

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 11- **9183**

AMENDED ORDER ADOPTING RULE 168 OF THE TEXAS RULES OF CIVIL PROCEDURE AND AMENDMENTS TO RULE 28 OF THE TEXAS RULES OF APPELLATE PROCEDURE

ORDERED that:

1. This Order vacates and supersedes the Order dated August 31, 2011, in Misc. Docket No. 11-9176. This Order clarifies that the rules adopted and amended by this Order apply only to cases commenced on or after September 1, 2011.

2. In accordance with the Act of May 25, 2011, 82nd Leg., R.S., ch. 203, § 3.01 (HB 274), amending section 51.014 of the Texas Civil Practice and Remedies Code, Rule 168 of the Texas Rules of Civil Procedure is adopted as follows, and Rule 28 of the Texas Rules of Appellate Procedure is amended as follows, both effective immediately.

3. The Clerk is directed to:

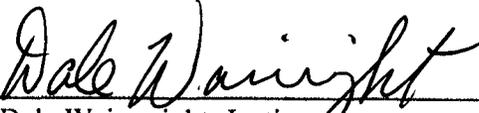
- a. file a copy of this Order with the Secretary of State;
- b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*;
- c. send a copy of this Order to each elected member of the Legislature; and
- d. submit a copy of the Order for publication in the *Texas Register*.

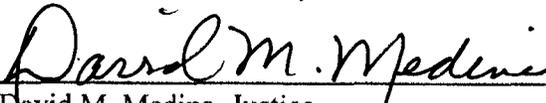
4. These amendments may be changed in response to comments received on or before November 1, 2011. Any interested party may submit written comments directed to Marisa Secco, Rules Attorney, at P.O. Box 12248, Austin, TX 78711, or marisa.secco@txcourts.gov.

Dated: September 9, 2011

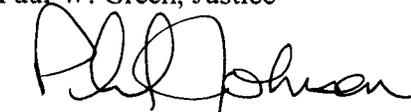

Wallace B. Jefferson, Chief Justice

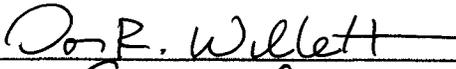

Nathan L. Hecht, Justice

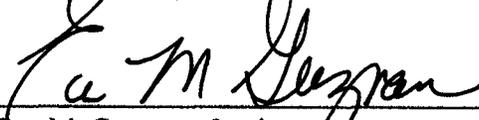

Dale Wainwright, Justice


David M. Medina, Justice


Paul W. Green, Justice


Phil Johnson, Justice


Don R. Willett, Justice


Eva M. Guzman, Justice


Debra H. Lehrmann, Justice

Adoption of Rule 168, Texas Rules of Civil Procedure:

RULE 168. PERMISSION TO APPEAL

On a party's motion or on its own initiative, a trial court may permit an appeal from an interlocutory order that is not otherwise appealable, as provided by statute. Permission must be stated in the order to be appealed. An order previously issued may be amended to include such permission. The permission must identify the controlling question of law as to which there is a substantial ground for difference of opinion, and must state why an immediate appeal may materially advance the ultimate termination of the litigation.

Comment to 2011 change: Rule 168 is a new rule, added to implement amendments to section 51.014(d)-(f) of the Texas Civil Practice and Remedies Code. Rule 168 applies only to cases filed on or after September 1, 2011. Rule 168 clarifies that the trial court's permission to appeal should be included in the order to be appealed rather than in a separate order. Rule of Appellate Procedure 28.3 sets out the corollary requirements for permissive appeals in the courts of appeals.

