# The Appellate Advocate

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## IN THIS ISSUE . . . .

### ARTICLES



### REGULAR FEATURES

## THE CHAIR REPORTS

My friend Mike Hatchell has built a strong edifice upon Ralph Brock's foundation. Ralph literally created the section, developed a strong membership, and began several worthy projects. Emulating Ralph, Mike has nurtured this section to a membership of over 1000, which by my rough count makes us – at the end of only our second year – the twelfth largest section in the State Bar. Mike has also established our section as one of the leaders in continuing education, sponsoring several excellent seminars and publications. He has done so, moreover, while ensuring fiscal security for the future. We all now should know Mike not only as one of the state's preeminent appellate lawyers, but also as a truly great section chairman.

Tempting it is to sit back and reap the rewards of Mike's labor. At the risk of trying to improve what is already nearly perfect, we should nevertheless continue to move forward where necessary. Our section already does a good job of assisting appellate advocates. We present outstanding seminars, we have an impressive newsletter, and we are slowly but surely completing the revision of a combined treatise-form book on Texas appellate practice. We also have committees studying suggested rule changes, state appellate practice, and federal appellate practice. Yet something seems missing.

Absent, in my view, is a strong bridge between the appellate bar and the appellate courts. In a real sense, the appellate court are the consumers of our legal services: they read our briefs and listen to our oral arguments. They also are one of our suppliers. They provide us with the common law that we try to mold to our clients' advantages. Accordingly, as appellate advocates, we share many interests and concerns with the appellate courts; only our respective perspectives may sometimes differ.

This year I want our section to concentrate on assisting the appellate courts. Toward that goal, I have appointed Retired Chief Justice Clarence A. Guittard to chair our Appellate Court Liaison Committee. His committee will be studying ways in which our section can help the appellate courts with regard to judicial selection, retention, resources, education, and compensation. His committee and I welcome any ideas that you have regarding how the appellate bar can help the appellate courts.

– Roger Townsend

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# IMPACT OF SUPREME COURT DISCRETIONARY REVIEW: N. R. E. (NO REAL EFFECT)

By Clinard J. (Buddy) Hanby

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Most of the cases considered by the Texas Supreme Court now are heard by the court based on a 1987 change in the law that gives it broad discretion to determine those cases that have an impact on the jurisprudence of the state.

There are two general types of jurisdictional schemes for courts of last resort. The first type of scheme is purely appellate: the court must review the merits of all properly brought cases for which it has potential jurisdiction under the law. The second type of scheme is discretionary review jurisdiction: the court has broad discretion to decide to hear the merits of each case. From 1928 until 1987, the Texas Supreme Court exercised a purely appellate jurisdiction. *See generally*, Robertson and Paulsen, "Discretionary Jurisdiction for the Texas Supreme Court?" 49 TEX. BAR J. 210 (1986). However, effective June 20, 1987, the legislature amended the governing statute. Although, judging from the bill analysis, the primary concern of the legislature was to extend the supreme court's jurisdiction over cases of "divorce, child custody, support, or reciprocal support," the rewording of the statute has given the supreme court a partially discretionary jurisdiction. TEX. GOV'T CODE ANN. § 22.001.

There are five specific circumstances under which the court must still review the merits of the case. But by far, the most common way a case reaches consideration by the court is when the court exercises its discretion to pick and choose.

This article will analyze whether this change in jurisdiction has noticeably affected the types of cases in which the court publishes opinions on the merits and provides a general suggestion on how appellate attorneys should alter their advocacy techniques when seeking relief from the Texas Supreme Court.

### The Old Jurisdictional Scheme

The Texas Supreme Court has long had jurisdiction in five rather specific circumstances:

(1) the justices of the court of appeals disagree on a material question of law;

(2) conflict of decisions between the court of appeals and another court of appeals or the supreme court on a material question of law;

(3) construction or validity of a statute;

(4) state revenue involved, and

(5) the railroad commission is a party.

Acts 1985, 69th Leg. Ch. 480, pp. 3368-3369.

Prior to 1987, the catch-all provision gave the court jurisdiction whenever a court of appeals made "an error of substantive law," that error "affected the judgment," and the jurisdiction of the court of appeals is not made final by statute. *Id.*

### The New Jurisdictional Scheme

It is important to note that the five specific circumstances under which the court has jurisdiction have not been changed. Presumably, if a case falls within one of these five subdivisions, the court must still consider the merits. What has been changed is the catch-all jurisdictional provision. Jurisdiction now requires:

(1) "an error of law;"

(2) that the error "is of such importance to the jurisprudence of the state that, in the opinion of the supreme court, it requires correction;" and

(3) the jurisdiction of the court of appeals is not made final by statute.

Impact of the New Scheme

In an effort to assess the effects, if any, of the new scheme, the author has reviewed each written opinion of the supreme court (excluding direct appeals and original proceedings) during the term of the court from September, 1982 to July, 1983 and during September, 1988 to July 1989. (This volume of the Texas Supreme Court Journal was selected because it was closest to the author's thumb.) The results were thoroughly unenlightening:

1. Total Opinions:

One of the rationales for a discretionary scheme is to reduce the caseload of the court so that it can render more reasoned opinions in important cases. Thus, one would hope for less written opinions. In fact, that is the result. The period September, 1982 through July, 1983 saw 128 opinions (other than original proceedings and direct appeals). The period September, 1988 through July, 1989 saw only 96.

2. Reversal Rate:

This is the percentage of those cases in which the court either granted the writ of error or considered the matter significant enough to write an opinion explaining why it denied the writ and in which the judgment of the court of appeals was reversed. The initial expectation is that a purely discretional system of review should have a lower reversal rate because the court of last resort will hear cases on the basis of their legal or public importance and not on the basis of an erroneous result below. Here are the results of the study (which excluded original proceedings and direct appeals):

| **Sept. 1982 - July, 1983** | **Sept. 1988 - July, 1989** |
|---|---|
| Total Opinions 128 | Total Opinions 96 |
| Aff'd 23 (18%) | Aff'd 11 (11.5%) |
| n. r.e./ref'd 15 (12%) | denied/ref'd 10 (10.5%) |
| Rev'd 73 (57%) | Rev'd 68 (71%) |
| Partially Rev'd 17 (13%) | Partially Rev'd 7 (7%) |

Comparing the sample periods, the reversal or partial reversal rate has apparently *increased* from 70% to 78% under the new scheme. Perhaps, the explanation is that there still must be an error of law for jurisdiction to be proper under the new catch-all provision. A purely discretionary system would give the court jurisdiction over questions of law, not just over errors.

3. Opinions Without Oral Argument:

A court with discretionary powers should decline to consider trivial cases and give its full attention to difficult or important cases. Thus, one would expect a reduction in short opinions ruling on the writ of error and in Rule 133(b) (Conflict in Decisions) reversals. In 1982-1983, there were 12 short opinions refusing the writ n.r.e. and 19 reversals without oral argument. This represented 39% of the total opinions. The explanation, of course, is that most of these cases were cases of mandatory jurisdiction.

4. Procedural Cases:

Although this is far from clear, one would expect an increased percentage of procedural cases under a system of discretionary review. This is because procedure sets the "rules of the game" for trials and appeals. Questions of procedure tend, by definition, to be "important." In 1982-1983, the court decided 37 largely procedural cases and 16 other cases involving significant procedural issues. Thus, about 41% of the docket involved procedural issues. In 1988-1989, the court decided 41 largely procedural cases and six other cases involving significant procedural issues. Thus, about 49% of the docket involved procedural issues.

5. Cases of Major Importance:

The primary goal of a discretionary review system is for the court of last resort to devote its valuable time to cases of great importance or extreme difficulty. However, any analysis of whether this goal is being achieved is necessarily extremely subjective. For purposes of analysis, a case was deemed "major" if: (1) it recognized and defined or refused to recognize a new theory of recovery; (2) it involved a non-frivolous constitutional issue; (3) construed an unclear statute; or (4) seemed for other reasons to be "major" to the author.

Under these vague guidelines, there were 21 "major" cases in 1982-1983. These included *Cameron v. Cameron*, 641 S.W.2d 210 (Tex. 1982), holding that a Texas divorce court has no authority to divest separate property, *In the the Adjudication of the*

*Water Rights of the Upper Guadalupe Segment*, 438 S.W.2d 642 (Tex. 1982), holding the Texas water rights laws constitutional, and *Duncan v. Cessna*, 665 S.W.2d 414 (Tex. 1984) near and dear to all personal injury lawyers. Approximately 16% of the docket consisted of "major" cases.

In 1988-1989 there were 17 "major" cases. Those included *Vinson v. Burgess*, 773 S.W.2d 263 (Tex. 1989), upholding the constitutionality of the "rollback" statute, *Casso v. Brand*, 32 Tex. Sup. Ct. J. 362 (May 10, 1989), rewriting the ground rules for summary judgment in public figure defamation cases, and *Gaulding v. The Celotex Corp.*, 772 S.W.2d 66 (Tex. 1989), rejecting alternative liability, enterprise liability, concert of action, and market share liability. Approximately 18% of the 1988-1989 docket consisted of "major" cases. This was a slight increase, but the "major" cases of 1982-1983 somehow seem to the author to be more major.

**Thoughts for Advocacy**

This study may have been premature. The act amending the jurisdictional statute provides that the new scheme applies only to judgments that became final after June 20, 1987. The author has not attempted to segregate pre-June 20, 1987 judgments from post-June 20, 1987 judgments.

However, the preliminary indications are that advocates should continue to devote most of their effort to convincing the supreme court that the court of appeals erred. Only secondary effort should be devoted to convincing the supreme court that the case is "important."▪

## IN THE LAW REVIEWS

Calvert, Robert W. "How an Errorless Judgment Can Become Erroneous," 20 ST. MARY'S L.J. 229 (1989).

Childress, Steven Alan. "A Standards of Review Primer: Civil Appeals in the Fifth Circuit and Beyond," 6 FIFTH CIRC. REP. 49 (November 1988).

