

# **APPELLATE RULES UPDATE**

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*with special thanks to  
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**CHAPTER 1**



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## APPELLATE RULES UPDATE

### I. INTRODUCTION

This paper provides an overview of rule changes under consideration by the Supreme Court Advisory Committee that might be of interest to appellate attorneys. All of the proposed rules discussed in this paper are expected to be on the agenda for the SCAC meeting on August 26, 2005. However, the print deadline for this paper occurred before the meeting. Accordingly, appropriate updates will be given during the presentation of this paper.

### II. PERMISSIVE INTERLOCUTORY APPEALS

The SCAC is considering amendments to the appellate rules to provide guidance to practitioners on how to proceed with permissive interlocutory appeals allowed, for the first time, by statutory provisions added by the 77<sup>th</sup> Texas Legislature, in 2001. The new provisions state:

- (d) A district court may issue a written order for interlocutory appeal in a civil action not otherwise appealable under this section if:
  - (1) the parties agree that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion;
  - (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation; and
  - (3) the parties agree to the order.
- (e) An appeal under Subsection (d) does not stay proceedings in the district court unless the parties agree and the district court, the court of appeals, or a judge of the court of appeals orders a stay of the proceedings.
- (f) If application is made to the court of appeals that has appellate jurisdiction over the action not later than the 10<sup>th</sup> day after the date an interlocutory order under Subsection (d) is entered, the appellate court may permit an appeal to be taken from that order.

TEX. CIV. PRAC. & REM. CODE § 51.014(d)-(f).

This past regular session, the 79<sup>th</sup> Legislature amended subsections (d) and (e), in HB 1294, to extend the coverage of the permissive appeal statute to county level courts. The Legislature, also in HB 1294, repealed subsection (f), eliminating the requirement that the “application [must be] made to the court of appeals that has appellate jurisdiction . . . not later than

the 10<sup>th</sup> day after the date an interlocutory order under subsection (d) is entered.”

The permissive appeal statute was modeled after the federal permissive appeal statute, 28 U.S.C. 1292(b). The detail of Federal Rule of Appellate Procedure 5 guides a party wishing to use section 1292(b).

Currently, however, Texas does not have a corresponding appellate rule governing state permissive appeals, and the courts of appeals have begun to identify a number of issues pertaining to the proper procedures for such appeals. *See generally, e.g., Diamond Prods. Int’l, Inc. v. Handsel*, 142 S.W.3d 491 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (discussing perfecting instrument and its contents); *Stolte v. County of Guadalupe*, 139 S.W.3d 406 (Tex. App.—San Antonio 2004, no pet.) (discussing the required perfecting instrument and its content and whether the time to file an application may be extended); *Richardson v. Kays*, No.02-03-241-CV, 2003 WL 22457054 (Tex. App.—Fort Worth Oct. 30, 2003, no pet.) (mem. op.) (discussing content of application); *In re D.B.*, 80 S.W.3d 698 (Tex. App.—Dallas 2002, no pet.) (discussing perfecting instrument and its content). *See also* Dana Livingston Cobb, *Permissive Interlocutory Appeals in State Court*, 12TH ANNUAL CONFERENCE ON STATE AND FEDERAL APPEALS, University of Texas (2002); Thompson, W. Richard, II, *Basic Training: Interlocutory Appeals in State Court*, APPELLATE BOOT CAMP, State Bar of Texas (2004).

In hopes of providing clear, workable procedures, the SCAC is considering these and other issues in drafting an appellate rule to further the statutory purpose under 51.014. A copy of the SCAC’s most recent draft is attached as Appendix A. The draft rules distinguish between civil cases that are appealed as of right and civil cases appealed with permission. The draft rules also establish detailed procedures for filing permissive appeals. In doing so, the draft rules would resolve several of the issues that have arisen in case law interpreting the permissive appeal statute:

#### A. Perfecting Instrument

One issue that has arisen under the permissive appeal statute is whether a notice of appeal was required to perfect the permissive appeal, in addition to the application that was statutorily required to be filed within 10 days. To be safe, appellate practitioners have recommended filing both papers within 10 days of the appealable order. *See Diamond Prods.*, 142 S.W.3d at 496 (Frost, J., concurring) (“[U]ntil [appellate rules are] adopted or until these issues are resolved by caselaw, it would seem sensible and prudent for appealing parties to file an application for permission to appeal and a notice of appeal at the same

time, and perhaps in the same instrument.” (citing Warren W. Harris & Lynne Liberato, *State Court Jurisdiction Expanded to Allow for Permissive Appeals*, 65 TEX. B.J. 31, 32 (2002) (stating that “[i]n state court, until a rule or the courts determine that a notice of appeal is unnecessary, it is advisable to file a notice of appeal within the 10-day period for bringing the permissive appeal.”)).

