The Appellate Advocate

State Bar Appellate Practice & Advocacy Section Report

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SPECIAL FEATURES

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THE CHAIR REPORTS

On November 4, your council met for several hours to discuss the section's current status and future. The Publications Committee, which publishes this newsletter, is holding a special meeting to plan further articles and to study ways to improve the publication. The Appellate Court Liaison Committee is meeting in Dallas to develop concrete ways in which the appellate bar can assist the appellate courts. The By-Laws Committee is considering an expansion of the council to allow more representation of, and participation by, section members.

The State Appellate Practice Committee has been busy working on suggested changes about mandamus procedures, unpublished opinions, and transcripts. Members of the State Appellate Rules Committee have been instrumental in securing changes to the Texas Rules of Appellate Procedure. The Programs Committee has exciting plans for next year's Bar Convention in Dallas. You will soon see some teases about it. The Continuing Legal Education Committee is already working on next year's Advanced Appellate Practice Course, which will be held in Houston in either September or October. They also are exploring the possibility of other, smaller seminars. Finally, we are continuing to progress on the second edition of the Texas Appellate Practice Manual. It should be available later in 1990.

— Roger Townsend

1989 Civil Appellate Law Specialists

Congratulations to the successful candidates for board certification in civil appellate law.

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▸ THE SUPREME COURT ◂

SUPREME COURT PRACTICE: A PRACTICAL APPROACH

By Warren Wayne Harris

[Porter & Clements, Houston; Former Briefing Attorney,Justice Eugene A. Cook, Supreme Court of Texas]

The purpose of this article is to offer practical tips for practice before the Supreme Court of Texas. Rather than discuss the procedural requirements for filing an application for writ of error, the focus will be on what practitioners can do to improve their chances of success before the supreme court.

I. The Motion for Rehearing in the Court of Appeals

The filing of a successful application for writ of error begins with the motion for rehearing in the court of appeals. Too often the motion for rehearing simply repeats the points of error raised in the court of appeals with little or no thought toward what points will be raised in the application. Because presenting an argument in a motion for rehearing is a jurisdictional prerequisite to asserting it in an application for writ of error, care should be taken in drafting the motion so that a proper predicate is laid for the application. This is an excellent time to narrow the issues in the case and focus on the points of error that will be raised in the application.

The prevailing party in the court of appeals must take care as well in deciding whether to file a motion for rehearing. Often the court of appeals will grant relief to an appellant on a point of error that calls for the case to be remanded for a new trial, and overrule a point of error requesting reversal of the judgment of the trial court and rendition judgment. The appellant may decide to accept the reversal and remand and forgo filing a motion for rehearing.

A problem arises, however, when the appellee files a motion for rehearing and then files an application for writ of error. The appellant, as respondent in the supreme court, has now waived any right to file a conditional application or cross-application because no motion for rehearing was filed in the court of appeals.

Thus, whether successful or unsuccessful in the court of appeals, one must be careful in deciding whether to file a motion for rehearing and, if so, the points to be raised. A mistake at this stage can effectively end any further appeal.

II. The Application for Writ of Error

After ensuring that error has been preserved in the court of ppeals, the application for writ of error can be prepared. In doing so, one should also keep in mind the manner in which the application is processed by the court and the audience to whom the application is addressed.

1. The Process

Once the case is ready for submission, this case is randomly assigned to one justice's office in a manner that will ensure both an even distribution of cases among the justices and confidentiality concerning the justice to whom the case has been assigned. Although the justices vary somewhat in the precise manner in which their chambers process the applications for writ of error, the case usually is given to one of the attorneys working for the justice to prepare a conference memorandum. The memorandum generally contains a brief overview of the case and a discussion of the arguments raised in the briefs. The memorandum is then given to the responsible justice who approves, modifies, or corrects it. Once this is done, the memorandum is distributed to the other members of the court with a copy of the court of appeals' opinion for consideration at the next Monday's application conference. At this point, copies of the brief have not been distributed to the other members of the court.

2. The Audience

The brief should be written on the proper level. As discussed above, in most instances the application is initially processed by an attorney who works for the responsible justice. Two-thirds of the attorneys at the court are briefing attorneys, who are recent law school graduates working at the court on a one-year appointment. Thus, the writer should not assume that the reader is familiar with the area of law on which the brief is written. At least a general summary of the law and citations to leading authorities should be given on even fairly basic points. The writer should not talk down to the reader, but should not write over the reader's head either.

3. The Brief

The writer should focus on doing what is necessary to ensure that the court is able to understand the case. The attorney may have been working on the case for several years by the

time it reaches the supreme court, but remember the court is seeing it for the first time.

While the headings listed in TEX. R. APP. P. 131, which give the requisites of applications, are adequate for most cases, they are not exhaustive of what might be needed in complicated cases. For example, particular cases might warrant adding a general statement of facts or a short summary of the argument. Be sure to include the requisites of rule 131, but consider adding other items if it will aid the court in understanding the case.

Some cases may be simplified by adding a chart or diagram. For example, a complex commercial case with a series of transactions might be easier to understand if the transactions are shown on a chart. As is true at other stages of the litigation process, be mindful of what can be done to make the case more understandable to the court.

The writer should also consider adding an appendix to the brief. For example, if parts of the record are crucial to the case, consider adding these pages as an appendix so they will be readily available to the reader without having to dig through the record. If the brief refers to parts of the court of appeals brief that are not reproduced in the application, one should consider adding the appropriate pages as an appendix. Likewise, the writer might consider appending out-of-state authorities or obscure secondary authorities relied upon because these are not readily available in the library in the court's chambers. Try to make the court's job as easy as possible in finding the materials cited in the brief.

The application should also point out to the court why any error in the case is of such importance to the jurisprudence of the state so as to require correction. *See* TEX. GOV'T CODE ANN. § 22.001 (Vernon 1988). Because the supreme court is now a court of discretionary jurisdiction, it is no longer just an error correcting court. Simply demonstrating an error made by the court of appeals may be insufficient to warrant supreme court review. Although this is rather elemental, spend the time necessary to prepare a good brief. The writer should strive for a concise, well-written brief that presents the case in an organized and logical manner. While a poor brief should not reflect on the merits of the case, sloppy work distracts from the arguments.

Be thorough in research. Too often the critical research is done by the court, not the parties. If the case involves the construction of a statute, check for relevant legislative history. If the case involves an issue of first impression in Texas, cite authorities from other states that have decided the issue.

An area often overlooked by appellate practitioners is the supreme court's use of per curiam disposition under TEX. R. APP. P. 133(b). This topic is discussed at length in Mike Northup's article "Per Curiam Review In The Supreme Court," that appears elsewhere in this issue.

III. The Brief in Response

The respondent should always file a response to the application for writ of error. There is nothing to be gained in not filing a response. In failing to respond, however, the respondent takes the risk that arguments that support its position will be missed.

The brief in response should demonstrate why the alleged error by the court of appeals is not of such importance to the jurisprudence of the state so as to require correction. For example, if the case depends on the coustruction of a statute that has since been amended, this should be pointed out to the court. Try to show how the alleged error affects ouly the parties before the court and not the jurisprudence of the state.

This is also the time to do a preservation of error and procedural check on the application. Surprisingly, the petitioner often fails to properly preserve error on points and the respondent fails to point this out to the court. Pointing out procedural problems gives the court the opportunity to dispose of the case on a procedural basis without reaching the merits of the petitioner's arguments.

IV. The Cause

If four justices vote to grant the application, it is then called a "cause" and will be set for oral submission. After the application is granted, copies of the briefs are distributed to the entire court. Before oral argument, the cause is randomly assigned to a particular justice to write the opinion. Generally, by the time of oral argument, the briefs have been read by most of the justices.

V. The Motion for Rehearing

Although the majority of motious for rehearing are overruled, enough are granted to justify filing them on the denial of the application for writ of error or on the disposition of the cause.

In the motion for rehearing, the writer should not simply rehash the earlier arguments and authorities. These have already been rejected once and are not likely to succeed the second time. Iustead, take a fresh look at the case and try to clarify the arguments.

VI. Conclusion

The job of appellate practitioners is to make it easy for the court to rule in their favor. By keeping in mind how an application for writ of error is handled by the supreme court, one can decide the most effective approach to take in a case. While there is no guarantee that the requested relief will be obtained, it is about all one can do toward that goal.

▸ THE SUPREME COURT ◂

PER CURIAM REVIEW IN THE SUPREME COURT

By R. Michael Northup

[Cowles & Thompson, Dallas; Former Briefing Attorney,Chief Justice Thomas R. Phillips, Supreme Court of Texas)

Each year approximately 1000 applications for writ of error are filed with the Texas Supreme Court. Of those applications, the court grants and sets for oral argument only an average of 80, or 8%. Office of Court Administration, *Texas Judicial System: Annual Report* (1984-88). Unless the application contains issues that are significant to the state's jurisprudence, chances are slim that it will be granted and set for submission.

Apart from the traditional method of review before the Texas Supreme Court, the Texas Rnles of Appellate Procedure set out an alternate form of review: per curiam disposition.

A per curiam opinion is an unsigned opinion in which six or more of the justices join. The authority of the Texas Supreme Court to issue such opinions is derived from TEX. R. APP. P. 133, which states in part:

> If the decision of the court of appeals is in conflict with an opinion of the Supreme Court, is contrary to the Constitution, the statutes or any rules promnlgated by the Supreme Court, the Supreme Court may, upon granting writ of error and without hearing argument in the case, reverse, reform or modify the judgment of the court of appeals, making, at the same time, such further orders as may be appropriate.

TEX. R. APP. P. 133(b). Under this rule, the supreme court, on average, disposes of an additional 33 applications for writ of error each year. Knowing how this rule operates can assist the appellate practitioner in preparing an application for writ of error. Although in practice, the court does not apply the rule as narrowly as its terms require, the applications to which the rule is applied share certain ascertainable characteristics. A look at the rule's requirements and the characteristics of the cases to which the rnle is applied is therefore essential.

I. The Conflict

Rule 133(b) expressly requires a conflict with a prior opinion of the supreme court, the constitution, a statute, or a rule promulgated by the court. The first question that must be answered then is: "What is a 'conflict'?" The answer to the question is not self-evident. In defining "conflict," the supreme court has attempted to draw a bright line test and has thereby narrowly defined the term for purposes of the rule.

The "conflict" needed to satisfy rule 133(b) is the same as that required to satisfy the supreme court's jurisdictional conflict requirement. *See* TEX. GOV'T CODE ANN. § 22.001(a)(2) (Vernon 1988); TEX. R. APP. P. 133(b). Section 22.001(a)(2), as interpreted, requires that "the conflict must be such that one decision would operate to overrule the other in case they were both decided by the same court." *John Farrell Lumber Co. v. Wood,* 400 S.W.2d 307, 308 (Tex. 1966). The conflict should appear on the face of both the prior opinion and the opinion appealed from and must be specifically pointed out in the application for writ of error. *Id.* at 309. Although the conflict requirement is narrowly defined for purposes of section 22.001(a)(2), in practice, the requirement is sometimes loosely applied or not applied at all for rule 133(b) purposes.

The supreme court's last term is filled with examples of the wide ranging application of rule 133(b). Without going into detail, *Roberson v. Robinson,* 768 S.W.2d 280 (Tex. 1989), is an example of a narrow application of rule 133(b). *Johnson v. City of Fort Worth,* 774 S.W.2d 653 (Tex. 1989) is on the opposite end of the spectrum as probably the loosest application of rule 133(b). Somewhere in between are cases such as *Otis Elevator Co. v. Bedre,* 32 TEX. SUP. CT. J. 480 (June 21, 1989), and *Eshleman v. Shield,* 764 S.W.2d 776 (1989). Reading a few examples of per curiam opinions and the conflicts set out in the opinions may help in developing an insight into what types of cases are per curiam material.

