RULES/LEGISLATION PREVIEW (STATE PERSPECTIVE)

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Organizations and Committees:

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Chair, Continuing Legal Education Committee, State Bar of Texas (2000-02)
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Member, Supreme Court Advisory Committee on Rules of Civil Procedure (1994-present); Chair, Subcommittee on Rules 16-165a
Member, Pattern Jury Charge Committee (Family Law), State Bar of Texas (1987-2000)
Supreme Court Liaison, Texas Judicial Committee on Information Technology (2001-present)
Tx. Bd. of Legal Specialization, Civil Appellate Law Advisory Commission (Member 1994-2001) and Civil Appellate Law Exam Committee (1990-present; Chair 1991-1995)
Tx. Bd. of Legal Specialization, Family Law Advisory Commission (1987-1993)
Member, Supreme Court Task Force on Jury Charges (1992-93)
Member, Supreme Court Advisory Committee on Child Support and Visitation Guidelines (1989, 1991; Co-Chair 1992-93; Chair 1994-98)
President, Texas Academy of Family Law Specialists (1990-91)
President, San Antonio Family Lawyers Association (1989-90)
Associate, American Board of Trial Advocates
Fellow, American Academy of Matrimonial Lawyers
Director, San Antonio Bar Association (1997-1998)
Member, San Antonio, Dallas and Houston Bar Associations

Professional Activities and Honors:

State Bar of Texas *Presidential Citation* "for innovative leadership and relentless pursuit of excellence for continuing legal education" (June, 2001)
State Bar of Texas Family Law Section's *Dan R. Price Award* for outstanding contributions to family law (2001)
State Bar of Texas *Gene Cavin Award for Excellence in Continuing Legal Education* (1996)
State Bar of Texas *Certificate of Merit*, June 1995, June 1996, & June 1997
Listed in the BEST LAWYERS IN AMERICA (1987-to date)

Continuing Legal Education and Administration:

Course Director, State Bar of Texas Practice Before the Supreme Court of Texas Course (June, 2002)
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Course Director, State Bar of Texas Advanced Expert Witness Course (2001, 2002, 2003)
Course Director, State Bar of Texas 1999 Impact of the New Rules of Discovery
Course Director, State Bar of Texas 1998 Advanced Civil Appellate Practice Course
Course Director, State Bar of Texas 1991 Advanced Evidence and Discovery Course
Director, Computer Workshop at Advanced Family Law Course (1990-94) and Advanced Civil Trial Course (1990-91)
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)

Books and Journal Articles:

---Chief Editor of the State Bar of Texas Family Law Section's EXPERT WITNESS MANUAL (Vols. II & III) (1999)
---Author of Vol. 6 of McDonald Texas Civil Practice, on Texas Civil Appellate Practice, published by Bancroft-Whitney Co. (1992) (900 + pages)
---*Obligations of the Trial Lawyer Under Texas Law Toward the Client Relating to an Appeal,* 41 SOUTH TEXAS LAW REVIEW 111 (1999)
---*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)
---Chapter 21 on *Business Interests* in Bancroft-Whitney's TEXAS FAMILY LAW SERVICE (Speer's 6th ed.)
---*Characterization of Marital Property*, 39 BAY. L. REV. 909 (1988) (co-authored)
---*Fitting a Round Peg Into A Square Hole: Section 3.63, Texas Family Code, and the Marriage that Crosses States Lines*, 13 ST. MARY'S L.J. 477 (1982)

SELECTED CLE SPEECHES AND ARTICLES

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); Characterization and Reimbursement (1986); 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 (1996); Qualifying and Rejecting Expert Witnesses (1997); New Developments in Civil Procedure and Evidence (1998); The Expert Witness Manual (1999); Reimbursement in the 21st Century (2000); Personal Goodwill vs. Commercial Goodwill: A Case Study (2000); What Representing the Judge or Contributing to Her Campaign Can Mean to Your Client: Proposed New Disqualification and Recusal Rules (2001); Tax Workshop: The Fundamentals (2001); Blue Sky or Book Value? Complex Issues in Business Valuation (2001)

State Bar's Marriage Dissolution Course: Property Problems Created by Crossing State Lines (1982); Child Snatching and Interfering with Possess'n: 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); Identifying and Dealing With Illegal, Unethical and Harassing Practices (1994); Gender Issues in the Everyday Practice of Family Law (1995); Dialogue on Common Evidence Problems (1995); Handling the Divorce Involving Trusts or Family Limited Partnerships (1998); The Expert Witness Manual (1999); Focus on Experts: Close-up Interviews on Procedure, Mental Health and Financial Experts (2000); Activities in the Trial Court During Appeal and After Remand (2002)

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); Appealing Non-Jury Cases in State Court (1991); The New (Proposed) Texas Rules of Appellate Procedure (1995); The Effective Motion for Rehearing (1996); Intellectual Property (1997); Preservation of Error Update (1997); TRAPs Under the New T.R.A.P. (1998); Judicial Perspectives on Appellate Practice (2000)

State Bar's Advanced Evidence & Discovery Course: Successful Mandamus Approaches in Discovery (1988); Mandamus (1989); Preservation of Privileges, Exemptions and Objections (1990); Business and Public Records (1993); Grab Bag: Evidence & Discovery (1993); Common Evidence Problems (1994); Managing Documents--The Technology (1996); Evidence Grab Bag (1997); Evidence Grab Bag (1998); Making and Meeting Objections (1998-99); Evidentiary Issues Surrounding Expert Witnesses (1999); Predicates and Objections (2000); Predicates and Objections (2001); Building Blocks of Evidence (2002); Strategies in Making a Daubert Attack (2002); Predicates and Objections (2002)

State Bar's Advanced Civil Appellate Practice 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); Non-Jury Appeals (1995); Technology and the Courtroom of the Future (1996); Are Non-Jury Trials Ever "Appealing"? (1998); Enforcing the Judgment, Including While on Appeal (1998); Judges vs. Juries: A Debate (2000); Appellate Squares (2000); Texas Supreme Court Trends (2002)

State Bar's Annual Meeting: Objections (1991); Evidentiary Predicates and Objections (1992-93); Predicates for Documentary & Demonstrative Evidence (1994); "Don't Drink That! That's My Computer!", (1997); The Lawyer As Master of Technology: Communication With Automation (1997); If You Don't Know Where You Are Going, It Doesn't Matter How You Get There: Technology Positioning (1999); Objections Checklist (2000); Evidence from Soup to Nuts (2000)

**Various CLE Providers: State Bar of Texas Advanced Civil Trial Course: Judgment Enforcement, Turnover and Contempt (1990-1991);
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RULES COMMITTEE UPDATE FOR 2002: EVIDENCE AND DISCOVERY

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Recent Publications:[1]

> Memorandum to Supreme Court Advisory Committee: "Will the 8th Circuit's *Anastasoff* decision affect the Texas rule concerning unpublished opinions?" (October 6, 2000).
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> Memorandum to Supreme Court Advisory Committee: "Composition of En Banc Court" (September 20, 2001).

[1] Available at SCAC web site (www.jwtechlaw.com/cgi-bin/WebObjects/jwinter?Q5-9)

TABLE OF CONTENTS

I. INTRODUCTION . . . . . -1-

II. TEXAS RULES OF CIVIL PROCEDURE . . . . . -2-
A. RULE 176. SUBPOENAS . . . . . -2-
B. RULE 194. REQUEST FOR DISCLOSURE . . . . . -3-

III. TEXAS RULES OF EVIDENCE . . . . . -5-
A. RULE 103. RULINGS ON EVIDENCE . . . . . -5-
B. RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES . . . . . -6-
C. RULE 701. OPINION TESTIMONY BY LAY WITNESSES . . . . . -7-
D. RULE 702. TESTIMONY BY EXPERTS . . . . . -8-

IV. INTRODUCTION. . . . . . -11-

V. NEW PROPOSED APPELLATE RULES. . . . . . -11-

VI. POSSIBLE ACTIVITIES OF THE 78TH LEGISLATURE. . . . . . -12-
A. REDISTRICTING . . . . . -12-
B. HOTLY-CONTESTED “UP BALLOT” RACES. . . . . . -13-
C. STATE BUDGET DEFICIT. . . . . . -14-
D. INTERIM COMMITTEES/STUDIES. . . . . . -14-
E. SCUTTLEBUTT ON HOT ISSUES FOR NEXT SESSION. . . . . . -17-
F. WHAT ABOUT THE GOVERNOR? . . . . . -17-

VII. APPENDIX . . . . . -18-

I. INTRODUCTION. The Supreme Court Advisory Committee ("SCAC") has recommended six rule changes in the areas of discovery and evidence. These recommendations are summarized as follows:

1. Add a comment to Rule 176, TEX. R. CIV. P., clarifying that trial subpoenas are not governed by the restrictions on discovery subpoenas.

