).

(ii) No request to include relevant items in clerk's record.

The same wiggle room does not exist with respect to the clerk's record. Rule 37.3(b) explicitly vests the court of appeals with discretion to dismiss the appeal if no clerk's record has been filed due to the appellant's failure to pay or make arrangements to pay for that record. TEX. R. APP. P. 37.3(b); *see Gordon*, 95 S.W.3d at 736; *see also In re R.M.M.*, No. 12-01-00321-CV, 2002 WL 199733, at *1 (Tex. App.—Tyler 2002, no pet.)(per curiam) (dismissing appeal for want of prosecution where appellant failed to make adequate arrangements to pay for clerk's record within one month after receiving order requiring him to do so).

6. Avoid the Pitfalls.

a. Clerk's record.

There are several issues to be wary of in seeing the clerk's record through to filing.

(i) Non-mandatory contents.

There are numerous examples of pleadings or other documents that are not mandatorily made a part of the clerk's record, but which are often essential (if not dispositive) of the issues on appeal. For example, the rule does not provide for the mandatory inclusion of objections to the court's charge or tendered jury questions and/or instructions. But issues that require such documents are frequently raised on appeal. An appellant who wishes to raise charge error has the burden of designating any written objections or tendered jury questions for inclusion in the clerk's record.

Similarly, you should be cautious to ensure that all live pleadings become a part of the record. The rule provides only that the record should include the pleadings on which trial was held, but note that in a complex case, or in a case that has been rife with amended and supplemental pleadings, the identification of those pleadings may be difficult, particularly for the clerk who has not been part of the case. Thus, the prudent move is to specifically include in your designation, any instruments that contain counterclaims, cross-claims, pleas in intervention, or other similar pleadings.

Finally, note that the rule provides only for the mandatory inclusion of post-judgment motions and orders. But this category will not catch pleadings like motions for judgment n.o.v., motions for summary judgment, or motions to transfer venue. *See Davis v. Medical Evaluation Specialists, Inc.*, 31 S.W.3d 788, 795 (Tex. App.—Houston [1st Dist.] 2000, pet. denied) (failure to include summary judgment motion in record precluded appellate court from reviewing merits of attack on summary judgment); *Elite Towing, Inc. v. LSI Fin. Group*, 985 S.W.2d 635, 645 (Tex. App.—Austin 1999, no pet.) (challenge to venue not reviewable where neither motion to transfer venue nor order ruling on that motion was included in record).

(ii) Lost or destroyed contents.

Where pleadings or other items designated for inclusion in the clerk's record have been lost or destroyed, if the parties can reach a written stipulation, they may deliver a copy of that item to the trial court clerk for inclusion in the record. TEX. R. APP. P. 34.5(e). If there is no agreement amongst the parties with respect to the replacement, the trial court must make a determination as to what constitutes an accurate copy of the missing item. *Id.* This determination can be made on the motion of any party, or at the request of the appellate court. *Id.*

b. Lost or destroyed reporter's record.

At one time, an appellant was entitled to a new trial if part or all of the reporter's record was missing. That is no longer true. TEX. R. APP. P. 34.6(f). Rule 34.6(f) provides that an appellant is entitled to a new trial only if: (1) the appellant has timely requested the reporter's record; (2) without the appellant's fault, a significant exhibit or a significant portion of the court reporter's notes and records has been lost or destroyed (or if the recording of the proceeding has been lost or destroyed, or is inaudible); (3) 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 (4) the parties cannot agree on a complete reporter's record. *Id.*

Note that even this has its limitations, though. For example, a court reporter is permitted to destroy records after three years have expired. *See* TEX. GOV'T CODE ANN. § 52.046(a)(4) (Vernon 1998); *see also Piotrowski v. Minns*, 873 S.W.2d 368, 370 (Tex. 1993). In some instances, there is the possibility — albeit an attenuated possibility — that more than three years will expire between the signing of a non-appealable interlocutory order and the signing of a final judgment. If your case fits that category, it is of paramount importance to request a transcription of any hearings that lead to the signing of the interlocutory order if that order might be at issue in your appeal. *See, e.g., Ganesan v. Vallabhaneni*, 96 S.W.3d 345, 349 (Tex. App.—Austin 2002, pet. denied); *see also Minns*, 873 S.W.2d at 370.

