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4.5 No Notice of Judgment or Order of Appellate Court; Effect on Time to File Certain Documents.

- (a) *Additional Time to File Documents.* A party may move for additional time to file a motion for rehearing in the court of appeals, a petition for review, or a petition for discretionary review, if the party did not — until after the time expired for filing the document — either receive notice of the judgment or order from the clerk or acquire actual knowledge of the rendition of the judgment or order.
- (b) *Procedure to Gain Additional Time.* The motion must state the earliest date when the party or the party’s attorney received notice or acquired actual knowledge that the judgment or order had been rendered. The motion must be filed within 15 days of that date but in no event more than 90 days after the date of the judgment or order.
- (c) *Where to File.*
 - (1) A motion for additional time to file a motion for rehearing in the court of appeals must be filed in and ruled on by the court of appeals in which the case is pending.
 - (2) A motion for additional time to file a petition for review must be filed in and ruled on by the Supreme Court.
 - (3) A motion for additional time to file a petition for discretionary review must be filed in and ruled on by the Court of Criminal Appeals.
- (d) *Order of the Court.* If the court finds that the motion

[The Court would make this change as recommended.]

<p>1 for additional time was timely filed and the party did 2 not — within the time for filing the motion for 3 rehearing, petition for review, or petition for 4 discretionary review, as the case may be — receive the 5 notice or have actual knowledge of the judgment or 6 order, the court must grant the motion. If the court 7 grants the motion, the time for filing the document will 8 begin to run on the date when the court grants the 9 motion.</p>	
	<p>10 Comment to 2002 change. Subdivision 4.5 is amended to 11 clarify that a party may obtain additional time to file documents where 12 the party fails to receive notice not only of an appellate court judgment, 13 but of an appellate court order — such as one denying a motion for 14 rehearing — that triggers the appeal period.</p>
<p>15 9.5 Service. 16 17 (a) <i>Service of All Documents Required.</i> At or before the 18 time of a document’s filing, the filing party must serve 19 a copy on all parties to the appeal or review. But a A 20 party need not serve a copy of the record in an appeal. 21 A party must serve a copy of the record in an original 22 proceeding.</p>	<p>15 9.5 Service. 16 17 (a) <i>Service of All Documents Required.</i> At or before the time of a 18 document’s filing, the filing party must serve a copy on all 19 parties to the appeal or review proceeding. But a party need not 20 serve a copy of the record.</p>
	<p>23 The change clarifies that the filing party must serve a copy of 24 the document filed on all other parties, not only in an appeal or review, 25 but in original proceedings as well. The rule applies only to filing 26 parties. Thus, when the clerk or court reporter is responsible for filing 27 the record, as in cases on appeal, a copy need not be served on the 28 parties. The rule for original civil proceedings, in which a party is 29 responsible for filing the record, is stated in subdivision 52.7.</p> <p><u>SCAC comment-The SCAC would adopt the above clarification as a</u> <u>comment to the rule During the Feb. Video Conference call, the</u> <u>SCAC suggested the following action:</u></p>

	<p><u>Rule 9.5(a)</u></p> <p><u>(a) Service of All Documents <i>Appellate</i> Required.</u> <u>At or before the time of a document’s filing, the filing party must serve a copy on all parties to the appeal or review <i>appellate</i> proceeding. But a party need not serve a copy of the record.</u></p> <p><u>Comment to 2002 change.</u> <u>The change clarifies that the filing party must serve a copy of the document filed on all other parties, not only in an appeal or review, but in original proceedings as well. The rule applies only to filing parties. Thus, when the clerk or court reporter is responsible for filing the record, as in cases on appeal, a copy need not be served on the parties. The rule for original civil proceedings, in which a party is responsible for filing the record, is stated in subdivision 52.7.</u></p>
<p>30 9.7. Adoption by Reference. Any party may join in or adopt by 31 reference all or any part of a brief, petition, response, motion, or 32 other document filed in an appellate court by another party in 33 the same case.</p>	<p>[The Court would make this change as recommended.]</p>
<p>34 35</p>	<p>Comment to 2002 change. Subdivision 9.7 is added to clarify that a party may adopt by reference all or part of another party’s filing.</p> <p><u>SCAC COMMENT-The Committee would delete that portion of comment relating to clarification</u></p>
<p>36 10.1. Contents of Motions; Response.</p>	<p>[A majority of the Court is not inclined to make this change. The</p>