2. Amend Rule 194.2, TEX. R. CIV. P., to allow requests for disclosure suited to family law cases.

3. Add an informational cross-reference to Rule 103, TEX. R. EVID., which deals with rulings on evidence.

4. Note a statutory exception to Rule 404(b), TEX. R. EVID., which deals with admissibility of evidence of other crimes or acts.

5. Amend Rule 701, TEX. R. EVID., (and add a comment) to clarify the distinction between expert and lay testimony.

6. Amend Rule 702, TEX. R. EVID., (and add a comment) to conform the rule to *Daubert/Robinson*.

These changes have not been adopted. They have merely been recommended to the Texas Supreme Court, and the Court can adopt them, reject them, or request revised recommendations.

The text of each affected rule and comment is set forth below with the proposed changes. As usual, the language to be deleted is stricken through and the language to be added is underlined. Each recommended change is followed by a note prepared by me. These notes do not necessarily reflect the views of the Texas Supreme Court or the SCAC.

Frank Gilstrap
Arlington, Texas
March 1, 2002

II. TEXAS RULES OF CIVIL PROCEDURE.

A. RULE 176. SUBPOENAS.

. . .

176.3. Limitations

(a) Range. A person may not be required by subpoena to appear or produce documents or other things in a county that is more than 150 miles from where the person resides or is served. However, a person whose appearance or production at a deposition may be compelled by notice alone under Rules 199.3 or 200.2 may be required to appear and produce documents or other things at any location permitted under Rules 199.2(b)(2).

(b) Use for Discovery. A subpoena may not be used for discovery to an extent, in a manner, or at a time other than as provided by the rules governing discovery.

. . .

Proposed comment:

Comments to 1999 change:

. . .

2. Rule 176.3(b) prohibits the use of a subpoena to circumvent the discovery rules. Thus, for example, a deposition subpoena to a party is subject to the procedures of Rules 196, 199, and 200, and a deposition subpoena to a nonparty is subject to the procedures of Rule 205. This subdivision does not govern the use of subpoenas for a trial or hearing.

NOTE

There are two kinds of subpoenas: trial subpoenas and discovery subpoenas. The first is used to compel attendance of a witness at a trial or hearing. The second is used as part of the discovery process. This proposed comment makes it clear that trial subpoenas are not subject to the restrictions that govern to discovery subpoenas.

The current Rule 176 deals generally with both trial subpoenas and discovery subpoenas. But the following provision deals only with discovery subpoenas:

> Use for Discovery. A subpoena may not be used for discovery to an extent, in a manner, or at a time other than as provided by the rules governing discovery.

Rule 176.3(b)(emphasis added).

The "rules regarding discovery" are found in Section 9(b) of the Rules of Civil Procedure (Rules 190-215, TEX.R.CIV.P.). These rules impose time constraints on the use of discovery subpoenas. For example, Rule 196.2 allows 30 days for a party to respond to a request for production. Under Rule 205.3, production may be compelled from a non-party by serving a subpoena "no later than 30 days before the end

of any applicable discovery period." Similarly, Rule 205.2 provides that a notice to produce documents or tangible things "must be served at least 10 days before the subpoena compelling production is served."

When it was adopted in 1999, Rule 176.3(b) was intended to apply only to discovery subpoenas. It was not intended to govern subpoenas issued for hearings on temporary injunctions or other requests for emergency relief.[2] But some trial courts have applied Rule 176.3(b) to trial subpoenas. This has presented problems in cases where hearings were set within the first 30 days of the suit. While these problems have arisen primarily with regard to requests for temporary orders in family law cases, they could also arise in temporary injunction proceedings or other proceedings heard within the first 30 days of suit.[3]

The SCAC considered a proposal to add language to Rule 176.3 expressly excluding trial subpoenas from the time constraints imposed by Section 9(b) in connection with (i) applications for temporary relief under the family code, (ii) applications for protective orders involving family violence, (iii) requests for temporary injunctions and (iv) hearings for emergency relief.[4] But the SCAC rejected this approach and recommended the comment quoted above to clarify the original rule.[5]

B. RULE 194. REQUEST FOR DISCLOSURE.

. . .

194.2. Content

A party may request disclosure of any or all of the following:

(a) the correct names of the parties to the lawsuit;

(b) the name, address, and telephone number of any potential parties;

(c) the legal theories and, in general, the factual bases of the responding party's claims or defenses (the responding party need not marshal all evidence that may be offered at trial);

(d) the amount and any method of calculating economic damages;

(e) the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case;

(f) for any testifying expert:

(1) the expert's name, address, and telephone number;

(2) the subject matter on which the expert will testify;

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[2] SCAC Transcript (Oct. 21, 2000), p. 2712 (remarks of Hon. Nathan Hecht).

[3] *Id.,* p. 2714 (remarks of Chip Babcock).

[4] *See* Memo from Richard Orsinger to Georgiana L. Simpson dated September 8, 1999 (presented at October 21, 2000, SCAC meeting).

[5] Transcript (Oct. 21, 2000), pp. 2714-2716.

(3) the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting such information;

(4) if the expert is retained by, employed by, or otherwise subject to the control of the responding party:

(A) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and

(B) the expert's current resume and bibliography;

(g) any indemnity and insuring agreements described in Rule 192.3(f);

(h) any settlement agreements described in Rule 192.3(g);

(i) any witness statements described in Rule 192.3(h);

(j) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills that are reasonably related to the injuries or damages asserted or, in lieu thereof, an authorization permitting the disclosure of such medical records and bills;

(k) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills obtained by the responding party by virtue of an authorization furnished by the requesting party.

(l) In a suit in which spousal or child support is at issue:

(1) the summary description of benefits provided through health insurance coverage in force or available through responding party's employment to insure a spouse or child, together with the corresponding insurance card and health care provider list;

(2) responding party's federal income tax returns, unless filed jointly with a spouse protected by a pre or post marital agreement, for the two previous years, including schedules and amendments, or, if no return has been filed, responding party's forms W-2, 1099s, and K-1s for such years;

(3) responding party's payroll check stubs for the preceding three months;

(m) In suits for divorce or annulment, except where there is a "*Pre or Post Marital Agreement*" between the parties:

(1) the last statement from all bank or brokerage accounts in which responding party claims an interest;

(2) the last statement of account for all of responding party's employee benefit plans;

(3) the last financial statement submitted to a lending institution by responding party; and

(4) all deeds, deeds of trust, promissory notes or leases for any real estate in the name of a party.

. . .

NOTE

Rule 194 is "designed to afford parties basic discovery of specific categories of information . . . upon request, without preparation of a lengthy inquiry, and without objection or assertion of work product."[6] Under Rule 194, a party can be required (i) to identify parties and witnesses; (ii) to set forth legal theories, factual claims, and damage calculations; (iii) and to provide copies of indemnity, insurance, and settlement agreements, witness statements, and medical records.

But Rule 194 is not well suited to family law cases, where the focus is often on support and property division.[7] Accordingly, local rules have been promulgated in some counties, requiring disclosure of both information and documents in family law cases.[8]

Originally, the SCAC considered adding a new rule 194A. This was prepared after consultation with members of the family law bar. It would have required disclosure of a broad category of documents and financial information in every case.[9]

But some SCAC members felt that this proposal was too heavily weighted toward high dollar divorces and that it could cause problems in other divorces.[10] The Committee also concluded the proposed disclosures would not be needed in cases where prenuptial or marital property agreements had been signed.[11] Accordingly, a compromise was drafted, and that compromise has been recommended to the Supreme Court.[12]

III. TEXAS RULES OF EVIDENCE.

A. RULE 103. RULINGS ON EVIDENCE.

(a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground

[6] Rule 194, Cmt. 1.

[7] Transcript (Oct. 21, 2000), pp. 2716-2717 (remarks of Joan F. Jenkins). *Cf.* TEX.FAM.CODE § 154.062 (listing "net resources for the purpose of determining child support liability.").

[8] Transcript (Oct. 21, 2000), p. 2722 (remarks of Joan F. Jenkins); *Id.*, p. 2725 (remarks of Hon. F. Scott McCown); *Id.*, p. 2729 (remarks of Gilbert Low); *Id.*, p. 2730 (remarks of Hon. Nathan Hecht); Transcript (Nov. 17, 2000), p. 3142 (remarks of Richard Orsinger). *See, e.g.,* Harris County Local Rules 4.4.1 & 4.4.2; Tarrant County Local Rule 4.05(b).

[9] Transcript (Oct. 21, 2000), pp. 2717-2718 (remarks of Joan F. Jenkins).

[10] Id., p. 2723 (remarks of Joan F. Jenkins); Id., pp. 2727-2728 (remarks of Hon. David Peeples); Id., p. 2729 (remarks of Chip Babcock); Id., pp. 2731-2732 (remarks of Hon. F. Scott McCown).

[11] Id., p. 2729 (remarks of Hon. Sarah Duncan).