The proposed SCAC rule, as currently drafted, resolves the uncertainty created by the “notice of appeal” language in the current version of the appellate rules and the “application” language in Section 51.014(f) by creating a new perfecting instrument—i.e., a “petition for permission to appeal.” The draft rule also requires this petition for permission to be filed “not later than the 10th day after the date a district court signs a written order granting permission to appeal.” The proposed rule eliminates the need for a notice of appeal and provides, rather, that the date a court of appeals grants a petition for permission is the date for determining further appellate deadlines.

However, the SCAC will certainly revisit the draft rules given the Legislature’s recent amendments to 51.014, eliminating the 10-day period and ending the “application” nomenclature.

### B. Content of Perfecting Instrument

Another issue that has arisen under the permissive appeal statute is what information should be included in the application or petition for permission to appeal. The statute requires that: (1) the trial court’s order involve a controlling question of law that warrants a substantial ground for a difference of opinion; (2) the immediate appeal of the order will advance the ultimate resolution of the suit; and (3) the parties agree to the order. TEX. CIV. PRAC. & REM. CODE § 51.014(d).

The courts of appeals are split on what information and how much detail the practitioner should include in an application or petitions for permission to appeal. *Compare Stolte*, 139 S.W.3d at 410 (“The application contains no facts or argument explaining why we should grant permission to appeal; it merely attaches the trial court’s order. We will not grant permission to appeal on the basis of this application.”) with *Diamond Prods.*, 142 S.W.3d at 494 (“The parties did not present facts or argument explaining why we should grant permission to appeal; however, the reasoning of the parties is apparent from the briefing.”).

The SCAC draft rules lists six items that must be included in a petition for permission to appeal, including the requirement that the petition “state concisely the issue or points presented, the facts necessary to understand the issues or points presented, the reasons why the order complained of involves a

controlling question of law as to which there is a substantial difference of opinion, why an immediate appeal may materially advance the ultimate termination of the litigation, and the relief sought.”

### C. Motions for Extension of Time

A third issue that has arisen under the permissive appeal statute is whether a party who fails to file a perfecting instrument by the deadline may, within 15 days after the date the instrument was due, move for an extension of time. See TEX. R. APP. P. 26.3 (“A motion for extension of time is necessarily implied when an appellant acting in good faith files [a perfecting instrument] beyond the time allowed by [the rules], but within the fifteen day period in which the appellant would be entitled to move to extend the filing deadline.”). The courts of appeals are split on this issue. *Compare Stolte*, 139 S.W.3d at 410 (“[W]e hold that the extension provided in Rule 26.3 [is] available in section 51.014(d) appeals.”) with *In re D.B.*, 80 S.W.3d at 701-02 (“Nor can the ten-day deadline . . . be extended by fifteen days on proper motion pursuant to [rule] 26.3 . . . . When a statute provides the deadline for perfecting an appeal, compliance with that statutory deadline, not the deadline in the rules of appellate procedure, is necessary to give the appellate court jurisdiction.”).

The draft rules allow an appellate court to “extend the time to file the petition if, within 15 days after the deadline for filing” the perfecting instrument, the petitioner files a proper motion with the petition.

## II. STAYS PENDING INTERLOCUTORY APPEALS

The SCAC is also considering amendments to the appellate rules to account for the Legislature’s 2003 amendment to the stay provisions of section 51.014(b). Before the amendments, the “commencement of a trial” was stayed, with some limitations and exceptions, pending resolution of an interlocutory appeal. The amendments added a more comprehensive stay in certain cases:

- (b) An interlocutory appeal under Subsection (a), other than an appeal under Subsection (a)(4), stays the commencement of a trial in the trial court pending resolution of the appeal. An interlocutory appeal under Subsection (a)(3) [order certifying or refusing to certify class action], (5) [order denying a summary judgment based on official immunity], or (8) [order granting or deny plea to the jurisdiction by governmental entity] also stays all other proceedings in the trial court pending resolution of that appeal.

The new comprehensive stay applies only to cases where the notice of appeal was filed on or after September 1, 2003. To account for these statutory changes, the SCAC has drafted the following amendment to Texas Rule of Appellate Procedure 29.5:

While appeal from an interlocutory order is pending, the trial court retains jurisdiction of the case and unless prohibited by statute may make further orders, including one dissolving the order complained of on appeal. If permitted by law, the trial court may proceed with a trial on the merits. But the court must not make an order that:

- (a) is consistent with any appellate court temporary order; or
- (b) interferes or impairs the jurisdiction of the appellate court or effectiveness of any relief sought or that may be granted on appeal.