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<p>(a) <i>Motion.</i> Unless these rules prescribe another form, a party must apply by motion for an order or other relief. The motion must:</p> <p>(1) contain or be accompanied by any matter specifically required by a rule governing such a motion;</p> <p>(2) state with particularity the grounds on which it is based;</p> <p>(3) set forth the order or relief sought;</p> <p>(4) be served and filed with any brief, affidavit, or other paper filed in support of the motion; and</p> <p>(5) in civil cases, contain or be accompanied by a certificate stating that the filing party conferred, or made a reasonable attempt to confer, with all other parties about the merits of the motion and whether those parties oppose the motion. A certificate of conference is not required for a motion for rehearing.</p>	<p>requirement of a conference is not burdensome. It may elicit agreement on some aspects of a motion. In general, exceptions to the standard requirement are not favored.]</p> <p><u>SCAC comment-SCAC is strongly for the proposed change and asks the Court to reconsider its' initial position.</u></p>
<p>12.6. Notices of Court’s Judgments and Orders. In any proceeding, the clerk of an appellate court must promptly send a notice of any judgment, mandate, or other court order of the court to all parties to the proceeding.</p>	<p>[The Court would make this change as recommended.]</p>
	<p>Comment to 2002 change. Subdivision 12.6 is amended to require the clerk to notify the parties of all of the court’s rulings, including the mandate.</p>
<p>13.1. Duties of Court Reporters and Recorders. The official court reporter or court recorder must:</p> <p>(a) when the court or any party to the case requests, attend</p>	<p>[The Court is not inclined to change the rule substantively. To protect litigants’ rights, the statewide practice should be that a reporter is to be present unless excused. However, the rule should be clarified as follows:]</p>

<p>1 court sessions and make a full record of the proceedings 2 unless excused by agreement of the parties; 3 4 5 6 7</p>	<p>13.1. Duties of Court Reporters and Recorders. The official court reporter or court recorder must:</p> <p>(a) unless excused by agreement of the parties, attend court sessions and make a full record of the proceedings unless excused by agreement of the parties;</p> <p><i>SCAC comment-The SCAC is divided. Several attorney have suggested leaving the standard as is. Several others support the proposed clarification. Other lawyers expressed concerns about rouge judges “going off the record” to the advantage or disadvantage of an attorney.</i></p>
<p>8 18.1 Issuance. The clerk of the appellate court that rendered the 9 judgment must issue a mandate in accordance with the 10 judgment and send it to the clerk of the court to which it is 11 directed and to all parties to the proceeding when one of the 12 following periods expires</p>	<p>[The Court would make this change as recommended.]</p>
	<p>Comment to 2002 change. Subdivision 18.1 is amended consistent with the change in subdivision 12.6.</p> <p><i>SCAC comment-The SCAC also has suggested a change to Rule 19.1</i> <u>Rule 19.1</u></p> <p><u>(b) 30 days after the court overrules all timely filed motions for rehearing, including motions for en banc reconsideration of a panel’s decision under Rule 49.7, and motions to extend time to file a motion for rehearing.</u></p> <p><i>Comment to 2002 change. Subdivision 19.1 is emended to clarify that a motion for en banc reconsideration extends the court of appeals’ plenary</i></p>

	<p><u>power in the same manner as a motion for rehearing addressed to the panel of justices who rendered the judgment or under consideration.</u></p>
<p>15 26.1 Civil cases. The notice of appeal must be filed within 30 days 16 after the judgment is signed, except as follows: 17 18 (a) the notice of appeal must be filed within 90 days after 19 the judgment is signed if any party timely files: . . . 20 21 (4) a request for findings of fact and conclusions of 22 law even if findings and conclusions either are 23 not proper or required by the Rules of Civil 24 Procedure or, if not required, could properly be 25 considered by the appellate court; . . .</p>	<p>[The Court is not inclined to make this change. The current rule does not appear to have caused problems. A request for findings and conclusions which is wholly improper should not be given the effect of extending appellate deadlines.]</p> <p><u>SCAC comments-Dorsaneo says this is a trap for people who practice in the area occasionally. The committee also examined killing the IKB decision in a comment or dropping the express reference to FOF and COL. They perfered doing all or nothing.</u></p>
<p>26 29.5. Further Proceedings in Trial Court. While an appeal from an 27 interlocutory order is pending, the trial court retains jurisdiction 28 of the case and may make further orders, including one 29 dissolving the order appealed from, and if permitted by law, 30 may proceed with a trial on the merits.</p>	<p>[The Court would make this change as recommended.]</p>
	<p>Comment to the 2002 change. Rule 29.5 is amended to acknowledge that a trial court may be prohibited by law from proceeding to trial during the pendency of an interlocutory appeal, as for example by section 51.014(b) of the Texas Civil Practice and Remedies Code.</p>
<p>36 33.1 Preservation; How Shown. . . . 37 38 (d) <i>Sufficiency of Evidence Complaints in Nonjury Cases.</i> 39 <i>A party desiring to complain on appeal in a nonjury</i> 40 <i>case that the evidence was legally or factually</i> 41 <i>insufficient to support a finding of fact, that a finding of</i> 42 <i>fact was established as a matter of law or was against</i> 43 <i>the overwhelming weight of the evidence, or of the</i></p>	<p>[The Court is divided over whether to make this change. In fairness to the trial court, and in the interest of efficiency, as a general rule all complaints made on appeal should first have been raised in the trial court. A concern is whether the practice of not raising points like those in (d) has become so deeply ingrained that the bar cannot easily adapt to a change. However, no cases reported since 1997 would suggest that this is the case.]</p>

