# The Appellate Advocate

*State Bar Appellate Practice & Advocacy Section Report*

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## ARTICLES



## SPECIAL FEATURE



## REGULAR FEATURES

# The Chair Reports

At my first opportunity as the new Chair of this Section, I want to thank my predecessor, Kevin Dubose, for his inspired leadership of this Section. The Section's Committees are well-staffed, and have been very productive in the last year. I hope to carry forward this existing momentum, with some small adjustments in course. Here are the 1996-1997 Section Committees and Chairs, and a description of goals.

**Publications Committee** — The *Newsletter Committee* becomes the *Publications Committee*, chaired by Ralph H. Brock (Lubbock). The Committee will be concerned not only with publishing the Section Report, but also with other forms of disseminating information to Section members, to the Bar, and to the public. New ways to publish include articles in the Texas Bar Journal, articles placed for publication in other Section Reports, information available through BarLink and the Section's new World Wide Web page [initially at http://www.txdirect.net/users/rrichard/appellat.htm]There will be a Section Report edition on the new TRAPs as soon as they are promulgated.

**Appellate Rules Committee** — To be co-chaired by former Chief Justice Clarence Guittard (Dallas) and Pamela Stanton Baron (Austin), this committee will monitor the finalization and implementation of the new TRAPs.

**Bench-Bar Committee** — This committee, chaired by Lori Gallagher (Houston), will foster local bench-bar conferences to open and maintain lines of communication between appellate judges, their professional staff, and practicing lawyers. The Committee will consider hosting a state-wide Bench-Bar event in the form of an early evening social on March 3 or 4, 1997, at the Super Regional Judicial Conference in Houston.

**Member Services Committee** — This committee, chaired by Randy Roach (Houston), will identify the needs of our Section members, and will recommend new services or changed services which the Section should offer. The Committee is presently conducting a comprehensive survey of the Texas appellate judiciary. When the results are in, they will be tabulated, and a summary will be published in the Section Report and full results published electronically and possibly in CLE coursebooks. The Committee also may conduct a survey of Section members. The Committee will consider ways to attract new members to the Section, including new lawyers, general practitioners, and criminal appellate practitioners.

**Improvement of Appellate Practice Committee** — This new committee, chaired by Helen Cassidy (Houston), will consider: designing a CLE event for appellate court staff attorneys; instituting a mentoring system, between established appellate lawyers and new lawyers; and implementing suggestions derived from the survey of the appellate judiciary and survey of Section members. This Committee will also monitor the activities of the Texas Commission on Judicial Efficiency and its four Task Forces (Judicial Selection, Information Technology, Funding Parity, and Staff Diversity). The Committee will consider organizing state-wide local CLE relating to criminal appeals, by assembling a package of articles and forms to be shipped to various locales, for local planners to use in hosting an afternoon CLE event, at low cost, using local speakers. The Committee will also foster efforts to put state appellate court decisions "on-line" for free through BarLink, electronic BBS's or the Internet.

**Awards Committee** — This committee, chaired by Justice Sarah Baker Duncan (San Antonio), will consider ways to memorialize and commemorate giants in Texas appellate practice. The Committee will inquire into erecting a board at the Texas Law Center to display bronze likenesses of Texas' great appellate judges and lawyers. The Committee will also explore preserving an oral history of living appellate giants, through taped interviews to be permanently stored at the State Bar headquarters, or a Texas university, with excerpts to be published in the Section Report and entire transcripts to be published electronically. The Committee will also consider giving an annual award for service to the Section.

**Projects Committee** — This committee, chaired by Doug Alexander (Austin), will handle writing projects done by the Section. The Committee will prepare, in partnership with the Books and Systems Department of the State Bar of Texas, a pocket guide to the new TRAP's, expected to be published at the time the new Rules go into effect.

**Committee ou Professionalism** — This committee, chaired by Skip Watson (Amarillo), will finalize its year-long effort to design standards of professionalism for the appellate Bench and Bar. When completed, these standards will be taken to each of the sixteen sitting Texas chief justices, to see if the standards can be adopted in their courts.

**Appellate Pro Bono** — This committee, chaired by Warren Harris (Houston), has over the past year put an appellate pro bono network in place. The Committee will continue to spread the word about the network. The Committee will also consider working with law schools to establish appellate clinics, that would permit law students to get practical experience handling appeals for indigents. The Committee will watch developments relating to the requirement of a legal internship as a condition to being licensed to practice law in Texas, to assure that appellate practice is properly integrated into any requirements. If you are interested in doing pro bono appellate work, contact Warren at (713) 226-0600.

**Annual Meeting Committee** — Jimmy Vaught (Austin) and Deborah Race (Tyler) will chair this committee to plan the Section CLE event on June 27, 1997, at the State Bar's Annual Meeting in Houston. This year Kathy Butler and her Committee presented an outstanding version of *Appellate Jeopardy*, which was informative and superbly entertaining. Plans are being formulated for a different game show take-off that will be a "must" for everyone who is in or can get to Houston for the Section meeting next June.

**Long Range Planning Committee** — This new Committee, chaired by Richard R. Orsinger (San Antonio), will formulate 1, 3, 5, and 10-year plans for where the Section should go. The Committee will prognosticate possible changes in technology, demographics, and the ways we work and live, and where those changes might take us, and steps we can take in anticipation of those changes.

Your Section leaders will keep you posted about our Committees' progress throughout the year. Send your comments and suggestions. Thanks.

— Richard R. Orsinger

# *Getting in the Last Words: Supplementing the Record on Appeal*

**by Robinson C. Ramsey**
SOULES & WALLACE
**San Antonio**

### Present Rules and Proposed Revisions

Despite an appellant's best efforts to bring forward a complete and accurate record at the time of initially filing the transcript and the statement of facts, it sometimes becomes necessary to supplement these materials. Proposed revisions to the Texas Rules of Appellate Procedure are calculated to make this job considerably easier by providing that correspondence for supplementation from parties or appellate courts to district clerks and court reporters will be sufficient, without the necessity of filing a formal motion, while also shifting the responsibility of filing the record from attorneys to court reporters and district clerks. *See* Richard Orsinger, *The New (Proposed) Rules of Appellate Procedure*," TECHNIQUES FOR HANDLING CIVIL APPEALS IN STATE AND FEDERAL COURT, § 3 (U.T., 6th Ann. Conf. on State and Federal Appeals) June 1995, at 19-20. It does not appear, however, that any rule changes will take effect until some time in 1997. *See* Kevin Dubose, *The Chair Reports*, 11 THE APPELLATE ADVOCATE, (State Bar of Texas Appellate Practice and Advocacy Section), Jan. 1996, at 3. Meanwhile, attorneys must continue to live with the existing rules, as well as the case law interpreting these rules, to ensure that an adequate record arrives at the court of appeals.

### Before and After

The safest time to attempt to supplement the record is before submission, in accordance with Rule 55(b) of the Texas Rules of Appellate Procedure, which provides:

> If anything material to either party is omitted from the transcript or statement of facts, before submission the parties by stipulation, or the trial court, upon notice and hearing either before or after the record has been transmitted to the appellate court, or the appellate court, upon a proper suggestion or on its own initiative, may direct a supplemental record to be certified and transmitted by the clerk of the trial court or the official court reporter supplying such omitted matter ....

Appellate court approval of such pre-submission requests is virtually automatic as long as the requested supplementation is material and will not unreasonably delay the disposition of the appeal. *See Crown Life Ins. Co. v. Estate of Gonzalez*, 820 S.W.2d 121, 121-22 (Tex. 1991). Post-submission supplementation is more difficult.

Rule 55(c) of the Texas Rules of Appellate Procedure provides:

> Should it be apparent during the submission or afterwards that the case has not been properly prepared as shown in the transcript ... or should it appear to the court, after the submission of the cause, that the statement of facts has been prepared in violation of the rules, the court may require the appellant to furnish a proper statement of facts, and upon his failure to do so may disregard it.

The easier and more prudent remedy is to request a pre-submission supplementation under Rule 55(b). Otherwise, an appellant — particularly one who has been made aware by an opponent's brief that a part of the record was not before the court — will have a difficult time establishing circumstances reasonably explaining the failure to take pre-submission steps to supplement the record. *See Nuby v. Allied Bankers Life Ins. Co.*, 797 S.W.2d 396, 398 (Tex.App.—Austin 1990, no writ).

In *Nuby*, the appellants claimed that they did not become aware that part of the transcript was missing until they began their post-submission briefing:

> However, [the appellee] raised the issue of [the appellants'] failure to include the statement of points in the transcript six months earlier in its reply brief. [The appellants] had notice from their opponents over five months before oral submission that a crucial document was not in the record and they failed to request that the record be amended by any of the methods described in Rule 55(b) ....

*Id.* at 398. The court accordingly denied the appellant's request to supplement the transcript. *Id.*

### Submissions and Omissions

It is the appellant's burden to ensure that a sufficient record exists to support any claims of alleged errors. *Englander v. Kennedy*, 428 S.W.2d 806, 807 (Tex. 1968); *Victoria Comfort Air Co. v. Alamo Express*, 529 S.W.2d 250, 254 (Tex.Civ.App.—Corpus Christi 1975, no writ). Although courts of appeals have the discretion to permit supplementation of the record before as well as after submission, "the filing of a post-submission statement of facts, absent some unusual circumstances, should not be allowed after the appellate court has written its opinion and rendered its judgment." *Irrigation Const. v. Motheral Contractors, Inc.*, 599 S.W.2d 336, 344 (Tex.Civ.App.—Corpus Christi 1980, no writ).

Rule 55(c) does not speak of an appellant's right to file a motion for leave to supplement the record, but instead refers to the appellate court's prerogative to take whatever steps it deems necessary to supplement the transcript or to require an appellant to furnish a proper statement of facts if the court determines after submission that the statement of facts was not properly prepared. *See Coleman v. Pacific Employers Ins. Co.*, 484 S.W.2d 449, 453-54 (Tex.Civ.App.—Tyler 1972, writ ref'd n.r.e.). An analysis of former Rule 428 of the Texas Rules of Civil Procedure, the precursor to TEX.R.APP.R. 55, confirms the view that this rule is for the court's benefit, not the appellant's:

> The purpose of the provision of Rule 428 above quoted, rather is applicable when and if the appellant brings forward a record full or sufficient enough for his appeal to be considered and disposed of on the merits, but the appellate court feels it needs additional portions of the record that have been omitted and which are material to a thorough and accurate disposition of the matter presented. It is not the purpose of said provision

*continued ...*

to relieve the appellant of his burden to bring up a sufficient record to have his appeal considered on its merits and to reflect any error and the harmful effect thereof, if any, or request that such record be ordered transmitted to the appellate court as provided for in said rule.

*Coleman*, 484 S.W.2d at 454.

### Taking It to the Limit

An appellate court's discretion to allow supplementation of the record is not unbridled, especially after the court has heard the cause and has issued its opinion:

> It is our opinion that such discretion should not be exercised, in the absence of some unusual circumstances, so as to permit new material to be filed after the appellate court has written its opinion and rendered its judgment. Such action would ... interfere with the orderly administration of justice.

*Archer v. Storm Nursery, Inc.*, 512 S.W.2d 82, 85 (Tex.Civ. App.—San Antonio 1974, no writ); *accord Jackson v. S.P. Leasing Corp.*, 774 S.W.2d 673, 677 (Tex.App.—Texarkana 1989, writ denied).

The appellant in *Jackson* did not ask to supplement the record until after the filing of a motion for rehearing. Acknowledging that it had the discretion to permit supplementation, the court nonetheless warned:

> [O]rdinarily this discretion should not be exercised in the absence of some unusual circumstance to allow omitted matter be filed after we issue a decision. To grant such permission is contrary to the spirit and purposes of TEX.R.APP.P. 54(a)(setting forth the appellate timetable) and TEX.R.APP.P. 50(d) (which places the burden upon appellant to present a sufficient record).

*Jackson*, 774 S.W.2d at 677.

Appellate courts tend to scrutinize more intensely supplementation requests filed after the overruling of a motion for rehearing, as the Corpus Christi Court of Appeals did in *Victoria Comfort*:

> Although our Court has discretion to supplement the transcript or statement of facts, we do not believe that we should exercise such discretion where such motion has been filed after the first motion for rehearing has been overruled as this would interfere with the orderly administration of justice ....

*Victoria Comfort*, 529 S.W.2d at 255.

### The Late Show

A motion to supplement the record should not only state a reason for an appellant's failure to supplement before submission, but should also offer an explanation of how the inclusion of the requested supplementation might change the court's decision or serve the interests of justice. For lack of such a showing, a motion to supplement failed in *Jackson*:

> After our opinion was issued in this cause, Jackson ... filed his motion for rehearing. During the pendency of the motion for rehearing, Jackson ... filed his motion to supplement the transcript. In that motion, the only reason given for this Court to allow the late filing ... was that Jackson's attorney had ... during the course of preparing the motion for rehearing, discovered the absence of the documents. Jackson in no way detailed how the filing of such documents might alter our decision or better serve the interests of justice.