### III. PRECEDENT IN TRANSFERRED CASES

The SCAC is also considering amendments to the appellate rules relating to the proper precedent to apply when a case is transferred between courts of appeals. The problem arises, for the most part, because the Legislature mandates that the supreme court periodically transfer cases from those courts of appeals with larger filing rates to those with smaller filing rates. These so-called “docket-equalization transfers” are intended to reduce disparities in the number of new cases filed per justice among the courts of appeals. The cases transferred are randomly chosen, and the supreme court issues docket-equalization orders quarterly. In fiscal year 2004, 150 civil cases and 221 criminal cases were transferred among the courts of appeals. *See Annual Report of the Texas Judicial System*, Office of Court Administration, at 35 (2004).

While equalizing dockets is perhaps a laudable goal, these transfer orders have caused problems when the law of the transferor court differs from that of the transferee court. *See, e.g., McLendon v. Texas Dep’t of Public Safety*, 985 S.W.2d 571, 576 n.6 (Tex. App.—Waco 1998), *rev’d*, 35 S.W.3d 632 (Tex. 2000); *American Nat’l Ins. Co. v. International Business Machines Corp.*, 933 S.W.2d 685, 687 (Tex. App.—San Antonio 1996, writ denied). Appellate courts have called for guidance on numerous occasions. *See, e.g., State v. Adams*, 930 S.W.2d 88, 96 (Tex. Crim. App., 1996) (Baird, J., dissenting) (criticizing the majority for providing “no guidance on when jurisdiction on transferred cases begins and ends”); *Kaufman v. State*, 901 S.W.2d 653, 656–57 (Tex. App.—El Paso 1995, pet. ref’d) (Larsen, J., concurring) (questioning the

“vagaries of the present ‘docket equalization’ system”). While both the Supreme Court and the Court of Criminal Appeals can resolve splits in authority between and among the appellate courts, the demands on the courts’ dockets do not allow them to resolve every conflict.

In the meantime, courts of appeals are divided on how to handle conflicts in transferred cases. *Compare McLendon*, 985 S.W.2d at 576 n.6 (“[W]e disagree with the reasoning of [our sister court] and will decline to follow [its precedent] notwithstanding the transfer status of this case.”) *and American Nat’l Ins.*, 933 S.W.2d at 688 (“[W]e are not to blindly apply either [the precedent of the transferring court or the our own precedent], but are to reach our best conclusion as to what the law of the State of Texas is on this issue.”) *with Pena v. State*, 995 S.W.2d 259, 261 (Tex. App.—Corpus Christi 1999, no pet.) (“We hold that when an appellate court has a case presenting [a conflict], the court accepting the transfer should apply the law of the transferring jurisdiction so as to uphold the rightful expectations of practitioners in the transferring jurisdiction.”).

And the conflicts issue has spurred several dissenting and concurring opinions from justices on the courts of appeals. *See, e.g., American Nat’l Ins.*, 933 S.W.2d at 688 (Duncan, J., dissenting) (discarding the “myth of uniformity” that compelled the majority to apply its own precedent and employing a modified choice of law analysis to conclude that the law of the transferor court should apply); *Jaubert v. State*, 65 S.W.3d 73, 76, 91 n. 1 (Tex. App.—Waco 2000) (Gray, J., concurring in initial opinion affirming trial court judgment and dissenting on petition for discretionary review) (feeling compelled initially to follow earlier announcement by his court that it “it would apply the law as it saw it, regardless of what some of court of appeals (from where the case originated) had announced it to be” but later concluding that he “would follow the . . . interpretation [of statutes and rules] by our sister courts, in particular the [sister court] from which this case was transferred to us”), *rev’d*, 74 S.W.3d 1 (Tex. Crim. App. 2002).

The 79<sup>th</sup> Legislature entangled itself in the controversy by passing this session a resolution, HCR 88, “urging the Supreme Court of Texas to adopt rules for determining which court of appeals’ precedent will be applied in cases that are transferred from one court of appeals to another court of appeals if there is a conflict between the precedent of the two courts of appeals.”

Even before the resolution passed, however, the SCAC deliberated on the issue. Some members strongly oppose drafting a rule that recognizes any theory other than a theory of uniform state law. These members contend that the choice of law analysis

advocated by some in this context is appropriate only when assessing conflicts between different sovereigns, not coordinate courts of one sovereign. These members would, presumably, agree with the San Antonio court of appeals when, in *American Nat'l Ins.*, the court stated:

The theory of our law is that the State of Texas has but one law on any given subject, and that the law is as proclaimed by the courts of appeals and finally, in civil cases, by the Texas Supreme Court. This theory acknowledges that there may be differences of opinion among the courts of appeals as to what that law is. The remedy for such conflicts or errors is an appeal to the Texas Supreme Court.

