The Appellate Advocate

State Bar Appellate Practice & Advocacy Section Report

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The Chair Reports

Appellate Practice Institute: The two day Appellate Practice Institute, sponsored by this Appellate Practice Section and the State Bar, held in Austin on February 10 and 11, was a success. Despite an ice storm, canceled flights, and other aggravating circumstances, approximately two hundred attended the Institute. The speaker reviews were good, and the concept was well received.

Council Actions: The Section Council met in conjunction with the Institute, and set forth an agenda for the remainder of the year:

- **By-Law Amendments:** As you will see elsewhere in this issue, by-law amendments will be submitted to the Section at its annual business meeting (on Friday afternoon) at the State Bar Convention.

- **Dues Increase:** Further, a dues increase, which was approved by the Council in May, 1993, will be presented to the membership at the same business meeting. The dues increase cannot go into effect until approved at the Bar Convention and submitted for review by the State Bar Board of Directors. Dues have not been increased since the formation of the Section, and as the Section becomes more active, it will need additional revenue. The increase will primarily cover the costs of producing the Appellate Advocate and furnish a modest stipend for the Editor. The increase will also cover the costs of the Appellate Rules Committee, and the other work of the Section.

- **Rules Committee Report:** The Section Council also heard a report from the Appellate Rules Committee, our most active standing committee. Judge Clarence Guittard, who has chaired this committee since its inception, gave in in-depth preview of the proposed changes, which are still evolving, and the rationale behind the proposals.

State Bar Business Meeting and Program: The business meeting at the State Bar Convention will conclude with election of new officers, and the presentation of a program entitled "*'Big Quake or Little Shakes,' the Impact of the Upcoming Rules Changes.*" There will be a series of panel discussions in which the areas of greatest interest to the Section (discovery, sanctions, jury charges, and appellate rules) will be covered.

No Judicial Reception: The Council was polled on whether or not to have a judicial reception in conjunction with the State Bar Convention Business Meeting and Program. These receptions are expensive, and attendance at the last several conventions has been poor. The Council was split on this issue, and I cast the deciding vote, not to have a formal reception. Rather, a cash bar will be available, with some light snacks. There are a number of competing receptions immediately after our program. This will save several thousand dollars, but if you would like to see the tradition revived, let the Council know.

Nominating Committee: Molly Anderson of Tyler, Ralph Brock of Lubbock, and Ann McClure of El Paso have been named as the nominating committee for the selection of new officers. This conforms to the composition of nominating committees under the proposed by-laws: One non-Council member, one former chair, and one Council member.

Advanced Appellate Practice Course: Charles "Skip" Watson of Amarillo has been named as course director for this year's Advanced Appellate Practice Course. A planning committee meeting was held in Austin on April 9, and the program for the fall looks great.

Living Legends of Appellate Practice: Sarah Duncan and Skip Watson were asked to serve as a committee to recognize those who, in the past, have advanced the concept of appellate practice. They have recommended six people as the first inductees, who will be presented at the Advanced Appellate Practice Course. These include two private practitioners, two state judges, and two federal judges.

Future Council Meetings: The Council will have two additional meetings during this term. The next will be at Hobby Airport on May 6, 1994. The final one will be in Austin at the Bar Convention, on Thursday evening, before the Annual Business meeting.

It has been an honor and a pleasure to work with the officers of this fine Section for the past year. We haven't accomplished as much as I had hoped, but we are moving in the right direction. During this year, we have presented two, two-day seminars, and have an active newsletter. Also, the number of standing committees has been expanded, a full afternoon of CLE program and business meeting have been arranged for the Bar Convention in Austin and the groundwork has been laid for future growth. Many thanks to you all for allowing me to serve as Chair of this Section. Good Luck to Judge O'Connor during the upcoming year.

— L. Wayne Scott

Jurisdiction in the Supreme Court of Texas: "Amount in Controversy"

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Most jurisdictional questions in the Supreme Court of Texas are routine. However, some jurisdictional questions are rarely (if ever) raised. Although rarely raised or discussed, § 22.225 of the Texas Government Code and the monetary limitations of the constitutional county courts' original jurisdiction essentially impose an amount in controversy requirement for the Court to exercise appellate jurisdiction subject to certain exceptions. Although there are several possible methods for addressing the effect of an amount in controversy requirement upon the Court's jurisdiction, the Court has yet to determine how it will resolve "amount in controversy" as a jurisdictional issue. We will explore amount in controversy as a jurisdictional issue in the Court and discuss three possible methods to resolve this issue. Of course, the opinions expressed in this article are those of the authors and do not necessarily reflect the views or opinions of Justice Hightower or the Supreme Court of Texas.

I. Jurisdiction

Section 22.001 of the Texas Government Code excludes from the jurisdiction of the Court "those cases in which the jurisdiction of the court of appeals is made final by statute." TEX. GOV'T CODE ANN. § 22.001(a)(6) (Vernon 1988). Section 22.225 provides that the judgment of a court of appeals is conclusive on the law and facts, and a writ of error is not allowed from the Court in several instances including "a case appealed from a county court or from a district court when, under the constitution, a county court would have had original or appellate jurisdiction of the case..." subject to certain exceptions. TEX. GOV'T CODE ANN. § 22.225(b)(1) (Vernon Supp. 1994). This section does not require that the suit actually originate in the constitutional county court. Instead, the provision applies when the case could have been brought there or when the that court could have had appellate jurisdiction.

Section 22.225 also provides numerous exceptions under which the jurisdiction of a court of appeals is final. Exclusive of amount in controversy, the Court has jurisdiction over cases involving probate matters, state revenue laws, the validity or construction of a statute, when the justices of a court of appeals disagree on a question of law material to the decision, and when the court of appeals holds differently from a prior decision of another court of appeals or of the Court on a question of law material to a decision of the case. TEX. GOV'T CODE ANN. §§ 22.001, 22.225 (Vernon 1988 & Supp. 1994).

II. Amount in Controversy

Applying § 22.225(b)(1) requires a determination of the original and appellate jurisdiction of county courts. Originally, the specific dollar amounts within the jurisdiction of county courts and the appellate jurisdiction of those courts were expressly included in article V, § 16 of the Texas Constitution. However, that constitutional provision was amended in 1985 and now states that the county court has jurisdiction "as provided by law." TEX. CONST. art. V, § 16.

The Government Code provides the "general" jurisdiction of county courts. The "general" jurisdictional statutes provide that a county court has concurrent jurisdiction with justice and district courts when the amount in controversy is between $200 and $5,000, and appellate jurisdiction in cases within the original jurisdiction of the justice courts in which the judgment appealed from or the amount in controversy exceeds $20. TEX. GOV'T CODE ANN. §§ 26.042(a), (d) & (e) (Vernon 1988 & Supp. 1994). Over the years, the legislature has increased the jurisdictional amounts of the county courts. For example, the latest change occurred in 1991 and increased the maximum amount from $2,500 to $5,000. TEX. GOV'T CODE ANN. § 26.042(a), (d) (Vernon Supp. 1994).

In addition to these "general" jurisdictional statutes, the Government Code also provides jurisdictional provisions relating to particular counties. *See* TEX. GOV'T CODE ANN. §§ 26.103 *et. seq.* (Vernon 1988 & Supp. 1994). The provisions relating to specific counties may restrict or increase the jurisdiction of their county courts. *See, e.g.*, TEX. GOV'T CODE ANN. § 26.175 (Vernon 1988) (if the county judge is licensed to practice law in Texas and practiced law for at least two years before his appointment or election, the Fayette County county court has

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concurrent jurisdiction with the district court in civil cases in which the matter in controversy exceeds $500 and does not exceed $20,000); TEX. GOV'T CODE ANN. § 26.327 (Vernon 1988) (the county court of Travis County has general jurisdiction of probate court but has no other civil or crimmal jurisdiction). Even when the Constitution provided the "general" jurisdiction of county courts, additional provisions relating to the jurisdiction of a particular county's county court existed. *See* Acts of 1941, 47th Leg., p. 188, ch. 136, sec. 3 (limiting the jurisdiction of the county court of Travis County to eminent domain and probate matters and revoking jurisdiction over civil or criminal matters); Acts of 1947, 50th Leg., p. 470, ch. 271, sec. 1 (providing jurisdiction of probate matters to the county court of Hill County and denying that court's jurisdiction over original or appellate civil cases or original or appellate criminal matters and eminent domain matters); TEX. GOV'T CODE ANN. § 26.112 revisor's note (4) (Vernon 1988) (explaining that the 1981 revisions limited the civil jurisdiction of the county court of Baylor County to probate jurisdiction only).

Section 22.225 of the Government Code and the monetary limitations of the county court's original jurisdiction essentially impose a requirement that the amount in controversy be more than $5,000 in order for the Court to have appellate jurisdiction subject to certain exceptions. *See Simpson v. McDonald*, 142 Tex. 444, 179 S.W.2d 239, 242 (1944); *see also Texas Pipe Line Co. v. Hunt*, 149 Tex. 33, 228 S.W.2d 151, 154 (1950) ("We think the intent of Article 1821(1) [repealed, now § 22.225] was merely to deprive the Supreme Court of jurisdiction in cases of limited financial importance described as such in the Constitution."). *See generally* 6 MCDONALD TEXAS CIVIL PRACTICE § 7:8 (Richard Orsinger, ed. 1992); Dan S. Boyd, *An Overview of Supreme Court Writ of Error Jurisdiction and its Exercise*, 46 TEX. B.J. 892, 894 (1983); James B. Sales & John W. Cliff, *Jurisdiction in the Texas Supreme Court and Court of Civil Appeal*, 26 BAYLOR L. REV. 501, 509-10 (1974).

III. Methods of Calculating Amount in Controversy

There are three possible methods for addressing the effect of § 22.225(b) upon the Court's jurisdiction. First, the Court could interpret § 22.225(b) to retain the jurisdictional limits in place prior to the 1985 constitutional amendment. In effect, the Court would continue to reject cases under $1,000 even though the constitutional provision setting the $1,000 jurisdictional limit has been amended to eliminate the $1,000 limit.