*Jackson*, 774 S.W.2d at 677. Under these circumstances, the court declined to permit the late filing of a supplemental transcript because of "the absence of any unusual circumstances." *Id.*

### Excuses, Excuses

In *Motheral*, the court chided the appellant for failing to explain "why the record of that hearing was not filed prior to submission of the cause." *Motheral*, 599 S.W.2d at 344. As *Motheral* demonstrates, appellate attorneys who were also the trial attorneys in the case are held to a particularly strict accounting because they are presumed to have known that part of the record was missing:

> He approved the original statement of facts. He signed defendant's brief. He argued the case before this Court. Under the record before us, we can only conclude that counsel for defendant had actual notice long before the submission of the cause that the record concerning what happened at the hearing on plaintiff's motion for judgment was not in the original statement of facts.

*Id.*

As excuses go, waiting until the time of drafting a motion for rehearing to discover that part of the record is missing is generally insufficient. *See Jackson*, 774 S.W.2d at 677. In *Elkins v. Auto Recovery Bureau*, 649 S.W.2d 73 (Tex.App.—Dallas 1983, writ ref'd n.r.e.), the court of appeals concluded that "Elkins' efforts to present this court with a sufficient record came too late. The burden is on the appellant to see, before submission of the cause, that a sufficient record is presented on appeal which preserves any error upon which he relies." *Id.* at 76. Moreover, the court found no good reason to grant Elkins' late request:

> We conclude that Elkins has failed to show "unusual circumstances" and that to allow Elkins to supplement the record at this late date would interfere with the orderly administration of justice ... [M]uch attorneys' and appellant [*sic*] judges' time and effort has been expended in deciding Elkins' appeal on the record he left before us. Judicial economy and efficient expenditure of attorneys' time and effort is crucial to the administration of justice. We choose, therefore, to leave Elkins' appeal in the posture he placed it and decide that appeal accordingly.

*Id.* at 76-77.

### The Best Policy

An appellant should do his best to see that the entire record reaches the appellate court at the time of the initial filing. Failing this, the appellant should diligently attempt to supplement the record as soon as it becomes apparent that such a supplementation is necessary. An attempt to supplement before submission will almost always be successful, whereas the chances of success diminish considerably after submission and erode even further after the court has delivered its opinion and is considering a motion for rehearing. In this regard, the proposed Appellate Rules of Legal Limericks contain this caveat:

If your record's in need of addition
And you're asking the court for permission
To add something new
The conservative view
Is to do it before the submission.

# Considerations When Settling A Pending Appeal

**by J. Morgan Broaddus III**
ATTORNEY AT LAW
**El Paso**

The settlement of a pending appeal may be a trap for the unwary. This is because of the long-established rule of Texas law: "When a cause becomes moot on appeal, all previous orders and judgments should be set aside and the cause, not merely the appeal, dismissed." *Freeman v. Burrows*, 141 Tex. 318, 171 S.W.2d 863, 863 (Tex.1943); *Guajardo v. Alamo Lumber Co.*, 159 Tex. 225, 317 S.W.2d 725 (Tex. 1958).

As a general rule, when a case becomes moot while on appeal, the proper course is not to merely dismiss the appeal, but to vacate the judgments and orders of the lower courts. *United Services Automobile Ass'n v. Lederle*, 400 S.W.2d 749 (Tex. 1966). Thus, it appears the law in Texas requires vacatur. One purpose of this rule is to prevent what might have been an erroneous opinion and judgment from becoming final in a moot case. *Speer v. Presbyterian Children's Home*, 847 S.W.2d 227 (Tex. 1993). Another purpose is to prevent affirmance "without according to the appealing parties a hearing upon the merits of their appeal." *International Ass'n of Machinists v. Federated Ass'n of Accessory Workers*, 133 Tex. 624, 130 S.W.2d 282, 283 (1939).

An appellate court may enter orders pursuant to TEX.R.APP.P. 59(a)(1) (authorizing the court to dispose of an appeal in accordance with an agreement of the parties), TEX.R.APP.P. 59(a)(2) (authorizing the court upon motion by appellant to affirm the judgment or dismiss the appeal with the judgment remaining intact), or TEX.R.APP.P. 80(b) (authorizing the court to affirm, correct or reform, reverse and render, or reverse and remand the judgment). TEX.R.APP.P. 59(a)(1)(B) provides:

> (1) The appellate court may finally dispose of an appeal ... as follows:
>
> * * *
>
> (B) On motion of appellant to dismiss the appeal or affirm the judgment appealed from, with notice to all other parties; provided, that no other party shall be prevented from seeking any appellate relief it would otherwise be entitled to.

The dilemma posed by the rules and the difficulty encountered by parties desiring to settle their dispute during the pendency of the appeal were demonstrated in *Panterra Corp. v. American Dairy Queen*, 908 S.W.2d 300 (Tex.App.— San Antonio 1995, no writ). In *Panterra*, after judgment and perfection of appeal, the parties filed a joint "Stipulation and Agreement of Voluntary Dismissal." The parties fully compromised and settled the issues in dispute and requested that the Fourth Court of Appeals dismiss the appeal and affirm the judgment of the court below. The court determined it could not do both. The appellate court issued an order explaining to the parties their inability to dismiss the appeal as moot and affirm the judgment below. The court allowed the parties an opportunity to clarify the relief they sought, or to withdraw the motion to dismiss and substitute an agreed motion to reverse and remand for entry of a judgment in conformity with the settlement agreement. Appellants responded: "If it is the desire of Appellees' counsel that other action be taken we are prepared to enter into an appropriate agreement. Otherwise on behalf of Appellants, we would request that the court issue its ruling on the Stipulation Agreement of Voluntary Dismissal [sic] in accordance with the law." Appellees did not respond. The "Stipulation and Agreement of Voluntary Dismissal" was granted in part. The cause was determined moot. All previous orders and judgments, both trial and appellate, were set aside and the cause dismissed.

Justice Duncan, dissenting in *Panterra*, agreed that the court could not both dismiss the appeal and affirm the judgment. She disagreed with the majority's limited view of the court's authority that the court could not do either and was required to contravene the result intended and requested in writing. Thus, she reasoned that pursuant to the parties' signed stipulation and Rule 59(a)(1)(B), the court could either dismiss the appeal, leaving the lower court's judgment intact, or summarily affirm. The *Panterra* dissent stated that the policies underlying the general rule were not present and that the general rule is not absolute. Furthermore, most cases cited by the majority did not involve a voluntary settlement or were prior to the current rules. There was a good reason to vary from the general rule—the parties bargained for and agreed upon a settlement that leaves the trial court's judgment intact as a bar to relitigation.

Public policy favors settlements, *Elbaor v. Smith*, 845 S.W.2d 240, 250 (Tex. 1992), and the efficient administration of justice. TEX.R.CIV.P. 1. "Why then should the parties have to expend the time, effort, and money involved in having a trial court enter judgment in accordance with their settlement agreement when a simple dismissal of tbe appeal or summary affirmance by this court will achieve the same effect at no additional cost to the parties and no additional burden on this court?" *Panterra* at 302 (Duncan, J., dissenting). Justice Duncan's dissent was applauded by the Eighth Court of Appeals in *Dunn v. Canadian Oil & Gas Services, Inc.*, 908 S.W.2d 323 (Tex.App.—El Paso 1995, n.w.h.).

It is of interest to note that the United States Supreme Court addressed the vacatur of lower court judgments when a case becomes moot while on appeal and decided that vacatur is not automatically required. *U.S. Bankcorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. — , 115 S. Ct. 386, 130 L. Ed.2d 233 (1994). *Panterra* states that *Bonner Mall* "is not binding precedent because the issue decided was one of federal procedural law. As such, it does not apply to state courts' application of state procedural law." *Panterra* at 301.

As demonstrated in *Panterra*, the strict application of Texas case law and the appellate rules may yield a result contrary to the intent of the settling parties. When settling a pending appeal, the appellate practitioner should assume the Texas practice requires vacatur and consider filing an agreed motion to reverse and remand the case to the trial court for entry of judgment in conformity with the settlement agreement. Special attention should be given to the relief sought. If the appellate court issues an order suggesting compliance with internal operating procedures, file an appropriate response. The Supreme Court should enact a specific appellate rule to effectuate a quick, easy, and economical method to settle a pending appeal in conformity with the intent of the parties.

# Texas Civil Appellate Update

**by Clinard J. "Buddy" Hanby**
Solo Practitioner
The Woodlands

## TEXAS SUPREME COURT

### When is a "Ruling" not a "Decision"?

*Saenz v. Fidelity & Guaranty Insurance Underwriters,* No. D-4561 (June 14, 1996)

The Corpus Christi Court agreed to rehear this case *en banc*. However, Chief Justice Nye retired sometime before an opinion was issued. Two justices dissented from the opinion, but it is not clear whether Chief Justice Nye participated. Thus, the court was originally divided either 4–2 or 3–2. Eight days after the opinion was issued Justice Yanez was added to the court. Justice Yanez dissented on rehearing, and the motion for rehearing was apparently "overruled" by a vote of 3–3.

The Supreme Court notes that, when a court of appeals sits *en banc* under TEX. GOV'T CODE § 22.223(b), a majority of the court must concur in a "decision." The Supreme Court also notes that, where a court of appeals is equally divided and a majority cannot concur in a "decision," the Chief Justice of the Supreme Court may assign a justice from another court of appeals to break the deadlock. However, the Supreme Court holds that a ruling on a motion for rehearing is not a "decision" under the statute or the rule. Thus, a motion for rehearing can be denied by an equally divided court.

### Texaco Rnle Construed

*Isern v. Ninth Court of Appeals*, No. 96-0330 (June 14, 1996)

This is a mandamus proceeding growing out of a medical malpractice case. A jury found for the plaintiff and awarded $3.1 million. Defendant perfected appeal, and filed a motion in the trial court under TEX. R.APP.P. 47(b) seeking to suspend the judgment pending appeal upon posting less than the amount of the judgment, interest, and costs. Defendant presented evidence in the trial court to show that he carried only $500,000 in liability insurance, had no means of posting a $3.1 million bond, and would be forced into bankruptcy unless the trial court ordered a supersedeas bond in a smaller amount. The trial court ordered that the judgment could be suspended pending appeal by posting a $500,000 bond. The court of appeals, however, adhering to its earlier decision in *Laird v. King*, 866 S.W.2d 110, 115 (Tex.App.—Beaumont 1993, orig. proc.), construed TEX. CIV. PRAC. & REM. CODE § 52.002 to preempt Rule 47(b) and prevent a trial court from ordering a supersedeas bond in a personal injury case for less than the judgment, interest, and costs.

The Supreme Court holds that § 52.002 does not conflict with Rule 47(b). A trial court can order a smaller supersedeas bond in a personal injury case upon a showing that posting bond in the full amount will cause irreparable harm to the judgment debtor and ordering a smaller amount will cause no substantial harm to the judgment creditor. The Supreme Court further holds that the evidence presented was sufficient to support both findings, and the trial court did not abuse its discretion in ordering a smaller bond.

### How to and How not to Preserve Error in a Brief

*Plexchem International, Inc. v. Harris County Appraisal Dist.*, 922 S.W.2d 930 (Tex. 1996).

The appraisal district appealed on a single point of error: "The trial court erred by granting Plexchem's motion for summary judgment." The appraisal district devoted three pages of its brief to an argument that Plexchem failed to exhaust administrative remedies. The court of appeals held that the contention that Plexchem failed to exhaust administrative remedies was waived by failing to assign this contention as error in a point of error. The Supreme Court holds that the point of error and argument were sufficient to preserve the issue.

*Anderson Producing Co. v. Koch Oil Co.*, No. 94-1198 (May 10, 1996)

The issue in this case is whether an expert witness should have been disqualified because he was also counsel for a party. After rejecting the contention that the witness *personally* should have been disqualified, the Supreme Court turns to the contention that the witness's entire firm should have been disqualified. The Court notes this contention was mentioned only in a single sentence of Koch's brief to the court of appeals. Other than this sentence, "Koch included no argument as to why the firm, as opposed to Campbell personally, should be disqualified." The Court implies that the issue was not properly preserved before the court of appeals. The Court further notes that the issue is only raised in a single sentence in the reply to application for writ of error. The Court holds that this was not sufficient to preserve the issue. Nevertheless, the Court rejects the issue on the merits.

### Of Mandamus and Special Appearance: Chapter III

*CRS, Ltd. v. Link*, No. 95-0933 (June 14, 1996)

CRS sold one load of asbestos in 1957 to an American company that shipped the asbestos to Houston. CRS has now been named as a defendant in a five asbestosis cases in Harris County. CRS's special appearance was denied by the trial judge, and CRS now seeks a writ of mandamus.

The Supreme Court reemphasizes that a defendant whose special appearance is denied must ordinarily wait until final judgment and appeal the ruling. However, in "extraordinary situations" appeal is an inadequate remedy. The Court holds that mandamus may be granted "when personal jurisdiction is clearly and completely lacking and when there are exceptional circumstances." Here, the Court rules that the very nature of mass tort litigation is an exceptional circumstance.