[12] Transcript (Nov. 17, 2000), p. 3143-3152.

was not apparent from the context. When the court hears objections to offered evidence out of the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections.

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer, or was apparent from the context within which questions were asked.

Proposed Comment:

For an explanation of preservation of error in obtaining a ruling from the trial court, see Rule 33.1(a)(2) of the Texas Rules of Appellate Procedure.

NOTE

Rule 33.1(a)(2), TEX.R. APP.P., sets forth the "prerequisite[s] to presenting a complaint for appellate review." The proposed comment merely cross-references that rule.[13]

B. RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES.

. . .

(b) Other Crimes, Wrongs or Acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .

Proposed Comment:

In certain prosecutions for an offense committed against a child under seventeen years of age, refer to Article 38.37 of the Code of Criminal Procedure for additional provisions on the admissibility of certain extraneous acts.

NOTE

Under Rule 404(b), "[e]vidence of other crimes, wrongs or acts is not admissible . . . to show action in conformity therewith." But such evidence can be admitted to show "motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." But the Code of Criminal Procedure expressly creates an exception to Rule 404 in criminal prosecutions for sexual assault of a minor. Under Section 38.37 of the Code, "evidence of other crimes, wrongs, or acts committed by the

[13] Id., pp. 3207-3208 (remarks of Gilbert Low).

defendant against the child who is the victim of the alleged offense" are admissible. This comment merely cross-references that exception.[14]

C. RULE 701. OPINION TESTIMONY BY LAY WITNESSES.

~~If the witness is not testifying as an expert,~~ If a witness's testimony is not based on scientific, technical, or other specialized knowledge within the scope of Rule 702, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences ~~which~~ that are ~~(a)~~ rationally based on the perception of the witness, and ~~(b)~~ helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

Proposed Comment:

The amendment to Rule 701 is intended to eliminate the risk that the reliability requirements for the admissibility of scientific, technical, or specialized knowledge under Rule 702 will be evaded through the expedient of proffering an expert as a lay witness.

The phrase "scientific, technical, or other specialized knowledge" is intended to have the same meaning as the identical phrase in Rule 702. Generally, lay testimony is based on common and everyday observations and inferences . However, the language does not change the standards for admissibility of evidence traditionally offered under Rule 701 which distinguishes between expert and lay testimony and not between expert and lay witnesses since it is possible for the same witness to give both lay and expert testimony in the same case.

NOTE

This recommendation is prompted by a recent change in the corresponding federal rule. Effective December 1, 2000, Federal Rule of Evidence 701 was amended to read as follows:

> If a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, ~~and~~ (b) helpful to a clear understanding of the witnesses testimony or the determination of a fact issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

According to the federal comments, the purpose of the federal amendment is "to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." [15] It is intended to focus on the distinction "between expert and lay *testimony*," rather than on the distinction "between expert and lay *witnesses*." [16]

[14] Id., p. 3208.

[15] Rule 701, Fed.R.Civ.P., Advisory Committee Notes, 2000 Amendments.

[16] Id., p. 3222 (remarks of Hon. Harvey F. Brown); Id., p. 3223 (remarks of Chip Babcock); Id., p. 3224 (remarks of Gilbert Low).

The SCAC concluded that this goal would be better served by adopting the wording of a competing proposal from the National Conference of Commissions on the Uniform State Laws to Revise the Uniform Rules of Evidence (the "Commissioners"),[17] and this was the source of the committees' recommendation.[18]

The SCAC concluded that the Commissioners' draft is superior to the amended federal rule in two ways. First, the amended federal rules begins with the phrase

> "If a witness is not testifying as an expert . . . ."

The Commissioners' draft, however, begins with the phrase,

> If the witness' testimony is not based on scientific, technical, or other specialized knowledge within the scope of Rule 702, . . .

Second, the federal amendment adds the phrase "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702," as a third subpart in the federal rule. This treats the quoted phrase as part of the test. But it is more consistent and logical to treat the quoted phrase as part of the predicate to determine whether the witness is testifying as a fact witness or as an expert witness.[19] Again, the SCAC felt that the Commissioners' approach was more consistent and logical.

D. RULE 702. TESTIMONY BY EXPERTS.

~~If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.~~

<u>A witness may give expert testimony in the form of opinion or otherwise if the following are satisfied:</u>

(1) <u>Basis for testimony. The testimony is based on scientific, technical, or other specialized knowledge.</u>

(2) <u>Assistance to trier of fact. The testimony will assist the trier of fact to understand evidence or determine a fact in issue.</u>

(3) <u>Qualification of witness. The witness is qualified by knowledge, skill, experience, training, or education as an expert in the scientific, technical, or other specialized field.</u>

(4) <u>Reliability**.** The testimony is</u>

(A) <u>based upon sufficient facts or data;</u>

(B) <u>the product of reliable principles and methods; and</u>

(C) <u>the product of a reliable application of the data, principles and methods to the facts of the case.</u>

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[17] Transcript (Oct. 21, 2000), pp. 3220-3221 (remarks of Hon. Harvey F. Brown).
[18] Transcript (Nov. 17, 2000), p. 3227 (unanimous vote).
[19] Id., p. 3222 (remarks of Hon. Harvey F. Brown).

Proposed Comment:

An expert opinion derived from scientific, technical, or other specialized knowledge must assist the trier of fact. *K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000). The opinion will not assist the trier of fact unless the opinion is relevant to a material issue and is based upon a foundation of knowledge shown to be, or known to be, reliable. *E.I. duPont de Nemours v. Robinson,* 923 S.W.2d 549 (Tex.1995).

Subdivisions (a)(1), (2) and (3) retain the substance of existing Rule 702 but are changed stylistically to show the different subparts of the rule.

Subdivision (a)(4) is based on FRE 702 as amended December 1, 2000 and the three different reliably tests identified by *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 714 (Tex.1997). Reliability requires the trial court to scrutinize not only the principles and methods used by the expert, but also whether these principles and methods have been properly applied to the facts of the case and any data, studies, or facts that underlie, or form the foundation of, the expert's opinion.

The relevant factors for determining reliability under Rule 702(a)(4) will vary from expertise to expertise. For a list of some of the factors used by courts, see *E.I. duPont de Nemours v. Robinson,* 923 S.W.2d 549 (Tex.1995); *Nenno v. State*, 970 S.W.2d 549, 561 (Tex.Crim.App.1998); *Kelly v. State*, 824 S.W.2d 569, 572, 573 (Tex.Crim. App.1992). The court should also consider whether the expert has used the same principles and methodology that the expert uses in his or her field. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). The reliability inquiry is a flexible one and will vary according to the expert's field. In some cases, the extent of the expert's personal experience will be an important factor for determining reliability. *Gammill v. Jack Williams Chevrolet, Inc*., 972 S.W.2d 713 (Tex.1998).

The trial court's determination of admissibility should be made outside the presence of the jury.

The role of the trial court is not to determine the validity or accuracy of the opinions formed by the expert, but to determine admissibility of the opinions. The trial court's decision on admissibility and selection of the criteria for examining the principles and methodology used by the expert is subject to review for abuse of discretion. Courts may consider inadmissible evidence pursuant to Rule 104(a) in making this determination.

____

Particular opinions or portions of the testimony of an expert may be admissible under this rule even though other opinions or portions of the testimony from the same witness are inadmissible under this rule.

NOTE

This recommendation is also prompted by a recent change in the corresponding federal rule. Effective December 1, 2000, Federal Rule 702 was amended to read as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify

> thereto in the form of an opinion or otherwise~~.~~, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The Texas Supreme Court adopted the *Daubert* rule in 1995,[20] but the SCAC decided against recommending a change in the wording of Rule 702 in order to let the case law develop further.[21] But now, the federal rule has been amended "in response to *Daubert*." [22] In light of this development, the SCAC decided that the time had come to address the wording of the Texas ruling.[23]

The SCAC recommendation takes language from both the recent federal amendment and a competing draft prepared by the Commissioners. Specifically, sub-parts 1, 2, and 3 of the recommended rule come from the Commissioners' draft while sub-part 4 comes from the amended federal rule.

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[20] E.I. duPont de Nemours and Co. v. Robinson, 923 S.W.2d 549 (Tex.1995).
[21] Transcript (Nov.17, 2000), pp. 3246-3247 (remarks of Hon. Harvey F. Brown).
[22] Rule 702, Fed.R.Civ.P., Advisory Committee Notes, 2000 Amendments.
[23] Id., pp. 3248-3255.

RULES/LEGISLATION PREVIEW (STATE PERSPECTIVE)©

by
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IV. INTRODUCTION. This article adds to Frank Gilstrap's paper on changes to the Texas Rules of Civil Procedure and Evidence, discussed recently-announced changes to the Texas Rules of Appellate Procedure, and makes some projections regarding legislative activity in the upcoming 78th Legislature.