Conflicts of law rules make sense when applied to separate sovereigns, whether nations or sovereign states, because in those instances there really can be conflicts in the law from one sovereign state or nation to the other. Where, however, there is only one sovereign, a court of appeals' duty is to decide and apply the law of that sovereign, not to ascertain the law as stated in a given district, whether its own or the district from which a case has been transferred.

The State of Texas consists of only one sovereign state, not fourteen. We acknowledge that there can be problems caused by the fact that Texas is such a large and diverse state, that we have fourteen courts of appeals districts, and that cases are transferred from one of those districts to other districts where the justices' views of what the law of Texas is may differ from the justices of the court from which the case arose. We believe, however, that the answer to those difficulties lies in an appeal to the Texas Supreme Court, in civil cases, or to the Texas Court of Criminal Appeals, in criminal cases, rather than in an effort on our part to be parochial in our application of the law to the facts presented us.

933 S.W.3d at 688.

Other members take a more pragmatic approach and respond that, in reality, there are differences that develop among the way the courts of appeals interpret and apply the law. And philosophical niceties cannot justify failing to craft a rule for resolving these conflicts. See *American Nat'l Ins.*, 933 S.W.2d at 688 (Duncan, J., dissenting) (“Th[e] theory [that there is ‘but one law’] is of course belied by reality, as the

abundance of conflicts among the Texas courts of appeals demonstrates. . . . [A] myth—however attractive—cannot and should not justify failing to recognize, and fashion a rule for resolving, the conflicts that inevitably arise between the intermediate appellate courts within a system.”).

However, even members who desire a rule disagree on how the rule should be fashioned. These members tend to agree that the general rule should be that the law of the transferor court should apply. But members differ on how much deference to give the transferor court. For example, some members advocate a rule that would require the transferee court to follow the law of the transferor court unless the law is “clearly erroneous.” Others would require application of “clear precedent” of the transferor court. Still others would require the transferee court “to consider and give due regard” to the transferor court precedent but the court “may decide the case in accordance with the court of appeals’ own precedent or view of Texas law,” an approach so lenient that even “but one law” advocates might support. (All members seem to acknowledge that, naturally, the coordinate transferee court would apply its own precedent if the transferor court has not decided the state law issue.)

Members also differ on what appellate procedures might be created to allow fairer and more efficient resolution of a case in which the transferee court determines that the conflicting precedent was outcome determinative in a particular case. Generally speaking, however, members tend to support a rule that requires the transferee court to expressly acknowledge the conflict in its opinion or after a motion for rehearing. Members also seem to support—again, generally speaking—a provision that would allow the supreme court (and presumably the Court of Criminal Appeals, as appropriate) greater latitude in handling an appeal when the courts believe litigants’ rights were unfairly affected by a random, docket-equalization transfer. One proposed draft would permit the supreme court to set aside the judgment of the transferee court without reference to the merits and, in the interest of justice, remand the case to the transferee court for decision on the merits. An alternative draft would require the supreme court to at least resolve the issue creating the conflict and, if necessary, remand the rest of the case back the court of appeals.

The most recent draft rule under consideration by the SCAC is included in this paper as Appendix B.

#### **IV. CONSOLIDATION OF CROSS-APPEALS NOTICED TO DIFFERENT COURTS OF APPEALS**

The SCAC is also considering amendments to the appellate rules to address the recurring problem of cross appeals of judgments rendered by courts lying

within the jurisdiction of more than one court of appeals district that are noticed to different courts of appeals.

The supreme court attempted to solve this problem by applying the common law rule of dominant jurisdiction to hold that once an appeal is perfected in a court of appeals of proper jurisdiction, the court appeals acquires jurisdiction over the entire controversy. *Miles v. Ford Motor Co.*, 914 S.W.2d 135 (1995). If an appeal from the same case is later perfected in another court of appeals, that appeal should be abated to “protect the second appellant’s right to proceed in its chosen forum if at any time it becomes apparent that the appellant filed the first appeal merely as a sham, with no intent to prosecute the appeal.” *Id.* at 139. “If for some reason the second appellant desires a transfer to protect a point of error that was not properly raised as a cross-point in the first appeal, the second appellant may make an appropriate motion to this Court.” *Id.*; *see also id.* at 137 n.2 (establishing the proper procedure for presenting a motion to transfer).

After *Miles*, parties—even those who prevailed—rushed from the courtroom after receipt of verdict to file a notice of appeal in their appellate forum of choice. However, in civil cases, when both parties prematurely file a notice of appeal, the notices are both deemed filed at the same time. *See* TEX. R. APP. P. 27.1 (“In a civil case, a prematurely filed notice of appeal is effective and deemed filed on the day of, but after, the event that begins the period for perfecting the appeal.”). Thus, it seems, *Miles* did not cure the problem entirely.

