# The Appellate Advocate

*State Bar of Texas Appellate Section Report*

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### CUMULATIVE INDICES

**DON'T FORGET! RENEW YOUR MEMBERSHIP!**

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## *The Chair Reports*

**by JoAnn Storey**
Chair, Houston

I am really lucky.

Everything I set out to do this year has been accomplished. Of course, those accomplishments are the result of hard work by many people whose efforts should not go unrecognized.

During our advanced course last fall, we held the first Special Section meeting. **Justice Ann McClure** proposed the idea; Member Services chair **Lori Gallagher** planned and organized the effort. **Daryl Moore** prepared a questionnaire that many of you completed. The results were reported in the November issue of this newsletter. The Council studied and heeded your comments (and appreciated the positive comments).

**Deborah Race**, chair of the newly-created Section History Committee, interviewed our founders and has chronicled our history in her article *"Reflections on the Formation of the Appellate Section"* reported in this issue. Deborah also began a section scrapbook, which includes photographs, newspaper articles, and programs from past annual meetings.

**Jimmy Vaugbt** chaired the Local Bar Coordinating Committee, which was also new this year. As a result of Jimmy's efforts, leaders and members of local appellate sections have attended Council meetings. Also, the Tarrant County Bar Association Appellate Section, the Travis County Bar Association Civil Appellate Law Section, and the Appellate Law Section of the El Paso Bar have been profiled in this Section's newsletter.

Our new webmaster, **Mark Steiner**, has been very busy putting together our new website (begun by second past chair **Richard Orsinger**). Go to http://www.stcl.edu for great links, docketing statements for every appellate court, and the latest in appellate news.

**Bill Boyce** and **Randy Roach**, co-chairs of the Program Committee, have put together an Annual Program to rival those presented in the past. This year's program will be well worth the trip to Fort Worth.

One last word - typical lawyer. We can thank **Wendell Hall** for putting together this issue of the newsletter. Nothing I like better than going out with a bang. Thanks, Wendell (you, too, Helen).

# Petitions for Review: Frequently Asked Questions

**by Pamela Stanton Baron**
Solo Practitioner, Austin

The petition for review (PFR) process is still new to many, having taken effect less than two years ago in September 1997. This paper provides answers to frequently asked questions (FAQs) about petitions for review to the Texas Supreme Court.

## I. BEFORE YOU FILE

### A. *Should I bother: What are the odds of success?*

Generally, the Court hears only about ten to twelve percent of the cases seeking review. For example, in the term ended August 31, 1998, the Court agreed to hear approximately 125 of 1100 appeals filed, or a little more than eleven percent. From September 1, 1998 through April 1, 1999, the Court granted 57 of 515 petitions on which it issued a ruling, again slightly more than eleven percent.

Before filing, it is useful to take a hard look at the issues of the particular case to determine whether it makes sense to proceed. The successful petitions can be grouped into two broad categories: cases presenting an issue of statewide importance on which the Court will hear oral argument and write a full opinion; and cases presenting a clear error that can be easily corrected in a short per curiam opinion without the need for argument. To obtain a grant under the first category, the petitioner should bear in mind the factors the Supreme Court considers in deciding whether to grant review: (1) whether there is a dissent in the court of appeals on an important point of law; (2) whether there is a conflict between two or more courts of appeals on an important point of law; (3) whether the case involves the construction or validity of a statute; (4) whether the case involves constitutional issues; (5) whether the court of appeals has committed an error of law of such importance that it merits correction; and (6) whether the court of appeals has decided an important issue of law that should be, but has not been, decided by the state's highest civil court. TRAP 56.1(a). To fit within the category of grants by per curiam opinion, the petition must convince the Court that there is a clear error of law that is simple to correct in a short opinion. In both categories, the Court is more likely to grant if there is a sense that the court of appeals' opinion is not just wrong, but also has resulted in unfairness to the parties.

### B. *What if the court of appeals' opinion is unpublished?*

The great majority of the appeals that are granted are seeking review of a published court of appeals' opinion. Although the Court does not track how many of its -cases are based on a published court of appeals' opinion, the author has reviewed the Supreme Court orders for the current term from September 1, 1998 through April 1, 1999. Of the 515 cases (excluding petitions that were dismissed, settled, or withdrawn), the Court issued a ruling on 254 published opinions and 261 unpublished opinions. The Court granted, either by setting for argument or issuing a per curiam opinion, 57 of those cases, 45 challenging published opinions and only 12 challenging unpublished decisions of the courts of appeals. This works out to an approximate grant rate of 8.7 percent for published cases and 2.3 percent for unpublished cases. A refusal to publish by the court of appeals substantially decreases the likelihood of review by the Supreme Court.

It is important, then, to file promptly with the court of appeals a motion to publish. The motion should be thoughtful and persuasive rather than pro forma. The motion should explain why the court's opinion meets one or more of the criteria for publication set forth in TRAP 47.4. The explanation should be backed up with research, identifying for the court similar issues that have been published and why the court's opinion provides additional guidance to the trial bench and bar in future cases presenting similar issues. If the court denies the motion, it is possible to petition the Supreme Court for publication, but such motions are rarely granted.

### C. *Is rehearing in the court of appeals required?*

Not usually. Under TRAP 49.9, a motion for rehearing in the court of appeals is no longer a prerequisite for Supreme Court review. The harder question is: is rehearing advisable? Since the rule change, one Supreme Court justice has consistently taken the position that a party who is serious about pursuing its case will seek rehearing in the court of appeals. *See, e.g.,* Justice Nathan L. Hecht and E. Lee Parsley, *Procedural Reform: Whence and Whither* (Sept. 1997). As a practical matter, however, since the Supreme Court no longer routinely has staff memoranda prepared on all cases, it is unlikely that the justices will even notice in the review process whether or

not a party has sought rehearing unless the court of appeals has issued a new opinion on rehearing.

In the author's opinion, there are three reasons to seek rehearing in the court of appeals. First, if the party wants to complain to the Supreme Court of an error arising for the first time in the court of appeals' opinion and judgment, it may be prudent to ensure that error is preserved by filing a motion for rehearing. (Note, though, that TRAP 53(f) seems to suggest that error arising for the first time in the court of appeals need not be preserved.) In addition, a good argument can be made that rehearing may be necessary to preserve any new error that may be taken to the United States Supreme Court. Second, a party should pursue rehearing if there is a reasonable chance that the court of appeals will correct or limit its error. Because rehearing is not required, the rehearing motion may be directed to particular errors and need not address every point or issue that the party will bring forward in the petition for review. Third, a party may want to seek rehearing simply to gain additional time to prepare its petition for review.

### D. *Is it a good idea to line up amicus support and, if so, when?*

One way of showing that a case is important to the jurisprudence of the state is to have other parties that are interested in or affected by the issue file amicus briefs with the Court. It is good idea to send the court of appeals' opinion to potential amici immediately after the opinion issues. For maximum benefit, an amicus brief urging the Court to grant a petition for review should be filed as soon as possible after the petition is filed, preferably within two to three weeks, to ensure that the amicus is before the justices when they rule on the petition. An amicus brief must disclose the source of any payment made for preparing the brief. TRAP 11. For a more extensive discussion of amicus briefs, *see* Pamela Stanton Baron, *The Civil Amicus Brief*, State Bar of Texas, Advanced Civil Appellate Practice Course (Sept. 1995).

## II. PETITION FOR REVIEW FILING MECHANICS

### A. *When is the petition due?*

The petition is due no later than 45 days after (1) the date of the court of appeals' judgment, if no motion for rehearing is filed; or (2) the date of the court of appeals' last ruling on all timely filed motions for rehearing. TRAP 53.7(a).

### B. *What about cross-petitions?*

If any party timely files a petition for review, then any other party may file a subsequent petition either 45 days after the court of appeals' last ruling on all timely filed motions for rehearing or 30 days after the filing of another party's timely-filed petition (including any extensions), whichever is later. TRAP 53.7(c). It is important to note that any party seeking to alter the court of appeals' judgment must file its own petition for review. TRAP 53.1. Complaints asking for a different or more favorable judgment below cannot be raised by cross-point in a response to a petition for review.

### C. *How do I get an extension of time to file the petition?*

File a motion with the Supreme Court no later than fifteen days after the due date. TRAP 53.7(f). The motion must state: the due date; the length of the extension sought; the facts reasonably explaining the need for an extension; the number of previously granted extensions; the court of appeals; the dates of the court of appeals' judgment; and the case number and style of the case in the court of appeals. TRAP 10.5(b). The motion must include a certificate of conference. TRAP 10.1(5). The Court will not grant an extension request without a certificate of conference. If the facts relied on in the motion are within the personal knowledge of the attorney signing the motion, the motion need not be verified. TRAP 10.2. The Court requires the filing of an original plus eleven copies of the motion. TRAP 9.3(b). There is a $10.00 filing fee. The Court routinely grants first motions. It will grant a second motion if there's a good reason, but will usually indicate on the order that no further extensions will be granted.

### D. *What if the court of appeals issues a new opinion on rehearing after one of the parties has filed a petition for review; what if a party files its petition before the court of appeals has ruled on all of the motions for rehearing; what if the court of appeals refuses to rule on a pending motion for rehearing because a party has filed a petition for review; what if . . . ?*

Look at TRAP 53.7(b). The Court has written a long and fairly complicated rule to resolve all potential problems of problems in transferring jurisdiction over the case from the court of appeals to the Supreme Court. For any readers who still remember the debacle in *Rose v. Doctors Hospital*, those problems should never recur. If another party files a petition while your rehearing is still pending, it is a good idea to contact the Supreme Court clerk's office to let them know that a rehearing motion is still pending in the case. The Court will delay acting on

the petition until the motion for rehearing has been overruled.

**E.** ***Where is the petition filed and how many copies are required?***

An original and eleven copies of the petition (and any separately bound appendix) are filed with the Supreme Court clerk. TRAP 53.7(a); TRAP 9.3(b). The mailing address is Post Office Box 12248, Austin, TX 78711. The delivery address is Supreme Court Building, 201 W. 14th Street, Room 104, Austin, TX 78701. The phone number for the clerk's office is 512/463-1312.

If you file the petition with the court of appeals by mistake, the rule treats the petition as having been filed in the Supreme Court on that same day; the clerk of the court of appeals' is instructed to forward the petition to the Supreme Court immediately. TRAP 53.7(g).

**F.** ***Can I use Federal Express?***

It depends. Never, never use Federal Express when you are sending the filing package on the due date. To get the benefit of the "mailbox" rule, the filing must be sent either first class, express, registered, or certified mail, must be properly addressed, and must be deposited in the mail on or before the last day for filing.9.2(b). Federal Express won't count. If you are filing a few days before the deadline, it is okay to use an overnight carrier, but be sure to confirm with the clerk's office that the filing actually gets there the next day. If the overnight carrier loses the filing package, you may need to put an extra set in the mail on or before the last day for filing.

**G.** ***Can I file electronically or by fax?***

No.

**H.** ***Is there a filing fee?***

Yes. There is a filing fee of $75.00.

**I.** ***Should I let the court of appeals know I've filed a petition for review?***

The rules do not require that a party notify the court of appeals that a petition has been filed. It is helpful to notify the court anyway. In several cases, courts of appeals have issued the mandate even though the case was pending at the Supreme Court. Once the mandate issues, the winning party may seek to enforce the judgment. A simple letter to the court of appeals' clerk could avoid having to ask the court later to recall the mandate or to stop enforcement proceedings pending recall of the mandate.

## III. PETITION FOR REVIEW FORMATTING MECHANICS

**A.** ***What are the basic formatting rules?***

The petition must be typed on standard 8½ by 11 inch paper with one-inch margins on both sides and at the top and bottom. Text must be double spaced except for block quotes, footnotes, short lists, and issues or points. Typeface for text must be either (1) standard 10 cpi (character per inch) non-proportionally spaced Courier typeface or (2) 13-point or larger proportionally spaced typeface. If a proportionally spaced typeface is used, footnotes may be printed in typeface no smaller than 10-point. The length of a petition is strictly limited. The petition may not exceed 15 pages excluding the following sections: the identity of parties and counsel, the table of contents, the index of authorities, the statement of the case, the statement of jurisdiction, the issues presented, the signature, proof of service, and the appendix. TRAP 53.6.

**B.** ***Can I staple the copies or is binding required?***

Either may be used, but the document must lie flat when open. TRAP 9.4(f). In the author's opinion, as a general rule, any document more than five pages in length should be bound with front and back covers. Binding should be spiral binding that allows the brief to lie flat.

**C.** ***Why can't the cover be red; isn't that a good way to get the court to pay attention?***

All petitions must have a cover that allows the ink on the clerk's stamp to be visible. The red ink does not show up well on plastic covers or on dark covers like red, black, or dark blue. The rule thus prohibits these types of covers. TRAP 9.4(f).

**D.** ***Why are so many petitions getting bounced?***

Many filings do not comply with the typeface rules, the margin rules, or the page limitation rules. The Court is rejecting documents that don't comply. Both the clerk's office and even some of the justices are carefully screening petitions for noncompliance. While the party has an opportunity to redraw the petition, a second failure may result in the petition being struck. TRAP 9.4(i).

**E.** ***What is 13 point proportionally spaced typeface anyway?***

If a type is non-proportional, all letters take the same amount of space. This is the typeface used by your old manual typewriter. Proportional type squeezes the letters together if there is extra space. So, unless you are writing only the letter "o", a line of proportional type will hold

many more characters than a line of non-proportional type. The standard old typewriter size is 10 cpi, which means that ten characters (no matter what characters they are) fit into one inch of type. To make sure everybody gets about the same number of letters in their petition, the Supreme Court has determined that a 13-point non-proportional typeface is equivalent to the old standard 10 cpi. 13-point type looks quite large and is not standard formatting on most word processing software. In Word for Windows, use CG Times or Times New Roman and set the size either by typing it into the toolbar window for type size or do the same in the Font Window from the Format Menu. In WordPerfect for Windows, use CG Times or Times New Roman; 13 is a type size option in the toolbar window.

## IV. PETITION FOR REVIEW CONTENTS

### A. *Can't I just file my brief from the court of appeal s instead of a petition for review?*

No. And don't try to get around this by attaching copies of the court of appeals' briefs in the appendix to the petition. *See Wal-Mart Stores, Inc. v. Sturges*, No. 98-1107, 42 Tex. Sup. Ct. J. 374 (Feb. 11, 1999) (striking appendix that included "argumentative material," *i.e.*, the court of appeals' briefs).

### B. *What are the required contents of the petition for review?*

The petition must contain the following items in the following order:

Identity of parties and counsel
Table of contents
Index of authorities
Statement of the case
Statement of jurisdiction
Issues presented
Statement of facts
Summary of the argument
Argument
Prayer
Appendix

TRAP 53.2.

### C. *What goes on the cover; do I ask for oral argument on the cover or in a separate motion?*

The cover must contain the following information: (1) the number of the case (leave blank if no number is assigned yet); (2) the style of the case; (3) the title of the document being filed; (4) the name of the party filing the document; and (5) the name, mailing address, telephone and fax number, and State Bar number for lead counsel for the filing party. TRAP 9.4(g). There is no provision in the rules for asking the Supreme Court for oral argument in an ordinary appeal. *Compare* TRAP 9.4(g) (request to court of appeals); TRAP 39.7 (request to court of appeals). Oddly, the rules do allow a request for argument in cases involving certified questions. TRAP 58.7(b). Anyway, the Court decides on its own whether to hear argument in a case. TRAP 59.1, 59.2. A party who does not ask for oral argument gives the impression of being more familiar with the Court's procedures than one who asks for argument.

### D. *Is there anything tricky about identifying parties and counsel?*

Sort of. The list must include all parties to the trial court's judgment, whether they are participating in the appeal or not. The list must also include the names and addresses of all trial counsel and all appellate counsel. TRAP 53.2(a). The disclosure of all parties is necessary to permit the justices to determine whether they are disqualified or should be recused from hearing the case. The disclosure also ensures that all interested parties receive notices from the clerk. If there are many parties to the trial court's judgment, such as in a class action, it is helpful to provide the clerk with a diskette containing the information. Call the clerk's office (512/463-1312) and ask for Elizabeth Saunders to discuss formatting requirements.

### E. *What needs to be in the table of contents?*

The petition must have a table of contents, which must "indicate the subject matter of each issue or point, or group of issues or points." TRAP 52.3(b). There are several ways to accomplish this result. One is simply to recopy under "Issues Presented" in the table of contents all of the issues listed in the petition. If the headings in the argument section of the petition track the issues, putting the headings in the table of contents may suffice. No matter how structured, though, the issues, headings, and subheadings in the table of contents should serve as an outline or summary of the argument.

### F. *Is there anything unusual about the index of authorities?*

No. The index must list the authorities alphabetically and show the pages of the petition where the authorities are cited. TRAP 53.2(c).

### G. *Some people are drafting the statement of the case in a table format; is this a good idea and what does it look like?*

Yes, the table format is a good idea. It provides the most basic information about the case in a very easy to

read and understand format. Members of the Court have expressed a strong preference for the table format. *See* Douglas W. Alexander and Lori Ellis Ploeger, *Petition for Review Practice*, South Texas College of Law, Civil Appellate Law Course for Practitioners at L-6 (Dec. 1998). The case statement should "seldom" exceed one page and must not discuss the facts. TRAP 52.3(d). The statement of the case must provide the following information: the nature of the case (*e.g.*, trespass to try title, divorce); the trial judge who signed the order appealed from; the designation of the trial court and county; the trial court's disposition; the parties in the court of appeals; the court of appeals' district; the names of the participating court of appeals' justices, including who authored the majority and any other opinions; the court of appeals' disposition; and the citation for the court of appeals' opinion or a statement that the opinion is unpublished. TRAP 53.2(d).

### H. *Should the statement of jurisdiction ever be more than 10 words long?*

Not normally. In 98% of the cases, the following statement should suffice: "This Court has jurisdiction under section 22.001(a)(6) of the Texas Government Code." Only if jurisdiction is questionable, such as in an interlocutory appeal, should the jurisdiction section be longer than a sentence. In this event, the petition should state briefly and "without argument" the basis for jurisdiction, such as dissent or conflict. TRAP 53.2(e). If conflict jurisdiction is asserted, the cases created the conflict should be listed, perhaps with a brief parenthetical; any argument detailing the conflict should be reserved for the argument section of the petition.