Haddad, Frank E. "How to Brief and Argue a Federal Criminal Appeal: The Best Approach," 12 AM. J. TRIAL ADVOC. 191 (1988).

Hittner, David & Lynne Liberato. "Summary Judgments in Texas," 20 ST. MARY'S L.J. 243 (1989).

Note, "The Right to Counsel in 'Frivolous' Criminal Appeals: A Re-evaluation of the Guarantees of *Anders v. California*," 67 TEX. L.R. 181 (1988) (Frederick D. Junkin).

Patton, Timothy. "Deadlines and Extension Motions in Civil Appellate Litigation," 20 ST. MARY'S L.J. 1 (1988).

Rubin, Alvin B. "What Appeals to the Court (Review of Tigar, *Federal Appeals: Jurisdiction and Practice*)," 67 TEX. L.R. 225 (1988).

# CIVIL HABEAS CORPUS

## PROCEDURE FOR WRITS OF HABEAS CORPUS IN CIVIL CASES

By James B. Spamer

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Civil habeas corpus proceedings typically arise when a divorced noncustodial parent is jailed for nonpayment of child support. The next step the lawyer takes is to the court of appeals to file an original proceeding.

Courts of appeals have jurisdiction to grant writs of habeas corpus *only* under TEX. GOV'T CODE ANN. § 22.221(d) (Vernon 1988). This section gives appellate courts jurisdiction over cases in which the parent is jailed by virtue of an order, process, or commitment in a divorce case, wife or child support case, or child custody case.

The nature of the beast is unlike any other proceeding before the court of appeals. This article is intended to review the requirements of this specialized proceeding.

By its nature, a habeas corpus proceeding is intended to be quick and clean. Its purpose is to establish whether an order of the trial court is absolutely void. *Ex parte LaRocca*, 282 S.W.2d 700, 703 (Tex. 1955); *see also Ex parte Gordon*, 584 S.W.2d 686, 687-88 (Tex. 1979).

A hearing on a writ of habeas corpus is not an evidentiary hearing like a trial. *See Kopeski v. Martin*, 629 S.W.2d 743, 745-46 (Tex. Crim. App. 1982); *Donna Irrigation Dist. v. West Coast Life Ins. Co.*, 103 S.W.2d 1091, 1092 (Tex. Civ. App. - San Antonio 1937, orig. proceeding). There is no discovery. The evidence before the trial court is the only evidence that the reviewing court can examine. *See Ex parte Hosken*, 480 S.W.2d 18, 20 (Tex. Civ. App. - Beaumont 1972, orig. proceeding). Documentary exhibits can be attached to your pleadings, and the rules specify the exhibits that must be attached to the petition. *See* TEX. R. APP. P. 120(b)(7). New evidence cannot be introduced.

So long as an alleged contemnor remains confined, a reviewing court retains jurisdiction to see if the confinement is void. *See Ex parte Dustman*, 538 S.W.2d 409 *passim* (Tex. 1976) (a relator's confinement for more than four months was itself corroboration of his uncontradicted testimony that he was unable to pay the child support that was ordered); *Ex parte Crawford*, 506 S.W.2d 920, 921 (Tex. Civ. App. - Tyler 1974, orig. proceeding) (a relator is "permitted to make successive applications for a writ").

Even though a reviewing court has denied one petition for writ of habeas corpus, it may accept a second petition. This is true if the grounds for the second petition are different or if circumstances surrounding the case have changed, such as if confinement has resulted in increased indigency and inability to pay.

When you file a petition for writ of habeas corpus, your object is to make your stroke swift, sure, clean, and directly aimed at the jugular. It is no time to make "shotgun" allegations. Therefore, pay careful attention to the formal requirements of a petition for writ of habeas corpus.

### Requesting a Writ

#### Indigency

An indigent client can file an affidavit of inability to pay costs. TEX. R. APP. P. 13(k). Costs include the $50 fee to the clerk of the court of appeals, the certified copies of relevant exhibits, and the statement of facts. TEX. R. APP. P. 13(k), governing costs in all civil cases in the appellate courts, incorporates TEX. R. APP. P. 40(a)(3)(B). That rule requires an indigent affiant to serve a copy of the affidavit of inability upon all opposing parties *and upon the court reporter.* The service must occur within two days of the filing of the affidavit.

Failure to serve an opposing party or the court reporter within the two-day period can result in dismissal of the proceeding. *See Fellowship Missionary Baptist Church of Dallas v. Sigel*, 749 S.w.2d 186 *passim* (Tex. App. - Dallas 1988, no writ); *In re V.G.*, 746 S.W.2d 500 *passim* (Tex. App. - Houston [1st Dist.] 1988, no writ); *Matlock v. Garza*, 725 S.W.2d 527, 528-29 (Tex. App. - Corpus Christi 1987, orig. proceeding).

If you do file an affidavit of inability to pay the costs of the habeas corpus proceeding, the record should reflect clearly that you served the appropriate parties. Your affidavit should always contain its own certificates of service showing you served all the relevant parties *and* the court reporter.

### Formal Averments of the Petition

TEX. R. APP. P. 120(b)(3) requires a certificate of service or a certificate explaining absence of service. An appropriate explanation is that you are anxious to file your petition to get your client out of jail as soon as possible. In that case, state that you have not yet served everyone, but that you will immediately do so. The immediate object of filing a petition is to get your client released on bond; if you clear that hurdle, your adversary will get a chance to argue later why the order of confinement is valid. Your petition should probably set out the factual allegations necessary to establish the jurisdiction of the appellate court.

Nothing in TEX. R. APP. P. 120 explicitly requires a jurisdictional statement, but subsection (b)(4) does ask for a concise statement of the "relator's right to the relief sought." In cases where the supreme court and an appellate court have concurrent jurisdiction, if the petition is brought to the supreme court, a necessary predicate is that the relator first sought relief from an intermediate appellate court. TEX. R. APP. P. 120(c).

An often overlooked requirement is proof of restraint. TEX. R. APP. P. 120(b)(6). It establishes the court's jurisdiction to act upon the petition for writ of habeas corpus. *See Deramus v. Thornton*, 333 S.W.2d 824, 827 (Tex. 1960) (a writ of habeas corpus can issue only when the alleged contemner is confined); *Ex parte Crawford*, 506 S.W.2d 920, 921 (Tex. Civ. App.–Tyler 1974, orig. proceeding) (proof of restraint is necessary for a reviewing court to entertain an application for writ of habeas corpus). A receipt for a prisoner's personal effects and a "book-in" sheet might be accepted as proof, but the most common proof is a certificate of confinement signed by a deputy sheriff. Check with your local deputy sheriffs to see if they have forms that can be easily filled out.

### Supporting Exhibits

The certified copies of the pleadings and the orders listed in subsection (b)(7) of Rule 120 are essential. *See Parks v. Hopkins*, 677 S.W.2d 791, 792 (Tex. App.–Fort Worth 1984, orig. proceeding). Certification probably requires the district clerk's seal; merely sworn exhibits might not suffice. *Cf.* TEX. R. APP. P. 121(a)(4) (expressly permitting sworn copies of the relevant exhibits in other original proceedings).

The only exception to the requirement for certified copies of the relevant orders is when your complaint is that a relevant order was never reduced to written form. *See Ex parte Hardy*, 531 S.W.2d 895, 896 (Tex. Civ. App.–Dallas 1975, orig. proceeding). Your best recourse in that situation is to submit an affidavit of the court clerk, stating that he or she could not locate a copy of any such order after examining the court records. The affidavit should be by the clerk, not you, because the clerk is the custodian of the court's records. *See* TEX. R. CIV. EVID. 803(7).

A statement of facts may be necessary to establish a defense based upon anything introduced or occurring at the contempt hearing, such as the denial of a request for a court-appointed attorney for an indigent contemner. *See, e.g., Ex parte Walker*, 748 S.W.2d 21, 22-23 (Tex. App.–Dallas 1988, orig. proceeding); *but see Ex parte Martinez*, No. 05-89-00753-CV (Tex. App.–Dallas, Aug. 7, 1989, orig. proceeding)(not yet reported). When you need a statement of facts to support your argument, what should you do while the reporter prepares the statement of facts? There is no necessity to delay filing a petition for writ of habeas corpus. It can be prepared while your client is released on bond, pursuant to TEX. R. APP. P. 120(d). However, the petition should recite what the statement of facts will prove and its materiality. It should also inform the reviewing court of a reasonable date by which it can expect the statement of facts to be filed and be supported by an affidavit of the court reporter. *See* TEX. R. APP. P. 73(i).

Rule 120(b)(8) requires the petition to be verified by affidavit. It is not clear whether verification is a formality, the lack of which can be waived by your adversary's failure to object, or a jurisdictional prerequisite. The best practice is to follow the rule and verify the petition.

### The Brief

A brief should accompany the petition. TEX. R. APP. P. 120(b)(5). Do not file the petition and ask leave to file a brief later. The reviewing court might permit that, but then again, it might not. As much as possible, your legal authorities should be opinions written in other habeas corpus proceedings, not opinions on appeal generally. Habeas corpus is a highly specialized area of the law, with sometimes a different set of rules and a different standard of review. You do not want to suggest that you are blurring the differences.

If an intermediate court denies your petition, rather than subject your client to an additionally delay by filing a motion for rehearing, it makes more sense to take a new petition directly to the supreme court. A motion for rehearing is not a predicate to filing a petition in the supreme court.

### Response

Rule 120(f) provides that if the case is set for oral argument, any interested party may submit an additional brief of authorities and a verified answer at least 10 days prior to the date scheduled for oral argument (unless another time is designated by the court). A general denial is not sufficient. The lack of a controverting response affidavit means running the risk that the relator's factual allegations will be taken as true. *See Keller v. Walker*, 652 S.W.2d 542, 544 (Tex. App.–Dallas 1983, orig. proceeding); *Hays v. Kessler*, 564 S.W.2d 496, 497 (Tex. Civ. App.–Dallas 1978, orig. proceeding).