<p>1 inadequacy or excessiveness of the damages found by 2 the court is not required to present the complaint in the 3 trial court to preserve it for appellate review.</p>	<p><i>SCAC comments-The committee was divided. Judge McCown felt the proposed rule had the effect of adding a new requirement not required by the rule. Both Dorsaneo and Hatchell raised additional technical questions about the implementation of the rule, include time constraints and the effect requesting findings.</i></p>
<p>4 Comment to 2002 change. The last sentence of former Rule 5 52(d) of the Rules of Appellate Procedure has been reinstated.</p>	<p>[If the proposed change is made, the Court would alter the proposed comment as follows:]</p> <p>Comment to 2002 change. The last sentence of former Rule 52(d) of the Rules of Appellate Procedure has been reinstated as subdivision 33.1(d). This sentence provides the only exception to the general requirement of Rule 33.1(a) that all appellate complaints must have been raised and ruled on in the trial court, whether by motion for new trial as required by Rule 324 of the Rules of Civil Procedure, or in some other way.</p>
	<p>Comment [to TRCP 324]</p> <p>This rule prescribes when a motion for new trial must be filed to preserve a complaint on appeal. However, the rule does not provide the exclusive requirements for preservation of appellate complaints. That subject is treated more comprehensively in Rule 33 of the Rules of Appellate Procedure.</p>
<p>21 34.6 Reporter’s Record. . . . 22 23 (e) <i>Inaccuracies in the Reporter’s Record.</i> 24 25 (1) Correction of inaccuracies by Agreement. The 26 parties may agree to correct an inaccuracy in 27 the reporter’s record, including an exhibit, 28 without the court reporter’s recertification. 29 30 (2) Correction of inaccuracies by Trial Court. If</p>	<p>34.6 Reporter’s Record. . . . (e) <i>Inaccuracies in the Reporter’s Record.</i> (1) Correction of inaccuracies by Agreement. The parties may agree to correct an inaccuracy in the reporter’s record, including an exhibit, without the court reporter’s recertification. (2) Correction of inaccuracies by Trial Court. If</p>

1 the parties dispute whether the reporter’s record
2 accurately discloses what occurred in the trial
3 court, or the parties agree that it is inaccurate
4 but cannot agree on corrections to the reporter’s
5 record, **or if the accuracy of an exhibit**
6 **designated for inclusion in the reporter’s record**
7 **is disputed and the parties cannot agree on what**
8 **constitutes an accurate exhibit**, the trial court
9 must — after notice and hearing—settle the
10 dispute. After doing so, the court must order
11 the court reporter to ~~conform~~**correct** the
12 reporter’s record **by conforming the text of the**
13 **record to what occurred in the trial court or by**
14 **adding an accurate copy of the exhibit**, and to
15 certify and file in the appellate court a
16 corrected reporter’s record.

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18 (3) Correction After Filing in Appellate Court. If
19 the dispute arises after the reporter’s record has
20 been filed in the appellate court, that court may
21 submit the dispute to the trial court for
22 resolution. The trial court must then ensure
23 that the reporter’s record is made to conform to
24 what occurred in the trial court.

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26 (f) *Reporter’s Record Lost or Destroyed.* An appellant is
27 entitled to a new trial under the following
28 circumstances:

- 29
30 (1) if the appellant has timely requested a
31 reporter’s record;
32
33 (2) if, without the appellant’s fault, a significant
34 exhibit or a significant portion of the court
35 reporter’s notes and records has been lost or
36 destroyed or — if the proceedings were

~~the parties dispute whether the reporter's record~~
~~accurately discloses what occurred in the trial~~
~~court, or the parties agree that it is inaccurate~~
~~but cannot agree on corrections to the reporter's~~
~~record~~ **cannot agree on whether or how to**
correct the reporter’s record so that the text
accurately discloses what occurred in the trial
court and the exhibits are accurate, the trial
court must — after notice and hearing — settle
the dispute. After doing so, the court must
order the court reporter to ~~conform~~**correct** the
reporter's record **by conforming the text to what**
occurred in the trial court **or by adding an**
accurate copy of the exhibit, and to certify and
file in the appellate court a corrected reporter's
record.

(3) Correction After Filing in Appellate Court. If
the dispute arises after the reporter's record has
been filed in the appellate court, that court may
submit the dispute to the trial court for
resolution. The trial court must then ensure
that the reporter's record is made to conform to
what occurred in the trial court.