The SCAC appellate subcommittee proposed a new appellate rule for consolidation of these cross appeals. The draft rule is included in this paper as Appendix C. Under the proposal, parties should attempt to agree on consolidation of the appeals in one court of appeals. If no agreement can be reached, parties must advise both appellate clerks who must notify the Chief Justice of the Supreme Court. The Chief Justice must randomly draw a court of appeals and order the cross appeals consolidated to that court of appeals.

I note that the supreme court has often recommended to the Legislature that the overlaps in appellate districts be eliminated. *See Recommendations for Reallocation of Courts of Appeals*, Order of the Supreme Court of Texas dated December 17, 2002, Misc. Docket No. 02-9232 (“No county should be in more than one appellate district.”); 1995 Report of the Supreme Court to the Legislature Regarding Appellate Courts (“The primary recommendation of the Court at this time is to eliminate the current jurisdictional overlaps that occur between two or more Courts of Appeals in ten counties, and in one instance, in three

counties.”); 1993 Report of the Supreme Court to the Legislature Regarding Appellate Courts (“No county should be in more than one appellate district.”); 1986 Report on the Reapportionment of the Courts of Appeals Districts as adopted by the Supreme Court of Texas and the Texas Judicial Council (“All current overlapping districts should be eliminated except for the 1st and 14th districts which are coterminous.”). This past session, the 79<sup>th</sup> Legislature, in passing HB 1077, reduced the number of counties lying within the jurisdiction of more than one court of appeals district. However, the new law does not eliminate all overlapping districts entirely.

## V. CERTIFICATES OF SERVICE

The SCAC is also considering rule changes to address the problem that has arisen because the Texas Rules of Civil Procedure have a different requirement for a certificate of service than do the appellate rules. Texas’ appellate rule on certificates of service requires that the certificate contain: (1) the date of service; (2) the manner of service; (3) the name of each person served; (4) the address of each person served; (5) if the person served is a party’s attorney, the name of the party represented by the attorney; and (6) the signature of the person who performed the service. TEX. R. APP. P. 9.5(e). In contrast, Texas’ procedural rule requires, simply, a statement that certifies to the court compliance with the rule. *See* TEX. R. CIV. P. 21a. Attorneys, unaware of the differences, sometimes file certificates of service in the appellate courts that do not comply with the more detailed requirements in Texas Rules of Appellate Procedure.

While most courts of appeals do not strictly enforce this particular appellate rule, in 2004, the First District Court of Appeals in Houston began striking any motions with non-conforming certificates of service. This action has led to an unequal enforcement of the rule among the intermediate courts. For example, between December 1, 2004, and February 4, 2005, the First Court of Appeals struck 174 documents. *See* Mary Alice Robbins, *Following the Rules—Lawyers Feel TRAPPED When 1st Court Strikes Motions Based on Technicalities*, 20 TEX. LAWYER No. 52, Feb. 28, 2005. In comparison, during this same time period, the Fourteenth Court of Appeals struck only one document because it exceeded the page limit. *Id.*

Sensitive to the frustration of attorneys appearing before her court, in June 2004, Sherry Radack, Chief Justice of the First District Court of Appeals, has asked the supreme court to consider amending the certificate of service rules so that the requirements the two rules mirror each other.

The SCAC voted against recommending that the supreme court amend appellate Rule 9.5(e) to reduce the amount of information required in an appellate

certificate of service. Members maintained that the detailed information required by 9.5(e) can be helpful in answering later questions about the parties or service and that the rules should not be changed to address an issue that may not be a problem.

However, there is currently no consensus among committee members about whether to recommend amending Texas Rule of Civil Procedure 21a to require more information as in the appellate rule. Some committee members recommend amending Rule 21a to conform to appellate Rule 9.5(e) for the same reason they support the wording of the appellate rule; that is, the more information the certificate contains, the more useful the certificate is. These members also note that the consequences of missing a deadline in appellate courts are much greater than in the trial court; if the additional information could help in some way to prevent any future problems in courts of appeals, it would be helpful.

Opponents of changing the Rule 21a cite serious concerns about increasing the amount of paper filed in large class actions and cases with numerous parties in trial court, such as asbestos litigation. Other members point out that, if the concern is that rules are unequally enforced, then amending the procedural rules will not cure the problem; uneven enforcement is even more likely among the many trial judges in the state.