Amendments to Rule 28, Texas Rules of Appellate Procedure:

RULE 28. ACCELERATED, AND AGREED, INTERLOCUTORY AND PERMISSIVE APPEALS IN CIVIL CASES

28.1. Accelerated Appeals.

- (a) *Types of Accelerated Appeals.* Appeals from interlocutory orders (when allowed ~~as of right~~ by statute), appeals in quo warranto proceedings, appeals required by statute to be accelerated or expedited, and appeals required by law to be filed or perfected within less than 30 days after the date of the order or judgment being appealed are accelerated appeals.
- (b) *Perfection of Accelerated Appeal.* Unless otherwise provided by statute, an accelerated appeal is perfected by filing a notice of appeal in compliance with Rule 25.1 within the time allowed by Rule 26.1(b) or as extended by Rule 26.3. Filing a motion for new trial, any other post-trial motion, or a request for findings of fact will not extend the time to perfect an accelerated appeal.
- (c) *Appeals of Interlocutory Orders.* The trial court need not file findings of fact and conclusions of law but may do so within 30 days after the order is signed.
- (d) *Quo Warranto Appeals.* The trial court may grant a motion for new trial timely filed under Texas Rule of Civil Procedure 329b(a)-(b) until 50 days after the trial court's final judgment is signed. If not determined by signed written order within that period, the motion will be deemed overruled by operation of law on expiration of that period.

- (e) *Record and Briefs.* In lieu of the clerk's record, the appellate court may hear an accelerated appeal on the original papers forwarded by the trial court or on sworn and uncontroverted copies of those papers. The appellate court may allow the case to be submitted without briefs. The deadlines and procedures for filing the record and briefs in an accelerated appeal are provided in Rules 35.1 and 38.6.

28.2. Agreed Interlocutory Appeals in Civil Cases.

- (a) *Perfecting Appeal.* An agreed appeal of an interlocutory order permitted by statute must be perfected as provided in Rule 25.1. The notice of appeal must be filed no later than the 20th day after the date the trial court signs a written order granting permission to appeal, unless the court of appeals extends the time for filing pursuant to Rule 26.3.
- (b) *Other Requirements.* In addition to perfecting appeal, the appellant must file with the clerk of the appellate court a docketing statement as provided in Rule 32.1 and pay to the clerk of the appellate court all required fees authorized to be collected by the clerk.
- (c) *Contents of Notice.* The notice of accelerated appeal must contain, in addition to the items required by Rule 25.1(d), the following:
 - (1) a list of the names of all parties to the trial court proceeding and the names, addresses, and telefax numbers of all trial and appellate counsel;
 - (2) a copy of the trial court's order granting permission to appeal;
 - (3) a copy of the trial court order appealed from;
 - (4) a statement that all parties to the trial court proceeding agreed to the trial court's order granting permission to appeal;
 - (5) a statement that all parties to the trial court proceeding agreed that the order granting permission to appeal involves a controlling question of law as to which there is a substantial ground for difference of opinion;
 - (6) a brief statement of the issues or points presented; and
 - (7) a concise explanation of how an immediate appeal may materially advance the ultimate termination of the litigation.
- (d) *Determination of Jurisdiction.* If the court of appeals determines that a notice of appeal filed under this rule does not demonstrate the court's jurisdiction, it may order the appellant to file an amended notice of appeal. On a party's motion or its own initiative, the court of appeals may also order the appellant or any other party to file briefing addressing whether the appeal meets the statutory requirements, and may direct the parties to file supporting evidence. If, after providing an opportunity to file an amended notice of appeal or briefing addressing potential jurisdictional defects, the court of

appeals concludes that a jurisdictional defect exists, it may dismiss the appeal for want of jurisdiction at any stage of the appeal.

- (e) *Record; Briefs.* The rules governing the filing of the appellate record and briefs in accelerated appeals apply. A party may address in its brief any issues related to the court of appeals' jurisdiction, including whether the appeal meets the statutory requirements.
- (f) *No Automatic Stay of Proceedings in Trial Court.* An agreed appeal of an interlocutory order permitted by statute does not stay proceedings in the trial court except as agreed by the parties and ordered by the trial court or the court of appeals.