*Editorial Comment: The Court's rationale is not very persuasive. A large corporation might very well be able to defend mass tort litigation in a distant forum with only minor inconvenience. A private individual, on the other hand, might be forced by denial of a special appearance to settle a simple auto-auto case. Under the Court's reasoning parties should, perhaps, submit financial statements to the court of appeals to demonstrate lack of an adequate remedy at law.*

**Abuse of Discretion and Factual Disputes**

*Pharo v. Chambers County*, 922 S.W.2d 945 (Tex. 1996)

This is a tort claims action. The issue on appeal is whether a juror engaged in misconduct by frequent association during the trial with her boy friend, a deputy sheriff employed by the county.

The Supreme Court attempts to clarify the standard of review in cases involving allegations of jury misconduct. The Court notes that some prior cases state that jury misconduct is a "question of fact for the trial court, and if there is conflicting evidence on this issue the trial court's finding must be upheld on appeal." Other cases state that the standard of review is "clear abuse of discretion." The Court holds that these are just alternate wordings of the same standard. In the present case, the basic facts are undisputed, and this would usually leave no room for the exercise of discretion. However, the question of whether the deputy sheriff was "connected with or interested in the case within the meaning of Rule 226a is a factually intensive inquiry, committed to the sound discretion of the trial court."

**Two Bites at the Apple?**

*L.M. Healthcare, Inc. v. Childs*, 920 S.W.2d 286 (Tex. 1996)

The trial court orally rendered judgment on January 28, 1994. Petitioner filed a premature motion for new trial on February 7, 1994. The trial court held a hearing and on March 4, 1994 signed both a written judgment and an order overruling the motion for new trial. On Monday, April 4, 1994, petitioner filed a motion to modify the judgment to reflect that it was without prejudice to refiling. This motion was granted, and the trial court signed a modified judgment on May 17, 1994. Childs appealed, and the court of appeals held that the trial court's plenary power expired on April 4, 1994 and the May 17 judgment was void. The Supreme Court assumes (but does not actually confirm) that a party may not file a new motion for new trial after a previous one is overruled. Thus, the trial court's plenary power would normally have expired on April 4, thirty days after the written order overruling the motion for new trial. However, the Supreme Court construes TEX.R.CIV. P. 329b to permit a party to file *both* a motion for new trial and a motion to modify. Each motion independently extends the trial court's plenary power. Here, the motion to modify was timely, and plenary power was extended until thirty days after it was disposed of.

**No Remands on Damages Only and Usually No Remittiturs**

*Redman Homes, Inc. v. Ivy*, 920 S.W.2d 664 (Tex. 1996)

The court of appeals held that the evidence of damages was factually insufficient and remanded for a new trial on damages only. The Supreme Court reaffirms the rule that, where liability is contested, a remand on damages only is not permitted. Respondents attempt to tender a remittitur of the portion of the damages found factually insufficient by the court of appeals. The Supreme Court notes that, despite the absence any rule or statute authorizing it to accept remittiturs, it has accepted remittiturs in the past. However, the Supreme Court can only accept a remittitur where the amount of damages is established as a matter of law.

## COURT OF APPEALS OPINIONS

**Just What is the Deadline to Perfect Appeal?**

*State v. Organic Composting Resources Co.*, No. 03-96-00241-CV (Tex. App. Austin June 12, 1996)

The State attempts to appeal by writ of error from an agreed judgment. Unfortunately, the State has not filed a notice of appeal or any other document other than the writ of error itself which indicates a desire to appeal. The court of appeals holds that *Grand Prairie ISD v. Southern Parts Imports, Inc.*, 813 S.W.2d 499 (Tex. 1991) will not stretch this far. In every case where an appellate court found a "bona fide" attempt to perfect appeal "appellant attempted to perfect appeal by filing an incorrect perfecting instrument. In the instant case, the State has failed to file a perfecting instrument." The appeal is dismissed. *Verburgt v. Dorner*, No. 04-95-00908-CV (Tex.App.—San Antonio March 20, 1996)

*Kleck Mechanical, Inc. v. Pack Brothers Const. Co.*, 919 S.W.2d 815 (Tex.App. —San Antonio 1996)

In these two opinions handed down on the same day the San Antonio court has stretched *Grand Prairie ISD* to its limit and, perhaps, beyond. In *Verburgt* appellant's appeal bond was filed one day late. Over a month later (well beyond the 15-day window in which to seek an extension) the court of appeals ordered appellant to show cause why the appeal should not be dismissed. Appellant filed a reply including a creative counting technique that magically turned 31 days into 30. Unfortunately, the court (three justices and, presumably, 30 fingers) could count to 30 and did not sustain this argument. However, the court ruled that the appeal bond filed a day late was a "bona fide" attempt to perfect appeal under *Grand Prairie* and further ruled that appellant's reply to the show cause order, although filed well beyond the 15 day limit seemingly imposed by TEX.R.APP.P. 41(a)(2), would be treated as a misnomered motion for extension of time to file the appeal bond and granted the motion.

In *Kleck Mechanical* the district clerk's postcard stated that the judgment was signed on August 24. The judgment, however, was dated August 21. As a result, the appeal bond was two days late. Citing *Winkins v. Frank Winther Inv., Inc.*, 881 S.W.2d 557, 558 (Tex.App.—Houston [1st Dist.] 1994, no writ), the court of appeals rules that the appeal bond was a bona fide attempt to perfect appeal, and the clerk's error excuses the two-day delay. *Winkins*, of course was decided under TEX.R.APP.P. 5(b)(4) & (5). Presumably, this appellant could obtain a finding from the trial court that it received no notice of an *August 21* judgment until a date that would make his bond timely. However, the court of appeals has construed *Grand Prairie ISD* to dispense with the necessity of this procedure.

*continued ...*

*... from the preceding page*

**No Rule 42(a) extension for bad faitb affidavit of inability to pay costs**

*Velasquez v. Lunsford*, No. 14-96-0429-CV (Tex.App.—Houston [14th Dist.] July 18, 1996)

This is a dispute over legal fees. Plaintiff filed suit and an affidavit of inability to pay costs under TEX.R.CIV.P. 145. The trial court ruled that the affidavit was frivolous and dismissed the suit on December 18, 1995. Plaintiff filed a timely motion for new trial, and the last day to perfect appeal was March 18, 1996. On February 27th, Plaintiff filed an affidavit of inability to pay costs on appeal. Defendant filed a timely contest, and the trial court signed a timely order extending the time in which to rule on the contest. On March 21st, the court heard the contest to the affidavit and sustained the contest. In the written order, the court further found the affidavit was "false, frivolous, and not filed in good faith." On March 29th, Plaintiff filed an appeal bond with the trial court and a conditional motion for extension in the court of appeals. Defendant moves to dismiss the appeal.

Clearly, the bond and motion for extension were filed within the 15-day window provided by TEX.R.APP.P. 41 (a)(2), and, but for the affidavit of inability to pay costs, the court of appeals would, most likely, have routinely granted the motion. The court holds, however: "[W]here the trial court sustains the contest to an affidavit and makes a written finding that the affidavit was not filed in good faith, there is no provision for an extension to file a cost bond or to make a cash deposit." Thus, the appeal is dismissed.

**Case Tried Without a Jury?**

In the wake of *Linwood v. NCNBTexas*, 885 S.W.2d 102, 103 (Tex. 1994) opinions continue to pour out concerning when a case was "tried without a jury," such that a request for findings extends the deadline to appeal. *Hernandez v. Texas Department of Insurance*, k923 S.W.2d 192 (Tex.App. —Austin 1996) holds that where the trial court dismisses for want of jurisdiction following an evidentiary hearing, a request for findings extends the timetable. However, *Lusk v. Service Lloyds Ins. Co.*, 922 S.W.2d 647 (Tex.App.—Austin 1996) holds that, where the trial court dismisses without hearing evidence, a request for findings does not extend the timetable). *Awde v. Dabeit*, 921 S.W.2d 489 (Tex. App.—Fort Worth 1996) holds that, where the trial court grants Rule 13 sanctions after an evidentiary hearing, request for findings does not extend the appellate timetable. *See also Davis v. State*, 904 S.W.2d 946 (Tex.App.—Austin 1995, no writ); *O'Donnell v. McDaniel*, 914 S.W.2d 209, 210 (Tex.App.—Fort Worth 1995, writ requested); *Phillips v. Beavers*, 906 S.W.2d 254, 256 (Tex.App. —Fort Worth 1995, writ requested); *Waco Indep. School Dist. Taxpayers Ass'n v. Waco Indep. School Dist.*, 912 S.W.2d 392, 394 (Tex.App.—Waco 1995, no writ); *West Columbia Nat'l Bank v. Griffith*, 902 S.W.2d 201, 205 (Tex.App. —Houston [1st Dist.] 1995, writ denied); *IKB Indus. (Nigeria) Ltd. v. Pro-Line Corp.*, 901 S.W.2d 568, 569 (Tex.App. —Dallas 1995, writ requested).

*Editorial Comment: These cases clearly demonstrate that formulating a clear rule regarding when a request for findings extends that deadline to appeal is a very difficult task. The Supreme Court should reconsider the* dicta *in* Linwood *and adopt a rule similar to that long applied to motions for new trial and amended judgments — a request for findings, no matter how inappropriate or frivolous, extends the appellate deadline. In the meantime, if you want to extend the deadlines, file a motion for new trial!*

**Judge, We'll Tie that Up Later ...**

*Owens-Corning Fiberglas Corp. v. Keeton*, 922 S.W.2d 658 (Tex.App.—Austin 1996)

This is an asbestosis case. The Plaintiffs introduced into evidence a large amount of documents from another manufacturer of asbestos products showing knowledge at an early date of the dangers associated with asbestos. Defendant requested a limiting instruction, but the trial court admitted them with limitation on the basis of the representation of Plaintiffs' counsel that it would be shown later in the trial that Defendant actually received copies of the documents. At the close of Plaintiffs' case, Defendant moved for a mistrial, contending that no evidence had been produced that Defendant received the documents.

The court of appeals holds that, under these circumstances, the Defendant was required to file a motion to strike the evidence. "By moving instead for a mistrial, Owens-Corning has failed to preserve error for our review."

**Remand on *Exemplary* Damages Only?**

*Miles v. Ford Motor Co.*, 922 S.W.2d 572 (Tex.App.—Texarkana 1996)

This is a product liability suit. In a previous opinion the court of appeals affirmed the portion of the judgment awarding compensatory damages, but found factually insufficient evidence of gross negligence and malice and remanded for a retrial of the issues relating to punitive damages. On rehearing, Ford challenges the partial remand under TEX.R.APP.P. 81(b)(1). The court of appeals rules that a partial remand on gross negligence, malice and punitive damages does not violate that rule.

**Which 10 to which 2**

*Hyman Farm Service, Inc. v. Earth Oil & Gas Co.*, 920 S.W.2d 452 (Tex.App. —Amarillo 1996)

This is a suit for actual and punitive damages. The trial was bifurcated in accordance with *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 29-30 (Tex. 1994). Apparently, the jury rendered a 10-2 verdict after both portions of the trial, but the ten from the first portion of the trial were not the same ten as the ten from the second portion.

The court of appeals holds that even in separate or bifurcated trials of different issues, the same ten jurors must agree and sign the verdict on the same issues. The court specifically disagrees with *Greater Houston Transp. v. Zrubeck*, 850 S.W.2d 579, 587 (Tex.App.—Corpus Christi 1993, writ denied) on this issue.

**How uot to Handle an Appeal**

*In the Matter of J.B.K., Attorney*, No. 08-96-00064-CV (Tex.App.—El Paso March 15, 1996)

It is alleged that J.B.K., the attorney for one of the parties in a pending case, contacted a member of the court's staff and asked among other things, as to what his "chances" were in the then pending case and whether he should "settle" his case prior to the issuance of the opinion. The court of appeals, citing TEX.R.APP.P. 6, makes it clear that it will not tolerate this and directs the clerk of the court to refer the matter to the State Bar for investigation and possible disciplinary action.

# *Report of the User-Friendly Courts Committee*

**by Lori Meghan Gallagher**
Chair, User-Friendly Courts Committee
ANDREWS & KURTH L.L.P.
Houston

## Introduction

The Appellate Practice & Advocacy Section created a "User-Friendly Courts Committee" with the goal of finding common ground between the appellate courts and practitioners. To this end, the Committee has endeavored to act as a liaison between the bench and bar to identify and alleviate technical or procedural roadblocks to appellate courts hearing cases on the merits and to improve relations between the bench and bar.

One aspect of the Committee's work included sending a survey to each of the appellate courts, in which the courts answered basic questions regarding court procedures and other issues of practical concern to appellate practitioners. The courts cooperated fully in explaining their basic procedures and requirements, and the information obtained from the fourteen courts of appeals and the two high courts is compiled in the charts below. The information in the charts applies to both criminal and civil cases in the courts of appeals unless otherwise indicated.

Although these charts are intended to provide helpful information at a glance that will lessen the number of routine telephone inquiries received by the clerks, these charts are not intended as a substitute for the Texas Rules of Appellate Procedure, local rules, or other guidelines developed by the appellate courts.