### I. *What is the difference between issues and points of error?*

Issues are slightly more general and free-form than points of error. Points of error tend to be mechanical complaints identifying the mistake-maker (the trial court erred), the form of the mistake (in granting the motion for judgment n.o.v.), and why it was a mistake (because there was some evidence of fraud). Points of error are sometimes very unhelpful in finding out what the case is really about. Issues do not have to identify the particular form of the error or even who made it. They focus on the basic questions the appellate court has to answer: Does execution of a release disclaiming reliance on pre-release representations bar a claim for fraudulent inducement? The rule provides that a broad issue "will be treated as covering every subsidiary question that is fairly included." TRAP 53.2(f). In the Supreme Court, the issues presented is one of the most important part of the petition. It is worth, then, spending time in framing the issues to ensure they are not to global ("Did the trial court abuse its discretion? Was the j.n.o.v. improper?"). At the other end of the spectrum, the judges do not like long issues that state all of the facts of the case, then ask some question based on those facts.

The issue should be framed the way the Court would write the issue in the first paragraph of an opinion deciding the case. It is helpful to look at holding sentences from recent opinions. The following are examples:

> The question presented is whether a company that markets and sells its products through independent contractor distributors and exercises control by requiring in-home demonstration and sales, owes a duty to act reasonably in the exercise of that control. *Read v. The Scott Fetzer Co.*, 42 Tex. Sup. Ct. J. 264 (Dec. 31, 1998).

> The issue in this case is whether an independent contractor's willingness to follow a premises owner's instructions, though no such instructions were given, is legally sufficient evidence of the premises owner's "right to control" in a premises liability case. *Coastal Marine Service of Texas, Inc. v. Lawrence*, 42 Tex. Sup. Ct. J. 352 (Feb. 4, 1999) (per curiam).

> We consider three issues in this petition for review: (1) when is a party, who seeks judicial review of a Texas Workers' Compensation Commission Appeals panel decision, required to file a copy of its petition with the Commission under the Texas Labor Code section 410.253; (2) whether "the mailbox rule" applies to section 410.253 filings in judicial review actions under Texas Labor Code chapter 410, subchapter G; and (3) whether an untimely section 410.253 filing with the Commission deprives the trial court of jurisdiction over the judicial review action. *Albertson's, Inc. v. Sinclair*, 42 Tex. Sup. Ct. J. 358 (Feb. 4, 1999) (per curiam).

### J. *What are unbriefed issues?*

While the issues presented should list every issue that the petitioner desires to bring forward, if there are more than one or two issues, as a practical matter they cannot all be briefed in the argument section of the petition. The rules permit the petitioner to preserve the issues by listing them in the issues presented section, but allows the petitioner to focus its argument on the best one or two issues in the argument section of the petition. TRAP 53.2(i). These unbriefed issues may be addressed later if the Court asks for full briefing on the merits.
When issues listed will not be briefed in the argument section, it is common practice to designate in parentheses that the issue is an "unbriefed issue."

**K.** ***Can I waive error by failing to raise all issues in the petition for review?***

Yes. The issues stated must encompass all complaints about issues decided by the court of appeals. If the court of appeals did not reach an issue or point of error, however, that issue may, but need not, be raised in the petition. The issue may be raised later in the reply, any brief, or even in a motion for rehearing. TRAP 53.4.

**L.** ***Is there anything special about the statement of facts in the petition for review?***

No. The rules require that the facts be stated "concisely and without argument." TRAP 53.2(g). The statement of facts counts in the fifteen-page page limit so the facts need to be straightforward. Remember, the more words spent on the facts, the less room there is left for the critical argument section of the petition. It is helpful to use subheadings if the fact statement exceeds two or three pages. It is also easier for the Court to understand when the facts are presented in chronological order.

The statement of facts must "affirm that the court of appeals correctly stated the nature of the case, except in the particulars pointed out." TRAP 53.2(g). The statement must be supported by references to the Clerk's Record (formerly known as the transcript), usually abbreviated "CR," *e.g.*, CR 333, and the Reporter's Record (formerly known as the statement of facts), "RR," *e.g.*, RR 245. *Id.* The statement of facts should also include a brief procedural history of the case, even if slightly repetitive of the statement of the case. TRAP 53.2(g).

**M.** ***Is a summary of argument required? Why, when the petition is so short?***

The petition must include a summary of the argument. TRAP 53.2(h). The summary must be "succinct, clear, and accurate" and may not merely repeat the list of issues presented. *Id.* With the argument unlikely to be more than about ten pages of fairly large type, in the author's opinion, the summary should be optional, but it is not. It is the justices' opinions that count, though, and many of them like the summary and read it carefully. Like the argument section, the summary should stress the reasons the Court should hear the case.

**N.** ***What is the court looking for in the argument section of the petition?***

The Court is looking for a reason to grant. The rule makes clear that the focus should be the reasons the Court should exercise jurisdiction "with specific reference to the factors listed in Rule 56.1(a)." TRAP 53.2(i). Those factors are:

(1) whether the justices of the court of appeals disagree on an important point of law;
(2) whether there is a conflict between the courts of appeals on an important point of law;
(3) whether a case involves the construction or validity of a statute;
(4) whether a case involves constitutional issues;
(5) whether the court of appeals appears to have committed an error of law of such importance to the state's jurisprudence that it should be corrected; and
(6) whether the court of appeals has decided an important question of state law that should be, but has not been, resolved by the Supreme Court.

Tex. R. App. P. 56.1(a); *see* Tex. Gov't Code § 22.001(a)(6) (only if "the error is of such important to the jurisprudence of the state that, in the opinion of the Supreme Court, it requires correction" will the court grant the petition). The phrase "of importance to the jurisprudence of the state" is not explicitly defined by rule or statute. Additionally, the rules provide insight into what is "important" in its setting of standards for the court of appeals to employ in determining whether an opinion merits publication:

> An opinion should be published only if it does any of the following: (a) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (b) involves a legal issue of continuing public interest; (c) criticizes existing law; or (d) resolves an apparent conflict of authority.

TRAP 47. Justice Hecht outlined his own standards for granting a case in his dissenting opinion on first hearing in *Maritime Overseas v. Ellis*, 40 Tex. Sup. Ct. J. 110 (Nov. 15, 1996) (Hecht, J., dissenting to denial of application for writ of error). In asserting that the writ should have been granted, Justice Hecht noted the size of the damage award, the importance of the central legal issue, the fact that the central legal issue had not been authoritatively addressed (presumably by the Texas Supreme Court), the existence of dissents and conflicts in the court of appeals, the granting of a similar issue in a pending case, the fact that the case was well briefed by capable counsel, and the existence of error in the court of appeals' judgment.

The concept that the case is important to the jurisprudence of the state should pervade the entire petition. This discussion should not, however, be set forth in the statement of jurisdiction. Tex. R. App. P. 52.3(e).

Not all cases that the Court decides to hear are important to the jurisprudence of the state. Many of the

justices also believe that an important function of the Court is to correct clear error. It is possible to pitch the argument in terms of clear and easily correctable error that has resulted in unfairness (quite often, a failure of a lower court to hear the merits of the case), rather than importance, in an effort to convince the Court to correct the error in a short per curiam opinion without hearing oral argument. Generally, a petition seeking error correction should be very short with only one or two issues. It should make clear that there are no complicating factors, like waiver, that would impede a simple fix.

### O. *The prayer isn't very important, right?*

It is in some cases. The prayer should contain the judgment the petitioner would like the Court to issue. In most cases, the relief requested is quite clear and the prayer doesn't really add any insight. In complicated cases where several arguments are made in the alternative, though, the prayer can be very important in explaining to the Court exactly what type of judgment would issue under each particular scenario. A well-written prayer can provide vital guidance to the Court in drafting the judgment.

### P. *Well, at least I can't get the certificate of service wrong, right?*

You can if you don't include all the items required by the rule: the date and manner of service,; the names and addresses of each person served; and, for each attorney served, the name of the party represented by that attorney. TRAP 9.5(e).

## V. APPENDIX TO PETITION FOR REVIEW

### A. *What is the appendix and why is it necessary?*

At the time the petition is filed, the Court does not have the record. The record is forwarded by the court of appeals only if the record is requested by the Supreme Court. *See* TRAP 54. The appendix provides the Court with an abridged copy of the record, focusing on those items most useful in deciding whether or not to grant the petition. The appendix includes both required and optional items, discussed below.

### B. *What must be included in the appendix?*

The following items must be included in the appendix unless "voluminous or impractical":

> The judgment or other appealable order of the trial court from which relief in the court of appeals was sought;
>
> The jury charge and verdict, if any, or the trial court's findings of fact and conclusions of law;
>
> The opinion and judgment of the court of appeals; and
>
> The text of any rule, regulation, ordinance, statute, constitutional provision, or other law (except case law) on which the argument is based, and the text of any contract or other document that is central to the argument. TRAP 53.2(k).

### C. *Can't I put anything else I want in there too?*

Within limits. The rules permit inclusion in the appendix of any other items pertinent to the issues, "including copies or excerpts of relevant court opinions, statutes, constitutional provisions, documents on which the suit was based, pleadings, and similar material." TRAP 53.2(k)(2). The rule specifically prohibits using the appendix to avoid the page limitations of the petition. *Id.* In other words, do not put argumentative material in the appendix. The Court recently struck an appendix that included copies of the court of appeals' briefs. *Wal-Mart Stores, Inc. v. Sturges*, No. 98-1107, 42 Tex. Sup. Ct. J. 374 (Feb. 11, 1999).

Although the required contents of the appendix suggest that case law should not be included, if there are one or two cases on which the decision turns, it is helpful to include them in the appendix, even if they are Texas cases.

### D. *Do I separately bind the appendix?*

The appendix may either be bound with the petition or separately. TRAP 9.3(h). In the author's opinion, it is preferable not to pad the appendix — include only the documents required by the rule and any other documents that are essential to an understanding of the case — and to bind the appendix with the petition rather than separately. The justices often carry the materials home for review and having everything in one document ensures that the appendix will not go astray. The appendix must be tabbed and indexed. TRAP 9.3(k). If it is separately bound, it must comply with the binding and cover requirements discussed above, *see* TRAP 9.3(f).

## VI. RESPONSE TO PETITION FOR REVIEW

### A. *Should I file a response?*

No, not usually. Speaking at CLE conferences, the justices uniformly discourage the filing of a response. They do encourage respondents to file letters waiving the response unless one is requested by the Court. A waiver letter does not waive anything, because, under the rules, the Court cannot grant a petition without first requesting a

response. TRAP 53.3. If you choose not to file a response, you should immediately file a waiver letter with the clerk.

**B. *What does a waiver letter look like and when and where is it filed?***

There is no special form for a waiver letter. The letter should be addressed to the clerk, identify the style and number of the case, and indicate that no response will be filed unless requested by the court. The waiver letter should be filed with the Supreme Court clerk as soon as possible after the petition is filed. The Court requires an original letter plus eleven copies. TRAP 9.3(b). There is no filing fee.

**C. *What are the advantages of filing a waiver letter?***

There are several advantages. First, it speeds up the process. The Court will not wait for the response time to pass or the response to be filed before considering whether to grant the petition. This is particularly a good move in a case that the Court is likely to deny. Second, it saves the client money. Third, if the Court eventually asks for a response, you at least have some signal on the level of interest in the case. Fourth, if you don't file a waiver letter and don't file a response within the thirty-day response period, you may be penalized. If the Court asks for a response, the time allowed will be reduced from thirty days to fourteen days if there is no waiver letter on file.

**D. *If I file a response, when is it due?***

A voluntary response (one that is not requested by the Court) must be filed no later than 30 days after the petition is filed. TRAP 53.7(d).

**E. *If I file a waiver and the court asks for a response, don't I get less time?***

No, you should still get thirty days. There were a few glitches early on in the process and a few respondents did not get a full response time. That should no longer occur.

**F. *What are the mechanics of filing a voluntary response?***

The response is limited to 15 pages, excluding the identity of parties and counsel, table of contents, index of authorities, statement of the case, statement of jurisdiction, issues presented, signature, proof of service, and the appendix. TRAP 53.6. The same formatting, margins, binding, cover, etc. requirements apply that apply to the petition for review. *See* TRAP 9.4. An original and eleven copies are required. TRAP 9.3(b).

**G. *Do the mechanics differ for a requested response?***

No, with two exceptions, one of which is very important. Read the letter requesting the response carefully. Usually, the Court requires that the response be received in the clerk's office by a certain date and time. This means the mailbox rule does not apply and the clerk must have the filing in hand by the date and time specified in the letter.
If the response is filed voluntarily, there is a $10.00 filing fee. If the response is requested, there is no fee.

**H. *What are the required contents of a response?***

The response must contain the following items in the following order; the starred items are optional and are discussed at the end of the list:

Identity of parties and counsel*
Table of contents
Index of authorities
Statement of the case*
Statement of jurisdiction*
Issues presented*
Statement of facts*
Summary of the argument
Argument
Prayer
Appendix*

TRAP 53.3.

There is no need to include a section on identity of parties and counsel unless the petition has made mistakes or omissions in the list. TRAP 53.3(a).

The respondent need not include a statement of the case or a statement of facts unless the respondent is dissatisfied with the discussion in the petition. TRAP 53.3(b).

The respondent need not list the issues presented unless: (1) the respondent is dissatisfied with the statement of issues in the petition. (In the author's view, the respondent should almost always recast the issues in a light more favorable to the respondent.); (2) the respondent is asserting independent grounds for affirming the court of appeals' judgment; or (3) the respondent is asserting grounds that establish a right to a judgment that is less favorable to the respondent than the court of appeals' judgment but more favorable than the judgment requested by the petitioner, such as a remand for a new trial rather than a take nothing judgment. TRAP 53.3(c). Note that complaints about issues that the court of appeals failed to

address may be raised at any time, even on rehearing. TRAP 53.4.

The statement of jurisdiction should be omitted unless the respondent is contesting jurisdiction. TRAP 53.3(d). If so, the reasons the Court lacks jurisdiction should be concisely stated. *Id.*

The argument section must be included, as well as summary of the argument. It is important to remember that the argument must address only the issues raised in the issues statement of the petition and response. TRAP 53.3(e).

The respondent may have no need for an appendix. The requirements for the respondent's appendix are the same as for petitioner's with one important exception: the respondent need not include materials already contained in the petitioner's appendix. TRAP 53.3(f). In short, only if the petitioner has omitted something from the appendix or the respondent is relying on some statute or other authority not provided by the petitioner is there a need for the respondent to have an appendix at all.

### I. *What should I try to accomplish in the response?*

Obviously, you should try to convince the Court not to grant the petition. There are several ways to accomplish this. One is to convince the Court that there was no error in the court of appeals' opinion. Another is to convince the Court that the case and the issues are not important, that the situation will never come up again, that the dollar amount is too small, that the resolution will not affect anyone other than the parties to the immediate case, and so forth. Another useful approach is just to make the case too hard to resolve simply by arguing any legitimate basis of waiver of the main issues or by showing complicating factors in the procedural history or facts of the case.

## VII. PETITIONER'S REPLY

### A. *Should I file a reply?*

Only if there is something new to say. A reply should never be filed to repeat arguments or to get the last word in.

### B. *If I file a reply, when is it due?*

The reply must be filed within 15 days after the response is filed. TRAP 53.7(e). However, the Court may decide the case without waiting for a reply to be filed. TRAP 53.5.

### C. *What are the mechanics of the reply?*

The reply may not exceed eight pages, exclusive of the table of contents, the index of authorities, the signature, and proof of service. TRAP 53.6. Other sections do not count in the page limit (such as statement of the case) but these other items really have no place in a reply. The reply must follow all of the same formatting rules as the petition.

### D. *Does the rule set out any substantive requirements for the reply?*

The rule provides that the reply may address "any matter in the response." TRAP 53.5.

## VIII. SUPREME COURT PROCEDURES FOR PROCESSING PETITIONS FOR REVIEW

NOTE: The internal operating procedures of the Supreme Court are very complex and are still in flux. This paper does not purport to provide the reader an in-depth understanding of those procedures. For a more detailed explanation, *see* Lee Parsley and Julie Caruthers Parsley, *Texas Supreme Court Internal Procedures and Statistics*, University of Texas School of Law, Eighth Annual Conference on State and Federal Appeals (May 1998) ["Parsley and Parsley"]. It is the author's understanding that the paper will be updated for the Ninth Annual Conference to be held in early June 1999.

### A. *Is the petition immediately forwarded to the court by the clerk?*

No. The petition is not forwarded until the 30 day time period for filing a reply has passed or a response or letter waiving a response has been filed.

### B. *After the petition is forwarded, is it assigned to a particular chambers for review?*

No. Under the petition for review system, all nine justices receive a copy of the petition and appendix and any response and reply. No chambers is assigned the job of reporting the case to the full court before the case is first considered.

### C. *What is the "conveyor belt" and how does it work?*

After a case is forwarded to the Court for disposition, the Court's administrative assistant puts the case on the agenda to be denied about 30 days later unless one or more justices take some action to prevent automatic denial. Parsley and Parsley at 4. This process has been informally referred to by practitioners as the "conveyor belt" or the "pipeline."

**D.** ***How does a petition get taken off the conveyor belt?***

When one or more justices take some action to pull it off before the deadline for action. Each justice is given a vote sheet on all the cases listing a number of options, any of which will prevent the automatic denial of the case. These option include discussing the case at conference, requesting a study memo, requesting full briefing on the merits, requesting the record, granting, issuing a per curiam opinion, dismissing, or refusing the case.

**E.** ***How many votes does it take to . . . ?***

The Court's internal procedures, which are subject to change, currently provide that the following number of votes are required to take the following actions:

Discuss at conference — 1
Request response — 1
Request record — 1
Request briefs on the merits — 2
Request study memo — 2
Hold case for another case — 6
Deny — (by default)
Refuse — 6
Dismiss — 5
Dismiss w.o.j. — 5
Grant — 4
Grant original proceeding — 5
Issue per curiam — 6
Issue signed opinion without argument — 6
Improvidently grant — 6
Parsley and Parsley at 11.

**F.** ***What happens once a petition is taken off the conveyor belt?***

If a justice marks a ballot sheet to request a response or the record, the case is put on hold until the requested material has been received. It will then be put on the conference agenda for discussion. In all other situations, the case will be put on the conference agenda for discussion. Parsley and Parsley at 5.

At conference, if there are four votes to grant, the Court will grant the petition, set the case for argument, and ask for briefs on the merits if they have not already been requested. If there are two votes for a study memo or briefing on the merits, the Court will request briefing on the merits and the record. A briefing attorney will prepare a study memo within thirty days after the response brief is received. The case will then be returned to the agenda and the Court will decide whether to grant, deny, or issue a per curiam opinion.

**G.** ***If my case is taking a long time, is there any way I can find out what's going on?***

Not really. The Court's deliberation process is secret. It is illegal to contact a justice or court attorney about the status of a particular case. You <u>can</u> check with the clerk's office to make sure you have received notices of all actions taken by the Court, such as requesting the record or a response.
The average time to disposition for most petitions is under three months. The process takes significantly longer if a response or full briefing on the merits is requested.