(f) *Reporter's Record Lost or Destroyed.* An appellant is
entitled to a new trial under the following
circumstances:

- (1) if the appellant has timely requested a reporter's
record;
(2) if, 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 proceedings were

<p>1 electronically recorded — a significant portion 2 of the recording has been lost or destroyed or is 3 inaudible; 4 5 (3) if the lost, destroyed, or inaudible portion of the 6 reporter’s record, or the lost or destroyed 7 exhibit, is necessary to the appeal’s resolution; 8 and 9 10 (4) if the parties cannot agree on a complete 11 reporter’s record replacement of the lost, 12 destroyed or inaudible portion of the reporter’s 13 record, or cannot agree on replacement of any 14 lost or destroyed exhibit and the missing exhibit 15 cannot be replaced with a copy that is 16 determined to accurately duplicate the original 17 exhibit with reasonable certainty by the trial 18 court.</p>	<p>electronically recorded — a significant portion of the recording has been lost or destroyed or is inaudible; (3) if the lost, destroyed, or inaudible portion of the reporter's record, or the lost or destroyed exhibit, is necessary to the appeal's resolution; and (4) if the parties cannot agree on a complete reporter's record lost, destroyed or inaudible portion of the reporter’s record cannot be replaced by agreement of the parties, or the lost or destroyed exhibit cannot be replaced either by agreement of the parties or with a copy determined by the trial court to accurately duplicate with reasonable certainty the original exhibit.</p>
	<p>Comment to 2002 change. Subparagraphs 34.6(e) and (f) are amended to clarify the application to exhibits. The language in subparagraph (e) referring to the text of the record is simplified without substantive change. The language in subparagraph (f) is clarified to require agreement only as to the portion of the text at issue, and to provide that the trial court may determine that a copy of an exhibit should be used even if the parties cannot agree.</p>
	<p>Rule 38 Requisites of Briefs</p> <p>[The Court requests counsel on whether the briefing procedure in the court of appeals should be changed in cases with multiple appellants. At present, each appellant may file an appellant’s brief, and then the parties respond. In the federal system, the person who first files a notice of appeal — or if there is a tie, the plaintiff in the trial court — is the appellant, and everyone else is a cross-appellant/appellee. Rule 28(h) of the Federal Rules of Civil Procedure provides:</p>

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	<p style="text-align: center;">(h) Briefs in a Case Involving a Cross-Appeal. If a cross-appeal is filed, the party who files a notice of appeal first is the appellant for the purposes of this rule and Rules 30 [Appendix to the Briefs], 31 [Serving and Filing Briefs], and 34 [Oral Argument]. If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by agreement of the parties or by court order. With respect to appellee’s cross-appeal and response to the appellant’s brief, appellee’s brief must conform to the requirements of Rule 28(a)(1)-(11) [contents of appellant’s brief]. But an appellee who is satisfied with appellant’s statement need not include a statement of the case or of the facts.</p> <p>Careful consideration would need to be given to how such a change would affect other rules. A less sweeping change that might have as much benefit would be to add a Rule 38.10 providing that in cases with parties who are not simply aligned on opposing sides of the same issues, a briefing schedule, including consolidated briefs, must either be ordered or agreed to with court approval.</p> <p>The Court would like the views of both appellate justices and appellate lawyers.]</p>
	<p>38.2 Appellee’s Brief.</p> <p style="padding-left: 40px;">(a) <i>Form of Brief.</i></p> <p style="padding-left: 80px;">(1) An appellee’s brief must conform to the requirements of subdivision Rule 38.1,</p>
<p>38.6 Time to File Briefs. . . .</p> <p style="padding-left: 40px;">(d) <i>Modification of filing time.</i> On motion complying with Rule 10.5(b), the appellate court may extend the time for filing the appellant’s a brief and may postpone submission of the case. A motion to extend the time to</p>	<p>[The Court would make this change as recommended.]</p>

<p>1 file the^a brief may be filed before or after the date the 2 brief is due. The court may also, in the interests of 3 justice, shorten the time for filing briefs and for 4 submission of the case.</p>	
	<p style="color: red;">Comment to 2002 change. Rule 38.6(d) is amended to clarify that an appellate court may postpone the filing of any brief, not just the appellant’s brief.</p>
<p>8 41.2 Decision by En Banc Court. 9 10 (a) Constitution of En Banc Court. An en banc court 11 consists of all members of the court who are not 12 disqualified or recused and — if the case was originally 13 argued before or decided by a panel — any members of 14 the panel who are not members of the court but remain 15 eligible for assignment to the court. A majority of the 16 en banc court constitutes a quorum. Where a case is 17 submitted to an en banc court, whether on motion for 18 rehearing or otherwise, a majority of the membership of 19 the court shall constitute a quorum and the concurrence 20 of a majority of the court sitting en banc shall be 21 necessary to a decision. A majority of the en banc court 22 must agree on a judgment.</p>	<p>[The Court is not inclined to make this change. The Court is of the view that any justice assigned to a case should participate in the decision whether to hear the case en banc and in the en banc court’s decision in the case.]</p>
<p>23 Rule 42. Dismissal; Settlement. 24 25 42.1. Voluntary Dismissal in Civil Cases. 26 27 (a) <i>Voluntary Dismissal.</i> 28 29 (1) The appellate court may dispose of an appeal as 30 follows: 31 32 (±A) in accordance with an agreement signed 33 by all parties or their attorneys and 34 filed with the clerk; or</p>	<p>Rule 42. Dismissal; Settlement 42.1. Voluntary Dismissal and Settlement in Civil Cases. (a) <i>On Motion or By Agreement.</i> The appellate court may dispose of an appeal as follows: _____ (1) in accordance with an agreement signed by all parties or their attorneys and filed with the clerk; or _____ (2) in accordance with a motion of appellant to</p>

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(2B) in accordance with a motion of appellant to dismiss the appeal or affirm the appealed judgment or order; but no party may be prevented from seeking any relief to which it would otherwise be entitled.