As a point of comparison, several members also observed that the federal rules have the same difference between its appellate and civil rules for certificates of service. Federal procedural rules only require that “all papers after the complaint required to be served upon a party, together with a certificate of service, must be filed with the court.” FED. R. CIV. P. 5(d). The Federal appellate rules require an acknowledgment of service or a proof of service consisting of—similar to the requirements of Texas’ appellate rules—a statement by the person who made the service that includes the date, manner, persons served, and address. *See* FED. R. APP. P. 25(d).

## VI. CERTIFICATES OF CONFERENCE

The SCAC is also considering amendments to the appellate rules to eliminate the requirement that a motion for rehearing contain a certificate of conference. Rule 10.1(a)(5) requires that all motions contain a certificate of conference, a “certificate stating that the filing party conferred, or made a reasonable attempt to confer, with all other parties about the merits of the motion and whether those parties oppose the motion.” While this rule makes sense for most motions, many appellate practitioners note that requiring the certificate of conference on a motion for rehearing is impractical, as the non-moving party will clearly be opposed to a rehearing.

The SCAC agreed without opposition. The draft rules, whose specific language is still under consideration by the SCAC, are as follows:

### 10.1 Contents of Motions; Response

(a) *Motion*. Unless these rules prescribe another form, a party must apply by motion for an order or other relief. The motion must:

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(5) in civil cases, other than a motion and further motion for rehearing filed under Rule 49, contain or be accompanied by a certificate stating that the filing party conferred, or made a reasonable attempt to confer, with all other parties about the merits of the motion and whether those parties oppose the motion.

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### 49.11 Certificate of Conference Not Required.

A certificate of conference is not required for motions for rehearing, further motions for rehearing or for en banc reconsideration or review of a panel’s decision.

## VII. BANKRUPTCY NOTICES

Finally, the SCAC is considering amendments to the appellate rules, proposed by the State Bar’s Court Rules Committee, to change the requirements of a bankruptcy notice. Current Rule 8.1(e) requires that the bankruptcy notice contain “an authenticated copy of the page or pages of the bankruptcy petition that shows when the petition was filed.”

However, as e-filing in federal courts becomes more prevalent, there will be less bankruptcy petitions filed in paper format and, thus, often no “file stamp”. Rather, e-filed petitions cause the federal court e-filing system to generate a separate document, called a Notice of Bankruptcy Case Filing and available on PACER, which does show the date of filing. The Court Rules Committee suggests that this notice should be accepted with Texas’ appellate courts to show the date of filing.

Therefore, the Court Rules Committee proposes the following amendment to Rule 8.1:

Any party may file a notice that a party is in bankruptcy. The notice must contain:

- (a) the bankrupt party’s name;
- (b) the court in which the bankruptcy proceeding is pending;

- (c) the bankruptcy proceeding's style and case number;
- (d) the date when the bankruptcy petition was filed; ~~and~~
- (e) ~~an authenticated~~ copy of the page or pages of the bankruptcy petition or a document generated by the bankruptcy court that showing when the petition was filed; and
- (f) evidence of the date of filing.



## APPENDIX A

**Proposed Changes to Texas Rules of Appellate Procedure 28**  
*(from Subcommittee Report, August 18, 2005)***Rule 28. Accelerated Appeals in Civil Cases****28.1 Civil Cases - Appeal As of Right**

(a) *Types of Accelerated Appeals.* Appeals from interlocutory orders (when allowed as of right by statute), appeals in quo warranto proceedings, appeals required by statute to be accelerated or expedited and appeals required by law to be filed or perfected within less than thirty days after the date of the order or judgment being appealed are accelerated appeals.

(b) Unless a statute expressly prohibits modification or extension of any statutory appellate deadlines, an accelerated appeal is perfected by filing a notice of appeal in compliance with Rule 25 within the time allowed by Rule 26.1(b) or as extended by Rule 26.3, regardless of any statutory deadlines. Filing a motion for new trial, any other post trial motion, or a request for findings of fact will not extend the time to perfect an accelerated appeal.

(c) *Appeals of Interlocutory Orders.* The trial court need not, but may – within 30 days after the order is signed – file findings of fact and conclusions of law.

(d) *Quo Warranto Appeals.* The trial court may grant a motion for new trial timely filed under Texas Rule of Civil Procedure Rule 329b (a) – (b) until 50 days after the trial court’s final judgment is signed. If not determined by signed written order within that period, the motion will be deemed overruled by operation of law on expiration of that period.

(e) *Record and Briefs.* In lieu of the clerk’s record, the appellate court may hear an accelerated appeal on the original papers forwarded by the trial court or on sworn uncontroverted copies of those papers. The appellate court may allow the case to be submitted without briefs. The deadlines and procedures for filing the record and briefs in an accelerated appeal are provided in Rules 35 and 38.