There is no need to include exhibits with the response. Remember that it is the relator's burden to show that the commitment order is void. *See Exparte McIntyre*, 730 S.W.2d 411, 417 (Tex. App.–San Antonio 1987, orig. proceeding). If the relator fails to put all the relevant exhibits before the reviewing court, the response should simply argue that the relator has not carried his or her burden of showing that the commitment order is void.

### Conclusion

The purpose of a habeas corpus proceeding is to determine, as quickly as possible, whether someone is being illegally confined. Packaging your habeas corpus proceeding in compliance with the rules will enable the reviewing court to act as quickly as it can, and inspire its confidence that you know exactly what you are doing and are entitled to the relief you request.▪

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# CIVIL HABEAS CORPUS

## MAKING A LIST AND CHECKING IT TWICE:

## THE NEED FOR SPECIFICITY IN CHILD SUPPORT ENFORCEMENT ORDERS

By Leslie A. Werner

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The lack of specificity in the enforcement order is a common attack in habeas corpus proceedings before courts of appeals. In a typical case, a father is jailed for failure to pay child support and comes to the court of appeals seeking relief from that confinement.

This article discusses the requirement of specificity in child support enforcement orders under the Family Code.

### THE REQUIREMENT OF SPECIFICITY

The Texas Family Code provides:

> An enforcement order shall contain findings setting out specifically and with particularity or incorporating by reference the provisions of the final order, decree, or judgment for which enforcement was sought, and the time, date, and place of each and any occasion on which the respondent failed to comply with such provision, and setting out the relief awarded by the court.

Section 14.33(a) (Vernon Supp. 1989).

This section requires that any child support enforcement order set out the date, time, and place of the respondent's failure to make any child support payments. This is true whether the enforcement order is one of contempt, or a combined order of contempt and commitment.

Even when the underlying motion for contempt complies with the specificity requirements of Tex. Fam. Code Ann. § 14.31(b), § 14.33(a) mandates that the order enforcing the contempt also be equally specific. Enforcement orders must set out with specificity and particularity, either on the face of the order itself, by attached exhibit, or by incorporation by reference, the date, time, and place of each

and any occasion respondent is alleged to have violated the court's child support order.

A review of a trilogy of Fourteenth Court of Appeals cases illustrates how strictly the courts of appeal interpret the specificity requirements of § 14.33(a) in determining whether an enforcement order is void.

The most recent case applying § 14.33(a) is *Ex parte Boykins*, 764 S.W.2d 590 (Tex. App.-Houston [14th Dist.] 1989, orig. proceeding). In *Boykins*, the trial court held relator in contempt by "reason of his failure and refusal to make payments of child support heretofore ordered in the amount of $8,800 in defiance of the terms of the decree." The commitment order did not set out the date, time, or place of any of relator's alleged acts of contempt. The court held that a mere recitation of arrearages in an enforcement order does not comply with the specificity requirements of § 14.33(a), and it declared the order void. *Id.* at 592.

*Ex parte Bahmani*, 760 S.W.2d 769 (Tex. App.-Houston [14th Dist.] 1988, orig. proceeding), involved the enforcement of a previous order on a motion to modify that required the relator to pay $250 per month in child support. The motion for contempt alleged that relator was $1000 in arrears in the payment of the child support. The order of commitment stated:

> AND IT APPEARS to the Court that the said Gloria C. Hosseini (Bahmani) has been duly cited; and the Court, after having heard all of the evidence and arguments offered in this matter, is of the opinion that the said Gloria C. Hosseini (Bahmani) is guilty of contempt of this Court in that she has failed and refused to pay child support as heretofore ordered in an amount of $1000.

*Bahmani*, 760 S.W.2d at 770. Neither the motion for contempt, nor the commitment order stated which child support payments relator did not pay, and when she was supposed to pay them pursuant to the court's order on the motion to modify. As in *Boykins*, the *Bahmani* commitment order merely recited a total arrearage. Id. The court held that the order was void because it did not list every date when the relator had not made a required child support payment. *Id.*

*Ex parte Sinclair*, 746 S.W.2d 956 (Tex. App.-Houston [14th Dist.] 1988, orig. proceeding) also involved a commitment order that only recited total arrearages without listing the date, time, and place of each of relator's failure to make the required child support payments. But it had a twist in that at the hearing on the movant's motion for contempt, Sinclair stipulated that he owed support payments under the divorce decree, and was in arrears for payments under a previous court order. The court found that if a trial court seeks to rely on a stipulation, its order must either set out the stipulation in its entirety, or incorporate it sufficiently by reference. *Sinclair*, 746 S.W.2d at 958. Because the enforcement order did not indicate that Sinclair stipulated to arrearages, nor did it set out the stipulation, or make any attempt to incorporate by reference the stipulations, it was void. *Id.*

Some relators have attempted to use the specificity requirement of § 14.33(a) to have an enforcement order declared void where the order did not recite the place were relator failed to comply. While the courts have been strict in their interpretation of § 14.33(a) as it relates to specific dates of non-compliance, complaints of lack of specificity with regard to place have fallen on deaf ears.

For example, in *Ex parte Conoly*, 732 S.W.2d 695 (Tex. App.-Dallas 1987, orig. proceeding), the relator argued that two different orders finding him in contempt for failure to pay child support were void because neither order stated where he failed to pay. Under the divorce decree, Conoly was required to make all child support payments through the Dallas County Child Support Office. The place of payment provision of the divorce decree was recited in the movant's motion for contempt, and the order of contempt referred to the decree by day and by volume and page number.

The Dallas court held that where there is an incorporation by reference in the motion for contempt and the enforcement order to the place where relator is required to make payment, the omission of the place of each failure to pay does not render an enforcement order void. *Id.* at 697. *See also Ex parte Parrott*, 723 S.W.2d 342, 345 (Tex. App.-Fort Worth 1987, orig. proceeding).

## METHODS OF COMPLIANCE WITH THE SPECIFICITY REQUIREMENT

There are several ways to comply with the specificity requirements of § 14.33(a). The easiest way is to list, on the face of the enforcement order, the date, time, and place of each non-payment.

If the list is rather lengthy, encompassing non-payment over several years, list the occurrences of non-payment as a separate exhibit, reference the exhibit in the order, and attach the exhibit to the order. If this format is used, it is imperative that the exhibit be attached to the enforcement order.

Section 14.33(a) also provides that the enforcement order may incorporate by reference the provisions of the divorce decree and the listing of the specific occurrences of non-payment which are listed in the motion for contempt. If there has been any modification to the divorce decree, or any additional orders entered since the entry of the divorce decree, § 14.33(a) requires that the modified or additional order also be referenced in the enforcement order. *See Ex parte Bagwell*, 754 S.W.2d 490, 492 (Tex. App.–Houston [14th Dist.] 1988, orig. proceeding).

### CONCLUSION

Failure to carefully draft enforcement orders with the specificity required by § 14.33(a) will likely result in the respondent's release from confinement upon proper application for writ of habeas corpus to the court of appeals.▪

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## FINAL OR INTERLOCUTORY?:

## DETERMINING WHETHER A JUDGMENT IS RIPE FOR APPEAL

By Sheryl Roper

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The rule that appeals may be prosecuted only from a final judgment from a district or county court "is deceiving in its apparent simplicity and vexing in its application." So said the Texas Supreme Court in *North East Indep. School Dist. v. Aldridge*, 400 S.W.2d 893, 895 (Tex. 1966). In that case, the court formulated a rule to dispose of most finality problems that continually had plagued the courts.

> The *Aldridge* rule provides that:
>
> When a judgment, not intrinsically interlocutory in character, is rendered and entered in a case regularly set for a conventional trial on the merits..., it will be presumed for appeal purposes that the Court intended to, and did, dispose of all parties legally before it and of all issues made by the pleadings between such parties.

400 S.W.2d at 897-98.

Under this rule, appellate courts presume that a judgment entered after a conventional trial on the merits is final. The *Aldridge* rule does not apply to a judgment that:

> (1) is inherently interlocutory, such as a partial summary judgment;
>
> (2) does not adjudicate the issues before the parties, such as a dismissal on a nonsuit or plea and abatement;
>
> (3) contains express language that reserves some ultimate issues or decisions for future adjudication; or
>
> (4) was entered in a case not set for a conventional trial on the merits, such as a summary or default judgment.

*Zellers v. Barthel*, 727 S.W.2d 364, 365 (Tex. App.–Fort Worth 1987, no writ).

This article examines those judgments where the *Aldridge* presumption does not apply and that continue to present finality problems on appeal.

### FINAL OR INTERLOCUTORY?

For purposes of appeal, a final judgment is one that determines the rights of all the parties and disposes of all the issues "so that no future action by the court will be necessary in order to settle and determine the entire controversy." *Wagner v. Warnasch*, 156 Tex. 334, 338, 295 S.W.2d 890, 892 (1956). Conversely, an interlocutory judgment is one that fails to dispose of any party or issue and the case requires further judicial action to be fully tried and adjudicated. *See Wilcox v. St. Mary's Univ.*, 501 S.W.2d 875, 876 (Tex. 1973).

In determining whether a judgment is final, an appellate court considers the language of the judgment, the pleadings, and the evidence. *MacNelly*

*v. Cameron County,* 590 S.W.2d 182, 185 (Tex. Civ. App.–Corpus Christi 1979, no writ). Many finality problems occur because the judgment or order does not conform to the pleadings or it does not include a catchall phrase stating "that all relief not expressly granted is denied." *See Aldridge,* 400 S.W.2d at 898.

The purpose of a catchall clause "is to aid the determination of whether a particular judgment is final or interlocutory." *Koepke v. Koepke,* 732 S.W.2d 299, 300 (Tex. 1987). Although a judgment entered after a conventional trial on the merits is presumed final without such a statement, *see Aldridge,* 400 S.W.2d at 897-98, in a summary proceeding, this phrase or similar language is an indicia of finality. *See Schlipf v. Exxon Corp.,* 644 S.W.2d 453, 455 (Tex. 1982). In *McCurry v. Aetna Casualty and Sur. Co.,* 742 S.W.2d 863, 866 (Tex. App.–Corpus Christi 1987, writ denied), the court concluded that a summary judgment was final because the prayer of the summary judgment motion requested the court to "enter judgment that the Plaintiff take nothing and that Defendant recover its costs from Plaintiff."