Because the courts were unanimous in their views on certain issues, those issues are summarized below as common issues and policies, rather than compiled in the charts.

As a final introductory note, I would like to acknowledge that this report has been made possible by generous contributions of time and effort by Liz Wiley, of Andrews & Kurth L.L.P., Houston, Texas, and by committee members James A. Vaught, of Zelle & Larson, L.L.P., Austin, Texas, and Bill Boyce, of Fulbright & Jaworski L.L.P., Houston, Texas. Additionally, I would like to acknowledge Don Hunt, of Carr, Fouts, Hunt & Wolfe, L.L.P., Lubbock, Texas, who created this project as the first chair of this committee and who passed the torch to me.

## Common Policies in All Courts of Appeals

1. If a deadline passes without a ruling from the court on a *timely filed* motion for an extension of time, most courts will address the problem in an equitable manner. The court may either grant the extension of time as requested in the motion or seta deadline it deems appropriate given the circumstances.

2. No court looks kindly on last-minute waivers of oral argument. Inform the court as far in advance as possible whether you intend to waive oral argument requested in an opening brief. A timely notice enables the court to set another case for submission on oral argument and permits the court to maintain an efficient disposition of its heavy caseload.

3. Adherence to the letter and spirit of the Texas Rules of Appellate Procedure is always the rule. This means that observance of page limits is not accomplished by changing font sizes, page margins, etc. When a deviation from the practice set forth in the Texas Rules of Appellate Procedure is genuinely warranted, file an appropriate motion.

4. Because some motions may require verification and others may not, verify *every* motion to avoid the possibility of the court returning a motion for lack of the required verification.

## Electronic Statements of Facts

West Publishing Company's 1996 edition of *Texas Rules of Court* includes the general rules governing electronic tape recording of civil proceedings. These rules include a list of counties and specific courts for which the Supreme Court of Texas has authorized by written order electronic tape recording of civil proceedings.

The Texas Rules of Appellate Procedure, however, do not address electronic statements of facts, thereby creating some difficulty in implementing the orders of the Supreme Court of Texas. One difficulty for practitioners arises with the requirement that each party file with its brief an appendix containing a written transcription of all portions of the recorded statement of facts and a copy of all exhibits relevant to the error asserted. Practitioners have asked how many copies of the appendix are necessary. Courts of appeals have interpreted the orders to require only one copy of the transcription, just as the Texas Rules of Appellate Procedure require only one statement of facts in an appeal. Numerous other differences regarding record content and filing deadlines exist for electronic statements of facts. *See* Electronic Recording Rules.

| Court | Number of Justices | Local Rules | Motions Generally | Opening Briefs |
|---|---|---|---|---|
| **Supreme Court** (Austin) | 9 | No. | File an original + 11 copies. *See* TRAP 19. Each motion for an extension of time is considered on its own merits and is not granted as a matter of right. | File an original + 11 copies. **In original proceedings:** The Court requires an original + 11 copies of the motion for leave, the petition, and the brief; an original + 2 copies of the record are required.<br><br>If binding is used, avoid plastic covers, black covers, or dark blue or red covers. The Court's file stamp will not adhere to plastic and does not show up on the darker colors. |
| **Court of Criminal Appeals** (Austin) | 9 | No. | File an original only for all motions except motions for rehearing. File an original + 11 copies of a motion for rehearing. | File an original + 11 copies. The only formal requirement for briefs is that they be bound in some manner. |
| **1st** (Houston) | 9 | No. | File an original + 5 copies. Orders on motions are issued on Thursdays. Orders in emergency filings will issue at any time. The Court generally will not rule on a motion, other than a motion to extend time for filing the record or brief in a criminal case, until 10 days after the date of filing. The Court is generally liberal in granting the first motion for an extension of time to file a brief if the request is reasonable. Subsequent motions for extensions of time are assessed on a case-by-case basis. | File an original + 5 copies. Briefs in excess of 50 pages must be filed with a motion for leave to file; leave is rarely granted. **In original proceedings:** Notwithstanding TRAP 121, the Court prefers an original + 5 copies of the motion, petition, and brief; only 1 copy of the record is required. |
| **2nd** (Fort Worth) | 7 | Yes. Published by West and available from the Court. | File an original only. The Court will act promptly on agreed/unopposed motions. All motions for an extension of time must be verified. In criminal cases such requests must also include the date sentence is imposed or suspended in open court or the date an appealable order is signed by the trial judge and whether the defendant is incarcerated. | File an original + 4 copies. The appellant's brief is due **60** days after the record is filed. The appellee's brief is due **60** days after the appellant's brief is filed. Because of these extended appellate deadlines, extensions of time are rarely granted. Briefs in excess of the 50-page limit will be returned. |
| **3rd** (Austin) | 6 | No, but the Court has available a detailed set of "rules" concerning internal procedure. | File an original + 3 copies. All justices gather one day per week for a motions conference. Routine motions filed prior to submission of the case, such as first requests for extensions of time to file a brief, are summarily granted by a single justice. Other motions are discussed at the conference. The Court will generally not rule on motions prior to the expiration of 10 days. Post-submission, the panel to which the cause is submitted hears all motions after the expiration of 10 days. Agreed motions must be signed by all parties; opposed motions must contain a statement that all parties conferred and could not agree on the disposition of the motion. The Court will generally grant extensions of time to file a brief, no more than 30 days per motion, not to exceed three extensions. | File an original + 6 copies. **In original proceedings:** File an original + 3 copies of the motion, petition, and brief, but only 1 copy of the record. Briefs in excess of the 50-page limit must be accompanied by a motion for leave to file. |

| Reply and Supplemental Briefs | Oral Argument | Rehearing En Banc | Fax Filing |
|---|---|---|---|
| No restrictions other than those that apply to opening briefs. | The Court will designate the time allowed for oral argument when it sets a case for argument. On the day of argument, the petitioner must check in with the Marshall and state how much time he or she wishes to reserve for rebuttal. Oral arguments are always audiotaped and available to the public for a fee. ($5 per 90-minute tape if a tape is provided with the request; $8 per tape if the Court provides the tape.) | Not applicable. | No. |
| No restrictions. | The Court will designate whether a case requires oral argument. Notification of such designation shall be sent to counsel along with notification of submission. If counsel desires oral argument and the Court has not so designated the case, counsel may petition the Court within 30 days of the submission notification. The total maximum time for oral argument is 20 minutes per side. Multiple additional citations should not be made orally during argument, but should be reduced to writing and filed with the Clerk. If a motion for rehearing is granted and the cause resubmitted, oral argument is limited to 15 minutes per side. | The Court sits en banc for hearing appeals in death penalty cases, cases for discretionary review in which leave to file was granted under TRAP 211(a), cases docketed under TRAP 213(b), and rehearings under TRAP 230. TRAP 222(a). | No. |
| Reply briefs and supplemental briefs may be filed at any time without leave of court, but they may not be used to circumvent the 50-page limit for opening briefs. No new points of error are allowed in supplemental briefs. | 20 / 20 / 10<br>Motions for additional time are rarely granted. | The entire Court votes on whether to grant rehearing en banc. First, the justices of the original panel consider the motion for rehearing en banc; their vote is reported to the rest of the Court, which then votes on whether to grant the motion. | Yes. |
| Reply briefs may be filed without a motion for leave if filed more than 7 days before the date of submission. Reply briefs and supplemental briefs may not exceed 15 pages. | 15 / 15 / 5<br>Oral argument must be requested on each party's brief, or it will be waived. Announcement of counsel is required at docket call. | Motions for rehearing en banc are circulated to the entire Court for consideration. | No. |
| A motion for leave is not necessary if a reply brief or supplemental brief is tendered prior to oral submission and the brief does not exceed 50 pages and does not raise additional points of error. A motion for leave must accompany a supplemental or reply brief tendered post-submission, unless the Court requested such briefing during submission, in which case the party should note the request in the brief and the transmittal letter. | 20 / 20; reserve time for rebuttal.<br>Any request for additional time must be made far in advance of the date of oral submission. Leave of court is required if more than two attorneys wish to argue on behalf of one party. The Court will attempt to accommodate counsel when scheduling oral argument if counsel notifies the Clerk in writing of planned vacation dates. | All motions for rehearing are seen by each justice on the Court. Formal consideration en banc is disfavored: The Court has granted only one motion for rehearing en banc in its history. | No. |

| Court | Number of Justices | Local Rules | Motions Geuerally | Opening Briefs |
|---|---|---|---|---|
| **4th** (San Antonio) | 7 | Yes. Published by West and available from the Court. | File an original + 4 copies. Procedural motions are considered daily. Agreed motions will not be held for the 10 days required in TRAP 19(c), (e). The Clerk is authorized to grant extensions of time to file briefs for up to 14 days upon timely, written motion. All motions must be verified. | File an original + 4 copies. Briefs exceeding 25 pages must be bound in a manner that allows the open brief to lie flat. Briefs exceeding the 50-page limit will be returned to counsel with a letter requesting that a motion for leave be filed. |
| **5th** (Dallas) | 13 | Yes. Published by West and available from the Court. | File an original + 2 copies. Motions are addressed when ripe by one central motions panel. An agreed motion will not be held for the 10 days required in TRAP 19(c), (e)—but only if the motion is clearly agreed by *all* parties. The Court will generally grant motions for extensions of time to file a brief for 30 days. | File an original + 6 copies. Briefs in excess of the 50-page limit must be accompanied by a motion for leave to file. |
| **6th** (Texarkana) | 3 | No. | File an original + 3 copies. Motions are considered and orders are issued daily. Motions for extensions of time to file briefs will generally be granted for up to 30 days. | File an original + 3 copies. Briefs exceeding 50 pages must be accompanied by a motion for leave to file. Text must be double-spaced, except quotations longer than 50 words may be single-spaced. Type size must not be smaller than 12-point for laser printers or 10-point for dot matrix printers. |
| **7th** (Amarillo) | 4 | No. | File an original + 1 copy of all motions, except motions for rehearing. File an original + 2 copies of motions for rehearing. Motions are considered and orders are issued everyday. Motions for extensions of time to file a brief will generally be granted for up to 30 days. | File an original + 5 copies. Briefs exceeding the 50-page limit must be accompanied by a motion for leave to file. Briefs must be securely bound. The Court would prefer that a party avoid dark colors for covers of briefs. |
| **8th** (El Paso) | 4 | Yes. Published by West and available from the Court. | File only an original in cases that have not yet been submitted. For motions filed after the case is submitted, file an original + 5 copies. File an original + 1 copy of motions to dismiss in criminal cases. All motions must be verified. Agreed motions are decided the first Wednesday after filing; all others are decided the first Wednesday after 10 days from the date of filing. Motions for extensions of time to file a brief **in criminal cases** that request more than a 60-day extension from the brief's original due date must state whether the defendant is incarcerated and must be served on both the defendant and opposing counsel. The Court will generally grant first motions for extension of time to file a brief for 60 days. | File an original + 5 copies. **In original proceedings:** File 6 copies of the motion, petition, and brief; only 1 copy of the record is required. Briefs must be bound to lie flat when opened. Briefs may be printed on both sides of the page. Numerous font changes, capitalization, and exclamation points for emphasis should be avoided. Color-coded briefs are encouraged: blue for appellant; red for appellee; green for intervenor or amicus curiae; grey for a reply brief, and white for a separately bound appendix. Briefs in excess of 50-pages must be accompanied by a motion for leave to file. |
| **9th** (Beaumont) | 3 | No. | File an original + 2 copies. Agreed motions require acknowledgment from opposing counsel in writing. Motions for extensions of time are ruled on the first Tuesday or Friday after filing. All other motions are ruled on the first Thursday after filing. | File an original + 3 copies. Briefs may be stapled; no special requirements exist regarding binding if it is used. Briefs in excess of the 50-page limit must be accompanied by a motion for leave to file. |