The rule 133(b) conflict need not be a conflict with another supreme court opinion. The rule provides that the conflict may be with an opinion of the Supreme Court, the Constitution, a statute, or a rule promulgated by the Texas Supreme Court. When the constitution, a statute, or supreme court rule is implicated, the conflict needed is essentially the same loose conflict applied to opinion conflicts.

Although the term "Supreme Court" in rule 133(b) apparently refers to opinions of the Texas Supreme Court, the Texas Supreme Court has used United States Supreme Court opinions as a basis of conflict. *See, e.g., LBL Oil Co. v. International Power Servs., Inc.,* 32 TEX. SUP. CT. J. 619 (Sept. 20, 1989); *Lopez v. Lopez,* 757 S.W.2d 721 (Tex. 1988). In the same vein, "Constitution" and "statute" may refer to the Texas Constitution or a state statute as well as the United States Constitution or a federal statute. *See, e.g., Myers v. Adams,* 728 S.W.2d 771 (Tex. 1987) (42 U.S.C. § 1983); *In re J.R.R.,* 696 S.W.2d 382 (Tex. 1985) (U.S. Const. amend. V).

II. Unexpressed Requirements

A. Size of Case

While the size of the case and number of issues or points of error are not generally determinative of whether an application may be subject to per curiam disposition, these factors have some importance. No particular size of case is required for a per curiam rendition. However, per curiam slip opinions themselves are typically about two legal-sized pages in length. Hence, the complexity of the facts or issues that must be addressed to dispose of the case, may discourage the writing of a per curiam opinion. Of course, the two-page limit is ouly a rule of thumb.

B. Points of Error

Applications containing numerous points of error are unlikely candidates for per curiam disposition unless there is one central issue that is dispositive of the entire case. The rule 133(b) conflict of authority should relate to the dispositive point or points of error. A point of error is dispositive when the granting of relief on that point alone entitles the petitioner to a complete reversal and either a rendition or a remand on the portion of the judgment from which the appeal is taken. If the disposition of those points only modifies the court of appeals' judgment or provides in complete relief, per curiam relief is unlikely and probably inappropriate.

By way of example, if an application for writ of error contains three points of error—one point arguing that the statute of limitations is a complete bar to the cause of action, one pont complaining of the measure of damages, and one point complaining of the admission of certain evidence at trial—the first point of error, if sustained, disposes of the entire cause of action and entitles the petitioner to a rendition on the judgment. If a sufficient conflict of authority with the limitations point exists, this case is a candidate for per curiam disposition. The remainder of the points need not be addressed because the sustaining of the first one will provide the petitioner with the most relief possible. However, the sustaining of the second or third point may not be dispositive of the remaining points or of the remainder of the judgment from which the appeal was taken; if not, per curiam relief is unlikely.

III. Application Strategy

The first person and usually the only person at the court to read an application is a briefing attorney or a staff attorney. A statement in the application suggesting that it is a proper candidate for per curiam disposition and a citation to the conflict authority is helpful and suggested. The request for per curiam disposition can be made in two places.

The appellate rules require the application to allege the basis upon which the supreme court's conflict jurisdiction rests: TEX. R. APP. P. 131(d). More often than not, attorneys merely allege jurisdiction in this section based upon Government Code section 22.001(a)(2), without setting out the specific underlying basis. Nevertheless, naming the opinion, constitutional provision, statute, or rule upon which jurisdiction may be taken and upon which a per curiam opinion may be based may increase the chance of per curiam relief.

Likewise, in the request for relief, a petitioner can specifically point out that his or her case is per curiam material and make a request for such relief in the event that the court does not grant the application outright. While this additional request is not required, it is one more chance to tell the attorney looking over the brief that this case may be disposed of in an alternate fashion.

One final strategy may be employed with caution in an application that seeks per curiam disposition. In making the determination of which points of error to appeal and how to frame a point of error, the attorney should keep in mind what types of points of error are per curiam material. For example, per curiam opinions are almost never based upon fact-specific points concerning such matters as the admissibility of evidence or the legal sufficiency of the evidence to support a finding. On the other hand, a single point of error which contends that a party is entitled to attorney's fees in accordance with a particular statute would be an excellent candidate for a per curiam opinion.

This strategy of trying to obtain a per curiam reversal, if used at all, should be used with great caution. Pinning one's hopes on per curiam relief is too uncertain to make such drastic decisions. By and large, the decision of how to frame points of error and which ones to appeal, should be made with little to no attention paid to the question of per curiam relief. After the determination of which points will be appealed, the attorney may then consider whether the application falls within the realm of rule 133(b).

IV. Conclusion

Obtaining relief in the supreme court is by no means scientific. Nevertheless, a petitioner can take certain steps to assist in that endeavor. Knowing what cases are per curiam material and taking steps to request per curiam relief is one such means toward obtaining relief. In any event, with the information outlined here, a working knowledge of per curiam type cases, and a little prayer, the chances of obtaining relief in the supreme court can be enhanced.

▸ THE HOUSTON COURTS OF APPEALS ◂

(Tex. App.—Houston [1st Dist.]):

A Review Of The Local Rules Of The First Court Of Appeals

By JoAnn Storey and Marguerite O'Connell
[Davis & McFall, Houston]

OVERVIEW

The First Court's local rules contain recommendations and, in some instances, requirements in addition to the Texas Rules of Appellate Procedure. The intent of this article is to highlight these recommendations and requirements and, where applicable, draw a comparison between the local rules and the rules of appellate procedure. At this time, there are no reported cases that interpret the First Court's local rules. The rules are cited: TEX. APP.—HOUSTON [1ST DIST.] LOCAL R. _____.

Scope Of Local Rules

The local rules of the First Court of Appeals became effective on April 1, 1987. They are pending approval by the Texas Supreme Court and the Court of Crinninal Appeals, but the court relies on the practices set out in them. The rules were established pursuant to TEX. R. APP. P. 1(b) and govern procedure for appeals, original proceedings, and other matters before the First Court. Rule 1:1.

The rules use a numbering system sinnilar to that of the United States Fifth Circuit Court of Appeals and correspond as closely as possible to the Texas Rules of Appellate Procedure to which each relates. For example, TEX. R. APP. P. 74 concerns the "Requisites of Briefs," as does local Rule 1:74. To the extent that the local rules conflict with the Texas Rules of Appellate Procedure or any other statute or rule, the statute or rule controls.

Rule 1:12 Monthly Report by Court Reporter

A copy of the court reporter's monthly report, provided for by TEX. R. APP. P. 12(c), niust be filed with the clerk of the court on or before the first day of each month and must include the following:

1. a list of cases pending appeal for which statements of fact are due;
2. the date the written request for the statement of facts was received;
3. the approximate number of pages and the due dates of each case;
4. the names, addresses, and phone numbers of any substitute reporter for each case; and
5. whether the case is on the CAT [computerized] system.

Compare TEX. R. APP. P. 12(c), which only requires that the report contain "the amonnt and nature of the business pending in the court reporter's office."

Rule 1:19 Motions

The First Court of Appeals has a "Motion Panel" that hears all motions for a particnlar month. Because the responsibility for deciding the motions rotates monthly among the panels, the panel that determines a motion contemplated by TEX. R. APP. P. 19 usually is not the saine as the panel that will nltinnately decide the case, unless the case has been set for submission.

Generally, no oral argument will be heard on motions. Rule 1:19(a). Ordinarily, the clerk will notify the party or the attorney of the ruling on the motion by letter. Proposed orders should not be submitted. Rule 1:19(b).

In the event of bankruptcy, Rule 1:19(c) provides for a motion to stay proceedings, to be filed by connsel for the party in bankruptcy. The inotion should 1) state by whom, in what court and when the bankruptcy proceeding was filed; 2) include a certificate of service of the motion on all other parties to the cause in the appellate court; and 3) be verified. Rule 1:19(c). After these requisites are met, the court will enter an order staying the case for a certain period. Rule 1:19(c). At the end of that period, it is necessary to file another motion to stay indicating the current status of the case. If any portion of the case on appeal is severable, connsel desiring severance should file a inotion requesting severance as soon as possible. Rule 1:19(c).

Rule 1:40 Assignment of the Appeal.

When a notice of appeal and/or an appeal bond is filed, the clerk of the county or district court randomly assigns the case to the First or Fourteenth Court. Rule 1:40(a). The clerk of the courts of appeals inay equalize dockets by transferring cases to and from the two Houston appellate courts. Rule 1:40(a). Any case previously assigned to the First Court, which has been returned to the trial court for any reason, will be reassigued to the First Court for subsequent review. Rule 1:40(a). The random assignment of appeals is not applicable to original proceedings, unless a related appeal or original proceeding was previously filed in one of the courts. Rule 1:121.

Generally, a case is set for submission shortly after the appellant's brief is filed and is assigned to the panel on which the preassigned author sits. Rule 1:40(b). Panels rotate three times a year, Rule 1:40(e), and are set up on a random basis.

Prior to the week a case is set for submission, a briefing attorney will review the file and prepare a memorandum of law discussing the issues in each case. Each judge on a panel is given that memorandum on the Friday prior to the week of submission. Either the afternoon before oral argument, or the morning of oral argument, depending on whether the panel hears arguments in the morning or the afternoon, the panel will meet to discuss each of the cases on its submission docket for that week. After this pre-submission conference, the judges hear oral argument.

After oral argument, the panel holds a post-submission conference at which the judges and attorneys further discuss the legal issues in the case and begin to decide what the majority opinion will hold and whether there will be dissenting or concurring opinions. After the post-submission conference, the judge authoring the majority opinion will finalize his or her draft. The draft opinion is then circulated to the other panel members for their comments. The draft is revised until a version has been adopted by a majority of the panel. The court circulates all of its opinions to all nine members of the court in an effort to keep opinions of the court consistent. All opinions and orders by the First Court of Appeals are issued on Thursday, except in emergency situations.

Rule 1:41 Pre-Submission Conferences

A pre-submission settlement conference between counsel and a conference judge may be scheduled upon motion of counsel or upon the court's own motion. The conference judge will be either a retired judge or an active justice not participating on the panel to which the case is assigned for disposition. The conference will last 45 minutes, unless extended by order of the conference judge. The matters to be discussed during the conference include: appropriate means for reducing the volume of the appellate record, the narrowing of issues on appeal, and the possibility of settlement. All discussions are confidential and are not disclosed to the members of the court. Any agreements reached between counsel must be reduced to writing, signed and filed as part of the record.

The First Court also refers appropriate cases to alternative dispute resolution procedures, pursuant to TEX. CIV. PRAC. & REM. CODE § 154.001 et seq. *See* Evans & Ramage, *Alternative Dispute Resolution Procedures at the Appellate Level*, 1 APPELLATE ADVOC., Winter, 1988. Ordinarily, counsel for the parties will be notified by letter, shortly after appellant's brief is filed, that the case may be appropriate for referral to an alternative dispute resolution procedure. The letter will contain a date and time of a preliminary telephone conference to discuss the referral of the case to an appropriate ADR procedure. At the time of such telephone conference, counsel should be prepared to make a brief statement about his or her position in the suit.

Rule 1:50 Record on Appeal

Rule 1:150(a) provides that the statement of facts and transcript may be checked out from the clerk of the court.

Rule 1:53 The Statement of Facts on Appeal

The clerk will not file the statement of facts until the transcript has been filed. Rule 1:53(a). In such event, the statement of facts will be marked "Received," rather than "Filed." The clerk likewise may receive portions of the statement of facts, but will file only the entire statement of facts, as designated by the appellant. Rule 1:53(b).