Second, the Court could strictly and literally interpret and apply all of the jurisdictional statutes. Under this method, one would be required to consider the "general" jurisdiction of the county court as well as the specific jurisdictional provisions relating to each particular county's county court. This method could result in differing jurisdictional amounts depending upon the county in which the case originated. For example, the Court would not have jurisdiction over a case brought in district court in Fayette County with an amount in controversy of $19,000 because the county court has original jurisdiction of matters under $20,000 and the case could have been brought in that court. TEX. GOV'T CODE ANN. § 26.175 (Vernon 1988). On the other hand, the Court would have jurisdiction over a $100 suit brought in district court in Travis County because the county court does not have jurisdiction over any civil matters and the case could not have been brought in that court. TEX. GOV'T CODE ANN. § 26.327 (Vernon 1988).

Third, the Court could rely only on the "general" jurisdictional statutes providing for original and appellate jurisdiction in county courts and effectively disregard the special jurisdictional provisions for particular counties when applying § 22.225. During the time that the "general" jurisdiction of county courts was specifically set forth in article V, § 16 of the Constitution, statutory law included other provisions relating to the jurisdiction of particular counties. The Court, however, still relied only on the general amounts in the Constitution when determining its jurisdiction. In *Simpson v. McDonald*, 142 Tex. 444, 179 S.W.2d 239, 242 (1944), the Court stated that it would not have jurisdiction of an application for writ of error in a case appealed from Tarrant County since the amount in controversy was less than $1,000. At the time the suit was brought, the Constitution provided that the original "general" jurisdiction of county courts was $1,000. However, the provisions relating to particular counties provided that the Tarrant County county court had neither civil or criminal jurisdiction, but rather had only probate court and juvenile jurisdiction. TEX. GOV'T CODE ANN. § 26.320 revisor's note (2) (Vernon 1988); *see also* Acts of 1909, 31st Leg., § 3, p.48; Acts of 1921, 37th Leg., ch.28, § 3, p. 70. Despite a statute limiting the general jurisdiction of the Tarrant County county court, the Court would rely exclusively on the "general" jurisdiction to determine the jurisdictional amount in controversy. *Simpson v. McDonald*, 179 S.W.2d at 242.

Applying the same reasoning under the current statutory scheme, the Court would look to § 26.042 to determine the "general" jurisdictional amounts. Application of this method would provide the courts of appeal with conclusive and final jurisdiction of cases appealed from justice court. In addition, absent some statutory exception, the Court would not have jurisdiction of a case when the amount in controversy is less than $5,000 regardless of whether the case originated in a county court or district court. This interpretation of § 22.225(b) would not result in the loss of the Court's jurisdiction over a large number of cases or in cases with issues significant to the jurisprudence of the state because of the exceptions in § 22.225 (b)(1) and (c). In addition, the third method would discourage the prosecution of matters of insignificant financial amounts when no substantial or important question of law is involved.

Note: This paper is adapted from a portion of Internal Procedures and Motion Practice in the Supreme Court, *Seventh Annual Advanced Civil Appellate Practice Course (Sept./Oct. 1993).*

Tunnel Vision: Appellate Review of A Summary Judgment Order Stating A Specific Ground for the Judgment

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I. Introduction

"I'll prepare an order," you say as the judge notes on his docket sheet that he has rendered summary judgment disposing of your opponent's entire case. Your motion offered three grounds for summary judgment. You know that if the judge signs a general order, your opponent must attack all three grounds on appeal.[1]

"Not so fast, counselor," your opponent responds. He then persuades the judge to direct you to make your order specify the ground the judge relied on in granting the motion. The problem is, the judge adopted the most tenuous of your three arguments. Are you condemned to rely only on that ground on appeal? Can the appellate court affirm the judgment on the other grounds in your motion? This article will address these questions by discussing the status of the law, and advocate that Texas courts adopt the federal approach to this issue.

II. Summary Judgment Must Be Based On Grounds Presented In the Motion For Summary Judgment

If a Texas court signs a general order granting summary judgment, the non-movant on appeal must negate every ground specified in the movant's motion.[2] A general order merely recites that the court found the motion meritorious and rendered summary judgment for the movant. If any ground in the motion for summary judgment will support the judgment, the appellate court will affirm.[3] Thus it is almost always preferable for the movant to prepare a general order.

It is appropriate to note here that the Texas Supreme Court recently held that the specific grounds for a motion for summary judgment must be expressly presented in the *motion* for summary judgment itself and not in a brief filed contemporaneously with the motion or in the summary judgment evidence.[4] However, it appears that a combined motion for summary judgment and brief in support will suffice. The better practice when combining the motion and brief is to caption the first portion of the pleading "Motion for Summary Judgment" and immediately specify the grounds in support of the motion for summary judgment after the introductory paragraph. The portion of the pleading containing your legal arguments should be separated from the motion with a subcaption, such as "Brief in Support of Motion for Summary Judgment."

As in the hypothetical given above, the non-movant will sometimes prevail upon the judge to sign an order specifying the ground upon which he based the judgment. Or perhaps the order will have been prepared by counsel unfamiliar with the advantages of a general order. Hence, the question arises, what is the effect of specifying one ground among several asserted in the motion?

Prior to 1978, one rule governed appellate review of summary judgments in Texas: Parties could assert *any* ground to either support or reverse the judgment on appeal, even if that ground were neither presented in the motion or response thereto, nor specified as the basis of the judgment.[5] Because the non-movant had no duty to specify his opposition to the motion for summary judgment, he could raise new and additional objections to the summary judgment on appeal. This practice resulted in frequent reversals and ultimately rendered summary judgments a useless and abandoned procedure.[6]

In an attempt to make summary judgment a more viable procedure, the State Bar Committee on the Administration of Justice recommended changes to Rule 166A "that would require the non-movant to provide some assistance to the trial judge in narrowing the issues to be decided."[7] The Supreme Court Rules Advisory Committee adopted that recommendation, and in 1977 the supreme court made two important revisions to section (c) of Rule 166A:

> The judgment sought shall be rendered forthwith if ... there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law [1] on the issues as expressly set out in the motion or answer

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> *or other response shall not be considered on appeal as grounds for reversal.*[8]

These revisions are the textual source of the post-1978 rule that a summary judgment can neither be affirmed nor reversed on any issue or ground not speeifically "presented" in the summary judgment motion or response.[9] Nothing in the revisions, however, supports the notion that a summary judgment must on appeal "live or die" on the ground chosen by the trial court as the basis for the judgment.

III. Texas Appellate Courts Must Confine Their Review of A Summary Judgment To The Ground Specified, If Any, By The Trial Court In The Judgment

The source for the 1978 revisions to Rule 166a was Federal Rule of Civil Procedure 56.[10] The federal courts have consistently interpreted Rule 56 to permit affirmance of a summary judgment on any ground contained in the motion, regardless of whether that ground was specified in the judgment.[11] In fact, the Fifth Circuit will affirm a summary judgment on any ground, even if it was not presented in the motion.[12] While the Fifth Circuit approach is clearly prohibited by Rule 166a, there is nothing in Rule 166a prohibiting a court from affirming a summary judgment on any of the grounds specified in the motion, whether set forth in the judgment or not.

Nevertheless, the Texas Supreme Court has held when the trial court's order explicitly specifies the ground relied on for the summary judgment ruling, an appellate court reviewing the order may *not* consider an independent summary judgment ground not specified in the trial court summary judgment order.[13] The Supreme Court confirmed that when reviewing a summary judgment granted on general grounds, the appellate court may consider whether *any* theories asserted by the summary judgment movant will support the summary judgment. But, where the trial court's order explicitly specifies the ground relied on for the summary judgment ruling, the judgment can be affirmed only if the theory relied on by the trial court is meritorious; otherwise the case must be remanded to allow the trial court to rule on the remaining grounds.[14] The supreme court adopted reasoning first advanced by the Austin Court of Appeals.[15] The Austin Court reasoned that when a party has sought summary judgment on grounds A and B, a judgment expressly granting summary judgment on ground A, without mentioning ground B, can only be construed to mean that the trial court did not consider ground B.[16] Accordingly, to construe such a judgment otherwise would be to permit and encourage an inference that is neither warranted by the record nor in keeping with the spirit of Rule 166a(c).[17]

Bootstrapping, the supreme court then continued that if it were to adopt a practice of affirming on alternate grounds where the trial court specifically ruled on only one ground, non-movants would be required to negate all grounds on appeal, even those not considered by the trial court.[18] The supreme court reasoned that the appealing party would thus be required to argue issues on appeal that the trial court never considered or ruled on. The court defended its holding as "the most judicious procedure."[19]

According to the supreme court, affirming a summary judgment on an independent ground not specifically considered by the trial court usurps the trial court's authority to consider and rule on issues before it and denies the appellate court the benefit of the trial court's decision on the issue.[20] The court suggested that such a practice would result in appellate courts rendering decisions on issues not considered by the trial court and would void the trial court's decision without allowing it to first consider the alternate grounds.[21] The supreme court also made the questionable pronouncement that affirming on grounds raised in the motion but not specifically considered by the trial court would not promote judicial economy. Instead, it would encourage summary judgment movants to obtain a specific ruling from a trial judge on a single issue, try again with alternate theories at the court of appeals, and then assert the same or additional alternate theories before the Supreme Court.[22] The supreme court concluded that our system of appellate review, as well as judicial economy, is better served when appellate courts only consider those summary judgment issues contemplated and ruled on by the trial court.[23]

In concurring and dissenting opinions, Chief Justice Phillips and Justices Cornyn, Hecht, and Gonzalez disagreed with the court's blanket rule prohibiting an appellate court from considering alternate grounds specified in a motion for summary judgment but not specified in the judgment. In their dissenting opinions, Justices Hecht, Cornyn, and Gonzalez cited Texas Rule of Appellate Procedure 81(c), which requires courts of appeals, when reversing a trial court judgment, to render the judgment that should have been rendered, unless a remand is necessary. According to Justices Hecht and Cornyn, this rule authorizes the appeals court to render judgment on a ground urged for summary judgment but not ruled on by the trial court.[24] Justice Hecht argued that by permitting affirmance of a judgment on grounds not relied on by the trial court, Rule 81 encourages trial courts to be specific in their rulings without risking a remand, rather than simply granting summary judgment motions in their entirety in order to enhance the chances of affirmance.[25] None of the dissenting justices, however, would go so far as to hold that an appellate court should always address grounds for summary judgment raised by a motion in the trial court but not expressly adjudicated. Justice Hecht noted that if it appeared that a ground was abandoned in the trial court, or was not fully addressed, or was not fully argued on appeal, it might be inappropriate to render judgment on it.[26]