(b2) A severable portion of the proceeding may be disposed of under (a1) if it will not prejudice the remaining parties.

(b) *Settled Cases.* If, at any time, a case is settled by agreement of the parties and all parties to the appeal move the appellate court to effectuate the agreement of the parties:

(1) if no other disposition is requested, the court must dismiss the appeal; or

(2) if requested by all parties, the court may:

(A) render a judgment effectuating the agreement of the parties;

(B) set aside the judgment of the trial court without regard to the merits and remand the case to the trial court for rendition of a judgment in accordance with the agreement; or

(C) abate the appeal until the lower court’s proceedings to effectuate the agreement are complete.

(c) *Effect on Opinion.* In dismissing a proceeding, the appellate court will determine whether to withdraw any

~~dismiss the appeal or affirm the appealed judgment or order; but no party may be prevented from seeking any relief to which it would otherwise be entitled.~~

(1) *On Motion of Appellant.* In accordance with a motion of appellant, the court may dismiss the appeal or affirm the appealed judgment or order unless such disposition would prevent a party from seeking relief to which it would otherwise be entitled.

(2) *By Agreement.* In accordance with an agreement signed by the parties or their attorneys and filed with the clerk, the court may:

(A) render judgment effectuating the parties’ agreement;

(B) set aside the trial court’s judgment without regard to the merits and remand the case to the trial court for rendition of judgment in accordance with the agreement; or

(C) abate the appeal and permit proceedings in the trial court to effectuate the agreement.

(b) *Partial Disposition.* A severable portion of the proceeding may be disposed of under (a) if it will not prejudice the remaining parties.

(c) *Effect on Court’s Opinion.* In dismissing a proceeding, the appellate court will determine whether to withdraw

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<p>opinion it has already issued.—An agreement or motion for dismissal cannot be conditioned on withdrawal of the opinion. The appellate court will determine whether or not to withdraw any opinion it has already issued.</p> <p>(d) Costs. In the absence of a motion or agreement concerning costs, in disposing of a case pursuant to this rule, the appellate court will tax costs against the appellant.</p>	<p>any opinion it has already issued. An agreement or motion for dismissal cannot be conditioned on withdrawal of the opinion.</p> <p>(d) Costs. Absent agreement of the parties, the court will tax costs against the appellant.</p>
<p>Comment to 2002 change. The changes are intended to clarify procedures for implementing settlements on appeal and to alter the rule followed by some courts that would require the cause, not just the appeal, to be dismissed. <i>See Panterra Corp. v. American Dairy Queen</i>, 908 S.W.2d 300 (Tex. App.—San Antonio 1995, no writ).</p>	<p>Comment to 2002 change. Rule 42.1 is amended to clarify the procedures for implementing settlements on appeal and to expressly give courts flexibility in effectuating settlements. The rule is also clarified to expressly permit the dismissal of an appeal without dismissal of the action itself. <i>See Panterra v. American Dairy Queen</i>, 908 S.W.2d 300, 301-303 (Tex. App.—San Antonio 1995, no writ) (Duncan, J., dissenting). The rule does not permit an appellate court to order a new trial merely on the agreement of the parties absent reversible error, or to vacate a trial court’s judgment absent reversible error or a settlement.</p> <p><u>SCAC comments-Several members believe Pantera may have been questioned in other cases.</u></p>
<p>46.5. Voluntary Remittitur. If a court of appeals reverses the trial court’s judgment because of a legal error that affects only part of the damages awarded by the judgment, the affected party may — within 15 days after the court of appeals’ judgment — voluntarily remit the amount that the court of appeals determined should not have been awarded by the judgment of the damages that the affected party believes will cure the reversible error. A motion for rehearing may include a conditional request for acceptance by the court of appeals of a voluntary remittitur and an affirmance of the trial court’s</p>	<p>46.5. Voluntary Remittitur. If a court of appeals reverses the trial court’s judgment because of a legal error that affects only part of the damages awarded by the judgment, the affected party may — within 15 days after the court of appeals’ judgment — voluntarily remit the amount that the court of appeals determined should not have been awarded by the judgment that the affected party believes will cure the reversible error. A party may include in a motion for rehearing — without waiving any complaint that the court of appeals erred — a conditional request that the court accept the remittitur and affirm the trial</p>