The court in *Minns v. Minns,* 762 S.W.2d 675 (Tex. App.– Houston [1st Dist.] 1988, writ denied)(op. on reh'g), determined that a default judgment, which did not contain such language, was interlocutory. In that case, the wife's divorce action and personal injury suit were consolidated, and the divorce action was abated and stayed pending disposition of the personal injury action. When the husband did not comply with discovery orders, the trial court entered a default judgment for the wife on "all issues pertaining to liability." The judgment did not refer to the divorce action and had no catchall language. Thus, the court rejected the husband's argument on appeal that the conduct and statements of both the court and the parties indicated that the default judgment was intended to be final.

Of course, this catchall or "Mother Hubbard" provision does not convert a clearly interlocutory judgment, such as a partial summary judgment, into a final judgment. In *Teer v. Duddleston,* 664 S.W.2d 702, 704 (Tex. 1984), the court explained:

> There is no presumption in partial summary judgments that the judgment was intended to make an adjudication about all parties and issues. The Mother Hubbard clause that "all relief not expressly granted is denied" has no place in a partial summary judgment hearing. The concepts of a partial summary judgment on the one hand, and a judgment that is presumed to determine all issues and facts on the other, are inconsistent.

## INTERLOCUTORY JUDGMENTS

There are several reasons why a judgment may not be not final. Certainly, a judgment is not final if, by its very nature, it is interlocutory. Examples include a partial summary judgment, *The City of Beaumont v. Guillory,* 751 S.W.2d 491 (Tex. 1988), or an order overruling a plea to the jurisdiction or a plea in abatement. *Witt v. Witt,* 205 S.W.2d 612 (Tex. Civ. App.–Fort Worth 1947, no writ).

A judgment that expressly reserves some ultimate issue or decision for future adjudication is also interlocutory. For example, a divorce judgment is not final if it expressly reserves the issue of property division. *Garrison v. Texas Commerce Bank,* 560 S.W.2d 451 (Tex. Civ. App.–Houston [1st Dist.] 1977, writ ref'd n.r.e.). An order that grants a divorce and divides the property but reserves the issue of conservatorship for a later hearing is also interlocutory. *Kelley v. Kelley,* 583 S.W.2d 671 (Tex. Civ. App.–Austin 1979, writ dism'd).

Further, a judgment is not final if it does not dispose of all affirmative claims of all parties as against all other parties. For example, when a case is dismissed on a non-suit, on a plea of abatement, or for want of prosecution, the judgment is interlocutory if it does not dispose of a pending cross-action. *See, e.g., Davis v. McCray Refrigerator Sales Corp.,* 136 Tex. 296, 150 S.W.2d 377 (1941) (dismissed on plea in abatement without disposing of cross-action); *Legrand v. Niagra Fire Ins. Co.,* 743 S.W.2d 241 (Tex. App.– Tyler 1987, no writ) (dismissed for want of prosecution without referring to cross-action).

## SUMMARY AND DEFAULT JUDGMENTS

The *Aldridge* presumption of finality does not apply to summary and default judgments because they are not "rendered and entered in a case regularly set for a conventional trial on the merits." *Aldridge,* 400 S.W.2d at 897-98. While such judgments may appear to be final, they are often interlocutory because either they omitted a party to the suit, *see, e.g., Moody-Rambin Interests v. Moore,* 722 S.W.2d 790, 793 (Tex. App.–Houston [14th Dist.] 1987, no writ); failed to address a pleaded theory of recovery or a theory of damage, *see, e.g., Houston Health Clubs v. First Court of Appeals,* 722 S.W.2d 692, 693 (Tex. 1986); or did not dispose of a counterclaim or cross-action. *See, e.g., Hodde v. Young,* 672 S.W.2d 45, 47 (Tex. App.–Houston [14th Dist.] 1984, writ ref'd n.r.e.).

A summary judgment was interlocutory in *Baker v. Yeager,* 728 S.W.2d 895 (Tex. App.–Houston [1st Dist.] 1987, no writ), because it left a matter for further adjudication. There, the plaintiffs filed

suit for injunctive relief and monetary damages. The defendants then filed a motion to dismiss with prejudice and a motion for summary judgment, alleging that the parties had reached an out-of-court settlement and they were entitled to the settlement funds. The trial courts' order granting the summary judgment stated that it heard the motion to dismiss, but because the order did not dismiss the plaintiff's action, the court held that the summary judgment was interlocutory.

Appellate courts are divided on the issue of whether an unserved defendant affects the finality of a default judgment. Texas Rule of Civil Procedure 240 states that:

> Where there are several defendants, some of whom have answered or have not been duly served and some of whom have been duly served and have made default, an interlocutory judgment by default may be entered against those who have made default, and the cause may proceed or be postponed as to the others.

In *Reed v. Gum Keepsake Diamond Center,* 657 S.W.2d 524, 525 (Tex. App.–Corpus Christi 1983, no writ), the court relied on Texas Rule of Civil Procedure 240 and held that a default judgment was not final because an unserved co-defendant remained in the case. *See also Ratcliff v. Sherman,* 592 S.W.2d 81, 822 (Tex. Div. App.–Tyler 1979, no writ); *Dickerson v. Mack Fin. Corp.,* 452 S.W.2d 552, 555 (Tex. App.–Houston [1st Dist.] 1970, writ ref'd n.r.e.).

Other courts, however, have ignored rule 240 and held that unserved defendants do not prevent a default judgment from being final. In *First Dallas Petroleum, Inc. v. Hawkins,* 715 S.W.2d 168, 170 (Tex. App.–Dallas 1986, no writ), the Dallas court held that the default judgment operated as a nonsuit to the unserved defendant. *See also Young v. Hunderup,* 763 S.W.2d 611, 612 (Tex. App.–Austin 1989, no writ); *Zepeda v. Bulleri,* 739 S.W.2d 496, 497 (Tex. App.–San Antonio 1987, no writ). The Dallas court relied on *Youngstown Sheet & Tube Co. v. Penn,* 363 S.W.2d 230, 232 (Tex. 1963), a summary judgment case, wherein the supreme court held that the case against an unserved defendant stood as if there had been a discontinuance to him.

### OPEN-ENDED JUDGMENTS

Judgments that call for some future action, or "open-ended" judgments, are not necessarily interlocutory. Rather, their finality depends on the facts of the case.

If a judgment disposes of all parties and all issues, it is final even where further proceedings may be necessary to execute it or some incidental or dependent matter remains to be settled. *Hargrove v. Insurance Inv. Corp.,* 142 Tex. 111, 117, 176 S.W.3d 744, 747 (Tex. 1944). Thus, a judgment that contemplates future acts that are purely ministerial is final. For example, *Ferguson v. Ferguson,* 161 Tex. 184, 188, 338 S.W.2d 945, 947 (Tex. 1960), involved a divorce judgment that ordered an accounting and division of business profits. The court held the judgment was final because all the equities and rights of the parties had been determined. All that remained was a future accounting and distribution, which were ministerial acts incident to the final judgment. *See also Hinde v. Hinde,* 701 S.W.2d 637, 639 (Tex. 1985); *Gani v. Gani,* 495 S.W.2d 576, 578 (Tex. 1973).

On the other hand, an open-ended judgment is not final if it is contingent upon the happening of some future event or contingency. For example, a judgment is interlocutory if it provides that the property is to be divided and sold but does not award or divide the proceeds between the parties. *Treadway v. Treadway,* 576 S.W.2d 121, 122 (Tex. Civ. App.–Texarkana 1978), *appeal after remand,* 613 S.W.2d 59. Also, a judgment is not final if it makes the rights and obligations of the parties uncertain. A judgment with an unascertainable amount of damages, therefore, is interlocutory. *See Jones v. Liberty Mut. Ins. Co.,* 733 S.W.2d 240, 242 (Tex. App.–El Paso 1987, no writ).

### MAKING INTERLOCUTORY JUDGMENTS FINAL

When the court disposes of all the issues and parties in the case, an interlocutory judgment will merge into a final judgment and become final and appealable. A party can also convert an interlocutory judgment or order into a final and appealable judgment by way of a nonsuit or a severance. For example, if a plaintiff obtains a judgment against only one of several defendants, the judgment obviously is interlocutory. If the plaintiff then nonsuits the other defendants, however, the judgment becomes final. *H. B. Zachery Co. v. Thibodeaux,* 364 S.W.2d 192, 193 (Tex. 1963); Corso v. Carr, 634 S.W.2d 804, 809-10 (Tex. App.–Fort Worth 1982, writ ref'd n.r.e.). Also, when a judgment fails to address all the pleaded issues, the successful party can obtain a final judgment by severing that part of the case that is fully adjudicated. *See, e.g., Parker v. Holland,* 444 S.W.2d 581 (Tex. 1969) (default judgment was final where action to determine party's interest was severed from action for accounting and partition).

Procedural rules may have an impact, however, on a severed judgment's finality. In *Philbrook v. Berry,* 683 S.W.2d 378 (Tex. 1985), Philbrook filed a products liability suit against Owens-Illinois and other defendants. When Owens-Illinois did not timely answer, the trial court severed the action against Owens-Illinois and entered a default judgment for plaintiff. Nine days after the default judgment, Owens-Illinois filed its answer in the original suit. Owens then learned of the default judgment and filed a motion for new trial in the original cause, rather than the severed cause. The trial court set aside the default judgment and granted Owens-Illinois a new trial 53 days after the default judgment was signed. In a mandamus action, the supreme court concluded that the default judgment became final 30 days after it was signed because the motion for new trial was filed in the wrong cause and could not extend the trial court's plenary power beyond the proscribed 30 days.