In a concurring opinion, Chief Justice Phillips argued in favor of adoption of a flexible rule that would be applied on a case-specific basis allowing appellate courts to decide whether a summary judgment should be affirmed on grounds that are not

specified in the judgment but are specified in the motion.[27] Justice Gonzales, in a dissent, pointed out that the courts of appeals were not in full accord on whether the grounds presented by a summary judgment motion but not made the basis of the judgment may be considered by a reviewing court as a basis for affirming the judgment.[28] Justice Gonzales posited that when the issues are properly preserved, the reviewing court should be able to consider alternate grounds for affirming a summary judgment.[29] However, he too was unwilling to hold that an appellate court should always address all grounds for summary judgment presented by a motion in the trial court but not expressly ruled on by the trial court. He joined Justice Hecht in stating that if a ground were abandoned or otherwise withdrawn, it would be improper for the appellate court to render judgment upon it.[30]

Justice Gonzales suggested that judicial economy supports the adoption of a procedure whereby the reviewing appellate court may affirm on grounds specified in the motion but not included in the judgment.[31] He argued that the non-movant not only has the opportunity to raise all issues that preclude judgment at the time the motion is considered, but in fact must do so in order to raise those complaints on appeal.[32]

IV. Courts in Other Jurisdictions Will Affirm a Summary Judgmeut on Any Viable Ground Specified in The Motion

The U.S. Supreme Court has held that federal courts of appeals may affirm a district court judgment on a ground different than that chosen by the district court.[33] The Fifth Circuit adheres to the rule that a court of appeals may affirm a summary judgment on grounds other than those relied upon by the district court when there is an independent and adequate basis for that disposition.[34] In *Golden Nugget, Inc. v. American Stock Exchange, Inc.*, 828 F.2d 586 (9th Cir. 1987), the Ninth Circuit, discussing its authority to affirm on an alternate basis, stated:

> Whether, as a prudential matter, we should do so depends on the adequacy of the record and whether the issues are purely legal, putting us in essentially as an advantageous a posture to decide the case as would be the district court.[34]

Concluding that the rulings to be made in that case were legal in nature, the court stated that it would foster judicial economy to examine alternative grounds in support of the judgment.[36]

State courts in numerous other jurisdictions also follow the rule permitting affirmance of a summary judgment on grounds other than those specified in the judgment.[37]

V. Texas Courts Should Be Permitted to Affirm A Summary Judgment On Any Ground Specified in The Motion

Plainly, "judicial economy" is best served by a rule that permits the appellate court to affirm the rendition of a summary judgment on any valid ground asserted by the movant regardless of whether that ground was specified as the basis for the trial court's judgment. The (divided) Texas Supreme Court's reasoning that to do so usurps the trial court of its authority is unsound. This reasoning — and the Court's entire opinion — is predicated on the faulty premise that when a trial court specifies one ground for summary judgment it must be assumed the Court did not consider the alternate grounds. The trial court has the opportunity to consider each and every ground presented by the movant in its motion for summary judgment, and the mere fact that the Court selects one ground over others does not warrant an assumption that the trial court did not consider the other grounds. Indeed, the Court's indulgence of this assumption flies in the face of its ruling in another recent case that when a summary judgment contains a standard Mother Hubbard clause it must be presumed that the trial court considered, and intended to dispose of, all claims presented in the motion.[38]

The Texas Supreme Court's reasoning that the proposed rule disserves judicial economy is equally tenuous. If the ground not specified in the summary judgment order supports rendition of judgment for the movant as a matter of law, it would seem more efficient for the appellate court to render judgment rather than waste judicial resources by remanding the case to the trial court. Since the rule adopted by the Supreme Court precludes that result, appellate courts probably will identify the valid ground for the motion for summary judgment (assuming there is one) and then remand the case to the trial court so that the trial court may reconsider the motion for summary judgment and seize upon the ground identified by the appellate court in dicta as an appropriate basis for granting summary judgment. This result — forcing litigants to return to the trial court for a decision on issues already presented both there and on appeal — undermines judicial economy in several important ways.

First, it subverts the primary purpose of summary judgment practice which is to permit either party to obtain the prompt disposition of a case involving "unmeritorious claims or untenable defenses," without the necessity of trial.[39] Indeed, the supreme court's seminal holding in *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671 (Tex. 1979) emphasizes that Rule 166(a) was amended to insure that more cases could be decided in a summary fashion. Second, in holding that a movant must return to the trial court for a decision on issues already presented both there and on appeal, the Texas Supreme Court's approach not only rewrites Rule 166(a), but actually doubles the burden on all parties, further delays the proceedings, and increases the Court's workload by giving the non-movant a second opportunity to breathe life into a questionable claim by manufacturing a fact

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question in order to avoid summary judgment. For both of these reasons, there is simply no reasoned basis for requiring parties to go back to the trial court when the appellate court can decide the same issues on the same record under the same standard of review.

Conversely, no injustice results when the court of appeals first passes on the alternate grounds. Because the alternate grounds are required to be expressly presented in the motion for summary judgment, the opponent has an opportunity to respond below. Further, the Appellant's burden is the same on appeal as it is at trial, as is the standard for the Court's decision.[40]

Finally, allowing the appellate court to consider alternate grounds finds ample support in related appellate standards of review,[41] and is consonant with the federal practice that allows appellate courts to affirm summary judgment on grounds other than those relied upon by the trial court.

VI. Conclusion

The better rule is to allow the reviewing court to consider all grounds specified in the motion for summary judgment, regardless of whether they were considered by the trial court. Unless and until this rule is adopted, practitioners representing summary judgment movants should always attempt to persuade the trial court to sign a general order granting summary judgment. Conversely, practitioners representing non-movants should seek to persuade the trial court to sign a specific order. In fact, at the hearing, if the court appears inclined to grant the motion for summary judgment, counsel representing the non-movant should identify the most tenuous ground stated in support of the motion for summary judgment and request that the judge, if he or she intends to grant summary judgment, specify that as the basis for the motion for summary judgment.

Endnotes

1. *Rogers v. Ricene Enter., Inc.*, 772 S.W.2d 76, 79 (Tex. 1989).
2. *Id.*
3. *Id.*
4. *McConnell v. Southside School District*; 858 S.W.2d 337 (Tex. 1993).
5. *See Womack v. Allstate Ins. Co.*, 156 Tex. 467, 296 S.W.2d 233, 237 (1956); *Phil Phillips Ford, Inc. v. St. Paul Fire & Mar. Ins. Co.*, 465 S.W.2d 933, 937 (Tex. 1971)(if the summary judgment evidence is sufficient, the appellate court can affirm the judgment on grounds different from those specified in the motion); *Swilley v. Hughes*, 488 S.W.2d 64, 67-68 (Tex. 1972)(without filing any response or even appearing at the hearing, appellant could raise ground of insufficiency of summary judgment proof).
6. *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 675 (Tex. 1979); *Combs v. Fantastic Homes, Inc.*, 584 S.W.2d 340, 343 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).
7. *Clear Creek*, 589 S.W.2d at 675.
8. *Id.* at 676. Italics in the original.
9. *Id.*; *Central Educ. Agency v. Burke*, 711 S.W.2d 7, 9 (Tex. 1986) (court of appeals erred in reversing summary judgment on grounds not raised in response to motion for summary judgment); *Hall v. Harris County Water Control & Imp. Dist.*, 683 S.W.2d 863, 867 (Tex. App.—Houston [14th Dist.] 1984, no writ) ("We refuse to address the additional [grounds] because they were not expressly presented in the motion for summary judgment").
10. The comments to Rule 166a disclose that Federal Rule 56 was the source of Rule 166a; therefore, the construction placed on the federal rule was previously adopted by the Supreme Court and should instruct its interpretation of Rule 166a. *Fennell v. Trinity Portland Cement Co.*, 204 S.W. 796, 797 (Tex. Civ. App.—Texarkana 1919, writ ref).
11. *See* 8 C. Wright and A. Miller, Federal Practice and Procedure § 2716 at 657 (1981) (citing cases).
12. *Pitts v. American Security Life Ins. Co.*, 931 F.2d 351, 357 (5th Cir. 1991).
13. *State Farm Fire & Cas. Co. v. S. S. & G. W.*, 858 S.W.2d 374, 380 (Tex. 1993).
14. *State v. Flag-Redfern Oil Co.*, 852 S.W.2d 480, 484 n.6 (Tex. 1993).
15. *E. A. Carlisle v. Phillip Morris, Inc.*, 805 S.W.2d 498, 518 (Tex. App.—Austin 1991, writ denied).
16. *Id.* at 518.
17. *State Farm*, 858 S.W.2d at 381.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 387.
25. *Id.*
26. *Id.*
27. *Id.* at 382.
28. *Id.* at 384.
29. *Id.*
30. *Id.* at 384 n.2.
31. *Id.* at 384.
32. *Id.*
33. *Thigpin v. Roberts*, 468 U.S. 27, 30 (1984); *Schweiker v. Hogan*, 475 U.S. 569, 684-85 (1982).
34. *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435 (5th Cir. 1993); *Morales v. Dept. of Army*, 947 F.2d 766 (5th Cir. 1991).
35. 828 F.2d at 590.
36. *Id.* at 590.
37. *See, e.g., Bryce v. St. Paul Fire & Marine Co.*, 783 P.2d 246 (Ct. App. Arizona 1989, rev. denied); *Wright v. State*, 824 P.2d 718, 720 (Alaska 1992); *Kniaz v. Benton Burough*, 535 A.2d 308, 309-10 (Pa. CMWLTH 1988); *Landis v. Allstate Ins. Co.*, 516 So.2d 305, 307 n. 3 (Ct. App. Fla. [3rd Dist.] 1987), *op. approved*, 546 So.2d 1051 (Fla. 1989); *In re Marriage of McFarlane*, 513 N.E.2d 1146 (Ct. App. Ill. [2d Dist.] 1987).
38. *See Mafrige v. Ross*, 866 S.W.2d 590 (Tex. 1993).
39. *See Gulbenkian v. Penn*, 151 Tex. 412, 415, 252 S.W.2d 929, 931 (Tex. 1952).
40. *Gibbs v. General Motors Corporation*, 450 S.W.2d 827, 828 (Tex. 1970) "[T]he question on appeal, as well as in the trial court ... is whether the summary judgment proof establishes as a matter of law that there is no genuine issue of fact as to one or more of the essential elements of the plaintiff's cause of action").
41. Texas Rule of Civil Procedure 324(c) provides that when judgment is rendered notwithstanding the verdict, the appellee may bring forward by cross point "any ground which would have vitiated the verdict or would have prevented an affirmative judgment had one been rendered by the trial court in harmony with the verdict ...." *See Motsenbocker v. Wyatt*, 369 S.W.2d 319 (Tex. 1963). Similarly, when "reviewing the judgment of the trial court where there are no findings of fact and conclusions of law requested or filed, the judgment must be upheld upon any legal theory that finds support in the evidence." *Strackbein v. Prewitt*, 671 S.W.2d 37, 38 (Tex. 1984).