28.3. Permissive Appeals in Civil Cases.

- (a) *Petition Required.* When a trial court has permitted an appeal from an interlocutory order that would not otherwise be appealable, a party seeking to appeal must petition the court of appeals for permission to appeal.
- (b) *Where Filed.* The petition must be filed with the clerk of the court of appeals having appellate jurisdiction over the action in which the order to be appealed is issued. The First and Fourteenth Courts of Appeals must determine in which of those two courts a petition will be filed.
- (c) *When Filed.* The petition must be filed within 15 days after the order to be appealed is signed. If the order is amended by the trial court, either on its own or in response to a party's motion, to include the court's permission to appeal, the time to petition the court of appeals runs from the date the amended order is signed.
- (d) *Extension of Time to File Petition.* The court of appeals may extend the time to file the petition if the party:
 - (1) files the petition within 15 days after the deadline, and
 - (2) files a motion complying with Rule 10.5(b).
- (e) *Contents.* The petition must:
 - (1) contain the information required by Rule 25.1(d) to be included in a notice of appeal;
 - (2) attach a copy of the order from which appeal is sought;
 - (3) contain a table of contents, index of authorities, issues presented, and a statement of facts; and
 - (4) argue clearly and concisely why the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion

and how an immediate appeal from the order may materially advance the ultimate termination of the litigation.

- (f) *Response; Reply; Cross-Petition; Time for Filing.* If any party timely files a petition, any other party may file a response or a cross-petition within 10 days. A party may file a response to a cross-petition within 10 days of the date the cross-petition is filed. A petitioner or cross-petitioner may reply to any matter in a response within 7 days of the date the response is filed. The court of appeals may extend the time to file a response, reply, and cross-petition.
- (g) *Length of Petition, Cross-Petition, Response, and Reply.* A petition, cross-petition, response, and reply must comply with the page limitations in Rule 53.6.
- (h) *Service.* A petition, cross-petition, response, and reply must be served on all parties to the trial court proceeding.
- (i) *Docketing Statement.* Upon filing the petition, the petitioner must file the docketing statement required by Rule 32.1.
- (j) *Time for Determination.* Unless the court of appeals orders otherwise, a petition, and any cross-petition, response, and reply, will be determined without oral argument, no earlier than 10 days after the petition is filed.
- (k) *When Petition Granted.* If the petition is granted, a notice of appeal is deemed to have been filed under Rule 26.1(b) on that date, and the appeal is governed by the rules for accelerated appeals. A separate notice of appeal need not be filed. A copy of the order granting the petition must be filed with the trial court clerk.

Comment to 2011 Change: Section 51.014(d)-(f) of the Texas Civil Practice and Remedies Code, as amended in 2011, provides for appeals of orders not otherwise appealable when permitted by the trial court. The 2011 amendments, which explicitly apply only to cases commenced on or after September 1, 2011, eliminated the prior requirement that the parties agree to the appeal and reinstated a requirement that the court of appeals also permit the appeal. Act of May 25, 2011, 82nd Leg., R.S., ch. 203, §§ 3.01, 6.01 [HB 274], amending Act of May 27, 2005, 79th Leg. R.S., ch. 1051 [HB 1294], §§ 1-2, 2005 Tex. Gen. Laws 3512, 3512-3513 and Act of May 17, 2001, 77th Leg., R.S., ch. 1389 [HB 978], § 1, 2001 Tex. Gen. Laws 3575. The amendments necessitated the addition of Rule 28.3 and the adoption of Rule of Civil Procedure 168, which governs the procedure for obtaining permission to appeal from the trial court.

New Rule 28.3 applies only to appeals in cases that were filed in the trial court on or after September 1, 2011. Rule 28.2 applies only to appeals in cases that were filed in the trial court before September 1, 2011.

Rule of Civil Procedure 168 clarifies that the trial court's permission to appeal should be included in the order to be appealed rather than in a separate order. As stated in Rule 28.3(c), if

a prior order containing the trial court's ruling is amended to include such permission, the time for appeal runs from the amended order. Rule 28.3(k) further clarifies that if the petition is granted, appeal is thereby perfected, and the appeal proceeds as an accelerated appeal, with all deadlines—including deadlines and obligations for preparing the record—running from the date the petition was granted. A separate notice of appeal need not be filed. The petition procedure in Rule 28.3 is intended to be similar to the Rule 53 procedure governing petitions for review in the Supreme Court.