In mandamus proceedings, the court may compel production of the appellate record or impose sanctions on the court reporter for failure to complete the record. Rule 1:53(c). The court may also direct the court reporter to refrain from any further activity in the trial court or otherwise until the record has been completed. Rule 1:53(c). If the court orders that no further extensions will be granted unless accompanied by a motion for leave to file a writ of mandamus, the court may direct the court reporter to pay the fding fee for the mandamus. Rule 1:53(c).

Rule 1:55 Amendment of the Record

An objection to the record does not extend the time to file a brief; hence, a motion for extension, if desired, must also be filed. Rule 1:55(a).

Motions to correct inaccuracies in the statement of facts filed under TEX. R. APP. P. 55(a) must include either: 1) a stipulation of the correct statement of facts signed by the attorneys for the appellant and the appellee or State, or 2) a certification that the attorneys have sought to correct the inaccuracy by agreement and that no agreement could be reached. Rule 1:55(b).

Rule 1:70 Motions to Postpone Argument

A motion to postpone oral argument must be in writing and show extraordinary circumstances. *Compare* TEX. R. APP. P. 70 which requires the motion to be supported by "sufficient cause" unless such sufficient cause is apparent to the court.

Rule 1:73 Motions for Extension of Time

All requests for extension of time should be filed on or prior to the date the item in question is due to filed. Rule 1:53(a). *Compare* TEX. R. APP. P. 41(a)(2), 41(b)(2), and 54(c), which provide for the filing of a motion for extension within 15 days of the date the bond or notice of appeal and the record are due. The rules provide that since most cases are set for submission shortly after the appellant's brief is filed, a request by the appellee may be shortened or denied if the extension will delay submission. Rule 1:73(b). However, largely because of the increase in filings since the court issued the local rules, the court now does not set cases this rapidly.

Rule 1:74 Requisites of Briefs

Rule 1:74(a) provides for the same 50-page limitation as does TEX. R. APP. P. 74(h). The court may order the rewriting of

a brief in excess of 50 pages or may not consider material after the fiftieth page. Rule 1:74(a). Supplemental briefs may be filed without leave of court only if no new points of error are raised. Rule 1:74(b).

Rule 1:75 Argument

The First Court limits oral argument to 20 minutes for each side, with 10 minutes for rebuttal. Rule 1:75(a). *Compare* TEX. R. APP. P. 75(d) which allows 30 minutes for each side, and 15 minutes for rebuttal. If additional time is desired, a written request must be filed when the brief is filed. Rule 1:75(a). The court may consider such a request if it is filed at least four days prior to submission and a reasonable explanation for the delayed request is shown, otherwise, the request is deemed to be waived. Rule 1:75(a). If there is more than one party for appellant or appellee, an announcement of how the time is to be divided must be made at the call of the docket. Rule 1:75(a). The First Court will grant leave for argument by law students who have a temporary bar card. Rule 1:75(f).

Oral argument may be waived by written or oral communication to the clerk at the earliest practicable time prior to submission. Rnle 1:75(b). The court may impose sanctions against attorneys who repeatedly request oral argument but do not appear. Rule 1:75(b). Oral argument in the First Court is scheduled on a staggered docket. Rule 1:75(c). The clerk will call the attorneys the day before the argument to advise of the time argument is scheduled. Therefore, it is not necessary to appear prior to the scheduled time. Rule 1:75(c).

The court will announce to the attorneys, prior to oral argument, that the justices have read the briefs and are familiar with the record and that a detailed discussion of the facts is not necessary.

Post-submission arguments may be filed without leave of court if no new points of error are raised. Rnle 1:75(e). Such arguments must be filed promptly, so that the panel may consider them before the decision is made.

Rule 1:120 Habeas Corpus in Civil Cases

The petition seeking issuance of a writ of habeas corpus must be accompanied by a motion for leave to file a writ of habeas corpus. *Compare* TEX. R. APP. P. 120 which does not require the filing of a motion for leave to file. If the relator intends to rely on a statement of facts, the motion must certify whether a written request for a statement of facts has been sent to the court reporter. The motion must certify that no other petition for habeas corpus has been submitted or is currently pending in any other court.

Rule 1:121 Mandamus, Prohibition and Injunction

All original proceedings should contain a certification that the petition has not been filed in any other court of appeals.

PARTICULAR RULES PERTAINING TO CRIMINAL CASES

Rule 1:7 Motions to Withdraw as Counsel

Rule 1:7 provides for the withdrawal of retained attorneys and court-appointed attorneys. A retained attorney's motion must contain one of the following: 1) written approval by the client, including a declaration that the client will proceed pro se or through a substitute attorney; or 2) a showing of due diligence by the attorney to secure cooperation of the client, accompanied with a copy of the letter, sent certified mail, return receipt requested, which informs the client that the attorney is withdrawing and that the court will act on the appeal 30 days after the certification is filed. Rule 1:7(a).

Before a court-appointed attorney's motion to withdraw will be entertained, the following requirements must be met:

1. If the client desires to represent himself or herself, the attorney must attach an affidavit from the client showing that he or she fully understands the inherent dangers of self-representation and that if he or she is incarcerated, the court will not permit the appellant to present oral argument. (The motion will not be granted if the attorney has already filed a non-frivolous brief.)

2. If the client wants to substitute retained counsel, the motion must contain an affidavit to that effect from the client. Also, court-appointed counsel is responsible for seeing that retained counsel has filed a motion to substitute.

Rule 1:7(b).

Rule 1:44 Time for Filing Briefs in Appeals in Habeas Corpus and Bail

Unless otherwise ordered by the court, the appellant's brief is due 20 days after the record is filed; the State's brief is due 20 days after appellant's brief is filed.

Rule 1:50(b) Record on Appeal-Inmate Access to Record

The court will grant a motion to allow the record to be made available to an imprisoned inmate if:

1. the inmate is pro se, or

2. the inmate's attorney has filed a frivolous appeal brief pursuant to *Anders v. California,* 386 U.S. 738 (1967) [holding that the appellant may file a pro se brief if counsel files a brief contending that the appeal is frivolous].

Rule 1:74(d) Requisites of Briefs - Copy of Appellant's Brief to State

In criminal cases from Harris County, an extra copy of the appellant's brief may be filed with the court and the clerk will make the copy available to the State's attorney.

▸ THE HOUSTON COURTS OF APPEALS ◂

(Tex. App.—Houston [14th Dist.]): Practicing in the 14th Court of Appeals

By Helen A. Cassidy
[Chief Staff Attorney, 14th Court of Appeals; Board Certified: Civil Appellate Law]

And

Ben Taylor
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The confidentiality necessary to an appellate court can needlessly cloak all its procedures in mystery. Although the author of an opinion, the stage of decision-making in a case after submission, judicial discussions or memoranda, and the outcome of an appeal before formal announcement must be confidential, *see* TEX. PENAL CODE ANN. § 39.03(b), the internal operating procedures of a court need not be. This article will review the structure and organization of the 14th Court of Appeals and its decision-making process.

A. Panel Assignments and Court Personnel

The nine judges on the court sit in three-judge panels. *See* TEX. GOV'T CODE ANN. § 22.222. An annual random draw determines panel composition. The senior justice on each panel presides over that panel. Chief Justice Brown always presides over A Panel. A briefing attorney, chosen by the judge for whom she works, assists each justice. A research attorney aids each panel with its more difficult civil cases. A fourth research attorney works for the chief justice. Four staff attorneys manage the docket and handle motious and original proceedings. The staff attorneys also draft opinions involving well-settled issues. Briefing attorneys serve for one year. The research and staff attorneys are permanent employees of the court.

The panels for 1990 are as follows:

A Panel—Chief Justice J. Curtiss Brown and Justices William Junell and Paul Murphy.

B Panel—Justices Sam Robertson, Ross Sears, and Joe Draughn.

C Panel—Justices Paul Pressler, Bill Cannon, and George Ellis.

B. Docketing of Cases on Appeal

The 14th Court of Appeals has concurrent jurisdiction with the 1st Court of Appeals over cases from Harris and 13 other counties. TEX. GOV'T CODE ANN. § 22.201(b). Each district clerk randomly determines assignment of each appeal. *Id.* at § 22.02(h).

The clerk of the 14th Court of Appeals sequentially assigns a number to each appeal as it is received. TEX. R. APP. P. 57(a). On January 2, 1990, she numbered the first appeal 14-90-0001-CV or CR. The 14 is the court designation. The 90 reflects, of course, the year. The *0001* indicates it was the first appeal of the year. The CV indicates civil; CR, criminal. The first appeal will be handled by A Panel, the second, B Panel; the third, C Panel. The last four numbers of an appeal thus allow a litigant to determine which panel is responsible for the appeal. For example, 14-89-0636-CV is clearly a C Panel case. The exception to the rule is consolidated cases. When the court consolidates cases, the court assigns the case to the panel with the lowest case number.

C. Follow the Supreme Court's Rules

The 14th Court of Appeals has no local rules. The court follows the Texas Rules of Appellate Procedure. In some instances the court grants more rights than the rules require, *e.g.,* it gives 30 days notice of submission not the required two weeks, and in other instances it demands strict adherence.

1. Strict Compliance Necessary for Extensions Regarding Record in Civil Cases

The 14th Court of Appeals requires precise compliance with TEX. R. APP. P. 54 and 19. Rule 54(a) requires filing of the record within 60 days after the judgment is signed (or 120 days if any party has filed a timely motion for new trial or to modify the judgment). Rule 54(a) expressly provides that the court has "no authority to consider a late filed transcript or statement of facts, except as permitted by this rule" (emphasis added). *See also* TEX. R. APP. P. 83. If a party fails to file a transcript timely, the appellee may move for dismissal or summary affirmance. *See* TEX. R. APP. P. 54(a), 60(a)(1). Failure to file a statement of facts on time is ground for dismissal or affirmance; it may also result in insurmountable presumption against the appellant. *See Englander Co. v. Kennedy,* 428

S.W.2d 806, 807 (Tex. 1968) (per curiam) (without complete statement of facts, party challenging sufficiency of evidence cannot show error requiring reversal); TEX. R. APP. P. 54(a).

Rule 54(c) does authorize extensions of time for filing the transcript or statement of facts, but only "if a motion *reasonably explaining* the need therefor is filed by appellant not later than 15 days after the last date for filing the record." TEX. R. APP. P. 54(c) (emphasis added). The motion must also "reasonably explain" any delay (presumably this means tardiness, if any) in requesting preparation of the statement of facts under Rule 53(a). TEX. R. APP. P. 54(c).

If the only explanation is negligence or mistake, as opposed to deliberate or intentional noncompliance with the deadline, it will probably qualify as a reasonable explanation. *See Garcia v. Kastner Farms, Inc.*, 774 S.W.2d 668, 669 (Tex. 1989) (reaffirming that the phrase "reasonably explaining" means "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"). Whatever the explanation, however, the 14th Court of Appeals *requires* a party to verify it by affidavit. *See* TEX. R. APP. P. 19(d). On form generally, the court requires strict compliance with TEX. R. APP. P. 73.