The supreme court in *Philbrook* did not address an interesting issue that was noted in the court of appeal's opinion. *Philbrook v. Berry,* 679 S.W.2d 651 (Tex. App.- Houston [1st Dist.] 1984), *overruled,* 683 S.W.2d 378 (Tex. 1985). That is, the defendant Owens was never served with notice of the motion for severance, as required by Texas Rule of Civil Procedure 72. The First Court of Appeals has interpreted the supreme court's silence on this issue to mean that failure to give notice of the motion of severance does not preclude a severed interlocutory judgment from becoming final. *McGrew v. Heard,* No. 01-88-01183-CV (Tex. App.- Houston [1st Dist.], April 14, 1989, orig. proceeding).

### SUMMARY

The posture of a judgment determines whether that judgment will be presumed final on appeal. The appellate court will presume a judgment entered after a conventional trial on the merits is final, even if it does not address some of the pleaded issues or parties. Conversely, the appellate court will not presume that a judgment entered after a summary disposition is final and will examine the entire record and the language of the judgment to determine finality.▪

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## GHOSTS FROM THE PAST: IN APPEALING A SPECIAL APPEARANCE, IS A MOTION FOR NEW TRIAL STILL NECESSARY?

By Muffie Moroney

[Vinson & Elkins, Houston]

A motion for new trial may no longer be necessary as a prerequesite to appealing a special appearance. Recent opinions and secondary authorities suggest that the law has changed.

### PROCEDURAL CONTEXT

A defendant's special appearance to challenge the personal jurisdiction of a Texas court under TEX. R. CIV. P. 120a is an evidentiary proceeding that is normally tried to the court. *Minexa Arizona, Inc. v. Staubach,* 667 S.W.2d 563, 565 (Tex. App.- Dallas 1984, no writ); TEX. R. CIV. P. 120a(2); W. Dorsaneo, 2 Texas Litigation Guide § 60.05 et seq. (1989 and 1989 Supp.); 2 R. McDonald, Texas Civil Practice in District and County Courts § 9.05.3 (rev. 1982).

Although it seems unfair, only an order sustaining a special appearance, once severed and made final, is appealable. *See Frye v. Ross Aviation, Inc.,* 523 S.W.2d 500, 502 (Tex. Civ. App.-Amarillo 1975, no writ) (order overruling plea to jurisdiction may not be appealed until there is a final judgment); 2 R. McDonald, *supra,* § 9.05.3 n. 18, 19.

The careful plaintiff who chooses to appeal an adverse ruling on the jurisdictional issue will include in the record both findings of fact and conclusions of law (TEX. R. CIV. P. 296 *et seq.*) and also a statement of facts from the special appearance hearing. When one or both of those documents are missing from the record, burdensome and potentially fatal presumptions arise on appeal. *See generally* 4 R. McDonald, *supra,* § 60.111.

### MOTION FOR NEW TRIAL?

In years gone by, under certain circumstances, filing a motion for new trial under TEX. R. CIV. P. 324, specifically attacking the trial court's findings and conclusions has been a necessary predicate for appeal.

Often revised (and reviled) in recent years, the present improved version of Rule 324 more clearly sets out the circumstances under which such a motion is required in a jury or nonjury case. But even the current listing is not exhaustive, so that a motion for new trial or its equivalent could be required in yet other instances to satisfy TEX. R. APP. P. 52. The basis for Tex. R. App. P. 52 is former TEX. R. CIV. P. 373, appealed effective September 1, 1986:

> Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

*See* W. Dorsaneo, *supra,* § 140.01-02; Guittard, "Appeals, Writs of Error - 1980 Amendments to Appellate Rules," Advanced Civil Trial Law Course, Chap. U (State Bar of Texas, 1980) (under TEX. R. CIV. P. 373, "if the complaining party has not otherwise made his position known to the court, he would be well advised to do so in a motion for new trial or a motion to modify the judgment").

In the context of special appearances, the paranoid practitioner may take little comfort in global reassurances from the experts that motions for new trial are no longer required, for although TEX. R. CIV. P. 373 was repealed in 1986, it was reborn in TEX. R. APP. P. 52. *See* notes, repealed TEX. R. CIV. P. 373 (Vernon Supp. 1989).

For example, McDonald tells us that when a proceeding is tried to the court, no motion for new trial is needed except to present a complaint upon which evidence must be heard, and that "[i]t is immaterial whether the subsequent appeal proceeds upon a statement of facts, findings of fact and conclusions of law, both, or neither." 4 R. McDonald, *supra,* § 18.04.2. Of course, it is not "immaterial" whether those documents are omitted from the record with respect to the various presumptions on appeal. *Id.* at § 16.10.

In the main text discussion of the appeal of special appearances, Dorsaneo suggests "that the plaintiff make a motion for new trial, specifically pointing out his objections and exceptions to the court's ruling on the jurisdictional question," citing *Southwestern Mobile Homes, Inc. v. Panel Corp. of America,* 373 S.W.2d 879 (Tex. Civ. App.– Tyler 1963, no writ). W. Dorsaneo, *supra,* § 60.111. But in the supplement, the author states, without explanation, that a motion for new trial is no longer required. *Id.* (1989 Supp.)

What happened in *Southwestern Mobile Homes,* and what has happened since then?

## A RED HERRING

In appealing an order granting a special appearance, the plaintiff in *Southwestern Mobile Homes* brought forward the trial court's findings of fact and conclusions of law without challenging them, and did not include a statement of facts in the record. 373 S.W.2d at 880. The court of appeals held that in the absence of a statement of facts, unchallenged findings and conclusions are binding on appeal if they support the judgment, suggesting the necessity of a motion for new trial or its equivalent under those circumstances. *Id. Accord Ferris v. Moore,* 441 S.W.2d 302, 303 (Tex. Civ. App.–Amarillo 1969, no writ).

The Texas Supreme Court has distinguished *Southwestern Mobile Homes.* In *Kissman v. Bendix Home Systems, Inc.,* 587 S.W.2d 675 (Tex. 1979), an appeal from a bench trial in which both findings of fact and conclusions of law and a statement of facts were in the record, the court allowed objections to the findings and conclusions to be made on legal sufficiency grounds for the first time on appeal, without a predicate motion for new trial. 587 S.W.2d at 678. *Accord Swanson v. Swanson,* 148 Tex. 600, 228 S.W.2d 156, 157-58 (1950). There is no mention in either *Kissman* or *Swanson* of any other requirement for lodging a no evidence complaint with the trial court, under TEX. R. CIV. P. 373 or otherwise.

More recently, the Fourteenth Court of Appeals, with the apparent blessing of the Texas Supreme Court, has held that it is not necessary to file a motion for new trial before raising a factual sufficiency complaint on appeal from a nonjury trial. *Bluebonnet Express, Inc. v. Employers Insurance of Wausau,* 651 S.W.2d 345, 352 (Tex. App.–Houston [14th Dist.] 1983, writ ref'd n.r.e.). And the Eastland Court of Appeals has allowed a judgment to be attacked on legal and factual sufficiency grounds for the first time on appeal, even in the absence of findings of fact and conclusions of law. *Farmer's Mutual Protective Ass'n v. Wright,* 702 S.W.2d 295, 296-97 (Tex. App.–Eastland 1985, no writ). Again, in neither of these cases did the court mention the possible effect of them-extant Rule 373. *See also Roberson v. Robinson,* 768 S.W.2d 280 (Tex. 1989) (per curiam).

### CONCLUSION

We might reasonably come to the conclusion, then, that between the numerous revisions to Rule 324, the repeal of Rule 373, and the ascendancy of common sense in the application of the Rules of Civil Procedure by the courts, the motion for new trial no longer has a place in an appeal of a special appearance. But the specter of TEX. R. APP. P. 52 still looms. A simple revision to Rule 324 would exorcise the ghosts for all time: "(b) Motion for New Trial Required. A point in a motion for new trial is a prerequisite to only the following complaints on appeal, and in no other circumstances: ...."

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## STATE CIVIL APPELLATE UPDATE

By Mark E. Steiner

[Assistant Professor, South Texas College of Law]

**Supreme court reasonably explains a reasonable explanation for failing to timely file an appeal bond.**

*Garcia v. Kastner Farms, Inc.*, 774 S.W.2d 669 (1989).

The issue in this case is whether Garcia reasonably explained his failure to timely file a cost bond for appeal.

In the court of appeals, the cost bond was due on June 9. The trial court did not sign findings and conclusions until June 14. The cost bond was filed on June 24 and Garcia requested an extension of time to that date. Garcia's counsel stated in the motion to extend that until he had received and reviewed the findings and conclusions, he could not adequately inform his client of the propriety or necessity of an appeal. The court of appeals held this explanation was not a reasonable one under the applicable caselaw.

In *Meshwert v. Meshwert*, 549 S.W.2d 383 (Tex. 1977), the supreme court held that the phrase "reasonably explaining" to mean "any plausible statement of circumstances indicating that failure to file within the [required] period was not deliberate or intentional, but was the result of inadvertence, mistake or mischance."

The supreme court reviews the *Meshwert* standard and concludes that "this liberal standard of review encompasses the negligence of counsel as a reasonable explanation for the necessity of an extension." The proper focus under *Meshwert* is on a lack of deliberate or intentional failure to comply.

The supreme court holds that the more lenient standard used in the Dallas Court of Appeals in *Heritage Life Ins. Co. v. Heritage Group Holding Corp.*, 751 S.W.2d 229 (Tex. App.–Dallas 1988, writ denied) is correct. The Dallas court, in applying *Meshwert*, held that any conduct short of deliberate or intentional non-compliance qualifies as inadvertence, mistake, or mischance – even if that conduct can also be characterized as professional negligence.

The supreme court concludes that Garcia's attempted late filing was not intentional or deliberate, but was due to the attorney's misunderstanding of the law.

**Supreme Court simplifies the meaning of anticipation of litigation: It doesn't mean anything.**

*Flores v. Fourth Court of Appeals*, 32 TEX. SUP. CT. J. 497 (June 28, 1989)(orig. proceeding).