**H.** ***How do I find out what action the Court has taken on the petition for review?***

The Court issues orders at 9:00 a.m. most Thursdays. You can listen to a recording of the orders by calling 512/463-1312 and choosing option 2. The time the recorded information is available varies from week to week. Sometimes the information is available shortly after 9:00 a.m.; just as often the recording is not available until much later in the day. Orders are available on the Court's bulletin board at 512/463-6649 and at the Court's website: http://www.supreme.courts.state.tx.us. Again, the time of availability varies, but the bulletin board is faster in posting orders and opinions.
The clerk's office also sends notice to counsel of action taken on the petition.

**I.** ***Does the court ever impose sanctions when it is considering a petition for review?***

Very rarely and only for egregious behavior. As a general rule, imposing sanctions is more trouble than it is worth. The Court has to give notice and an opportunity to respond and must determine that the petition is frivolous. TRAP 62.

## IX. BRIEFS ON THE MERITS

**A.** ***What does it mean when the court ask for briefs on the merits?***

If the request is made at the same time the Court schedules the case for oral argument, it means that at least four justices have decided the petition should be granted. If the request for briefs is not accompanied by a setting of the case for argument, it means at least two justices are interested in learning more about the case. It could also mean that the Court is considering granting the case or issuing a per curiam opinion. The odds of either of these events happening goes up significantly when the Court asks for full briefing on the merits. *See* Parsley and Parsley. One informal survey of cases showed that the

odds could increase to as much as 67% that the Court will grant or issue a per curiam opinion.

When the Court asks for full briefing on the merits, it will also usually ask a court briefing attorney to prepare a study memo. The memo is assigned to one of the nine justice's office on a rotation so that each chambers receives every ninth memo assignment. The memo is prepared within thirty days after the response brief on the merits is filed. The briefing attorney does not wait for the petitioner's reply brief on the merits. The memo deadlines may not be extended unless the Chief Justice approves. As a practical matter what this means is that the case should be discussed at the next petitions conference about thirty days after the response deadline. At that conference, the justices will decide whether to grant, deny, or draft a per curiam opinion.
At the same time briefs on the merits are requested, the Court also asks for the record to be forwarded from the court of appeals if the record has not already been requested.

**B.** ***Should I file a brief on the merits; can I waive the filing of the brief?***

You should file a brief on the merits if you have something to add to the petition for review. If there are unbriefed issues in the petition for review, those should be addressed in the brief on the merits. If the petition does not address out-of-state cases, treatises, law reviews, and larger policy questions relevant to the issues, these should be discussed in the brief on the merits.

If the brief on the merits would simply repeat without elaboration the contents of the petition for review, choose to stand on the petition for review and waive the filing of a brief on the merits. The Court's letter asking for briefs on the merits advises attorneys of this option: "Please note that any party may elect to rely upon the briefs already on file with the Court by notifying this office in writing no later than the due date of the brief. . . The filing of a notification letter shall invoke the same timetable as the filing of a brief."

**C.** ***Can I file the brief from the court of appeals instead?***

Yes. Any party may rely on the brief filed in the court of appeals instead of filing a brief in the merits. TRAP 55.5. Although the rule does not require it, the Court would like a party relying on a prior brief to file 12 copies with the clerk. A failure to file the copies will result in the case being delayed until the copies are provided.

The author does not recommend reliance on a prior brief, especially for the petitioner. The petitioner already has filed a petition for review, which frames the issues for the Supreme Court. The court of appeals' brief does not address the problems in the court of appeals' opinion nor discuss the importance of those issues to the jurisprudence of the state.

**D.** ***What is the difference between briefs filed on the merits and the petition and response?***

The format and designated sections of briefs on the merits and the petition and response are identical. *Compare* TRAP 53.2 and 55.3 *with* TRAP 55.2 and 55.3. The big difference is that briefs on the merits have a page limit of 50 pages (excluding the identity of parties and counsel, table of contents, index of authorities, statement of the case, statement of jurisdiction, issues presented, signature, proof of service, and appendix). TRAP 55.6. The issues presented in the briefs on the merits need not be identical to those in the petition. TRAP 55.2(f). However, the parties may not raise additional issues or change the substance of the issue raised in the petition. Id.

As discussed above, the briefs on the merits should discuss unbriefed issues and develop out-of-state case, treatises, and law reviews relevant to the issues. It is also important to explore fully the policy ramifications of the decision.

**E.** ***Does petitioner have the right to reply?***

Yes. The letter asking for briefs will set out the time for filing a reply. The reply is limited to 25 pages. TRAP 55.6.

**F.** ***What is the time for filing the various briefs?***

The time is set out in the letter from the Court asking for briefs on the merits. In the unlikely event the clerk fails to set out a briefing schedule in the letter, TRAP 55.7 sets a default schedule. Parties may ask for the time to be extended. TRAP 55.7. Note, though, that in many cases the Court sets the case for oral argument at the same time it requests briefs on the merits. The Court is less likely to grant an extension when it has set a case for argument. The Court has granted a least one extension request when a case had been set for argument. There, though, the extension was agreed to by all parties, the adjustments were very slight, and the Court still received all of the briefs well before the time for argument.
Remember that an extension request must comply with TRAP 10.5(b) and must contain a certificate of conference.

**G.** ***What are the mechanics for filing the briefs?***

The same as the petition. The briefs must be filed with the clerk on the specified date. Unless the letter asking for briefs states otherwise, the mailbox rule applies and the

briefs may be mailed to the clerk on or before the last day for filing. TRAP 9.2(b) (setting forth requirements for compliance with mailbox rule).

The same formatting, margin, binding, cover, etc. requirements apply as applied to the petition and response. An original and eleven copies are required. TRAP 9.3(b).

**H.** ***Is there a filing fee?***

Yes. There is a $10.00 filing fee applicable to the petitioner's brief on the merits, the response, and the reply. If the Court grants the case and sets it for argument, the petitioner is assessed an additional fee of $75.00.

**I.** ***What happens next?***

If the case has been set for argument, the Court will hear argument on the scheduled date. If the case has not been set for argument, the Court will discuss the case at conference once briefs on the merits have been filed and decide whether to grant, deny, or issue a per curiam opinion. The decision will be announced on the Court's regular Thursday orders and confirmed in a letter to counsel from the clerk.

## X. DECISION WITHOUT ARGUMENT

**A.** ***When can the court issue an opinion without hearing argument?***

Any time six justices agree not to hear argument. TRAP 59.1.

**B.** ***As a practical matter, when is the Court likely to dispense with oral argument?***

The Court is evaluating more closely whether argument will really help resolution of this case. If the argument will not be of significant assistance to the Court because the issues are very narrow or very clear-cut, the Court is more likely to proceed without argument.

**C.** ***Aren't these per curiam opinions written by staff attorneys and not justices?***

No. Per curiam opinions are drafted just like opinions in which argument is heard. The staff will assist in drafting the opinion, but the justice who is urging the adoption of a per curiam opinion in the case takes responsibility for the opinion.

**D.** ***What's the difference between a per curiam opinion and an opinion signed but issued without argument?***

Whether the names of the justices are shown. The Court may dispense with oral argument on the vote of six justices, whether or not those six agree on the disposition of the case. TRAP 59.1. Ordinarily, the result is a "per curiam" unsigned opinion. Occasionally, though, one or more justices decide to write a separate concurring or dissenting opinion in a case in which oral argument has not been heard. It is the Court's general policy in these circumstances to issue the opinions without argument but to show by name the justices joining the various opinions.

## XI. ORAL ARGUMENT

**A.** ***When does the court hear argument?***

The Court hears argument one week a month, on Tuesday, Wednesday, and Thursday, at 9:00 a.m. Arguments usually begin in September and continue through April. The Court does not hear argument late in the term when it is focusing on issuing opinions.

The arguments are usually completed before the Court breaks for lunch. Occasionally, the Court will continue the arguments in the afternoon or set cases to begin at 2:00 p.m.

Argument is usually held in Austin in the Supreme Court's courtroom. Under a new constitutional provision, though, the Court may hear argument outside of Austin. The Court has heard arguments in Waco, Dallas, and Fort Worth. Tex. Const. art. V, § 3a.

**B.** ***How do I know what the court is interested in hearing?***

The Court previously granted applications for writ of error on specific points. Although the Court retained jurisdiction over the entire case, the points granted were an indication of the Court's principal areas of interest. Under the petition for review process, the Court no longer grants on points or issues so it is harder to judge what issues are the primary focus. Usually, though, the parties know which one or two issues in the petition are the critical issues and those should be the focus of the argument. You should be prepared to answer questions on any issue.

You should also think about how a decision in your case affects other cases and other situations and be prepared to answer questions about them. Do not answer "that's not this case." You need to be able to explain why the decision you seek will not have adverse effects on other situations.

**C.** ***How do the justices prepare for argument?***

The case will be assigned to one of the justices before the argument. The cases are assigned by random draw, with each justice receiving one-ninth of the cases. If a staff study memo has not already been prepared on the case, the assigned justice's chambers must prepare a memo within 30 days after the response brief is filed or by the Friday before the argument, whichever is earlier.

The justices read the briefs very carefully and tend to ask numerous questions. An attorney preparing for argument should focus on possible questions and prepare thoughtful answers. The most important function of the argument is to answer questions and concerns that the justices have.

The Court meets after the arguments and takes a tentative vote on how the case should be resolved. The assigned justice has seventeen weeks to circulate a draft opinion to the Court.

**D.** ***How much time does each side get?***

The rule provides that the time is whatever the Court orders. TRAP 59.4. In virtually every case, though, even complex ones, each side gets only twenty minutes. The petitioner may reserve part of its time for rebuttal. It is possible to file a motion with the Court to enlarge the time for argument; these motions are almost never granted.

**E.** ***How do I know which parties are aligned as petitioner and respondent; what about amici?***

It's obvious when there are only two parties and one petition for review. The problem arises when there are multiple petitions and the Court has granted all of them. Parties that the Court decides to align must share the twenty minutes for argument. Usually the Court picks only one petitioner (the party who has raised the issue the Court is most interested in) and labels everyone else a respondent, even though the respondents may disagree on a number of issues. It is possible to file a motion to align the parties before the argument. TRAP 59.4. In the absence of a motion, though, the Court will make the alignment, which will be reflected in the submission schedule released the Friday before the argument.

Amici are not parties and have no right to argue unless they can persuade a party to surrender part of its twenty minutes. TRAP 59.6. The amicus must also obtain leave of Court to argue. *Id.*

**F.** ***Can I split my time?***

You can, but it's a bad idea. The rule encourages argument by only one counsel. TRAP 59.5. And, inevitably, a justice will direct a question to whichever attorney is not responsible for that particular issue during the split argument time. Splitting of argument usually cannot be avoided when there are multiple parties on a side. If the first attorney exceeds the time allocated, though, that time is usually subtracted from the second counsel's time for argument. Only two counsel may appear on a side, and counsel may not split the time for rebuttal. *Id.*

**G.** ***What are the mechanics for checking in with the clerk, using visual aids, knowing where to sit, etc.?***

The courtroom opens at 8:30 a.m. the morning of the argument. Counsel must be screened through a metal detector and then check in with the marshal of the court. Petitioner must tell the marshal the amount of time reserved for rebuttal. The petitioner sits on the left side of the courtroom and the respondent sits on the right. No more than two counsel may sit at counsel table during the argument unless a motion has been previously submitted to and granted by the Court. TRAP 59.5.

Visual aids must be checked in at the clerk's office. It is helpful to provide a bench copy because, given the length of the bench, the justices will not all be able to read a display board. There is a filing fee of $25.00, which covers all exhibits and bench copies.

Chief Justice Phillips will call each case. There is a ten to fifteen minute break between cases. The marshal of the Court introduces counsel for the petitioner and the respondent; the petitioner is not reintroduced for rebuttal. You need not repeat your name. The Court discourages introducing co-counsel or the client. Just say, "May it please the Court," and start into the argument. There will be a green warning light when five minutes are remaining and then a red light when your time has expired. When the red stop light comes on, you may finish your sentence or complete an answer to a question. You may not continue after that, though, even to add a conclusion or a prayer, unless another question is asked.

**H.** ***Is the argument recorded?***

Yes. Copies may be obtained from the clerk's office for $5.00 per tape. Copies may be picked up at the clerk's office; copies will be mailed only when the clerk is provided with a self-addressed stamped envelope large enough for the tapes.

### I. *Can I file a brief after the argument?*

There is no provision in the rule for post-submission briefing. However, the Court regularly accepts such filings without a motion. As with any brief, though, a post-submission brief should not be filed simply to get the last word in and to repeat earlier arguments. Only file a brief if there is a substantial, previously unaddressed question raised during oral argument or if a post-submission brief filed by another party or an amicus necessitates a reply.

## XII. REHEARING OF DENIAL OF PETITION OR ISSUANCE OF OPINION

### A. *When is the rehearing motion due?*

Rehearing must be filed no later than 15 days from the date the Court renders judgment or issues an order on a Rehearing must be filed no later than 15 days from the date the Court renders judgment or issues an order on a petition for review. TRAP 64.1.

### B. *Can I ask for an extension?*

Yes. The motion must be filed within fifteen days of the rehearing deadline. TRAP 64.5. As a practical matter, it is better practice to file the extension motion as soon as possible after the Court's decision issues. The motion must comply with the rule governing extension motions, TRAP 10.5(b), and must contain a certificate of conference.

### C. *Should I bother to file a rehearing when the court denies my petition? If it issues an opinion?*

The Court grants very few rehearing motions. In the term ended August 31, 1998, the Court granted 2 out of 85, or 2.3%, of rehearing motions filed in causes and 4 out of 300, or 1.3%, of rehearing motions filed in cases in which review was sought by petition for review or application for writ of error.

The chances for a grant of a rehearing on petition for review are slim and are even slimmer if the rehearing motion simply repeats earlier arguments. These motions are virtually automatically denied. Rehearing has a better chance if the Court has taken longer than usual to act on the petition and has asked for a response or full briefing in the case. This means that at least some of the justices thought there might some merit in granting the case. To be successful, the rehearing motion must creatively raise new arguments and reasons the case is important to the state's jurisprudence. It may be helpful to garner amicus support for rehearing. Amicus briefs should be filed quickly, though, because the Court generally acts on rehearing motions promptly.

Rehearing when the Court issues an opinion is a different task. While the Court is unlikely to change the judgment, it may alter its writing which could affect disposition of the case on remand or impact other cases. The motion should point out specific mistakes or problem language in the Court's opinion. The rehearing motion should also address larger policy issues and problems that the Court's opinion creates. And, of course, amicus support is always helpful.

### D. *What is the form and content of a rehearing motion?*

The rule provides little guidance, other than to require that the motion specify the points relied upon for rehearing. TRAP 64.2. The motion is limited to fifteen pages. TRAP 64.6. Oddly, there is no exclusion from the page limit of any section of the motion, such as the issues presented or the index of authorities. While these should not count in the fifteen page limit, this remains an open question under the new rules. All of the formatting, binding, and cover rules apply to motions for rehearing. While the rules technically require a certificate of conference on motions for rehearing, the Court does not enforce this requirement.

### E. *Should I respond to a rehearing motion?*

It is not necessary to respond. The Court (except in "exceptional" cases) will not grant rehearing without asking for a response. TRAP 64.3. Most rehearing motions are denied so, as a general rule, it is preferable not to respond unless the rehearing motion has raised new arguments that have not been previously addressed. If the response will simply repeat earlier arguments, do not file it unless the Court requests a response.

### F. *How are rehearing motions processed?*

Motions for rehearing of petitions are immediately distributed to all nine justices without waiting for a response. The rehearing is put on the "conveyor belt" to be overruled on the next orders list after about 30 days have passed unless a justice takes some action to request a response, discuss, or study the case.

Motions for rehearing of causes are also immediately distributed to the full Court. The justice who authored the majority opinion, however, is responsible for making a recommendation on the motion and for putting the motion on the agenda for disposition.

**G. *What's this new constitutional amendment requiring action on the motion within 6 months?***

Tex. Const. art. V, § 31 now provides that "if the supreme court does not act on a motion for rehearing before the 180th day after the date on which the motion is filed, the motion is denied." In at least one instance since the adoption of the amendment, the Court failed to rule on a rehearing motion and the motion was overruled by operation of law. *See In re General Elec. Capital Corp.*, 41 Tex. Sup. Ct. J. 503 (Mar. 13, 1998). Since then, the Court has creatively wired around the constitutional deadline by simply granting the motion for rehearing before the six month deadline with "opinion to follow." *See, e.g., Holland v. Wal-Mart Stores, Inc.*, 42 Tex. Sup. Ct. J. 160 (Dec. 3, 1998) (per curiam) (motion for rehearing granted; opinion to follow); *Quick v. City of Austin*, 42 Tex. Sup. Ct. J. 154 (Nov. 19, 1998) (motion for rehearing granted; opinion to follow); *In re American Home Products*, 42 Tex. Sup. Ct. J. 154 (Nov. 19, 1998) (motion for rehearing granted; opinion to follow), *opinion issued*, 42 Tex. Sup. Ct. J. 252 (Dec. 31, 1998).

**H. *Can I file a second rehearing motion?***

No. The Court will not consider a second motion for rehearing. TRAP 64.4. The clerk will return the motion unfiled.

## XIII. RESOURCES

**A. *Are there any on-line resources that can help?***

It is very helpful to keep up with recent Texas Supreme Court opinions to know what issues may appeal to the Court. The Court maintains a bulletin board dial-up system for downloading the orders and opinions of the Court at 512/463-6649. In addition, information about the Court and copies of the Court's opinions and orders are available on its website:

http://www.supreme.courts.state.tx.us

There is currently no on-line guide to Texas Supreme Court practice.

**B. *What about print resources?***

The following papers may be helpful:

Lee Parsley and Julie Caruthers Parsley, *Texas Supreme Court Internal Procedures and Statistics*, University of Texas School of Law, Eighth Annual Conference on State and Federal Appeals (May 1998) [note: this paper will be updated and presented at the 9th Annual Conference in June 1999).

Robert H. Pemberton, *One Year Under the New TRAP: Improvements, Problems and Unresolved Issues in Texas Supreme Court proceedings*, State Bar of Texas, Twelfth Annual Advanced Civil Appellate Practice Course (Sept. 1998).

Douglas W. Alexander and Lori Ellis Ploeger, *Petition for Review Practice*, South Texas College of Law, Civil Appellate Law Course for Trial Lawyers (Dec. 1998).

Pamela Stanton Baron, *Beyond Debate: Per Curiam Disposition by the Texas Supreme Court*, Houston Bar Association, Appellate Practice Section (Mar. 1997).

Pamela Stanton Baron, *The Civil Amicus Brief*, State Bar of Texas, Advanced Civil Appellate Practice Course (Sept. 1995).