<p>1 judgment as reduced by the remittitur, without waiving the 2 movant’s complaint that the court of appeals erred in ruling that 3 a reversible error was committed in the court below. If the 4 court of appeals determines that the request for voluntary 5 remittitur is not sufficient to cure the reversible error, but that 6 remittitur is appropriate, the court must suggest a remittitur in 7 accordance with subdivision 46.3. If the remittitur is timely 8 filed and the court of appeals determines that the voluntary 9 remittitur cures the reversible error, then the remittitur must be 10 accepted and the trial court judgment affirmed.</p>	<p>court’s judgment as reduced. If the court of appeals determines that the voluntary remittitur is not sufficient to cure the reversible error, but that remittitur is appropriate, the court must suggest a remittitur in accordance with Rule 46.3. If the remittitur is timely filed and the court of appeals determines that the voluntary remittitur cures the reversible error, then the remittitur must be accepted and the trial court judgment affirmed.</p>
<p>11 12 13 14</p>	<p>Comment to 2002 change. Subdivision 46.5 is amended to clarify the procedure for offering a voluntary remittitur. The offer may be made in a motion for rehearing without waiving any complaint that the court of appeals erred, thereby extending the deadlines for further appeal.</p>
<p>15 RULE 47. OPINIONS; AND PUBLICATION 16 , AND CITATION 17 18 47.1. Written Opinions. The court of appeals must hand down a 19 written opinion that is as brief as practicable but that addresses 20 every issue raised and necessary to final disposition of the 21 appeal. Where the issues are settled, the court should write a 22 brief memorandum opinion no longer than necessary to advise 23 the parties of the court’s decision and the basic reasons for it. 24 25 47.2. Designating and Signing of Court Opinions; Participating 26 Justices. Each opinion for the court must be designated either 27 an “Opinion” or a “Memorandum Opinion.” A majority of the 28 justices who participate in considering the case must determine 29 whether the opinion will be signed by a justice or will be per 30 curiam and whether it must be designated an opinion or 31 memorandum opinion. The names of the participating justices 32 must be noted on all written opinions or orders of the court or a 33 panel of the court.</p>	<p>RULE 47. OPINIONS, DISTRIBUTION, AND CITATION 47.1. Written Opinions. The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal. Where the issues are settled, the court should write a brief memorandum opinion no longer than necessary to advise the parties of the court’s decision and the basic reasons for it. 47.2. Designating and Signing of Court Opinions; Participating Justices. Each opinion for the court must be designated either an “Opinion” or a “Memorandum Opinion.” A majority of the justices who participate in considering the case must determine whether the opinion will be signed by a justice or will be per curiam and whether it will be designated an opinion or memorandum opinion. The names of the participating justices must be noted on all written opinions or orders of the court or a panel of the court.</p>

1 **47.3. Publication of Opinions.** All opinions of the courts of appeals
2 must be made available to the public including public reporting
3 services, print or electronic.
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5 ~~———— (a) *The Initial Decision.* A majority of the justices who~~
6 ~~participate in considering a case must determine —~~
7 ~~before the opinion is handed down — whether the~~
8 ~~opinion meets the criteria stated in 47.4 for publication.~~
9 ~~If those criteria are not met, the opinion will be~~
10 ~~distributed only to the persons specified in Rule 48, but~~
11 ~~a copy may be furnished to any person on request by~~
12 ~~that person.~~

13
14 ~~———— (b) *Notation on Opinions.* A notation stating “publish” or~~
15 ~~“do not publish” must be made on each opinion.~~

16
17 ~~———— (c) *Reconsideration of Decision on Whether to Publish.*~~
18 ~~Any party may move the appellate court to reconsider~~
19 ~~its decision regarding publication of an opinion but the~~
20 ~~court of appeals must not order any unpublished~~
21 ~~opinion to be published after the Supreme Court or~~
22 ~~Court of Criminal Appeals has acted on any party's~~
23 ~~petition for review, petition for discretionary review, or~~
24 ~~other request for relief.~~

25
26 ~~———— (d) *High Court Order.* The Supreme Court or the Court of~~
27 ~~Criminal Appeals may, at any time, order a court of~~
28 ~~appeals' opinion published.~~

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30 **47.4. Standards for Publication. ~~Presumption for Memorandum~~**
31 **~~Opinions.~~** If the issues are settled, the court should write a
32 brief memorandum opinion no longer than necessary to advise
33 the parties of the court's decision and the basic reasons for it.
34 An opinion ~~should be published only if~~ must be designated a
35 memorandum opinion unless it does any of the following:
36

47.3. ~~Publication~~ **Distribution of Opinions. All opinions of the
courts of appeals must be made available to public reporting
services, print or electronic.**

~~———— (a) *The Initial Decision.* A majority of the justices who~~
participate in considering a case must determine —
before the opinion is handed down — whether the
opinion meets the criteria stated in 47.4 for publication.
If those criteria are not met, the opinion will be
distributed only to the persons specified in Rule 48, but
a copy may be furnished to any person on request by
that person.