The court in this 6-3 opinion holds that, in determining privilege, the filing a notice of claim for workers' compensation does not constitute litigation. The court further holds that the determination of good cause for anticipating litigation requires both an objective and subjective approach. If any defendant can overcome these obstacles, Justice Mauzy also suggests that otherwise privileged material is discoverable under new TEX. R. CIV. P. 166b(3)(e), which allows discovery upon a showing of undue hardship.

The majority also embellishes its opinion with a bow to the discretion of the trial court and the limited scope of mandamus review. The supreme court has championed this strict approach to mandamus relief whenever it supports the result of the case at hand. *Cf. Loftin v. Martin*, 32 TEX. SUP. CT. J. 401 (May 24, 1989).

Justice Gonzales dissents and advocates a bright-line rule that holds a filing of a claim constitutes the beginning of litigation. Justice Gonzales also criticizes the objective-subjective analysis because it demands "clairvoyant knowledge."

**Mandamus relief available where written order for reinstatement is not signed within proper period.**

*Emerald Oaks Hotel/Conference Center, Inc. v. Zardenetta,* 32 TEX. SUP. CT. J. 601 (September 13, 1989)(orig. proceeding)(per curiam).

The supreme court grants mandamus relief where a written order of reinstatement was not signed during the period of the trial court's plenary power and jurisdiction. The court holds that a "trial court's oral pronouncement and docket entry reinstating a cause is not an acceptable substitute for the written order" required by TEX. R. CIV. P. 165a(3).

This case is a good example of why the supreme court is responsible for the current confusion in mandamus law. Here, mandamus relief is entirely appropriate yet the court fails to explain the well-settled basis for granting mandamus relief: void trial court orders are subject to mandamus review. *See e.g. Dikeman v. Snell,* 490 S.W.2d 183 (Tex. 1973).

**The factual sufficiency merry-go-round.**

*Lofton v. Texas Brine Corp.,* 32 TEX. SUP. CT. J. 612 (September 20, 1989).

In this case's second trip to Austin, the supreme court holds that the court of appeals "disregarded the direct instructions of this court" in its opinion on remand. The majority opinion holds that the court of appeals "may not, as it has thus far done, substitute its own judgment for that of the finder of fact." The majority assumes that the majority of the court of appeals has had "difficulty recognizing some contrary evidence and inferences and applying the correct standard of law." In its original opinion and in the opinion on remand, a divided panel of the court of appeals had held that the evidence was factually insufficient to support the finding of proximate cause against a defendant.

Both Justice Gonzalez and Justice Hecht dissent. Justice Gonzalez is dismayed with "playing ping pong with the court of appeals" and complains that *Pool v. Ford Motor Co.,* 715 S.W.2d 629 (Tex. 1986) is being used to "second guess" the courts of appeals on factual sufficiency questions.

Justice Hecht, joined by Chief Justice Phillips and Justice Cook, complains that "to accomplish the desired end, the court must keep reversing the judgment of the court of appeals until it reaches a result that the court approves."

This case demonstrates what happens when the court of appeals and the supreme court both try to sit in the jury box. The jury box was not designed to hold either court; it certainly cannot hold both.

**Appellee may raise cross-points without perfecting an independent appeal.**

*Donwerth v. Preston II Chrysler-Dodge, Inc.,* 32 TEX. SUP. CT. J. 517 (June 5, 1989).

The supreme court holds that an appellee may raise cross-points without perfecting an independent appeal. The Dallas Court of Appeals consistently has held for the last couple of years that an appellee must perfect an independent appeal to bring a cross-point that complains of a judgment. *See* Butler, *The Need to Perfect an Independent Appeal to Raise Cross-Points,* II Appellate Advoc. Winter, 1989, at 3. This assault on cross-points was misguided and was based initially on an errant sentence in *Young v. Kilroy Oil Co.,* 673 S.W.2d 236 (Tex. App.–Houston [1st Dist.] 1984, writ ref'd n.r.e.). In that case, the opinion included a sentence that suggested that cross-points must be "directed to the defense of the judgment against appellant." The case implied that if the appellee raised cross-points that did not urge affirmance of the trial court's judgment, the appellee must file an independent appeal.

The Dallas Court of Appeals began rejecting cross-points that were not directed to the defense of the judgment. After a while, the court would not consider any cross-points where an independent appeal was not perfected.

The supreme court has addressed this problem. The court holds:

> Unless an appellant limits his appeal pursuant to Texas Rule of Appellate Procedure 40(a)(4), an appellee may complain by cross-point in his brief in the court of appeals, without perfecting an independent appeal, of any error in the trial court as between appellant and appellee. In this case, the court of appeals was required to consider the Donwerths' cross-points.

**What you don't know can't hurt you: time period for filing a motion for rehearing of an administrative order does not begin until agency notifies parties of order.**

*Commercial Life Ins. Co. v. Texas State Board of Ins.,* 774 S.W.2d 650 (1989).

Because Commercial Life did not learn of an adverse administrative order until 17 days after its rendition, it did not file a motion for rehearing within the 15-day period required by section 16(e) of the Administrative Procedure and Register Act. TEX. REV. CIV. STAT. ANN. art. 6252-132 § 16(e) (Vernon Supp. 1989). The motion for rehearing is a predicate for judicial review of an administrative order. The lower courts had held that Commercial Life had not perfected review in a timely manner. The supreme court holds that the notice provision of section 16(b) requires prompt notice of an administrative order. The period for filing a motion for rehearing does not begin until an agency complies with its "statutory duty to notify the parties of the order or decision."

Because of a recent amendment to § 16(b), the effect of this holding is limited. Section 16(b) now provides that a party is presumed to have been notified on the date the notice is mailed and requires that the motion for rehearing be filed within 20 days after notification. The holding of this case, therefore, controls only "cases tried before an administrative agency prior to the effective date of the amendment."

**Appellant's motion for judgment in the trial court does not waive complaints about judgment on appeal.**

*First Nat'l Bank v. Fojtik,* 32 TEX. SUP. CT. J. 510 (June 28, 1989)(per curiam).

The supreme court holds there "must be a method by which a party who desires to initiate the appellate process may move the trial court to render judgment without being bound by its terms." The Court disagrees with that portion of the court of appeals' opinion that held the appellants could not complain about jury findings of zero damages. The court of appeals had ruled that appellants' motion for judgment on the verdict amounted to an affirmation that the jury findings were supported by the evidence. The apellants had attempted to reserve their complaints by stating in the motion that they "disagree with the findings of the jury" and did not concur with the "content and result" of the judgment. Disagreeing with the court of appeals, the supreme court holds that the reservation of the right to complain was "an appropriate exercise" of that right.

**Court of appeals' authority to limit remand is limited.**

*Otis Elevator Co. v. Bedre,* 32 TEX. SUP. CT. J. 480 (June 21, 1989)(per curiam).

TEX. R. APP. P. 81(b)(1) authorizes a partial reversal and remand only if the issues are severable. Here, the court rules that the liability issues between the plaintiff and the defendant–the defendant's liability and the plaintiff's contributory negligence–are indivisible. The court of appeals erred when it reversed in part and remanded for a new trial solely on the issues of defendant's liability. The court of appeals had held that the jury failing to find the plaintiff contributorily negligent meant that the jury had "absolved" the plaintiff of negligence.

**A question of statutory construction is not a fact issue that precludes summary judgment.**

*Johnson v. City of Fort Worth,* 774 S.W.2d 653 (1989) (per curiam).

Matters of statutory construction are questions of law for the court to decide and not issues of fact. Here, the court of appeals had held that a summary judgment was improper because a defense was based on a particular reading of a statute of response.▪

## DID YOU KNOW?

If the movant on a default judgment relying on substituted service under TEX. CIV. PRAC. & REM. CODE (Vernon 1986) § 17.045(a,d), fails to use the magic words defendant's "home or home office address" for service, a direct attack on the judgment will most likely be granted. *See Chaves v. Todaro,* 770 S.W.2d 944 (Tex. App.–Houston [1st Dist.] 1989, no writ), and *Bank of America v. Love,* 770 S.W.2d 890 (Tex. App.–San Antonio, 1989, writ pending).–*Susan Allinger, Houston.*

# State Criminal Appellate Update

By Alan Curry

[Assistant District Attorney, Harris County, Houston]

## COURT OF CRIMINAL APPEALS

**Old appellate rules under Texas Code of Criminal Procedure apply to appeals perfected under those rules.**

*Harris v. State,* No. 69,366 (Tex. Crim. App., June 28, 1989) (not yet reported)(slip opinion at 5).

Since the appellant's appeal was perfected under the old appellate rules of the Texas Code of Criminal Procedure, those rules would apply to the appellant's appeal, and not the Texas Rules of Appellate Procedure.

**Loss of appellate record does not automatically result in reversal of conviction.**

*Harris v. State,* No. 69,366 (Tex. Crim. App., June 28, 1989) (not yet reported)(slip opinion at 7).

As one of the bases for finding that the appellant's conviction should not be reversed because of the loss of the court reporter's notes of a pretrial hearing, the court of criminal appeals notes that "the missing portion of the record is a transcription of the notes of a pretrial hearing that are not essential or even applicable to a resolution of the appeal."

**Proper harmless error analysis revealed.**

*Harris v. State,* No. 69,366 (Tex. Crim. App., June 28, 1989) (not yet reported)(slip opinion at 36).

A reviewing court in applying the harmless error rule should not focus upon the propriety of the outcome of the trial. Instead, an appellate court should be concerned with the integrity of the process leading to the conviction.

Consequently, the court should examine the source of the error, the nature of the error, whether or to what extent it was emphasized by the State, and its probable collateral implications. Further, the court should consider how much weight a juror would probably place upon the error. In addition, the court must also determine whether declaring the error harmless would encourage the State to repeat it with impunity.

In summary, the reviewing court should focus not on the weight of the other evidence of guilt, but rather on whether the error at issue might possibly have prejudiced the jurors' decision-making; it should ask not whether the jury reached the correct result, but rather whether the jurors were able to properly apply the law to facts in order to reach a verdict. Consequently, the reviewing court must focus upon the process and not on the result.