II. PERFECTING THE FEDERAL APPEAL

A federal appeal “as of right” from a final district court judgment is perfected by filing a notice of appeal. FED. R. APP. P. 3(a)(1); *Smith v. Barry*, 502 U.S. 244, 247-48 (1992). The Federal Rules of Procedure make a distinction between appeals “as of right” (FED. R. APP. P. 3(a)(1)) and appeals by permission under 28 U.S.C.A. § 1292(b) (West 2004) (FED. R. APP. P. 3(a)(4) and FED. R. APP. P. 5) or appeals from bankruptcy cases (FED. R. APP. P. 6). In addition, there are appeals from other interlocutory orders provided by specific statutes.

A. REQUISITES OF NOTICE OF APPEAL — DISTRICT COURT FINAL JUDGMENT

1. Appeal must be from a final judgment.

Under 28 U.S.C.A. § 1291 (West 2004), a court of appeals has jurisdiction over final, appealable orders of a district court. For a judgment to be final, it must conclusively determine the rights of the parties to the litigation and leave nothing for the court to do but execute the order or resolve collateral issues. The judgment must dispose of all the claims of all the parties, thereby effectively ending the litigation. *See, e.g., Ludgood v. Apex Marine Corp. Ship Mgt.*, 311 F.3d 364, 368 (5th Cir. 2002); *Transit Mgmt. of S.E. La., Inc. v. Group Ins. Admin., Inc.*, 226 F.3d 376, 381-82 (5th Cir. 2000); *FirsTier Mortgage Co. v. Investors Mortgage Ins. Co.*, 498 U.S. 269, 273-74, 276 (1991) (“For a ruling to be final, it must end the

litigation on the merits, and the judge must clearly declare his intention in this respect.”).

Federal Rule of Civil Procedure 54(b) provides in part that:

... any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

However, unlike state practice, a judgment in federal court is final for appellate purposes even if the issue of attorneys’ fees or costs is still pending — because those are considered “collateral” to the decision on the merits. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200-02 (1988) (attorney’s fees); *Buchanan v. Stanships, Inc.*, 485 U.S. 265, 266-69 (1988)(costs); see also *Samaad v. City of Dallas*, 922 F.2d 216, 218 (5th Cir. 1991)(attorney fees and costs are “collateral matters for purposes of finality”); *Treuter v. Kaufman County*, 864 F.2d 1139, 1143 (5th Cir. 1989)(order dismissing claim and awarding attorney fees as sanctions was final even though amount of fees was not yet determined). But see *Deus v. Allstate Ins. Co.*, 15 F.3d 506, 520-22 (5th Cir. 1994), cert. denied, 513 U.S. 1014 (1994)(where attorneys fees are sought as substantive relief or a part of damages, then they are not “collateral” and the judgment is not final for appeal purposes until the fees are determined).

2. Perfect appeal by filing notice of appeal with district court.

To perfect an appeal as of right from a district court judgment, a notice of appeal must be filed with the district court within the time allowed by Rule 4. FED. R. APP. P. 3(a); *Martin v. Alamo Community College*, 353 F.3d 409, 411 (5th Cir. 2003); *Houston v. Lack*, 487 U.S. 266, 273 (1988)(receipt by district clerk of notice of appeal constitutes “filing”); *In re Lacey*, 114 F.3d 556, 557 (5th Cir. 1997)(timely notice of appeal is mandatory and jurisdictional). Note that this same procedure is applicable to an appeal from a judgment by a magistrate judge. FED. R. APP. P. 3(a)(3). However, if the notice is erroneously filed with the appellate court, the clerk of the court of appeals will note the date and forward it to the clerk of the district court. The notice is deemed filed in the district court

as of the date of receipt noted by the appellate court clerk. FED. R. APP. P. 4(d).