~~———— (b) *Notation on Opinions.* A notation stating “publish” or~~
“do not publish” must be made on each opinion.

~~———— (c) *Reconsideration of Decision on Whether to Publish.*~~
Any party may move the appellate court to reconsider
its decision regarding publication of an opinion but the
court of appeals must not order any unpublished
opinion to be published after the Supreme Court or
Court of Criminal Appeals has acted on any party's
petition for review, petition for discretionary review, or
other request for relief.

~~———— (d) *High Court Order.* The Supreme Court or the Court of~~
Criminal Appeals may, at any time, order a court of
appeals' opinion published.

47.4. Standards for Publication. ~~Memorandum Opinions.~~ If the
issues are settled, the court should write a brief memorandum
opinion no longer than necessary to advise the parties of the
court's decision and the basic reasons for it. An opinion may
not be designated a memorandum opinion if the author of a
conurrence or dissent opposes that designation. An opinion
should be published only if ~~must be designated a memorandum~~

- 1 (a) establishes a new rule of law, alters or modifies an
2 existing rule, or applies an existing rule to a novel fact
3 situation likely to recur in future cases;
4
5 (b) involves ~~a~~ **issues of constitutional law or other** legal
6 ~~issues of continuing public interest important to the~~
7 **jurisprudence of Texas**;
8
9 (c) criticizes existing law; or
10
11 (d) resolves an apparent conflict of authority.
12

13 **An opinion may not be designated as a memorandum opinion if**
14 **the author of a concurrence or dissent opposes that designation.**

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16 **47.5. Concurring and Dissenting Opinions.** Only a justice who
17 participated in the decision of a case may file or join in an
18 opinion concurring in or dissenting from the judgment of the
19 court of appeals. Any justice on the court may file an opinion
20 in connection with a denial of a hearing or rehearing en banc.
21 ~~A concurring or dissenting opinion may be published if, in the~~
22 ~~judgment of its author, it meets one of the criteria established in~~
23 ~~47.4. If a concurrence or dissent is to be published, the majority~~
24 ~~opinion must be published as well.~~

25
26 **47.6. Action of ~~Change in Designation by En Banc Court.~~** ~~Sitting~~
27 ~~en banc, the court may modify or overrule a panel's decision~~
28 ~~regarding the signing or publication of the panel's opinion or~~
29 ~~opinions. A court en banc may change a panel's designation of~~
30 ~~an opinion.~~

31
32 **47.7. Citation of Unpublished Opinions.** Opinions not designated
33 for publication by the court of appeals **under prior rules** have no
34 precedential value ~~and must not~~ **but may** be cited as authority by
35 counsel or by a court.

opinion unless it does any of the following:

- (a) establishes a new rule of law, alters or modifies an
existing rule, or applies an existing rule to a novel fact
situation likely to recur in future cases;
(b) involves ~~a~~ **issues of constitutional law or other** legal
issues ~~of continuing public interest important to the~~
jurisprudence of Texas;
(c) criticizes existing law; or
(d) resolves an apparent conflict of authority.

47.5. Concurring and Dissenting Opinions. Only a justice who
participated in the decision of a case may file or join in an
opinion concurring in or dissenting from the judgment of the
court of appeals. Any justice on the court may file an opinion
in connection with a denial of a hearing or rehearing en banc.
~~A concurring or dissenting opinion may be published if, in the~~
~~judgment of its author, it meets one of the criteria established in~~
~~47.4. If a concurrence or dissent is to be published, the majority~~
~~opinion must be published as well.~~

47.6. Action of ~~Change in Designation by En Banc Court.~~ ~~Sitting~~
~~en banc, the court may modify or overrule a panel's decision~~
~~regarding the signing or publication of the panel's opinion or~~
~~opinions. A court en banc may change a panel's designation of~~
~~an opinion.~~

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	<p>[The Court is divided over whether Rule 47.7 should stay essentially as it is, whether the Committee’s recommendation should be adopted, or whether previously unpublished opinions should be citable for whatever weight a court may give them. The other two options are thus:</p> <p>47.7. Citation of Unpublished Opinions. Opinions not designated for publication by the court of appeals under prior rules have no precedential value and must not be cited as authority by counsel or by a court.</p> <p>47.7. Citation of Unpublished Opinions. Opinions not designated for publication by the court of appeals under prior rules have no precedential value and must not may be cited as authority by counsel or by a court.</p> <p>Recognizing that the Committee has already debated these issues generally, the Court nevertheless requests the Committee’s response to these three options.]</p>
	<p>Comment to 2002 change. The rule is substantively changed to discontinue the use of the “do not publish” designation, to require that all opinions of the court of appeals be made available to public reporting services, and to remove prospectively any prohibition against the citation of opinions as authority. The rule favors the use of “memorandum opinions” designated as such except in certain types of cases but does not change other requirements, such as those in <i>Pool</i> and ____. An opinion previously designated “do not publish” —</p> <p>[either]</p> <p>has no precedential value and may not be cited as authority.</p> <p>[or]</p> <p>has no precedential value but may be cited.</p>

