

NEW APPELLATE RULES UPDATE

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STATE BAR OF TEXAS
14TH ANNUAL LITIGATION UPDATE INSTITUTE
January 16-17, 1998
Plaza Hotel, San Antonio, Texas

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Member, State Bar of Texas' Ad Hoc Committee to Study Bar-Section Relations (1997)
Member, State Bar of Texas' Ad Hoc Committee to Study PDP Finances (1992-93)
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Tx. Bd. of Legal Specialization, Family Law Advisory Commission (1987-1993)
Appointed Member, Supreme Court Task Force on Jury Charges (1992-93)
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Past-President, Texas Academy of Family Law Specialists (1990-91)
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Editor - Texas Academy of Family Law Specialists' Family Law Forum (1988-89)
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Listed in the BEST LAWYERS IN AMERICA (1987-1997)
State Bar of Texas *Certificate of Merit*, June 1995, June 1996, & June 1997
State Bar of Texas *Gene Cavin Award for Excellence in Continuing Legal Education* 1996

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Course Director, State Bar of Texas 1991 Advanced Evidence and Discovery Course
Course Director, State Bar of Texas 1987 Advanced Family Law Course

Course Director, Texas Academy of Family Law Specialists First Annual Trial Institute, Las Vegas, Nevada (1987)

CLE Planning Committees

State Bar's Marriage Dissolution Course 1982, 1986, 1987, 1993, 1995
State Bar's Advanced Family Law Course 1986-1995
State Bar's Family Law: For Legal Assistants and Attorneys, 1987, 1990
State Bar's Advanced Evidence and Discovery Course 1988, 1990, 1991, 1993
State Bar's Advanced Appellate Course 1991, 1992, 1994
Texas Academy of Family Law Specialists Trial Institute 1987, 1988, 1989

Authored

Asserting Claims for Intentionally or Recklessly Causing Severe Emotional Distress, in Connection With a Divorce, 25 ST. MARY'S L.J. 1253 (1994), republished in the AMERICAN JOURNAL OF FAMILY LAW (Fall 1994) and Texas Family Law Service *NewsAlert* (Oct. & Dec., 1994)

Author of Vol. 6 of McDonald Texas Civil Practice, on Texas Civil Appellate Practice, published by Bancroft-Whitney Co. (1992) (1125 pages)

Chapter 21 on *Business Interests* in Bancroft-Whitney's TEXAS FAMILY LAW SERVICE (Speer's 6th ed.)

13 ST. MARY'S L.J. 477, *Fitting a Round Peg Into A Square Hole: Section 3.63, Texas Family Code, and the Marriage that Crosses States Lines*-1982

39 BAY. L. REV. 909, *Characterization of Marital Property*-1988 (co-authored)

SELECTED CLE ACTIVITY

State Bar's Advanced Family Law Course

Intra and Inter Family Transactions (1983); Handling the Appeal: Procedures and Pitfalls (1984); Methods and Tools of Discovery (1985); Trusts and Family Law (1986); The Family Law Case in the Appellate Court (1987); Post-Divorce Division of Property (1988); Marital Agreements: Enforcement and Defense (1989); Marital Liabilities (1990); Rules of Procedure (1991); Valuation Overview (1992); Deposition Use in Trial: Cassette Tapes, Video, Audio, Reading and Editing (1993); The Great Debate: Dividing Goodwill on Divorce (1994); Characterization (1995); Ordinary Reimbursement and Creative Theories of Reimbursement--Who Has the Burden of Proof of Offsets (1996)

State Bar's Marriage Dissolution Course

Property Problems Created by Crossing State Lines (1982); Child Snatching and Interfering with Possession: Remedies (1986); Family Law and the Family Business: Proprietorships, Partnerships and Corporations (1987); Appellate Practice (Family Law) (1990); Discovery in Custody and Property Cases (1991); Discovery (1993)

SMU's Specialists' Symposium on Family Law

Practitioner's Guide to Interstate Custody Disputes (1984); Dealing with the Family Home on Divorce (1986); Conflict of Law: Full Faith and Credit, Comity and Judgments (1988)

UT School of Law

Trusts in Texas Law: What Are the Community Rights in Separately Created Trusts? (1985); Partnerships and Family Law (1986); Proving Up Separate and Community Property Claims Through Tracing (1987)

State Bar's Advanced Evidence & Discovery Course

Effective Approaches to Mandamus (1988); Mandamus (1989); Preservation of Privileges, Exemptions and Objections (1990); Business and Public Records (1993); Common Evidence Problems (1994)

State Bar's Advanced Appellate Course

Handling the Appeal from a Bench Trial in a Civil Case (1989); Appeal of Non-Jury Trials (1990); Successful Challenges to Legal/Factual Sufficiency (1991); In the Sup. Ct.: Reversing the Court of Appeals (1992); Brief Writing: Creatively Crafting for the Reader (1993); Interlocutory and Accelerated Appeals (1994); Motions for Rehearing (1995); Technology and the Courtroom of the Future (1996)

South Texas College of Law

Interstate Jurisdictional Problems in Family Law Matters (1986-87); Drafting of Decrees and Agreements Incident to Divorce (1988); UCCJA, PKPA, Child Abduction: What Does It All Mean? (1990); Election of Remedies, Domestic Torts Course (1989); The Scope and Method of Mandamus Problems (1989); The New Texas Pattern Jury Charges (Vol. 3) (Products, Premises, Professional Malpractice and Damages (1990)

University of Houston Law Center

Valuation of Closely-Held Businesses and Professional Practices (1988-89); Experts, Opinion Evidence, and Privileges (1990)

State Bar's Ultimate Trial Notebook

Objections (1991); Evidentiary Predicates and Objections (1992-93)

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NEW APPELLATE RULES

by

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I. INTRODUCTION. This article discusses the new Texas Rules of Appellate Procedure (new TRAPs), which became effective on September 1, 1997. On August 15, 1997, the Texas Supreme Court and the Texas Court of Criminal Appeals issued transitional orders governing appeals that are in process when the new TRAPs became effective. A copy of those Orders is included in Appendix A.

II. BACKGROUND.

A. Appellate Section Subcommittee The original drafting of the new TRAPs was performed by two combined committees. For some years, Retired Chief Justice Clarence Guittard of the Dallas Court of Appeals chaired the Appellate Rules Committee of the Council of the Appellate Practice and Advocacy Section of the State Bar of Texas. The committee was concerned with proposing changes to the Texas Rules of Appellate Procedure. The committee consisted of various court of appeals justices and appellate practitioners, and committee expenses were underwritten for some years by the Appellate Practice and Advocacy Section. When the Supreme Court Advisory Committee [SCAC] was reconstituted in 1994, Professor William Dorsaneo, of SMU School of Law, was appointed as chair of the SCAC's subcommittee on appellate rules. Professor Dorsaneo's subcommittee and Chief Justice Guittard's committee worked in tandem to bring forward all the work done by Guittard's committee into the SCAC product. Justice Guittard published an overview of the rules-creation process: Guittard, *A Review of Court-Managed Procedural Reform in Texas*, 60 TEX. B.J. 404 (May, 1997). (Chief Justice Guittard brought a unique perspective to the drafting process. Chief Justice Guittard has been involved with the SCAC since its first meeting in 1940, which he attended as a briefing attorney for the Texas Supreme Court.)

B. SCAC Work and Court Approval The work of the SCAC Appellate Rules Subcommittee was presented to the SCAC on a number of occasions, and the SCAC worked through the proposals to arrive at a consensus or, failing that, a vote on final language. Judge Sam Houston Clinton from the Texas Court of Criminal Appeals participated in the SCAC process, to be sure that rule changes would be acceptable to the Court of Criminal Appeals. The final version of the TRAPs was reported by the SCAC to the Supreme Court on March 21, 1995. The Supreme Court reviewed the proposed new TRAPs, made the changes it desired, and forwarded the package to legal writing expert Bryan A. Garner of Dallas. Mr. Garner and his associates modernized the language of the TRAPs, using principles

described in his booklet, *Guidelines for Drafting and Editing Court Rules*, and returned the new TRAPs to the Supreme Court. After some adjustments, the Supreme Court delivered the new TRAPs to the Court of Criminal Appeals. Once the Supreme Court and Court of Criminal Appeals finalized the language, the new TRAPs were promulgated on March 20, 1997, and were published in the May 1997 Texas Bar Journal. The Supreme Court took comments after the publication, made edits, and on August 16, 1997, released the final version of the new TRAPs.

C. Where to Get the TRAPs The new TRAPs can be viewed online or downloaded from the Office of Court Administration's World Wide Web site: <<http://www.courts.state.tx.us/apprules.html>>. The March 20, 1997 (i.e., next-to-last) version of the TRAPs is contained in the *Guide to the New Texas Rules of Appellate Procedure*, authored by the Appellate Section and published by the State Bar of Texas. A copy of this book can be purchased from the State Bar of Texas by calling 1-800-204-2222, ext. 1141. The cost is \$26.00, plus \$4.00 handling fee, plus sales tax. The State Bar has issued a pocket part with changes that occurred with the final issuance of the new TRAPs. West Group has published the new TRAPs in a Special Supplement to Texas Rules of Court: State (1997). Check the Appellate Section's web site: <<http://www.txdirect.net/users/richard/news.htm>> for the latest information on the TRAPs.

D. Structure of This CLE Article Paragraph III of this Article is the outline for the oral presentation of this article. Beginning with Paragraph IV, this Article follows the format of the Author's book on Texas Appellate Procedure, 6 MCDONALD'S TEXAS CIVIL APPELLATE PRACTICE (Bancroft-Whitney 1992). That is, rule changes are correlated with chapters in Volume 6. Chapter names correlate to Section titles in this CLE Article. Where no important changes were made that would impact a chapter of the book, there is no equivalent section heading.

III. TEN BIG CHANGES (Thumbnail Sketch)**A. The List**

- Perfecting Appeal
- Docketing Statement
- The Record on Appeal
- Briefs in the Court of Appeals
- Motions
- Writ of Error Appeal/Restricted Appeal
- Original Proceedings
- Appeals to the Supreme Court
- Sanctions
- Summary Judgments
- Appeal of Special Appearance

B. The Details

1. Perfecting Appeal (TRAP 25) Who? What? When? Where?

- Who? Under TRAP 25.1(c), any party who wishes to alter the trial court's judgment or appealable interlocutory order must perfect an appeal. Appellee can not "piggy-back" on appellant's perfection.
- What? Now we perfect appeal by filing a notice of appeal. Certain administrative information is required to be in the notice.
- When? Date of judgment plus thirty (30) days. Judgment plus ninety (90) days if someone timely files a: i) motion for new trial; ii) motion to modify; iii) motion to reinstate; iv) request for findings of fact and conclusions of law (where appropriate). Accelerated appeal = Order plus twenty (20) days. Restricted appeal = Judgment plus six (6) months.
- Where? File notice of appeal in trial court; copy to court of appeals; copy to all parties; if accidentally filed in court of appeals, deemed filed in trial court.

2. Docketing Statement (TRAP 32)

- appellant must file docketing statement at time the notice of appeal is filed;
- administrative, not jurisdictional;
- information needed to help manage appeal in civil case:
 - identify appellant's counsel;
 - date of perfection;
 - identity of trial court;
 - date of judgment and events extending time to perfection;
 - other parties and trial counsel;
 - nature of case;
 - name of court reporter;
 - interlocutory or ancillary relief;
 - supersedeas.

3. The Appellate Record (TRAP 34)

- clerk's record; and ii) reporter's record;
- request at or before time for perfecting appeal;
- record due either 60 or 120 days after judgment is signed, or 10 after perfecting an interlocutory appeal, or 30 days after perfecting a restricted appeal;
- responsibility of trial court clerk and court reporter;
- now, must pay for both clerk's record and reporter's record in advance;
- partial reporter's record:
 - Statement of points;
 - Presumption, overrules *Englander Co. v. Kennedy* (except guilt/innocence in criminal case);
- can supplement by letter request without motion for leave.