In other words, a reviewing court must always examine whether the trial was an essentially fair one. If the error was of a magnitude that it disrupted the jurors' orderly evaluation of the evidence, no matter how overwhelming it might have been, then the conviction is tainted. Again, it is the effect of the error and not the other evidence that must dictate the reviewing court's judgment.

**Loss or destruction of exhibits can prevent consideration of point of error.**

*Knox v. State,* 769 S.W.2d 244, 247 (Tex. Crim. App. 1989).

On the State's petition for discretionary review, the court of criminal appeals held that it could not review whether an examination of a defendant arrested for driving while intoxicated amounted to custodial interrogation because the videotape of the examination has been mistakenly erased.

**Reviewing court should reform probation revocation judgment if proper basis for judgment appears in record.**

*Mazloum v. State,* 772 S.W.2d 131 (Tex. Crim. App. 1989).

When a trial court sets forth in its judgment revoking a defendant's probation an invalid basis for revoking the defendant's probation, an appellate court can and should reform the judgment to show a valid basis for revocation of the defendant's probation when that valid basis was given by the trial court in its oral pronouncement of the judgment.

## TEXAS COURTS OF APPEALS

**Appealability of error when a defendant voluntarily enters a plea of guilty or nolo contendere.**

*Cooper v. State,* 773 S.W.2d 749 (Tex. App.–Corpus 1989).

If a defendant voluntarily enters a plea of guilty or nolo contendere *without* an agreed recommendation from the State as to punishment, the defendant still retains the right to appeal concerning errors which allegedly occurred subsequent to the entry of the plea. *Cf. Helms v. State,* 484 S.W.2d 925 (Tex. Crim. App. 1972).

*Fernandez v. State,* No. 4-88-618-CR (Tex. App.–San Antonio, July 31, 1989)(not yet reported).

If a defendant voluntarily enters a plea of guilty or nolo contendere with an agreed recommendation from the State as to punishment, the defendant still retains the right to appeal alleged errors that occurred after the entry of the plea. *Cf.* TEX. R. APP. P. 40(b)(1).

*Francis v. State,* 774 S.W.2d 768 (Tex. App.–Corpus Christi, 1989).

If a defendant voluntarily enters a plea of guilty or nolo contendere with an agreed recommendation from the State as to punishment, but does not state in his notice of appeal that he is appealing with permission of the trial court as required by TEX. R. APP. P. 40(b)(1), he may still appeal alleged error if he was in fact given permission to appeal by the trial court. *See* TEX. R. APP. P. 83.

*See Miles v. State,* No. 7-89-177-CR (Tex. App.–Amarillo, July 27, 1989)(not yet reported). *Cf. Jackson v. State,* No. 14-88-823-CR (Tex. App.–Houston [14th Dist.], July 20, 1989)(not yet reported) (Fourteenth Court of Appeals continues to dismiss appeals where the appellant fails to comply with *Tex. R. App. P.* 40(b)(1)).

**If defendant's conviction is to be affirmed, State's cross-point of error will not be considered.**

*Hargrove v. State,* 774 S.W.2d 771 (Tex. App.–Corpus Christi 1989).

If a defendant's conviction is to be otherwise affirmed, a court of appeals need not consider a State's cross-point of error brought under TEX. CRIM. PROC. CODE ANN. art. 44.01(c) (Vernon Supp. 1989) since such a consideration is not necessary to the disposition of the appeal. *See* TEX. R. APP. P. 90(a).

**Defendant's repeated failure to file appellate brief may force court of appeals to consider appeal without appellate brief.**

*Coleman v. State,* 774 S.W.2d 736( Tex. App.–Houston [14th Dist.] 1989).

When an appellant has failed to file an appellate brief, the trial court has already held a hearing under TEX. R. APP. P. 74(1)(2), and it has been determined that the appellant still desires to prosecute his appeal, but has still failed to file an appellate brief, an appellate court is forced to consider the appellant's appeal without the benefit of the appellant's brief.

**After a supplemental record is filed, a defendant may only bring new points of error based upon that supplemental record.**

*Rice v. State,* 773 S.W.2d 27 (Tex. App.–Houston [14th Dist.], 1989, no pet.).

When a supplemental appellate record is properly filed, an appellant is not entitled to file a supplemental brief that raises new points of error that are based upon alleged errors present in the appellate record that was originally filed.

**When hearing on motion for new trial is denied, appellate court should remand to trial court to hold that hearing.**

*McMillan v. State,* 769 S.W.2d 675, 677 (Tex. App.–Dallas 1989, no pet.); *Haight v. State,* 772 S.W.2d 159, 162 (Tex. App.–Dallas 1989, no pet.).

When a defendant has been improperly denied a hearing on a motion for new trial, the proper appellate remedy is for the appellate court to remand the case and direct the trial court to correct its error. *See* TEX. R. APP. P. 81(a).

**TEX. CRIM. PROC. CODE ANN. art. 44.29(b) (Vernon Supp. 1989) is not an ex post facto law.**

*Cooper v. State,* 769 S.W.2d 301, 305-07 (Tex. App.–Houston [1st Dist.], 1989, pet. filed).

TEX. CRIM. PROC. CODE ANN. art. 44.29(b) (Vernon Supp. 1989) applies to a defendant's case even if his trial ended before the date on which the statute took effect. *See Hernandez v. State,* 774 S.W.2d 319 (Tex. App.–Dallas 1989)(refused to decide the issue because it was premature).▪

# FEDERAL CIVIL APPELLATE UPDATE

By W. Wendell Hall

[Participating Associate, Fulbright & Jaworski, San Antonio]

## FIFTH CIRCUIT COURT OF APPEALS

**District court's order granting new trial because of excessive damages will be reversed only where there is plain injustice or monstrous or shocking resnlt.**

*Worsham v. City of Pasadena,* No. 88-2770 (5th Cir. Aug. 31, 1989).

In this case, the district court granted a new trial on the issue of damages because the district court concluded that the jury's verdict was against the great weight of the evidence. The court, recognizing that the district court's decision was subject to the abuse of discretion standard of review held that where the size of the verdict, and not the evidence presented, rests as the basis for the new trial, the issue is a matter for the trial court which had the benefit of hearing the testimony and of observing the demeanor of the witnesses. The court also held that great deference must be accorded the district court's judgment under these circumstances, and that reversal is appropriate in situations where the reviewing court is pressed to conclude that there is "plain injustice" or "monstrous" or "shocking" result.

**Summary judgment cases.**

*McIncrow v. Harris County,* 878 F.2d 835 (5th Cir. 1989).

In reviewing FED. R. CIV. P. 56, the court observed that the rule does not require a statement of the reasons by a trial judge for granting a motion for summary judgment. However, the court observed that it has emphasized the importance of a detailed discussion by the trial judge of the reasons for granting a summary judgment. Where it has no notion of the basis for a district court's decision, because its reasoning is vague or simply left unsaid, the court noted that there is little opportunity for effective review. In appropriate cases, the court held that it has not hesitated to remand such cases for an illumination of the court's analysis through some formal or informal statement of reasons.

*Veillon v. Exploration Services, Inc.,* 876 F.2d 1197 (5th Cir. 1989).

In reviewing a district court's refusal to grant a party's motion for summary judgment, the court held that a district judge has the discretion to deny a FED. R. CIV. P. 56 motion even if the movant otherwise successfully carries its burden of proof "if the judge has doubt as to wisdom of terminating the case before a full trial."

**Standard of review of administrative agency decisions.**

*Acadian Gas Pipeline System v. Federal Energy Regulatory Comm'n,* 878 F.2d 865 (5th Cir. 1989).

In reviewing FERC's interpretation of its own regulations, the court observed that while the judiciary begins with the presumption that the agency action is valid, a court's review should not be categorized as a summary endorsement of the agency's actions. The court noted that it does not serve the function of a mere rubber stamp of agency decisions. Rather, its review of agency actions should be "searching and careful," and the agency's interpretation must rationally flow from the language of the regulation and any departure from past interpretations of the same regulation must be adequately explained and justified. Where an agency fails to distinguish past practice, the court concluded that its actions may indicate that lack of reasoned articulation and responsibility vitiates the difference the reviewing court would otherwise show.

**Certified mail is appropriate under FED. R. APP. P. 25(a).**

*Prince v. Poulos,* 876 F.2d 30 (5th Cir. 1989).

Appellant moved to strike the appellees' brief on the grounds that it was not timely filed. Appellees mailed their brief by certified registered mail on the due date. The appellant argued that certified mail was not first class mail nor was it "the most expeditious form of delivery by mail" under FED. R. APP. P. 25(a). The court held that certified mail was first class and appropriate under Rule 25(a). The appellant also argued that the appellees should have used Federal Express, but the court held that Webster's definition of "mail" involves a "public authority" and that because Federal Express is not a "public authority" it need not be used under Rule 25(a).

**Four factors determine if district court abuses its discretion in dismissing case for discovery abuse.**

*Prince v. Poulos,* 876 F.2d 30 (5th Cir. 1989).

The plaintiff's employment case was dismissed for discovery abuse. The court held that the district court's decision to dismiss the complaint with prejudice for violation of a discovery order could only be reversed if it amounted to an abuse of discretion. The court observed that four factors are considered in determining if there was an abuse of discretion: (1) dismissal is authorized only when the failure to comply with the court's order results from willfulness or bad faith, and not from the inability to comply; (2) dismissal is proper only where the deterrent value of FED. R. CIV. P. 37 cannot be substantially achieved by the use of less drastic sanctions; (3) whether the other party's preparation for trial was substantially prejudiced; and (4) dismissal may be inappropriate when neglect is plainly attributable to an attorney rather than a blameless client, or when a party's simple negligence is grounded in confusion or sincere misunderstanding of the court's orders. In this case, the appellant (who was an attorney) engaged in piecemeal disclosure designed to impede discovery, was disingenuous with the court, was twice assessed monetary sanctions, continued to ignore discovery orders, prejudiced the appellees' case with his delay, therefore, the court found that dismissal was proper under all of the circumstances.