| Reply and Supplemental Briefs | Oral Argument | Rehearing En Banc | Fax Filing |
|---|---|---|---|
| Any brief replying to the last brief filed may be filed without a motion if it is tendered by noon at least 7 days prior to the date of oral argument. Reply briefs may not exceed 25 pages. Amended, supplemental, or post-submission briefs must be accompanied by a motion for leave to file. | **Civil:** 20 / 20 / 10<br>**Criminal:** 20 / 20; appellant may reserve time for rebuttal.<br><br>Counsel must be present in the courtroom at the time set for oral argument to announce their presence.<br><br>Oral argument must be requested on the cover of the brief. | The motion for rehearing en banc must be filed at the same time as the motion for rehearing and must be filed separately. The entire Court votes on whether to grant rehearing en banc; upon majority vote, the Court will consider the matter en banc. | No. |
| Supplemental briefs may be filed without leave of court only if no new points of error are included. Amended or reply briefs may not be filed without leave of court. A post-submission memorandum may be filed if leave is obtained from the panel to whom the case is submitted. The Court will consider the promptness of the post-submission brief in deciding whether to grant leave. | 20 / 20 / 5<br>"Oral Argument Requested" must appear in the upper right-hand corner of the opening brief's cover. Counsel must be present in the courtroom at the time set for oral argument to announce ready. If more than one attorney will be arguing for a party, the attorneys must announce to the Court how they intend to divide their time. | Although the entire Court is made aware of the filing of a motion for rehearing en banc, only the panel that originally heard the case determines whether rehearing en banc will be granted. | Yes. |
| Reply briefs, supplemental briefs, and post-submission briefs have no page limits but must be accompanied by a motion for leave to file, unless permission was granted at oral argument. A post-submission letter brief of additional authorities does not require a motion for leave. | 20 / 20 / 10<br>A request for extra time must be made by motion, and the requesting party must justify the extra time in the motion. The Court rarely grants motions for extra time. | Not applicable. | No. |
| No restrictions apply to reply briefs or supplemental briefs filed prior to submission. Post-submission briefing, including a letter brief of authorities, may be filed only with leave of court. If the Court orally grants this leave at oral argument, a written motion is not required. | 20 / 20 / 5<br>"Oral Argument Requested" or "Oral Argument Waived" must appear on the front cover of the opening brief. Motions for additional time for argument are rarely granted and only in cases where multiple parties are involved. Counsel must be present at docket call to avoid waiving oral argument. | The original panel that heard the case will decide whether to grant rehearing en banc. | No. |
| Any brief following the opening briefs may not exceed 25 pages without leave of court. Reply briefs must be filed at least 10 days before the case is set for submission. An update or supplement of authorities may be submitted to the Court in letter form. If during oral argument the Court requests additional briefing, the brief is due within 10 days unless the Court states otherwise. Any response from the opposing party is due 10 days thereafter. | 20 / 20 / 10<br>A request for oral argument must be printed on the cover of the party's opening brief. A motion requesting additional time must be filed at least 10 days before oral argument. If any party requests oral argument, all parties will be given the opportunity to argue. In cases of multiple appellants or appellees, the attorneys must announce to the Court prior to argument how they will divide their time. The Court will attempt to accommodate vacation plans upon timely receipt of a letter setting out pending appeals and the dates counsel will be unavailable. | Both motions for rehearing and motions for rehearing en banc are submitted to the entire Court for consideration. | Yes. |
| No restrictions apply to reply briefs or supplemental briefs filed prior to argument. Any additional brief filed after submission requires leave of court. | 20 / 20 / 10<br>Oral argument is waived if not requested prior to or at the time the opening brief is filed. In cases involving multiple parties. the attorneys must announce prior to argument how they intend to divide their time. Guests and attorneys must sign in and be present when their case is called. | Not applicable. | Yes. |

| Court | Number of Justices | Local Rules | Motions Generally | Opening Briefs |
|---|---|---|---|---|
| **10th** (Waco) | 3 | Yes. Published by West and available from the Court. | File an original + 1 copy. Motions are considered and orders are issued on Wednesdays. Motions for extensions of time to file a brief are generally granted for 30 days per request. | File an original + 5 copies. Briefs must be bound in a manner that allows them to lie flat when open. Briefs that exceed the 50-page limit may be ordered rebriefed or the Court may consider only the first 50 pages. |
| **11th** (Eastland) | 3 | No. | File an original + 2 copies. Motions are considered and ruled on each Thursday. Motions in civil cases will be held for 10 days unless they are fully unopposed. Motions in criminal cases are not held for 10 days, but will be ruled on the Thursday following filing. Motions for extensions of time to file a brief will be granted for the time requested, provided the extension is reasonable. | File an original + 4 copies. |
| **12th** (Tyler) | 3 | No, but the Court does have several preferred practices. | File an original + 2 copies of all motions. Motions in civil cases will be held for 10 days. Most motions in criminal cases are not held for 10 days, but will be ruled on as soon as practicable. First motions for an extension of time to file a brief are generally granted for up to 45 days per motion.<br><br>**In original proceedings:** File an original + 4 copies of the motion for leave to file. | File an original + 4 copies. No dark colors may be used for covers of briefs. Briefs in excess of the 50-page limit must be accompanied by a motion for leave to file.<br><br>**Iu original proceedings:** File an original + 4 copies. |
| **13th** (Corpus Christi) | 6 | Yes. Published by West and available from the Court. | File an original + 3 copies. All motions must be accompanied by an affidavit. The Court normally does not rule on any motion before the expiration of 10 days unless the opponent joins in the motion before the expiration of 10 days. The Court will generally not grant extensions of time in excess of that requested and many times will shorten the length of time requested. | File an original + 3 copies. Briefs that exceed the 50-page limit will be struck, and rebriefing will be ordered. |
| **14th** (Houston) | 9 | No. | File an original + 5 copies. The Court does not hear civil motions until the expiration of 10 days, except in emergencies or with joint or agreed motions. Motions for extensions of time to file a brief are generally granted, but not usually for more than 45 days per motion. | File an original + 5 copies. The Court will automatically return to counsel a brief that exceeds the 50-page limit. |

| Reply and Supplemental Briefs | Oral Argument | Rehearing En Banc | Fax Filing |
|---|---|---|---|
| Before submission, reply briefs and supplemental briefs may be filed without leave of court. Any post-submission brief must be accompanied by a motion for leave to file. | 15 / 15 / 5, unless the presiding justice grants additional time at the time of argument.<br><br>"Oral Argument Requested" must appear on the front cover of the brief. Authorities cited during oral argument that are not cited in the brief must be submitted to the Clerk and all opposing parties by letter brief not later than the Friday following oral argument. Counsel must be present in the courtroom at docket call or will waive oral argument. | Not applicable. | Yes. |
| Supplemental briefs require leave of court if they add points of error. No other restrictions apply to additional briefing as long as it is reasonable. | 30 / 30 / 15<br>No motion is required to request additional time. An attorney need only ask the presiding justice prior to argument for additional time. | Not applicable. | No. |
| No post-submission briefing is permitted without leave of court. If the Court has granted a motion for leave to file, limit reply or supplemental briefs to 20 pages. Additional authorities not cited in the opening briefs must be filed in writing as a supplemental brief and should be filed prior to oral argument. The Court may orally grant leave to file a post-submission letter brief of recent authorities that were not available prior to argument. | 20 / 20 / 5<br>Requests for oral argument should be noted on the cover page of the brief. The Court will ask the parties to estimate how much time they expect to use for their argument. Arguments rarely exceed 15 minutes. The Court will lengthen or shorten the time for argument as it deems proper, such as allowing extra time for argument when the Court asks numerous questions. | Not applicable. | No. |
| Reply briefs are permitted as a matter of right until the date of oral argument. Letters with recent citations are permitted at any time without leave of court. Supplemental or post-submission briefs are permitted only with leave of court. | 30 / 30 / 15; The Court will also ask the parties at the time of submission how much time they expect to use for their argument.<br><br>Attorneys must sign the attorney register on the Clerk's desk in the courtroom when they arrive for the argument. The request for oral argument should be typed at the bottom left-hand corner of the cover of the brief. Cases cited during oral argument that are not in the opening briefs must be presented to the Clerk and opposing counsel in writing. A post-submission letter with certificate of service is sufficient. If during oral argument the Court requests additional briefing, this briefing is due within 10 days of argument if the Court does not state otherwise. Any response of opposing counsel is due 10 days thereafter. | Motions for rehearing en banc are circulated among the entire Court for consideration. | Yes. |
| The Court has no restrictions on filing reply briefs. Supplemental briefs may not raise new points of error. Post-submission briefs are accepted and considered as long as they arrive before issuance of the opinion. | 30 / 30 / 15<br>Although not required, it is helpful to state the request for oral argument in a conspicuous place on the cover of the brief. | The Chief Justice decides whether to grant rehearing en banc after the original panel that heard the case denies the motion for rehearing. | Yes. |

| Courts Permitting Fax Filing | What may be faxed? | Fees | Follow-up required? | Other Relevant Information |
|---|---|---|---|---|
| **10th**<br><br>**(Waco)** | 1. Motions to extend time to file a cost bond or the equivalent.<br>2. Motions to extend time to file the transcript or the statement of facts.<br>3. Motions to extend time to file a brief.<br>4. Motions to extend time to file a motion for rehearing. | $5 for the first 10 pages; $0.50 for each page thereafter. The sender is responsible for any applicable fees; if the fee is not paid, the Court will strike the motion. | The sender must maintain the original with the original signature as per Tex. Gov't Code § 51.806, but a copy must be forwarded to the Court within a reasonable time. | A cover sheet must show: name, address, telephone number, and fax number of the sender; the motion being transmitted; the number of pages; and the name of the deputy clerk to whom the fax is directed.<br><br>Filings received after 5 p.m. will be deemed filed on the following day. |
| **13th**<br><br>**(Corpus Christi)** | Non-voluminous, routine motions are accepted by fax, as well as responses to motions. | The sender must forward any filing fees to the Court on the same day that the motion is sent to the Court. There is no additional fee for the use of the fax machine. | The sender must forward the original of the motion and any required copies on the same day the motion is sent by fax. | Motions may be transmitted during and after working hours. |
| **14th**<br><br>**(Houston)** | Any motion or any response to a motion. | There is no additional fee for the use of the fax machine. | The Court will make the necessary 5 copies from the motion transmitted by the fax machine. No other follow-up is required by the sender. The sender must maintain the original with the original signature as required by § 51.806 of the Texas Gov't Code. | The fax machine is on at all times. If a document arrives before midnight, it is deemed filed that day. If a document arrives after midnight, it is deemed filed the following day that is neither a Saturday, Sunday, or legal holiday. |

# Fax Filing in the Courts of Appeals

| Courts Permitting Fax Filing | What may be faxed? | Fees | Follow-up required? | Other Relevant Information |
|---|---|---|---|---|
| **1st** (Houston) | Any motion. | No additional fee required for the use of the fax machine. | Follow up with an original + 5 copies within a reasonable time. | |
| **5th** (Dallas) | The Court has an approved order from the Supreme Court of Texas approving for fax filing the following "jurisdictional" motions:<br>1. Motions to extend time to file the cost bond or equivalent;<br>2. Motions to extend time to file the transcript or the statement of facts; and<br>3. Motions to extend time to file a motion for rehearing.<br>In practice, the Court will process any motion it receives by fax. | $5 for the first page, plus $2 per additional page, plus the charge for the call. Upon receipt of the filing, the Clerk will prepare and mail an invoice, with payment due within 10 days. If the party is the appellant, failure to pay the fax filing fee may result in the dismissal of the appeal. | The number of copies required by the Texas Rules of Appellate Procedure must be forwarded to the Court on the same day of the fax filing. The sender maintains the original hard copy with the original signature, as required by TEX. GOV'T CODE ANN. § 51.806 (Vernon 1988). | The fax machine will be maintained only during regular business hours, 8 a.m. to 5 p.m. Arrangements may be made with the Clerk's office to maintain the fax machine during non-business hours if such arrangements are made in writing and in advance. Absent such arrangement, a document filed after 5 p.m. will be deemed filed the following day that is not a Saturday, Sunday, or legal holiday. |
| **8th** (El Paso) | 1. Motions to extend time to file the cost bond or equivalent.<br>2. Motions to extend time to file the transcript or the statement of facts.<br>3. Motions to extend time to file a brief.<br>4. Motions to extend time to file a motion for rehearing.<br>5. Briefs. | $1 per page. The sender is responsible for fees. The failure to pay the appropriate fees may result in the motion being struck. | The sender must keep the original with the original signature pursuant to Tex. Gov't Code § 51.806, but a copy of the motion must be forwarded to the Clerk on the same day that the motion is transmitted by fax. If the document filed by fax is a motion for rehearing, the sender must forward 5 copies of the motion to the Court. | A cover sheet must show: name, address, telephone number, and fax number of the sender; the motion being transmitted; the number of pages; and the name of the deputy clerk to whom the fax is directed.<br>The fax machine operates from 8 a.m. to 5 p.m. Mountain Time. Filings received after 5 p.m. will be deemed filed on the following day. |
| **9th** (Beaumont) | Any document. | $5 for the first 10 pages; $0.50 for each page thereafter. | An original + 2 copies of the document must be placed in the mail on the same day as the transmission by fax. | The sender must calculate the fax filing fee and include a check for the amount of the fax filing fee with the required follow-up copies. |