Pay Now or Pay Later, Part Two: Preparing, Delivering And Paying for Statements of Facts

by Robinson C. Ramsey
SOULES & WALLACE
San Antonio

A reporter exceedingly sly
Told me, "Yes, I've begun to transcribe.
If you pay me today,
I can finish by May.
If not, it may take 'til July."

Clerks and Court Reporters

The Fourteenth Court of Appeals recently chastised the Tyrannical behavior of a district clerk in refusing to prepare a transcript unless the appellants paid the clerk's fee in advance. *See Click v. Tyra*, 867 S.W.2d 406 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding) (mand. overruled). The court reasoned that the appellants' cost bond was adequate security for the clerk's fees and that the clerk had an absolute duty under Rule 51(c) of the Texas Rules of Appellate Procedure to prepare and deliver the transcript upon receipt of the cost bond, which the clerk was required to accept. *Id.* at 407.

In granting the writ of mandamus in *Tyra*, the court rejected the contention that district clerks should be able to collect on delivery for producing their part of the record in the same manner as court reporters, who have something that district clerks wish they had: Rule 46(e) of the Texas Rules of Appellate Procedure. Rule 46(e) requires an appellant to pay a court reporter "upon completion and delivery of the statement of facts," even if the appellant has filed a cost bond. *Id.* at 408. As the court noted, "If the Supreme Court had intended for the District Clerk to also collect cash after a cost bond is filed, it would have made a special provision in the Rules for clerks as it did for court reporters." *Id.* at 408.

"Transcripts" and Statements of Facts

Section 52.047(a) of the Texas Government Code also protects court reporters by providing that, "[a] person may apply for a transcript of the evidence in a case reported by an official court reporter ... and the reporter shall furnish the transcript *on payment of the transcript fee* ...." [*emphasis added*]. The person requesting the "transcript" is not entitled to receive it until the required fee is received. TEX. GOV'T CODE ANN. § 52.047(c) (Vernon Supp. 1992). Although this section refers to a "transcript", it really means a "statement of facts", which the section refers to as a "transcript of the evidence". *Id.* at 52.047(a).

"Preparing" vs. "Fnrnishing"

An important distinction exists between a court reporter's duty to *prepare,* as opposed to the duty to *furnish,* the statement of facts. Although a court reporter is not required to *furnish* the statement of facts until receiving payment, this does not mean that the reporter is entitled to payment before beginning to *prepare* the statement of facts. *Browning v. Alexander*, 843 S.W.2d 703, 705 (Tex. App.—Corpus Christi 1992, no writ); *City of Ingleside v. Johnson*, 537 S.W.2d 145, no writ (Tex. Civ. App.—Corpus Christi 1976, no writ); *Alexander v. Bowens*, 581 S.W.2d 714, 716 (Tex. Civ. App.—Dallas 1979, no writ). "A court reporter must *prepare* the statement of facts upon request and may not insist on cash in advance when a bond is filed sufficient to perfect the appeal." (*Emphasis added*). *Browning*, 843 S.W.2d at 705 (citing *Fine v. Page*, 572 S.W.2d 577, 578 (Tex. Civ. App.—Eastland 1978, writ disn'd)).

In *Browning*, in response to a request for a statement of facts on appeal, the court reporter notified the appellants that the reporter "wanted full payment before commencing the statement of facts." *Id.* at 704. The appellants had timely filed their cost bond, and the court reporter had not challenged the sufficiency of the bond. Under these circumstances, the court of appeals conditionally granted a writ of mandamus directing the court reporter to prepare the statement of facts:

> We hold that respondent has a duty to prepare the statement of facts in this case and that he has refused to perform that duty. We are not to be understood as holding that he must prepare the statement of facts without charge.

Id. at 705. The court thus acknowledged that, although the court reporter had a duty to prepare the statement of facts, the reporter nevertheless would not be required to deliver the statement of facts without payment:

continued ...

PAYING FOR STATEMENTS OF FACTS

... *from the preceding page*

> The Government Code provides that the court reporter shall *furnish* the transcript upon payment of the reporter's fee. TEX. GOV'T CODE ANN. § 52.047(a), (c) (Vernon Supp. 1992). An appellant is required, under the current rules, to either pay or make arrangements to pay the court reporter upon *completion* and *delivery* of the statement of facts. Tex. R. App. P. 46(e).

Id. at 704–05.

Extensions

Thus, while the reporter does have a right to demand and receive payment before *delivering* the statement of facts, a court reporter does not have a right to demand payment in advance of *preparing* the statement of facts. *Browning*, 843 S.W.2d at 704–05; *Alexander*, 581 S.W.2d at 715–16. As a practical matter, an appellant may not gain much by requiring the court reporter to prepare the statement of facts without prior payment because the appellant is not entitled to receive the statement of facts until payment or arrangements are made to pay the court reporter. However, one thing that an appellant may gain in this situation is an extension of time in which to file the statement of facts. *See Jackson v. Crawford*, 715 S.W.2d 130, 132 (Tex. App.—Dallas 1986, no writ).

The Texas Supreme Court has held that an appellant who has timely complied with all appellate prerequisites and who is nevertheless unable to obtain a statement of facts is entitled to an extension of time in which to file the statement of facts. *Wolters v. Wright*, 623 S.W.2d 301, 304 (Tex. 1981). A court reporter's improper demand for a deposit before beginning *preparation* of the statement of facts is a reasonable explanation that supports a request for an extension of time in which to file the statement of facts. *Jackson,* 715 S.W.2d at 132.

Mandamus

If a court reporter continues to refuse to prepare the statement of facts, the ultimate remedy is a petition for writ mandamus to compel the court reporter to perform his or her nondiscretionary duty:

> [T]he duty to prepare appellate records is as *important* as any other professional duty of the reporter, *including* the daily reporting of court proceedings [*citations omitted*]. Furthermore, the duty to prepare a statement of facts may, in the proper case, take precedence over all other duties of the reporter [*citations omitted*]. The court reporter may therefore be compelled by writ of mandamus to furnish a statement of facts.

Wolters, 623 S.W.2d at 305.

A court of appeals has original jurisdiction to protect its own jurisdiction, and mandamus is the way to do it when a court reporter refuses to prepare a statement of facts. TEX. GOV'T CODE ANN. § 22.221(a) (Vernon 1988); *Browning*, 843 S.W.2d at 705. A relator in this situation does not have an adequate remedy by appeal because without a statement of facts the appeal "would be meaningless." *Id.* at 705.

If a court reporter disobeys a court of appeals' writ of mandamus ordering the reporter to complete the statement of facts, this failure to perform a nondiscretionary duty is subject to punishment by contempt. *Wolters*, 623 S.W.2d at 305. In this situation, the court of appeals will generally refer the contempt hearing to the trial court to conduct an evidentiary hearing and to forward the results of the hearing to the court of appeals, which would retain jurisdiction. *Id.* at 305. If the court reporter still fails to furnish the statement of facts, the court of appeals could remand the case for a new trial. However, this would be a last resort that the court of appeals would use only if this were the only way to adequately protect the appellant's rights. *Id.* at 305–06.

Pay Now or Pay Later

Even after obtaining a writ of mandamus to compel a court reporter to prepare a statement of facts, an appellant must still be prepared to pay the court reporter because, assuming that the appellant is not indigent or otherwise exempt, the court reporter is under no obligation to deliver the statement of facts without receiving payment. Although an appellant may use a court reporter's refusal to prepare the statement of facts as a ground for extending the time in which to file the statement of facts, the time will eventually come when the court reporter, thanks to Rule 46(e), has the last word.

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State Civil Appellate Update

by Clinard J. "Buddy" Hanby
Solo Practitioner
Houston

Texas Supreme Court

Timely Designation of Witnesses

Mentis v. Barnard, 870 S.W.2d 14 (Tex. 1994)

This case construes the requirement that experts be designated "as soon as practical" under Rule 166(b)(6)(b). Plaintiff filed suit shortly after an automobile accident. A new attorney was retained three months before trial, and an accident reconstruction expert was designated 32 days before trial. The trial court excludcd this witness on the ground that he was not designated "as soon as practical." The court of appeals affirmed.

Held: "[T]he trial court need consider good cause for late identification only if it finds that the witness was not designated as soon as was practical." The court holds that the burden is on the party seeking to exclude the witness to produce evidence to show that the designation was not "as soon as practical." Here the only evidence produced was that the suit had been on file for almost two years and the witness was not designated until 32 days before trial. This, alone, did not meet the burden. Thus, the trial court erred in excluding the witness.

Deerfield No Longer the Law

McConathy v. McConathy, 869 S.W.2d 341 (Tex. 1994)

Defendant moved for summary judgment. Plaintiff filed a response which included unauthenticated deposition excerpts. The trial court granted the motion, and the court of appeals, holding that unauthenticated deposition excerpts were not proper summary judgment proof, affirmed.