V. NEW PROPOSED APPELLATE RULES. The Texas Supreme Court and Court of Criminal Appeals, on August 8, 2002, promulgated proposed changes to the Texas Rules of Appellate Procedure. See Misc. Docket No. 02–9119. The Courts issued the following statement:

> The Texas Supreme Court and the Court of Criminal Appeals have proposed amendments to the Texas Rules of Appellate Procedure to take effect Jan. 1. Among the 25 revisions is one that calls for publication of all civil cases by Texas appellate courts and allows the citation of previously unpublished opinions in appellate court briefs.
>
> The proposal would change TRAP Rule 47 to require publication of each civil law opinion by the courts of appeals, allowing the courts to designate each as either "opinion" or "memorandum opinion." In criminal cases, courts of appeals may order opinions to be issued not for publication.
>
> The rule orders all decisions by the courts of appeals to be made available to public reporters, the electronic and print publishers.
>
> The rules revisions set standards for designating "memorandum opinions," excluding those that establish new legal rules or modifications of rules, that apply existing rules to novel facts "likely to recur," or that involve constitutional issues or issues important to Texas jurisprudence. Previous decisions that were ordered not published may be cited in legal briefing to a court with a notation that they were designated not for publication.
>
> The proposed changes also include new rules relating to the service of record materials in original proceedings (Proposed Rule 52.7(c)), the procedure for offering a voluntary remittitur and implementing settlements (Proposed Rule 46) and expressly

would allow a party to adopt by reference portions of an appellate brief filed in an appellate court by another party in the same case (Proposed Rule 9.7).

> The proposed changes will be published, as required, in the September issue of the State Bar of Texas' monthly magazine, the Texas Bar Journal, and will be published in the Texas Register.
>
> The proposals, the first major revision to the Texas Rules of Appellate Procedure since 1997, began as a list of suggestions from the State Bar's Appellate Section and were discussed and modified in a series of debates over several years by the Supreme Court Advisory Committee.
>
> Both courts seek public comments on the proposed revisions. Comments should be addressed to the Supreme Court not later than Nov. 31 and submitted to the Court's rules attorney, Chris Griesel, at P.O. Box 12248, Austin 78711, or be emailed to chris.griesel@courts.state.tx.us.
>
> Comments will be forwarded to all 18 members of the state's highest courts.

Proposed amendments to Tex. R. App. P. 47 eliminate unpublished opinions of courts of appeals in civil cases. Under the proposed amendments, each court of appeals opinion must be designated either “Opinion” or “Memorandum Opinion.” Memorandum opinions are to be used for cases where the issues are settled, and should be long enough only to advise the parties of the court’s decision and the basic reasons for it. Proposed TRAP 47.4.

VI. POSSIBLE ACTIVITIES OF THE 78TH LEGISLATURE. It is too early to tell much about the legislative session that will start on January 14, 2003.

A. REDISTRICTING. Existing electoral boundaries were redistricted by a federal three-judge panel in judgments that were issued November 28-30, 2001. The opinions, judgments, and related maps can be found at

http://gis1.tlc.state.tx.us/static/2002districts.htm

Interested persons might take time to read Judge Hannah’s concurring opinion in the State Senate redistricting decision, which begins:

> I have concurred with the legal conclusion reached by my brethren in regard to the House and Senate Redistricting Plan. I write separately to express my shock at the drawing of districts by the State of Texas. The dominant political party treated all members of the opposing party as if they were "enemies of the State" instead of respected state leaders, many with a great wealth of governmental knowledge and ability that has and could inure to the benefit of Texas.

On June 17, 2002, the U.S. Supreme Court affirmed the decision of the three-judge federal court on Texas congressional and legislative redistricting.

Some political insight in the situation is provided in a 12-6-2001 article by Dave McNeely, of the Austin American-Statesman:

> Several of Democratic House Speaker Pete Laney's key team members have decided not to seek re-election since a three-judge federal court on Nov. 28 approved the board's plan with only slight changes.
>
> Others quitting — so far — are Appropriations Chairman Rob Junell, D-San Angelo; Public Education Chairman Paul Sadler, D-Henderson; Civil Practices Chairman Fred Bosse, D-Houston; County Affairs Chairman Tom Ramsay, D-Mount Vernon; Public Health Chairwoman Patricia Gray, D-Galveston; and Transportation Vice Chairwoman Judy Hawley, D-Portland.
>
> The board put all but Junell, who is in line for a federal judgeship, into districts with other incumbents. Several other Laney team members were paired with other legislators. Although some — such as Public Safety Chairman Bob Turner, D-Voss, who's paired with Rep. Harvey Hilderbran, R-Kerrville — plan to seek re-election, others, such as Pensions and Investments Chairman Dale Tillery, D-Dallas, might retire.

http://www.austin360.com/aas/metro/mcneely/1201/120601.html. Some of these retirement decisions pre-dated the adoption of the redistricting plan, which means that some of the combinations were not designed to eliminate incumbents. But the Republicans do have a chance at capturing the House and Senate. It is not certain that a Republican House would elect a Republican Speaker, and current Speaker Laney (a Democrat) is said to have support from some Republican State Reps to continue as Speaker of the House.

It is projected that there will be 40-50 new House members, which may impact what legislation comes up or gets out. There will be 8-10 new State Senators, but several of those are "House broken" (i.e., already served in the House and know what's going on). The Texas Constitution does not require that the presiding officer of the Senate be the Lieutenant Governor, so a possibility exists that a Republican Senate might not elect a Democratic Lt. Gov. to preside, but that looks like a long shot.

B. HOTLY-CONTESTED "UP BALLOT" RACES. Apart from the potentially revolutionary effects of redistricting, Democratic candidates are running vigorous state-wide campaigns that may have a "coat tail" effect on other electoral races. A poll taken from July 31 to Aug. 8 by Austin's Montgomery & Associates shows Democrat gubernatorial candidate Tony Sanchez lagging behind Gov. Rick Perry, 40 vs. 52 percent. *See* Dave McNeely, *Perry's lead is slipping, polls show*, Austin American-Statesman (Aug. 15, 2002). Democratic U.S. Senatorial candidate Ron Kirk appears to be running a close race with Republican candidate John Cornyn. However, some observers feel that in recent years there has not been a pronounced coat tail effect for down ballot races, and if voters are splitting their votes rather than pulling "party levers" then the coat tail effect may not materialize.

In a hotly contested governor's race, the candidates may have to take positions or make promises that they must try to follow-through with during the ensuing legislative session. Possibly the next Governor may have an agenda that crowds out the agendas of specific legislators.

The political landscape may look quite different after election day, November 5, 2002.

C. STATE BUDGET DEFICIT. State Comptroller Carole Keeton Rylander announced in April 2002 that the Texas Legislature most likely will be facing an approximately $5 billion shortfall in setting the 2004-2005 state budget, when the Legislature convenes on January 14, 2002.

Speaking to the Beaumont Chamber of Commerce on April 17, 2002, Comptroller Rylander said that most of the state's money comes from sales tax revenue and motor-vehicle taxes. She said that, along with considering an overhaul of the state's school finance system, legislators will have to deal with an obligation to fund a $1.25 billion teacher health insurance program. "I think that things like that are probably going to have to be plugged in first," Rylander said. "Education, education, education is where I come from, and of course that's a part of education."

One Texas State Senator commented to the author that as a result of the projected deficit, "most of the interim session attention has been focused on money, money, and money."

The Texas constitution prohibits deficit financing. If tax collections and other state revenues drop below what is already budgeted, legislators would have to cut spending, transfer funds between programs, or raise taxes to keep the state budget balanced. The last general state tax increase in Texas occurred in special session in 1991, where the Legislature overcame a $4.6 billion shortfall by a combination of accounting changes, agency consolidations, tax increases, fee increases, and the institution of a state lottery.

On August 22, 2002 acting Lt. Gov. Bill Ratliff announced that a special session to pass a budget is a distinct possibility. He projected a $8 billion revenue shortfall for the 2004-2005 budget. San Antonio Express News p. 1 (Aug. 23, 2002).

D. INTERIM COMMITTEES/STUDIES.[24] There is a host of special and standing committees of both the House and Senate that have been working on "charges" assigned to those committees by the Speaker of the House and Lt. Governor. You can access these charges at

http://www.lrl.state.tx.us/interim/cmtes.cfm

While these committee charges do reflect legislative priorities, some interim committees don't meet very often and the reports are written by staff, and anyway the reports have not yet issued, so probably not much can be gleaned from the committee charges.

[24] Supreme Court Rules Attorney, Chris Griesel, helped assemble the information contained in this Section of the article.

1. House Committees. House Interim Study Charges, issued in November 2001, of interest to practicing lawyers include:

- House Committee on Business and Industry: review of binding arbitration requirements in consumer agreements, especially where the consumer has no bargaining power; consider substantive recodifications of the Business Organization Code; assess need for regulation in sale of caskets.