<p>1 2 3 4 5</p>	<p style="text-align: center;">[or]</p> <p style="text-align: center;">may be cited for whatever precedential value a court may give it, mindful that at the time the opinion issued it was to have no precedential value.</p> <p><i><u>SCAC comments- In Sec. 47.3, the SCAC would make it clear that all opinions “are open to the public” and made available . They are also against the 47.7 proposal to not allow the old DNP opinions to be cited. They evenly split between the 47.7 proposal that allow citation and but alternatively, make no comment on their weight or states that they have no precedential value.</u></i></p>
<p>6 7 8 9 10</p> <p>49.10. Length of Motion and Response. A motion or response must be no longer than 15 pages, exclusive of pages containing the identity of parties and counsel, the table of contents, the index of authorities, the statement of the case, the issues presented, the signature, the proof of service and the appendix.</p>	<p>[The Court is not inclined to make this change. The length of motions for rehearing does not appear to have been a problem. The change suggests that a motion should contain components that are not required, like an appendix.]</p>
<p>11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28</p>	<p>52.7. Record</p> <p>(a) <i>Filing by Relator Required.</i> Relator must file with the petition:</p> <p>(1) a certified or sworn copy of every document that is material to the relator’s claim for relief and that was filed in any underlying proceeding; and</p> <p>(2) a properly authenticated transcript of any relevant testimony from any underlying proceeding, including any exhibits offered in evidence, or a statement that no testimony was adduced in connection with the matter complained.</p> <p>(b) <i>Supplementation Permitted.</i> After the record is filed,</p>

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relator or any other party to the proceeding may file additional materials for inclusion in the record.

(c) *Service of Index of Record Contents on All Parties.*
Relator and any party who files materials for inclusion in the record must at the same time serve on all other parties an index listing the materials filed and describing them in sufficient detail to identify them in the underlying proceeding.

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Comment to 2002 change. Subdivision 9.5(a) states that a party need not serve a copy of the record on other parties. Subdivision 52.7(c) is added to provide that in original proceedings a party who files materials for inclusion in the record must serve all other parties with an index of the materials describing them so that they can be identified in the record of the underlying proceeding.

SCAC comment- During the video conference, the SCAC suggested the following:

Rule 52.7 (c) (New)

(c) Service of Record on All Parties. Relator and any party who files materials for inclusion in the record must at the same time serve the materials on all other parties with an index listing the materials filed. But materials previously served on a party as part of the record in one original proceeding filed in an appellate court do not need to be served on the same party in connection with another original proceeding filed in the same or another appellate court if an index listing the materials filed and describing them in sufficient detail to identify them is served on the party at the same time the materials are filed in the other original proceeding.

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55.1 Request by Court. A brief on the merits must not be filed unless requested by the Court. With or without granting the petition for review, the Court may request the parties to file briefs on the merits. **In appropriate cases, the Court may realign**

1	parties and direct that parties file consolidated briefs.
2 3 4	Comment to 2002 change. Subdivision 55.1 is clarified to provide that the Court may realign parties require consolidated briefing for a clearer and more efficient presentation of the case.
5 6 7 8	<p>55.2 Petitioner’s Brief on the Merits. . . .</p> <p>(e) <i>Statement of Jurisdiction.</i> The petitionbrief must state, without argument, the basis of the Court’s jurisdiction.</p>
9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24	<p>56.3. Settled Cases. If a case is settled by agreement of the parties and allthe parties so move, the Supreme Court may grant the petition if it has not already been granted and, without hearing argument or considering the merits, render a judgment to effectuate the agreement. The Supreme Court’s action may include setting aside the judgment of the court of appeals or the trial court without regard to the merits and remanding the case to the trial court for rendition of a judgment in accordance with the agreement. The Supreme Court may abate the case until the lower court’s proceedings to effectuate the agreement are complete. A severable portion of the proceeding may be disposed of if it will not prejudice the remaining parties. In any event, the Supreme Court’s order does not vacate the court of appeals’ opinion unless the order specifically provides otherwise. An agreement or motion cannot be conditioned on vacating the court of appeals’ opinion.</p>
25 26	Comment to 2002 change. Subdivision 56.3 is clarified to provide for partial settlements.
27 28 29 30 31	<p>64.6 Length of Motion and Response. A motion or response must be no longer than 15 pages, exclusive of pages containing the identity of parties and counsel, the table of contents, the index of authorities, the statement of the case, the issues presented, the signature, the proof of service and the appendix.</p> <p>[The Court is not inclined to make this change. The length of motions for rehearing does not appear to have been a problem. The change suggests that a motion should contain components that are not required, like an appendix.]</p>

	<p><u>Other SCAC comments-The members in attendance also voted to take no action with respect to amending Appellate Rule 38. The members also decided to take no action on the issue of the rejection of amicus brief for good cause.</u></p>
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