**Review of constitutionality of statute subject to de novo standard of review.**

*International Society for Krishna Conscious of New Orleans, Inc. v. City of Baton Rouge,* 876 F.2d 494 (5th Cir. 1989).

In this challenge to the constitutionality of a municipal ordinance prohibiting solicitation of operation of motor vehicles, the court held that whether the ordinance impermissibly infringed on the appellant's free speech rights was a mixed question of law and fact subject to the de novo standard of review.

**Review of judgments n.o.v.**

*Landry v. The Cooper/T. Smith Stevedoring Co.,* 880 F.2d 846 (5th Cir. 1989).

In this review of a judgment n.o.v., the court held that a judgment n.o.v. is proper only when the facts and inferences point so strongly and overwhelmingly in favor of the moving party that reasonable people could not arrive at a contrary verdict, viewing the facts in the light most favorable to the party against whom the motion is made, and giving that party the advantage of every fair and reasonable inference which the evidence justifies. The court observed, however, that there must be a "conflict in substantial evidence" to create a jury question; a mere scintilla of proof is insufficient.

**Denial of Rule 60(b) motion is final and appealable.**

*Schwegmann Bank & Trust Co. of Jefferson v. Simmons,* 880 F.2d 838 (5th Cir. 1989).

The court held that an appeal from a FED. R. CIV. P. 60(b) motion is final and appealable. The court held that an appeal of the denial of a Rule 60(b) motion did not bring up the underlying judgment for review. The court also held that the converse of that rule is equally true. Thus, an appeal of the underlying judgment does not bring up a subsequent denial of a Rule 60(b) motion.

**Court considers eight factors in reviewing district court's action on a Rule 60(b) motion.**

*Hester International Corp. v. Federal Republic of Nigeria,* 879 F.2d 170 (5th Cir. 1989).

In reviewing a FED. R. CIV. P. 60(b) motion (motion to set aside judgment), the court observed that the trial court's decision is reviewed only for an abuse of discretion. However, the court delineated eight factors to be considered in reviewing a district court's ruling on a motion under Rule 60(b): (1) that final judgment should not lightly be disturbed; (2) that the Rule 60(b) motion is not to be used as a substitute for appeal; (3) that the rule should be liberally construed in order to achieve substantial justice; (4) whether the motion was made within a reasonable time; (5) whether – if the judgment was a default or a dismissal in which there was no consideration of the merits – the interest in deciding cases on the merits outweighs, in the particular case, the interest in the finality of judgments, and there is merit in the movant's claim or defense; (6) whether – if the judgment was rendered after a trial on the merits – the movant had a fair opportunity to represent his claim or defense; (7) whether there are intervening equities that would make it inequitable to grant relief; and (8) any other factors relevant to the justice of the judgment under attack. The court went on to state that these factors are to be considered in light of the great desirability of preserving the principle of the finality of judgments.

**Motion to remand may be reviewed on appeal if part of a final order disposing of case.**

*Aaron v. National Union Fire Ins. Co. of Pittsburgh, Pennsylvania,* 876 F.2d 1157 (5th Cir. 1989).

In this case, the district court simultaneously denied the plaintiff's motion to remand and granted the defendant's Rule 12(b)(6) motion to dismiss. The district court subsequently made the order dismissing the two defendants a final order pursuant to

Rule 54(b). Therefore, the court held that a final appealable order was entered along with the denial of the motion for remand, and that it could review the motion for remand without a need to resort to the extraordinary remedy of mandamus.

**Dismissal for failure to prosecute is a harsh remedy that is given very careful review.**

*Markwell v. County of Bexar,* 878 F.2d 899 (5th Cir. 1989).

In this review of a FED. R. CIV. P. 41(b) dismissal with prejudice for failure to prosecute, the court observed that the district court's action is an extreme sanction which is to be used only when a plaintiff's conduct has threatened the integrity of the judicial process in a way which leaves the court no choice but to deny that plaintiff its benefits. The court held that it is reluctant to affirm such a dismissal upon a party solely because of the sins of his counsel. In close cases, the court observed that it would particularly examine the record for proof of aggravating factors: (1) that the plaintiff personally contribute to the delay, (2) that the defendant was prejudiced as a result of delay, or (3) that the delay was intentional on the plaintiff's part.

**Sanction order against attorney who no longer represents a party in the case is final and appealable.**

*Markwell v. County of Bexar,* 878 F.2d 899 (5th Cir. 1989).

Following a decision of the Third Circuit, *Evanson, Auchmuty & Greenwald v. Holtman,* 775 F.2d 535 (3d Cir. 1985), the court concluded that, under the collateral order doctrine, it had appellate jurisdiction over an order of a district court imposing a monetary sanction against an attorney under FED. R. CIV. P. 11 (if an immediate appeal of the sanctions order would not impede the progress of the underlying litigation), where the attorney had withdrawn his appearance in favor of substituted counsel, and the district court had not yet entered a final judgment in the underlying action.■

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## FEDERAL CRIMINAL APPELLATE UPDATE

By Joel M. Androphy

[Partner, Berg & Androphy, Houston]

### COURTS OF APPEALS

**Speedy Trial Act time limitation tolled by filling motion to dismiss pursuant to Speedy Trial Act.**

*United States v. Bruckman,* 874 F.2d 57 (1st Cir. 1989).

In case where time limitation of Speedy Trial Act, 18 U.S.C. §§ 3161- 3174, expired on Saturday, First Circuit determined that FED. R. CRIM. P. 45(a) did not require trial to begin until the following Monday. By filing motion to dismiss pursuant to Speedy Trial Act on Monday, Monday because an excludable day and made trial on Tuesday proper.

**Unlike habeas petitioner, appellant seeking relief through motion to vacate or correct sentence not held to cause and prejudice standard.**

*United States v. Marcello,* 876 F.2d 1147 (5th Cir. 1989).

Appellant who sought relief through a motion to vacate or correct sentence based on error in theory of prosecution was not held to cause and prejudice standard applied to habeas petitioners.

**Inadvertent service by juror who had been peremptorily struck by defense is not grounds for new trial.**

*United States v. Bilecki,* 876 F.2d 1128 (5th Cir. 1989).

Defendant realized after conviction that one of jurors who convicted defendant had been peremptorily struck from the panel by the defendant. The juror is question had been a deputy sheriff for 25 years who offered in voir dire that he would give law enforcement officer's testimony more credibility. The court upheld the conviction. The court determined that the sheriff's service on the jury was not plain error pursuant to FED. R. CRIM. P. 51, 52.

**Time limitation for petition for writ of error coram nobis.**

*United States v. Cooper,* 876 F.2d 1192 (5th Cir. 1989).

Fifth Circuit panel, noting a split among the circuits on the issue, determines that petition for writ of error coram nobis is a civil procedure subject to 60-day appeal period provided in FED. R. APP. P. 4(b). Judge Gee, dissenting, would apply the time limit used for criminal appeals provided in FED. R. APP. P. 4(b).

**State's use of non-Mirandized statements to State psychiatrist violates Fifth Amendment, but is harmless.**

*Brown v. Butler,* 876 F.2d 427 (5th Cir. 1989).

In 1974 armed robbery case Louisiana used testimony of psychiatrist to rebut insanity defense. The psychiatrist had examined defendant in order to determine his competency to stand trial. The court determined that because the defendant had not been given a Miranda warning before his meeting with psychiatrist that it was improper to use statements that later made by defendant against him at trial. The panel then held that this amounted to harmless error.

**Defendant's prearrest statement that he would not confess invokes privilege against self incrimination.**

*Coppola v. Powell,* 878 F.2d 1562 (1st Cir. 1989).

Prearrest statement of habeas petitioner that he would not confess invoked privilege against self incrimination. Use of statement against defendant who did not testify was not harmless error.

**Appellate court uses abuse of discretion standard in admission of prejudicial evidence pursuant to FED. R. EVID. 403.**

*U. S. v. Bratton,* 875 F.2d 439 (5th Cir. 1989).

Admission of evidence that husband abused wife was upheld in prosecution for possession of stolen property. The evidence was allowed as attempt to impeach wife's testimony favorable to husband as motivated by fear. The court determined that the appropriate standard of review is whether the admission of the evience was an abuse of discretion. The appellate court quoted *United States v. Hall,* 653 F.2d 1002, 1008 (5th Cir. 1981): "Cross examination into any motivation or incentive a witness may have for falsifying his testimony must be permitted."

**Unexplained Government delay in sealing surveillance tapes is sufficient grounds for suppressing tapes.**

*United States v. Ojeda Rios,* 875 F.2d 17 (2nd Cir. 1989).

Unexplained delay of from 82 to 96 days in sealing tapes after expiration of wiretapping order pursuant to 18 U.S.C.A. § 2510 et seq., was sufficient grounds for the suppression of tapes regardless of the integrity of the tapes. Not every delay requires suppression, but government has the burden of explaining delay.▪

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## FROM THE EDITOR

The job of appellate courts is sometimes described as "grading papers." *Appellate Advocate* civil case update editor Mark Steiner has gone from helping judges "grade papers" to grading real papers. Professor Steiner has left the First Court of Appeals for academia and is teaching at South Texas College of Law.

He will remain an associate editor of the *Appellate Advocate.* His office is an elevator ride from the one he used to have next door to mine. But I sure miss his running into my office, waiving an advance sheet, and announcing yet another idea for an article. While I have enjoyed the title and accolades, we truly have been co-editors.

For almost a year now, anytime someone has offered to write an article on a topic I suggested, I replied that we needed one analyzing the effect of the 1987 change in Texas Supreme Court jurisdiction. As should come as no surprise, I got no takers. When all else fails and there's a tough job that needs careful and deliberate attention, I have learned to ask Clinard "Buddy" Hanby. With something less than unbridled enthusiasm, he agreed to the task. The results are on page 3. Whether you agree with him or not, it makes interesting reading.

This issue was to have had the second in an ongoing series of articles on local practices of the various courts of appeals. The one we had planned on printing in this issue fell through. Next issue, we'll make up for lost ground and have two articles on the courts. On second thought, maybe I shouldn't make any promises.

– Lynne Liberato

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