4. Briefs in Court of Appeals (TRAP 38)

- Appellant's brief due record plus 30 days; appellant's brief plus 30; appellee's brief plus 20.
- Issues or points presented; statement of facts; summary of argument; appendix.
- Appendix: judgment; charge and verdict or findings of fact and conclusions of law; controlling statute; text of contract; plus optional contents like court opinions, pleadings, excerpts of testimony, etc.
- Page limits: 50, 50, 25.
- Multiple appellant's briefs; multiple appellee's briefs; 90-page aggregate total per party.
- 13-point proportional font (or larger); front and back sides; 1 inch margins on all edges.
- Appellee's brief includes statement of case, statement of issues, and statement of facts, only if appellee is unhappy with appellant's versions. Appellee's appendix need not repeat what's in appellant's appendix.

5. Motions (TRAP 10)

- Same physical requirements as briefs.
- Certificate of conference (TRAP 10.1(a)(5)).
- Verification not required unless:
 - not in record;
 - not in court's official knowledge;
 - not in personal knowledge of attorney signing motion.

6. Restricted Appeal (TRAP 30)

- Replaced writ of error to court of appeals.
- Restricted to default judgment where appellant did not participate in the hearing that resulted in the judgment.
- Cannot have filed timely post-judgment motion or request for findings of fact and conclusions of law.
- Can perfect up to six (6) months after judgment.
- In other respects like an appeal.

7. Original Proceedings (TRAP 52)

- No motion for leave to file.
- In re [relator], not relator vs. respondent.
- Page limits 50 plus 50 plus 8 (15 pages in Supreme Court).
- Appendix.
- Certificate or sworn copy of order.
- Certificate of sworn copy of every important document.
- Relevant testimony and exhibits.
- Text of rules.
- (In habeas corpus) proof of incarceration.
- In Supreme Court, copy of court of appeals' order or opinion.
- Optional additional items.

- Response not required and court can't grant relief without receiving response or at least requesting a response.
- Oral argument not required.
- Sanctions TRAP 52.10: "just sanctions"; against party or attorney "not acting in good faith," which means; groundless/for delay/grossly misstating or omitting.

- Burden on respondent to come up with summary judgment evidence.
- May affect the number of depositions, and length, and what you cover.
- Rule set in concrete; "comments" in flux.

8. Appeals to Supreme Court (TRAP 53)

- Motion for rehearing in court of appeals no longer precondition.
- Application for writ of error is gone.
- Now use petition for review.
- Filed in Supreme Court (not court of appeals like application for writ of error).
- Due 45 days after court of appeals' judgment (or overruling last timely m. reh.).
- 15 pages max.
- Statement of jurisdiction (w/o argument).
- Issues presented (or points presented).
- Statement of facts.
- Summary of argument.
- Argument (with emphasis on factors for granting review): dissent; conflict; important to jurisprudence of state; court of appeals decided important question of state law that should be resolved by Supreme Court.
- Not every issue or point needs to be addressed in Petition.
- Appendix (like in court of appeals, but add court of appeals' opinion and judgment).
- No record (unless Supreme Court requests it).
- Not obliged to file Response (won't grant petition without having a Response or requesting a Response).
- Response due petition plus 30 days.
- Reply, Response due plus 15 days--8 pages.
- Briefs (50, 50, 25) (due date of notice plus 30 days; response = petitioner's brief plus 20; reply = respondent's brief plus 15).

9. Sanctions on Appeal (TRAPs 45 and 62)

- Old rule (delay and without sufficient cause; court of appeals: 10% judgment or 10 times court costs);
- New rule (frivolous; any amount; just damages; notice and opportunity to respond).
- Consider only what's in the record.
- On motion or sua sponte (after notice).
- Available in original proceeding as "just sanctions."

10. Summary Judgments (TRCP 166a(i))

- Effective September 1, 1997.
- "No evidence" motion.
- Movant targets specific aspect of opponent's case.

11. Appeal of Special Appearance Under a new statute enacted in the 75th Legislature, the denial of a special appearance is now subject to interlocutory appeal, except in family law cases.

As a general rule, you can appeal in Texas only from a final judgment or order that disposes of the entire case. However, TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (Vernon Supp. 1998) lists instances where you can take an appeal from an interlocutory order. The list of appealable interlocutory orders includes an order that: (1) appoints a receiver or trustee; (2) overrules a motion to vacate an order appointing a receiver or trustee; (3) certifies or refuses to certify a class under TRCP 42; (4) grants or refuses a temporary injunction or motion to dissolve a temporary injunction; (5) denies an individual's motion for summary judgment based upon governmental immunity; (6) denies a motion for summary judgment filed by a media defendant and based upon freedom of speech or press; (7) grants or denies a governmental unit's plea to the jurisdiction. *Id.*

However, the 75th Legislature added two new subsections to this Code provision, both effective June 20, 1997. New Section 51.014(a)(7) permits an interlocutory appeal from an order that "grants or denies the special appearance of a defendant under Rule 120a, Texas Rules of Civil Procedure, except in a suit brought under the Family Code." New Section 541.014(b) provides that "[a]n interlocutory appeal under Subsection (a) shall have the effect of staying the commencement of a trial in the trial court pending resolution of the appeal." Acts 1997, 75th Legislature, ch. 1296, § 1.

Having ability to appeal from a ruling on a special appearance is a significant change in Texas law. Causing the appeal of an interlocutory order to suspend trial of the main case is also a significant change in Texas law. The Supreme Court had already sanctioned mandamus review for the denial of a special appearance, in some circumstances. *See CSR Ltd. v. Link*, 925 S.W.2d 591 (Tex. 1996). But having the right to appeal should permit a broader range of challenges to be raised. Plus, appellate review is an entitlement while mandamus review is only by leave of the appellate court.

IV. REPRESENTATION BY COUNSEL

A. Scope of Trial Lawyer's Employment Texas Disciplinary Rule of Professional Conduct ["TDRPC"] 1.02(b) permits a lawyer to limit the scope, objectives and general methods of the representation if the client consents after consultation. Comment 6 to TDRPC 1.02 says that "Unless the representation is terminated as provided in Rule 1.15, a lawyer should carry through to conclusion all matters undertaken for a client." Comment 6 continues:

"For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility of the matter." Note that this comment typically would not apply to an appellee, because the judgment presumably would not be adverse to an appellee. The ethics rules do not prescribe what duties the trial lawyer has regarding an appeal where the client won in the trial court and will therefore be an appellee, but has not employed the lawyer to handle the appeal.

B. Lead Counsel New TRAP 6.1(a) defines "lead counsel" for the appellant as the attorney whose signature first appears on the notice of appeal. Lead counsel for a party other than the appellant is the attorney whose signature first appears on the first document filed on behalf of that party in the appellate court. New TRAP 6.1(b). Lead counsel can also be designated by filing a notice containing the lead counsel's name, address, telephone number, fax number and State Bar Id. No. New TRAP 6.1(c). If a new lead counsel is being designated, the notice of new lead counsel must be signed by the new lead counsel and either the client or old lead counsel. New TRAP 6.1(c).

C. Where to Send Notices. The SCAC faced a difficulty in wanting to prescribe by new TRAP 6 where notices would be sent to a party who had never made an appearance in an appeal. It was believed that notices should go to that party's attorney in charge in the trial court, since that attorney would be in a position to explain the notices to the client and advise the client regarding participating in the appeal. Also, in contingent fee cases, the lawyer might have an interest in the judgment, although not being a formal party to the judgment. However, such a procedure puts a duty on the trial counsel to forward information regarding the appeal to the client, and the failure to forward notices to the client could give rise to a complaint by the client against the attorney.

1. Send Notices and Copies to Lead Counsel Under new TRAP 6.3, all communications from the court or other counsel to a party on appeal must be sent to that party's lead counsel on appeal, if one has appeared.

2. Where No Attorney Has Appeared on Appeal Where a party has no lead counsel on appeal, notices must be sent to the party's lead counsel in the trial court. New TRAP 6.3(b). (See TRCP 8 as to attorney in charge in the trial court.) This would include the notice of filing of notice of appeal, which is to be sent by the clerk of the appellate court to the lead attorney for all parties. See new TRAP 12.1(d). The identity of lead counsel in the trial court should be reflected in the "docketing statement" filed by the appellant. See new TRAP 32.1(e).

3. Non-Representation Notice A lead counsel in the trial court who receives mailings from the appellate court or other parties, in connection with an appeal, can file a "non-representation notice" in the appellate court. New TRAP

6.4. The notice must state that the attorney is not representing the client on appeal, that future communications should be sent directly to the party, and the name, address, and telephone number of the party, and the notice must be signed by the client. An appointed lawyer in a criminal case cannot file a non-representation notice. New TRAP 6.4(b).

D. Motion to Withdraw on Appeal An attorney who has made an appearance in the appellate proceeding can seek the appellate court's permission to withdraw by filing a motion to leave to withdraw. New TRAP 6.5. The motion must contain: (i) a list of current deadlines and settings; (ii) the party's last known address and telephone number; (iii) a statement that the motion was delivered to the party; and (iv) a statement that the party was notified in writing of the right to object to the motion. New TRAP 6.5(a). The motion to withdraw must be delivered to the party, either in person or mailed to the party's last known address--by both certified and first class mail. New TRAP 6.5(b).

If withdrawal is permitted, the withdrawing attorney must immediately notify the party, in writing, of any deadlines or settings that were not already disclosed to the party, and a copy of that notice must be filed with the appellate court. New TRAP 6.5(c). If one attorney is substituting in for another attorney, the motion to withdraw need only state the new attorney's name, address, etc., and the motion must be served on the client but written notice of deadlines and settings is not required. New TRAP 6.5(d).

V. AGREEMENTS OF PARTIES AND COUNSEL Under new TRAP 6.6, in order to be enforceable, an agreement between parties or counsel, concerning an appellate court proceeding, must be in writing and signed by the parties or their counsel. Unlike TRCP 11, it is not necessary to file the agreement in order to have it enforced. Such agreements are subject to orders of the appellate court that are necessary to ensure that the case is properly presented. New TRAP 6.6.

VI. DECISION TO SEEK APPELLATE REVIEW

A. Sanctions for Frivolous Appeal The old rules governing sanctions on appeal ((old TRAP 84 (court of appeals) and old TRAP 182 (Supreme Court)) have been changed. Under the old rules, sanctions could be levied only where the appeal was taken for delay and without sufficient cause. The court of appeals could assess 10% of the judgment or ten times costs on appeal. The Supreme Court was not limited as to the amount of damages. Under new TRAPs 45 and 62, courts of appeals and the Supreme Court can award "just damages" to the party prevailing on appeal where the court determines that the appeal is "frivolous." The appellate court can consider only what appears in the record, briefs or other papers filed in the court. New TRAPs 45 & 62. The appellate court may impose sanctions upon motion of a party or sua sponte. The targeted party must have notice and a reasonable opportunity to respond. In *Jatoi v. Decker, Jones, McMackin, Hall & Bates*, 955 S.W.2d 430 (Tex. App.--Fort Worth 1997, n.p.h.), the court of appeals indicated that ordinarily

it would have imposed sanctions for taking a frivolous appeal, but that it had not given the notice required under new TRAP 45, so no sanctions were levied. Arguably new TRAP 45 did not apply since the appeal in that case had been perfected before September 1, 1997.

B. Sanctions in Original Proceedings There was no provision under the old rules for an appellate court to award sanctions in an original proceeding. Under new TRAP 52.10, the appellate court can award "just sanctions" after notice and a reasonable opportunity to respond, on a party or attorney who is not "acting in good faith." Lack of good faith is demonstrated by: (i) filing a petition that is groundless; (ii) bringing a petition solely for delay of the underlying proceeding; (iii) grossly misstating or omitting an obviously important and material fact in the petition or response; or (iv) filing an appendix that is clearly misleading because of the omission of obviously important and material evidence or documents.

VII. AMICUS BRIEFS New TRAP 11 governs amicus curiae briefs. The rule states that an amicus curiae brief must identify the person or entity on whose behalf the brief is tendered, and it must disclose the source of any fee paid or to be paid for preparing the brief. The amicus brief must comply with all briefing rules for parties and must certify that copies have been served on parties.