Index to the Supreme Court of Texas (TLI Publ. Co.). This is a weekly listing of all cases pending before the Supreme Court of Texas, indicating all actions taken by the Court on each matter. It is published on pink paper and is sometimes called the "pink thing." Subscriptions are available by calling 512/338-0495.

*Quotable Quotes*

"[A]ppellate judges watch from on high the legal battle fought below, and when the dust and smoke of the battle clears they come down out of the hills and shoot the wounded."

*Black v. State*, 723 S.W.2d 674, 677 n.1 (Tex. Crim. App. 1986 (Onion, P.J., dissenting).

# Dispelling Misconception

**by Justice Brian Quinn**
Seventh Court of Appeals

Not too long ago I had the "pleasure" of writing an opinion in a case wherein the appellant asserted over 30 points of error in his brief. Some time had to pass between the date I completed that opinion and the date I began drafting this article. Had I not so delayed, the tone of it would have been quite different (*i.e.,* less judicious). It is not that I dislike working; for if I did, I would not be an appellate judge.[1/] Rather, what frustrates me are those who endeavor to waste my time, and that is what happened when I began working on the aforementioned appeal. Seeing 30 plus points of error (or issues as they are now called) made me think of two things: either the trial judge lacked all concept of the law or appellant's counsel misunderstood his task.

Admittedly, trial judges commit error, as do intermediate appellate judges and those who grade the papers of intermediate appellate judges. But, I have yet to encounter one that commits over 30 harmful mistakes in one case. Nor did I encounter one in the case alluded to above. Instead, counsel fell prey to a type of thinking in which many who argue before appellate courts indulge. This thinking is comprised of numerous misconceptions. I will share some of the "bigger" ones with you in hope that you too will not succumb to them.

First and foremost, more is not always better. Seldom is a judge swayed by the sheer number of issues which an ingenious counsel can contrive. Why? Think about it. If you have twenty topics to address but only a finite time within which to do it, do you think each will be analyzed as thoroughly as would one or two issues in the same time? For those afraid to answer, let me do it for you. The answer is "no." This does not mean that a judge is uninterested in your case, only that he has many, many other "interesting" cases which need attention. Remember that the greater the number of issues asserted, the greater the chance that a legitimate issue will be under-analyzed or missed. It only takes one good point of error to win, anyway.

Second, the use of legalese or "six-bit" college words may help convince your client that you are worth the hourly fee being charged, but it does not help win his case. Indeed, it actually interferes in your communication with the court when the judge is constantly shifting his attention from the brief to either a Webster's, Black's Law, or a Latin-to-English dictionary. I know you received a high dollar education. Instead of trying to impress me with some high-brow vocabulary, use your education to figure out how to simplify what you are saying with plain language. After all, the simpler you make it, the easier it is for me to understand.

Third, history is great when it is in a history book, but briefs are not history books. Similarly, pages of facts are great when you are reading a novel, but briefs are not novels. Instead, they are opportunities to tell the appellate court what your complaint is, why it is legitimate, and why it matters in the grand scheme of things. So, do just that. Tell us enough for us to know what the problem is. Cite some supporting authority. And, describe how the mistake unduly influenced the outcome of the trial. It is seldom necessary to refer to Blackstone's musings on contracts just because your case involves a contract. Nor do we need to know about the size and make of car tires if the pivotal issue is subject-matter jurisdiction or the color of an accused's clothing and hair if the question involves a coerced confession. All the fluff may be great reading, but it distracts from your argument. Keep your argument focused by mentioning only the facts relevant to your issue.

Conversely, avoid being overly "brief and concise." There have been occasions, for instance, where the appellant asserted that the evidence was insufficient to support the verdict, and in developing the proposition, he merely stated that "the evidence was insufficient to support the verdict." He may have been correct, but he lost. Why? Because it was his job to explain why the evidence that was presented to the fact finder fell short. Simply voicing a conclusion was inadequate, given the particular issue. Similarly, if the dispute involves the admissibility of some bit of evidence, for example, the appellant must do more than merely conclude that the evidence was inadmissible and leave us to determine why. Explain the who, what, where, when, why, and how of your argument, but in as few words as possible. Do not expect the court to do it for you.

In effect, you are being asked to strike a balance between too much and too little. Including needless matter poses the risk of distracting the court while being conclusory may result in our holding the argument waived. Exercise your judgment with appropriate regard for the possible consequences when striking the balance.

Fourth, while omnipotence would be a fine quality to have, no human has it, not even a judge. In lacking that quality, we do not always know whether a court has addressed your argument before. Help us out by citing

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[1/] At this point, attorneys are free to stop hooting, hollering, and laughing in disbelief.

authority. It is much easier to accept what is being argued if you can back it up with precedent. But, string cites are, in my view, pretty much worthless. They just add to the length of the brief. Be selective. Give us the best one or two opinions you can find.

Incidentally, when it comes to citing the best opinions, first try to cite those from the court in which your case pends. If the Amarillo Court of Appeals has ruled on the dispute before, I want to know. Though a tad of egotism may be involved, my interest lies more in being consistent. If we have decided a question, it is only fair to have that decision bind identical disputes which arise later. It makes my job easier since I can then turn to resolving other questions. And, the only opinions more relevant than those of the court in which you are appearing are those written by the courts of last resort. It is not because the jurists filling those seats are any smarter than us. Rather, their word is final and immutable . . . until they change it. Thus, providing it to us not only facilities the disposition of the case but also reduces the chance of reversal.

Additionally, you must remember that the law is in flux. A ruling issued forty years ago on a particular issue may not be correct today. This seems especially so in matters of criminal law generally and search and seizure specifically. Therefore, cite the latest case possible. That minimizes the risk of relying on outdated law. Also, shepardize the case to determine both its writ history and its continued precedential value. Indeed, when I come across citation to a case that has been reversed or overruled, I know that the lawyer failed to do all his homework.

Fifth, an amusing misconception worthy of note involves the belief that there exists a hierarchy of opinions among the intermediate appellate courts. I am surprised by how often lawyers ask whether decisions rendered from certain "rural" courts of appeal have much precedential value. It has been my experience that judicial talent knows no geographical boundaries. Some of the most intellectual writings I have read came from the appellate courts in Amarillo (of course), El Paso, Tyler, Beaumont, Eastland, Texarkana, Waco, Corpus Christi, Austin, Fort Worth, San Antonio, Dallas, and Houston. It so happens that some of the most idiotic have also come from the very same courts. Simply put, no judge or court has a hammer-lock on intelligence. Besides, if one of them there "rural courts" writ an opus that done favored your'n side you'd do some good to cite it to us'uns anyway. Precedent influences our decision making regardless of where it came from.

Sixth, just as we do not know the cite of every authoritative opinion, we do not necessarily know where in the record to find what you are talking about. We have had reporter's records consisting of thousands of pages. So too have we been faced with the task of addressing cases wherein the clerk's record alone filled several shipping boxes. Indeed, one filled over twenty. To alleviate the angst that comes with our watching delivery trucks cart in boxes of records, cite to the record. Tell us where your complaint appears in that document. Not only do the rules of appellate procedure demand this but also the failure to comply may result in waiver.

Seventh, and as previously alluded to, not every error merits reversal. Just because the trial court did something wrong does not mean that your client is entitled to a new trial. As discussed in the rules of appellate procedure, the error must be harmful. At the risk of over-simplifying the topic, there must be a link between the error and the judgment which you attack. See if that link exists before you spend time writing on the point. Though the rules of appellate procedure do not expressly demand this, it is best to explain the link in your brief. By this, I do not mean that you merely say that there was harm. Tell me what makes it harmful. Look at the entire record and assess whether the mistake really mattered. If you cannot reasonably explain why it does, then you would do well to omit the issue from your brief and focus on another.

Eighth, while appellate judges may have been born at night, few were born last night. I have read arguments that a comedian would pay good money to use. When this occurs, I usually pass it to my law clerks. Everyone is entitled to a good laugh. And, as the laughter dies down, we inevitably get around to wondering where it came from and whether the writer thinks we actually read the briefs. This is not to say that novel arguments lack their place. Quite the contrary, it is the novel argument that has initiated great strides in our jurisprudence. I welcome their debate when logically founded. Yet, for those tempted to assert the novel, you should ask yourself the following: "would you buy it if you were the judge?" If your answer is "no," then do not think that we will.

Finally, that the appellee won a favorable judgment does not mean that he *ipso facto* wins on appeal. Admittedly, most judgments are affirmed due, in some part, to the applicable standards of review. To a greater extent, it is because the trial court either did not err or did not err in a reversible manner. Nevertheless, that does not mean that the appellee can sit back and do nothing. So, just because you have not succeeded in reversing a trial court, do not adopt the mind-set that you never will. Your client is entitled to your best effort at all times. And, I expect it, and your best judgment, too.

In sum, I would ask the brief writer to heed the admonition inherent in the word "brief." Be informative, yet brief.

Author's note: A special thank you to Hon. Charles R. Reynolds, for his comments and suggestions. Also, thanks to Richard Gore and Wesley Myers for their input and observations.

# The New Texas Rules of Discovery: What the Appellate Lawyer Needs to Know

**by Tracy J. Willi**
Womble & Cotellesse, Houston

Effective January 1, 1999, the Texas Supreme Court adopted the new Texas procedural rules governing discovery. The changes involve new terminology, new deadlines, and a new approach to discovery which is similar, but not identical, to the federal approach.

## I. WHERE IS THE LAW?

### A. *Two Orders on the Miscellaneous Docket*

The Supreme Court issued two orders regarding the revisions to the discovery rules. Tex. Sup. Ct. Order, Misc. Docket No. 98-9224, Dec. 31, 1998; Tex. Sup. Ct. Order, Misc. Docket No. 98-9196, Nov. 9, 1998. The later order contains new substantive information on the application of the rules, new rule revisions, and also makes corrections to the earlier order. Both orders contain substantive information and must be read together.

The bottom line on the application of the rules is this:

1. Rule 190 discovery control plans (designating Level 1, 2, or 3 and setting limitations on discovery) applies to all cases filed on or after January 1, 1999, but a court may adopt an appropriate discovery control plan in old cases;

2. If you have answered discovery before January 1, 1999, you need not go back and change your response to comply with the new rules;

3. If you have sent out discovery before January 1, 1999, but the response will be made after January 1, 1999, the party must respond under the new rules;

4. If interrogatories sent out, but not answered, before January 1, 1999 request information on experts, the interrogatories should be answered. The new Rule 195 on experts should not be applied to disrupt expert that is in progress or impending, or that has been scheduled by order or by agreement of the parties.

### B. *Notes and Comments*

The notes and comments appended to the rules, unlike most other notes and comments in the Rules of Civil Procedure, are intended to inform their construction and application by both courts and practitioners. Tex. Sup. Ct. Order, Misc. Docket No. 98-9196, Nov. 9, 1998.

## II. DISCOVERY CONTROL PLAN

The most significant item for the appellate lawyer under Rule 190 is the determination of the discovery period. Discovery must be sent out so that it can be answered during the discovery period. The beginning of the nine month discovery period in Level 2 cases is triggered by the first oral deposition or the due date of the first response to written discovery. T.R.C.P. 190.3(b)(1)(B)(ii). To the extent parties can agree to conduct informal discovery, they can avoid the immediate imposition of the nine month discovery period.

The discovery period for cases filed before January 1, 1999 ends the date the case is set for trial unless otherwise ordered by the court. Tex. Sup. Ct. Order, Misc. Docket No. 98-9224, Dec. 31, 1998.

## III. RESPONDING TO AND RESISTING CERTAIN TYPES OF DISCOVERY

### A. *Subpoenas*

Rule 176 governs trial and discovery subpoenas. The most significant change to the subpoena rules is the elimination of the "subpoena duces tecum." Any request for production of documents must comply with Rule 196. That is, a person is entitled to 30 days to comply with the

request for the production of documents even if it is included in a Notice of Deposition. T.R.C.P. 176.3(b).

The new rule also clarifies the procedure for objecting to or resisting subpoenas.

For subpoenas requiring production of documents and things:

1. Serve objections on the opposing party before the time specified for compliance; or

2. File a motion for protection before the time specified for compliance

A. In the court in which the action is pending, or

B In the district court in the county where the subpoena was served. T.R.C.P. 176.6(d),(e).

If your client is not the person commanded to appear or produce records, but is a "person affected by the subpoena" the only option is to file a motion for protective order. T.R.C.P. 176.6(e).

For subpoenas requiring a person to appear at a deposition:

1. File a motion for protection before the time specified for compliance

A. In the court in which the action is pending, or

B. In the district court in the county where the subpoena was served. T.R.C.P. 176.6(d).

For subpoenas requiring a person to attend and give testimony at a hearing or trial or to produce documents at a hearing or trial:

1. file a motion for protection before the time specified for compliance

A. In the court in which the action is pending, or

B. In the district court in the county where the subpoena was served; or

2. Object at the time and place specified for compliance; or

3. Move for protective order at the time and place specified for compliance. T.R.C.P. 176.6(d),(e).

The party requesting the subpoena has the burden to go forward and request a hearing and obtain an order compelling disclosure. The party making the objection or moving for protection need not disclose the offending documents unless ordered to do so by the court. T.R.C.P. 176.6(d),(e).

If the subpoena calls for the production of privileged information, the nonparty or party against whom the subpoena is issued must follow the procedure set forth in Rule 193.3 for asserting privileges. T.R.C.P. 176.6(c); *see infra*, IV. Privileges.

### B. *Request for Disclosure*

The contents of a request for disclosure are found at 199.8. Virtually every case will include a request for disclosure because the only way to obtain discovery on experts under the new rules is by request for disclosure or deposition. T.R.C.P 195.1. The fact that a request for disclosure is a new form of discovery is not as significant as the changes to the scope of discovery. For example, there is a new definition of fact witnesses and the new rule provides discovery of witness statements without a showing of substantial need.

#### 1. *Persons with Knowledge of Relevant Facts*

A person has knowledge of relevant facts when that person has or may have knowledge of any discoverable matter. The person need not have admissible information or personal knowledge of the facts. An expert is a "person with knowledge of relevant facts" only if that knowledge was obtained first-hand or if it was not obtained in preparation for trial or in anticipation of litigation. T.R.C.P. 192.3(c).

#### 2. *Effect on Deadlines for Designating Experts*

Although the information regarding experts may be requested in the request for disclosure, it will have little effect on the designation deadlines unless it is filed very late in the case. Unless otherwise ordered by the court, the parties must designate experts, i.e., provide the information requested in the disclosure, by the later of the following two dates:

1. 30 days after the request for disclosure is served; or

2. With regard to all experts testifying for a party seeking affirmative relief, 90 days before the end of the discovery period; with regard to all other experts, 60 days before the end of the discovery period. T.R.C.P. 195.2

In other words, if a request for disclosure is received early in the case, the expert designations are due for

plaintiffs 90 days before and defendants 60 days before the end of the discovery period, unless the court orders otherwise.

Keep in mind that even as a defendant there may be some experts who must be designated on a "plaintiff's timetable." If a defendant seeks to recover its attorney's fees, or seeks to recover on a counter-claim or indemnity, that would be considered affirmative relief.

Rule 199 does not require disclosure of a consulting expert. A consulting expert is an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert. T.R.C.P. 192.7(d). The identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert are not discoverable. T.R.C.P. 192.1(e).

There are two circumstances under which the consulting expert must be disclosed: (1) when the mental impressions and opinions have been reviewed by a testifying expert; and (2) when the consulting expert has first-hand knowledge and therefore must be disclosed as a "person with knowledge of relevant facts."

#### 3. *Witness Statements*

Witness statements may be requested in a request for disclosure. T.R.C.P. 194.2(i). A witness statement is (1) a written statement signed or otherwise adopted or approved in writing by the person making it, or (2) a stenographic, mechanical, electrical, or other type of recording of a witness's oral statement, or any substantially verbatim transcription of such a recording. Notes taken during a conversation or interview with a witness do not constitute a witness statement. T.R.A.P. 192.3(h).

At a seminar this spring, the question was raised whether a witness statement taken under before January 1, 1999, must be disclosed. University of Texas CLE, *New Discovery Rules*, Jan. 22, 1999. The panelists agreed that the request for a witness statement would have to occur after January 1, 1999, to be subject to the new rules. However, there was some discussion as to whether disclosure could be withheld based upon the party's expectation of confidentiality at the time the statement was taken.

Further, not all witness statements are automatically discoverable. The same rules concerning scope of discovery and privileges are also applicable to witness statements. T.R.C.P. 192, comment 9.

### C. *Requests for Production and Inspection of Documents and Tangible Items*

After the party producing documents in response to written discovery receives actual notice that the document will be used in a pretrial proceeding or at trial, the party has 10 days (or a longer or shorter period if court ordered) to object to the authenticity of the document, or any part of it, stating the specific basis for objection. The objection must be in writing or on the record. The other party will be given a reasonable opportunity to establish the authenticity. T.R.C.P. 193.7.

Authenticity is not the same as admissibility. T.R.C.P. 193, comment 7. Even if no objection is raised to the authenticity, the party may still raise objections to the admissibility of the document as evidence in a pretrial proceeding or at trial.

What is not clear from the rule is whether the authenticity that is admitted, if not objected to, is that the document is authenticated as a business record — in which case it qualifies as an exception to hearsay — or simply that the document "is what its proponent claims" as provided in Texas Rule of Evidence 901(a). Under Texas Rule of Evidence 803(6), a document cannot be considered a "Record of a Regularly Conducted Activity" unless it is proved up by competent testimony or accompanied by an affidavit pursuant to Texas Rule of Civil Procedure 902(10). Is this requirement negated if the party does not object to authentication?

### D. *Discovery from Nonparties*

A party may compel discovery from a nonparty by obtaining a court order for (1) entry upon property, (2) deposition before suit or to investigate claims, or (3) mental or physical examination. Alternatively, a party may compel discovery from a nonparty by serving a subpoena for (1) oral deposition, (2) a deposition on written questions, (3) request for production of documents served with **or without a notice of oral or written deposition.** T.R.C.P. 205.

A nonparty may not be required by subpoena to appear or produce documents or other things in a county that is more than 150 miles from where the person resides or is served. T.R.C.P. 176.3.

## IV. ASSERTING PRIVILEGES

### A. *No Objections to a Request for Privileged Information*

We no longer make stock objections to protect any possible privileged document which may be responsive to

the request. T.R.C.P. 193.3. Instead, we "assert" a privilege and create a withholding statement. After identifying a responsive item which is privileged, the party must provide the following response with regard to that item:

1. information or material responsive to the request has been withheld;

2. the request to which the information or material relates; and

3. the privilege or privileges asserted.

Upon written request from the party seeking the discovery, the withholding party must within 15 days:

1. describe the information or materials withheld that, without revealing the privileged information itself or otherwise waiving the privilege, enables other parties to assess the applicability of the privilege; and

2. asserts a specific privilege for each item or groups of items withheld. T.R.C.P. 193.3(b).