- House Committee on Civil Practices: investigate use of confidentiality orders to seal information in product liability cases that might impact public health and safety; analyze changes over past decade (arbitration, mediation and other ADR) that affect the right to litigants to "appropriate review by a judicial body"; review changes in law enforcement procedures necessitated by terrorism; analyze appellate decisions that clearly failed to implement legislative purpose, or found statutes to be in conflict, or held a statute to be unconstitutional, or expressly suggested legislative action; and finally *to "monitor the rule-making proceedings of the Texas Supreme Court"*. [Emphasis added]

- House Committee on Criminal Jurisprudence: review statutes regulating "eight-liner" gambling machines; study trends involved in identity theft.

- House Committee on Financial Institutions: review mortgage lending industry for compliance with Mortgage Broker Licensing Act of 1999; research trends and practices in sub-prime lending; review practices of financial institutions to comply with consumer privacy law.

- House Committee on General Investigating: review creation of special purpose districts of limited geographical area and with the power to tax, etc.

- House Committee on Insurance: review issues associated with homeowners' insurance coverage of mold and mold-related claims; review medical liability insurance market as to the number and financial condition of carriers, claims experience, etc.; insurance claims practices.

- House Committee on Judicial Affairs: review Uniform Durable Power of Attorney Act; evaluate rules for ethical conduct of appellate court briefing attorneys;[1] monitor progress of fax filing in courts, use of electronic signatures and electronic notarization, etc.; assess judicial campaigns as to financing, accountability, immunity, candidate qualifications; consider establishment of a uniform schedule of fees for filing of civil cases.

- House Committee on Juvenile Justice and Family Issues: examine role of attorney ad litem and guardian ad litem in suits affecting the parent-child relationship; study gestational agreements.

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[1] Last Session Governor Perry vetoed SB 1210 regarding "signing bonuses" for appellate court briefing attorneys, on the grounds that it was "overly broad and vague, and restricts the ability of judges across the state to hire qualified judicial clerks . . . ." Veto Proclamation, June 17, 2001. [http://www.lrl.state.tx.us/legis/vetoes/sb1210.pdf]

- House Committee on Land and Resource Management: study urban sprawl, loss of farm land and wildlife habitat.

- House Committee on Natural Resources: gather information on security of Texas waters as against acts of terrorism.

- House Committee on Public Health: assess healthcare infrastructure in light of hospital foreclosures, rising costs, etc.; gather information on production, distribution, use and disposal of biological agents that could be used for biological attacks.

- House Committee on State Affairs: ensure availability of broadband service statewide; study security of state-owned buildings, electric generation and transmission facilities.

- House Committee on Constitutional Revision: evaluate public perception of need for comprehensive revision of the Texas Constitution.

On November 15, 2001, House Speaker Pete Laney made appointments to seven committees or task forces: Health Disparities Task Force (eliminate disparities in access to health services); Bi-National Health Benefit Insurance Coverage (border area health needs); Electronic Government Projects (oversee creation of electronic projects for state agencies); Oil Field Cleanup (State Oil Field Cleanup Fund); Personal Privacy Task Force (collection and dissemination of personal information by state agencies); Sunset Advisory Commission (recommendations on renewing state agencies scheduled to expire–including the State Bar of Texas); Poet Laureate, Musician & Artists Committee (designate poet laureate, state musician, and state artists).

2. Joint Committees. Several joint committees have been active between sessions, including: the Long Term Care Legislative Oversight Committee (nursing homes); Joint Interim Committee on Health Services (monitor Medicaid and Children's Health Insurance Program costs); Joint Interim Committee on Higher Education Excellence Funding (funding issues); and the Joint Interim Committee on Private Activity Bonds; Joint Interim Committee on Public School Finance (comprehensive review of system).

3. Senate Committees. Senate Interim Study Charges, all with a reporting deadline of November 15, 2002, that might be of interest to practicing lawyers include:

- Senate Committee on Administration: study contract claims procedure under Tex. Gov't Code ch. 2260.

- Senate Committee on Business and Commerce: study termination of contractual agreements between insurers and insurance agents; monitor trends in lending practices, with an eye toward retaining bank deposits in Texas, increasing loan-to-deposit ratios in Texas, etc.

- Senate Committee on Criminal Justice: study rehabilitation programs as an alternative to incarceration for non-violent drug-dependent offenders; other prison-related issues.

- Senate Committee on Education: study accountability in public schools; evaluate teacher certification programs; study programs designed to increase accessibility of higher education.

- Senate Committee on Finance: study state tax system, including exemptions and abatements; study rising medical costs and impact on state budget; review Crime Victims Compensation Fund; evaluate capacity and funding for trauma care.

- Senate Committee on Intergovernmental Relations: study foreclosure and other powers granted to property owners' associations to enforce covenants; examine special districts and including fresh water supply districts; study possible county regulation of growth in unincorporated areas.

- Senate Jurisprudence Committee: study judicial system revenue structure, including collection of court costs; make recommendations on reapportionment of judicial districts; study structure of court system with regard to improving quality, cost-effectiveness and uniformity of visiting judges; study need for additional courts and eliminating jurisdictional conflicts between courts; avoidance of racial profiling by peace officers.

- Senate Committee on Natural Resources: assess current efforts to reduce emissions and comply with federal Clean Air Act; study alternative fuels and fuel additives.

- Senate Committee on State Affairs: monitor Texas Transportation Plan, including with regard to NAFTA traffic, etc.

E. SCUTTLEBUTT ON HOT ISSUES FOR NEXT SESSION. The State budget can be expected to consume much legislative energy. House and car insurance availability and Texas' unusually high premium rates will be a controversial issue. Some candidates campaign on an anti-lawyer basis, and tort law reform interest groups are expected to return to Austin to push legislation. *See* http://www.tortreform.com/default.asp. Controversy over "sunsetting" the State Bar of Texas could surface, particularly if tort reform and unauthorized practice of law bills are attached to the State Bar Act as it passes either chamber. Several State Bar Sections have legislation they will be pushing, such as the Real Estate, Probate & Trust Law Section's Uniform Principal and Income Act and Uniform Prudent Investor Act. The Family Law Section will be pushing a bill on gestational agreements.

F. WHAT ABOUT THE GOVERNOR? After a bill passes the Legislature, it faces an uncertain fate with the Governor. In the past session, Governor Perry broke all records over 20 years in the number of bills vetoed. Here is the count:

Gov.	Legislature	Year	# Vetoes
Perry	77th	2001	82
Bush	76th	1999	33
Bush	75th	1997	37
Bush	74th	1995	25
Richards	73rd	1993	26

Richards	72nd	1991	36
Clements	71st	1989	56
Clements	71st 4th	1990	1
Clements	71st 5th	1990	2
Clements	71st 6th	1990	1
Clements	70th	1987	52
White	69th	1985	51
White	69th 3d	1986	1
White	68th	1983	43

Governor Perry's proclamations in vetoing bills from the last Legislature can be found at

http://www.lrl.state.tx.us/legis/vetoes/77veto.html

Governor Perry's Veto Proclamations reflect a concern for consistency, an expression of the Governor's political philosophy, and a view that the Executive Branch has a pro-active role in the law-making process. However, the high number of vetoes has created a greater-than-average number of disgruntled legislators and interest groups. If Governor Perry is re-elected, it will be interesting to see whether his staff works more closely with the Legislature to work out "kinks" in the bills during the session so that veto can be avoided.

VII. APPENDIX. Attached are the proposed amendments to the Texas Rules of Appellate Procedure. They become effective January 1, 2003, as amended between now and then.

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 02–9119

APPROVAL OF AMENDMENTS TO THE TEXAS RULES OF APPELLATE PROCEDURE

ORDERED that:

1. The Texas Rules of Appellate Procedure are amended as follows:

a. Rules 4.5, 9.5(a), 11, 12.6, 13.1, 18.1, 19.1, 25.2, 26.2, 29.5, 34.6(e), 34.6(f), 38.6(d), 42.1, 46.5, 47, 52.7, 55.1, 56.3, 68.4(g), and 71 are amended and comments added;

b. Rules 38.2(a)(1) and 55.2(e) are amended without comments; and

c. Rules 9.7 and 33.1(d) are added with comments;

2. These amendments, with any changes made after public comments are received, take effect January 1, 2003;

3. 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; and

4. 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 ______ day of August, 2002.

____
Thomas R. Phillips, Chief Justice

____
Nathan L. Hecht, Justice

____
Craig T. Enoch, Justice

____
Priscilla R. Owen, Justice

____
James A. Baker, Justice

____
Deborah G. Hankinson, Justice

____
Harriet O'Neill, Justice

____
Wallace B. Jefferson, Justice

____

Xavier Rodriguez, Justice

4.5 No Notice of Judgment or Order of Appellate Court; Effect on Time to File Certain Documents.

(a) *Additional Time to File Documents.* A party may move for additional time to file a motion for rehearing in the court of appeals, a petition for review, or a petition for discretionary review, if the party did not — until after the time expired for filing the document — either receive notice of the judgment or order from the clerk or acquire actual knowledge of the rendition of the judgment or order.