Held: Under the amended summary judgment rule it is no longer necessary to authenticate deposition excerpts with a certificate of the court reporter or an affidavit of counsel. In a rare case where the authenticity of the deposition might be challenged, the burden is on the opposing party to raise that issue.

Exact Wording Not Required

Little v. X-Pert Corp., 867 S.W.2d 15 (Tex. 1993)

Footnote 5 of this case interprets the requirement that a point of error be preserved in a motion for rehearing before the court of appeals in order to be brought before the Supreme Court. The author has always copied his points of error before the Supreme Court word for word from the points of error in the motion for rehearing before the court of appeals. The Supreme Court now makes it clear that this is unnecessary so long as "the substance of the argument is the same."

Effect of a Lost Statement of Facts

Piotrowski v. Minns, 37 TEX. S. CT. J. 264 (Dec. 8, 1993)

Plaintiff filed two suits against defendant, a divorce suit and a personal injury suit. Defendant filed a special appearance in the divorce suit which was originally granted, but denied on a motion for rehearing in August of 1982. Defendant also filed a special appearance in the personal injury suit, but never secured a hearing or ruling on this special appearance. In the meantime, the trial court consolidated the divorce and personal injury suits. Five years later, the trial court struck defendant's pleadings on the personal injury issues for discovery abuse. Defendant perfected appeal, but the appeal was dismissed because the divorce issues were unresolved. *See Minns v. Minns*, 762 S.W.2d 675 (Tex. App.—Houston [1st. Dist] 1988, writ denied). Plaintiff then nonsuited the divorce action and the case proceeded to trial on the damages portion of the personal injury action. The result was a $32,000,000 judgment for the plaintiff.

Defendant perfected a second appeal and requested a statement of facts. In addition to the trial testimony, the request specifically designated certain pretrial hearings and generally requested "all other pretrial hearings." In response to the request, the reporter advised defendant's counsel that her notes from the 1982 special appearance in the divorce action and a 1987 hearing to recuse the trial judge were unavailable because notes from the hearings were destroyed after three years. The court of appeals reversed and remanded because appellant was unable to obtain a complete record. After the decision, plaintiff's counsel located the transcript of the 1987 hearing and tendered it to the court of appeals. Nevertheless, rehearing was denied.

Held: The Court notes that TEX. GOV'T CODE, § 52.046 requires the court reporter to retain notes for three years after they were taken. By implication, this permits destruction of the notes after three years. The burden is on the party seeking reversal on the basis of a missing record to show that he made a timely request and is unable, through no fault of his own, to obtain a complete record. Thus, the court holds that defendant had the burden to request transcription of these hearings within three years. The case is remanded

continued ...

... from the preceding page

to the court of appeals.

Granted Writs Of Error

Statute of Repose

Trinity River Authority v. URS Consultants, Inc., 37 TEX. SUP. CT. J. 374 (Jan. 12, 1994)

The Supreme Court has granted a writ of error to decide the constitutionality under the open courts provision of the 10 year statute of repose.

Venue

Wilson v. Texas Parks and Wildlife Dept., 37 TEX. SUP. CT. J. 315 (Jan. 5, 1994)

Plaintiff sued the Texas Parks and Wildlife Department in Travis County. The defendant successfully moved to transfer venue to Blanco County, the place where the injury occurred. The court of appeals ruled that, regardless of whether venue was proper in Travis County, it was undeniably proper in Blanco County. Thus, any error was harmless. The Supreme Court has granted writ to consider the application of the harmless error rule to venue matters.

Courts Of Appeals

Baukruptcy Stays

Roadside Stations, Inc. v. 7HBF, No. 2-94-012-CV (Tex.App.—Fort Worth, April 12, 1994, n.w.h.)

Under 11 U.S.C. § 108(c), where a defendant has filed for bankruptcy, the due date of the next item that must be filed to commence or continue the appeal is 30 days from the date of lifting of the stay.

Verify those motious to reinstate

Owen v. Hodge, No. 01-93-00970-CV (Tex. App.—Houston [1st Dist.] April 7, 1994, n.w.h.)

The trial court dismissed for want of prosecution. Plaintiff filed a timely, but unverified motion to reinstate. He amended the motion to supply the verification 38 days after judgment was signed. The appeal bond was filed on the 90th day.

Held: Appeal dismissed. An unverified motion to reinstate extends neither the trial court's plenary power nor the time in which to appeal.

Punitives via Arbitration?

Kline v. O'Quinn, No. A14-93-00187-CV (Tex. App.—Houston [14th Dist.] March 29, 1994, n.w.h.)

Defendant refused to pay amounts due under a fee-splitting agreement, and the matter was submitted to arbitration pursuant to an arbitration clause in the agreement. The arbitrators awarded actual damages, punitive damages, and attorneys' fees. The trial court struck the punitive damages and attorneys' fees and rendered judgment for the actual damages plus interest. Defendant then paid the actual damages and interest. Plaintiff appealed.

Held: The court first holds that acceptance of the actual damages and interest did not estop plaintiff from appealing because the appeal could not possibly affect her right to those payments. Next, the court holds that the arbitration clause was broad enough to embrace exemplary damages. Finally, the court holds that the agreement plainly provides that each party should bear its own attorneys' fees.

Notice of Hearing

Sebastian v. Braeburn Valley Homeowner's Ass'n, No. 01-92-00656-CV (Tex. App.—Houston [1st Dist.] Mar. 10, 1994, n.w.h.)

This is an appeal by writ of error from a post answer default judgment. The issue is notice of the trial. The judgment recites that defendant was duly notified of the trial, and the court notes the general rule that a default judgment will not be overturned simply because there is no affirmative proof of notice. No timely statement of facts was filed, and there would normally be a presumption that the evidence supports the judgment. Nevertheless, the court notes an undelivered postcard addressed to defendant's attorney marked "forwarding order expired." This was not the notice of trial, but the court considers it as evidence of lack of notice of the trial. The court further takes judicial notice that defendant's attorney was disbarred.

Held: "Sebastian asserts that he never received notice required by TEX. R. CIV. P. 21a. We find that the evidence on the face of the record supports his contention." Reversed.

Request for Findings and Conclusions on a Summary Judgment

Chavez v. Housing Authority, No. 08-93-00422-CV (Tex. App.—El Paso, March 3, 1994, n.w.h.)

The trial court signed a summary judgment against appellant. Within 20 days, appellant requested findings of fact and conclusions of law. Appellant's appeal is timely only if the request for findings and conclusions extended the appellate deadlines.

Held: Motion to Dismiss denied. The court notes that the deadline is extended "if any party has filed a timely request for findings of fact and conclusions of law in a case tried without a jury." TEX. R. APP. P. 41 (a)(1). Appellee argues that a summary judgment is not a "trial" within the meaning of the rule. However, the court finds the situation analogous to a defective motion for new trial which does not preserve error but, nevertheless, extends appellate deadlines. The court further notes that a "motion for new trial" is actually inappropriate in a summary judgment setting. Thus, a literal reading of Rule 41 "would preclude any extension of appellate deadlines in summary judgment cases."

Variations ou a Pauper's Oath

Watson v. Hart, No. 3-93-459-CV (Tex. App.—Austin, Feb. 23, 1994, orig. proc.)

On July 1, 1993, Plaintiff filed a timely affidavit of inability to pay costs on appeal. He served the opposing parties, two court reporters, and the district clerk. He did

not serve a third court reporter, because the official reporter mistakenly informed him that she had transcribed a hearing in fact transcribed by the third reporter. He did not learn of the third reporter until August 12. Several contests were filed. The first contest was filed on July 15, 1993. On July 16, 1993 the trial court signed an order setting a hearing on the contests for August 3, 1993, and, on August 5, 1993, the trial court signed an order sustaining the contests. Plaintiff seeks mandamus relief.

Held: The court construes Rule 40(a)(3) as requiring service on the court reporter who actually transcribed the hearing, not merely on the official reporter. However, the court holds that failure to notify this reporter was not fatal. The failure was caused by an error by the official court reporter, not an error by Plaintiff. Furthermore, the third reporter has been served with the mandamus petition and does not complain of lack of notice or otherwise oppose the petition.

Turning to the merits, the court notes that all contests to an affidavit of inability to pay costs on appeal must be ruled upon within 10 days after the filing of the *first* contest. The trial court can extend this time by means of a written order. The court of appeals construes the order setting the hearing for August 3 as an order extending the time. Next, the court notes that the written order was not signed until August 5, two days too late. As a result, the affidavit of inability to pay costs must be taken as true and mandamus is granted.

Securing Trial Costs

Manicca v. Johnson & Gibbs, P.C., No. 3-92-614-CV (Tex. App.—Austin, Feb. 2, 1994, n.w.h.)

The trial court signed a take-nothing judgment and awarded the defendants $21,720.76 in costs. Plaintiffs attempted to appeal on an affidavit of inability to pay costs, but the trial court sustained the contests. In addition, on motion of the defendants, the trial court raised the cost bond for appeal to $30,000. Nevertheless, the plaintiffs filed a $1,000 cost bond, a petition for mandamus relating to the affidavit of inability to pay costs, and a motion to decrease the cost bond.

Held: The court first notes that it has held in an unpublished opinion that plaintiffs' evidence was insufficient to sustain their affidavit of inability to pay *any part* of the costs. Plaintiffs never filed an affidavit contending that they were able to pay only part of the costs. The court further notes that plaintiffs have not challenged the large award of costs against them or the court reporters estimate of the cost of the statement of facts. Thus, the only issue is whether the trial court can require a cost bond large enough to cover both trial and appellate costs.

Held: Appeal Dismissed. The plain language of Rule 46 requires a bond conditioned that appellant "shall pay all costs which have accrued in the trial court and the cost of the statement of facts and transcript...." In a lengthy (and quite interesting) analysis of the history of Rule 46, the court concludes that the trial court had discretion to require a bond sufficient to secure the cost incurred at trial plus appellate costs. In a footnote the court urges trial judges to use restraint in exercising their discretion to increase cost bonds.

Harmless Error Revisited

Durbin v. Dal-Briar Corp., No. 08-92-00409-CV (Tex. App.—El Paso Feb. 2, 1994, n.w.h.)