VIII. ETHICS, MALPRACTICE, AND CRIMINALITY IN APPELLATE PRACTICE

A. Fewer Drop-Dead Traps By and large, the new TRAPs are more forgiving of slip-ups, so that there should be fewer cases disposed of based upon errors of appellate counsel as opposed to rulings on the merits of the appeal. A driving philosophy behind the effort to revise the TRAPs was to make them more user friendly, and permit appellate courts the flexibility to reach the merits of the case notwithstanding less-than-optimal work by appellate counsel. The appellate court should now be better able to patch a flawed record, and there should be fewer instances of waiver by improper briefing.

B. Lead Attorney The problem of the lead trial attorney receiving notices relating to the appeal is a potential malpractice trap, if the trial attorney does not forward notices to the client or does not file a non-representation notice. Complications might arise where the client fails to or refuses to sign the non-representation notice, which is required before the lead trial attorney can exit the communications loop. See the discussion in Section III above.

IX. JURISDICTION OF APPELLATE COURTS

A. Plenary Power of Courts of Appeals New TRAP 19 governs plenary power of courts of appeals. A court of appeals' plenary power over its judgment expires 60 days after judgment, if no timely filed motion to extend time or motion for rehearing is then pending. If they are pending, then plenary power expires 30 days after such motions are overruled. New TRAP 19.1. The court of appeals retains

plenary power for these periods even if a petition for review is filed in the Supreme Court. After plenary power expires, a court of appeals can only correct clerical errors in its opinion or judgment, issue or recall its mandate, enforce or suspend enforcement of its judgment, alter supersedeas requirements, or order its opinion published in accordance with new TRAP 47.

B. Court of Appeals Unable to Hear Case Under new TRAP 17, if a court of appeals having jurisdiction over a matter cannot take immediate action when necessary, due to unavailability of judges, etc., the party seeking relief can go to the nearest court of appeals for relief. ("Nearest" means the appellate court, nearest to the courthouse of the trial court, that can take immediate action). New TRAP 17.2. After acting or refusing to act, the nearest court of appeals must promptly send a copy of its order, together with the original or copy of the documents filed in its court, to the original court of appeals, and the original court of appeals will conduct any further proceedings in the matter. New TRAP 17.3.

X. APPELLATE TIMETABLES

A. Court Can Suspend Deadlines. Under new TRAP 2, for good cause on motion or on its own initiative the appellate court can suspend the operation of any rule in a particular case, except the deadline for perfecting appeal. Old TRAP 2 previously gave this power to the courts only in criminal cases; new TRAP 2 gives this power in both civil appeals and criminal appeals. New TRAP 2 thus would permit the extension of deadlines and late-filing of documents in civil appeals, except for perfecting appeal. The court cannot, however, suspend any provision in the Code of Criminal Procedure. In *Jauregui Partners, Ltd. v. Grubb & Ellis Commercial Real Estate Service*, 1997 WL 781248 (Tex. App.--Corpus Christi 1997, n.w.h.), the court of appeals was asked to use new TRAP 2 to extend the deadline for the trial court to have signed an order granting a new trial. Analogizing to the use of old TRAP 2(b) in criminal cases, the court of appeals held that it could not use new TRAP 2, in a civil case, to retroactively suspend rules governing events that previously occurred at the trial level before the record was forwarded to the appellate court.

B. Computation of Time Under old TRAP 5, and under new TRAP 4.1(a), if the last day of a period for filing a document ends on a Saturday, Sunday or legal holiday, the filing deadline is extended to the next business day which is not a legal holiday. New TRAP 4.1(b) also extends the deadline when the court clerk's office where the document is to be filed is closed or inaccessible during regular hours on the last day for filing. New TRAP 4.1(b). Inaccessibility can be proved by certificate of the clerk or counsel, by a party's affidavit, or other satisfactory proof, and can be contested in like manner. New TRAP 4.1(b).

C. Filing by Mail As before, under new TRAP 9.2(b), a document can be filed with an appellate court by mailing it on or before the date it is due, and if received within ten days of the deadline it is deemed timely filed. Under new

TRAP 9.2(b)(2), conclusive proof of the date of mailing consists of (i) a legible postmark, (ii) a USPS receipt for registered or certified mail, or (iii) a USPS certificate of mailing. Other proof may be considered.

D. Deadline for Perfecting Appeal The new TRAPs continue the same deadlines for perfecting appeal.

1. **Final Judgments** Under the shorter timetable (no post-judgment motion, no request for findings), the deadline for perfecting the appeal continues to be 30 days after the judgment is signed. New TRAP 26.1. The deadline for perfecting appeal is 90 days after the judgment is signed if any party timely files a (i) motion for new trial; (ii) motion to modify the judgment; (iii) motion to reinstate after DWOP; or (iv) a request for findings and conclusions where they are required or can be properly considered by the appellate court. New TRAP 26.1(a). New TRAP 4.3(a) specifically provides that modifying the judgment during the trial court's period of plenary power restarts the appellate timetable.

2. **Accelerated Appeals** In an accelerated appeal, appeal must be perfected within 20 days after the judgment or appealable interlocutory order is signed. New TRAP 26.1(b).

3. **Restricted Appeals** In a "restricted appeal" (replacement for the appeal by writ of error after a default judgment), the appeal must be perfected within 6 months after the judgment or order is signed. New TRAP 26.1(c).

4. **Other Parties** If any party timely perfects an appeal, any other party may perfect an appeal within the applicable deadlines, or within 14 days after the first party perfects an appeal, whichever is later. New TRAP 26.1(d).

5. **Extending the Deadline** The appellate court can extend the time for perfecting appeal if the appeal is perfected within 15-days after the deadline, and within that same period, a motion is filed in the appellate court reasonably explaining the need for the extension, as required by new TRAP 10.5(b). Under new TRAP 26.3, the deadline for perfecting may be extended in all appeals, including accelerated appeals. In the recent case of *Verburgt v. Dorner*, 41 TEX. SUP. CT. J. 138 (Dec. 4, 1997) [1997 WL 746421], the Supreme Court held (5-to-4) that a party who perfects an appeal late, but within 15 days after the deadline, impliedly files a motion for extension of time, even if one is not in actuality filed.

6. **No Notice of Trial Court's Judgment** New TRAP 4.2 carries forward the procedure for a delayed appellate timetable which applies when a party did not receive notice from the trial court clerk of the signing of a judgment, and did not receive actual notice of signing, within 20 days of the date the judgment was signed.

E. Deadline for Requesting the Record

a. **The Clerk's Record** It is not necessary for the appellant to request the preparation of the clerk's record (previously known as the "transcript"). Under new TRAP 35.3(a), the trial court clerk has the duty to prepare and file the clerk's record if: (i) a notice of appeal has been filed, and (ii) the party responsible for paying for the clerk's record has paid the clerk's fee, or made satisfactory arrangements to pay the fee, or is entitled to appeal without paying the fee. See Paragraph XV below.

b. **The Reporter's Record** The reporter does not have to prepare the reporter's record (previously known as the "statement of facts") unless it has been requested. New TRAP 35.3(b)(2). The appellant must request in writing that the official reporter prepare the reporter's record. This request is due at or before the time for perfecting appeal. New TRAP 34.6(b)(1). The reporter must prepare and file the reporter's record if: (i) a notice of appeal has been filed; (ii) the appellant requests preparation of the reporter's record; and (iii) the party responsible for paying for the reporter's record has paid the reporter's fee, or has made satisfactory payment arrangements, or is entitled to appeal without paying the fee. New TRAP 35.3(b). See Paragraph XVI below.

F. Deadline for Filing Record In civil cases, the record must be filed in the appellate court within 30 days after appeal is first perfected. New TRAP 35.1. In accelerated appeals, the record is due within 10 days after appeal is perfected. New TRAP 35.1. In criminal cases, the record is due 60 days after sentencing or the appealable order is signed, unless a timely motion for new trial is filed and denied, in which event the record is due 120 days after sentencing. New TRAP 35.2. Because (as explained in Paras. XV & XVI below) under the new TRAPs the duty to file the clerk's record (formerly the transcript) and the reporter's record (formerly the statement of facts) in the appellate court belongs to the trial court clerk and the court reporter, respectively, there is no longer a provision for filing a motion to extend the time for filing the record. New TRAP 35.3, *Notes and Comments*. The appellate court must allow the late filing of the record if the delay is not the appellant's fault, and *may* do so when the delay is the fault of appellant. New TRAP 35.3(c).

G. Effect of Motion to Modify, Motion to Reinstate, and Request for Findings. Under the old rules, there was some doubt as to whether *all* appellate deadlines were extended by a timely motion to modify judgment, motion to reinstate, or request for findings of fact. Under the new TRAPs, the only surviving variable deadline is the time for perfecting appeal. Under new TRAP 26.1(a), a motion for new trial, a motion to modify judgment, a motion to reinstate, and a request for findings of fact (where appropriate), all extend the deadline for perfecting appeal.

H. Bankruptcy New TRAP 8 addresses the effect of bankruptcy on the Texas appellate deadlines. Under new TRAP 8.2, the filing of a bankruptcy petition by or against a party to a case suspends the appeal and the operation of all

appellate time periods, from the date the bankruptcy petition was filed, *in accordance with federal law*. This suspension continues until the appellate court where the appeal is pending orders reinstatement of the case, or severs the debtor from the case. New TRAP 8.3. Upon reinstatement or severance, unexpired but suspended periods begin to run anew on the date of reinstatement or severance, and run for the full period. New TRAP 8.2. The filing of the bankruptcy may be brought to the attention of the trial court or the appellate court by any party to the trial court's judgment by filing a notice of bankruptcy, with the necessary identifying information. New TRAP 8.1. Papers filed during the period of suspension are not ineffective, but are deemed to have been filed on the date of reinstatement or severance, but subsequent thereto. New TRAP 8.2.

Case law suggests that the filing of a bankruptcy by a party to an appeal stays the appellate proceeding, but only if the trial court proceeding is against, rather than by, that party. See 6 MCDONALD'S TEXAS CIVIL APPELLATE PRACTICE § 12.43 (1992). The case law also indicates that appellate steps taken while an automatic stay is in effect are void. It was the intention of the SCAC that new TRAP 8 would stay the Texas appellate proceeding any time any party to a case goes into bankruptcy, regardless of whether the case being appealed is for or against the debtor. However, since the suspension of the appeal under new TRAP 8.2 occurs "in accordance with federal law," it is possible that new TRAP 8 may apply only when the underlying proceeding is one brought against the debtor.

The suspended Texas appeal does not automatically become reinstated simply because of a lifting of the stay by the bankruptcy court, or dismissal or resolution of the bankruptcy. The Texas appeal is reinstated only when the Texas appellate court issues an express order reinstating the appeal. An order reinstating the appeal would be proper under federal law only if the bankruptcy court has lifted the automatic stay, or the bankruptcy proceeding has been resolved. An order of severance would reinstate the appeal only as to non-debtor parties if their claims are severed from the claims of the debtor.

If the motion to reinstate is based upon expiration or lifting of the stay by court order, a certified copy of the bankruptcy order must be attached. New TRAP 8.3(a). Any party may move to sever the appeal with respect to the debtor and to reinstate the appeal as to all other parties. However, the motion must show that the case is severable and must comply with applicable federal law regarding severance of a bankrupt party. New TRAP 8.3(b).

XI. PERFECTING THE APPEAL One of the greatest changes under the new TRAPs involves who must perfect an appeal in a civil case, and how an appeal is perfected in a civil case.

A. Notice of Appeal Under new TRAP 25, appeal is perfected by filing a notice of appeal with the clerk of the trial court. The appellant must file a copy of the notice with the appellate court clerk. If the original notice is mistakenly

filed in the appellate court, the notice is deemed to have been filed that same day with the trial court clerk, and the appellate court clerk must send a copy of the notice to the trial court clerk. New TRAP 25.1(e). The notice must: (i) give the number and style of the case and trial court where it is pending; (ii) give the date of the judgment or order appealed from; (iii) state the party's desire to appeal; (iv) state the court to which the appeal is taken (or in the case of the 1st and 14th Courts of Appeals, to either of them); (v) the name of each party filing the notice; and (vi) in an accelerated appeal, the fact that the appeal is accelerated. New TRAP 25.1(d). The notice must be served on all parties to the trial court's judgment, or in an interlocutory appeal, upon all parties in the trial court. New TRAP 25.1(e). The notice can be amended freely up until the time appellant's brief is filed, by merely filing an amended notice, subject to having the notice stricken for cause. After appellant's brief is filed, the notice of appeal can be amended only upon leave of court, and on terms prescribed by the court. New TRAP 25.1(f).