If a party must request an extension of time for filing the record, it must file the motion within 15 days after the original 60 or 120 day deadline, as applicable; otherwise, the court has "no authority" to consider any record it may later receive. If the fifteenth day after deadline falls "on a Saturday, Sunday or legal holiday, *as defined by Article 4591, Revised Civil Statutes*," then the time for filing runs until "the next day which is neither a Saturday, Sunday nor legal holiday." *See* TEX. R. APP. P. 5(a) (emphasis added). This might create a trap if, for example, the fifteenth day fell on Thanksgiving, November 22, 1990. Since that is "the fourth Thursday in November," it is a legal holiday "as defined by Article 4591, Revised Civil Statutes." See id. The next day, Friday the 23rd, is not listed or defined in article 4591, but the clerk's office may well be closed for business. If uncertain, counsel should "contact the clerk prior to the due date and make arrangement for the clerk to open the courthouse or accept the document for filing at the clerk's home." Patton, *Deadlines & Extension Motions in Civil Appellate Litigation*, 20 ST. MARY'S L.J. 1, 6 (1988). In a really drastic situation, counsel may take the motion to any of the justices, who "may" or may not permit filing with him or her. TEX. R. APP. P. 4(b). If this is done (and it is *not* recommended), be sure the judge notes on the motion the time and date he received it. *Id.*

2. Mandamus Sometimes Necessary Against Court Reporter

If the court grants a third extension for filing the statement of facts, the order generally stipulates no further extensions will be granted unless a motion for leave to file petition for writ of mandamus against the court reporter and the petition for mandamus accompany the next motion for extension. Rule 121 governs mandamus and parties should follow the rule in petitioning for a writ of mandamus against a court reporter. The court has the power to issue the writ to protect its jurisdiction. *See* TEX. GOV'T CODE ANN. § 22.221(A).

If the court grants the mandamus, it sets a due date for the statement of facts and orders that, if the court reporter has not prepared the statement of facts by that date, he shall appear and show cause why the court should not hold him in contempt.

3. Filing by Mail Against Deadline

If a party mails *any* time-sensitive document, it should mail the document to the Clerk of the 14th Court of Appeals "by first-class United States mail in an envelope or wrapper properly addressed and stamped" and the party should deposit it "in the mail one day or more before the last day for filing same . . . ." TEX. R. APP. P. 4(b). *If* that is done, then the court will deem the motion timely if the clerk receives it not later than 10 days after the deadline. *Id.* The Rules Advisory Committee has proposed an amendment to TEX. R. APP. P. 4(b). The proposed rule extends the mailing deadline to "on or before" the last day for filing. *See* 52 TEX. BAR J. 1165 (Nov. 1989). Although Federal Express is ordinarily a reliable carrier, it probably will not trigger application of Rule 4(b). SEE MR. PENGUIN TUXEDO RENTAL SALES, INC. V. NCR CORP., 777 S.W.2d 800 (Tex. App.—Eastland 1989, writ requested [C-9178]) (construing identical language in TEX. R. CIV. P. 5). Also, the "filed by mail" provision in TEX. R. APP. P. 5(a) likewise may not encompass Federal Express filings. SEE PRINCE V. POULOS, 876 F.2d 30, 32 n.1 (5th Cir. 1989) ("mail" means letters conveyed under "public authority").

4. The Record in Criminal Cases

In criminal cases, the rules provide an exception to the 15-day grace period of Rule 54(c). Rule 83 allows late filing of the record on a showing that otherwise the appellant may be deprived of effective assistance of counsel.

In criminal cases, TEX. R. APP. P. 53(m) gives the court the discretion to order a hearing if appellant fails to file a statement of facts. The court's policy is to exercise the discretion and order the hearing. The court does so only after it sends a letter informing all parties that the court has received no statement of facts. If the court receives no motion within 30 days of the date of the letter, the court orders the hearing.

D. Motion Practice Generally

Except in emergencies or with joint or agreed motions, the court does not hear civil motions until the first motion docket following the expiration of 10 days. *See* TEX. R. APP. P. 19(d). The court hears criminal motions to extend the time to file briefs or the record at its first opportunity. *Id.* at (e). Each panel handles the motions for its cases. If a party timely files a proper motion to extend time for the brief or record and the

due date elapses before the court acts on the motion, except in extraordinary circumstances, the court grants some extension past the date it announces its ruling on the motion.

E. Filing Considerations and Communications with the Court

When a transcript, statement of facts, brief, or other document arrive at the court, they are marked "received" or "filed." A document that has only a "received" stamp on it is not officially a part of the record. Parties should ask the clerk what motion is necessary to ensure a document is properly "filed."

TEX. R. APP. P. 4(c)(1) requires each party to file six copies of briefs, petitions, motions, and other papers. The 14th Court of Appeals interprets the rule to mean parties shall file an original and six copies.

Correspondence or other communications relative to any matter before the court must be conducted with the clerk and shall not be addressed to or conducted with any of the justices or other members of the court's staff. TEX. R. APP. P. 6. Neither the clerk nor her deputies are licensed attorneys. All are pleased, however, to answer questions concerning the status of an appeal and general information relative to appeals. It is probably unwise, nonetheless, to solicit legal advice from them.

F. Briefing, Submission, and Oral Argument

In civil cases, parties may check out the record from the clerk of the court to prepare their briefs. Criminal practitioners must secure the record from the appropriate district or county clerk. Criminal appellants should present proof they have returned the record to the district or county clerk when they present their brief for filing in the 14th Court of Appeals.

When cases are ready for argument, staff attorneys set the cases for submission. The order of the cases on the docket is numerical. The court is receptive to motions from parties to be placed in a different order on the docket. The court generally gives 30 days notice of submission rather than the required two weeks. TEX. R. APP. P. 77(a). Because the rules mandate two weeks' notice of submission, if a party needs to reschedule oral argument, it should do so promptly upon receipt of notice of submission. The court is reluctant to grant motions to reschedule if doing so leaves a vacancy on the docket.

Numerically, the caseload of approximately 1200 appeals annually is roughly ⅔ criminal, ⅓ civil. In practice, however, the court spends approximately equal time on both types of cases. The court, thus, normally rotates submissions between criminal and civil cases. In 1989, the court set criminal cases 14 weeks and civil cases 14 weeks. Except for emergencies, the court does not schedule submissions in July and August.

The court usually hears six criminal cases at a setting or four civil cases. The rules require a party to request oral argument at the time it files a brief. TEX. R. APP. P. 75(f). Putting request for oral argument on the cover of the brief prevents the possibility of the request being overlooked. The court favorably considers motions for oral arguments if the party files the motion promptly after discovering it has omitted the request. The court, of course, looks with less favor on a last minute request for oral argument. In civil cases, the court allows 30 minutes for each side with 15 minutes for rebuttal by appellant. Exercising the discretion the rules permit, the court allows each side 20 minutes, with 10 minutes for appellant's rebuttal in criminal cases. *See* TEX. R. APP. P. 75(d).

The court also exercises the discretion the rules allow to submit civil cases without oral argument if oral argument would not materially aid the court in the determination of the appeal. TEX. R. APP. P. 75(f). The court gives 21 days notice of these submissions. *Id.*

G. Opinions

In fiscal year 1989 (September 1, 1988 through August 31, 1989), the average time in the 14th Court of Appeals from submission to issuance of opinion was 1.3 months. Civil cases averaged 1.5 months and criminal cases 1.2 months. The average time from filing to disposition was 7.7 months for civil cases and 9.9 months for criminal cases. The overall average from filing to disposition was 9.1 months. In fiscal year 1989 the court disposed of 395 civil cases and 764 criminal cases.

A random draw several months in advance of submission determines authorship of each case. On each panel, the justices and legal staff read the records and briefs and discuss the cases at a pre-submission conference before oral argument. After post-submission conference, the authoring judge circulates an opinion only to the other members on the panel. Except for emergency matters, the court issues all court orders and opinions on Thursdays.

Rule 90(c) states the standards for publication. In the 14th Court of Appeals, the authoring justice makes the decision to publish if the other justices do not object. The court is receptive to motions to publish if they are made within a reasonable time after the court issues the opinion.

H. Library Resources

The court has an excellent Texas law library and has access to both Westlaw and Lexis. The library is not extensive in the federal area. The court's library does not contain the Federal Reporter or the Federal Supplement. The court has the Supreme Court Reporter but not United States Reports. Though certainly parties have no duty to assist the court, a citation to the Supreme Court Reporter is obviously helpful. The rules permit addenda to contain "statutes, rules, regulations, etc" that do not count against the 50-page limit. TEX. R. APP. P. 74(h). If some obscure authority directly supports a position and is well-reasoned or persuasive, appending it to the brief is especially courteous.

THE RIGHT CITE

By Ursula Weigold
[Assistant Professor, South Texas College of Law]

Out-of-State Cases

Occasionally, the legal writer must cite to cases from a sister state. For example, (1) when the court is required by rules of procedure or conflict of laws principles to apply another state's law, or (2) when an issue has not been addressed by Texas courts or there is no binding authority from Texas.

The process for finding the correct cites is much the same as for citing old Texas cases with parallel citations to the official reports. Here's how:

First, check section "H" in the back of the Bluebook (A Uniform System of Citation), under the state whose law you wish to cite.

Next, under that state's listing, find the issuing court.

There, the Bluebook will list which reporter citations (i.e., parallel citations) are required.

For example, a case from the Supreme Court of Hawaii requires a citation to the Hawaii Reports ("Haw.") and a parallel citation to the Pacific Reporter ("P. or P.2d"). [See page 185 of the Bluebook, 14th edition.]

Once you know which citations are required, it's not hard to find them. Often the correct parallel citation will be listed above the case style of the opinion itself. If not, simply check the volume of Shepard's that contains the cite that you do know, e.g., the regional reporters' Shepard's or the state Shepard's for a state reporter; or Westlaw or Lexis. In Shepard's, all parallel citations to the same case will be in parentheses at the beginning of the listing for your case in whatever reporter you are checking.

SECTION PLANS ORAL ARGUMENT DEMONSTRATION

FOR STATE BAR MEETING IN DALLAS

The Appellate Practice and Advocacy Section will sponsor a program entitled "Effective Oral Argument—A Demonstration and Critique" at the upcoming State Bar meeting in Dallas. The program features Rusty McMains and Mike Hatchell squaring off as adversaries before a three-judge panel. The problem involves a mandamus proceeding in a state-court discovery matter. Following the argument, a panel of judges and appellate practitioners will critique the substance of the argument as well as the style of the advocates. The third segment of the program will consist of a panel discussion to address the need for and possible approaches to mandamus reform.

The program will be held from 2 p.m. to 5 p.m. on Friday, June 8, 1990 in the Chambers Lecture Hall. Following the program and section meeting, the section will host a cocktail reception from 5 p.m. to 7 p.m. The section committee plans to invite the appellate and supreme court justices to attend the reception as our guests.

At publication time, Supreme Court Justice Nathan Hecht and First Court of Appeals Justice James F. "Bud" Warren have agreed to hear the argument. The planning committee, which is chaired by JoAnn Storey, Davis & McFall, is seeking MCLE credit of 2.5 hours for the program. Attendance is free to all who register for the State Bar Annual Meeting.

BOOK REVIEW: Bork's *The Tempting of America: The Political Seduction of the Law*

By Bertrand C. Moser
[Pannill, Moser, Mize & Herrmann]

Senator Sam Ervin frequently told the story of the man who was celebrating his 100th birthday. A reporter asked, "I'll bet in a hundred years you've seen a lot of changes." "Yeah," said the old man, "and I've been against every damn one of 'em."

In the first half of his new book *The Tempting of America: The Political Seduction of The Law,* Judge Robert Bork analyzes the development of constitutional law since before *Marbury v. Madison.* His view of the Court's opinions is the same as the old man's.

The Court, according to Bork, has consistently refused to interpret the Constitution in accordance with the original intent of the Framers. Instead, the Supreme Court simply makes up rights that do not exist in the Constitution to carry into effect the political agenda of a particular set of judges. In the second half of the book, Bork ties his view of the Constitution into an explanation of why the Senate did not confirm his nomination to the Supreme Court. According to Bork, there is a left-liberal culture in this country that knows it can enact its political beliefs into law only through the Supreme Court and not through popularly elected officials. This group is far more egalitarian and socially permissive than the public as a whole and knows that an originalist, non-political interpretation of the Constitution would undermine the liberal culture's most important victories in the courts. Therefore this highly influential "elite" (one of Bork's favorite words) used scare tactics and distortion to deny Bork confirmation. The first part of the book makes its point better than the second.