It is not necessary to assert a privilege or prepare a withholding statement for communication to or from a lawyer or lawyer's representative or a privileged document of a lawyer or a lawyer's representative —

1. created or made from the point at wich a party consults a lawyer with a view to obtaining professional legal services from the lawyer in the prosecution or defense of a specific claim in the litigation in which discovery is requested, and

2. concerning the litigation in which the discovery is requested. T.R.C.P. 193.3(c).

**B. *Proving a Privilege***

If the privilege is challenged, the party making the objection must support the privilege with evidence at a hearing. The evidence may be live testimony at the hearing or affidavits filed with the court at least 7 days before the hearing. If the court determines that an *in camera* review is necessary, the claimed privileged information must be produced to the court in a sealed wrapper within a reasonable time after the hearing. If the court orders the records produced, the information must be produced within 30 days after the court's ruling, or at such time as the court orders. T.R.C.P. 193.4.

Keep in mind, any information withheld due to an objection cannot be used by the withholding party at any hearing or at trial. T.R.C.P. 193.4(c).

**C. *Work Product Defined***

The rules define work product for the first time. The work product and party communications exemptions have been melded into the following work product definition:

1. Material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

2. A communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents. T.R.C.P. 192.5(a).

**D. *Protection of Work Product***

1. Core Work Product — the work product of an attorney or attorney's representatives that contains the attorneys or the attorney's representative's mental impressions, opinions, conclusions, or legal theories — is not discoverable. T.R.C.P. 192.5(b)(1).

2. Other Work Product -- discoverable only upon a showing of substantial need and the party seeking the discovery is unable without undue hardship to obtain the substantial equivalent of the material by other means. T.R.C.P. 192.5(b)(2).

3. It is not a violation of the discovery rules if disclosure pursuant to the substantial need exception to work product incidentally discloses by inference attorney mental processes otherwise protected by the core work product privilege. T.R.C.P. 192.5(b)(3). The disclosure based upon substantial need should be limited insofar as possible. T.R.C.P. 192.5(b)(4).

**E. *Types of Work Product Not Protected from Discovery***

1. Testifying expert materials, trial witnesses, witness statements and contentions as required to be produced in response to a request for disclosure.

2. Trial Exhibits.

3. Name, address and telephone number of any potential party or person with knowledge of relevant facts.

4. Photographs or electronic images.

5. Any work product created within an exception to the attorney-client privilege (fraud, probate matters - client

deceased, legal malpractice action, lawyer is the attesting witness, joint clients). T.R.C.P. 192.5(c).

### F. *Retrieval of Disclosed Privileged Information*

If privileged information is disclosed without intending to waive the privilege, the privilege is not waived as long as the party requests return of the information within 10 days after actually discovering the production. T.R.C.P. 193.3(d). This new rule overturns *Granada Corp. v. First Court of Appeals*, 844 S.W.2d 223 (Tex. 1992). T.R.C.P 193, comment 4.

## V. OBJECTIONS TO WRITTEN DISCOVERY

### A. *Request for Disclosure*

There are no objections or assertions of work product permitted to a request for disclosure. T.R.C.P. 194.5.

### B. *Objection to Time or Place*

If the client cannot respond to the discovery request during the time period requested, it must state a reasonable time and place when it can respond to the request. T.R.C.P 193.2(b).

### C. *No Prophylactic Objections*

There is no objection unless a good faith factual and legal basis for the objection exists at the time the objection is made. T.R.C.P. 193.2(c). In other words, unless there is a particular document or particular information which is subject to a privilege or otherwise objectionable, there can be no objection made in the initial response.

### D. *Amending Objections*

Responses and objections can be amended or supplemented if, at the time of the initial response, the objection or response was either inapplicable or unknown after reasonable inquiry. T.R.C.P. 193.2(d).

### E. *"Overly Burdensome" Objections*

The discovery methods permitted by these rules should be limited by the court if it determines, on motion or on its own initiative and on reasonable notice, that:

1. Discovery sought is unreasonably cumulative or duplicative, or is obtainable from other source that is more convenient, less burdensome, or less expensive; or

2. The burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issue. T.R.C.P. 192.4. This rule borrows from Federal Rule of Civil Procedure 26(b)(2). A party should state the factual basis for the overly burdensome objection and support the objection with evidence at the hearing.

## VI. OBJECTIONS TO WRITTEN DEPOSITIONS

The rules on objections at oral depositions do not apply to written depositions. All applicable objections should be raised or they will be waived. T.R.C.P. 200.4, comment 1.


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Three Courts of Appeals, the Houston (1st District), Dallas (5th District) and the Houston (14th District), are accepting applications for **6 staff attorneys positions for each court**. The 18 staff attorneys for these courts will be assigned to assist with the civil and criminal backlogs. The positions have been funded for a two-year period. If you are interested in one of these positions, please contact the Clerk of the Court for further information. You may obtain the addresses and telephone numbers for the Courts at:
www.courts.state.tx.us/

## *Quotable Quotes*

***Twinkle, twinkle, little star[e],***
***How I wonder what you are, ...***

"The concurring opinion asks how this case is any different from *Dennis v. Allison*, 698 S.W.2d at 94. The answer to that question is that the makeup of the court has changed. Predictability and stability in our law is not to be maintained at the cost of being wrong. Two wrong decisions do not make a right decision. The simple thrust of the matter is that the dissent was right in 1985 and the majority was wrong. The people, speaking through the elective process, have constituted a new majority of this court which has not only the power but the duty to correct the incorrect conclusion arrived at by the then-majority in 1985 on this question."

*Melody Homes Mfg. Co. v. Barnes*,
741 S.W.2d 349, 361 (Tex. 1987) (Mauzy, J., concurring).

***On second thought ...***

"So often this court has spoken of *stare decisis* and the stability of the law, yet in this instance the court ignores both legislative-made law and the court-made common law as announced in its previous opinion in *Barclay v. Campbell*, 704 S.W.2d 8 (Tex. Tex. 1986). ... Litigants should be able to confidently rely on the opinions handed down by this court and rely on the procedural rules mandated by its opinions."

*McKinley v. Stripling*,
763 S.W.2d 407, 411 (Tex. 1989) (Mauzy, J., dissenting).

*Lawyers are an indispensable part of the pursuit of justice. They are officers of courts charged with safeguarding, interpreting, and applying the law through which justice is achieved. Appellate courts rely on counsel to present opposing views of how the law should be applied to facts established in other proceedings. The appellate lawyer's role is to present the law controlling the disposition of a case in a manner that clearly reveals the legal issues raised by the record while persuading the court that an interpretation or application favored by the lawyer's clients is in the best interest of the administration of equal justice under law.*

*The duties lawyers owe to the justice system, other officers of the court, and lawyers' clients are generally well-defined and understood by the appellate bar. Problems that arise when duties conflict can be resolved through understanding the nature and extent of a lawyer's respective duties, avoiding the tendency to emphasize a particular duty at the expense of others, and detached common sense. To that end, the following standards of conduct for appellate lawyers are set forth by reference to the duties owed by every appellate practitioner.*

*Use of these standards for appellate conduct as a basis for motions for sanctions, civil liability or litigation would be contrary to their intended purpose and shall not be permitted. Nothing in these standards alters existing standards of conduct under the Texas Disciplinary Rules of Professional Conduct, the Texas Rules of Disciplinary Procedure or the Code of Judicial Conduct.*

## LAWYERS' DUTIES TO CLIENTS

*A lawyer owes to a client allegiance, learning, skill, and industry. A lawyer shall employ all appropriate means to protect and advance the client's legitimate rights, claims, and objectives. A lawyer shall not be deterred by a real or imagined fear of judicial disfavor or public unpopularity, nor be influenced by mere self-interest. The lawyer's duty to a client does not militate against the concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of harm on the appellate process, the courts, and the law itself.*

1. Counsel will advise their clients of the contents of these Standards of Conduct when undertaking representation.

2. Counsel will explain the fee agreement and cost expectation to their clients. Counsel will then endeavor to achieve the client's lawful appellate objectives as quickly, efficiently, and economically as possible.

3. Counsel will maintain sympathetic detachment, recognizing that lawyers should not become so closely associated with clients that the lawyer's objective judgment is impaired.

4. Counsel will be faithful to their clients' lawful objectives, while mindful of their concurrent duties to the legal system and the public good.

5. Counsel will explain the appellate process to their clients. Counsel will advise clients of the range of potential outcomes, likely costs, timetables, effect of the judgment pending appeal, and the availability of alternative dispute resolution.

6. Counsel will not foster clients' unrealistic expectations.

7. Negative opinions of the court or opposing counsel shall not be expressed unless relevant to a client's decision process.

8. Counsel will keep clients informed and involved in decisions and will promptly respond to inquiries.

9. Counsel will advise their clients of proper behavior, including that civility and courtesy are expected.

10. Counsel will advise their clients that counsel reserves the right to grant accommodations to opposing counsel in matters that do not adversely affect the client's lawful objectives. A client has no right to instruct a lawyer to refuse reasonable requests made by other counsel.

11. A client has no right to demand that counsel abuse anyone or engage in any offensive conduct.

12. Counsel will advise clients that an appeal should only be pursued in a good faith belief that the trial court has committed error or that there is a reasonable basis for the extension, modification, or reversal of existing law, or that an appeal is otherwise warranted.

13. Counsel will advise clients that they will not take frivolous positions in an appellate court, explaining the penalties associated therewith. Appointed appellate counsel in criminal cases shall be deemed to have complied with this standard of conduct if they comply with the

requirements imposed on appointed counsel by courts and statutes.

## LAWYERS' DUTIES TO THE COURT

*As professionals and advocates, counsel assist the Court in the administration of justice at the appellate level. Through briefs and oral submissions, counsel provide a fair and accurate understanding of the facts and law applicable to their case. Counsel also serve the Court by respecting and maintaining the dignity and integrity of the appellate process.*

1. An appellate remedy should not be pursued unless counsel believes in good faith that error has been committed, that there is a reasonable basis for the extension, modification, or reversal of existing law, or that an appeal is otherwise warranted.

2. An appellate remedy should not be pursued primarily for purposes of delay or harassment.

3. Counsel should not misrepresent, mischaracterize, misquote, or miscite the factual record or legal authorities.

4. Counsel will advise the Court of controlling legal authorities, including those adverse to their position, and should not cite authority that has been reversed, overruled, or restricted without informing the court of those limitations.

5. Counsel will present the Court with a thoughtful, organized, and clearly written brief.

6. Counsel will not submit reply briefs on issues previously briefed in order to obtain the last word.

7. Counsel will conduct themselves before the Court in a professional manner, respecting the decorum and integrity of the judicial process.

8. Counsel will be civil and respectful in all communications with the judges and staff.

9. Counsel will be prepared and punctual for all Court appearances, and will be prepared to assist the Court in understanding the record, controlling authority, and the effect of the court's decision.

10. Counsel will not permit a client's or their own ill feelings toward the opposing party, opposing counsel, trial judges or members of the appellate court to influence their conduct or demeanor in dealings with the judges, staff, other counsel, and parties.

## LAWYERS' DUTIES TO LAWYERS

*Lawyers bear a responsibility to conduct themselves with dignity towards and respect for each other, for the sake of maintaining the effectiveness and credibility of the system they serve. The duty that lawyers owe their clients and the system can be most effectively carried out when lawyers treat each other honorably.*

1. Counsel will treat each other and all parties with respect.

2. Counsel will not unreasonably withhold consent to a reasonable request for cooperation or scheduling accommodation by opposing counsel.

3. Counsel will not request an extension of time solely for the purpose of unjustified delay.

4. Counsel will be punctual in communications with opposing counsel.

5. Counsel will not make personal attacks on opposing counsel or parties.

6. Counsel will not attribute bad motives or improper conduct to other counsel without good cause, or make unfounded accusations of impropriety.

7. Counsel will not lightly seek court sanctions.

8. Counsel will adhere to oral or written promises and agreements with other counsel.

9. Counsel will neither ascribe to another counsel or party a position that counsel or the party has not taken, nor seek to create an unjustified inference based on counsel's statements or conduct.

10. Counsel will not attempt to obtain an improper advantage by manipulation of margins and type size in a manner to avoid court rules regarding page limits.

11. Counsel will not serve briefs or other communications in a manner or at a time that unfairly limits another party's opportunity to respond.

## THE COURT'S RELATIONSHIP WITH COUNSEL

***Unprofessionalism can exist only to the extent it is tolerated by the court. Because courts grant the right to practice law, they control the manner in which the practice is conducted. The right to practice requires counsel to conduct themselves in a manner compatible with the role of the appellate courts in administering justice. Likewise, no one more surely sets the tone and***

*the pattern for the conduct of appellate lawyers than appellate judges. Judges must practice civility in order to foster professionalism in those appearing before them.*

**1. Inappropriate conduct will not he rewarded, while exemplary conduct will he appreciated.**

**2. The court will take special care not to reward departures from the record.**

**3. The court will he courteous, respectful, and civil to counsel.**

**4. The court will not disparage the professionalism or integrity of couusel based upon the conduct or reputation of counsel's client or co-counsel.**

**5. The court will endeavor to avoid the injustice that can result from delay after suhmission of a case.**

**6. The court will ahide hy the same standards of profcssionalism that it expects of counsel in its treatment of the facts, the law, and the arguments.**

**7. Members of the court will demonstrate respect for other judges and courts.**

## *Quotable Quotes*

"I will look, your Honor, and endeavor to find a precedent, if you require it; though it would seem to be a pity that the Court should lose the honor of being the first to establish so just a rule."

Rufus Choate
WORKS OF RUFUS CHOATE 1:292 (1862).

# *REFLECTIONS ON THE FORMATION OF THE APPELLATE SECTION*

**by Deborah Race**
Solo Practitioner, Tyler

With the advent of the new Millennium (actually 2001, despite popular insistence to celebrate it in 2000), and the recent passage of the Appellate Section's Tenth Anniversary, the Appellate Section Council has asked some of the founding members to reflect on the formation of the section, their original expectations for the section, their reflections on the first ten years of the section, the future of the section, and their memories of section events.

Ralph Brock, the first section chair, and has been involved from the inception of the section. In an article published on the section's website, Ralph recalled the first mention of forming a section was at a 1985 appellate seminar in San Antonio. Mike Hatchell of Tyler, and Justice Michol O'Connor of Houston (First Court of Appeals), asked anyone attending the seminar to leave a business card if they were interested in forming an appellate section. About a year later, Ralph, Mike and Marvin Sloman of Dallas attended the Fifth Circuit

seminar in New Orleans and discussed the formation of the section again.

Mike Hatchell then cleared the way for the formation of the section with the State Bar of Texas. The founders originally estimated the section would have 200 members. Marvin Sloman prepared a budget, and Ralph Brock drafted the section's bylaws as well as the petition that was presented to the State Bar to create the section. Mike Hatchell circulated the petition at an appellate seminar to obtain the fifty signatures required for the petition. Roger Townsend of Houston then joined the *ad hoc* committee and acted as the liaison with the State Bar. Roger remembers that they were excited "to finally put appellate lawyers on the map, with our unique concerns and abilities." The group looked forward to providing a forum for appellate lawyers to share information and ideas.

Professor Wayne Scott of San Antonio (St. Mary's University School of Law) refers to what happened next as simply the "Oyster Bar Meeting." This was actually an organizational meeting called by Mike Hatchell and held at the old Oyster Bar restaurant next to the Texas Law Center in Austin. Ralph Brock, Wayne Scott, Marvin Sloman, Rusty McMains, John Watts and Mike Hatchell attended the meeting. The group proposed the first slate of officers: Ralph Brock, chair; Mike Hatchell, chair-elect: Roger Townsend, vice-chair; and Rusty McMains, secretary-treasurer. Don Hunt, Wayne Scott, Clarence Guittard, Marvin Sloman, Beverly Willis Bracken and John Watts were slated to be on the first six council members. The original section name was the Appellate Practice and Advocacy Section of the State Bar of Texas.

Wayne Scott recalls that the first meeting held during the 1987 State Bar Convention was in a small, dimly lit auditorium at one of the convention hotels. The section was formed too late to be included in the official program, so the State Bar put flyers about the section meeting in all the packets. Ralph recalls that about twenty people attended the meeting and the proposed slate of officers and council were elected. Rusty McMains presented a program about the upcoming first civil appellate specialization exam.

Rusty McMains was the appropriate choice to discuss the first civil appellate specialization exam. While he was not as involved in the actual formation of the section as some others, he was involved with the creation of the civil appellate law specialization. The creation of an appellate specialization exam was tied to the formation of the section, since, according to Rusty, the section needed to be formed to assist in the creation of the specialty. As with the formation of the section, the creation of the specialization took time. Rusty recalls that the first discussions about an appellate specialization exam occurred in 1985. Originally, the specialization was intended to include civil and criminal appellate law. However, for various reasons, the State Bar approved a specialization for civil appellate law.

While the section started small, those involved were willing to volunteer their time to insure the success of the section. At the close of the first meeting, Lynne Liberato volunteered to edit the section's newsletter. The founders opined that the quarterly newsletter represents one of the best aspects of the section and that articles on appellate practice topics did not exist at all. When the first section newsletter was published, section membership had grown to more than seven hundred members. The section now has over thirteen hundred members.

Don Hunt remembers one of those early meetings fondly, noting, "One of my best memories is of a section meeting held at a posh hotel in New Orleans." This was actually one of the first Council meetings held during the Fifth Circuit seminar in the fall after the section was formed. Mike Hatchell hosted a breakfast one morning, only to have to leave and miss his own breakfast meeting. Don thinks "[i]t is always good to have someone else paying who is not there when the last orders are taken."

Don Hunt anticipated that the section would "establish the appellate practice as a specialty." He also believes that, "More than anything else the Appellate Section gave the appellate lawyers a place at the head of the table rather than in the kitchen." Roger Townsend recalls that the founders wanted to improve the appellate system. They also hoped to provide the courts and rules committees "with input from lawyers who actually handled appeals on a regular basis under the applicable rules." According to Roger, the section "wanted to educate both appellate lawyers and non-specialists about the procedure and techniques that the best advocates have learned."

The section has exceeded those original expectations. Don Hunt writes, "The section has far exceeded my expectations. Not only has the section helped establish appellate practice as a specialty, the section has become one of the pre-eminent sections of the State Bar. It was interesting to note, as a member of the Supreme Court Advisory Committee, that when the committee began to look at revisions of the Texas Rules of Appellate Procedure, the section's State Rules Committee was in place and functioning. It was no surprise that almost every member of the section's State Rules Committee became members of the Supreme Court Advisory Committee and occupied pre-eminent roles in the rewriting of the Texas Rules of Appellate Procedure, as well as many other new rules that are beginning to come online."