This is a suit for wrongful termination in retaliation for filing a worker's compensation claim. The trial court excluded evidence of other workers who had been fired after filing worker's compensation claims. The trial court also excluded evidence from a supervisor who would have testified that his instructions from upper management were to terminate employees who suffered on the job injuries and that ten people with compensation claims had been fired. The trial court did permit plaintiffs' immediate supervisor to testify that defendant's policy was to "get rid of" people who filed workers' compensation claims.

Held: The court first determines that the evidence of other fired workers was relevant and admissible. The court then turns to the perpetual problem of applying the harmless error rule to evidentiary rulings. The court notes that Rule 81(b) provides that a case shall not be reversed unless error is "reasonably calculated to cause and probably did cause rendition of an improper judgment." The court states that a party need not show that "but for" the error a different judgment would necessarily result. Instead, "it is enough to show that an improper verdict probably resulted." The court notes the line of cases stating that the test for harmless is whether "the whole case turns on the excluded [or admitted] evidence." The court, however, finds this test inconsistent with guidelines from the Supreme Court and specifically disavows this test. Turning to the facts before it, the court finds that the trial court's rulings "seriously undermin[ed] the credibility of [plaintiff's] star witness." Furthermore, had the trial court made correct evidentiary rulings, the defendant's theory of the case "would have been far less plausible." Thus, the court reverses.

Deadlocked

Fidelity & Guaranty Ins. Co. v. Saenz, No. 13-91-029-CV (Tex. App.—Corpus Christi, Jan. 20, 1994, n.w.h.)

The court previously issued a panel opinion reversing this case. This is a dissenting opinion by Justice Yanez on a motion for rehearing en banc. The Corpus Christi court has six justices. In this case all three of the non-panel justices dissent from the panel opinion. The vote to rehear the case en banc is three to three, but Rule 79(e) requires a *majority* to grant rehearing en banc. Thus, the motion for rehearing en banc is overruled, and the case is reversed despite an equally divided court. Justice Yanez states: "The effect of Rule 79(e) in this case is that a panel majority carries the day, and the substantial opposition is forestalled from granting en banc rehearing due to the frustrating problem of simple mathematical impossibility." Justice Yanez urges the Supreme Court to modify Rule 79(e) to require the case to be reheard en banc (with possible appointment of a tie-breaking justice) whenever a court of appeals splits evenly on a motion for rehearing en banc.

State Criminal Appellate Update

by Alan Curry
Assistant District Attorney
Houston

Court of Criminal Appeals

A defendant who enters a plea of guilty or no contest in accordance with a plea agreement cannot appeal non-jurisdictional defects that occurred before or after the entry of the plea if he only files a "general" notice of appeal.

Davis v. State, No. 1212-89 (Tex. Crim. App., Jan. 12, 1994) (not yet reported); *Lyon v. State*, No. 225-89 (Tex. Crim. App., Jan. 12, 1994) (not yet reported).

If a defendant enters a plea of guilty or no contest *in accordance with* a plea bargain, and files a notice of appeal that does not state that he is appealing with permission of the trial court or that he is appealing a matter that was raised by a written motion and ruled on before trial, this "general" notice of appeal fails to confer jurisdiction on the court of appeals to address non-jurisdictional defects that occurred *before or after* entry of the defendant's plea, such as the trial court's ruling on the defendant's motion to suppress, sufficiency of the evidence, or ineffective assistance of counsel. A "general" notice of appeal in such situations confers jurisdiction on the court of appeals to address only jurisdictional issues.

A defendant who enters a plea of guilty or no contest without an agreed recommendation from the State as to punishment may still appeal errors that occurred after the entry of the plea without regard to the kind of notice of appeal that was filed.

Jack v. State, Nos. 513-93, 514-93 (Tex. Crim. App., Mar. 9, 1994) (not yet reported).

Even after the decisions of the Texas Court of Criminal Appeals in *Davis* and *Lyon*, a defendant who enters a plea of guilty or no contest *without* an agreed recommendation from the State as to punishment waives only non-jurisdictional defects that occurred *prior* to the entry of the plea. Such a defendant does not waive non-jurisdictional errors that occurred *after* the entry of the plea.

Even after the decisions of the Texas Court of Criminal Appeals in *Davis* and *Lyon*, if a defendant waives all non-jurisdictional defects by filing a "general" notice of appeal, a defendant's attorney must still file an *Anders* brief if he believes that he is faced with a frivolous appeal. *See Fowler v. State*, No. 3-93-677-CR (Tex. App.— Austin, Feb. 16, 1994) (not yet reported).

In a State's appeal from a ruling on a motion to suppress, the State is not required to show the nnderlying basis for its certification that the appeal is not takeu for delay and that the evidence is of substantial importance.

State v. Johnson, No. 103-93 (Tex. Crim. App., Mar. 9, 1994) (not yet reported).

In order to bring a State's appeal from a trial court's ruling on a motion to suppress, the State is not required to show the underlying basis for its certification that the State's appeal is not taken for the purpose of delay and that the evidence suppressed is of substantial importance in the case. There is no provision for challenging the truth of the State's certification.

Courts Of Appeals

A court of appeals is prevented from determining whether a defendant was entitled to a hearing on his motion for new trial hased upon a matter that occurred at the hearing on his plea of guilty if the record does not contain the hearing on the defendant's plea of guilty.

Montoya v. State, No. 1-93-577-CR (Tex. App.—Houston [1st Dist.], Feb. 10, 1994) (not yet reported).

The trial court did not err in denying a hearing on the defendant's motion for new trial in which the defendant claimed that his plea of guilty was involuntary because he is hard of hearing and does not speak or understand English. The record reflected that a court reporter had been waived at the hearing on the defendant's plea of guilty; therefore, it was impossible for the court of appeals to determine whether the trial court abused its discretion in denyimg the defendant a hearing on his motion for new trial. "Without a record of appellant's plea, this Court cannot determine whether appellant's ability to hear and understand the English language was addressed when appellant entered his guilty plea."

In an appeal from an agreed plea bargain, where the defendant filed a "general" notice of appeal, a docket sheet entry refiecting the defendant's appeal from a pre-trial motion is still not sufficient to give a court of appeals jurisdiction to consider the appeal from the pre-trial motion.

Greatsinger v. State, No. 1-93-344-CR (Tex. App.—Houston [1st Dist.], Mar. 3, 1994) (not yet reported).

The defendant's notice of appeal did not state literally that the trial court granted permission to appeal, nor did it specify that the defendant was appealing from the trial court's pre-trial ruling on his written

motion for continuance. Although the docket sheet reflected that the defendant gave notice of appeal as to his motion for continuance, the docket sheet entry was not a separately signed order containing all the information required by TEX. R. APP. P. 40(b)(1). However, the court of appeals continued to urge the Texas Court of Criminal Appeals to reevaluate its position on TEX. R. APP. P. 40(b)(1). *See Moreno v. State*, 866 S.W.2d 660 (Tex. App.—Houston[1st Dist.] 1993, no pet.).

If a defeudant files a notice of appeal within the 15-day grace period after it is due, that is sufficient to give the court of appeals jurisdiction over the appeal, even if the defendant does not file a motion for extension of time to file the notice of appeal.

Sanchez v. State, No. 13-93-350-CR (Tex. App.—Corpus Christi, Jan. 13, 1994) (not yet reported).

The filing of a notice of appeal within the 15-day grace period of TEX. R. APP. P. 41((b)(2) necessarily implies a proper request for an extension of time under TEX. R. APP. P. 41(b)(2). Therefore, under TEX. R. APP. P 41(b)(2) and TEX. R. APP. P. 83, the defendant's notice of appeal filed within the 15-day grace period was timely and properly invoked the jurisdiction of the court of appeals.

A defendant may file an uusworn declaration of indigency in order to be entitled to a free statement of facts, but he mnst still sustain the allegations in the declaration of indigency at a subsequent hearing.

Shivers v. State, No. 8-92-225-CR (Tex. App.—El Paso, Feb. 9, 1994) (not yet reported).

While an unsworn declaration of indigency may be sufficient under Chapter 132 of the Texas Civil Practice and Remedies Code, and, therefore, under TEX. R. APP. P. 53(j)(2), that unsworn declaration must still clearly evidence the defendant's intention to affirm the truth of the statements of fact made in the declaration. Furthermore, in addition to filing an unsworn declaration under Chapter 132 of the Texas Civil Practice and Remedies Code, an allegedly indigent defendant must also sustain the allegations in the declaration of indigency at a subsequent hearing. Otherwise, the defendant will not be entitled to a free statement of facts.

A defendant's conviction must be reversed if the court's reporter's notes are lost or destroyed, even if the court reporter was permitted to destroy those notes well before the defendant made a request for those notes.

Duran v. State, 868 S.W.2d 879 (Tex. App.—El Paso 1993, no pet.).

After the defendant was granted an out-of-time appeal, he made a request for the transcription of the hearing on his plea of guilty, which had occurred ten years earlier. However, since court reporters were permitted to destroy their notes after three years, the court reporter's notes for the defendant's plea of guilty had been lost or destroyed. Nevertheless, the court of appeals still held that the defendant's conviction should be reversed pursuant to TEX. R. APP. P. 50(e) because of the loss or destruction of those notes.

There must be a basis upon which to place a drug-testing coudition upon a defendant's appeal bond.

Ex parte Sotelo, No. 2-93-167-CR (Tex. App.—Waco, Dec. 31, 1993) (not yet reported).

It is unreasonable to place a condition upon a defendant's appeal bond that he submit to drug test twice weekly, at the defendant's expense, if there is no basis for the setting of such a condition, such as the drug-related nature of the conviction.

A court of appeals will not entertain a request to supplement the record that is made for the first time in the appellate brief.

Johnson v. State, No. 14-93-238-CR (Tex. App.—Houston [14th Dist.], Jan. 27, 1994) (not yet reported).

When the defendant claimed in his brief on appeal that the record should be supplemented with a missing pre-sentence investigation report, the court of appeals refused to address the point of error, holding such a request was not appropriate for an appellate brief. The court of appeals held that such a request should have been presented in a motion to supplement the record.

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Federal Criminal Appellate Update

by Sandra Morehead & Joel Androphy
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Houston

Circuit Courts Of Appeals

Admission of undercover agent's testimouy regarding the meaniug of defendaut's statements was improper.