**28.2 Civil Cases – Appeal By Permission***(a) Petition for permission to appeal.*

(1) To request permission to appeal an interlocutory order pursuant to Section 51.014(d)-(f) of the Civil Practice and Remedies Code, a party to the trial court proceeding must file a petition for permission to appeal with the clerk of the appellate court that has appellate jurisdiction over the action.

(2) The petition must be filed not later than the 10th day after the date a trial court signs a written order granting permission to appeal. The appellate court may extend the time to file the petition if, within 15 days after the deadline for filing the petition, the petitioner:

(A) files the petition in the appellate court, and

(B) files in the appellate court a motion complying with Rule 10.5(b)

*(b) Contents of petition; service; response or cross-petition*

(1) The petition must:

(A) identify the trial court, and trial judge, and state the case’s trial court number and style;

(B) list the names of all parties to the trial court proceeding and the names, addresses and telefax numbers of

all trial and appellate counsel;

(C) identify the trial court's order granting permission to appeal by stating the title and date of the order and attaching a copy of the order to the petition;

(D) state that all parties agree to the trial court's order granting permission to appeal;

(E) identify the written order sought to be appealed by stating the title and date of the order and attaching a copy of the order to the petition;

(F) state concisely the issues or points presented, the facts necessary to understand the issues or points presented, the reasons why the order complained of involves a controlling question of law as to which there is substantial ground for difference of opinion, why an immediate appeal may materially advance the ultimate termination of the litigation, and the relief sought.

(2) The petition must be served on all parties to the trial court proceeding.

(3) If any party timely files a petition, any other party may file a response or a cross-petition not later than 7 days after the initial petition is served. Any response or cross-petition must be served on all parties to the trial court proceeding.

*(c) Form of papers; number of copies.* All papers must conform to Rule 9. Except by the appellate court's permission, a petition, response, or cross-petition may not exceed 10 pages, exclusive of pages containing the identity of parties and counsel, any table of contents, any index of authorities, the issues presented, the signature and proof of service and the accompanying documents required to be attached to the petition. An original and 3 copies must be filed unless the appellate court requires a different number by local rule or by order in a particular case.

*(d) Submission of petition; appellate court's order.* Unless the court of appeals orders otherwise, the petition and response or cross-petition will be submitted to the appellate court without oral argument. A copy of the appellate court's order granting or denying permission to appeal, dismissing the petition, or otherwise directing the parties to take further action, must be served on all parties to the trial court proceedings. No motion for rehearing may be filed.

*(e) Grant of petition; prosecution of appeal*

(1) Within 10 days after the signing of the appellate court's order granting permission to appeal, in order to perfect an appeal under these rules, any party to the trial court proceeding may file a notice of accelerated appeal with the trial court clerk and the clerk of the appellate court in conformity with Rule 25.1 together with a docketing statement as provided in Rule 32. The provisions of Rule 26.3 apply to such a notice.

(2) After perfection of the appeal, the appeal shall be prosecuted in the same manner as any other accelerated appeal.

#### **[Alternative (e)]**

*(e) Grant of petition; prosecution of appeal*

(1) Within 10 days after the signing of the order granting permission to appeal, any party to the trial court proceeding must:

(A) file a notice of accelerated appeal with the trial court clerk to perfect the appeal,

(B) file with the clerk of the court of appeals a copy of the notice of accelerated appeal and a docketing statement in accordance with Rule 32, and

(C) pay all required fees

(2) After perfection of the appeal, the appeal shall be prosecuted in the same manner as my other accelerated appeal.

COMMENT: Subdivision 28.1 is amended to provide a uniform appellate timetable for all accelerated appeals, regardless of my statutory deadlines. Many statutes provide for accelerated or expedited appellate timetables, including, among others, appeals of final judgments in a suit in which termination of the parent-child relationship is in issue as provided in Family Code Section 109.002 and appeals of “final orders” as provided in subchapter E of the Chapter 3 of the Texas Family Code. Rule 28 is made expressly applicable to all such appeals. Subsection 28.2 is amended to provide a procedural mechanism for seeking permission to appeal an interlocutory order that is not appealable as of right in accordance with Civil Practice and Remedies Code § 51.014 (d)-(f), as amended in 2005.



## APPENDIX B

**Proposed Rule Concerning Transferred Cases**  
*(from Subcommittee Report, July 11, 2005)*

## Rule \_\_. Transfer of Court of Appeals Cases

**\_.1 Authority to Transfer.** The Supreme Court may order cases transferred from one court of appeals to another at any time that, in the opinion of the Supreme Court, there is good cause for the transfer.