B. Who Must Perfect? Under new TRAP 25.1(c), any party who wishes to alter the trial court's judgment or interlocutory order appealed from must perfect an appeal. The appellee can no longer "piggy-back" on the appellant's perfection of an appeal. If an appellee wishes to make changes to the judgment that only affect cross-appellees, the appellee must perfect its own appeal. If several parties perfect an appeal, each such party is an appellant, and will be filing an appellant's brief and an appellee's brief.

C. Errors in the Notice of Appeal If the clerk of the appellate court determines that the notice of appeal is defective, the clerk must notify the parties and the trial court clerk so that the defect can be remedied if possible. New TRAP 37.1. If no curative action is taken within 30 days, the matter is referred to the appellate court for disposition. See TRAP 37.1.

D. Effect on Judgment Under new TRAP 25.1(g), the filing of a notice of appeal does not suspend enforcement of the judgment. This provision does not affect the automatic suspension of enforcement when the state appeals an adverse judgment. New TRAP 25.1(g)(2). See 6 MCDONALD TEXAS CIVIL APPELLATE PRACTICE § 14:2[b] (1992).

E. Time for Perfecting Appeal New TRAP 26.1 still requires that an appeal from a final judgment be perfected within 30 days of signing the judgment, or in the event of a timely motion for new trial, motion to modify, motion to reinstate, or request for findings of fact (where appropriate), then appeal must be perfected within 90 days after the judgment is signed by the court. A prematurely-filed notice of appeal is effective. New TRAP 27.1(a). In an accelerated appeal, appeal must be perfected by the 20th day after the appealable order or judgment is signed. New TRAP 26.1(b). In a restricted appeal (formerly writ of error appeal), perfection must be accomplished within 6 months after judgment. New TRAP 26.1(c).

XII. APPEAL BY INDIGENT PERSONS The provisions relating to filing a "pauper's oath" in order to escape advance payment of the cost of the record and filing fees in an appeal are contained in new TRAP 20, entitled "When Party is Indigent."

A. Establishing Indigence; Effect A party who cannot pay the costs in an appellate proceeding can appeal without advance payment of costs if: (i) the party files an affidavit of indigence; (ii) the claim of indigence is not contested, or any contest is not sustained by written order; and (iii) the party timely files a notice of appeal. New TRAP 20.1(a). If the party establishes indigence, the trial court clerk and court reporter must prepare the appellate record without prepayment. New TRAP 20.1(j). If a party can pay or give security for part of the costs, the court must issue a written order for the party to pay or give security, to the extent of his or her ability. The court then allocates payment between the clerk and the reporter. New TRAP 20.1(k). If an indigent party later is able to pay some or all costs, the appellate court can order payment. New TRAP 20.1(l).

B. Contents of Affidavit The affidavit of indigence must contain the nature and amount of employment income, governmental entitlement income, passive income, other income, spouse's income (and whether it is available to the appellant), real and personal property owned, cash on hand and on deposit, other assets, dependents, debts, monthly expenses, the appellant's ability to obtain a loan for court costs, whether an attorney is providing free legal services without a contingent fee, and whether an attorney has agreed to pay or advance court costs. New TRAP 20.1.

C. Where and When to File. The affidavit of indigency must be filed in the trial court with or before the notice of appeal. New TRAP 20.1(c)(1). For original proceedings, the affidavit must be filed in the appellate court, with or before the document seeking relief. New TRAP 20.1(c)(2). A respondent who requests preparation of a record must file the affidavit of indigence in the appellate court within 15 days after the date the respondent requests preparation of the record. New TRAP 20.1(c)(2). The deadline for filing the affidavit of indigence can be extended if a motion for extension is filed within 15 days after the deadline. New TRAP 20.1(c)(3).

D. Serving Copies The indigent party is no longer required to serve a copy of the affidavit on the court reporter, as under the old rule. If the affidavit of indigence is filed with the trial court clerk, that clerk must promptly forward a copy to the appropriate court reporter. New TRAP 20.1(d)(1). If the affidavit is filed with the appellate court clerk, and the filing party seeks a free record, the appellate court clerk must send a copy of the affidavit to the trial court clerk and court reporter, together with a notice stating the deadline for filing a contest. New TRAP 20.1(d)(2). The notice must also be sent to all parties. *Id.*

E. Contest A contest of the affidavit can be filed by the clerk, the court reporter, or any party. The contest must be filed on or before the 10th day after the affidavit was filed

with the trial court clerk. If the affidavit was filed with the appellate court clerk, the contest is due by the date set by the appellate court clerk. New TRAP 20.1(e). If no contest is filed, the affidavit is taken as true and the party is allowed to appeal without paying costs. New TRAP 20.1(f). If a contest is filed, the party who claims indigency must prove the affidavit's allegations. For an incarcerated party, the affidavit itself is evidence and is sufficient to meet the party's burden, without the incarcerated party attending the hearing. New TRAP 20.1(g).

1. Decision by the Appellate Court. If the affidavit of indigence is filed in the appellate court and the contest consequently occurs there, the appellate court can: (i) conduct a hearing and rule; (ii) decide the contest based on the affidavit and other timely filed documents; (iii) request written submission of additional evidence; or (iv) refer the matter to the trial court to hear evidence and grant appropriate relief. New TRAP 20.1(h).

2. Decision by the Trial Court. If the affidavit and contest are filed in the trial court, or are referred by the appellate court to the trial court, then the trial court must give notice and conduct a hearing. A hearing on the contest must be conducted within 10 days after the contest is filed, or after the matter was received from the appellate court. The trial court can sign an order extending the time for hearing, but that extension cannot exceed 20 days from the date of the order. Unless the trial court signs an order sustaining the contest, the affidavit is taken as true and the party entitled to proceed without paying costs in advance. New TRAP 20.1(i).

XIII. DOCKETING STATEMENT New TRAP 32 provides for a "docketing statement" in an appeal. The item is for administrative purposes only, and does not affect the appellate court's jurisdiction. New TRAP 32.4. Upon perfecting appeal in a civil case, the appellant must file in the appellate court a docketing statement containing: identifying information on appellant's counsel; the date appeal was perfected; identifying information on the trial court; date of the judgment or order appealed from; date of post-judgment activities that could affect the appellate timetable (motion for new trial, to modify judgment, to reinstate, request for findings of fact); identifying information on all other parties to the trial court's judgment and their trial counsel; the general nature of the case (personal injury, breach of contract, temporary injunction, etc.); whether the appeal is accelerated or should be advanced for submission; whether a reporter's record has been or will be requested and whether the proceedings were electronically recorded; name of the court reporter or court recorder; whether appellant intends to seek interlocutory or ancillary relief pending appeal; dates relating to any affidavit of indigence; whether a supersedeas bond has been or will be filed; and any other information required by the appellate court. New TRAP 32.1. Different information is prescribed for criminal appeals. New TRAP 32.2. Any party can file a supplementing or correcting docketing statement. New TRAP 32.3.

You will need to get a copy of the form docketing statement from the court of appeals you are appealing to. Some docketing statements are available in electronic form over the World Wide Web, courtesy of the State Bar of Texas' Appellate Section. At the Appellate Section's Web site you can get the docketing statements for the 1st, 2nd, 4th, 5th, and 14th Courts of Appeals. The 1st and 14th Courts of Appeals share the same docketing statement. Docketing statements for civil cases are different than for criminal cases. The URL for the Appellate Section's Web site is: <<http://www.txdirect.net/users/rriehard/news.htm>>. A sample docketing statement is appended to this Article.

XIV. SUPERSEDING THE JUDGMENT

A. Declaration in Docketing Statement The party appealing a case must declare, in the docketing statement filed with the clerk of the appellate court, whether or not a supersedeas bond has been or will be filed. New TRAP 32.1(l).

B. Agreement to Supersede Judgment Under new TRAP 24.1(a)(1), a judgment debtor can suspend execution of a judgment by written agreement with the creditor, provided that the written agreement is filed with the trial court clerk.

C. Alternate Security New TRAP 24.1(c), "Deposit in lieu of bond," provides other ways to post a supersedeas bond. Old TRAP 48 permitted the depositing of cash. In addition to cash, new TRAP 24.1(c) also permits the filing with the clerk of a cashier's check made payable to the clerk, which is to be deposited immediately by the clerk. The cashier's check must be drawn on a federally or state-chartered bank or S&L which is federally insured. With leave of court, the judgment debtor also can deposit with the trial court clerk a negotiable obligation of the U.S. government or and any federally insured and federally or state-chartered bank or S&L. New TRAP 24.1(c)(1)(c).

D. Amount of Security New TRAP 24.2 provides the amounts of security needed to supersede the judgment. These amounts are the same as under old TRAP 47. Under old TRAP 47, the trial court could order lesser security than the norm, but only for money judgments. New TRAP 24.2(b) permits the court to set lesser security in all types of cases. The standard for reducing the security under new TRAP 24.2(b) matches the standard set out in TEX. CIV. PRAC. & REM. CODE ANN. § 52.002 (Vernon 1997): (i) setting security at the amount of the judgment, interest and costs, would cause irreparable harm to the debtor, and (ii) setting a lesser sum would not substantially decrease the degree of collectibility when appeals are exhausted. Thus personal injury judgments are treated under the rule the same as other judgments are treated under the statute.

E. Class Actions Under old TRAP 43, an appeal of an order certifying a class suspended that order and trial on the merits. Under new TRAP 29, this is no longer true. New TRAP 29, *Notes and Comments*.

XV. CLERK'S RECORD Under the new TRAPs, what was formerly called the "transcript" is now called the "clerk's record." New TRAP 34.1.1

A. What's Automatically to be Included New TRAP 34.5(a) prescribes what the clerk of the trial court must automatically include in the clerk's record. Instead of just motions for new trial as provided under old TRAP 51(a), the clerk must include "any request for findings of fact and conclusions of law, any post-judgment motion, and the court's order on the motion." New TRAP 34.5(a)(6). These are all items that affect the deadline for perfecting appeal. The clerk's record must also include any request for the reporter's record (with any statement of points to be relied upon under TRAP 34.6(c), relating to partial reporter's record), and any request for the clerk's record.

B. Timely Request New TRAP 34.5 omits the provision in old TRAP 51(b), saying that failure to make timely designation of items to include in the transcript waives the right to complain of omissions.

C. Duty to File the Clerk's Record It is no longer the duty of the appellant to see that the clerk's record is timely filed in the court of appeals. New TRAP 35.3 provides that the trial court clerk has this responsibility. Thus, appellate counsel will no longer need to seek extensions from the appellate court to permit additional time for the transcript to be filed. New TRAP 35, *Notes and Comments*.

D. Time for Filing Under TRAP 35.1, in a civil case the clerk's record must be filed within 60 days after the judgment is signed, unless one of the following exceptions applies:

- (1) if a timely motion for new trial, motion to modify judgment, motion to reinstate, or valid request for findings and conclusions is filed, then the clerk's record is due 120 days after the judgment is signed;
- (2) in an accelerated appeal, the clerk's record is due 10 days after the notice of appeal is filed;
- (3) in a restricted appeal, the clerk's record is due 30 days after the notice of appeal is filed.

If the clerk's record is not filed by the deadline, the appellate court clerk must notify the trial court clerk, with a copy to the parties and the trial judge, advising of the missed deadline and requesting that the record be filed within 30 days. If that deadline is not met, then the appellate court clerk must refer the matter to the appellate court, to make whatever order is appropriate to avoid further delay and protect the parties' rights. New TRAP 37.3. If the delay in filing the record is not appellant's fault, the appellate court *must* permit late-filing of the record; if it is appellant's fault, it *may* allow late-filing. New TRAP 35.3(c). If the reason for the missed deadline is appellant's failure to pay for the clerk's record, the appeal can be dismissed, after reasonable opportunity to cure. New TRAP 37.3(b).

E. Cost of Excessive Portions New TRAP 34.5(b)(3) provides that a party who requests more items than necessary can be required by the appellate court to pay for unnecessary portions, regardless of the outcome of the case.