# Alternative Dispute Resolution

| Court | Description Of Alternative Dispnte Resolution Program |
|---|---|
| **1st**<br>**(Houston)** | The Court evaluates all civil appeals to determine whether a particular case will be referred to mediation. *See* TEX.CIV.PRAC. & REM.CODE ANN. § 154.021(a) (Vernon Supp. 1996). When an appeal is filed [and usually after the transcript is filed in the court of appeals], the clerk of the Court sends the parties a docketing statement, which the parties must complete and return within 5 days of receipt. The statement asks for certain information about the case and is used by the Court to determine whether the case should be referred to mediation.<br><br>If the Court deems mediation appropriate, it will order that the case be referred to mediation. The parties have 10 days to file a written objection to this order. Within 10 days of the order, or within 10 days of an adverse ruling on an objection, the parties must notify the Court of the name, address, and telephone and fax numbers of the mediator they have chosen. If the parties cannot agree on a mediator, the Court will appoint one. The parties, or a representative with full settlement authority, must attend the mediation with their counsel of record. The mediation must take place within 45 days of the date of the order of referral. The appellate timetable is suspended for 45 days from the date of the order. The mediator and the parties must advise the Court within 48 hours of the mediation whether the case settled. |
| **3rd**<br>**(Austin)** | The Court evaluates most civil appeals to determine whether a particular case is amenable to mediation. Upon learning of the case, either through the filing of the transcript or a motion to extend time to file a transcript, the Court sends out a docketing statement that the parties must complete and return within 10 days of receipt. If the case appears amenable to mediation, court staff hold a telephone conference with all parties to discuss the possibility. Currently, the Court will refer a case to mediation only if all parties consent; the Court retains the option to exercise its statutory authority and order the case to mediation irrespective of the parties' consent.<br><br>The Court encourages parties who know they want to mediate following trial to move jointly for referral to mediation and for extension of time to file the appellate record. Their motion should contain a copy of the judgment and the perfecting instrument to avoid referral of nonfinal judgments and appeals which are not timely or properly perfected. This procedure enables the parties to save the costs of preparing the appellate record. The Court also has suggested to parties following submission on oral argument that they might consider referral to mediation. The Court has also referred original proceedings to mediation.<br><br>The parties must complete the mediation within 30 days of the referral. The precise scheduling and conduct of the mediation is left to the parties and the mediator. The parties may choose a mediator of their own or may choose from the Court's list of approximately 60 attorney-mediators, each of whom has agreed to perform two free mediations. The parties may move for abatement of the briefing deadlines during the 30-day referral period; this procedure enables parties to save the costs of preparing their briefs. Without an abatement request, the normal appellate timetable applies. If the mediation resolves all issues, the parties must move jointly for dismissal within 10 days after the mediator's report is filed or explain why a longer delay is necessary. If the mediation does not resolve all issues, the parties may request accelerated briefing schedules and an advanced submission. |
| **4th**<br>**(San Antonio)** | Upon motion of counsel or upon the Court's own motion, the Court may determine that a particular case should be referred to an alternative dispute procedure. *See* TEX.CIV.PRAC. & REM.CODE ANN. §§ 154.001-.073 (Vernon Supp. 1996). After a conference with counsel of record and if the Court decides to refer the case, the Court will issue an order of referral, setting forth the essential terms of the process. The order will state: (1) that the preliminary conference was held; (2) the Court's decision on any written objections or that the referral is made on the parties' agreement; (3) that the parties or their representatives, with settlement authority, are required to attend the designated procedure with counsel; (4) the length of time allowed for commencement and completion of mediation; (5) whether the referral extends the normal timetable for the appellate process; (6) the third parties, if any, appointed by the Court to facilitate the procedure and the responsibilities of the parties; and (7) that the procedure will remain confidential, including the assurance that the conduct and demeanor of the parties and their counsel will never be disclosed to anyone, including the Court, except as to the result of the referral or any written settlement agreement. Once the case has been referred, the alternative dispute resolution process is entirely in the hands of counsel and their clients, subject only to the coordinating responsibilities of the third parties designed to facilitate the settlement session. |

| Court | Description Of Alternative Dispute Resolution Program |
|---|---|
| **5th**<br><br>**(Dallas)** | The Court evaluates all civil appeals to determine whether a particular case will be referred to mediation. When an appeal is perfected, the trial court clerk provides counsel with a civil appeal information sheet, which the parties must complete and return to the clerk of the Court of Appeals by the end of the first business day following the perfection. *See* 5th Tex.App. (Dallas) LOC. R. 1:40. The civil appeal information sheet asks for certain information about the case and is used by the Court to determine whether the case should be referred to mediation.<br><br>If the Court deems mediation appropriate, it will order that the case be referred to mediation. The parties have 10 days to file a written objection to this order. The parties also have 10 days to agree upon a mediator; if the parties do not agree, one is appointed by the Court. The parties, or a representative with full settlement authority, must attend the mediation with their counsel of record. The mediation must take place within 30 days of the date of the order of referral. The appellate timetable is suspended for 30 days from the date of the order. The mediator is required to mail a report about the outcome of the mediation session to the Court immediately after the mediation session. |
| **9th**<br><br>**(Beaumont)** | The Court evaluates all civil appeals to determine whether a particular case will be referred to mediation. *See* TEX.CIV.PRAC. & REM.CODE ANN. § 154.021(a) (Vernon Supp. 1996). When a transcript is filed, the clerk of the Court sends the parties a mediation docketing statement, which the parties are asked to complete and return within 10 days. The "statement" asks pertinent information about the case to be used by the Chief Justice to determine whether the case should be referred to mediation.<br><br>If the Court deems the case appropriate for mediation, an order will be entered by the Court which includes the assigned mediator's name, address, etc. The mediation must be held within 90 days of the date of the order. The appellate timetables *are not* suspended, so any "motion for extensions" must be filed as necessary. The mediator is assigned the responsibility of notifying the Court of the results of the mediation. A form is provided to the mediator for this purpose. |
| **13th**<br><br>**(Corpus Christi)** | The Court evaluates all civil appeals to determine whether a particular case will be referred to mediation. *See* TEX.CIV.PRAC. & REM.CODE ANN. § 154.021(a) (Vernon Supp. 1996). When an appeal is filed [and usually after the transcript is filed in the court of appeals], the clerk of the Court sends the parties a docketing statement, which the parties must complete and return within 15 days from the day the statement is sent. The statement asks for certain information about the case and is used by the Court to determine whether the case should be referred to mediation on the Court's own motion. The Court may also refer a case to mediation upon motion of counsel or may encourage mediation from the bench during oral argument.<br><br>If the Court determines mediation is appropriate, it will notify the parties of this determination. *See id.* § 154.022. The Court encourages the parties to agree on a mediator and will offer a list of suggested mediators if this is necessary to facilitate the parties' agreement, but the Court will appoint a mediator if the parties cannot reach an agreement. The parties have 10 days to file a written objection to the proposed referral or to report whether they have selected a mediator. After the period for objection has passed and any objections have been considered, the Court will either withdraw the proposed referral upon counsel's objection or order referral to mediation. The order will appoint the chosen mediator, require the parties to contact the mediator within 10 days to schedule the mediation, and require the parties or representatives with full settlement authority to attend the mediation with their counsel. The order also requires the mediator to report when the process was completed, whether the parties appeared as ordered, and whether settlement resulted. Neither the proposed referral to mediation nor the subsequent order modifies the appellate timetable. |

# Fee and Costs Schedule for the Appellate Courts

NOTE: **The cost deposit due upon filing the transcript on appeal is $50. TRAP 13(a). Other motions or proceedings not specifically enumerated in TRAP 13, when no record has heen filed, require a deposit of $10 in the court of appeals, or $75 in the Supreme Court of Texas. TRAP 13(g). In such cases, upon filing the record only a $40 deposit will he assessed in the court of appeals, or $50 in the Supreme Conrt of Texas. TRAP 13(g). There are no filing fees in the Court of Criminal Appeals.**

| COURT | Motions | Briefs | Original Proceedings | Applications for writ of error |
|---|---|---|---|---|
| **Supreme Court** (Austin) | 1. Motion for rehearing: $10; additional $15 if granted.<br>2. Motion to extend time to file application for writ of error: $50.<br>3. Miscellaneous motions: $10. | $5 for reply briefs, supplemental briefs, amended briefs, or letter briefs. | $50; additional $75 if granted. | $50 (payable to the court of appeals at the time of filing); additional $75 if granted.<br>**Other fees:** Certified question from a court of appeals: $75. Certified question from a federal court: $100. Direct appeal: $100. To file exhibits not included in an initial filing: $25. |
| **All other courts of appeals, except those noted below** | Motion for extension of time to file the record: $5; no filing fee for any other motions. | No fees. | $20; additional $30 if granted. | $20 to the Court of Appeals to cover the cost of forwarding the appellate record to the Supreme Court of Texas; $50 to John T. Adams, Clerk of the Supreme Court of Texas. |
| **2nd** (Fort Wortb) | All civil motions (except original proceedings): $5. | same | same | **$15** to the Court of Appeals; $50 to John T. Adams, Clerk of the Supreme Court of Texas. |
| **3rd** (Austin) | same | same | same | **No fee** required to forward the appellate record to the Supreme Court of Texas; $50 to John T. Adams, Clerk of the Supreme Court of Texas. |
| **6th** (Texarkana)<br>*<br>**9th** (Beaumont)<br>*<br>**13th** (Corpus Christi) | same | same | same | **$25** to the Court of Appeals; $50 to John T. Adams, Clerk of the Supreme Court of Texas. |

## Statistics from the Office of Court Administration
## Average Time for Disposition — in Months

September 1, 1995 - March 31, 1996

| COURT | FILING TO DISPOSITION: CIVIL | CRIMINAL | SUBMISSION TO DISPOSITION: CIVIL | CRIMINAL |
|---|---|---|---|---|
| **1st** (Houston) | 7.8 | 12.3 | 5.2 | 1.8 |
| **2nd** (Fort Worth) | 8.1 | 14.8 | 3.1 | 3.0 |
| **3rd** (Austin) | 6.4 | 10.1 | 2.7 | 1.8 |
| **4th** (San Antonio) | 7.6 | 10.8 | 4.3 | 2.5 |
| **5th** (Dallas) | 7.4 | 20.0 | 2.3 | 1.3 |
| **6th** (Texarkana) | 4.3 | 7.3 | 0.6 | 0.3 |
| **7th** (Amarillo) | 6.2 | 7.7 | 1.4 | 0.3 |
| **8th** (El Paso) | 9.3 | 13.2 | 2.7 | 1.7 |
| **9th** (Beanmont) | 9.9 | 12.8 | 4.1 | 3.6 |
| **10th** (Waco) | 6.5 | 11.4 | 3.9 | 2.8 |
| **11th** (Eastland) | 7.8 | 8.3 | 2.9 | 1.3 |
| **12th** (Tyler) | 8.0 | 12.7 | 3.1 | 2.9 |
| **13th** (Corpus Cbristi) | 11.9 | 12.5 | 5.5 | 3.1 |
| **14th** (Houston) | 10.8 | 14.0 | 1.3 | 1.0 |

# Texas Criminal Appellate Update

**by Alan Curry**
Assistance District Attorney
Houston

## COURT OF CRIMINAL APPEALS

**A late-filed notice of appeal cannot give a court of appeals jnrisdiction unless a motion for extension of time is timely filed and granted by the court.**

*Olivo v. State*, 918 S.W.2d 519 (Tex. Crim.App. 1996)

A written notice of appeal that is filed late may be considered timely filed so as to invoke the jurisdiction of a court of appeals if (1) the notice of appeal is filed within 15 days of the last day allowed for filing the notice of appeal, (2) a motion for extension of time to file the notice is appeal is filed with the court of appeals within the same 15-day period, and (3) the court of appeals grants the motion for extension of time. However, when a written notice of appeal is filed within the 15-day period, but no timely motion for extension of time is filed, the court of appeals lacks jurisdiction.

Furthermore, a court of appeals cannot utilize TEX.R.APP.P. 2(b) or TEX.R. APP. P. 83 to create jurisdiction where none exists. *Cf. State v. Adams*, No. 1177-93 (Tex. Crim.App., Apr. 25, 1996) (not yet reported); *Oldham v. State*, No. 1350-94 (Tex.Crim.App., June 19, 1996) (not yet reported).

**A defendant who files a "general" notice of appeal cannot appeal non-jurisdictional defects, even if he is appealing from an order revoking his "deferred adjndication" community supervision.**

*Watson v. State*, No. 1287-94 (Tex.Crim. App., May 29, 1996) (not yet reported)

A defendant who enters a plea of guilty or no contest and then receives deferred adjudication in accordance with a plea bargain agreement cannot appeal non-jurisdictional defects after his community supervision is revoked if he did not file a notice of appeal that stated that he was appealing the trial court's ruling on a written pre-trial motion or that he was appealing with the trial court's permission. This is true even though the defendant clearly did not originally agree to the trial court's ultimate assessment of punishment when he revokes the defendant's community supervision. The trial court's ultimate assessment of punishment must only be within the statutory range.

**A defendant who timely files an indigency affidavit and motion for a free statement of facts need not make sure that the trial court bolds the iudigency hearing.**

*Gray v. State*, No. 635-94 (Tex.Crim. App., June 26, 1996) (not yet reported)

If a defendant timely files an affidavit of indigency, and timely files a motion for a free statement of facts on appeal, the defendant need not make sure that the trial court holds an indigency hearing to determine whether the defendant is in fact indigent and entitled to a free statement of facts. The defendant need only demonstrate his indigency at such hearing.

## COURTS OF APPEALS

**A defendant cannot appeal the trial court's improper admonishments if he enters a plea of guilty or no contest in accordance with a plea bargain and files only a "general" notice of appeal.**

*Tillman v. State*, 919 S.W.2d 836 (Tex. App.—Fort Worth 1996, no pet.)