3. Service of notice of appeal.

Under Rule 3(d), the district clerk must serve notice of the filing of a notice of appeal by mailing a copy to each party’s counsel of record, except the appellant. Thus, when filing the notice, counsel should include enough copies to perfect that service. However, because Rule 3(d) does not relieve the party filing the notice from its requirement to serve opposing parties, counsel should also serve opposing parties.

4. Contents of notice of appeal.

“Rule 3’s dictates are jurisdictional in nature, and their satisfaction is a prerequisite to appellate review.” *Barry*, 502 U.S. at 248. Note that there is a form notice of appeal immediately following the Federal Rules of Appellate Procedure. FED. R. APP. P. Appendix of Forms, Form 1.

a. Must specify party appealing.

Prior to the 1993 amendment of Rule 3(c), a notice of appeal naming only one party and then adding an et al. to cover any other appellants was insufficient to perfect an appeal except on behalf of the named party. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 315-19 (1988). The 1993 amendments sought to remedy that trap and prevent the loss of appellate rights by a party who intended to appeal, but was not named specifically in the notice of appeal. *Garcia v. Wash*, 20 F.3d 608, 609 (5th Cir. 1994).

The amendments changed the requirement from “shall specify the party” to “must specify the party” and provided for some limited generic descriptions of appellants, such as “all plaintiffs,” “the defendants,” “the plaintiffs A, B, et al.” or “all defendants except X.” FED. R. APP. P. 3(c). Note that these amendments have been held to be retroactive. *Garcia*, 20 F.3d at 609. However, the amended rule still provides that “a notice of appeal must specify the party or parties taking the appeal.” But see *Longmire v. Guste*, 921 F.2d 620, 622-23 (5th Cir. 1991)(Rule 3(c) does not require that notice name all appellees so long as receive notice). According to the Advisory Committee Notes to FRAP 3, the test is “whether it is objectively clear that a party intended to appeal.” *Garcia*, 20 F.3d at 610. Thus, some ambiguity remains with regard to the extent terms like “et al.” or “e.g.” can be used; consequently, the careful practitioner should continue to list in the body of the notice of appeal all parties by name who intend to file

an appeal, but be aware that if some names are inadvertently omitted, his right to appeal may be saved by the Rule 3(c) amendment.

b. Must designate order or judgment being appealed and court to which appeal is taken.

The notice of appeal must also designate the judgment, order, or part thereof from which an appeal is being taken. FED. R. APP. P. 3(c); *Warfield v. Fidelity and Deposit Co.*, 904 F.2d 322, 325 (5th Cir. 1990)(no jurisdiction over order not specified in notice of appeal); *F.T.C. v. Hughes*, 891 F.2d 589 (5th Cir. 1990)(no jurisdiction where notice failed to specify order denying Rule 59 motion). However, the Fifth Circuit has at times relaxed that requirement, holding that Rule 3(c)'s requirement of identifying the order should be "construed broadly." *Pluet v. Frasier*, 355 F.3d 381, 383 (5th Cir. 2004); *Osterberger v. Relocation Realty Serv. Corp.*, 921 F.2d 72, 74 (5th Cir. 1991); *see also United States v. O'Keefe*, 128 F.3d 885, 889 7 n.4 (5th Cir. 1997), *cert. denied*, 523 U.S. 1078 (1998)(notice of appeal designating order denying reconsideration of order granting new trial was viewed as including order granting new trial); *Friou v. Phillips Petroleum Co.*, 948 F.2d 972 (5th Cir. 1991)(notice of appeal which did not refer to summary judgment order adequate where both sides briefed summary judgment issues).

5. Joint or consolidated appeals.

When two or more parties are entitled to appeal from a judgment and their interests make joinder practicable, they may file a joint notice of appeal. FED. R. APP. P. 3(b)(1). Even if the parties have filed separate timely notices of appeal, the court of appeals can consolidate those appeals. FED. R. APP. P. 3(b)(2); *Lauderdale County Sch. Dist. v. Enterprise Sch. Dist.*, 24 F.3d 671, 682 (5th Cir. 1994).