F. Paying the Cost of the Clerk's Record New TRAP 35.3(a)(2) provides that the trial court clerk will prepare the clerk's record upon perfection of the appeal, *and upon payment or arrangement with the clerk to pay the fee*. Thus, it will now be necessary to pay for the clerk's record, rather than just ordering it and leaving it as a cost to be collected at a later time.

G. Defects/Inaccuracies in the Clerk's Record Under new TRAP 34.5(d), the appellate court clerk should automatically check the clerk's record to see that all items required by TRAP 34.5(a) are included. If not, the clerk of the appellate court must contact the trial court clerk to get the omitted material supplemented. If needed items are missing from the trial court's records, the parties can by written stipulation substitute copies. Failing that, the trial judge, after notice and hearing, can settle the dispute. New TRAP 34.5(e).

H. Supplementing the Clerk's Record If something is omitted from the clerk's record, the parties, the trial court, or the appellate court, may request a supplemental clerk's record *by letter*. A motion for leave to supplement is no longer necessary. New TRAP 34.5(c).

XVI. REPORTER'S RECORD Under the new TRAPs, what was formerly called the "statement of facts" is now called the "reporter's record." New TRAP 34.1. The reporter's record includes the court reporter's transcription of so much of the proceedings, and such of the exhibits, as the parties to the appeal designate. New TRAP 34.6(a)(1). For electronically recorded records, see Paragraph XV.E below.

A. Who Has Duty to File Reporter's Record? It is now the duty of the court reporter or recorder to see that the reporter's record is timely filed in the appellate court. See new TRAP 35.3(b). Thus, appellate counsel will no longer need to seek extensions from the appellate court to permit additional time for the transcript to be filed. New TRAP 35, *Notes and Comments*.

B. Time for Filing Under TRAP 35.1, in a civil case the reporter's record must be filed within 60 days after the judgment is signed, unless one of the following exceptions applies:

(1) if a timely motion for new trial, motion to modify judgment, motion to reinstate, or valid request for findings and conclusions is filed, then the reporter's record is due 120 days after the judgment is signed;

(2) in an accelerated appeal, the reporter's record is due 10 days after the notice of appeal is filed;

(3) in a restricted appeal, the reporter's record is due 30 days after the notice of appeal is filed.

If the reporter's record is not filed by the deadline, the appellate court clerk must notify the court reporter, with a copy to the parties and the trial judge, advising of the missed deadline and requesting that the reporter's record be filed within 30 days. If that deadline is not met, then the appellate court clerk must refer the matter to the appellate court, to make whatever order is appropriate to avoid further delay and protect the parties' rights. New TRAP 37.3. If the delay in filing the record is not appellant's fault, the appellate court *must* permit late-filing of the record; if it is appellant's fault, it *may* allow late-filing. New TRAP 35.3(c). If the reason for the missed deadline is appellant's failure to pay for the reporter's record, the appellate court can, after notice and an opportunity to cure, decide the issues or points that do not require a reporter's record for a decision. New TRAP 37.3(c).

C. Cost of Reporter's Record Under new TRAP 35.3(b), the appellant must pay or arrange to pay the court reporter before the court reporter is required to file the reporter's record. Under TEX. GOV'T CODE ANN. § 52.047, payment is required before delivery of the reporter's record. See 6 MCDONALD TEXAS CIVIL APPELLATE PRACTICE § 16:23 (1992).

D. Partial Reporter's Record Old TRAP 53(d) permits a party to request a partial statement of facts, provided at the same time the party gives a statement of the points to be relied upon in the appeal. New TRAP 34.6(c)(1) carries forward the idea of requesting a partial reporter's record, while simultaneously including the points or issues to be presented on appeal.

1. *Englander Co. v. Kennedy Case Overruled* In *Englander Co. v. Kennedy*, 428 S.W.2d 806, 806 (Tex. 1968) (per curiam), the Supreme Court ruled that a complaint about the legal or factual sufficiency of the evidence cannot be successfully raised without a complete statement of facts. See *Schafer v. Conner*, 813 S.W.2d 154, 155 (Tex. 1991); 6 MCDONALD TEXAS CIVIL APPELLATE PRACTICE § 44:7 (1992). New TRAP 34.6(c)(4) provides that when a partial reporter's record is properly designated, "[t]he appellate court must presume that the partial reporter's record designated by the parties constitutes the entire record for purposes of reviewing the stated points or issues. This presumption applies even if the statement includes a point or issue complaining of the legal or factual sufficiency of the evidence to support a specific factual finding identified in that point or issue." This new language overrules *Englander* in those situations where a partial reporter's record is properly requested. Note the description of the evidentiary complaints as challenging a *specific* factual finding identified in a point or issue. Under new TRAP 34.6(c)(5), in a criminal appeal which challenges the sufficiency of the evidence to support a finding of guilt, the reporter's record must include the entirety of the evidence on guilt and innocence.

2. **Who Pays for Additional Portions?** Under New TRAP 34.6(c)(3), when the appellant requests a partial reporter's record, other parties can designate additional portions to be included in the reporter's record, *at appellant's cost*. The appellate court can tax unnecessary portions of the reporter's record against the party requesting them, regardless of how costs are otherwise assessed on appeal. New TRAP 34.6(c)(3).

E. Electronic Recording The SCAC vigorously debated requests that electronic reporting be eliminated or receive blanket approval. In the final analysis, the SCAC did neither. Under the new TRAPs, the Supreme Court will still continue to authorize electronic reporting on a court-by-court basis, through Supreme Court order. However, numerous rule changes were made to protect the integrity of the process of electronic reporting. These are set out in new TRAP 13.2.

New TRAP 34.6(a)(2) defines the reporter's record which was recorded electronically to include: (i) certified copies of all tapes or other audio-storage devices on which the proceedings were recorded; (ii) any exhibits that the parties designate; and (iii) certified copies of the original logs prepared by the court recorder pursuant to new TRAP 13.2.

In an appeal using an electronically-recorded recorder's record, each party must file one copy of an appendix containing a transcription of all portions of the recording that the party considers relevant. A copy of relevant exhibits must be included. New TRAP 38.5.

F. Inaccuracies in the Reporter's Record Under new TRAP 37.2, the appellate court clerk should automatically check the reporter's record to see that it complies with the Supreme Court's and Court of Criminal Appeals' order on preparation of the record. If not, the clerk of the appellate court is to contact the court reporter to bring the reporter's record into compliance with the rule. New TRAP 37.2. New TRAP 34.6(e) provides that inaccuracies in the statement of facts can be corrected by agreement of the parties without recertification by the court reporter. If a dispute arises as to the accuracy of the reporter's record, the trial judge, after notice and hearing, can settle the dispute. New TRAP 34.6(e)(2). If the dispute arises after the statement of facts is filed in the appellate court, that court can submit the matter to the trial court. New TRAP 34.6(e)(3).

G. Lost or Destroyed Records Under new TRAP 34.6(f), if part of the reporter's record is missing, without appellant's fault, then a new trial will be ordered but only if a significant exhibit or a significant portion of the court reporter's notes and records has been lost or destroyed. The same is true if the trial was electronically recorded and a significant portion of the recording has been lost or destroyed.

XVII. BILLS OF EXCEPTION

A. Informal Bills of Exception and Offers of Proof Old TRAP 52(b) specifically discussed making an offer of proof when evidence is excluded at trial. That provision has been deleted from the new TRAPs. The requirement to make an offer of proof when evidence has been excluded is now set out only in TEX. R. CIV. EVID. 103(b).

B. Deadline for Formal Bills of Exception Under old TRAP 52(c)(11), formal bills of exception were due sixty (60) days after the judgment is signed, or ninety (90) days if a motion for new trial was timely filed. Under new TRAP 33.2(c)(1), the time for filing formal bills of exception in civil cases is always 30 days after the filing party perfects appeal. The deadline does *not* vary depending on timely filing of a motion for new trial, etc. The deadline can be extended upon a proper motion to extend the deadline, filed within 15 days after the deadline. New TRAP 33.2(e)(3).

XVIII. MOTIONS IN THE COURT OF APPEALS

A. Physical Aspects of Motions Under new TRAP 9.4, all documents filed in an appellate court must be typewritten or printed on 8-1/2 by 11 inch opaque white or near white paper. Typewritten papers must be doublespaced, except for footnotes, block quotations, short lists and issues or points of error. Documents must be bound so that they will not fall apart or lose their cover in regular use. New TRAP 9.4.

B. Certificate of Conference Motions must contain or be accompanied by a certificate stating that the filing party conferred, or made a reasonable attempt to confer, with all other parties about the merits of the motion and whether those parties oppose the motion. New TRAP 10.1(a)(5).

C. Need not be Verified Old TRAP 19(d) provided that motions dependent upon facts not apparent from the record or known to the court must be supported by affidavit or other evidence. Many courts of appeals routinely required all motions to be verified. New TRAP 10.2 says that a motion need not be verified, unless it depends on facts: (i) not in the record; (ii) not within the court's knowledge in its official capacity; or (iii) not within the personal knowledge of the attorney signing the motion. Those categories of facts must be supported by affidavit or other satisfactory evidence. New TRAP 10.2.

XIX. BRIEFS AND ORAL ARGUMENT IN COURT OF APPEALS

A. Who Files an Appellant's Brief? Because everyone who wishes to change the trial court's judgment must perfect an appeal, every perfecting party would file an appellant's brief. Thus both sides (or all sides) in a case may be filing an appellant's brief, and will also be filing an appellee's brief in response to the opposing party's appellant's brief.

B. Physical Aspects of Brief Under new TRAP 9.4(b), all briefs must be typewritten or printed on 8-1/2 by 11 inch opaque white or near white paper. Typewritten papers must be doublespaced, except for footnotes, block quotations,

short lists and issues or points of error. Briefs must be bound so that they will not fall apart or lose their covers in regular use. New TRAP 9.4(f). Briefs should be stapled once in the top left-hand corner or be bound so that they will lie flat when open. New TRAP 9.4(f). Front and back covers must be durable, and cannot be plastic, red, black or dark blue. New TRAP 9.4(f). The front of the brief must contain the case style and number, the name of the party filing the brief, and the identity and address etc. of lead counsel for the party. New TRAP 9.4(g). Briefs can be printed on both side of the page. New TRAP 9.4(a). Briefs must be printed in either (i) 10-character-per-inch nonproportionally spaced Courier typeface, of (ii) 13-point or larger proportionally spaced typeface. New TRAP 9.4(c). All margins must be at least one inch. New TRAP 9.4(c).

C. Limitations on Length The appellant's brief and appellee's brief are limited to 50 pages each. The 50-page count excludes pages containing the identities of parties and their counsel, the table of contents, the index of authorities, statement of the case, the issues or points presented, and the appendix. New TRAP 38.4. A reply brief is limited to 25 pages, excluding the pages set out above. New TRAP 38.4. The aggregate number of pages filed by a party is limited to 90 pages, excluding the pages which are not counted against the total. Thus, if you file an appellant's brief, an appellee's brief, and an appellant's reply brief, the ordinary page limitations on each brief are subject to a rule that the total of all your briefs cannot exceed 90 pages. New TRAP 38.4. The court on motion can extend the page limits. New TRAP 38.4.

D. Amended/Supplemental Briefs Under new TRAP 38.7, a brief can be amended or supplemented "whenever justice requires" upon whatever reasonable terms the appellate court may prescribe.

E. Requisites of Brief Old TRAP 74, relating to requisites of briefs in the courts of appeals, has been cleaned up. There are also several new components of a brief.

1. Identity of Parties and Counsel New TRAP 38.1(a) requires that the brief give a complete list of parties to the trial court's judgment or appealable order, and the names and addresses of all trial and appellate counsel.

2. Table of Contents New TRAP 38.1(b) requires that the brief contain a table of contents with page references. The table of contents must indicate the subject matter of each issue or point, or each group of issues or points.

3. Index of Authorities New TRAP 38.1(c) requires the brief to have an index of authorities, arranged alphabetically with page references.

4. Statement of the Case New TRAP 38.1(d) requires that the brief state concisely the nature of the case (i.e., suit for damages, suit on a note, or involving a murder prosecution), the course of the proceedings, and the trial court's disposition of the case. Record references are required. The

statement of the case should seldom exceed one-half page, and should not discuss the facts.