If a defendant enters a plea of guilty or no contest in accordance with a plea bargain with the State, he cannot appeal the trial court's allegedly improper admonishments under TEX.CRIM.PROC.CODE ANN. art. 42.12, § 5 (Vernon Supp. 1996), if he did not file a written notice of appeal stating the appeal was with permission from the trial court. The trial court's failure to properly give those admonishments is a non-jurisdictional defect.

*But cf. Ramos v. State*, No. 14-94-525-CR (Tex.App.—Houston [14th Dist.], June 20, 1996 (not yet reported), where under same circumstances, court of appeals held that defendant could appeal allegedly improper admonishments under TEX.CRIM. PROC.CODE ANN. art. 26.13 (Vernon 1989) because such a challenge goes to voluntariness of defendant's plea, which can always be appealed.

**A defendant can cballenge an allegedly unauthorized punishment, even if he euters a plea of guilty or no contest in accordance witb a plea bargain and files only a "general" notice of appeal.**

*Tate v. State*, 921 S.W.2d 496 (Tex. App. —Waco 1996, no pet. h.)

If a defendant enters a plea of guilty or no contest in accordance with a plea bargain with the State, he can appeal an allegedly unauthorized punishment assessed against him regardless of the type of written notice of appeal that he filed because an unauthorized punishment is a jurisdictional defect.

**A defendant is not always entitled to challenge the sufficiency of the evidence if he enters a plea of guilty or no contest without an agreed recommendation from the State as to punisbment.**

*Richardson v. State*, 921 S.W.2d 359 (Tex.App.—Houston [1st Dist.] 1996, no pet. h.)

If a defendant enters a plea of guilty or no contest without an agreed recommendation from the State as to punishment, he cannot appeal the sufficiency of the evidence to support his conviction if the State filed the defendant's judicial confession supporting his conviction before the defendant entered his plea.

**In appeal from municipal court decision, a defendant cannot file an amended brief or a motion for extension of time in which to file the original brief.**

*Purnell v. State*, 921 S.W.2d 432 (Tex.

App.—Houston [1st Dist.] 1996, no pet. h.)

In an appeal from a conviction in municipal court to county court, there is no provision for the extension of time in which to file the appellate brief, and there is no provision for the filing of an amended brief. Furthermore, any point of error considered by the county court must have been presented in a motion for new trial in the municipal court.

**A court of appeals will review the factual sufficiency of the evidence in a pre-*Clewis* case of the defendant's challenge to the sufficiency of the evidence could reasonahly be construed as a challenge to tbe factual sufficiency of the evidence as well.**

*Kerr v. State*, 921 S.W.2d 498 (Tex. App. —Fort Worth 1996, no pet. h.)

Although in *Clewis v. State*, 922 S.W.2d 126 (Tex.Crim.App. 1996), the Texas Court of Criminal Appeals did not indicate whether it intended its holding to be given retroactive effect, the court of appeals held that it would conduct a review of the factual sufficiency of the evidence under *Clewis* in pending appeals submitted prior to January 31, 1996 (the date *Clewis* was decided) if the defendant asserted a challenge to the legal sufficiency under *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), if that challenge to the legal sufficiency of the evidence could be reasonably construed as raising a factual sufficiency challenge as well.

# *Fifth Circuit Civil Appellate Update*

**by Marcy Hogan Greer**

FULBRIGHT & JAWORSKI L.L.P.

Austin

**Antisuit Injunction/International Comity**

*Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624 (5th Cir. 1996)

The court of appeals upheld an antisuit injunction against the prosecution of a "mirror image" lawsuit in Japan. The case involved a contractual dispute between two sophisticated, private corporations regarding an agreement to distribute Kaepa footwear in Japan. The agreement expressly provided that Texas law and the English language would govern and had a forum selection clause for suit in San Antonio, Texas. The Japanese company, Achilles, removed the action to federal court and engaged in comprehensive discovery, but then, apparently dissatisfied with the Texas proceedings, filed suit in Japan alleging "mirror-image claims."

While recognizing that the federal courts are highly deferential to principles of international comity in determining the propriety of an antisuit injunction against proceedings in a foreign country, the court concluded that the district court did not abuse its discretion in barring the prosecution of the foreign litigation. Central to its analysis were the following factors: (i) the private nature of the dispute, (ii) the clear indications by both parties that claims arising from their contract should be adjudicated in this country, (iii) the duplicative and vexatious nature of the Japanese action, and (iv) the court's view that the antisuit injunction would not "actually threaten[] relations" between the United States and Japan.

The majority refused to apply the more restrictive standard used by other circuits and urged by Judge Garza in his dissent, which it characterized as "elevat[ing] the principles of international comity to the virtual exclusion of essentially all other considerations.... We decline[] to require a district court to genuflect before a vague and omnipotent notion of comity every time that it must decide to enjoin a foreign action."

Rule 65(a)(1) does not require an oral hearing prior to the entry of a preliminary injunction if no factual dispute is involved. Because the district court did not rely upon any disputed facts in granting the antisuit injunction, its failure to hold a hearing was not error.

Rule 65(c), which provides that "[n]o ... preliminary injunction shall issue except on the giving of security by the applicant in such sum as the court deems proper ...," gives the trial court discretion not to require any security at all.

*continued ...*

**Collateral Order Doctrine/Pendent Appellate Jurisdiction**

*Cantu v. Rocha*, 77 F.3d 795 (5th Cir. 1996)

Under the collateral order doctrine, a denial of summary judgment on the basis of qualified immunity is immediately appealable when based on an "issue of law." Conversely, an order that must resolve fact-related disputes of "evidence sufficiency, i.e., which facts a party may, or may not be able to prove at trial," must await final judgment. The court analyzed the factual insufficiency principles of the two recent Supreme Court decisions on the issue — *Johnson v. Jones*, 115 S. Ct. 2151, 2156 (1995) and *Behrens v. Pellotier*, — S.Ct. — (1996) — and concluded that, "[i]n the wake of *Behrens*, it is clear that *Johnson's* limitation on appellate review applies only when 'what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred.'" In this case, the defendants argued that the conduct as alleged did not amount to a violation of a clearly established liberty or property interest. Thus, the argument was based upon an "issue of law" and was immediately appealable.

Courts of appeals should be reluctant to exercise pendent jurisdiction over rulings which are not independently appealable prior to judgment in the absence of a "compelling reason." Since the "compelling reasons" actually dictated against premature consideration of the merits issues, the court lacked appellate jurisdiction over the denial of summary judgment on the merits.

**Appellate Procedure/"Accord And Satisfaction" as Precluding Appeal**

*Gloria v. Valley Grain Products, Inc.*, 72 F.3d 497 (5th Cir. 1996) (per curiam)

The acceptance of the payment of an unsatisfactory judgment does not, standing alone, amount to an accord and satisfaction precluding an appeal of the entire claim (citing *United States v. Hougham*, 364 U.S. 310, 312 (1960)). An appeal is precluded "only if the parties mutually intended a final settlement of all the claims in dispute and a termination of the litigation." (citing *McGowen v. King*, 616 F.2d 745, 746 (5th Cir. 1980)). Since the plaintiff did not sign a settlement or release, the cashing of defendant's check for the amount of the judgment at issue was not an accord and satisfaction of the claims—even though the plaintiff failed to object. Therefore, the plaintiff's appeal was not precluded.

**Choice of Law/Multi-District Litigation/Discovery Limitations**

*In re Air Disaster at Ramstein Air Base, Germany*, 81 F.3d 570 (5th Cir. 1996)

In multi-district litigation, the transferee court which receives the consolidated cases must apply the choice of law rules of each of the jurisdictions in which the transferred actions were originally filed. The district court's choice of law decision is reviewed de novo.

Both Texas and Florida apply the law of the state "with the most significant relationship to the particular substantive issues before the court." Under this Restatement approach, as applied in a products case, the court is to give more weight to each state's contacts with the design and manufacture of a product than the place of injury, which is generally fortuitous.

The district court's limitation of depositions to 16 for each side was not an abuse of discretion absent a showing that the plaintiffs exhausted the 16 allotted or demonstrated other prejudice.

**Evidence/Lay Opinions**

*Haun v. Ideal Industries, Inc.*, 81 F.3d 541 (5th Cir. 1996)

The trial court did not abuse its discretion in allowing testimony by former supervisor as to his lay opinion that the company was "deliberately phasing-out older workers" under FED.R.CIV. EVID. 701.

**Appellate Review/Magistrate Reports and Recommendations/**

**Plain Error and Manifest Injustice**

*Douglass v. United Services Automobile Association*, 79 F.3d 1415 (5th Cir. 1996) (en banc)

In response to the panel's invitation to reconsider the issue en banc, the full court overruled *Nettles v. Wainwright*, 677 F.2d 404, 408 (5th Cir. 1982) (en banc), and revised the standard of review when a party fails to file timely, written objections to the proposed findings of fact and conclusions of law in a magistrate judge's report and recommendation. According to statute, a party must file these written objections within 10 days after being served with a copy. 28 U.S.C. § 636(b)(1); *see also* FED.R.CIV.P. 72. Under *Nettles*, the failure to object operated as a waiver of appellate review of factual findings adopted by the district court. Under the Fifth Circuit's new standard, the failure to do so bars that party from attacking on appeal both the unobjected-to proposed factual findings *and* legal conclusions adopted by the district court—except upon grounds of plain error—provided that the party has been provided advance notice of these potential consequences. The Fifth Circuit characterized this rule as one of "forfeiture," not "waiver."

Review of the forfeited error is limited to "plain error." The court engages in a lengthy analysis of "plain error," compares and contrasts it with "manifest injustice," and concludes that "[t]here is no justification for having 'manifest injustice' as a separate standard for reviewing unobjected-to proposed findings and conclusions," in large part because "there is no meaningful difference" between the two as applied in this context. Although the opinion is limited to review of magistrate's recommendations under section 636, the opinion probably presages a collapse of the two standards in other contexts as well.

**Declaratory Judgments**

*Texas Medical Ass'n v. Ætna Life Ins. Co.*, 80 F.3d 153 (5th Cir. 1996)

When the legislature has provided an exclusive remedy for an alleged wrong, a plaintiff cannot seek the same relief under the guise of a declaratory judgment action.

**Appellate Review—Law of the Case/Lost Evidence**

*Bituminous Cas. Corp. v. Vacuum Tanks, Inc.*, 75 F.3d 1048 (5th Cir. 1996)

A prior panel opinion in a given case is the law of the case and must be followed by the court unless an intervening decision or statute makes the prior panel decision clearly wrong. (citing *LaFarge Corp. v.*

*Hartford Casualty Ins. Co.*, 61 F.3d 389, 403 (5th Cir. 1995)).

The terms of a lost insuranee policy can be proved by secondary evidence, such as a specimen poliey and testimony about contemporaneous state law requirements in effect for that particular policy.

**Sufficiency of the Evidence/Preservation of Error/Remittitur**

*Polanco v. City of Austin*, 78 F.3d 968 (5th Cir. 1996)

Generally when a defendant fails to move for judgment as a matter of law under Rule 50(a) both at the close of the plaintiff's case and after all the evidence has been presented, the court of appeals applies the "plain error" standard of review to any sufficiency of the evidence challenge. In this case, the defendant filed a motion for judgment at the end of the plaintiff's case, which the court took under advisement, but failed to file a renewed motion after presenting its case. The court of appeals held that the failure to renew the motion was a de minimis departure from Rule 50(b) because it would have served no purpose since the court had already taken the matter under advisement and the plaintiff had offered no additional evidence since that point. Accordingly, it reviewed the City's sufficiency of the evidence challenge on the merits.

The jury award, which exceeded the relief requested by the plaintiff by about 200%, was not held to amount to mandate a new trial because the trial court could—and did—remit the award to cure any potential harm caused by any alleged overcompensation.

The district court did not abuse its discretion by excluding testimony of the plaintiff's former mistress about deceit in the context of an extra-marital affair where the proffered testimony did not relate to the plaintiff's reputation for truthfulness in the community or the department. The court also suggested that testimony by "angry ex-mistresses," ex-spouses, and other "ex-companions" is generally charged with emotion and should generally tilt the Rule 403 balancing test in favor of exclusion.

**Sufficiency of Evidence/Preservation of Error**

*Scottish Heritable Trust v. Peat Marwick Main & Co.*, 81 F.3d 606 (5th Cir. 1996)

Although the defendant failed to renew its motion for judgment as a matter of law after the close of all evidence, its objection to the jury charge on the basis of insufficient evidence satisfied the purposes of FED.R.CIV.P. 50 and thus preserved its right to challenge the sufficiency of the evidence on appeal.

**Snmmary Judgment**

*Stults v. Conoco, Inc.*, 76 F.3d 651 (5th Cir. 1996)

On appeal from a summary judgment, the court of appeals may consider only those materials which were included in the pretrial record and which would have been admissible at trial in determining whether there exists a genuine issue of material fact.

Where the nonmovant fails to file a timely response to a motion for summary judgment, it fails to meet its "burden to designate 'specific facts showing that there is a genuine issue for trial'" (quoting *Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir. 1994), *cert denied*, 115 S.Ct. 195 (1994) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)).