United States v. Sanchez-Sotelo, 8 F.3d 202 (5th Cir. 1993)

The district court permitted an undercover agent to testify that the statement "the guy that's with me is my brother" meant that the defendant would stay in the truck and watch the drug deal; and the statement, in response to a question as to who was with him, "my brother", meant that the defendant and his brother would do the deal. The Fifth Circuit held that this testimony regarding the plain meaning of words was contrary to of Federal Rule of Evidence 701. The trial court should have permitted the jury to draw its own conclusions. However, because there was other evidence tying the defendant to the conspiracy, the appellate court did not find reversible error.

Failure to instruct jury on the meaning of the word securities in transportation of illegal securities prosecution was reversible error.

United States v. Rogers, 9 F.3d 1025 (2d Cir. 1993)

The trial court determined, as a matter of law, that the instruments at issue in a prosecution for transportation of fraudulent securities were securities; therefore, it refused to put the issue before the jury. The Second Circuit reversed the conviction, noting that a defendant has the right to have the jury determine whether or not the instruments at issue are securities if there is some evidence to support the contention that they are not and if the defendant makes a timely request for the instruction.

Defeudant's sentence may be euhauced for use of a firearm, even wheu he never had control of tbat firearm.

United States v. Coleman, 9 F.3d 1480 (10th Cir. 1993)

Defendant was convicted of armed robbery because he participated in his companions' robbery of a bank. Although the defendant never had a gun himself, the trial court enhanced his sentence for possession of a firearm because he struggled briefly, and unsuccessfully, with a guard for the guard's firearm. The Tenth Circuit affirmed, holding that the enhancement doesn't depend on the degree of control over the firearm; instead, it depends on whether the victims could reasonably expect that the defendant could use the firearm to inflict serious bodily injury on them.

Trial court's statement objecting to the length of the sentence but concludiug "I don't know what I can do about it" doesn't mean that trial court did not know it could depart.

United States v. Lewis, 10 F.3d 1086 (4th Cir. 1993)

When announcing defendant's sentence, the trial court stated "That's more time than a man should receive, but that is what the guidelines say and I don't know what I can do about them." The defendant appealed his sentence, claiming that the trial court was unaware that it could depart from the guidelines. The Fourth Circuit affirmed the sentence, noting that the trial court had asked for motions for departure from either side, but none were made; therefore, it concluded that the trial court was aware of its ability to depart.

Doctor's opiuiou that sexual abuse bas actually occurred is improper.

United States v. Whitted, 11 F.3d 782 (8th Cir. 1993)

During defendant's trial for sexual abuse of a minor, a doctor testified that he believed from the child that sexual abuse had occurred and he recommended that the defendant be denied access to the child. The Eighth Circuit reversed the conviction, holding that the doctor's testimony regarding his belief of the child and her assertions that the defendant was the perpetrator were improper bolstering of the child.

Trial court may make pretrial determination tbat evidence regarding entrapment defense may not be introduced.

United States v. Santiago-Gomez, 12 F.3d 722 (7th Cir. 1993)

The government filed a motion in limine to prevent the defendant from putting on evidence that he was entrapped. The trial court asked the defendant to proffer the evidence he expected to put on to support the defense. After hearing the proffer, the court granted the government's motion, and prohibited the defendant from putting on entrapment evidence. The Seventh Circuit noted that entrapment is normally a question of fact for the jury to determine because it so often hinges on the credibility of witnesses. However, in this case, the trial court accepted as true all of the proffered evidence and still held it insufficient as a matter of law; therefore, the appellate court held that the pretrial ruling was appropriate.

Court may consider extraneous post-plea conduct as acceptance of responsibility.

United States v. Harris, 13 F.3d 555 (2d Cir. 1994)

Defendant waived indictment, signed the plea agreement and entered a guilty plea, providing significant evidence that he was accepting responsibility. However, the trial court refused to deduct points from the defendant's sentence level because the defendant violated the terms of his release by failing drug tests, moving without informing the government and failing to take opportunities for drug counseling. The Second Circuit affirmed, noting that Sentencing Guideline § 3E1.1 Application Note 1(g) permits the trial court to consider post-offense rehabilitation efforts in determining acceptance of responsibility.

Trial court's failure to make written instructions available to counsel and to jury abuse of discretion.

United States v. Van Dyke, 14 F.3d 415 (8th Cir. 1994)

In a nine count bank fraud case, the trial court read the instructions to the jury, but refused to provide a written copy to counsel or to the jury. The court did, however, provide the jury with a copy of the indictment and a copy of one of the statutes (18 U.S.C. § 1005). The Eighth Circuit found this to be an abuse of discretion, holding that the jury should be given written instructions in a complex, multi-count case. The Court also noted that the lack of neutral instructions was especially unfair in light of the fact that the jury had a copy of the indictment, which contains a prosecutorial slant.

By-Law Amendments

Ed. note: The Committee on By-Laws, composed of Kevin Dubose, JoAnn Storey, and Ann McClure has proposed amendments to the Section's By-Laws that incorporate gender-neutral language and implement certain substantive changes. Pursuant to Article XI of the existing By-Laws, the Council has approved the proposed amendments, and written notice of the proposed amendments is hereby provided to the members of the Section. A vote on the proposed amendments will be taken at the annual meeting of the Section, June 24th in Austin. The text of the proposed amendments is preceded by a summary of the substantive changes prepared by JoAnn Storey.

Summary of Suhstantive Changes

Article 1, Section 2

We have added to our Section's purpose the goal of improving the practice of appellate law in Texas.

Article II, Section 2

The revision omits any reference to a specific dues amount and simply provides that the amount of the dues shall be by a vote of the Council.

Article III, Section 1

The offices of secretary and treasurer have been separated.

Article III, Section 2

The makeup of the Council has been changed to omit the Vice-President of the State Bar as an ex-officio member, that office having been abolished, and to include the immediate past Chair of the Section as a voting member.

Article IV, Section 4

This section has been changed to show only the duties of the Secretary.

Article IV, Section 5

This is a new section detailing the duties of the Treasurer and authorizing the Treasurer to hire a bookkeeper to do accounting for the Section, and to engage an auditor, if necessary, to prepare a financial report.

Article V, Section 2

This section adds the provision that the Chair can authorize payment of amounts of $500 or less, but that amounts over $500 must be approved by a majority of the Council.

Article V, Section 3

This section changes the quorum requirement for Council meetings from "not less than six voting members" to "not less than six voting members present when the meeting is convened." This section has also been changed to provide that in addition to voting in person, members of the Council may vote by conference call, mail, or fax.

Article V, Section 5

This section, formerly providing for written vote by the Council, is deleted as it is covered by Article 5, § 3.

Article VII, Section 3

This section changes the composition of the Nominating Committee. The original section provided that the Nominating Committee would consist of three members of the Section, none of whom were officers or members of the Council. The section has now been changed to provide that the Nominating Committee will consist of one of the two immediate past chairs, one of the non-officer Council members whose term is not going to expire at the next annual meeting, and one non-Council member of the Section who is not a candidate for a position on the Council.

Article VIII, Section 3

This section provides for succession in the event of the death, disability or refusal of the Chair-Elect to serve. Sections originally numbered 3 through 6 have been renumbered 4 through 7.

Article X, Section 2

This section provides for reimbursement of reasonable and necessary expenses incurred on behalf of the Section, not only by officers and members of the Council, but by ex-officio members of the Council and persons whom the Chair has requested to attend a Council meeting.

continued ...

BYLAW AMENDMENTS

... from the preceding page

The Text Of The

STATE BAR OF TEXAS

APPELLATE PRACTICE AND ADVOCACY SECTION

Proposed Bylaws

ARTICLE I
Name and Purpose

Section 1. This Section shall be known as the Appellate Practice and Advocacy Section of the State Bar of Texas.

Section 2. The purpose of this Section is to promote the role and enhance the skills of members of the State Bar of Texas engaged in appellate practice and to improve the practice of appellate law in Texas. The Section shall further these goals by offering continuing legal education, disseminating materials on matters of interest and concern to the membership, and creating opportunities for the exchange of ideas among the membership of the Section. The Section also will cooperate with other Sections, promote the objectives of the State Bar of Texas, and encourage participation in the State Bar by appellate practitioners.

ARTICLE II
Membership and Dues

Section 1. Any member of the State Bar of Texas shall be enrolled as a member of the Section after registering with the Treasurer of the Section and paying annual dues. Any member of a non-lawyer division of the State Bar of Texas shall be enrolled as a non-voting member of the Section after registering with the Treasurer of the Section and paying annual dues.

Section 2. Dues shall be payable by June 1 of each year. The amount of the dues shall be by a vote of the Council.

ARTICLE III
Officers and Council

Section 1. The officers of the Section shall be Chair, Chair-Elect, Vice-Chair, Secretary, and Treasurer.

Section 2. The Council shall consist of the five officers, the two immediate past Chairs, and six other members to be elected by the Section to serve staggered three-year terms. Each member of the Council shall cast only one vote on Council actions. The President and President-Elect of the State Bar of Texas, the State Bar Board Advisor assigned to the Section, and the editor of the Section's Newsletter shall be ex-officio members of the Council, without the right to vote.

ARTICLE IV
Duties and Power of Officers

Section 1. The Chair shall preside at all meetings of the Section and the Council. If the Chair is absent, the Chair-Elect or Vice-Chair, in that order, shall preside. At each Annual Meeting of the State Bar of Texas, the Chair shall present a report of the work of the Section for the preceding year. The Chair shall appoint the Chairs and members of all Committees of the Section who are to hold office during the Chair's term. The Chair shall plan and supervise the program of the Section at the Annual Meeting of the State Bar of Texas, subject to the direction and approval of the Council. The Chair shall oversee the performance of all activities of the Section, keep the Council informed, and carry out its decisions. The Chair shall perform other duties designated by the Council.

Section 2. The Chair-Elect, after consulting with the Chair, shall arrange for the appointment of the Chairs and members of all Committees who are to hold office during the upcoming term. The Chair-Elect shall aid the Chair in the performance of responsibilities at the request of the Chair. The Chair-Elect shall perform other duties and have other powers designated by the Council or the Chair.