It is fair to say that the section has far exceeded the founders' dreams. At the beginning, they would have thought that a membership of 100 was great. The founders never thought that there would be several annual seminars devoted solely to appellate practice. As they noted, before the formation of the section, there was a one day seminar on appellate practice about once every three years.

Marvin Sloman writes, "When the section was formed, not even the founders could have foreseen the scope and extent of all its wonderful accomplishments. I join in what the other early hands have said about the importance of maintaining and explaining all this work, especially through bright able up-and-comers."

These original founders have all served as officers of the section. Following Ralph Brock (Lubbock) as the first chair in 1987-88, the subsequent chairs were Mike Hatchell (Tyler), Roger Townsend (Houston) , Rusty McMains (Corpus Christi), Don Hunt (Lubbock), Marvin Sloman (Dallas), Professor Wayne Scott (San Antonio), Justice Michol O'Connor (Houston), Kevin DuBose (Houston), and Lynne Liberato (Houston). The current chair is JoAnn Story (Houston).

Wayne Scott recalls his years of involvement and serving as an officer fondly, although he found the hardest job to be that of treasurer when he did handled the books himself. He also remembers devoting the State Bar Appellate Practice course to a review and analysis of the new rules of appellate procedure which were scheduled to become effective, and then didn't! With respect to those years, Wayne remarks, " It was a great ride. I loved it."

Don Hunt believes one of the best things about the section is "that no chair could serve more than one year." Don also reflects that "[t]o serve as chair-elect and chair - and do it right - taxes a person's limits. Thus it is good that no one can ever be re-elected." Don remarks that "The section also gives the best of the rising young appellate stars a place to shine."

Marvin Sloman has concerns about the section's recent name change to "The Appellate Section." Marvin notes that, "Our original name included appellate advocacy." He offers the following thoughts: "It's all right to refer to us as the "appellate section" for shorthand, but the needless recent change in our name may reflect an unintended de-emphasis of advocacy as an all-important head of our interests in favor of technical aspects of appellate practice. Both are crucially important to a quality judicial system. Frequent comments from judges about the poor quality of argument and briefs tell us to step up efforts not only of individual mentoring but also our group emphasis on integrity, credibility, elegant persuasion and all the other essentials of wholesome effective advocacy."

As for the future, one founder urged the section never to compromise on quality. "Over time organizations tend to become bureaucratized, which means compromise, become institutionalized, so that rewards are based on personality and connections rather than talent and energy, " observed Roger Townsend. Don Hunt suggests, "Future sections should seek to (1) foster the delivery of excellent appellate services to clients; (2) increase collegiality among appellate lawyers; and (3) return professionalism to all areas of the practice of law."

It is evident from these various observations that the section has come a long way since its inception. The current section has exceeded the wildest hopes of its founders. It is for the current and future members to continue the fine legacy established by the founders. It is for these members to guard against the compromise and bureaucracy and to further the goals of the founders. The section has much to be proud of in the past and much to accomplish in the future.

I hope this look back at the formation of the section and the thoughts of some of those who put this section together have proved interesting. I would like to thank those people who responded to my surveys or took time from their schedules to answer my questions. I would also like to thank Ralph Brock for allowing me to use his article, which can be found on the section's website, as a resource for this article and also for his assistance in reviewing the final draft.

*Quotable Quotes*

"The law is sort of a hocus-pocus science."

Charles Macklin, Love à la Mode, act II, sc. I. (1759)
(Hocus was an old cunning attorney).

## *Appellate Law Section of the El Paso Bar*

The Appellate Law Section of the El Paso Bar Association began in 1994 at the instigation of El Paso lawyer Link Beck. A good idea deserves a reward. Beck was therefore immediately elected the Section's first leader and assumed the now-traditional appellation of "Grand Inquisitor" a.k.a. "Grand Poobah." Former "Inquisitors" include Steven Hughes, Ken Slavin and Jeff Alley. The upcoming Bar year marks the ascension of the first female "Inquisitor," Mara Blatt.

Initially section meetings were accompanied by margaritas at a local watering hole, La Hacienda. Present day meetings are, however, a little less festive and a bit more sedate with the Section meeting monthly for lunch. Each gathering includes a CLE program on current appellate topics. Former speakers include each of the four justices of the El Paso Eighth Court of Appeals and Chief Judge of the Court of Criminal Appeals Mike McCormick. The Section also acts as a liaison to and sounding board for the Eighth Court of Appeals which seeks the Section's input on revisions to local rules of appellate procedure, mediation policies and other matters affecting bench and bar. Section membership requirements are simple--a good sense of humor and a thirst for appellate wisdom.

Plans for the future include an expanded CLE program and a monthly newsletter. The Section may someday form official subcommittees but, for the present, all Section activities are assigned on an ad hoc basis. Anyone interested in obtaining further information about the Section can contact Mara Blatt at (915) 532-6205 or by e-mail at marablatt@aol.com.

*Quotable Quotes*

Si alicujus rei societas sit et negotio impositus est, finitur societas.

(If you depart from the law, you will go astray, and all things will be uncertain to everybody.)

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

## Texas Supreme Court

### When an objection is a waste of time, you may not need to bother

*In re Perritt*, 1999 WL 125535 (Tex. Mar 11, 1999)

Plaintiffs sued the Perritts, the owners of a Golden Corral restaurant franchise, and Golden Corral Corporation for alleged food poisoning. The Perritts moved to recuse the trial judge, and a visiting judge was assigned to hear the recusal motion. Golden Corral objected the judge assigned to hear the motion under Tex. Gov't Code, Sec. 74.053(b). The objection was denied. The Perritts, who had neither joined Golden Corral's objection nor independently asked the judge to step aside, then sought a writ of mandamus to compel the judge to step aside.

Held: A party's right to mandamus relief generally requires a predicate request for some action and a refusal of that request. However, this requirement is excused where that "the request would have been futile and the refusal little more than a formality." Here, the visiting judge made it clear that any such request would have been denied. Thus, the Perritts did not need to file a formal objection. On the merits, the Court rules that Section 74.053 applies to recusal motions and grants the writ.

### A file-stamp is not conclusive

*Coastal Bank v. Helle*, 1999 WL 140993 (Tex. Mar 11, 1999)

The Court holds: "When a dispute arises as to the filing date of an instrument essential to a court's appellate jurisdiction, the date the instrument is tendered to the clerk controls, and not the file-stamp date. The uncontroverted affidavits of the court clerk and Coastal's counsel, as well as the shipping receipt submitted by Coastal, demonstrate that Coastal's certificate of cash deposit in lieu of bond was timely delivered to the clerk on or before the deadline."

### Effect of a general remand

*Garcia v. Martinez*, No. 97-1011 (Tex. Apr. 1, 1997)

The Court seems accept the contention that "[g]enerally, when an appellate court remands a case for further proceedings, the effect is to remand the case for a new trial on all the issues of fact and the case is reopened in its entirety. If a reversal is limited to particular fact issues, it must clearly appear from the decision that it is so intended." However, in this case the remand was clearly only "as to the issue of the Guardian Ad Litem's fee."

### A petition for review brings up only the issues listed in the petition

*In re C.O.S.*, No. 98-0198 (Tex. Apr. 1, 1999)

"In his brief to the court of appeals, C.O.S. raised other issues that he did not mention in his petition for review in this Court and that he did not reserve for full briefing on the merits. After we granted C.O.S.'s petition, he filed the brief he had submitted in the court of appeals in lieu of a brief on the merits in this Court, which he is entitled to do. However, our rules provide that only those issues that are identified in a petition for review are before this Court. C.O.S. has not sought to amend his petition."

### What you (bopefully) don't need to know

*Douglas v. Delp*, 1999 WL 172978 (Tex. Mar 25, 1999)

If you are planning to commit malpractice, the plaintiff will not be able to recover mental anguish damages unless the case involves child custody, loss of liberty, or another situation in which mental anguish is normal.

## Court of Appeals Opimions

### Mafrige strikes again!

*Lehmann v. Har Con Corp.*, 1999 WL 144846 (Tex.App.-Houston [14th Dist.] Mar 18, 1999)

We will skip the gory details. Another appellant is *Mafriged*! The Court of Appeals asks the Supreme Court to reconsider that case.

*Editorial comment: The author has been complaining about Mafrige ever since it was decided. Hopefully, complaining from a more distinguished source will get the attention of the Supreme Court. However, the courts of appeals may be reading Mafrige too broadly. The "Mother Hubbard" clause is a device that we have borrowed from oil & gas law. It was originally designed to include small pockets of land missed by surveyors within a lease. Such clauses have never been construed to embrace entire independent tracts of land. Similarly, Mafrige itself involved numerous defendants and a*

*multitude of theories of recovery. All defendants sought summary judgment, but a few defendants omitted some of the interrelated theories of recovery from their motions. Under these circumstances, the Mother Hubbard clause was, perhaps, appropriate. Although the language of Mafrige seems to so require, the case should not be extended to construe a summary judgment as dismissing the entire case against a defendant who has not even sought summary judgment.*

**Sometimes you can seek relief: Appealability of third-party discovery orders**

*Enviro Protection, Inc. v. National Bank of Andrews*, 1999 WL 178706 (Tex.App.-El Paso Apr 01, 1999)

Enviro served a subpoena duces tecum on the Bank relating to litigation between Enviro and a third party. The Bank produced some documents, but obtained a protective order from the trial court permitting it to withhold many of the documents and awarding attorneys' fees and copying costs. Enviro appeals.

Citing Stough v. Cole, 720 S.W.2d 675 (Tex. App.-San Antonio 1986, no writ), the Court holds that a discovery order involving a third party who is not involved in the main litigation is a final, appealable judgment.

**And sometimes you can't**

*In re Moreno*, 1999 WL 161018 (Tex. App.-Houston [14th Dist.] Mar. 25, 1999)

This is a mandamus proceeding relating to a bill of review. The trial court entered an order granting the bill of review but has not yet held a trial on the merits. The Court notes that such an order is interlocutory and not appealable. Where the pleadings do not state sufficient grounds for a bill of review, some courts of appeals have held that an order granting the bill is void. The Fourteenth Court holds that the order is merely voidable. As a result, mandamus is not a proper remedy. Relator can appeal after the trial on the merits.

*Diana Rivera & Assoc., Inc. v. Calvillo*, 1999 WL 85699 (Tex.App.--Corpus Christi 1999)

This is an attempt to appeal an interlocutory order on the jurisdictional ground that the order amounts to a mandatory injunction. The Court holds that an order directing the defendant to provide certain records to an auditor and deposit certain money in the registry of the court was not appealable a "temporary injunction" because it did not "adjudicate the rights of the complaining party." The Court declines to follow Pilot Eng'g Co. v. Robinson, 470 S.W.2d 311, 312 (Tex. Civ. App.- Waco 1971, no writ).

**A motion for summary judgment must specify the grounds, except when . . .**

*Withrow v. State Farm Lloyds*, 1999 WL 176136 (Tex. App.-Texarkana Apr. 1, 1999)

Plaintiff sued State Farm alleging breach of contract, a breach of the duty of good faith and fair dealing, and negligence. State Farm moved for summary judgment and asserted that plaintiff's pleadings conclusively established she was not entitled to recover on her breach of contract claim because all facts she pleaded fell within exclusions in the insurance policy. State Farm also moved for summary judgment on the basis that, as a matter of law, it did not breach its duty of good faith and fair dealing. State Farm did *not* move for summary judgment on the negligence claim. Nevertheless, the trial court granted a final summary judgment.

The Court of Appeals affirmed the summary judgment on the breach of contract and breach of duty of good faith claims on the grounds that plaintiff's live pleadings demonstrated that the claim fell within the exclusions in the insurance policy. Turning to the negligence claim, the Court held that a simple negligence cause of action does not exist in Texas when an insurer denies an insured coverage for personal loss under a policy. The Court holds that it may affirm a summary judgment on a cause of action not addressed in the motion for summary judgment where "reversing the summary judgment would be meaningless because the omitted cause of action is precluded as a matter of law."

*Editorial comment: Had State Farm followed the proper procedure, a special exception to this portion of the pleading as failing to state a cause of action, plaintiff would have been entitled to amend. It appears that doing nothing is sometimes the most efficient course of action.*

**And except when . . .**

*Lampasas v. Spring Center, Inc.*, 1999 WL 161008 (Tex. App. -Houston [14th Dist.] Mar. 25, 1999)

This is a negligence action resulting from a fire. Defendants moved for summary judgment under Tex.R.Civ.P. 166a(i) contending that plaintiff could produce no evidence of the elements of duty, breach, and causation. Shortly before the hearing plaintiff filed an amended pleading that petition included four new variations of negligence against Spring Center and Braun and one new variation of negligence against McAlexander. One issue on appeal is whether the trial court could properly grant summary judgment on the new variations even though they were not specifically addressed on the motion for summary judgment.

The Court writes: "Appellees' motion for summary judgment specifically challenged the elements of duty, breach, and causation of Lampasas's myriad negligence claims. The essential elements of any negligence case invariably include duty, breach, and causation. And no matter how many ways one cuts the cake, the knife slices through the essential elements of flour, sugar, and water i.e., duty, breach, and causation. To hold otherwise would provoke the predicament of an amended pleading followed by a new motion for summary judgment followed by a new amended pleading. Like sudden death overtime, the last pleading filed would win."

**When hoth parties seek reversal, will the Court reverse? Don't count on it**

*Stankiewicz v. Oca*, 1999 WL 177555 (Tex. App.-Fort Worth Apr. 1, 1999)

This is a restricted appeal from a default judgment. The Court confirms that the requirements for a restricted appeal are essentially the same as the requirements for the old appeal by writ of error. Appellant's primary complaint is that she was *personally* served despite an order for substituted service. The Court holds that an order for substituted service does not preclude personal service. Footnote 2 may be of some interest. Appellee "declined to file a brief, but has filed a letter stating that he does not oppose reversal and remand for trial on the merits. Oca's acquiescence notwithstanding, we cannot reverse the trial court's judgment unless we find error that probably caused rendition of improper judgment."

**The more things change, the more they stay the same: Chapter I**

*Hall v. Timmons*, 1999 WL 160564 (Tex. App.-Beaumont Mar. 25, 1999)

"SiBon also argues in its third point of error that the trial court erred in failing to distinguish between Timmons' neck injury and back injury in submitting the damage issue to the jury. SiBon argues that as to the back injury, there is no causation. Though we fail to see the causal connection, SiBon's brief does not provide a reference to the record where the trial court was appraised of this objection and ruled against SiBon. See Tex. R. App. P. 38.1(h). Thus, nothing is preserved for review. See Tex. R. App. P. 33.1(a)."

**The more things change, the more they stay the same: Chapter II**

*Maida v. Fire Ins. Exchange*, 1999 WL 162820 (Tex. App.-Fort Worth Mar. 25, 1999)

In a case arising after the new Rules of Appellate Procedure, the Court writes: "Maida's point is multifarious, and we are not required to review it." The Court, however, construes the point liberally and rules on the merits.

**The more things change, the more they stay the same: Chapter III**

*Keever v. Finlan*, 1999 WL 74594 (Tex. App.-Dallas Feb. 18, 1999)

"Because Friedman does nothing more than summarily state his point of error, without citations to the record, legal authorities, or substantive analysis, we conclude he has failed to preserve this argument for review."

**The more things change, the more they stay the same: Chapter IV**

*Elite Towing, Inc. v. LSI Financial Group*, 985 S.W.2d 635, 645 (Tex.App.-Austin Jan. 28, 1999)

Appellant waived his complaint of improper venue by failing to request that the motion to transfer venue and order denying the motion be included in the clerk's record.

**An *unreasonable* explanation?**

*Weik v. Second Baptist Church of Houston*, 1999 WL 163914 (Tex.App.-Houston [1st Dist.] Mar. 25, 1999)

The trial court dismissed this case for want of prosecution. Appellant filed a timely motion to reinstate, but the trial court denied the motion. Appellant perfected appeal on the 30th day after denial of the motion to reinstate. *Unfortunately*, this was more than 90 days after the judgment. *Fortunately*, this was less than 105 days after the judgment.

Citing *Verburgt v. Dorner*, 959 S.W.2d 615, 617 (Tex.1997), the Court recognizes that there is a pending implied motion for extension. The Court proceeds to determine whether Appellant has provided a "reasonable explanation" of the need for an extension. Appellant's explanation is "his lawyer told him that if he appealed the case while the trial court still had the authority to reinstate the case, that the trial court would reinstate the case and Weik would have a difficult time prosecuting his claim because of the trial court's displeasure . . . [Appellant's] lawyer agreed to file the appeal bond after the trial court's plenary power had expired." The Court holds that "[t]hese actions show an intentional course of conduct on the part of appellant to delay the filing of his appeal bond. The decision to file his appeal bond after the expiration of 90 days was not the result of inadvertence, mistake, or

mischance." The Court denies the implied motion for extension.

*Editorial comment: Perhaps, it can be inferred from the "explanation" that the attorney was ignorant of the 90-day deadline. Ignorance of the law does not make an explanation unreasonable. Garcia v. Kastner Farms, Inc., 774 S.W.2d 668, 669 (Tex.1989). However, supplying an implied explanation to an implied motion may be more than a court should do to help a litigant. Hopefully, the Supreme Court will soon tell us whether the effect of Verburgt is to simply extend the deadline to appeal to 105 days.*

**To object or submit, that is the question**

*Green Tree Financial Corp. v. Garcia*, 1999 WL 43590 (Tex. App.-San Antonio Feb. 3, 1999)

This is an action for defamation, violations of the Texas Debt Collection Act, and violations of the DTPA. The jury awarded $34,500 in actual damages and $2,250,000 in exemplary damages. On appeal, Green Tree complains that the jury was not given the proper instruction concerning when exemplary damages may be awarded against a corporation. Green Tree objected to the absence of the instruction but failed to tender an instruction in substantially correct form.

The Court of Appeals holds: "In this case, in addition to Green Tree's objection, an express reference was made to the applicable pattern jury charge provision. In addition, the trial court informed the parties that he had an instruction in response to the issue raised by Green Tree. Under these facts, we hold that Green Tree preserved error through its objection. The reference to the pattern jury charge, and the court's reassurance that he had the requisite instruction, satisfied the tender requirement under rule 278."

**A wealtb of cases**

*Editorial note: there were more cases involving appellate procedure during the first quarter of 1999 than the author could possibly comment on at length. Hence short squibs.*

*Frazier v. Yu*, 1999 WL 79639 (Tex. App.–Fort Worth 1999) (A written ruling on objections to summary judgment proof is no longer required under the new rule; an objection may be sustained by implication).