The drift away from original intent and toward result-oriented, political jurisprudence did not begin, as many conservatives believe, with the New Deal Court. No, it began in *Calder v. Bull* in 1798. There, in a dissenting opinion, Justice Chase said that the legislature is restricted not only by the precise terms of the Constitution but also by "the great first principles of the social compact" and by "the general principles of law and reason," principles that just happened to be consistent with the philosophy of the Federalist Party. In *Fletcher v. Peck* and in *Wilson v. Black Bird Creek Marsh Co.,* even John Marshall flirted with the idea that the courts may strike down laws on the basis of natural justice or other unwritten limits to the legislative power. But what became known as "judicial activism" was really born in the *Dred Scott* case.

Chief Justice Taney was a Southern partisan and resented the principle of the Missouri Compromise—that slavery was an evil to be limited. The right to own slaves is not found in the Constitution but Taney simply created one so as to conform the judicial decision to his own political beliefs. He did this by devising a doctrine that Bork calls a "momentous sham" that has imperiled constitutional interpretation ever since—substantive due process. To Bork, this interpretation is an oxymoron. The "due process" in the Fifth Amendment means just that—fair procedures for applying the law. "Due process," however, can never define whether the law itself is fair.

According to Bork, what Taney unleashed has yet to be contained. From *Dred Scott* came *Lochner v. New York,* the "symbol, indeed the quintessence of judicial usurpation of power." Next came *Meyer v. Nebraska* and *Pierce v. Society of Sisters* in which the Court invalidated certain restrictions of parents' decisions about how their children should be educated, even though parents are given no such right in the Constitution. Next came the New Deal Court's upholding every piece of economic legislation merely because the judges thought the laws were economically sound, even though the wisdom of legislation is not supposed to be a factor in determining its constitutional validity. Even *Brown v. Board of Education,* which Bork calls a "great and correct decision" that led to "the greatest moral triumph that constitutional law has ever produced," has caused an enormous amount of trouble in the law, because it was based on Earl Warren's personal views of the psychologically deleterious effects of racial segregation and not on the original intent of the authors of the Fourteenth Amendment.

Since *Brown* reached such a morally justified result, without regard to what the Fourteenth Amendment really meant, what it meant came to be viewed as irrelevant. So it was not surprising that the Court later came up with the decisions that were at the heart of Bork's confirmation hearing—*Griswold v. Connecticut* and *Roe v. Wade,* in which a sexually permissive minority of the American public imposed its cultural values on everyone else.

The Court in *Griswold* and *Roe,* of course, tried to ground their holdings in the Constitution by saying that specific sections of the Constitution have "penumbras," such as in *NAACP v. Alabama* where the Court found that the freedom of association emanates from the freedom of speech. If that is true, the Court reasoned, the emanations from the whole Bill of Rights create a "right of privacy" that, of course, is nowhere mentioned in the Constitution. "Roe [is] the greatest example and symbol of the judicial usurpation of democratic prerogatives in this century [and] should be overturned," writes Bork. "Since 1973, no one, however pro-abortion, has ever thought of an argument that even remotely begins to justify *Roe v. Wade* as

a constitutional decision." These are statements Bork neglected to make at his confirmation hearing.

There are a lot of problems with this view of how judge's interpret the Constitution. It is impossible to interpret the words of the Constitution without reference to the judge's own sense of values, an idea that Bork rejects. Take one of my favorite cases, *Rochin v. California.* The police come into a man's bedroom looking for, to use a modern oxymoron, controlled substances. The police see some pills on the night stand. Rochin gets to the pills first, grabs them, and swallows them. The police take Rochin to the hospital, pump his stomach without his consent, and recover the still undigested capsules. The case arose before the Fourth Amendment prohibition against unreasonable search and seizure was incorporated into the Fourteenth. The issue before the Court, therefore, was whether the prosecution's use of the pills as evidence violated the defendant's due process.

Justice Frankfurter ruled for the defendant because he found the policy action "shocks the conscience," offends "those canons of decency and the fairness which express the notions of justice of English-speaking peoples," and violates "considerations deeply rooted in reason and in the compelling traditions of the legal profession." Bork, of course, would criticize this approach by saying that what Frankfurter was doing was simply substituting his own sense of right and wrong for what the Constitution says.

But suppose we do it Bork's way. Let's rely simply on whether the authors of the Fourth Amendment would have found this to be an "unreasonable search and seizure." If the judge believes the Fourth Amendment was designed only to stop the police from breaking into someone's house, then he would find the search reasonable. If he believed the Fourth Amendment was meant to deal with broader privacy concerns, then he would rule for the defendant. But the process by which a judge selects between these two possible interpretations inevitably involves consulting his own definition of conscience, fairness, and right.

Bork admits that original intent does not require a fixed result. It only requires that the judge use the constitutional text as a starting point. Bork has no difficulty with including freedom of association in the First Amendment or wiretapping in the Fourth. Yet Bork believes that every judge who reaches a result with which Bork profoundly disagrees did so by abandoning the Constitution as a guide. But if that is so, why should we assume, as he does, that the judges who decided that a suspect must be read his rights to give meaning to the privilege against self-incrimination made up this right and did not derive it by reading the Constitution? And why can judges reading the entire Bill of Rights not honestly conclude that certain personal activities not specifically mentioned are off limits to government regulation? The Bill of Rights is, after all, the greatest restriction of goverument regulation ever to appear in a political document.

When I practice Bach's inventions, I use the original text. It has only the notes. It has no phrasing, no staccatos, no fingerings; it does not say *forte* or *piano;* it does not say *moderato* or *allegro.* I still do the best I can trying to decide how Bach wanted the music to be played. Many others conclude differently. That does not mean that they are intellectually honest and I am not.

The main difficulty with Bork's view of original understanding is that try as he will, he cannot reconcile it with any modern notion of civil rights, a charge often made by the Judiciary Committee. There is no doubt that the authors of the Fourteenth Amendment saw nothing wrong with segregated schools. And *Plessy v. Ferguson* said that the authors knew that racial separation caused psychological burdens on blacks, but the authors didn't care. Bork tries to get around this by saying that the Fourteenth Amendment was a mandate of racial equality and that as the years passed, even the Fourteenth Amendment authors would have realized that equality is not possible with segregation. To me this seems not very different from what *Brown* actually said, that is, if the authors in 1868 had been aware of the state of the world in 1954 they would have found the principle of the Fourteenth Amendment consistent with the result *Brown* reached.

There is even less doubt that the original intent of the Fourteenth Amendment was that it gave absolutely no protection to women. Only four years after the Fourteenth Amendment was adopted, the Supreme Court, which presumably knew the intent better than we do today, had no trouble in ruling 8-1 that the Fourteenth Amendment did not keep Illinois from prohibiting Myra Bradwell, a married woman otherwise qualified, from practicing law. As any student of feminist literature should know, three judges of the Supreme Court joined in Justice Bradley's concurrence that:

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong or should belong to the family institution, is repugnant to the idea of woman adopting a distinct and independent career from that of her husband.

If the Fourteenth Amendment was intended to treat sex discrimination on a "rational basis" test, as Bork believes, why did it take half a century and a constitutional amendment before woman got the right to vote. Certainly, if the Framers of the Amendment though that sex discrimination should be analyzed on a rational basis, the Supreme Court could have figured that out in 50 years.

The discussion could continue but has gone far enough to show why Bork was not confirmed. He says the greatest indictment against him was that he was "out of the mainstream" but his book goes on to prove that he was. He defends himself by saying that most constitutional scholars who oppose his views are overwhelmingly "liberal to radical law school professors."

But then Bork discusses conservative theorists like Bernard Siegan and Richard Epstein, who likewise reject Bork's view of original understanding. Most telling is Bork's discussion of Justice John Harlan, certainly one of the giants of conservative jurisprudence. In *Poe v. Ullman,* the forerunner to *Griswold v. Connecticut,* Justice Harlan fell into the liberal's trap, applied his own view of sexual morality nowhere found in the Constitution, and concluded that the Connecticut law banning the sale of contraceptives to married couples violated due process. So separate are sex and the Constitution that in Bork's view, a state law banning marriage would be constitutional.

"Matters have not improved since Justice Harlan wrote." In fact, they have gotten worse. We are at a point that now the entire Supreme Court has cut the Constitution adrift from what the Framers had in mind. Using as his text the recent decision of *Michael H. v. Gerald D.,* Bork rues the fact that seven of the current members of the Court believe the due process clause gives judges a free hand to put their own ideas about fairness into the Fourteenth Amendment and only two—Scalia and Rehnquist—even have any reservations about doing so. (This brings to mind Casey Stengel's observation that a successful manager is the one who can keep the five players who hate his guts from the four who have no opinion.) So it's not just liberals who don't like him, it's everyone. Bork's view of the forces against him may explain the votes of Ted Kennedy, Joseph Biden, and Howard Metzenbaum. It cannot explain the votes of Sam Nunn, John Stennis, and John Warner.

Not only is Bork's view of the Constitution at odds with everyone he cites, his view is also inconsistent with what the public expects courts to do. Bork believes the executive and legislative branches should have a virtually free hand. It is therefore ironic that he should then criticize a Congress that defeated him by the largest margin of any Supreme Court nominee that ever came to a vote. In 200 years of court decisions limiting the powers of the other branches of government, Bork is not able to cite one that he agrees with in result and reasoning. Arthur Miller has said that the press is the only occupation with its own amendment. The courts, on the other hand, have their own article. That status is hardly deserving if courts can never find a way to interpret the Constitution to protect the citizen from government interference in his life.

To me, the best observation at the confirmation hearing was by Senator Paul Simon, not surprisingly, a non-lawyer, "The thing I have to decide is whether the Bill of Rights would be safe in your hands." Bork never addressed that successfully in the hearings and his book does no better. He does tell the story of the time that Judge Learned Hand had lunch with Justice Holmes. As Holmes rode off in a carriage, Hand in a burst of enthusiasm ran after him crying "Do justice, sir, do justice." Holmes reproved Hand by saying "That is not my job. It is my job to apply the law." Bork never recognizes that there is a connection between the two. Bork's critics did and that is why he was defeated. Perhaps the critics knew what the Framers intended after all.

Extending Time For Perfecting Appeal: It May Not Be Over Unless You Know Its Over

By Bruce Ramage
[Senior Staff Attorney, First Court of Appeals, Houston]

At the end of a summary judgment hearing, the trial judge tells the lawyers that he will rule on the motion after he has reviewed the matter closely. The next day, the judge grants the motion and signs a final judgment. Two months later the defendant learns of the judgment and desires to appeal. Should the defendant's lawyer contact his malpractice insurance carrier or is there still hope for an appeal?

The purpose of this article is to discuss how the period for perfecting appeal can be extended under TEX. R. APP. P. 5(b)(4) and TEX. R. CIV. P. 306a(4) when a party does not have notice or actual knowledge that the trial court has signed the judgment or appealable order.

Extensions for Perfecting Appeal

The period for perfecting an appeal or filing a motion for new trial begins on the date that the judgment is signed. TEX. R. APP. P. 5(b)(1); TEX. R. CIV. P. 306a(1). But, the opportunity to appeal may be foreclosed if a party does not know that the trial court has signed a judgment and discovers that the judgment has been signed after the period for perfecting appeal has expired.