5. Issues Presented New TRAP 38.1(e) introduces the concept of "issues presented," in lieu of points of error. The appellate brief can state either issues presented or points presented for review. New TRAP 38.1(e) indicates that the statement of an issue or point will be treated as covering every subsidiary question that is fairly included. This new approach is closer to the federal approach, and should avoid appellate courts declaring that complaints were waived by the failure to craft a sufficiently accurate point of error.

6. Statement of Facts New TRAP 38.1(f) requires that the brief state concisely and without argument the facts pertinent to the issues or points presented. TRAP 38.1(f) further provides that in a civil case the court may take as true assertions of fact unless the other party contradicts them. The statement of facts must be supported by record references. *Id.*

7. Summary of the Argument New TRAP 38.1(g) requires that the brief contain a succinct, clear, and accurate statement of the arguments made in the body of the brief. This summary must not merely repeat the issues or points presented.

8. Argument New TRAP 38.1(h) requires that the brief contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record.

9. Prayer New TRAP 38.1(i) requires that the brief contain a short conclusion that clearly states the nature of the relief sought.

10. Appendix Under new TRAP 38.1(j), the appendix must contain (i) the trial court's judgment or other appealable order; (ii) the jury charge and verdict, or trial court's findings and conclusions; (iii) the text of any rule, regulation, ordinance, statute, constitutional provision, or other law on which the argument is based, and the text of any contract or other document central to the argument. New TRAP 38.1(j)(1). The appendix may contain other items pertinent to the issues or points presented for review. TRAP 38.1(j)(2) specifically warns against using the appendix to avoid the page limits for a brief.

11. Cross Points New TRAP 38.2(b) states the rule of TEX. R. CIV. P. 324(c), regarding judgments n.o.v. and bringing forward as cross-points any complaints that would have vitiated the verdict or prevented affirmance had judgment been rendered on the verdict.

12. Electronic Statement of Facts Under New TRAP 38.5, if the reporter's record was electronically recorded, each party must file separately with the court of appeals one copy an appendix containing a transcription of whatever portions of the recorded statement of facts that that party deems relevant to the issues raised on appeal. Relevant exhibits must be included. Transcriptions are presumed accurate,

without authentication, unless an objection is raised. New TRAP 38.5(a)(1). Appellee's appendix need not duplicate any portions of appellant's appendix. New TRAP 38.5(a)(2). It is not necessary to serve copies of the appendix on other parties, but you must give written notice that the appendix was filed, and specify the parts of the recorded statement of facts that are included, giving reference to index numbers in the court recorder's logs. New TRAP 38.5(a)(1). It is presumed that nothing omitted from the appendices is relevant to the issues on appeal. New TRAP 38.5(b). The appellate court has no duty to review any part of the electronic recording. New TRAP 38.5(b). The appellate court can require a party to file a supplemental appendix containing additional portions of the recording, and the court can grant leave for a party to do so. New TRAP 38.5(c). New TRAP 38.5(d) provides for a free transcription upon an affidavit of indigency that the party has neither access to the equipment nor the necessary skill to prepare the appendix. New TRAP 38.5(e) sets out a procedure to deal with inaccuracies in the transcriptions. The cost of preparing the appendixes is taxed as costs. New TRAP 38.5(f).

F. Deadlines for Briefs Under new TRAP 38.6(a), appellant's brief is due 30 days after the latter of (i) when the clerk's record was filed, or (ii) when the reporter's record was filed. In an accelerated appeal, the brief is due in 20 days. *Id.* Under new TRAP 38.6(b), appellee's brief is due 30 days after appellant's brief was filed. In an accelerated appeal, the brief is due in 20 days. *Id.* New language provides that where appellant does not file a brief, appellee's brief is due 30 days after appellant's brief was due. *Id.* The appellant's reply brief must be filed within 20 days after the appellee's brief was filed. New TRAP 38.6(c).

G. Appellant's Reply Brief New TRAP 38.3 permits an appellant to file a reply brief, addressing any matter in the appellee's brief. The reply brief is limited to 25 pages. New TRAP 38.4. However, the aggregate limit of 90 pages per party applies. *Id.* As noted above, the appellant's reply brief must be filed within 20 days after the appellee's brief was filed. New TRAP 38.6(c).

H. Rebriefing New TRAP 38.9(a) provides that where the briefing rule has been flagrantly violated, the court can require the brief to be amended, supplemented or redrawn. If another brief is filed that does not comply, the court can prohibit the filing of a brief and proceed as if the party failed to file a brief. New TRAP 38.9(b) adds language saying that, where the court of appeals finds that the case has not been properly presented in the briefs, the court can postpone submission, require additional briefing, or make other orders necessary to secure a more satisfactory submission of the case.

I. Requesting Oral Argument New TRAPs 9.4(g) & 39.7 provide that a party desiring oral argument in the court of appeals must request it on the front cover of the party's first brief.

J. Postponing Oral Argument Under New TRAP 10.5(c), a motion to postpone oral argument is no longer required to be verified by affidavit. However, it must be supported by sufficient cause.

K. Submission Without Oral Argument Under new TRAP 39.8, a court of appeals can decide a case without oral argument if "argument would not significantly aid the court in determining the legal and factual issues presented in the appeal."

L. Purpose of Oral Argument New TRAP 39.2 states the purpose of oral argument. Oral argument should emphasize and clarify the briefs. Counsel should not read from prepared text. Counsel should assume that all members of the court have read the briefs, and should be prepared to answer questions. Counsel should not refer to matters not in the record.

XX. COURT OF APPEALS: OPINION AND JUDGMENT; MOTION FOR REHEARING; MOTION TO RETAX COSTS; MANDATE

A. Unpublished Opinions Despite a suggestion to the contrary from the SCAC, unpublished opinions still cannot be cited as authority by counsel or court. New TRAP 47.7.

B. Judgments in the Courts of Appeals New TRAP 43.2 adds to the types of judgment the courts of appeals can issue. The new list of options includes: (1) affirm; (2) modify and affirm; (3) reverse and render; (4) reverse and remand; (5) vacate and dismiss; and (6) dismiss. Categories 5 and 6 are new. New TRAP 43.3 adds a new provision saying that in reversing the trial court, the court of appeals can remand for a new trial in the interest of justice instead of rendering judgment.

C. Rule as to Mandates is Relocated Formerly, TRAP 86 governed the issuance of mandates from the courts of appeals. Those provisions have been moved to new TRAP 18.

D. Date for Issuance of Mandate New TRAP 18.1 reduces the time for issuing mandate from 45 days to 10 days. The period runs from the date when the time to file a petition for review has expired, or if a petition was filed, then 10 days from the last possible day for filing a motion for rehearing on the rejection of the petition for review.

E. Rehearing New TRAP 49.9 provides that a motion for rehearing in the court of appeals is no longer a prerequisite for appellate review in the Supreme Court or the Court of Criminal Appeals. But filing a motion for rehearing is permitted.

XXI. PETITION FOR REVIEW IN THE SUPREME COURT New TRAP 53 introduces a new procedure to Texas appellate law: the petition for review. This procedure supplants the writ of error. Essentially, the 50-page application for writ of error is replaced by a 15-page petition for review. New TRAP 53, *Notes and Comments*.

A. Time for Filing Under New TRAP 53.7(a), the petition must be filed with the Supreme Court clerk within 45 days of the court of appeals' judgment (if no motion for rehearing was timely filed) or, if timely motions for rehearing were filed, within 45 days after the last timely motion for rehearing is overruled. New TRAP 53.7(c) permits cross-petitions to be filed within the 45-day deadline, or within 30 days after a preceding petition is filed, whichever is later. A response to a petition for review is due 30 days after the petition is filed. New TRAP 53.7(d). Any reply to a response must be filed within 15 days after the response is filed. New TRAP 53.7(e). The Supreme Court can extend the deadline for filing a petition upon proper motion filed within 15 days of the deadline. New TRAP 53.7(f). The deadline to file a response or reply can be granted upon proper motion filed either before or after the document was due. New TRAP 53.7(f).

B. Page Limitations Under new TRAP 53.6, the petition and any response can be no longer than 15 pages, excluding introductory pages, table of contents, index of authorities, statement of case, etc. Any reply can be no longer than 8 pages, exclusive of the same items. The court can permit a longer petition, response, or reply on motion.

C. Contents of the Petition for Review

1. Identity of Parties and Counsel New TRAP 53.2(a) requires that the petition give a complete list of parties to the trial court's judgment or appealable order, and the names and addresses of all trial and appellate counsel.

2. Table of Contents New TRAP 53.2(b) requires that the petition contain a table of contents with page references. The table of contents must indicate the subject matter of each issue or point, or each group of issues or points.

3. Index of Authorities New TRAP 53.2(c) requires the petition to have an index of authorities, arranged alphabetically with page references.

4. Statement of the Case New TRAP 53.2(d) requires that the petition contain a statement of the case that should seldom exceed one page and should not discuss the facts. The statement must contain the following: (1) a description of the nature of the case; (2) the name of the judge who signed the judgment or order appeared from; (3) the designation of the trial court and the county; (4) the disposition of the case by the trial court; (5) the district of the court of appeals; (6) the names of the court of appeals' justices who participated in the decision, including the author of the opinion and the author of any separate opinion; (7) the citation for the court of appeals' opinion, if available, or a statement that the opinion was not published; (8) the disposition of the case by the court of appeals; and (9) an affirmation that the court of appeals correctly stated the nature of the case, except for particulars pointed out.

5. Statement of Jurisdiction New TRAP 53.2(e) requires that the petition state the basis of the court's jurisdiction, without any argument.

6. Issues Presented New TRAP 53.2(f) substitutes the concept of "issues presented" for points of error. The petition can state either issues presented or points presented for review. New TRAP 53.2(f) indicates that the statement of an issue or point will be treated as covering every subsidiary question that is fairly included. The statement of issues or points must be supported by record references. This new approach is closer to the federal approach, and should avoid appellate courts declaring that complaints were waived by the failure to craft a sufficiently accurate point of error.

7. Statement of Facts New TRAP 53.2(g) requires that the petition state concisely and without argument the facts pertinent to the issues or points presented. The statement of facts must be supported by record references.

8. Summary of the Argument New TRAP 53.2(h) requires that the petition contain a succinct, clear, and accurate statement of the arguments made in the body of the petition. This summary must not merely repeat the issues or points presented.

9. Argument New TRAP 53.2(i) requires that the petition contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record. The argument should include the reasons why the Supreme Court should exercise jurisdiction to hear the case with reference to factors listed in new TRAP 56.1(a), *Considerations in granting review*.

10. Prayer New TRAP 53.2(j) requires that the petition contain a short conclusion that clearly states the nature of the relief sought.

11. Appendix Under new TRAP 53.2(k), the appendix must contain (i) the trial court's judgment or other appealable order; (ii) the jury charge and verdict, or trial court's findings and conclusions; (iii) the opinion and judgment of the court of appeals; and (iv) the text of any rule, regulation, ordinance, statute, constitutional provision, or other law on which the argument is based, and the text of any contract or other document central to the argument. The appendix may contain other items pertinent to the issues or points presented for review. TRAP 53.2(k)(2) specifically warns against using the appendix to avoid the page limits for a petition.

D. Response to Petition for Review Under new TRAP 53.3, any party may file a response, but it is not mandatory. If no response is filed, or if a waiver of response is filed, the Court will consider the petition without a response. However, no petition will be granted before a response has been filed or requested by the Court. The response must conform to the requirements of new TRAP 53.2, with some exceptions.

E. Reply to Response The petitioner may file a reply addressing any matter in the response. New TRAP 53.5.

F. Filing the Record Under new TRAP 54.2(a), the court of appeals' record is not sent to the Supreme Court unless it is requested. The Supreme Court may request that the record be filed, with or without granting the petition for review. New TRAP 54.1.