(b) *Procedure to Gain Additional Time.* The motion must state the earliest date when the party or the party's attorney received notice or acquired actual knowledge that the judgment or order had been rendered. The motion must be filed within 15 days of that date but in no event more than 90 days after the date of the judgment or order.

(c) *Where to File.*

(1) A motion for additional time to file a motion for rehearing in the court of appeals must be filed in and ruled on by the court of appeals in which the case is pending.

(2) A motion for additional time to file a petition for review must be filed in and ruled on by the Supreme Court.

(3) A motion for additional time to file a petition for discretionary review must be filed in and ruled on by the Court of Criminal Appeals.

(d) *Order of the Court.* If the court finds that the motion for additional time was timely filed and the party did not — within the time for filing the motion for rehearing, petition for review, or petition for discretionary review, as the case may be — receive the notice or have actual knowledge of the judgment or order, the court must grant the motion. If the court grants the motion, the time for filing the document will begin to run on the date when the court grants the motion.

Notes and Comments

Comment to 2002 change: Subdivision 4.5 is amended to clarify that a party may

obtain additional time to file documents when the party fails to receive notice not only of an appellate court judgment, but of an appellate court order — such as one denying a motion for rehearing — that triggers the appeal period.

9.5 Service.

(a) *Service of All Documents Required.* At or before the time of a document's filing, the filing party must serve a copy on all parties to the ~~appeal or review~~ proceeding. But a party need not serve a copy of the record.

Notes and Comments

Comment to 2002 change: The change clarifies that the filing party must serve a copy of the document filed on all other parties, not only in an appeal or review, but in original proceedings as well. The rule applies only to filing *parties*. Thus, when the clerk or court reporter is responsible for filing the record, as in cases on appeal, a copy need not be served on the parties. The rule for original civil proceedings, in which a party is responsible for filing the record, is stated in subdivision 52.7.

9.7. Adoption by Reference. Any party may join in or adopt by reference all or any part of a brief, petition, response, motion, or other document filed in an appellate court by another party in the same case.

Notes and Comments

Comment to 2002 change: Subdivision 9.7 is added to provide express authorization for the practice of adopting by reference all or part of another party's filing.

RULE 11. AMICUS CURIAE BRIEFS

An appellate clerk may receive, but not file, an amicus curiae brief. But the court for good cause may refuse to consider the brief and order that it be returned. An amicus curiae brief must:

(a) comply with the briefing rules for parties;

(b) identify the person or entity on whose behalf the brief is tendered;

(c) disclose the source of any fee paid or to be paid for preparing the brief; and

(d) certify that copies have been served on all parties.

Notes and Comments

Comment to 2002 change: The change expressly recognizes that a court may refuse to consider an amicus curiae brief for good cause.

12.6. Notices of Court's Judgments and Orders. In any proceeding, the clerk of an appellate court must promptly send a notice of any judgment, mandate, or other court order ~~of the court~~ to all parties to the proceeding.

Notes and Comments

Comment to 2002 change: Subdivision 12.6 is amended to require the clerk to notify the parties of all of the court's rulings, including the mandate.

13.1. Duties of Court Reporters and Recorders. The official court reporter or court recorder must:

(a) unless excused by agreement of the parties, attend court sessions and make a full record of the proceedings ~~unless excused by agreement of the parties~~;

(b) take all exhibits offered in evidence during a proceeding and ensure that they are marked;

(c) file all exhibits with the trial court clerk after a proceeding ends;

(d) perform the duties prescribed by Rules 34.6 and 35; and

(e) perform other acts relating to the reporter's or recorder's official duties, as the trial court directs.

Notes and Comments

Comment to 2002 change: Subdivision 13.1(a) is amended merely for clarification.

18.1 Issuance. The clerk of the appellate court that rendered the judgment must issue a mandate in accordance with the judgment and send it to the clerk of the court to which it is directed and to all parties to the proceeding when one of the following periods expires: . . . .

Notes and Comments

Comment to 2002 change: Subdivision 18.1 is amended consistent with the change in subdivision 12.6.

19.1 Plenary Power of Courts of Appeals. A court of appeals' plenary power over its judgment expires:

(a) 60 days after judgment if no timely filed motion to extend time or motion for rehearing is then pending; or

(b) 30 days after the court overrules all timely filed motions for rehearing, including motions for en banc reconsideration of a panel's decision under Rule 49.7, and motions to extend time to file a motion for rehearing.

Notes and Comments

Comment to 2002 change: Subdivision 19.1 is amended to clarify that a motion for en banc reconsideration extends the court of appeals' plenary power in the same manner as a motion for rehearing addressed to the panel of justices who rendered the judgment or under consideration.

25.2. Criminal Cases.

(a) *Rights to Appeal.*

(1) Of the State. The State is entitled to appeal a court's order in a criminal case as provided by Code of Criminal Procedure article 44.01.

(2) Of the Defendant. A defendant in a criminal case has the right of appeal under these rules. In a plea bargain case — that is, a case in which a defendant's plea was guilty or nolo contendere and the punishment did not exceed the punishment recommended by the prosecutor and agreed to by the defendant — a defendant may appeal only:

(A) those matters that were raised by written motion filed and ruled on before trial, or

(B) after getting the trial court's permission to appeal.

(~~a~~b) *Perfection of appeal.* In a criminal case, appeal is perfected by timely filing a sufficient notice of appeal. In a death-penalty case, however, it is unnecessary to file a notice of appeal.

(~~b~~c) *Form and sufficiency of notice.*

(1) Notice must be given in writing and filed with the trial court clerk.

(2) ~~Notice is sufficient if it shows~~ To be sufficient to invoke the appellate court's jurisdiction of the notice of appeal and the appellate record, notice must show the party's desire to appeal from the judgment or other appealable order.

~~(3) But if the appeal is from a judgment rendered on the defendant's plea of guilty or nolo contendere under Code of Criminal Procedure article 1.15, and the punishment assessed did not exceed the punishment recommended by the prosecutor and agreed to by the defendant, the notice must:~~

~~(A) specify that the appeal is for a jurisdictional defect;~~

~~(B) specify that the substance of the appeal was raised by written motion and ruled on before trial; or~~

~~(C) state that the trial court granted permission to appeal.~~

(3) To be sufficient to invoke the appellate court's full jurisdiction, notice also must:

(A) if the State is appealing, comply with Code of Criminal Procedure article 44.01, or

(B) if the defendant is the appellant, bear the trial court's certification of the defendant's right of appeal under Rule 25.2(a)(2). The certification should be part of the original notice, but may be added by timely amendment under this rule or Rule 37.1

(d) *Amending the Notice.* An amended notice of appeal correcting a defect or omission in an earlier filed notice may be filed in the appellate court at any time before the ~~appellant's~~ appealing party's brief is filed. The amended notice is subject to being struck for cause on the motion of any party affected by the amended notice. After the ~~appellant's~~ appealing party's brief is filed, the notice may be amended only on leave of the appellate court and on such terms as the court may prescribe.

(~~c~~e) *Clerk's duties.* The trial court clerk must note on the copies of the notice of appeal the case number and the date when the notice was filed. The clerk must then immediately send one copy to the clerk of the appropriate court of appeals and one copy of a defendant's notice of appeal to the State's attorney.

(~~e~~f) *Effect of appeal.* Once the record has been filed in the appellate court, all further proceedings in the trial court — except as provided otherwise by law or by these rules — will be suspended until the trial court receives the appellate-court mandate.

Notes and Comments

Comment on 2002 change: Rule 25.2, for criminal cases, is amended. Subdivision 25.2 (a)(2), which replaces former subdivision 25.2(b)(3), conforms to Code of Criminal Procedure article 44.02. Subdivision 25.2(b) is given the requirement that a notice of appeal be in "sufficient" form, which codifies the decisional law. Subdivision 25.2(c)(1) requires a minimum level of sufficiency for the notice to invoke the jurisdiction of the appellate court over the preliminary stages of the appeal. Subdivision 25.2(c)(3) adds a requirement that every defendant's notice of appeal be certified by the trial court. If the

notice is not certified, the appeal has not been fully perfected under subdivision 25.2(b). Similarly, the State's appeal is not fully perfected if its notice is not in compliance with Code of Criminal Procedure 44.01. If a sufficient notice of appeal is not filed after the appellate court deals with the defect (see Rule 37.1), preparation of an appellate record and representation by an appointed attorney may cease. A form of notice of appeal for defendants is provided in an appendix to these rules.

[Form to be included in Appendix:]

The State of Texas	In the ______________ Court
v.	of
________, Defendant	____________ County, Texas

DEFENDANT'S NOTICE OF APPEAL IN CRIMINAL CASE

This is notice of the defendant's desire to appeal from the judgment or other appealable order in this case.