6. Separate notice of appeal required if you seek any modification of judgment.

If any party other than the one filing the first notice of appeal desires to alter, modify, reverse, or remand the judgment or enlarge his rights under the judgment, then he must file a separate notice of appeal. *United States v. Coscarelli*, 149 F.3d 342, 343 (5th Cir. 1998)(en banc); *Crist v. Dickson Welding, Inc.*, 957 F.2d 1281, 1289-90 (5th Cir.), *cert. denied*, 506 U.S. 864 (1992) (appeal dismissed because party failed to file notice of appeal as to part of judgment adverse to it). The notice of cross appeal must be filed within the original time period for notices of appeal or within 14

days after the filing of first notice of appeal, whichever is later. FED. R. APP. P. 4(a)(3); *Maiz v. Virani*, 311 F.3d 334, 339 (5th Cir. 2002).

7. Representation statement must be filed with court of appeals.

FRAP 12(b) requires that 10 days after filing a notice of appeal, the attorney who filed the notice shall file with the clerk of the court of appeals a statement naming each party represented by that attorney. FED. R. APP. P. 12(b). Under 5th Cir. R. 12, the FRAP 12 requirement is met by completing the Fifth Circuit's form for appearance of counsel and returning it to the clerk within 30 days of filing the notice of appeal. 5th Cir. R. 12. This form is sent to counsel after the appeal is docketed in the Fifth Circuit.

B. TIMELINES FOR FILING NOTICE OF APPEAL

1. 30 days from entry of judgment if no post-trial motion.

A notice of appeal must be filed within 30 days after entry of judgment — or 60 days by any party if the United States or an officer or agency thereof is a party. FED. R. APP. P. 4(a)(1); *United States ex rel. Russell v. Epic Healthcare Mgt. Group*, 193 F.3d 304, 306-07 (5th Cir. 1999). "Entry of judgment" occurs when the judgment is set forth on a separate document under FRCP 58 and entered by the clerk on the civil docket as provided in Rule 79(a). FED. R. APP. P. 4(a)(7); *Transit Mgmt.*, 226 F.3d at 381-82; *see also Tijerina v. Plentl*, 984 F.2d 148 (5th Cir. 1993)("entry" of judgment distinguished from signing or filing judgment). The "separate document" requirement means a document distinct from the district court's opinion or memorandum. FED. R. CIV. P. 58 advisory committee note; *Ludgood*, 311 F.3d at 368.

In the event a district court should issue a document entitled "final judgment" which meets the requisites of a final judgment before it issues its memorandum or opinion, the triggering date for calculating the deadline for the filing of a notice of appeal remains the "entry" of judgment, not the later opinion. *See Ludgood*, 311 F.3d at 368-69 (appeal dismissed because notice filed within 30 days of date of memorandum rather than judgment was untimely).

The time limits for filing a notice of appeal are mandatory and jurisdictional and cannot be enlarged by the appellate court. *Ramsey v. Colonial Life Ins. Co. of America*, 12 F.3d 472, 476 (5th Cir. 1994).

Given that “[a] timely notice of appeal is necessary to the exercise of appellate jurisdiction,” an appellate court cannot review the merits of an appeal absent a timely notice of appeal. *United States v. Truesdale*, 211 F.3d 898, 902 (5th Cir. 2000). However, under Rule 4(a)(5), the district court, upon a showing of excusable neglect or good cause may extend the time for filing a notice of appeal if a motion is filed within 30 days after the time prescribed by Rule 4(a).

2. 30 days from entry of order disposing of certain post-trial motions.