**Attorneys' Fees/Contingency Contracts**

*Augustson v. Linea Aerea Nacional-Chile S.A.*, 76 F.3d 658 (5th Cir. 1996)

The rights and obligations regarding attorneys' fees under a contingency fee contract are controlled by state law.

Under Texas law, an attorney is not entitled to his contingency fee where he withdraws from the case without "just cause." Instead, the attorney is only entitled to his or her actual reasonable expenses incurred before withdrawal. The attorney bears the burden of proving "just cause."

In this case, the failure of the client to accept what the attorney considered to be a favorable settlement was not "just cause." Nor was the failure to do so a "constructive discharge" of the attorney.

The court's grant of permission to withdraw for "good cause" did not constitute a finding of "just cause" for recovering the fee.

**Motion for Attorneys' Fees/58(a) "Separate Judgment" Requirement**

*Cooper v. Pentecost*, 77 F.3d 829 (5th Cir. 1996)

The time limit for filing a petition for attorney's fees or a motion for new trial (or other post-trial relief) under Rule 59 does not begin to run until a judgment is entered in compliance with Rule 58. Rule 58 requires that the judgment be set forth on a separate paper and entered on the clerk's docket. The court specifically noted that the importance of this rule was illustrated in this case because the lack of a Rule 58 judgment created confusion over the parties' rights and obligations.

The attorneys in this case did not make the "exceptional" showing necessary to warrant enhancement of the presumptively correct lodestar method for determining attorney's fees (i.e., multiplying the reasonable number of hours times the reasonable billing rate). It is questionable whether any kind of punishment multiplier enhancement is appropriate in attorneys' fees awards under 42 U.S.C. § 1988.

**Statutory Construction/Equal Access to Justice Act**

*Texas Food Industry Assoc. v. USDA*, 81 F.3d 578 (5th Cir. 1996)

Holding that, under the Equal Access to Justice Act, 28 U.S.C. § 2412, et. seq., an association's eligibility for an award of attorney's fees is dependent only upon the association's net worth and size, not the assets and size of its constituent members. Judge Garza dissented, contending that the EAJA was designed to alleviate the burden upon *small* economic entities—not trade associations representing billion dollar corporations.

Post-enactment legislative history does not control a statute's interpretation. Further, and absent ambiguity, the federal court must look only to the plain language of a statute: "As we have stressed repeatedly, we must 'presume that a legislature says in a statute what it means and means in a statute what it says.'" (citing *U.S. v. Meeks*, 69 F.3d 742, 744 (5th Cir. 1995)).

**Limitations/Warranty/Preemption/Limitations on Briefs**

*Allgood v. R.J. Reynolds Tobacco Co.*, 80 F.3d 168 (5th Cir. 1996)

Claims by survivors of deceased smoker

*continued ...*

*... from the preceding page*

were barred by limitations. The discovery rule tolled limitations only up to the point the deceased learned of the injury, which was when he was diagnosed by his physician with emphysema and told to quit smoking. The court of appeals rejected a number of other equitable tolling arguments as well.

Plaintiff's claims of fraudulent concealment or failure to warn arising after 1969 are preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331-1340 (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992)). Furthermore, because the dangers of cigarette smoking are "common knowledge," the defendants had no duty to warn the deceased of such dangers (citing *Joseph E. Seagram & Sons v. McGuire*, 814 S.W.2d 385, 387 (Tex. 1991)).

The court chided the appellants for trying to circumvent the 50-page limit on briefs by incorporating argument from papers previously filed in the district court record.

**Post-Judgment Motions/Retroactivity of Amended Rules**

*Long v. Simmons*, 77 F.3d 878 (5th Cir. 1996)

The recent amendment to Federal Rule of Civil Procedure 59(e)—motion to alter or amend judgment—which requires *filing* of the motion within ten days after entry of judgment, applies retroactively to cases pending on the effective date of amendment. Prior to December 1, 1995, Rule 59(e) required *service* within ten days of the entry of the judgment.

**Trial Court's Supervision over Conduct of Trial/Limitations on Trial Proceedings**

*Sims v. ANR Freight Sys., Inc.*, 77 F.3d 846 (5th Cir. 1996)

The trial judge, imposed numerous restrictions upon the parties' presentations in a jury trial, such as: allowing only one day to try the case, as opposed to the 5-7 days requested; imposing strict time limits on the presentation of the case; requiring parties to submit extremely detailed statements of facts; refusing to allow the parties to introduce any evidence as to uncontested issues; denying a request to read certain stipulated facts to the jury; ordering plaintiff to call witnesses in a certain order; repeatedly limiting both direct and cross examination; and frequently ordering counsel to "move on." While noting the burdens of the federal court system and commending the trial court on its efforts to reduce the docket, the court of appeals nonetheless found that these restrictions adversely impacted the jury's comprehension of the evidence to the point that the plaintiff was effectively "denied a trial." However, the Fifth Circuit refused to reverse since the overwhelming evidence was against the plaintiff.

# *Federal Criminal Appellate Update*

**hy Sandra L. Morehead and Joel Androphy**
BERG & ANDROPHY
Houston

**Prosecutor may not ask character witness about specific bad acts if it is unlikely that those acts are known in the community.**

*United States v. Monteleone*, 77 F.3d 1086 (8th Cir. 1996)

Defendant put on a witness to testify as to his good character. In cross-examination, the prosecutor asked if the witness knew that the defendant had lied during his grand jury testimony. Even though the trial court gave a limiting instruction regarding the use of the character testimony, the Eighth Circuit reversed the conviction, holding that the harm from the implication that the defendant lied to the grand jury was too great to be cured by the instruction. The Court held that even if the government could prove that the defendant lied to the grand jury, the question should still not have been asked because testimony before the grand jury is not the type of information that the community at large would tend to know about.

**No reduction in sentence for acceptance of responsibility when defendant admits guilt, but goes to trial on entrapment and duress defenses.**

*United States v. Spires*, 79 F.3d 464 (5th Cir. 1996)

Defendant was charged as a felon in possession of a firearm. At trial, he admitted he was in possession of the gun, but argued that he acted as a result of entrapment and duress. He was convicted, and contested the trial court's denial of a reduction in his sentence for acceptance of responsibility. The Fifth Circuit held that he was not entitled to the reduction, even though he admitted possession of the gun because he did not admit the culpable state of mind and disputed the government's version of the facts.

**Government expert permitted to testify regarding the likelihood that a person in a hypothetical situation identical to that of the defendant would have heen suffering from a manic episode.**

*United States v. Levine*, 80 F.3d 129 (5th Cir. 1996)

Defendant, who was diagnosed as a manic-depressive, had asserted temporary insanity in defense of a bank robbery charge,

alleging he was in a manic episode at the time. The trial court permitted the governments expert to testify that the actions of a hypothetical person, identical to those of defendant, were not, in his opinion, the actions of a person suffering from a manic episode. The Fifth Circuit affirmed the conviction, holding that the testimony was proper because it did not contain an opinion regarding the defendant's state of mind.

**Trial court permitted to modify forfeiture provisions of plea agreement when it determines those provisions are unfair.**

*United States v. Dean*, 80 F.3d 1535 (11th Cir. 1996)

Defendant had executed a plea agreement which contained non-binding recommendations by the prosecutor, which included an agreement to forfeit $140,000 which had been seized from him. The trial court accepted the plea agreement, but modified the forfeiture amount to $5,000, stating that the $150,000 was an excessive fine in violation of the Eighth Amendment. The Eleventh Circuit affirmed the trial court, holding that, although acceptance of the plea generally prohibits a court from modifying that agreement, a court may exercise equitable jurisdiction over the forfeited property. The Court cautioned that the equitable jurisdiction should be used sparingly, but that a trial court should not ratify a defendant's consent to an unjust or illegal punishment.

**A defendant merely bolding a position of public or private trust is not enough to support a sentencing adjustment for abuse of that trust.**

*United States v. Harrington*, 82 F.3d 83 (5th Cir. 1996)

The trial court enhanced the defendant's sentence for smuggling illegal aliens for abuse of a position of trust based on the fact that the defendant was an attorney and, therefore, an officer of the court. The Fifth Circuit reversed, holding that special status, by itself, was not enough to support an enhancement. For a defendant to receive such an enhancement, the position of trust must have contributed, in a significant way, to the offense at issue.

**Trial court has discretion to refuse to give instruction during jury deliberation.**

*United States v. Mejia*, 82 F.3d 1032 (11th Cir. 1996)

During deliberations, the jury sent a note stating that some of them believed that the Government had "created" the crime. The defendants asked for an entrapment instruction to be given, but the trial court refused. Because no defendant had asked for an entrapment instruction prior to deliberations, and, in its opinion, the evidence had not sufficiently raised the issue, the Eleventh Circuit affirmed the convictions.

**Ninth Circuit holds that money seized after a failure to file a report when transporting the money overseas cannot be forfeited.**

*United States v. Bajakajian*, 84 F.3d 334 (9th Cir. 1996)

The defendant pled guilty to transporting currency in excess of $100,000 outside the United States without filing the required form. The trial court then held a bench trial on the third count of the indictment, which was a forfeiture of the entire $357,144 that was seized from the defendant. The trial court found the entire amount was forfeitable, but ordered that only $15,000 be forfeited, because anything more would be an excessive fine. The government appealed. The Ninth Circuit held that any forfeiture of funds seized because the requisite form was not filed would be punishment because the funds (which were legally held and not contraband) were not instrumentalities of the crime. However, because the defendant failed to file a cross-appeal, the Appellate Court affirmed the $15,000 forfeiture.

**Informant's report to police that individuals suspected of possessing cocaine had a gun in their apartment and had barricaded the door is not an exigent circumstance precluding the need for officers to "knock and announce"**

*United States v. Bates*, 84 F.3d 790 (6th Cir. 1996)

Police officers must generally knock on the door and announce their presence when executing a search warrant, unless exigent circumstances exist. In this case, the officers did not do so, claiming the exigent circumstances of (1) likelihood that the cocaine would be destroyed, (2) the presence of a firearm in the apartment (per an informant), and (3) the fact that the door to the dwelling was barricaded. The trial court suppressed the evidence obtained in the search, and the Sixth Circuit affirmed, holding that (1) there must be specific evidence that the contraband is to be destroyed, not just a generalized fear; (2) the mere suggestion that a firearm is present within the dwelling is not enough, there must be some evidence that the occupants are armed and are intending to resist; and (3) the barricade of the door was not enough to interfere with the officer's entry into the dwelling, especially since they entered through another door.

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# From the Editor ...

**This issue is a keeper!**

In addition to two fine lead articles and our four regular update features, this issue of the *Appellate Advocate* contains something special that you'll want to drop in your permanent reference file and use again and again. Lori Gallagher and Liz Wiley have put together a User-Friendly Courts Committee Report that — for the first time anywhere — summarizes the often unpublished practice requirements of all the non-military appellate courts in Texas (that's an inside joke for those who had the good fortune to attend the Section's annual meeting in June). Arranged in a tabular format, this report allows you to ascertain a particular court's requirements for motions, opening briefs, reply and supplemental briefs, oral argument, en banc rehearing, and to compare those requirements among the various courts.

The chart (which appears on pages 10–15) also tells you the number of justices on each court, whether a particular court has local rules, and whether it accepts fax filings. A related chart (pages 16–17) tells you what instruments may be filed by fax, the applicable fees, what follow-up is required, and other relevant information for the seven courts of appeals that accept fax filings.

A third chart (pages 18–19) describes the alternative dispute resolution programs in the six courts of appeals that have formalized the practice. The fees and costs requirements for all the appellate courts are set forth in a fourth chart (page 20), and a fifth chart (page 21) shows the average disposition times for civil and criminal cases in all the courts of appeals.

Not only is the report of the User-Friendly Courts Committee a much-needed aid for the appellate practitioner, but its comparative format points up the disparity among the courts in routine practices. Perhaps such a comparison will lead eventually to a more uniform adoption of the best practices among the courts.

**The *Appellate Advocate* is online!**

Our chair, Richard R. Orsinger, has created a Web site for the Section, and the *Appellate Advocate* (Electronic Version) is already experimenting with an electronic publication at the Section's new page on the World Wide Web:

http://www.txdirect.net/users/rrichard/appellat.htm

The Section's Web site also contains, among other things, the names and addresses of the Section's officers, Council members, committee chairs and committee members, a history of the Section, and an invitation to join. More information, especially more Section history and articles from back issues of the *Appellate Advocate*, will be added soon.

Some new articles will appear both in the print and the electronic publication, and others will appear only on the Web site. New authors, especially, are encouraged to submit articles first to the Electronic Version, where there are no space limitations.

For more information, contact:

Richard R. Orsigner
phone 210/225-5567
fax 210/267-7777
74767.2472@compuserve.com
rrichard@txdirect.net

Finally, as a member of the Computer Section Council, your editor would also encourage you to connect to that Section's home-page at http://www.sbot.org. This site also has a number of useful features you might like to explore, including links other law-related sites and sources of law on the Web.




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