___________________________________	___________________________________
Defendant (if not represented by counsel)	Counsel
Mailing address:	State Bar of Texas identification number:
Telephone number:	Mailing address:
Fax number (if any):	Telephone number:
	Fax number (if any):

TRIAL COURT'S CERTIFICATION OF DEFENDANT'S RIGHT OF APPEAL

I, judge of the trial court, certify in this criminal case that the defendant's appeal:

G is not in a plea-bargain case, and the defendant has the right of appeal. [*or*]

G is in a plea-bargain case, but is on matters that were raised by written motion filed and ruled on before trial, and the defendant has the right of appeal. [*or*]

G is in a plea-bargain case, but is taken after getting the trial court's permission to appeal, and the defendant has the right of appeal. [*or*]

G is in a plea-bargain case, and the defendant has NO right of appeal.

_______________________________________ ______________________

Judge Date Signed

("A defendant in a criminal case has the right of appeal to a court of appeals under these rules. In a plea bargain case — that is, a case in which a defendant's plea was guilty or nolo contendere and the punishment did not exceed the punishment recommended by the prosecutor and agreed to by the defendant — a defendant may appeal only: (A) those matters that were raised by written motion filed and ruled on before trial, or (B) after getting the trial court's permission to appeal." TEXAS RULE OF APPELLATE PROCEDURE 25.2(a)(2).)

26.2 Criminal Cases

(a) *By the Defendant.* ~~The~~ A notice of appeal that complies with Rules 25.2(c) (1) and (2) must be filed:

(1) within 30 days after the day sentence is imposed or suspended in open court, or after the day the trial court enters an appealable order; or

(2) within 90 days after the day sentence is imposed or suspended in open court if the defendant timely files a motion for new trial.

(b) *By the State.* If the State is making an appeal under Code of Criminal Procedure article 44.01(a) or (b), a ~~The~~ notice of appeal that complies with Rules 25.2(c) (1) and (2) must be filed within 15 days after the day the trial court enters the order, ruling, or sentence to be appealed.

Notes and Comments

Comment on 2002 change: In criminal cases the time limit for filing the notice of appeal is made applicable to only the minimally sufficient notice. If a notice is otherwise insufficient, the appellate clerk will notify the parties, and the appealing party will have 30 days to remedy the defect; see Rule 37.1. Subdivision 26.2(b) is conformed to Code of Criminal article 44.01.

29.5. Further Proceedings in Trial Court. While an appeal from an interlocutory order is pending, the trial court retains jurisdiction of the case and may make further orders, including one dissolving the order appealed from, and if permitted by law, may proceed with a trial on the merits. But the

court must not make an order that:

(a) is inconsistent with any appellate court temporary order; or

(b) interferes with or impairs the jurisdiction of the appellate court or effectiveness of any relief sought or that may be granted on appeal.

Notes and Comments

Comment to 2002 change: Rule 29.5 is amended to acknowledge that a trial court may be prohibited by law from proceeding to trial during the pendency of an interlocutory appeal, as for example by section 51.014(b) of the Texas Civil Practice and Remedies Code.

33.1 Preservation; How Shown. . . .

(d) *Sufficiency of Evidence Complaints in Nonjury Cases.* In a nonjury case, a complaint regarding the legal or factual insufficiency of the evidence — including a complaint that the damages found by the court are excessive or inadequate, as distinguished from a complaint that the trial court erred in refusing to amend a fact finding or to make an additional finding of fact — may be made for the first time on appeal in the complaining party's brief.

Notes and Comments

Comment to 2002 change: The last sentence of former Rule 52(d) of the Rules of Appellate Procedure has been reinstated.

34.6 Reporter's Record. . . .

(e) *Inaccuracies in the Reporter's Record.*

(1) Correction of Inaccuracies by Agreement. The parties may agree to correct an inaccuracy in the reporter's record, including an exhibit, without the court reporter's recertification.

(2) Correction of Inaccuracies by Trial Court. If the parties ~~dispute whether the reporter's record accurately discloses what occurred in the trial court, or the parties agree that it is inaccurate but cannot agree on corrections to the reporter's record~~ cannot agree on whether or how to correct the reporter's record so that the text accurately discloses what occurred in the trial court and the exhibits are accurate, the trial court must — after notice and hearing — settle the dispute.

After doing so, the court must order the court reporter to ~~conform~~ correct the reporter's record by conforming the text to what occurred in the trial court or by adding an accurate copy of the exhibit, and to certify and file in the appellate court a corrected reporter's record.

(3) Correction After Filing in Appellate Court. If the dispute arises after the reporter's record has been filed in the appellate court, that court may submit the dispute to the trial court for resolution. The trial court must then ensure that the reporter's record is made to conform to what occurred in the trial court.

(f) *Reporter's Record Lost or Destroyed.* An appellant is entitled to a new trial under the following circumstances:

(1) if the appellant has timely requested a reporter's record;

(2) if, without the appellant's fault, a significant exhibit or a significant portion of the court reporter's notes and records has been lost or destroyed or — if the proceedings were electronically recorded — a significant portion of the recording has been lost or destroyed or is inaudible;

(3) if the lost, destroyed, or inaudible portion of the reporter's record, or the lost or destroyed exhibit, is necessary to the appeal's resolution; and

(4) if the ~~parties cannot agree on a complete reporter's record~~ lost, destroyed or inaudible portion of the reporter's record cannot be replaced by agreement of the parties, or the lost or destroyed exhibit cannot be replaced either by agreement of the parties or with a copy determined by the trial court to accurately duplicate with reasonable certainty the original exhibit.

Notes and Comments

Comment to 2002 change: Subparagraphs 34.6(e) and (f) are amended to clarify the application to exhibits. The language in subparagraph (e) referring to the text of the record is simplified without substantive change. The language in subparagraph (f) is clarified to require agreement only as to the portion of the text at issue, and to provide that the trial court may determine that a copy of an exhibit should be used even if the parties cannot agree.

38.2 Appellee's Brief.

(a) *Form of Brief.*

(1) An appellee's brief must conform to the requirements of ~~subdivision~~ Rule 38.1, ...

38.6 Time to File Briefs. . . .

(d) *Modification of filing time.* On motion complying with Rule 10.5(b), the appellate court may extend the time for filing ~~the appellant's~~ a brief and may postpone submission of the case. A motion to extend the time to file ~~the~~ a brief may be filed before or after the date the brief is due. The court may also, in the interests of justice, shorten the time for filing briefs and for submission of the case.

Notes and Comments

Comment to 2002 change: Rule 38.6(d) is amended to clarify that an appellate court may postpone the filing of any brief, not just the appellant's brief.

Rule 42. Dismissal; Settlement

42.1. Voluntary Dismissal and Settlement in Civil Cases.

(a) *On Motion or By Agreement.* The appellate court may dispose of an appeal as follows:

~~(1) in accordance with an agreement signed by all parties or their attorneys and filed with the clerk; or~~

~~(2) in accordance with a motion of appellant to dismiss the appeal or affirm the appealed judgment or order; but no party may be prevented from seeking any relief to which it would otherwise be entitled.~~

(1) On Motion of Appellant. In accordance with a motion of appellant, the court may dismiss the appeal or affirm the appealed judgment or order unless such disposition would prevent a party from seeking relief to which it would otherwise be entitled.

(2) By Agreement. In accordance with an agreement signed by the parties or their attorneys and filed with the clerk, the court may:

(A) render judgment effectuating the parties' agreement;

(B) set aside the trial court's judgment without regard to the merits and remand the case to the trial court for rendition of judgment in accordance with the agreement; or

(C) abate the appeal and permit proceedings in the trial court to effectuate the agreement.

(b) *Partial Disposition.* A severable portion of the proceeding may be disposed of under (a) if it will not prejudice the remaining parties.

(c) *Effect on Court's Opinion.* In dismissing a proceeding, the appellate court will determine whether to withdraw any opinion it has already issued. An agreement or motion for dismissal cannot be conditioned on withdrawal of the opinion.

(d) *Costs.* Absent agreement of the parties, the court will tax costs against the appellant.

Notes and Comments

Comment to 2002 change: Rule 42.1 is amended to clarify the procedures for implementing settlements on appeal and to expressly give courts flexibility in effectuating settlements. The rule is also clarified to expressly permit the dismissal of an appeal without dismissal of the action itself. The rule does not permit an appellate court to order a new trial merely on the agreement of the parties absent reversible error, or to vacate a trial court's judgment absent reversible error or a settlement.