If any party timely files one of the following motions, the timetable for filing a notice of appeal is extended as to all parties and the 30 days begins to run from the entry of an order disposing of the last outstanding motion:

- (1) motion for judgment under Rule 50(b)
- (2) motion to amend or make additional findings of fact under Rule 52(b) whether or not granting the motion would alter the judgment
- (3) motion to alter or amend the judgment under Rule 59
- (4) motion for attorneys’ fees under Rule 54 if district court under Rule 58 extends the time for appeal
- (5) motion for a new trial under Rule 59
- (6) motion for relief under Rule 60 if the motion is served within 10 days after the entry of judgment.

FED. R. APP. P. 4(a)(4); *see also Simmons v. Reliance Standard Life Ins. Co. of Tex.*, 310 F.3d 865, 867-68 (5th Cir. 2002)(timely FRCP 59(3) motion renders underlying judgment nonfinal until district court disposes of the motion); *Richardson v. Oldham*, 12 F.3d 1373, 1377 (5th Cir. 1994) (timely filed Rule 59 motion tolled 30-day appeals clock as to all other defendants whose liability was determined in the judgment which the motion sought to amend).

A “timely filed” motion is an extremely important component of this timeline. The Fifth Circuit has held that where a Rule 59 motion was not timely filed, it did not extend the time for filing a notice of appeal. *Midwest Employers Cas. Co. v. Williams*, 161 F.3d 877, 878-89 (5th Cir. 1998).

Subsequent motions for rehearing or reconsideration after a district court has ruled on a post-judgment motion like FRCP 59(e) will not extend the time for filing the notice of appeal because Rule 4(a)(4) is clear that the time runs from the overruling of one of the designated post-judgment motions. *Anderson v.*

Pasadena Indep. Sch. Dist., 184 F.3d 439, 446-47 (5th Cir. 1999); *Hamilton Plaintiffs v. Williams Plaintiffs*, 147 F.3d 367, 371 (5th Cir. 1998).

3. Extensions for filing notice of appeal.

a. Timeline for filing motion for extension.

An extension of the deadline for filing a notice of appeal may be had by motion filed within 30 days after the due date, which shows excusable neglect or good cause for the late filing of the notice. FED. R. APP. P. 4(a)(5); *Dunn v. Cockrell*, 302 F.3d 491, 492-93 (5th Cir. 2002), *cert. denied*, 123 S.Ct. 1208 (2003)(party cannot use FRCP 60(b) to vacate and re-enter judgment as a substitute for a timely notice of appeal because such “squarely collides with Rule 4(a)(5)”; *Wilkins v. Johnson*, 238 F.3d 328, 330-31 (5th Cir. 2001), *cert. denied*, 533 U.S. 956 (2001)(appeal dismissed because motion for extension was filed more than 60 days after entry of judgment). However, a court may, under Rule 4(a)(5), extend the time for filing a notice of appeal no more than 30 days after the original due date or 10 days after entry of order granting extension, whichever is longer. This 30-day time period is jurisdictional. *United States v. Doyle*, 854 F.2d 771, 773 (5th Cir. 1988).

b. Motion for extension must be filed with district clerk.

Any motion for extension must be filed with the district clerk, not the court of appeals, because the appellate court cannot extend the time for filing a notice of appeal. *In re Lacey*, 114 F.3d 556, 557 (5th Cir. 1997).

c. Standard for obtaining extension.

The “good cause” standard in Rule 4(a)(5) applies only to requests made before the expiration of the original 30-day time period in which to file the notice of appeal. If the extension is requested after the due date of the notice but within the 30-day extension period allowed by Rule 4(a)(5), the standard is “excusable neglect.” *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199, 1202 n.6 (5th Cir. 1993).

The Fifth Circuit has traditionally construed the “excusable neglect” requirement narrowly. *See, e.g., Latham*, 987 F.2d at 1201-02 (counsel received judgment late, but within appeal time); *Campbell v. Bowlin*, 724 F.2d 484, 488 (5th Cir. 1984)(counsel failed to read federal rules); (client had economic difficulties). However, *Pioneer Inv. Serv. Co. v.*

Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 388 (1993) has caused the court to be somewhat more flexible in its interpretation. There the court held “excusable neglect” can include mere inadvertence and carelessness in certain circumstances, including a consideration of a party’s good faith, prejudice to other parties, impact on the litigation, and cause of the delay.