*Ford v. Whitehead*, 1999 WL 155952 (Tex. App.San Antonio Mar 24, 1999) (An affidavit of indigence must be filed *at or before* a party's notice of appeal. The party may not file an amended notice of appeal accompanied by the affidavit in order to "feign compliance with Rule 20.1(c).").

*Musgrave v. Brookhaven Lake Property Owners Ass'n*, 1999 WL 147481 (Tex. App.-Texarkana Mar 19, 1999) (An injunction that does not comply with Tex.R.Civ.Proc. 683 is void and no trial court objection is required to raise the issue on appeal).

*Dean v. LaFayette Place (Section One) Council of Co-Owners, Inc.*, 1999 WL 144609 (Tex. App.-Houston [1st Dist.] Mar 18, 1999) (If an appellee is satisfied with the relief granted by the trial court, but merely wants to present additional, independent grounds for affirming the trial court's judgment, no cross-notice of appeal is required. The independent grounds for affirmance can be raised in a cross-point as long as the appellee is not requesting greater relief than that awarded by the trial court.).

*Esquivel v. Murray Guard, Inc.*, 1999 WL 144831 (Tex. App.-Houston [14th Dist.] Mar 18, 1999) (Tex.R.App.P. 24 does not authorize a trial court to order an appellant to post a bond to cover costs. Appellee's remedy is to execute on the judgment).

*Chadderdon v. Blaschke*, 1999 WL 157175 (Tex. App.-Houston [1st Dist.] Mar 11, 1999) (If a notice of hearing on a motion for summary judgment is served by mail, it must be placed in the mail 24 days before the hearing).

*Brown v. Brookshire's Grocery Store*, 1999 WL 59791 (Tex. App.-Dallas Feb 10, 1999) (Court refuses to apply the rule that error is waived by failure to object to a restricted appeal. "[A]n objection requirement would vitiate appeals by writ of error because a writ of error is designed to protect parties who could not object because they were not present at the trial proceedings.").

*Brazosport Bank of Texas v. Flournoy*, 985 S.W.2d 281 (Tex. App.-Tyler Jan 29, 1999, pet. filed) (On the first appeal, the court of appeals reversed a party's recovery and awarded damages to the opposing party. The loser complained on rehearing and to the Supreme Court that the court of appeals erred in failing to consider other jury findings which supported a *defense* to recovery by the opposite party. This waived the contention that the same jury findings entitled the loser to an affirmative recovery).

*Evans v. Dolcefino*, 1999 WL 33613 (Tex. App.-Houston [1st Dist.] Jan 28, 1999) (The statute permitting an interlocutory appeal by a media defendant from the denial of a summary judgment motion based on a free speech or free press defense is constitutional. The statute does not permit the plaintiff to cross-appeal).

*Fojtik v. Charter Medical Corp.*, 985 S.W.2d 625 (Tex. App.-Corpus Christi Jan 21, 1999) (In order to rely on unfiled discovery in a summary judgment proceeding, a party must show the trial court the language from the unfiled discovery before the trial court rules on the motion for summary judgment. Where the Appellant failed to do this, the depositions filed two months after the summary judgment was granted were not properly part of the record).

*Yzaguirre v. Gonzalez*, 1999 WL 18824 (Tex. App.-San Antonio Jan 20, 1999) (The losing party filed a motion for rehearing that was overruled. Less than 30 days later, the party filed a motion for consideration en banc. The Court holds that the second motion was timely was a "motion for rehearing" for purposes of the plenary power of the Court of Appeals under Tex.R.App.P. 19).

## *Trivia*

***Do You Know the Latin Phrase on the Seal of the Supreme Court of Texas Bench?***

# SICUT PATRIBUS SIT DEUS NOBIS

Translation:
As God was to, or with, our Fathers, may he be to, or with, us.

## *Quotable Quotes*

"Appeal, *v.t.* In law, to put the dice into the box for another throw."

Ambrose Pierce
THE DEVIL'S DICTIONARY 25 (1911).

**by Marcy Hogan Greer**
Fulbright & Jaworski L.L.P., Austin

**Appellate Procedure/Appellate Jurisdiction/Post-Judgment Motions**

*Midwest Employers Cas. Co. v. Williams*, 161 F.3d 877 (5th Cir. 1998)

At issue was whether counsel's mistake as to the timeliness of a motion for new trial was sufficient to constitute "excusable neglect" for extending the time to file a notice of appeal. The appellant's counsel filed a motion for new trial three days late, believing that the mail rule—Fed.R.Civ.P. 6(e)—applied to judgments served by mail. The motion was ultimately denied as untimely, but the magistrate judge exercised his discretion to allow additional time in which to perfect the appeal. The court of appeals held that the magistrate abused his discretion in doing so based in large part on its earlier decision in *Halicki v. Louisiana Casino Cruises, Inc.*, 151 F.3d 465 (5th Cir. 1998). As a result, the appeals court dismissed the appeal for want of appellate jurisdiction based upon the untimely notice of appeal. In its decision, the court reaffirmed that it was not foreclosing "the possibility that some misinterpretations of the federal rules could constitute excusable neglect," but also indicated that those cases would be few and far between.

Judge Emilio M. Garza dissented and stated that he would have upheld the magistrate judge's exercise of discretion based upon his review of the relevant authorities.

**Attorney's Fees/Timely Request**

*Romaguera v. Gegenheimer,* 162 F.3d 893, (5th Cir. 1998), *modified on reh'g* 1999 U.S. App. LEXIS 3859 (5th Cir. Mar. 5, 1999)

Federal Rule of Civil Procedure 54(d)(2) delineates the procedure for obtaining attorneys' fees. A request for attorney's fees in a pleading is insufficient; the party must also file a timely motion for attorney's fees under rule 54(d)(2) within 14 days after the entry of a final judgment. The failure to file a timely motion acts as a waiver of the request.

In this case, although the plaintiff did not file a timely motion, the district court, in its original order and again in its findings and conclusions on remand, noted that the plaintiff had requested attorneys' fees and stated that the request would be addressed at a separate hearing: "As a consequence of the court's acknowledgment of the request, together with its indication in its order that a hearing would be held thereon..., a filing was not needed and the subsequent filing by [the prevailing plaintiff] simply served as a reminder to the court that it had failed to set a hearing date." 1999 U.S. App. LEXIS 3859 , at *1.

The court of appeals, however, found the fee awarded to be excessive and an abuse of the district court's discretion because the district court failed to consider the level of success ultimately achieved by the plaintiff. In particular, the district court failed to take into consideration the fact that the plaintiff voluntarily relinquished many of her substantive claims, suffered dismissal of the constitutional argument, and abandoned her class certification attempt. Because the district court essentially awarded the plaintiff all of her attorney's fees and expenses for the entire course of the litigation, without taking into account her limited success, the award was excessive and was vacated and remanded for redetermination.

**Bankruptcy/Agreed Judgment**

*Lindsey v. Prive Corp.,* 161 F.3d 886 (5th Cir. 1998)

Plaintiff-Appellant, a former head waitress at a gentlemen's club, brought an action against Prive Corporation, her former employer, under the Age Discrimination in Employment Act claiming constructive discharge and unlawful denial of a promotion. Prive Corporation's trustee in bankruptcy agreed to entry of judgment in the amount of $3.3 million against the corporation. The trustee explained that Prive Corporation has no assets, but if it consented to a judgment, the plaintiff might be able to pursue Prive Corporation's successors in interests on a theory of successor liability. The agreed judgment would allow Prive Corp. to receive 25% of any recovery plaintiff received.

Although the bankruptcy court approved the agreed-upon judgment, it added that it was not taking a position regarding the effect of the claim in the bankruptcy case as to claims in any other courts. Despite the agreed-upon judgment, the district court required the plaintiff to try her claims to a jury with the alleged successors interest. The jury found against the plaintiff. Although the plaintiff appealed on several grounds that are discussed in the opinion, only the bankruptcy issues are summarized here.

While recognizing that generally a trustee in bankruptcy has the authority to settle claims filed against eh estate and

that judgments of bankruptcy courts normally enjoy the issue preclusive effect of a final judgment, the Fifth Circuit explained that those general principles do not decide this case. Here, the judgment was "the product not of adversaries, but of joint venturers," and redetermination of issues was warranted. The bankruptcy court's judgment therefore was not entitled to preclusive effect against the successors in interest. The Fifth Circuit noted that its conclusion was consistent with the general rule that parties who choose to resolve litigation through settlement may not dispose of the claims of a third party and may not impose duties or obligations on a third party, without that party's agreement.

**Class Action - Intervention - Appellate Procedure**

*Cook v. Buick,* 155 F.3d 758 (5th Cir. 1998)

In a class action challenging defendant motor vehicle dealers' practice of charging ad valorem taxes on new vehicles, proposed intervenors filed a motion to intervene after the plaintiff class of motor vehicle purchasers jointly moved with the defendant class of motor vehicle dealers for the court's preliminary approval of a settlement agreement. Proposed intervenors appeared at the settlement agreement's fairness hearing, and the court gave counsel for the intervenors the opportunity to cross examine the parties' witnesses, present other witnesses, offer evidence, and make arguments in support of the intervenors' position. The court also gave the proposed intervenors the opportunity to opt out of the settlement class, which they declined.

The court denied the motion to intervene based upon its conclusions that the proposed intervenors' interests were adequately represented by the existing parties, their objections to the proposed settlement were without merit, and their motion to intervene was untimely. The court issued a final judgment, certifying the settlement class and approving the settlement agreement. The proposed intervenors appealed this judgment, as well as the denial of their motion to intervene. Because the proposed intervenors were denied leave to intervene and, thus, never obtained status of parties in this suit, the Fifth Circuit dismissed their appeal as to all issues except the denial of their motion to intervene.

The court of appeals rejected an argument that the intervention order itself was unreviewable due to the putative intervenors' failure to specify that decision in its notice of appeal. The notice of appeal was from the final judgment, and "all prior orders intertwined with the final judgment," including the intervention decision, were thus preserved. The attempted intervenors' failure to obtain a Rule 58 "separate document" order on intervention was also insufficient to deprive the court of appeals of jurisdiction over the denial of intervention. The court of appeals noted in a footnote its "concern" over delaying review of an order denying intervention until after final judgment when the order is itself immediately appealable. The panel went so far as to suggest that it would have preferred to impose an immediate appeal requirement on a denial of intervention, but found that Fifth Circuit Rule 58 precedent—requiring a separate document to finalize a ruling—precluded it from doing so. The court of appeals intimated a rule change or en banc reconsideration of the issue and suggested, in the meantime, that district courts "may avoid this conundrum by entering a Rule 58 document when denying intervention."

Reviewing the court's denial of intervention *de novo,* the court examined the requisites for intervention as a matter of right. Its specific focus was upon the requirement that the proposed intervenor's interest not be adequately represented by the existing parties. When the parties seeking to intervene have the same ultimate objective as the parties to the suit, the existing parties are presumed to represent adequately the parties seeking to intervene unless the proposed intervenors demonstrate adversity of interest, collusion, or nonfeasance. Concluding that the proposed intervenors in this case were represented adequately by the existing parties, the Fifth Circuit affirmed the district court's order denying intervention without examining the other elements of intervention as of right.

**Default Judgments**

*Rogers v. The Hartford Life and Accident Insurance Co.,* 167 F.3d 933 (5th Cir. 1999)

The plaintiff, a former employee of Entergy Corporation, filed an ERISA action against the benefits plan and the insurer, Hartford. Service was made on the plan by sending a copy of the summons and complaint by certified mail to the plan's administrator. Hartford's agent for service in Mississippi executed a waiver of service, which was filed with the district court. Neither Hartford nor the plan timely answered the lawsuit, and a default judgment was entered. The district court denied the defendants' motions to set aside the default judgment in its entirety, but granted partial relief in ordering that the plaintiff could not recover expenses for medical treatment and so adjusted the judgment accordingly. The court of appeals affirmed.

The Fifth Circuit first acknowledged its longstanding "policy in favor of resolving cases on their merits and against the use of default judgments," but noted that the policy is "'counterbalanced by considerations of social goals, justice and expediency, a weighing process [that] lies largely within the domain of the trial's judge's

discretion.'" *Id.* (quoting *Pelican Prod. Corp. v. Marino*, 893 F.2d 1143, 1146 (10th Cir. 1990)).

The court of appeals rejected Hartford's first defense, which was that it had "appeared" in the action by waiving service, and so was entitled to notice of the default judgment hearing. The Fifth Circuit did not believe that "mere acceptance of formal service of process" could constitute an appearance in the action as would be necessary to entitle the defendant to notice prior to default.

The court of appeals found no abuse of discretion in the trial court's rejection of Hartford's alternative showing of excusable neglect. Hartford apparently demonstrated that its agent for process forwarded the complaint by Airborne Express to Hartford's address, but inexplicably, Hartford never received the delivery. Hartford argued that this evidence satisfied the Court's equitable test for setting aside a default judgment, which includes consideration of (i) the extent of prejudice to the plaintiff; (ii) the merits of the defendant's asserted defense; and (iii) the culpability of the defendant's conduct. The court of appeals agreed with the district court that Hartford was at least partially responsible for the default because its registered agent had notified a senior claims examiner in Hartford's claims office in Atlanta, and Hartford had failed to follow up. The court of appeals seemed to believe that Hartford had failed to establish "minimum internal procedural safeguards" to protect against this kind of loss.

The plan argued that it was improperly served, and so the default judgment rendered against it was void. The court of appeals examined Mississippi law regarding service for purposes of Federal Rule of Civil Procedure 4(e). It made an "*Erie* guess" that the plan had been properly served in accordance with Mississippi law, and so, the default judgment was not void. The court of appeals also rejected the plan's contention that the default judgment should be set aside for lack of proper venue under ERISA. It held instead that any defect in venue was waived by the default.

The Fifth Circuit also found fault with the plan's excuse for the default. Apparently, the plan received the summons and complaint, but these documents were forwarded to the legal department along with a number of internal documents. Staff in the legal department apparently did not discover the suit papers among the many internal documents and mistakenly concluded that the materials were an internal file pending resolution by Hartford. The court of appeals again found a failure to establish and maintain minimum internal procedural safeguards, which, in its opinion, amounted to culpable behavior.

**Evidence/Expert Witnesses/Daubert**

*Kuhmo Tire Co., Ltd. v. Carmichael*, 526 U.S. __, No. 97-1709 (Mar. 23, 1999), *rev'g*, 131 F. 3d 1433 (11th Cir. 1997).

In this landmark opinion, the United States Supreme Court clarified that the gate-keeping role of federal district judges first defined in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), extends to all testimony based upon "technical" and "other specialized" knowledge. In doing so, the Court emphasized that the *Daubert* factors — including (i) whether the theory or technique can be and has been tested; (ii) whether it has been subjected to peer review and publication; (iii) whether there is a high known or potential rate of error with respect to the particular technique and standards controlling the technique's operation; and (iv) whether the theory or technique enjoys general acceptance within a relevant scientific community — are meant to be flexible inquiries rather than rigid guideposts. As a result, these factors "neither necessarily nor exclusively appl[y] to all experts or in every case. Rather, the law grants the district court the same broad latitude when it decides ***how*** to determine reliability as it enjoys in respect to its ultimate reliability determination." *Id.* (emphasis in original).

In extending *Daubert*, the Court noted that neither the language of Federal Rule of Evidence 702 nor the evidentiary rationale that underlay *Daubert's* gate-keeping analysis was limited to "scientific" knowledge. As to the factors, Justice Breyer, writing for the majority, emphasized repeatedly that federal district judges need to consider the applicability of these factors on a situation by situation basis: "The conclusion, in our view, is that we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue." At bottom, *Daubert*'s gate-keeping role is "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom, the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."

Applying *Daubert* in this context, the Court found no abuse of discretion in excluding expert testimony as to the cause of a tire failure which lead to a fatal blowout because that expert "fail[ed] to satisfy either *Daubert's* factors ***or any other*** set of reasonable reliability criteria." *Id.* (emphasis in original).

Justice Stephens concurred in part and dissented in part, joining the majority's analysis on the extension of

*Daubert*, but dissenting from its application to the facts at hand because he believed it would be more appropriate for the Eleventh Circuit to do so first.

Justice Scalia, joined by Justices O'Connor and Thomas, concurred in the opinion, but noted that the Court would be keeping watch for *Daubert* violations: "Though, as the Court makes clear today, the *Daubert* factors are not holy writ, in a particular case the failure to apply one or another of them may be unreasonable, and hence an abuse of discretion."

**Evidence/Inadvertent Destruction of Documents**

*Caparotta v. Entergy Corp.*, _____ F.3d _____, No. 97-30659, 1999 U.S. App. LEXIS 3007 (5th Cir. Feb. 25, 1999)

In an age discrimination case, in-house counsel for the defendant-employer collected a number of relevant documents and placed them in a box under a ledge at her secretary's station so that they could be copied the next day for outside counsel. The next day, however, the box was missing, and in-house counsel ultimately discovered that it had been accidently incinerated. The district court conducted an evidentiary hearing and concluded that Entergy had not acted in bad faith and so the plaintiff was not entitled to a spoliation instruction. Nonetheless, the district court allowed evidence of the destruction to be brought the jury. At issue was whether proof of the destruction of these documents was properly before the jury.

Although, the court of appeals noted sympathy "to the dilemma faced by the district court of what to do when evidence is inadvertently destroyed," it found nonetheless that the lower court had committed an abuse of discretion in allowing this evidence to come in through the testimony of defense counsel. In its view, the trial court performed an improper balancing of the relevance and prejudice considerations of Federal Rule of Evidence 403. The court of appeals suggested that "[i]t would have been more appropriate for the district court to have informed the jury that the documents had been inadvertently destroyed and that the district court found no bad faith on the part of Entergy." Because Entergy's substantial rights had been adversely affected by the presentation of the evidence in this manner, the court of appeals vacated the judgment and remanded for new trial.

Judge Dennis dissented in a lengthy and scholarly opinion in which he criticized the majority's Rule 403 analysis as placing undo emphasis on the potential prejudicial effect. In his view, the plaintiff was entitled to have the jury know about the missing documents because he had the burden of proving his case, and the absence of evidence might have reflected adversely upon him. Further, the jury was fully informed that the document destruction had been inadvertent, and the judge informed the jury that he had concluded "as a matter of law" that the destruction was inadvertent. Judge Dennis would actually have found error in the district court's instruction because he believed that the trial judge should not have taken the issue away from the jury. In his view, there was sufficient evidence from which the jury reasonably could have found an intentional destruction.