G. Briefs on the Merits A brief is not filed unless requested by the court. The court may request briefs with or without granting review. New TRAP 55.1. The petitioner's brief must be confined to the issues or points stated in the petition for review, and must contain the identity of parties and counsel, table of contents, index of authorities, etc. New TRAP 55.2(a)(j). If a petitioner files a brief, then any other party may file a brief in response. New TRAP 55.3. Briefs and responses must not exceed 50 pages. New TRAP 55.6. The petitioner may file a reply which may not be longer than 25 pages. New TRAP 55.4 and 55.6. Briefs must be filed in accordance with the Supreme Court Clerk's notice. If no notice, then petitioner's brief is due 30 days after the date of the notice, and respondent's brief is due 20 days after receiving petitioner's brief. Petitioner's reply is due 15 days after receiving respondent's brief. New TRAP 55.7.

XXII. MOTIONS IN THE SUPREME COURT Old TRAP 160, regarding motions in the Supreme Court, has been deleted. New TRAP 9 (Papers Generally), and new TRAP 10 (Motions in Appellate Courts), apply to motions filed in the Supreme Court. Motions for extensions of time to file a petition, response, brief, etc. are set out in new TRAPs 53.7(f) and 55.7.

XXIII. ACCELERATED APPEALS Under the existing TRAPs, it was believed that the appellate court could not extend the time for perfecting an accelerated appeal. *See* 6 MCDONALD'S TEXAS CIVIL APPELLATE PRACTICE § 13:6 n. 21 (1992). New TRAP 26.3 permits the appellate court to extend the deadline for perfecting an accelerated appeal. Under old TRAP 43, an appeal of an order certifying a class suspended that order and trial on the merits. Under new TRAP 29, this is no longer true. New TRAP 29, *Notes and Comments*.

XXIV. LIMITED APPEALS Old TRAP 40(a)(4) an appellant could limit the scope of the appeal to a severable portion of the judgment by issuing a notice of limitation of appeal. That procedure is no longer available under the new TRAPs.

XXV. CROSS-APPEALS; MULTI-PARTY APPEALS Under the old TRAPs, in some instances there was confusion as to whether an appellee had to perfect its own appeal as against the appellant or as against other appellees. *See* 6 MCDONALD TEXAS CIVIL APPELLATE PRACTICE § 27:2. (1992). Under the new TRAPs, every party who wishes to alter the trial court's judgment or other appealable order must perfect its own appeal. New TRAP 25.1(c).

XXVI. DWOPS A timely motion to reinstate now has the same affect on the deadline for perfecting appeal as a motion for new trial. New TRAP 26.1(a).

XXVII. WRIT OF ERROR APPEALS TO THE COURT OF APPEALS The writ of error appeal to the court of appeals, offered to parties who suffered a default judgment, is no longer provided by the TRAPs. (However, the remedy continues to be discussed in TEX. CIV. PRAC. & REM. CODE ANN. § 51.012 (Vernon 1997)). Instead, new TRAP 30 provides for a "restricted appeal," available only to parties who did not participate in the hearing that resulted in the judgment complained of, and who did not timely file a post-judgment motion or request for findings and conclusions. The deadline for perfecting a restricted appeal is 6 months from the date of judgment or order being attacked. New TRAP 26.1(c). The notice of appeal in a restricted appeal must recite three things: (i) the name and address of each party to the trial court's judgment; (ii) that the appellant is a party affected by the trial court's judgment, but did not participate in person or through counsel in the hearing that resulted in the judgment complained of; (iii) that the appellant did not timely file a post judgment motion, request for findings and conclusions, or a notice of appeal. New TRAP 25.1(d)(7). If the appellant is pro se, the notice of appeal must be verified. New TRAP 25.1(d)(7)(D). There is no requirement that the error appear from the "face of the record," as required by earlier law.

XXVIII. DISPOSITION OF CASE IN THE COURT OF APPEALS AND THE SUPREME COURT

A. Supreme Court New TRAP 60.2 specifies the types of judgment the Supreme Court can issue. The new list of options includes: (1) affirm the judgment of the court of appeals in whole or in part; (2) modify and affirm the court of appeals; (3) reverse and render the judgment that the court of appeals should have rendered; (4) reverse and remand to the court of appeals or trial court; (5) vacate both lower court judgments and dismiss; and (6) if the Supreme Court of Texas or the U.S. Supreme Court has announced a "relevant new rule of law" after the trial court or the court of appeals made its decision, vacate the lower court judgment and remand for further proceedings in light of the newly announced rule of law. New TRAP 60.3 says that the Supreme Court can remand for a new trial in the interest of justice, in all cases where it reverses the judgment of the court of appeals. New TRAP 60.6 provides that the Supreme Court can make any other appropriate order as the law and the nature of the case may require.

B. Court of Appeals New TRAP 43.2 adds to the types of judgment the courts of appeals can issue. The new list of options includes: (1) affirm; (2) modify and affirm; (3) reverse and render; (4) reverse and remand; (5) vacate and dismiss; and (6) dismiss. Categories 5 and 6 are new. New TRAP 43.3 adds a new provision saying that in reversing the trial court, the court of appeals can remand for a new trial in the interest of justice.

XXIX. MANDAMUS, HABEAS CORPUS, AND OTHER ORIGINAL PROCEEDINGS

A. Overhaul of Rule on Original Proceedings There has been an overhaul of the rules governing original proceedings in civil cases. Old TRAPs 120, 121, and 122 have been merged into new TRAP 52.

B. What to File Under new TRAP 52, there is no requirement of a motion for leave to file the original proceeding. New TRAP 52, *Notes and Comments*. The document to be filed by a relator is the petition. See new TRAP 52.1 The offending court (such as a trial judge) is no longer to be mentioned in the title of the original proceeding, even though s/he remains the respondent in the proceeding. Instead, the style is "In re [name of relator]." New TRAP 52.1. The person against whom relief is sought is the respondent. New TRAP 52.2. A person whose interest would be affected by the relief sought is a real party at interest. New TRAP 52.2.

1. **The Petition** The factual statements in the petition must be verified by affidavit on personal knowledge and must: identify the parties and counsel; contain a table of contents and index of authorities; state, without argument, the basis for the court's jurisdiction; in a habeas corpus, show that the relator is restrained of liberty; show why there is no adequate remedy at law; address concurrent jurisdiction between the Supreme Court and courts of appeals; give the facts, argument and authorities, a prayer and certificate of service. New TRAP 52.3. The petition is limited to 50 pages in the court of appeals, 15 pages in the Supreme Court. New TRAP 52.6. Supporting documents must be included in an appendix, which must contain: a certified or sworn copy of any order complained of; any order or opinion of the court of appeals (if the proceeding is filed in the Supreme Court); a certified or sworn copy of every document that is material to the relator's claim and that was filed in any underlying proceeding; a transcript of relevant testimony and exhibits from any underlying proceeding; the text of rules, statutes, etc. which apply; and in a habeas corpus proceeding, proof of relator's incarceration. New TRAP 52.3(j)(1). The appendix may contain additional items offered by the relator. New TRAP 52.3(j)(2).

2. **The Response** Any party can file a response of up to 50 pages (15 pages in the Supreme Court) to the petition. New TRAPs 52.4; 52.6. The appellate court cannot grant relief before a response has been filed or requested. New TRAP 52.4. The respondent's argument must be confined to the issues or points presented in the petition. New TRAP 52.4(d).

3. **The Reply** The petitioner may file a reply of up to 8 pages to the response. New TRAPs 52.5; 52.6.

C. Temporary Relief A party requesting temporary relief must certify that s/he notified or made a diligent effort to notify all parties by telephone or fax that temporary relief has been requested. New TRAP 52.9(a). The court can grant temporary relief without notice, and may require a

bond. New TRAP 52.9(b). Such relief remains in effect until the case is finally decided. New TRAP 52.9(b). Any party can move at any time to have the court reconsider temporary relief. New TRAP 52.9(c).

D. Action on Petition If the court is of the tentative opinion that the relator is entitled to the relief sought, or that a serious question requires further consideration, the court *must* request a response if one has not been filed. New TRAP 52.7(b)(1). The Supreme Court may request full briefing, under New TRAP 55. New TRAP 52.7(b)(2). In a habeas corpus proceeding, the Court may order the relator discharged upon filing a bond. New TRAP 52.7(b)(3). The court may (but is not required to) set the case for oral argument. New TRAP 52.7(b)(4).

In denying relief, the court can (but is not required to) issue an opinion. If relief is granted, an opinion must be issued. New TRAP 52.7(d). Motions for rehearing are allowed, but are not required. New TRAP 52.8.

E. Sanctions for Frivolous Original Proceedings The old TRAPs 84 (court of appeals) and old TRAP 182 (Supreme Court), regarding damages for delay on appeal, did not authorize sanctions in original proceedings. That has been changed. Under new TRAP 52.10, the appellate court can award "just sanctions" after notice and a reasonable opportunity to respond, on a party or attorney who is not "acting in good faith." Lack of good faith is demonstrated by: (i) filing a petition that it groundless; (ii) bringing a petition solely for delay of the underlying proceeding; (iii) grossly misstating or omitting an obviously important and material fact in the petition or response; or (iv) filing an appendix that is clearly misleading because of the omission of obviously important and material evidence or documents.

XXX. POINTS OF ERROR The new TRAPs abandon the term "points of error" and recognize "issues or points presented." New TRAP 38.1(c); 53.2(f); 55.2(f). "Points presented" are really points of error. "Issues presented" are more like core propositions and need not focus on specific rulings, as was required for points of error.

XXXI. STATEMENT OF THE FACTS New TRAPs 38.1(f) & 53.2(g) now expressly recognize a segment of the brief called "statement of facts." The use of such a device is widespread, despite the fact that it was not authorized under the old TRAPs. The statement of facts "must state concisely and without argument the facts pertinent to the issues or points presented." The statement must be supported by record references. *Id.* In civil cases, the appellate court can accept the facts stated as true unless another party contradicts them. *Id.*

XXXII. ARGUMENT

A. Unpublished Opinions Although the SCAC had recommended that unpublished opinions should be permitted as persuasive but not authoritative, the Supreme Court did not agree, and there is no change in the rule that

unpublished opinions cannot be cited as authority by counsel or a court. New TRAP 47.7.

XXXIII. THE APPELLATE RECORD Under new TRAP 34.1, the appellate record consists of the clerk's record, and, if necessary, the court reporter's record. A SCAC proposal to include all documents on file with the trial court clerk as part of the appellate record, even those not designated to be forwarded to the appellate court, was rejected by the Supreme Court.

XXXIV. CHALLENGING THE SUFFICIENCY OF THE EVIDENCE

A. Non-Jury Cases Old TRAP 52(d) said that, in a non-jury case, a complaint regarding the legal or factual insufficiency of the evidence may be made for the first time on appeal in the complaining party's brief. This provision has been dropped from the TRAPs, on the theory that it was redundant, since Tex. R. Civ. P. 324 does not list that complaint as one that must be raised by motion for new trial.

XXXV. PRESERVATION OF ERROR IN THE TRIAL COURT

A. General Preservation Requirement To complain on appeal, the appellate record must reflect that a timely request, objection or motion was presented to the trial court, and that it was ruled upon by the trial court. New TRAP 33.1(a). If the trial judge refuses to rule, an objection to that failure preserves the complaint. New TRAP 33.1(a)(2)(B). Under new TRAP 33.1(b), this requirement of a ruling does not apply to the overruling of a motion for new trial or motion to modify by operation of law--except where taking evidence was necessary to properly present the complaint in the trial court.

New TRAP 33.1(c) provides that a signed, separate order is not required to preserve a complaint for appeal, as long as the trial court's ruling is reflected in the record. This invalidates cases which held that a ruling on a motion for directed verdict must be in writing to be recognized on appeal. See e.g. *Soto v. Southern Life & Health Ins. Co.*, 776 S.W.2d 752, 754 (Tex. App.--Corpus Christi 1989, no writ); criticized is *Sipco Services Marine, Inc. v. Wyatt Field Service Co.*, 857 S.W.2d 602, 608-09 (Tex. App.--Houston [1st Dist.] 1993, no writ) (Cohen, J., concurring).

B. Sufficiency of the Evidence in Non-Jury Cases

Under old TRAP 52(d), in a non-jury case you could attack the legal or factual sufficiency of the evidence without preserving that complaint in the trial court. This provision was omitted from the new TRAPs, on the theory that it was redundant, since TEX. R. CIV. P. 324 does not list that complaint as one that must be raised by motion for new trial.

XXXVI. ADMINISTRATIVE APPEALS New TRAP 36 streamlines the procedure for getting the record of an Administrative Procedure Act appeal into the court appeals.