However, if certain requirements are met, TEX. R. APP. P. 5(b)(4) provides an extension for perfecting appeal from a judgment or appealable order. When there is no timely motion for new trial, TEX. R. APP. P. 41(a)(1) requires an appeal to be perfected within 30 days after the judgment is signed. Rule 5(b)(4), however, allows an extension if there is no notice. For rule 5(b)(4) to apply, the party adversely affected by the judgment or his attorney must not have received the notice from the trial court clerk as required by rule 5(b)(3) or actual knowledge within 20 days after the judgment is signed. If this condition is satisfied, the period for perfecting appeal begins on the date the party received notice or acquired actual knowledge

that the judgment was signed or 90 days from the date the judgment was signed, whichever is earlier. *University of Texas v. Joki,* 735 S.W.2d 505, 507 (Tex. App.— Austin 1987, writ denied); TEX. R. APP. P. 5(b)(4). Thus, a party who receives notice or acquires actual knowledge 90 days or more after the date the judgment is signed may perfect an appeal as late as 120 days after the judgment is signed. This is the maximum period that rule 5(b)(4) provides when no timely motion for new trial is filed.

Motions for New Trial

Like the period for perfecting appeal, the period for filing a motion for new trial may also be extended when a party does not receive notice or acquire actual knowledge that the judgment was signed.

The timely filing of a motion for new trial extends the period for perfecting appeal from 30 days after the judgment is signed to 90 days. TEX. R. APP. P. 41(a)(1). To be timely, a motion for new trial must be filed prior to or within 30 days after the judgment is signed. TEX. R. CIV. P. 329b(a), 306a(1). If a party does not receive the notice required by rules 5(b)(3), 306a(3) and does not acquire actual knowledge that a judgment was signed, the period for filing a motion for new trial may expire before the party is aware of the judgment.

Rule 306a(4) contains identical requirements for an extension to those of TEX. R. APP. P. 5(b)(4). The 30-day period for filing a motion for new trial begins on the date the party or his attorney receive notice or acquire actual knowledge of the judgment or 90 days after the signing, whichever is earlier, if the party or his attorney had neither notice nor actual knowledge within 20 after the judgment was signed. Thus, rule 306a(4) provides a maximum period of 120 days (90+30) for filing a motion for new trial. (If the trial court does not rule on the motion by written order, it will be overruled by operation of law, at the latest, 165 (90+75) days after the judgment is signed. *See Looney v. Gibraltar Sav. Ass'n,* 693 S.W.2d 336, 340 (Tex. App.—Amarillo 1985, no writ); TEX. R. CIV. P. 329b(c). The trial court's plenary power will expire, at the latest, 195 (90+75+30) days after the judgment is signed. *Id.;* TEX. R. CIV. P. 329b(e). The 90-day period for perfecting appeal, TEX. R. APP. P. 41(a)(1), begins the day the party receives notice or acquires actual knowledge of the signing or 90 days after the signing of the judgment, whichever is earlier. *Joki,* 735 S.W.2d 505, 507. Therefore, the maximum period, under rules 306(a)(4), 5(b)(4), for perfecting an appeal when a timely motion for new trial is filed is 180 days after the judgment was signed.)

Procedure

Parties must follow specific procedures to obtain extensions under TEX. R. APP. P. 5(b)(4) and TEX. R. CIV. P. 306a(4). A party alleging no notice and no actual knowledge under either TEX. R. APP. P. 5(b)(4) or TEX. R. CIV. P. 306a(4) must 1) file a sworn motion in the trial court alleging lack of notice and actual knowledge, 2) prove, by presenting evidence at a hearing recorded by the court reporter, that the party or his attorney did not receive notice or actual knowledge of the judgment within 20 days of the signing thereof, and 3) obtain a ruling that includes a finding by the trial court determining the date the party received notice or acquired actual knowledge of the signing. *Memorial Hosp. v. Gillis,* 741 S.W.2d 364, 366 (Tex. 1987); TEX. R. APP. P. 5(b)(5); TEX. R. CIV. P. 306a(5). To appeal an adverse ruling by the trial court or to show that the appellate court has jurisdiction of the appeal after a favorable ruling by the trial court, the party asserting no notice or no actual knowledge must include in the appellate record the 1) sworn motion, 2) the statement of facts from the hearing, and 3) the trial court's ruling. *Gillis,* 741 S.W.2d 365-66; *Sabine Towing and Transp. Co. v. Evans,* 709 S.W.2d 783 (Tex. App.— Beaumont 1986, writ ref'd n.r.e.); *Olvera v. Olvera,* 705 S.W.2d 283 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.).

The provisions of rule 306a also apply to an order dismissing a case for want of prosecution. TEX. R. CIV. P. 165a.

Exceptions

There are situations to which rules 5(b)(4), 306a(4) do not expressly apply. No extension is expressly provided when a party fails to receive notice of a nonsuit that makes an interlocutory judgment final. *See McGrew v. Heard,* 779 S.W.2d 455 (Tex. App.—Houston [1st Dist.] 1989, orig. proceeding); TEX. R. CIV. P. 162.

STATE CIVIL APPELLATE UPDATE

By Mark E. Steiner
[Assistant Professor, South Texas College of Law]

TEXAS SUPREME COURT

Defective pleadings are good enough to invoke trial court's jurisdiction and to prevent the running of limitations.

Peek v. Equipment Service Co., 779 S.W.2d 802 (Tex. 1989)

A plaintiff's failure to state a jurisdictional amount in controversy in its petition will not deprive the trial court of jurisdiction. Unless the petition affirmatively shows that no cause of action exists or that the plaintiffs recovery is barred, the trial court must give the plaintiff an opportunity to amend before

granting a motion to dismiss or a motion for summary judgment.

Here, the plaintiffs did not plead the amount of damages sought in their original or first amended petition, either by alleging the damages exceeded the minimum jurisdictional limits of the court or by alleging a specific sum. After the statute of limitations had run, plaintiffs again amended their petition and asked for some dollars. The defendants moved to dismiss the suit, claiming that the plaintiffs did not invoke the jurisdiction of the trial court before the statutory time ran out. The trial court dismissed the suit.

The supreme court states that trial courts should liberally construe pleadings. Unless it is clear from the pleadings that the court lacks jurisdiction of the amount of controversy, it should retain the case.

Party assumes risk of trial stipulation.

Johnson v. Swain, 33 Tex. Sup. Ct. J. 20 (Oct. 4, 1989)(opinion on reh'g).

Despite receiving a favorable partial instructed verdict that a defendant was strictly liable and his conduct was a producing cause, a plaintiff's trial stipulation bars recovery.

In this personal injury case, the plaintiff sued under strict liability and negligence. The trial court granted a partial instructed verdict for the plaintiff, holding the defendant was strictly liable and that the defendant's conduct was a producing cause of plaintiff's injuries. The parties then stipulated that the plaintiff's comparative causation on his strict liability claim would be determined by the jury's finding on comparative negligence. Both parties expected the jury to allocate at least some negligence to the defendant. The jury, however, found that the plaintiff was contributorily negligent and failed to find that the defendant was negligent. The trial court viewed that finding as translating to one hundred percent causation on plaintiff under the stipulation. Plaintiff, thus takes nothing.

The supreme court affirms the take-nothing judgment because "courts should give effect to voluntary agreements freely made between the parties.... Although the jury's result was not contemplated by either of the parties, there is no recognized basis for remanding this cause for a new trial."

The majority also establishes an apparent modern record for judicial opinions by using the prepositional phrase "as to" seven times in the space of seven sentences. As the TEXAS LAW REVIEW MANUAL ON STYLE (4th ed.) notes, this phrase is "usually either an awkward substitute for a simple preposition, or entirely useless." As to how long this record will stand, I do not know.

Supreme Court again makes a point about cross-points.

Warren v. Triland Investment Group, 779 S.W.2d 808 (Tex. 1989)(per curiam).

The supreme court addresses whether an appellee may seek affirmative relief in the courts of appeals by cross-points without perfecting a separate appeal. Following *Donwerth v. Preston II Chrysler-Dodge, Inc.*, 775 S.W.2d 634 Tex. (1989), the court again holds that an appellee may do so.

Unless an appellant limits its appeal under TEX. R. APP. P. 40(a)(4), an appellee may complain by cross-point, without perfecting an independent appeal, of any error in the trial court as between the appellant and appellee.

Supreme Court reviews bill of review practice.

State v. 1985 Chevrolet Pickup Truck, 778 S.W.2d 463 (Tex. 1989)(per curiam).

This opinion details the necessary steps that allow the trial court to grant an equitable bill of review.

After the trial court rendered a judgment of forfeiture, the defendants filed bills of review under TEX. R. CIV. P. 329b. The trial court granted the bills of review, and in an "amended judgment" awarded the pickup truck to one of the defendants. The State appealed, arguing the trial court had no basis to enter the "amended judgment" because the defendants did not follow proper bill of review procedure.

The supreme court again enunciates the necessary steps for a bill of review proceeding. First, the bill of review petitioner must allege "factually and with particularity" that the prior judgment was rendered as a result of fraud, accident, or wrongful act of the opposing party or official mistake and was not mixed with the petitioner's own negligence. The petitioner also must allege sworn facts sufficient to constitute a defense and, before trial, present prima facie proof to support its contentions. Second, if a prima facie defense is shown, the court conducts a trial. There, the petitioner must prove by a preponderance of the evidence that the judgment was rendered as a result of fraud, accident, or wrongful act of the opposing party or official mistake and was not mixed with the petitioner's own negligence. If the petitioner meets its burden, the fact finder then determines whether the bill of review defendant (the original plaintiff) proved the elements of its cause of action. The trial court should grant the requested relief if it finds that the petitioner is "suffering under a wrongfully obtained judgment that is unsupported by the weight of the evidence."

Here, the petition for bill of review failed to allege that the prior judgment was rendered as a result of fraud or other bad things. The bill of review petitioner also did not present any evidence of extrinsic fraud or official mistake. Because the necessary elements and procedural steps under bill of review practice were not taken, the supreme court vacates the trial court's order that granted the equitable bill of review.

Conclusory statements by court of appeals is not enough for a factual insufficiency reversal.

INA of Texas v. Briscoe, 33 Tex. Sup. Ct. J. 110 (Nov. 29, 1989)(per curiam).

The supreme court holds that the court of appeals did not apply the standard of review under *Pool v. Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986) because it did not detail the evidence nor state why the contrary evidence outweighs the supporting evidence.

The court of appeals reversed and remanded, holding that the jury findings on producing cause were against the great weight and preponderance of the evidence. The court of appeals, however, merely stated that "there is no dispute he sustained some disability, albeit minor. All of the medical evidence attributed some disability to the injury."

The supreme court holds that "these conclusory statements do not comport with the correct legal standard for reviewing factual sufficiency points of error." When a court of appeals concludes the supporting evidence is insufficient, the court must detail all the relevant evidence and state why the jury finding is factually insufficient.

COURTS OF APPEALS

So long to long briefs.

Great American Mortgage Corp. v. Plows, No. 2-89-173-CV (Tex. App.—Fort Worth, November 7, 1989, n.w.h.)(not yet reported).

The Fort Worth court not only denies an appellant's motion to file a 177-page brief but also explains why. All appellate practitioners should read this opinion before writing another brief.

The court denies the motion because the 177-page brief with 157 points of error "attempts to shift to the court the responsibility of its appellate counsel to sift through the record and discriminately determine which rulings of the trial court merit appellate review because of the likelihood that reversible error occurred." The court states that "long briefs not only abuse the court, they also tend to confuse rather than clarify the points on appeal." The court concludes:

> Often the quality of long briefs suggests that their authors were either unacquainted with good briefing techniques or failed to take the time to review and edit their work. Long briefs remind one of the correspondent who apologized for writing a long letter because he did not have time to write a short one. Although the intent of such briefs is to serve as a road map persuading us to adopt the author's point of view, they too often serve as road blocks to comprehension.