46.5. Voluntary Remittitur. If a court of appeals reverses the trial court's judgment because of a legal error that affects only part of the damages awarded by the judgment, the affected party may — within 15 days after the court of appeals' judgment — voluntarily remit the amount ~~that the court of appeals determined should not have been awarded by the judgment~~ that the affected party believes will cure the reversible error. A party may include in a motion for rehearing — without waiving any complaint that the court of appeals erred — a conditional request that the court accept the remittitur and affirm the trial court's judgment as reduced. If the court of appeals determines that the voluntary remittitur is not sufficient to cure the reversible error, but that remittitur is appropriate, the court must suggest a remittitur in accordance with Rule 46.3. If the remittitur is timely filed and the court of appeals determines that the voluntary remittitur cures the reversible error, then the remittitur must be accepted and the trial court judgment affirmed.

Notes and Comments

Comment to 2002 change: Subdivision 46.5 is amended to clarify the procedure for offering a voluntary remittitur. The offer may be made in a motion for rehearing without waiving any complaint that the court of appeals erred, thereby extending the deadlines for further appeal.

RULE 47. OPINIONS, DISTRIBUTION, AND CITATION

47.1. Written Opinions. The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal. ~~Where the issues are settled, the court should write a brief memorandum opinion no longer than necessary to advise the parties of the court's decision and the basic reasons for it.~~

47.2. Designating and Signing ~~of~~ Court Opinions; Participating Justices.

(a) *Civil and Criminal Cases*. Each opinion for the court must be designated either an "Opinion" or a "Memorandum Opinion." A majority of the justices who participate in considering the case must determine whether the opinion will be signed by a justice or will be per curiam and whether it will be designated an opinion or memorandum opinion. The names of the participating justices must be noted on all written opinions or orders of the court or a panel of the court.

(b) *Criminal Cases*. In addition, each opinion in a criminal case must bear the notation "publish" or "do not publish," as determined — before the opinion is handed down — by a majority of the justices who participate in considering the case. Any party may move the appellate court to change the notation, but the court of appeals must not change a notation after the Court of Criminal Appeals has acted on any party's petition for discretionary review or other request for relief. The Court of Criminal Appeals may, at any time, order that a "do not publish" notation be changed to "publish."

47.3. ~~Publication~~ Distribution of Opinions. All opinions of the courts of appeals are open to the public and must be made available to public reporting services, print or electronic.

~~(a) *The Initial Decision*. A majority of the justices who participate in considering a case must determine — before the opinion is handed down — whether the opinion meets the criteria stated in 47.4 for publication. If those criteria are not met, the opinion will be distributed only to the persons specified in Rule 48, but a copy may be furnished to any person on request by that person.~~

~~(b) *Notation on Opinions*. A notation stating "publish" or "do not publish" must be made on each opinion.~~

~~(c) *Reconsideration of Decision on Whether to Publish*. Any party may move the appellate court to reconsider its decision regarding publication of an opinion but the court of appeals must not order any unpublished opinion to be published after the Supreme Court or Court of Criminal Appeals has acted on any party's petition for review, petition for discretionary review, or other request for relief.~~

~~(d) *High-Court Order.* The Supreme Court or the Court of Criminal Appeals may, at any time, order a court of appeals' opinion published.~~

47.4. ~~Standards for Publication.~~ Memorandum Opinions. If the issues are settled, the court should write a brief memorandum opinion no longer than necessary to advise the parties of the court's decision and the basic reasons for it. An opinion may not be designated a memorandum opinion if the author of a concurrence or dissent opposes that designation. An opinion ~~should be published only if~~ must be designated a memorandum opinion unless it does any of the following:

(a) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases;

(b) involves ~~a~~ issues of constitutional law or other legal issues ~~of continuing public interest~~ important to the jurisprudence of Texas;

(c) criticizes existing law; or

(d) resolves an apparent conflict of authority.

47.5. Concurring and Dissenting Opinions. Only a justice who participated in the decision of a case may file or join in an opinion concurring in or dissenting from the judgment of the court of appeals. Any justice on the court may file an opinion in connection with a denial of a hearing or rehearing en banc. ~~A concurring or dissenting opinion may be published if, in the judgment of its author, it meets one of the criteria established in 47.4. If a concurrence or dissent is to be published, the majority opinion must be published as well.~~

47.6. ~~Action of~~ Change in Designation by En Banc Court. ~~Sitting en banc, the court may modify or overrule a panel's decision regarding the signing or publication of the panel's opinion or opinions.~~ A court en banc may change a panel's designation of an opinion.

47.7. Citation of Unpublished Opinions. Opinions not designated for publication by the court of appeals under these or prior rules have no precedential value ~~and must not~~ but may be cited ~~as authority by counsel or by a court~~ with the notation, "(not designated for publication)."

Notes and Comments

Comment to 2002 change: The rule is substantively changed to discontinue the use of the "do not publish" designation in civil cases, to require that all opinions of the court of appeals be made available to public reporting services, and to remove prospectively any prohibition against the citation of opinions as authority in civil cases. The rule favors the use of "memorandum opinions" designated as such except in certain types of cases but

does not change other requirements, such as those in *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635-636 (Tex. 1986). An opinion previously designated "do not publish" has no precedential value but may be cited. The citation must include the notation, "(not designated for publication)."

52.7. Record. . . .

(c) *Service of Record on All Parties.* Relator and any party who files materials for inclusion in the record must — at the same time — serve on each party:

(1) those materials not previously served on that party as part of the record in another original appellate proceeding in the same or another court; and

(2) an index listing the materials filed and describing them in sufficient detail to identify them.

Notes and Comments

Comment to 2002 change: Subdivision 52.7(c) is added to specify how record materials in original proceedings are to be served. Ordinarily, a party must serve record materials and an index of those materials on all other parties. But when materials have already been served in related original proceedings, they need not be served again. Examples are when original proceedings raising the same issues are brought in both the court of appeals and the Supreme Court, or when separate original proceedings are filed arising out of the same underlying lawsuit. The purpose of this procedure is to ensure that all parties have record materials readily available without requiring unnecessary duplication.

55.1 Request by Court. A brief on the merits must not be filed unless requested by the Court. With or without granting the petition for review, the Court may request the parties to file briefs on the merits. In appropriate cases, the Court may realign parties and direct that parties file consolidated briefs.

Notes and Comments

Comment to 2002 change: Subdivision 55.1 is clarified to provide that the Court may realign parties require consolidated briefing for a clearer and more efficient presentation of the case.

55.2 Petitioner's Brief on the Merits. . . .

(e) *Statement of Jurisdiction.* The ~~petition~~ brief must state, without argument, the basis of

the Court's jurisdiction.

56.3. Settled Cases. If a case is settled by agreement of the parties and ~~all~~ the parties so move, the Supreme Court may grant the petition if it has not already been granted and, without hearing argument or considering the merits, render a judgment to effectuate the agreement. The Supreme Court's action may include setting aside the judgment of the court of appeals or the trial court without regard to the merits and remanding the case to the trial court for rendition of a judgment in accordance with the agreement. The Supreme Court may abate the case until the lower court's proceedings to effectuate the agreement are complete. A severable portion of the proceeding may be disposed of if it will not prejudice the remaining parties. In any event, the Supreme Court's order does not vacate the court of appeals' opinion unless the order specifically provides otherwise. An agreement or motion cannot be conditioned on vacating the court of appeals' opinion.

Notes and Comments

Comment to 2002 change: Subdivision 56.3 is clarified to provide for partial settlements.

68.4. Contents of Petition. A petition for discretionary review must be as brief as possible. It must be addressed to the "Court of Criminal Appeals of Texas" and must state the name of the party or parties applying for review. The petition must contain the following items: . . .

(g) ~~*Reasons for Review.*~~ *Argument.* The petition must contain a direct and concise argument, with supporting authorities, amplifying the reasons for granting review. See Rule 66.3. The court of appeals' opinions will be considered with the petition, and statements in those opinions need not be repeated if counsel accepts them as correct.

Notes and Comments

Comment to 2002 change: The original catch line of subdivision 68.4(g) was "Reasons for Review," which caused confusion because of its similarity to the catch line in subdivision 66.3 ("Reasons for Granting Review"). It is changed to "Argument."

RULE 71. DIRECT APPEALS

71.1. Direct Appeal. Cases in which the death penalty has been assessed under Code of Criminal Procedure article 37.071, and cases in which bail has been denied in non-capital cases under Article I, Section 11a of the Constitution, are appealed directly to the Court of Criminal Appeals.

71.2. Record. The appellate record should be prepared and filed in accordance with Rules 31, 32, 34,

35 and 37, except that the record must be filed in the Court of Criminal Appeals. After disposition of the appeal, the Court may discard copies of juror information cards or other portions of the clerk's record that are not relevant to an issue on appeal.

71.3. Briefs. Briefs in a direct appeal should be prepared and filed in accordance with Rule 38, except that the brief need not contain an appendix (Rule 38.1(j)), and the brief in a case in which the death penalty has been assessed may not exceed 125 pages. All briefs must be filed in the Court of Criminal Appeals. The brief must include a short statement of why oral argument would be helpful, or a statement that oral argument is waived.

Notes and Comments

Comment to 2002 change: A requirement that briefs include a statement regarding oral argument is added.