The record of an agency proceeding filed in the trial court may be brought forward on appeal either as part of the clerk's record or as part of the reporter's record. New TRAP 36.2. Inaccuracies in the administrative record can be corrected under new TRAP 36.3, either by agreement of the parties, or by intervention of the appellate court which must refer the dispute over the correction to the trial court. New TRAP 36.3(a) & (b).

XXXVII. APPENDIX This appendix contains the Orders of the Supreme Court and Court of Criminal Appeals adopting the new Texas Rules of Appellate Procedure, and providing transitional rules which apply to cases already in the appellate pipeline on September 1, 1997, the effective date of the new rules.

A. The Orders of Adoption and Transition

STATE OF TEXAS

RULES OF APPELLATE PROCEDURE

August 15, 1997

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 97-_____

FINAL APPROVAL OF REVISIONS TO THE
TEXAS RULES OF APPELLATE PROCEDURE

ORDERED that:

1. The Texas Rules of Appellate Procedure, amended by Order of March 20, 1997, and now changed after public comments, are those attached. The format and style of these amended rules are part of the official promulgation.

2. These amended rules take effect September 1, 1997, and apply fully to any appeal perfected on or after that date and any proceeding initiated in an appellate court on or after that date. Beginning September 1, 1997, no application to the Supreme Court for writ of error may be filed except a successive application under former Appellate Rule 130(c).

3. If the initial brief, petition, or application is filed before September 1, 1997, all other briefs in that case in that court may comply with the former rules in all respects, including format and timetables, but if the initial brief, petition, or application is filed on or after September 1, 1997, that filing, and all other filings in that case in that court, must comply with these amended rules.

4. In an appeal perfected before September 1, 1997, any cross-appeal may be brought in accordance with either the rules and law in effect before that date or these amended rules.

5. Beginning September 1, 1997, no case can be disposed of or issue decided on the grounds that the record was not timely filed, before or after that date, except under these amended rules.

6. Appellate Rule 49.9 applies only to a petition for review and not to an application to the Supreme Court for writ of error.

7. Except as provided in paragraph 3, the timeliness of an act done on or after September 1, 1997, must be determined under these amended rules unless it was determined untimely by written order before September 1, 1997.

8. To facilitate the complete transition to these amended rules and to further the resolution of appeals on the merits, the courts of appeals are authorized and directed to suspend these amended rules in a particular case as necessary and as provided in Appellate Rule 2.

9. The notes and comments appended to these amended rules are incomplete, are included only for the convenience of the bench and bar, and are not a part of the rules.

10. The Clerk is directed to file an original of this Order with the Secretary of State forthwith, and to cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the Texas Bar Journal.

SIGNED AND ENTERED this 15th day of August, 1997.

THOMAS R. PHILLIPS
Chief Justice
RAUL A. GONZALEZ
NATHAN L. HECHT

JOHN CORNYN
CRAIG T. ENOCH
ROSE SPECTOR
PRISCILLA R. OWEN
JAMES A. BAKER
GREG ABBOTT
Justices

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

Misc. Docket No. 97-_____

FINAL APPROVAL OF REVISIONS TO THE
TEXAS RULES OF APPELLATE PROCEDURE

ORDERED that:

1. The Texas Rules of Appellate Procedure, amended by Order of March 20, 1997, and now changed after public comments, are those attached. The format and style of these amended rules are part of the official promulgation.

2. These amended rules take effect September 1, 1997. Unless this order provides otherwise, they shall govern all proceedings in motions for new trial, appeals, petitions for discretionary review, and petitions for extraordinary writs thereafter brought and in all such proceedings then pending, except to the extent that in the opinion of the court their application in a particular proceeding then pending would not be feasible or would work injustice, in which case the former procedure may be followed.

3. If the initial brief, petition for discretionary review, or petition or application for extraordinary writ in a case is filed before September 1, 1997, all other briefs in that case in that court may comply with the former rules, but if the initial brief, petition for discretionary review, or petition or application for extraordinary writ in a case is filed on or after September 1, 1997, all other papers filed in that case in that court must comply with these amended rules.
4. In an appeal perfected before September 1, 1997, any cross-appeal may be brought in accordance with either the rules and law in effect before that date or these amended rules.
5. Beginning September 1, 1997, no case can be disposed of or issue decided on the ground that the record was not timely filed, before or after that date, except under these amended rules.
6. Except as provided in Paragraph 3, the timeliness of an act done on or after September 1, 1997, must be determined under these amended rules unless it was determined untimely by written order before September 1, 1997.
7. The notes and comments appended to these changes are incomplete, are included only for the convenience of the bench and bar, and are not a part of the rules.
8. The Clerk is directed to file an original of this Order with the Secretary of State forthwith, and to cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the Texas Bar Journal.

SIGNED AND ENTERED this 15th day of August, 1997.

MICHAEL J. McCORMICK
Presiding Judge
CHARLES F. (CHARLIE) BAIRD
MORRIS L. OVERSTREET
LAWRENCE E. MEYERS
STEPHEN W. MANSFIELD
SHARON KELLER
TOM PRICE
SUE HOLLAND
PAUL WOMACK
Judges

B. Sample Docketing Statement

<p>Appellate Docket Number:</p> <hr style="width: 30%; margin-left: 0;"/>	
<p>Appellate Case Style:</p>	
<p>DOCKETING STATEMENT (CIVIL) Fourteenth Court of Appeals [to be filed in the court of appeals upon perfection of appeal under TRAP 32]</p>	
I. Parties (TRAP 32.1(a), (e)):	
<p>Appellant(s):</p> <p>(See note at bottom of page)</p>	<p>Appellee(s):</p> <p>(See note at bottom of page)</p>
<p>Attorney (lead appellate counsel):</p>	<p>Attorney (lead appellate counsel, if known; if not, then trial counsel):</p>
<p>Address (lead counsel):</p>	<p>Address (lead appellate counsel, if known; if not, then trial counsel):</p>
<p>Telephone: (include area code)</p>	<p>Telephone: (include area code)</p>
<p>Telecopy: (include area code)</p>	<p>Telecopy: (include area code)</p>

SBN (lead counsel):	SBN (lead counsel):
If not represented by counsel, provide appellant's/appellee's address, telephone number, and telecopy number. On Attachment 1, or a separate attachment if needed, list the same information stated above for any additional parties to the trial court's judgment.	
II. Perfection Of Appeal And Jurisdiction (TRAP 32.1(b), (c), (g), (j)):	
Date order or judgment signed: (Attach a signed copy, if possible)	Date notice of appeal filed in trial court: (Attach file-stamped copy; if mailed to the trial court clerk, also give the date of mailing)

<p>What type of judgment? (e.g., jury trial, bench trial, summary judgment, directed verdict, other (specify))</p> <p>If money judgment, what was the amount?</p> <p>Actual damages:</p> <p>Punitive (or similar) damages:</p> <p>Attorneys' fees (trial):</p> <p>Attorneys' fees (appellate):</p> <p>Other (specify):</p>	<p>Interlocutory appeal of appealable order: Yes <input type="checkbox"/> No <input type="checkbox"/></p> <p>(Please specify statutory or other basis on which interlocutory order is appealable) (<i>See</i> TRAP 28)</p> <p>Accelerated appeal (<i>See</i> TRAP 28): Yes <input type="checkbox"/> No <input type="checkbox"/></p> <p>(Please specify statutory or other basis on which appeal is accelerated)</p> <p>Appeal that receives precedence, preference, or priority under statute or rule? Yes <input type="checkbox"/> No <input type="checkbox"/></p> <p>(Please specify statutory or other basis for such status)</p>
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Appeal from final judgment? Yes No

Does judgment dispose of all parties and issues:
Yes No

Does judgment have a Mother Hubbard clause?
(E.g.: "All relief not expressly granted is denied"):
Yes No

Does judgment have language that one or more parties
"take nothing"?
Yes No

Other basis for finality?

Will you challenge this Court's jurisdiction? If yes, explain.

III. Actions Extending Time To Perfect Appeal (TRAP 32.1(d)):

Action	Filed		Date Filed
	Check as appropriate		
Motion for New Trial	No <input type="checkbox"/>	Yes <input type="checkbox"/>	
Motion to Modify Judgment	No <input type="checkbox"/>	Yes <input type="checkbox"/>	
Request for Findings of Fact and Conclusions of Law	No <input type="checkbox"/>	Yes <input type="checkbox"/>	
Motion to Reinstate	No <input type="checkbox"/>	Yes <input type="checkbox"/>	
Motion under TRCP 306a	No <input type="checkbox"/>	Yes <input type="checkbox"/>	
Other (specify):	No <input type="checkbox"/>	Yes <input type="checkbox"/>	

IV. Indigency Of Party (TRAP 32.1(k)): (Attach file-stamped copy of affidavit)

Event	Filed		Date	N/A
	Check as appropriate			
Affidavit filed	No <input type="checkbox"/>	Yes <input type="checkbox"/>		
Contest filed	No <input type="checkbox"/>	Yes <input type="checkbox"/>		
Date ruling on contest due:				
Ruling on contest: Sustained <input type="checkbox"/> Overruled <input type="checkbox"/>				

V. Bankruptcy (TRAP 8):

Will the appeal be stayed by bankruptcy?
Date bankruptcy filed?

Name of bankruptcy court: Bankruptcy Case No.:

Style of bankruptcy case:

VI. Trial Court And Record (TRAP 32.1(c), (h), (i)):			
Court:	County:	Trial Court Docket Number (Cause No.):	
Trial Judge (who tried or disposed of case): Telephone Number: (include area code) Telecopy Number: (include area code) Address:		Court Clerk (district clerk): Telephone Number: (include area code) Telecopy Number: (include area code) Address:	
Clerk's Record Yes <input type="checkbox"/>	Sworn copy for accelerated appeal Yes <input type="checkbox"/> (See TRAP 28.3)	Will request <input type="checkbox"/> (Note: No request required under TRAP 34.5(a), (b))	Was requested on:
Court Reporter or Court Recorder: Telephone Number: (include area code) Telecopy Number: (include area code) Address:		Court Reporter or Court Recorder: Telephone Number: (include area code) Telecopy Number: (include area code) Address:	
(Attach additional sheet if necessary for additional court reporters/recorders)			
Length of trial (approximate):		State arrangements made for payment of court reporter/recorder:	
Reporter's or Recorder's Record (check if electronic recording <input type="checkbox"/>)	None <input type="checkbox"/>	Will request <input type="checkbox"/>	Was requested on:

<p>VII. Nature Of The Case (TRAP 32.1(f)) (Subject matter or type of case: E.g., personal injury, breach of contract, workers' compensation, or temporary injunction) (<i>see</i> list below):</p>			
Administrative/agency _____ Banking _____ Business _____ Condemnation _____ Consumer/DTPA _____ Construction _____ Contract _____ Employment/Labor _____ Family _____ Custody _____ Property Division _____ Termination _____ Other _____ Fraud _____ Insurance _____ Juvenile _____ Landlord/Tenant _____	Malpractice Legal _____ Medical _____ Other _____ Motor Vehicle _____ Municipal _____ Oil & Gas _____ Personal Injury _____ Premises Liability _____ Probate _____ Products Liability _____ Real Property _____ Securities _____ Tax _____ U.C.C./Tex. Bus. & Com. Code _____ Venue _____ Workers' compensation _____ Other (specify): _____		
<p>VIII. Supersedeas Bond (TRAP 32.1(1)):</p>	None <input type="checkbox"/>	Will file <input type="checkbox"/>	Was filed on:
<p>IX. Extraordinary Relief: Will you request extraordinary relief (e.g., temporary or ancillary relief) from this Court? Yes <input type="checkbox"/> No <input type="checkbox"/> If yes, briefly state the basis for your request.</p>			

3. Give a brief description of the issues to be raised on appeal, the relief sought, and the applicable standard of review, **if known** (without prejudice to the right to raise additional issues or request additional relief; use a separate attachment, if necessary).

XI. Related Matters: List any pending or past related **appeals or original proceedings** (e.g., mandamus, injunction, habeas corpus) before this or any other Texas appellate court by court, docket number, and style.

XII. Any other information requested by the court (see attachments, if any).