Section 3. The Vice-Chair shall advance the purposes of the Section, in consultation with the Chair of appropriate Committees and other officers of the Section. The Vice-Chair shall aid the Chair and the Chair-Elect in the performance of their responsibilities. The Vice-Chair will perform other duties and have other powers designated by the Council or the Chair.

Section 4. The Secretary shall consult with and assist all the officers of the Section with the work of the Section generally, as they may request. The Secretary shall be the custodian of all books, papers, documents, and other property of the Section, and shall keep a record of all meetings of the Section and of the Council, whether assembled or acting under submission. The Secretary shall assist the Chair in the preparation of the Section's annual report submitted in the Spring of each year for publication in the Texas Bar Journal, describing the activities and plans of the Section. In conjunction with the Chair, as authorized by the Council, the Secretary shall attend generally to the business of the Section.

Section 5. The Treasurer shall maintain all financial records of the Section and collect, receive and account for the funds of the Section. This includes maintaining the Section's bank accounts, making deposits, writing checks, and preparing a financial report for the annual meeting. The Treasurer shall maintain the financial records so that they can be made available for inspection by any Section officer, upon reasonable notice. The Treasurer is authorized to hire a bookkeeper to do accounting for the Section, and may engage an auditor to prepare a financial report, if necessary.

ARTICLE V
Duties and Power of Council

Section 1. The Council shall have general supervision and control of the affairs of the Section, subject to the provisions of the Charter and Bylaws governing the State Bar Act, and the State Bar Rules, Subtitle G, Appendix, TEX. GOV'T CODE ANN., Volume 3, Vernon's Texas Government Code, the policies adopted by the Board of Directors of the State Bar of Texas, and these Bylaws.

Section 2. No payments of money shall be made without the Council's authorization. For amounts $500 or less, the Chair can give authorization on behalf of the Council. Amounts over $500 must be approved by the Council, either at a meeting of the Council, by conference call, by mail, or by fax.

Section 3. All binding action of the Council shall be by majority vote of those voting, provided that a quorum of not less than six voting members are present when the meeting is convened. Members of the Council may vote in person, by conference call, by mail, or by fax.

Section 4. The Council shall meet at least once during the term of the Chair, and as often as the reasonable needs of the Section require. Reasonable advance written notice of meetings shall be given to all members of the Council by the Chair or the Secretary.

ARTICLE VI
Meetings of the Section

Section 1. The Annual Meeting of the Section shall be held concurrently with the Annual Meeting of the State Bar of Texas. The order of business and a program may be arranged by the Chair, subject to the direction and approval of the Council.

Section 2. Special meetings of the Section may be called by the Chair, upon approval of the Council, at a time and place determined by the Council. Reasonable notice of any special meeting shall be given to all Members of the Section.

Section 3. The Members of the Section present at any meeting shall constitute a quorum for transacting business.

Section 4. All binding action of the Section shall be by majority vote of the Members present.

Section 5. The procedure of Section meetings

shall be governed by Robert's Rules of Order Revised, unless otherwise provided in these Bylaws.

Section 6. The Council has authority to act for the Section in matters that may come before the Section during intervals between the Annual and Special meetings of the Section.

Section 7. The Council may direct that a matter be submitted in writing to the Members of the Section for written vote. The Members of the Section may vote upon such submitted proposition by tendering their vote to the Secretary, in writing, with their signature, within a reasonable time prescribed by the Council. The Secretary shall record in the minutes of the Section the text of the proposition submitted, that it was submitted to all Members of the Section in writing without a meeting, and the vote. Binding action of the Section shall be by a majority of the votes received in accordance with the provisions of this section. Ballots may be transmitted by mail, fax, electronic mail, or any other reasonable and reliable means.

ARTICLE VII
Elections

Section 1. The officers, other than the Chair, shall be elected at the Annual Meeting of the Section. They shall serve one-year terms, beginning at the adjournment of the Annual Meeting at which they are elected, or until their successors have been elected and qualified. The Chair-Elect shall become Chair upon adjournment of the Annual Meeting.

Section 2. Two Members of the Council, other than the officers of the Section, shall be elected at the Annual Meeting of the Section. They shall serve three-year terms, beginning at the adjournment of the Annual Meeting at which they are elected and qualified.

Section 3. Before each Annual Meeting of the Section, the Chair shall appoint a Nominating Committee of three members, consisting of one of the two immediate past Chairs, one of the non-officer Council members whose term is not going to expire at the next Annual Meeting, and one non-Council member of the Section who is not a candidate for a position on the Council. That Committee shall report nominations to the Section for the officers and Council Members scheduled to be elected at the Annual Meeting. No nominees shall be reported to the Section unless they have agreed to serve if elected. Other nominations may be made from the floor at the Annual Meeting, if the nominee has agreed to serve if elected.

ARTICLE VIII
Succession of Officers and Vacancies

Section 1. The Chair-Elect shall automatically assume the office of Chair at the end of the Annual Meeting unless prevented by death or disability, or refusal to act as Chair. The Chair shall serve a term of one year.

Section 2. In the event of death, disability, or refusal of the Chair to serve during the term, the Chair-Elect shall perform the duties of the Chair for the remainder of the Chair's term or disability.

Section 3. In the event of the death, disability, or refusal of the Chair-Elect to serve during the term, the Vice-Chair shall perform the duties of the Chair-Elect for the remainder of the Chair-Elect's term or disability.

Section 4. In the event of the death, disability, or refusal of the Vice-Chair to serve during the term, the Secretary shall perform the duties of the Vice-Chair for the remainder of the Vice-Chair's term or disability.

Section 5. Between Annual Meetings of the Section, the Council may fill vacancies in its own membership, or in the offices of Secretary or Treasurer. Members of the Council and officers selected in this manner shall serve until the close of the next Annual Meeting of the Section. The remainder of any Council Member's unexpired term shall be filled by election at the next Annual Meeting, as provided in Article VII of these Bylaws.

Section 6. If any elected Member of the Council fails to attend a Council meeting held in conjunction with each of two successive Annual Meetings of the Section, the office held by the Member shall be vacated automatically, and the vacancy shall be filled according to these Bylaws.

Section 7. At the end of the term in office as Chair, the immediate past Chair shall serve as a Member of the Council for the next two years.

ARTICLE IX
Committees

Section 1. Except as otherwise provided in these Bylaws, all Committees shall be appointed in accordance with the provisions of Article IV, and any Member of the Section, including members of the Council, may serve as a Committee Chair of as a member of a Committee.

Section 2. Standing Committees of the Section shall be the Committee on State Appellate Rules, the Committee on State Appellate Practice, the Committee on Federal Appellate Practice, the Committee on Appellate Court Liaison, the Committee on Continuing Legal Education, the Committee on Programs, the Committee on Publications, and the Nominating Committee mentioned in Article VII of these Bylaws. Any of these Committees may work jointly as needed.

Section 3. Special Committees shall be appointed, as needed.

ARTICLE X
Miscellaneous Provisions

Section 1. The fiscal year of the Section shall be the same as that of the State Bar of Texas.

Section 2. No salary or compensation shall be paid to any officer of the Section, member of the Council, or member of the Committee for their professional services or time, except that the Council may authorize reasonable compensation for the Editor of the Section Newsletter. Officers, members, ex-officio members of the Council, and persons whom the Chair has requested to attend a Council meeting shall be reimbursed for expenses reasonably and necessarily incurred on behalf of the Section by submitting requests and receipts to the Treasurer.

Section 3. No action by this Section shall become effective as the action of the State Bar of Texas until it is approved by the Board of Directors of the State Bar of Texas. Any resolution adopted or action taken by the Section may, if requested by the Section, be reported by the Chair of the Section to the Annual Meeting of the State Bar of Texas for action by its Board of Directors.

Section 4. These Bylaws shall become effective upon their approval by the Board of Directors of the State Bar of Texas and by the Section.

ARTICLE XI
Amendments

These Bylaws may be amended at any Annual Meeting of the Section by a majority vote of the Members of the Section present and voting, provided that any proposed amendment shall first be approved by a majority of the Council and written notice of the proposed amendment shall be provided to all Members of the Section at least 30 days prior to the Annual Meeting. No amendment shall become effective until approved by the Board of Directors of the State Bar of Texas.

Notice of Annual Section Meeting

The annual meeting of the Appellate Practice and Advocacy Section will be Friday, June 24, 1994, from 2:00–5:00 p.m., at the Austin Convention Center, Austin, Texas, in conjunction with the Annual Meeting of the State Bar of Texas.

The following items of business will come before the Section's membership:

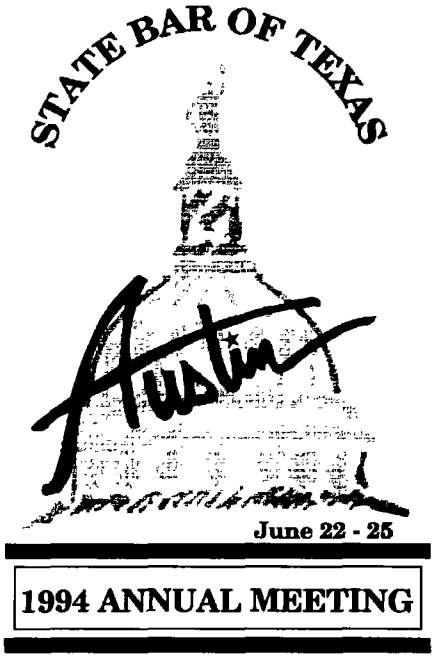
- Proposed By-Law Amendments (see pp. 17–19)
- Proposed Dues Increase (see page 2)
- Election of officers and Council members

The program at the Annual Meeting will be "'*Big Quake or Little Shakes,' the Impact of the Upcoming Rules Changes.*" There will be a series of panel discussions in which the areas of greatest interest to the Section (discovery, sanctions, jury charges, and appellate rules) will be covered.

Following the program, the Section will host a cash bar from 5:00–7:00 p.m.

It's been 11 years since the Annual Meeting was held in Austin and it's going to be a major event.

We want you to be there.



Look for the registration form in the April issue of the Texas Bar Journal

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The **Appellate Advocate**
State Bar Appellate Practice & Advocacy Section Report

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