Fort Worth Court of Appeals knows authority.

Tarrant County Water Control v. Crossland, No. 2-88-071-CV (Tex. App.—Fort Worth, November 22, 1989, n.w.h.) (not yet reported).

In a cross-point, appellees argued that the damages limitations of the Texas Tort Claims Act are unconstitutional. The Fort Worth court notes it rejected the same argument in *Tarrant County Hosp. Dist. v. Ray,* 712 S.W.2d 271 (Tex. App.---Fort Worth 1986, writ ref'd n.r.e.). The court states that "the cross-point has no merit beyond persistence in challenging the long-established law of governmental immunity. Cf. Luke, 18:2-5." Judge Lattimore's scriptural reference is to the following parable:

> There was in a certain city a judge who did not fear God, and did not respect man.
> And there was a widow in that city, and she kept coming to him, saying "Give me legal protection from my opponent."
> And for a while he was unwilling: but afterward he said to himself, "Even though I do not fear God nor respect man, yet because this widow bothers me, I will give her legal protection, lest by continually coming she wear me out."

Be careful what you pray for—you might just get it.

Hampton v. State Farm Mutual Automobile Insurance Co., 778 S.W.2d 476 (Tex. App.--Corpus Christi 1989, n.w.h.)(opinion on motions).

After reversing a judgment not withstanding the verdict and reinstating a $50,000 jury verdict, the Corpus Christi court refuses to award prejudgment interest or penalties as pleaded in the trial court because the appellant did not complain about interest or pray for prejudgment interest before the court issued its opinion. "Relief that has not been prayed for on appeal cannot be granted.... Since appellant did not pray for prejudgment interest and penalties, we cannot award them."

Mandamus: An appeal is an adequate remedy at law.

Smith Shopping Center v. Farrar, 779 S.W.2d 132 (Tex. App.—Fort Worth 1989, orig. proceeding).

The court finds that the relators in this mandamus proceeding have an adequate remedy by appeal and denies the application for writ of mandamus. The trial court had refused to allow an evidentiary hearing and relators contended that mandamus relief is available to force the district court to trial even when there is an adequate remedy by appeal. The court explains that because the statute governing mandamus proceedings in the court of appeals no longer specifically authorizes mandamus to compel a district judge to trial, mandamus is not available where the relators have an adequate remedy by appeal.

The court of appeals also rejects relators' argument that an appeal is not an adequate remedy because it involves a greater length of time than a mandamus action. "Our supreme court has held that neither the delay in obtaining relief, nor the added cost of a trial and the appellate process, renders an appeal an inadequate remedy. *Iley v. Hughes,* 158 Tex. 362, 311 S.W.2d 648, 652 (Tex. 1958)."

Harmless error applied to venue.

Lewis v. Exxon Co., No. 08-89-00080-CV (Tex. App.—El Paso, Nov. 1, 1989, n.w.h.)(not yet reported).

The court of appeals applies to the harmless error rule to venue where the lawsuit was transferred to a county of proper venue. The plaintiff filed suit in Jefferson County and defendant Exxon moved that the case be transferred to Midland County, where the cause of action accrued. The plaintiff complained on appeal that venue was proper in Jefferson County because Exxon maintained an agency or representative in that county.

The court of appeals concludes that it cannot say the trial court erred in determining that the plaintiff made a prima facie case for venue in Jefferson County. Moreover, the court concludes that the error was harmless because the case was transferred to a county of proper venue. The court explains that TEX. CIV. PRAC. & REM. CODE sec. 15.064(4) directs appellate courts not to find harmless error if the venue was improper. Here, however, the venue was proper in the county of trial, and the error, if any, "in incorrectly determining the venue question may have been harmless and not reversible."

El Paso Court of Appeals questions standard of review for legal insufficiency as a "matter of law."

Montes v. Texas Employers' Insurance Association, 779 S.W.2d 485 (Tex. App.—El Paso 1989, n.w.h.).

While affirming a take-nothing judgment in a worker's compensation case, the El Paso court of appeals questions the standard of review where the appellant is attacking the legal sufficiency of an adverse finding on an issue on which the appellant had the burden of proof. The court notes that typically the appellant in a matter of law challenge is cast as having "two hurdles to overcome. First, the record must be examined for evidence that supports the jury's finding while ignoring all evidence to the contrary. If there is no evidence to support the fact finder's answer, then the entire record must be examined to see if the contrary proposition is established as a matter of law."

The court points out that the first hurdle of this standard of review makes little sense. A "no" answer to a jury question does not have to be supported by affirmative evidence; it only means that the party with the burden of proof failed to carry that burden. Additionally, a "no" answer does not translate to a finding of the opposite of the issue asked about.

The court concludes there is only one hurdle in a matter of law challenge: "Does a review of the entire record establish the proposition as a matter of law? If that question is answered in the affirmative, it must necessarily mean that the jury answer was wrong and the jury could not legally have answered the question in the negative." *See also* 6 W. Dorsaneo, TEXAS LITIGATION GUIDE 151.06 [4][b][ii](1989)(noting scope of review is not completely clear in matter of law points of error).

State Criminal Appellate Update

By Alan Curry

[Assistant District Attorney, Harris County]

COURT OF CRIMINAL APPEALS

Court of Appeals has no jurisdiction to grant a motion for extension of time to file notice of appeal when notice of appeal is not filed with trial court.

Miles v. State, 780 S.W.2d 215 (Tex. Crim. App. 1989).

A court of appeals has no jurisdiction to grant a motion for extension of time to file a notice of appeal pursuant to TEX. R. APP. P. 83 when no notice of appeal was ever filed with the trial court. However, the Court of Criminal Appeals dismisses the State's petition for discretionary review since it was taken from an interlocutory order.

An appellant must make a timely request for a statement of facts before being entitled to a new trial based upon loss or destruction of the appellate record.

Corley v. State, No. 748-88 (Tex. Crim. App., Nov. 15, 1989)(not yet reported).

An appellant who appealed from a judgment revoking his probation is not entitled to a new trial because the court reporter had destroyed the notes to the original hearing on the appellant's plea of no contest, which had been held 10 years before the judgment revoking the appellant's probation. He had made no timely request for the court reporter's notes of the original plea hearing as required by TEX. R. APP. P. 50(e).

McKenna v. State, No. 1422-88 (Tex. Crim. App., Nov. 29, 1989)(not yet reported).

When an appellant has entered a plea of guilty or nolo contendere, a court of appeals must consider on appeal from the denial of a motion to suppress evidence if that evidence has been "somehow used" against the appellant, regardless of whether the rest of the allegedly untainted evidence is sufficient to sustain the appellant's conviction, following *Kraft v. State,* 762 S.W.2d 612 (Tex. Crim. App. 1988) and overruling *Johnson v. State,* 722 S.W.2d 417 (Tex. Crim. App. 1986). *Cf. McGlynn v. State,* 704 S.W.2d 18 (Tex. Crim. App. 1982).

COURTS OF APPEALS

Appeal will be dismissed for failure to timely file notice of appeal.

Bermea v. State, 779 S.W.2d 951 (Tex.App.—Amarillo, 1989)

Court of Appeals will dismiss an appeal pursuant to *Shute v. State,* 744 S.W.2d 96 (Tex. Crim. App. 1988) if no notice of appeal is timely filed as set forth in TEX. R. APP. P. 41(b).

To preserve error on appeal, notice of appeal must state that the appellant is appealing from the pre-trial denial of a motion.

Berger v. State, 780 S.W.2d 321 (Tex. App.—Austin 1989, n.p.h.).

To preserve error on appeal from a pre-trial denial of a written motion, an appellant who pleaded guilty or nolo contendere must state in his notice of appeal that he is appealing from the denial of a written motion that has been ruled on before trial. The appellant's failure to do so, however, does not deprive the court of appeals of jurisdiction.

FEDERAL CIVIL APPELLATE UPDATE

By W. Wendell Hall
[Participating Associate, Fulbright & Jaworski, San Antonio]

FIFTH CIRCUIT COURT OF APPEALS

District court must review record as it exists at time of ruling on a motion for reconsideration.

Xerox Corp. v. Genmoora Corp., No. 88-1446 (5th Cir. Nov. 17, 1989).

When reviewing a district court's refusal to grant reconsideration, the appellate court applies an abuse of discretion standard; however, the district court, like the appellate court must consider judicially the record as it existed at the time of the motion for reconsideration not just as it existed at the time of initial ruling.

Mandamus available to set aside remand order where not authorized by statute.

In re Wilson Indus., Inc., 886 F.2d 93 (5th Circ. 1989).

Mandamus, an extraordinary remedy, may be granted where the district court premises a remand of a case to state court upon a basis not authorized by statute, such as the court's crowded docket. If, however, the district court's error is based upon a misinterpretation of the remand statute, then mandamus is not appropriate.

Instructions require reversal if they tend to confuse or mislead the jury.

Summers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan, 883 F.2d 345 (5th Cir. 1989).

While the district court is accorded substantial latitude in preparing jury instructions, if the instructions tend to confuse or mislead the jury, it will constitute grounds for reversal. If, considering the totality of the charge, the instructions are comprehensive, balanced, fundamentally accurate, and not likely to confuse or mislead the jury, the charge will not constitute grounds for reversal.

Special interrogatories require reversal if they do not adequately present case to jury, are unfair, or are not clearly submitted.

Barton's Disposal Serv., Inc. v. Tiger Corp., — F.2d —, 1989-2 Trade Cas. (CCH) 868, 839 (5th Cir. 1989).

Because a trial court is afforded great latitude in the framing and structure of the instructions and special interrogatories given to the jury, the Fifth Circuit is "loath to disturb that discretion absent a showing of abuse of discretion." The court held that an abuse of discretion is established if, when read as a whole and in conjunction with the general charge, the interrogatories do not adequately present contested issues to the jury, the submission of the issues to the jury is unfair, or the alternative questions of fact are not clearly submitted to the jury.

District courts cautioned against overuse of Rule 403 to exclude evidence.

Herrington v. Hiller, 883 F.2d 411 (5th Cir. 1989).

Generally, a district court's evidentiary rulings are reviewed only for an abuse of discretion. With respect to cases involving FED. R. CIV. EVID. 403, the Fifth Circuit has cautioned that because these rulings are often inextricably bound with the facts of a particular case, they will not be disturbed absent a showing of clear abuse. The court also cautioned district courts against overuse of FED. R. CIV. EVID. 403 as an exclusionary device because it permits the exclusion of probative evidence which is an extraordinary remedy that must be used sparingly.

Appellate timetable runs from entry of judgment on docket sheet, not signing or filing of judgment.

Burrell v. Newsome, 883 F.2d 416 (5th Cir. 1989).

The district court's judgment was filed on August 9, 1988; however, it was not *entered* on the docket until August 10, 1988. Thus, the period for appeal began to run from the *date of entry of the judgment on the docket sheet.*

Notice of appeal that reads "Rendon, et al." is sufficient to designate all plaintiffs as appellants where there is a class certification.

Rendon v. AT&T Technologies, 883 F.2d 388 (5th Cir. 1989).

The plaintiffs' notice of appeal in this case was designated "Gilbert Rendon, et al." as appellants. The appellee contended that the Fifth Circuit had no jurisdiction to consider the cross-appeal because under FED. R. APP. P. 3(c), the phrase "et al." gave no notice of the parties seeking an appeal. The Fifth Circuit held that the appellee's argument may have merit where there is no class certification; however, the argument is rejected when a class has been certified. Liberally construing the specificity requirement of Rule 3(c), the Fifth Circuit held that "Gilbert Rendon, et al." was sufficient to designate the certified class of plaintiffs as appellants.