**\_.2 Jurisdiction When Transferred.** The court of appeals to which a case is transferred has jurisdiction of the case without regard to the district in which the case originally was tried and to which it is returnable on appeal.

**\_.3 Place of Decision.** The court of appeals to which a case is transferred shall deliver, enter and render the opinions, orders and decisions in a transferred case at the place where the court to which the case is transferred regularly sits as provided by law.

**\_.4 Oral Argument.**

(a) Except as provided by Subsections (b) and (e), the justices of the court of appeals to which a case is transferred shall hear oral argument, after due notice to the parties or their attorneys, at the place from which the case is originally transferred.

(b) If requested by all parties or their attorneys, the oral argument in a transferred case may be heard in the regular place of the court to which the case is transferred.

(c) If a case is transferred to a court that regularly sits not more than 35 miles from the place the court from which the case was transferred regularly sits, the court, at the discretion of its chief justice and after notice to the parties or their counsel, may hear oral arguments at the place it regularly sits. For purposes of this subsection, the place where a court of appeals regularly sits is that specified in Subchapter C, Chapter 22, and the mileage between the places is that determined by the comptroller under Chapter 660.

(d) The actual and necessary traveling and living expenses of the justices in hearing an oral argument at the place from which the case is transferred shall be paid by the state from funds appropriated for that purpose.

(e) At the discretion of its chief justice, a court to which a case is transferred may hear oral argument through the use of teleconferencing technology as provided by Section 22.302. The court and the parties or their attorneys may participate in oral argument from any location through the use of teleconferencing technology. The actual and necessary expenses of the court in hearing an oral argument through the use of teleconferencing technology shall be paid by the state from funds appropriated for the transfer of case, as specified in Subsection (d).

**\_.5 Precedent in Transferred Cases****Alternative One**

In cases transferred by the Supreme Court from one court of appeals to another, the court of appeals to which the case is transferred must decide the case in accordance with [the clear precedent] of the transferor court under principles of stare decisis. [The court's opinion must also state whether the outcome would or would not have been different had the transferee court applied its own precedent or view of the law or another court of appeals' precedent.]

The Supreme Court may take the following action on a petition for review that alleges error because precedent of the transferor court was not applied to resolve the case:

(a) grant the petition for review and decide the issue itself,

(b) set aside the judgment of the court of appeals without reference to the merits and, in the interest of justice, transfer the case to the transferor court for decision on the merits, or

(c) deny or refuse the petition.

### **Alternative Two**

In cases transferred by the Supreme Court from one court of appeals to another court of appeals, the court of appeals must consider and give due regard to the decisions of the transferor court under principles of stare decisis but may decide the law in accordance with the court of appeals' own precedent or view of Texas law. [The court may when it issues its opinion, and must on a motion for rehearing, state whether the outcome will have been different had the court of appeals decided the case in accordance with the precedent of the court from which the case is transferred.]

The Supreme Court may take the following action on a petition for review that alleges error because precedent of the transferor court was applied to resolve the case:

(a) grant the petition for review and decide the issues itself,

(b) grant the petition for review, resolve the actual or apparent conflict of decisions and, if necessary, remand the case to the court of appeals for further action.

(c) deny or refuse the petition.

## APPENDIX C

**Proposed New Appellate Rule on Consolidation of Cross-Appeals  
Noticed to Different Court of Appeals  
(from Subcommittee Report, July 11, 2005)**

**Rule \_\_. Consolidation of Cross-Appeals Noticed to Different Court of Appeals**

\_.1 *Cross appeals to be consolidated:* If cross appeals by two or more parties are noticed to different courts of appeals that have concurrent jurisdiction of the appeals, the cross appeals must be consolidated.

\_.2 *Procedures for Consolidation:* When an appealing party has knowledge that cross appeals from a judgment or order have been noticed to different courts of appeals, that party shall promptly contact lead counsel for all other appealing parties and attempt to agree on consolidation of the appeals in one court of appeals.

If no agreement can be reached, the parties shall so advise the clerk of both courts in writing and request that the appeals be consolidated.

The clerks of the respective courts of appeals shall notify the Chief Justice of the Supreme Court of Texas of the cross appeals, and the Chief Justice shall refer the matter to the Clerk of that court for consolidation by lot according to the following procedure.

For each pair of courts of appeals that have concurrent jurisdiction of appeals from the same county, the Clerk shall maintain an appropriate receptacle with the name of each court of appeals on an equal number of slips, but no less than five each. Upon receipt of a request for consolidation, the Clerk shall blindly draw one slip from the proper receptacle and advise the Chief Justice of the name of the court of appeals drawn. The Chief Justice shall order the cross appeals consolidated in that court of appeals. The slips in the receptacles shall be replenished to the original number when there are three slips remaining.