The Fifth Circuit has acknowledged that “*Pioneer* does allow somewhat more room for judgment in determining whether mistakes of law are excusable than does the strict standard for excusable neglect espoused by some of our prior decisions.” *United States v. Clark*, 51 F.3d 42, 44 (5th Cir. 1995)(in light of new standard, remanding to district court for reconsideration of counsel’s mistaken use of wrong time-computation rule for filing notice of appeal; but noting that opinion did not hold that such was as a matter of law excusable neglect). Accordingly, to the extent that any prior opinions “strenuously construing ‘excusable neglect’” conflicted with *Pioneer*, the Fifth Circuit disapproved them. *Halicki v. La. Casino Cruises, Inc.*, 151 F.3d 465, 468 (5th Cir. 1998), cert. denied, 526 U.S. 1005 (1999).

4. Timeline extended if no notice of judgment.

If no notice of judgment is received within 21 days after entry of judgment, as required by FRCP 77(d), the district court may reopen the time for appeal for a 14-day period if the following conditions are met: (1) a motion to reopen the time to file an appeal is filed within the earlier of (a) 180 days after entry of judgment or (b) within 7 days of receipt of notice; (2) the court finds a party was entitled to notice of the judgment, but did not receive such; and (3) the court finds that no party would be prejudiced. FED. R. APP. P. 4(a)(6); *Wilkins*, 238 F.3d at 331-32 (appeal dismissed because failed to file motion within 7 days of district court’s faxing judgment to appellant even though 180-day period had not yet expired); *Latham*, 987 F.2d at 1202 (motion must be filed within 7 days of receiving notice).

5. Prematurely filed notice of appeal.

Under current Rule 4(a)(2), if a notice of appeal is prematurely filed before the entry of the judgment, such notice is deemed to have been filed immediately after entry of the judgment. *Long v. Simmons*, 77 F.3d 878, 879 n.5 (5th Cir. 1996); *Lauderdale County*, 24 F.3d at 681. Rule 4(a)(2) also permits a notice of appeal from a non-final decision to operate as a notice of appeal from the final judgment when a district court

announces a decision that would be appealable if immediately followed by the entry of judgment. *Brown v. Miss. Valley State Univ.*, 311 F.3d 328, 332 (5th Cir. 2002); *Barrett v. Atlantic Richfield Co.*, 95 F.3d 375 (5th Cir. 1996).

In addition, Rule 4 provides that if a party files a notice of appeal after judgment is announced, but before the post-judgment motions are ruled upon, the notice is deemed effective when an order disposing of the last such motion is entered. FED. R. APP. P. 4(a)(4)(B)(i).

C. AVOID THE PITFALLS

1. No “mailbox” rule for notices of appeal.

Note that there is no “mailbox” rule whereby the notice of appeal simply must be placed in the mail by the due date; rather, the notice of appeal must be received by the district clerk on or before the due date. The notice is effective only on the date it is filed. *Ludgood*, 311 F.3d at 367-68; *In re Arbuckle*, 988 F.2d 29, 31-32 & n.5 (5th Cir. 1993).

2. Be careful in your computations of deadlines.

Re-read the rules before computing deadlines. For example, prior to the 2002 amendments, under Rule 26(a) weekends were excluded only if the time allowed for filing was less than 7 days. *Clark*, 51 F.3d at 43 n.3 (notice of appeal not timely because mistakenly excluded weekends). However, effective December 1, 2002, Rule 26(a) was amended to conform to FRCP 6 such that weekends are excluded from the calculation if the time allowed for filing is less than 11 days. FED. R. APP. P. 26(a).

Also, the Rule 26(c) additional 3 days allowed if service is by mail applies only to matters served by a party and does not apply to filings with the clerk of matters, such as notices of appeal or petitions for rehearing. 5th Cir. R. 26.1.

739750v3