Where a first party's claim against a second party is dismissed and the dismissal is adverse to the first party, the first party's failure to file a notice of appeal precludes appellate review of the dismissal.

Stockstill v. Petty Ray Geophysical, No. 88-3701 (5th Cir. Nov. 29, 1989).

In this case, Geophysical filed a notice of appeal from the dismissal of its claim against B & B Operators. B & B Operators, however, did not file a notice of appeal from the dismissal of its claim against its insurance agent, BMF. On appeal, BMF argued that the court did not have jurisdiction over B & B's

appeal of the order of dismissal because B & B failed to file a notice of appeal. The Fifth Circuit observed that once Geophysical filed its notice of appeal, B & B had fourteen days in which to file its appeal under FED. R. APP. P. 4(a)(3). B & B relied upon *Anthony v. Petroleum Helicopters, Inc.*, 693 F.2d 495 (5th Cir. 1982) and *Bryant v. Technical Research Co.*, 654 F.2d 1337 (9th Cir. 1981), to argue that its failure to file a notice of appeal was not a jurisdictional defect. *Anthony* and *Bryant* stand for the proposition that an initial notice of appeal is jurisdictional but a protective or cross-appeal is permissive and courts of appeal may retain all parties in order to do justice. The court noted, however, that it is questionable whether *Anthony* or *Bryant* remain good law in light of *Torres v. Oakland Scavenger Co.*, 108 S.Ct. 2405 (1988) (requirements of FED. R. APP. P. 3 and 4 must be satisfied as to each party). The court held that under *Torres* it was doubtful that it had jurisdiction to review the dismissal of BMF. However, the court found it unnecessary to address the issue.

Affirmative defense not raised by defendant may be considered on appeal where it is raised sua sponte by the district court.

Burrell v. Newsome, 883 F.2d 416 (5th Cir. 1989).

Generally, the Fifth Circuit will not consider an affirmative defense not raised by a party below; however, the court may consider an affirmative defense where it is raised sua sponte by the district court.

Second motion to reconsider based on substantially the same grounds as first motion does not toll the time for filing notice of appeal.

Charles L. M. v. Northeast Indep. School Dist., 884 F.2d 869 (5th Cir. 1989).

On August 17, 1988, the final judgment in this case was entered. On August 23, the plaintiff filed a motion for reconsideration. Because the motion was filed within 10 days of the order complained of, the motion was treated as a FED. R. CIV. P. 59(e) motion that tolls the running of the 30-day period for filing a notice of appeal. On September 6, the district court denied the motion for reconsideration. Once the Rule 59(e) motion was ruled upon, the 30-day period for appeal began running anew. However, on September 15, the plaintiff filed another motion to reconsider wherein he alleged that the September 6 order denying reconsideration gave new reasons not contained in the original order granting dismissal. On October 4, the court denied the September 15 motion to reconsider the denial of the first motion to reconsider. On October 12, the plaintiff filed his only notice of appeal, which specified that it was from the final judgment of August 17, the order of September 6 and the order of October 4. The court held that where an appellant files a second motion to reconsider based upon substantially the same grounds as urged in the earlier motion, the filing of the second motion does not interrupt the running of the time for appeal, and the appeal must be dismissed. Because the second motion (the September 15 motion) was a successive motion for reconsideration, the filing of the second motion did not toll the running of the 30-day time for appeal; therefore, the notice of appeal was untimely and the appeal was dismissed.

Factual findings in an intentional discrimination case subject to clearly erroneous standard of review.

Rendon v. AT&T Technologies, 883 F.2d 388 (5th Cir. 1989).

In an employment discrimination case, a district court's factual finding of intentional discrimination is reviewed under the clearly erroneous standard of review. If the district court's findings are plausible in light of the record viewed in its entirety, the Fifth Circuit will not reverse the findings even though it is convinced that had it been sitting as a trier of fact, it would have weighed the evidence differently. When there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. Thus, on review, the Fifth Circuit will reverse a district court's factual findings only if, on the entire evidence, it is left with the definite and firm conviction that a mistake has been committed.

Standard of review in summary judgment cases.

Barrett Computer Servs., Inc. v. PDA, Inc., 884 F.2d 214 (5th Cir. 1989).

Upon review of a summary judgment, when a fact question controls the disposition of a summary judgment motion, the Fifth Circuit reviews the evidence and any inferences to be drawn therefrom in the light most favorable to the non-moving party. Questions of law, in contrast, are decided in the same manner as the court decides questions of law outside the summary judgment context—by de novo review.

District courts strongly encouraged to give reasons for granting summary judgment.

O'Neill v. Air Line Pilots Ass'n Internat'l, _ F.2d —, 132 LRRM 2876 (5th Cir. 1989).

Although nothing in FED. R. CIV. P. 56, governing summary judgment, technically requires a statement of reasons by a district court for granting a motion for summary judgment, the Fifth Circuit reiterates in this case that it has many times emphasized the importance of a detailed discussion by the district court of its reasons. The Fifth Circuit emphasized that in all but the simplest case, such a statement usually proves not only helpful, but essential.

FEDERAL CRIMINAL APPELLATE UPDATE

By Joel Androphy
[Partner, Berg & Androphy, Houston]

District court has no authority to order ex parte deposition.

In re United States, 878 F.2d 153 (5th Cir. 1989).

District court order authorizing ex parte deposition of government witness is not authorized by Federal Rules of Criminal Procedure. Mandamus reversing trial judge's order allowing defendants' attorneys to depose defendants' former attorney who was expected to testify against defendant at trial.

Liberal construction of indictment at appellate level.

U. S. v. Wilson, 884 F.2d 174 (5th Cir. 1989).

Objections to indictment that fails to state an essential element of a crime can be made at any time, but standard become much less favorable to defendant at appellate level. Appeals court will read indictment liberally.

Unduly suggestive procedures do not invalidate identification where there is no substantial likelihood of misidentification; factors delineated.

U. S. v. Flannigan, 884 F.2d 945 (7th Circ. 1989).

Hospital room "show-up" identification of suspect was unduly suggestive, but did not result in substantial likelihood of misidentification. Factors considered by court include: 1) witness' opportunity to see suspect at time of crime; 2) attention given by witness to suspect at time of crime; 3) accuracy of prior description; 4) witness' level of certainty; and 5) the length of time between the crime and the identification.

***Massiah* violation excludes fruits of illegally obtained statement.**

U. S. v. Kimball, 884 F.2d 1274 (9th Cir. 1989).

Massiah violation requires suppression not only of improperly obtained statements, but of the fruits of those statements as well. Undercover agents questioned defendant following indictment. To exclude evidence obtained through illegal questioning violation must at least be "but for" cause of the discovery of the evidence.

District court must state reason for departure from sentencing guidelines.

United States v. Hernandez-Vasquez, 884 F.2d 1314 (9th Cir. 1989).

Departure from sentencing guidelines is intended to be rare; court must state reasons for departure from guidelines with sufficient specificity to allow meaningful review. Use of improper factor to depart from guideline requires remand for new sentence.

Prior acts inadmissible to show modus operandi absent sufficient similarity.

U. S. v. Miller, 883 F.2d 1546 (11th Cir. 1989).

Modus operandi exception to 404(b) does not allow evidence to show defendant did things in a certain way. Admission under 404(b) of prior bad act to show defendant's acts fit modus operandi was an abuse of trial court's discretion. Prior acts tending to show modus operandi are ouly admissible if similarity is strong enough to clearly show that offense was defendant's work. Evidence must tend to show identity.

Submission of trial judge's opinion with party's marginalia is unprofessional.

Allen v. Seidman, 881 F.2d 375 (7th Cir. 1989).

Department of Justice submission of trial judge's opinion complete with marginalia was "indecorous" and "unprofessional conduct." Appendix to government brief contained trial court opinion, upon which comments were scribbled indicating personal opinions as to court findings. "Wrong" was scribed in margin next to several court findings.

Jeopardy attaches after examination of first government witness.

U. S. v. Ramirez, 884 F.2d 1524 (1st Cir. 1989).

Jeopardy attaches after jury empaneled and government has completed direct examination of their first witness.

Trial court's evaluation of prima facie Batson case subject only to clearly erroneous review.

U. S. v. Grandison, 885 F.2d 143 (4th Cir. 1989).

Trial judge's determination regarding *Batson* challenge is entitled to great deference and will not be disturbed unless clearly erroneous.

Trial court did not require prosecution to explain use of challenges to black jurors, because trial court felt that a prima facie case of racial discrimination had not been made. Affirmed.

FROM THE EDITOR . . .

I like to tease my friends at the 14th Court, especially chief staff attorney Helen Cassidy, that even though the court says it has no local rules, the truth of the matter is that it has no *written* local rules. So, when I saw the statement in this issue's article by Helen Cassidy and Ben Taylor on the 14th Court practices that contained this incomplete statement that the 14th Court has no local rules, I grabbed my editor's pen to add the word "written." Then I realized that I was exceeding my editor's prerogative and that I had a vehicle elsewhere to offer my opinion.

At the First Court we have local rules. In repeating that fact, I have to avoid the tendancy to sound defensive. People have a bad attitude toward local rules. But, there are certain local rules of practice and custom each court of appeals has adopted. The First Court formalized these practices to help ensure consistency by the court and to assist the bar. With only a few exceptions, JoAnne Storey and Marguerite O'Connell's article on the First Court demonstrates this approach.

The articles on the First and Fourteenth Courts are part of our series on practice before the various courts of appeals. Although it was by happenstance, I would have scheduled the review of the two Houston courts side-by-side if I had thought of it. We purposely have not specified to authors what to cover in these articles. What they identify as important to know about a court is significant information itself. In the next issue, Jessie Amos, Pat Shannon, and Nancy Green will examine practice before the Austin Court of Appeals.

I haven't mentioned Ralph Brock lately. Ralph spends hours at his computer composing the type for the *Appellate Advocate*. He's as good a guy as he is a lawyer. Also thanks are in order to George Hricik and Bowne of Houston, who last issue finished their year of printing the *Appellate Advocate*. The Appellate section's coffers are full largely because Bowne of Houston alternates annually with Bowne of Dallas in printing the *Appellate Advocate* for free. Both Bownes are prompt, courteous, and treat us like paying customers.

You may recall my mention earlier of my favorite explanation of why someone was late with his article. Said Bert Moser: "I had asked Salman Rushdie to proof read it." This time he was only a little late. His reason for his relative promptness: "Salman Rushdie now has a fax machine." Bert also sent along with his book review of Robert Bork's book, a copy of a review by George Will. My question after reading both reviews: Did you guys read the same book?

The brain drain from the First Court to South Texas College of Law continues to flow. *Appellate Advocate* board member Ursula Weigold follows Mark Steiner to law school professorship. Although her considerable talents are lost to the court, Ursula promises to continue telling us "The Right Cite."

First Court staff attorneys Bruce Ramage and Jeff Nobles join the *Appellate Advocate* board—not the least of their many attributes is that they are geographically desirable members of the board from the editor's perspective. Bruce claims his topic in this issue on obtaining an extension to perfect an appeal if a party does not have notice of the judgment is "boring." My view is that almost all legal articles are boring—until you need to refer to them.

Jeff will begin a regular column next issue in which he analyzes all the state appellate court civil reversals during each four-month period between issues and looks for common threads. His work should help lawyers evaluate the likelihood a case will be reversed.

Both Bruce and Jeff have been instructed not to receive any calls from Dean Wilks at South Texas.

—Lynne Liberato

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