**Evidence/Hearsay/Improper Jury Argument**

*Whitehead v. Beef Food Max of Miss., Inc.*, 163 F.3d 265 (5th Cir. 1998)

Plaintiffs who had been abducted from a Kmart parking lot in Jackson, Mississippi and criminally violated , filed suit against Kmart for failing to provide adequate security. One important issue was the introduction of allegedly inadmissable hearsay evidence regarding a warning from Kmart's previous security company that Kmart should not discontinue security services in the parking lot from which the plaintiffs were abducted because of crime in the area. Kmart did not object to this evidence at trial, but argued on appeal that it was inappropriate and misled the jury regarding Kmart's duties. The court of appeals reiterated its holding in *Peaches Entertainment v Entertainment Repertiore*, 62 F.3d 690, 694 (5th Cir. 1995): "'[U]nobjected-to hearsay maybe considered by the trier of fact for such probative value as it may have.'" Because of the lack of any objection, the court's review was limited to plain error, and it held that the hearsay fell "fall short of satisfying the standard for plain error reversal."

The court of appeals was more willing to find plain error with respect to plaintiffs' counsel's inflammatory and plainly improper closing argument. Apparently, plaintiffs' counsel emphasized Kmart's status as an out of state corporation, invoked the "golden rule," and made other "blatantly prejudicial" comments. Although counsel are allowed "reasonable latitude" in making closing arguments, the argument in this case apparently exceeded those boundaries. In this regard, the court of appeals noted that a closing argument must be reviewed in context of the entire trial, considering the court's rulings on objections, the jury charge, and any corrective measures employed by the district court.

Although the court expressed its "extreme reluctance" to upset the judgment on grounds that Kmart had fail to preserve, it felt compelled to do so in order to serve the interests of justice. Plaintiffs' counsel had apparently made repeated references to himself as a "little old lawyer down here in Mississippi" who was having "to take on national corporation...." He argued that Kmart was geographically and practically removed from the people of

Mississippi who were affected by its security decisions. Although the district court sustained Kmart's objections to his comments about the company's failure to bring representatives from the national headquarters to testify about Kmart's security policies, he continued this line of attack throughout the argument.

Plaintiff's counsel also made other very prejudicial statements during his argument which were not related to the facts, but instead to the atrocities visited upon the plaintiffs by the criminal defendants. The court concluded that "[s]uch statements could serve no purpose other than to inflame the passions of the jury to return large awards." Counsel went even further and invited the members of the jury to imagine themselves in the place of the plaintiffs in deciding damages. The court of appeals found these comments, considered collectively, to have inflamed and biased the jury's findings with respect to damages. Although the court of appeals was not willing say that the damages were excessive, it noted that "at the very least, they are at the high end of the spectrum for such damages. This large verdict, when accompanied by counsel's improper arguments, further indicates that the jury was influenced by the prejudicial statements." The proper appellate remedy for a passion and prejudice verdict is a new trial — not remittitur. However, the new trial in this case need only be on damages because the facts relating to damages were sufficiently distinct and independent of the liability questions.

**Personal Jurisdiction/Minimum Contacts**

*Latshaw v. Johnston*, 167 F.3d 208 (5th Cir. 1999)

The court of appeals reversed a dismissal for lack of personal jurisdiction upon its conclusion that the plaintiffs had established a *prima facie* showing a personal jurisdiction. At issue were the claims by a Texas plaintiff against a Louisiana resident and Louisiana corporation for breach of an alleged oral partnership/joint venture agreement. The parties' business relationship was longstanding, but was not memorialized in many written documents.

The court of appeals reviewed the district court's ruling on the jurisdictional challenge *de novo*, accepting as true the uncontroverted allegations in the complaint and resolving factual conflicts raised by the affidavits in favor of the plaintiff. Because there was no evidentiary hearing, the plaintiff could satisfy its jurisdictional burden by showing a *prima facie* case of personal jurisdiction.

Applying these standards to the facts of the case, the court of appeals concluded that the evidence was sufficient to establish a *prima facie* case of jurisdiction. In doing so, it rejected application of *Hydrokinetics, Inc. v. Alaska Mech., Inc.*, 700 F.2d 1026 (5th Cir. 1983), because that case involved a "on-shot purchaser of Texas goods whose only connection with the state grew out of a Texas manufacturer's marketing efforts." By contrast, in the case presented, the parties—one of whom was a Texas resident—entered into ongoing business relationship with multiple trips and correspondence to Texas in furtherance of that relationship. Casting the facts in light most favorable to the plaintiff, the court of appeals found that the Louisiana defendant had "purposely availed himself of the benefits and protections of doing business in Texas and could reasonably anticipate being held into court there."

**Removal/Removal Procedure**

*Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. __, No. 97-1909 (Apr. 5, 1999), *rev'g*, 125 F.2d 1396 (11th Cir. 1997)

Resolving a circuit split, the United States Supreme court eliminated a long-standing removal trap in holding that the "courtesy" copy of a initial pleading before a defendant is properly served and joined to as action is insufficient to trigger the 30-day removal deadline. At issue was the correct statutory interpretation of the term "receipt through service or otherwise" in the removal statute, 28 U.S.C. § 1446(b). That provision requires the removing party to effect the removal within 30 days of the receipt "through service or otherwise" of the initial pleading or paper that provides the basis of federal and removal jurisdiction. The facts presented a classic presentation of the problem in that the defendant removed within 30 days of actual service, but 44 days after the original receipt of a fax courtesy copy of the pleading. The Court reviewed the history of the service requirement and held that "[u]nless a named defendant agrees to waive service, the summons continues to function as the *sine qua non* directing an individual or entity to participate in a civil action or forego procedural or substantive rights." Because there was no basis for exercising jurisdiction over the defendant before it was made a party through service, it was improper to commence any deadlines before that point.

The Court noted that one of the purposes of the amendment which added the "or otherwise" language was to address variations in state practice and to make uniform the removal period throughout the fifty states. For example, at the time, New York allowed a defendant to be joined to the lawsuit by a virtue of a summons without any pleading attached and even before suit was filed. Thus, at the time of service, the defendant would not know whether the case was removable, and apparently Congress concluded that it was unfair to start 30-day deadline until that defendant had actually received a copy of the initial pleading.

The Court also pointed to Rule 81(c), which ties the answer date after removal to the same "receipt through service or otherwise" of the initial pleading. This rule has been "sensibly" interpreted to give the defendant at last twenty days after service. The Court concluded that it would be anomalous to treat identical language differently. Chief Justice Rehnquist, joined by Justices Scalia and Thomas, dissented, criticizing the majority's willingness to look behind what he believed to be the plain language of the statute.

Please note: The Fifth Circuit has granted rehearing en banc in two of the cases reported in prior updates: *Bartley v. Euclid, Inc.*, 158 F.3d 261 (5th Cir. 1998) (*See Appellate Advocate Vol..XII, No.2* (Feb. 1999)); and *Valley v. Rapides Parish Sch. Bd.*, 145 F.3d 329 (5th Cir. 1998) (*See Appellate Advocate Vol. XII, No. 1* (Nov. 1998)).

*Quotable Quotes*

"Suspicion linked to suspicion produces only more suspicion...."

*Browning-Ferris Indus. v. Reyna,*
865 S.W.2d 925, 927 (Tex. 1993).

# Texas Criminal Appellate Update

**by Alan Curry**
Assistant District Attorney, Houston

**COURT OF CRIMINAL APPEALS**

**A defendant does not necessarily waive error for the purposes of appeal when he states, "Okay," in response to trial court's adverse ruling.**

*Tucker v. State*, No. 1166-98 (Tex. Crim. App., Mar. 24, 1999) (not yet reported).

A defendant did not waive error for the purposes of appeal with regard to the trial court's failure to allow him to give an opening statement when, after the trial court denied him that right, the defendant's trial attorney responded, "Okay." **Cf. Dunn v. State**, 819 S.W.2d 510 (Tex. Crim. App. 1991) (case in which defendant's trial attorney waived error by responding, "Thank you," to trial court's ruling that he could not give opening statement at that particular time, but could do so just before the defense's case-on-chief).

**A defendant cannot raise a collateral estoppel claim by way of a pre-trial application for a writ of habeas corpus if his claim does not involve a constitutional double jeopardy claim.**

**Headrick v. State**, No. 1082-97 (Tex. Crim. App., Mar. 10, 1999) (not yet reported).

A defendant cannot raise a claim of collateral estoppel in a pre-trial application for a writ of habeas corpus if the claim does not allege a constitutional double jeopardy violation. In this case, the defendant claimed, by way of a pre-trial application for a writ of habeas corpus, that the trial court should have granted his motion to suppress in a prosecution for driving while intoxicated because an administrative law judge had previously found that the Texas Department of Public Safety had failed to prove that an arresting officer did not have probable cause to stop the defendant. The defendant had an adequate remedy at law and, therefore, could not pursue the trial court's denial of his motion to suppress by way of a pre-trial application for a writ of habeas corpus—the defendant could appeal the trial court's denial of his motion to suppress by way of a direct appeal after he had been convicted. **Cf. Ex parte Robinson**, 641 S.W.2d 552 (Tex. Crim. App. 1982).

**A defendant's speedy trial claim is reviewed under botb the abuse of discretion and *de novo* standards of review.**

*State v. Munoz*, No. 65-98 (Tex. Crim. App., Feb. 17, 1999) (not yet reported).

When reviewing a defendant's constitutional speedy trial claim, an appellate court should apply a bifurcated

standard of review, meaning an abuse of discretion standard of review for the factual components, and a *de novo* standard of review for the legal components of the trial court's decision.

**A harm analysis can he applied under the new Texas Rules of Appellate Procedure, even though those rules were not in effect at time of the perfection of the defendant's appeal, and even though the defendant may have obtained a reversal under the old Texas Rules of Apppellate Procedure.**

*Fowler v. State*, No. 75-98 (Tex. Crim. App., Mar. 31, 1999) (not yet reported).

The defendant's rights were not violated by an application the harm analysis set forth in Rule 44.2 of Texas Rules of Appellate Procedure, in effect at the time of the disposition of the defendant's appeal, rather than an application of the harm analysis set forth in Rule 81(b)(2) of the old Texas Rules of Appellate Procedure, which were in effect at the beginning of the defendant's appeal, and which may have entitled the defendant to relief. The application of Rule 44.2 does not represent a violation of the Texas Constitution's prohibition of retroactive laws.

## COURTS OF APPEALS

**A defendant who enters a plea in accordance with a plea bargain cannot appeal a jurisdictional defect if he only files a "general" notice of** appeal.

*Trollinger v. State*, No. 5-98-264-CR (Tex. App.—Dallas, Feb. 11, 1999) (not yet reported).

A defendant who enters a plea of guilty or no contest in accordance with a plea bargain with the State is not entitled to appeal even jurisdictional defects if he does not state in his notice of appeal that he is appealing a jurisdictional defect.

**The State cannot appeal the trial court's ruling excluding the crucial piece of the State's evidence if the trial court did not exclude that evidence on the ground that it was illegally ohtained.**

*State v. Medrano*, No. 8-970494-CR (Tex. App.—El Paso, Feb. 4, 1999) (not yet reported).

The State cannot appeal the trial court's ruling excluding the crucial piece of the State's evidence as a ruling effectively terminating the prosecution under Article 44.01(a)(1) of the Texas Code of Criminal Procedure because the trial court's ruling does not affect the indictment against the defendant. Furthermore, even though the trial court relied upon constitutional bases for the exclusion of the crucial piece of the State's evidence, the trial court did not hold that the evidence was illegally obtained. Therefore, the State could not appeal the trial court's ruling as one suppressing evidence under Article 44.01(a)(5) of the Texas Code of Criminal Procedure. *See State v. Roberts*, 940 S.W.2d 655 (Tex. Crim. App. 1996).

**A trial court cannot grant a defendant a new trial if he did not sign an order granting the defendant a new trial.**

*Sanchez v. State*, No. 13-96-459-CR (Tex. App.—Corpus Christi, Jan. 28, 1999) (not yet reported).

When the trial judge did not sign any order granting the defendant's motion for new trial, and when he did not sign any order granting a post-judgment mistrial, the defendant's motion for new trial was actually overruled by operation of law. Therefore, the trial court's holding of a second trial was a nullity.

**A trial court cannot impose conditions on an appeal bond that are not related to ensuring that the defendant will remain available.**

*Cuellar v. State*, No. 1-98-790-CR (Tex. App.—Houston [1st Dist.], Jan. 28, 1999) (not yet reported).

The trial judge abused her discretion in ordering the defendant to pay $160,000.00 into the court registry as restitution as a condition of his appeal bond. It was also an abuse of discretion for the trial court to impose the appeal bond condition that the defendant post on his web site and other advertising the fact that he had been convicted when there was no evidence that the defendant used the Internet or any other advertising to engage in the conduct for which the jury had found him guilty.

**The failure to obtain a written jury waiver is non-constitutional error and can be harmless error.**

*Salinas v. State*, No. 13-97-10-CR (Tex. App.—Corpus Christi, Feb. 18, 1999) (not yet reported).

The failure to obtain a written jury waiver is non-constitutional error subject to a harm analysis under Rule 44.2(b) of the Texas Rules of Appellate Procedure. This case was on remand from the Texas

Court of Criminal Appeals, which ordered the court of appeals to re-examine the case in light of *Meek v. State*, 851 S.W.2d 868 (Tex. Crim. App. 1993) and *Cain v. State*, 947 S.W.2d 262 (Tex. Crim. App. 1997). *But cf. Yarborough v. State*, 981 S.W.2d 846 (Tex. App.—Houston [1st Dist.] 1998, no pet.); *Lowery v. State*, 974 S.W.2d 936 (Tex. App.—Dallas 1998, no pet.).

*Quotable Quotes*

"The elaborate argument ... does not need an elaborate answer."

*United States v. Wurzbach*,
280 U.S. 396, 399 (1930) (Holmes, J.).

# *Federal Criminal White Collar Appellate Update*

**by Joel M. Androphy**
Berg Androphy & Wilson, Houston

**Sixth Circuit clarifies its standard of review of sentencing determinations concerning obstruction of justice under U.S.S.G. §3C1.1.**

*United States v. McDonald*, 165 F.3d 1032 (6th Cir. 1999).

The Court noted that in prior opinions, three different standards of review have been articulated that apply in the application of §3C1.1, *United States v. Sanchez*, 928 F.2d 1450, 1458 (6th Cir. 1991) (de novo standard of review); *United States v. Bennett*, 975 F.2d 305, 308 (6th Cir. 1992) (abuse of discretion standard); *United States v. Smart*, 41 F.3d 263, 264 n.1 (6th Cir. 1994) (factual findings concerning the Guidelines are reviewed under the clearly erroneous standard while legal conclusions concerning the Guidelines are reviewed de novo). The Court has now promulgated a three-step test. First, findings of fact are reviewed under the clearly erroneous standard. Second, the trial court's determination of whether the facts amount to obstruction of justice is reviewed de novo. Third, once obstruction of justice has been found and the defendant's sentence has been enhanced, such enhancement is reviewed de novo.

**Court vacates district court's finding that a claimant must forfeit over $270,000 for failure to comply with reporting requirements and making false statements to custom officials.**

***United States v. $273, 969.04*, 164 F.3d 462 (9tb Cir. 1999) (per curiam).**

While at the airport, the claimant was searched by customs officers, who seized undeclared cash and certain pieces of undeclared jewelry. After pleading guilty to making a false statement to customs officials, the claimant argued in a forfeiture proceeding that forfeiture of the undeclared cash and jewelry was prohibited by the double jeopardy and excessive fines clauses. The government's motion for summary judgment was granted and on appeal, the Ninth Circuit vacated and remanded for a decision whether the seizure of the cash was an eighth amendment violation due to a gross disparity to the seriousness of the offense.

**Multiplicitous indictment found where defendants were charged with both domestic and international money laundering which was hased on the same transfer of funds.**

***United States v. Zvi*, 168 F.3d 49 (2d Cir. 1999).**

Defendants were charged twice for the same money laundering transfers of funds. The indictment charged domestic money laundering (18 U.S.C. §1956(a)(1)(B)(i)) and international money laundering (§1956(a)(2)(B)(i)). On appeal, the defendants claimed that being charged and convicted for both types of money laundering based on the same funds transfers was multiplicitous. The Court noted that whether there is multiplicity depends on whether the provisions defining the offenses clearly authorize punishment for a violation, whether the charged offenses are sufficiently distinguishable so as to reasonably infer that Congress intended to allow multiple punishments, and if so, whether a contrary legislative intent is evidenced in the legislative history. Here, the only element not common to both counts was the fact that §1956(a)(2)(B)(i) also required that the transfer be international in scope. The international transfers "are simply a species of financial transactions," and as such, the charges are multiplicitous.

**Claim of ownership in property to avoid a civil forfeiture is not admissible in a criminal prosecution because it would violate the defendant's Fifth Amendment rights.**

***United States v. Scrivner*, 167 F.3d 525 (9tb Cir. 1999).**

The defendant was jailed on drug charges and at the same time, authorities seized several items from his home including a machine gun, silencer, and other items. Civil forfeiture proceedings were initiated and the defendant had twenty one days to assert ownership in the property or face forfeiture. The defendant asserted in an affidavit his Fifth Amendment right and claimed a possessory interest in some or all of the items seized. The affidavit was admitted in the defendant's later trial for illegally possessing a machine gun. The prior affidavit was admitted to counter the defendant's defense that he did not own the weapons. The Ninth Circuit held that admission of the affidavit violated the defendant's right against self-compelled incrimination.

**Tbe fees of a bankruptcy trustee are not includible in calculating the loss stemming from a bankruptcy fraud.**

***United States v. Izydore*, 167 F.3d 213 (5tb Cir. 1999).**

"Loss" is defined as "the value of the money, property, or services unlawfully taken." The fees of the trustee are consequential damages which, generally, are not part of the loss calculation. While consequential damages are to be considered in certain instances, the fact that such damages are allowed only in specific fraud cases "is strong evidence that consequential damages were omitted from the general loss definition by design rather than mistake."

**Restitution ordered to be made to the FDIC in a criminal case was correctly converted to a civil judgment according to tbe Federal Debt Collection Procedures Act.**

***United States v. Rostoff*, 164 F.3d 63 (1st Cir. 1999).**

The defendants–convicted of defrauding a bank and causing it to fail–were ordered to pay up to $650,000 in restitution pursuant to the Victim and Witness Protection Act. At the conclusion of the defendant's supervised release, only $8,000 had been paid by each defendant, at which time proceedings were begun to collect the balance pursuant to the FDCPA. The trial court entered civil judgments and the defendants appealed challenging the government's use of the FDCPA to collect under a restitution order in favor of the FDIC. The defendants argued that orginally, the restitution order was in favor of a private party and that "debt" under the FDCPA excludes such payments. The court rejected this argument noting that the victim in the restitution order was the FDIC and therefore, the FDCPA was properly used.

Please Join Us For The

# Special Annual Membership Meeting

5:00 p.m., Thursday, October 7, 1999
(At the conclusion of the first day of the seminar)
Advanced Civil Appellate Practice Course 1999
Doubletree Hotel
Austin, Texas

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