

Practice Before the Third Court of Appeals

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Practice Before the Third Court of Appeals

General

1. Clerk's office location and hours
2. Two three-judge panels
3. Release of opinions
4. Citation and Form
5. The Court's library
6. Jurisdiction check

Attorneys

7. Nongovernment counsel
8. Lead counsel
9. Appointed counsel
10. Appearance for additional counsel
11. Changes in lead counsel
12. Communication with lead counsel only
13. Counsel for appellee
14. Withdraw of counsel
15. Withdraw of government counsel
16. Pro Hac Vice
17. Vacation notification

Fees for Costs

18. Fees for costs in civil cases
19. Standard copies
20. Checks
21. Failure to pay fees
22. Fees when judgment is rendered

Filing Documents.....

23. Proof of service and certificate of service
24. Attorney's State Bar of Texas ID number
25. Electronic filing
26. Redaction required
27. Filing by paper (number of copies)
28. Original proceedings

- 29. File marked copies returned to a party
- 30. Mail
- 31. Filing by mail

Sealed Records

- 32. Sealed Documents originating at the trial court level
- 33. Motions to Seal Documents tendered in this Court

Perfecting Instruments.....

- 34. Notice of appeal
- 35. The notice of appeal in civil causes
- 36. Copy of the NOA filed with Clerk
- 37. Amended notice of appeal
- 38. Affidavit of inability to pay

Docketing Statements

- 39. Docketing statements

Record on Appeal.....

- 40. The clerk's record and the reporter's record
- 41. Designation of the clerk's record
- 42. Supplemental clerk's record
- 43. Checking out the record
- 44. Supersedeas bond
- 45. Original papers or exhibits
- 46. Administrative records

Motions.....

- 47. Motions
- 48. Supported by affidavit or other satisfactory evidence
- 49. Time for determination
- 50. Determination by the Court
- 51. A motion to extend the time
- 52. Motions not required
- 53. Motions to dismiss
- 54. Certificate of conference required
- 55. Motion to expedite

Briefs.....

- 56. Content
- 57. Time to file briefs
- 58. Post-submission briefs
- 59. Failure to file a brief

Oral Argument

- 60. Oral Argument settings
- 61. Call of the Docket.
- 62. Between cases
- 63. Allotment of time
- 64. Submitted
- 65. Audio and video recording
- 66. Electronic devices

Mandate

- 67. Issuance of the mandate

Bankruptcy

- 68. Notice of bankruptcy filed
- 69. Request for clarification

General

1. The Clerk's office is open continuously from 8:00 a.m. to 5:00 p.m., Monday through Friday, except for certain legal holidays. See Tex. Gov't Code Ann. §§ 662.003, .004, .021, .022 (West 1994 & Supp. 2002). The street address for the Clerk's office is room 101 of the Price Daniel, Sr. Building, 209 West 14th Street, Austin, Texas 78701. The courtroom is located on the first floor (not the ground floor) of the Price Daniel, Sr. Building. The mailing address for the Clerk's office is Post Office Box 12547, Austin, Texas 78711-2547. The telephone number for the Clerk's office is (512) 463-1733. The telecopier number for the Clerk's office is (512) 463-1685; however, the Clerk does not accept fax filings.
2. The Court sits in two three-judge panels whose membership changes each January 1 and July 1. See Tex. Gov't Code Ann. § 22.222(b) (West 1988). Oral submission of causes usually occurs on Wednesdays at 9:00 a.m. and 1:30 p.m. The Court typically allows twenty minutes for each side to argue; the appellant may reserve time for rebuttal. A party should request additional time well in advance of the date of oral submission.
3. The Court releases its opinions and orders on a daily basis.
4. The Court follows *The Bluebook: A Uniform System of Citation* (17th ed.) and *Texas Rules of Form* (10th ed., 2d printing) with a few minor exceptions.
5. The Court's library includes *United States Supreme Court Reports, Lawyer's Edition*, so a parallel citation to that private reporter is helpful; the Court's library also includes *United States Code Annotated*. The Court has access to the Federal Supplement, Federal Reporter, West regional reporters, *Code of Federal Regulations*, *Federal Register*, and *Texas Register* in the State Law Library, but would appreciate receiving copies of those materials when they are germane. Counsel are advised to include relevant municipal and county ordinances in the appellate record. See *Metro Fuels, Inc. v. City of Austin*, 827 S.W.2d 531 (Tex. App.—Austin 1992, no writ). The Court has access to Lexis-Nexis and Westlaw.
6. A jurisdiction check is performed on causes once the clerk's record is received, which may result in the Clerk sending a letter inquiring about the status of the cause. Counsel should regard such letters as a communication from the Court, but should not regard such letters as a final determination by the Court even if the letter states that the Court has taken a particular position or action. If counsel regards a statement in a clerk's letter as significant to the cause, counsel should consider tendering a motion and requesting a formal ruling on the matter.

Attorneys

7. Nongovernmental counsel are reminded that with respect to the application of the Texas Rules of Appellate Procedure and the Texas Disciplinary Rules of Professional Conduct, individual attorneys, not law firms, represent parties before this Court. In contrast, the elected or appointed attorney general, district attorneys, county attorneys, etc., personally represent parties even though they may act through assistants.

8. Unless another attorney is designated, the Court considers the attorney whose signature first appears on the notice of appeal as appellant's lead counsel. Tex. R. App. P. 6.1(a). For a party other than appellant, the attorney whose signature first appears on the first document filed in the appellate court on that party's behalf will be recognized as lead counsel unless another attorney is designated. Tex. R. App. P. 6.1(b).
9. In a criminal cause in which the appellant is indigent, counsel appointed by the trial court automatically continues to represent the appellant until all appeals are exhausted or counsel is relieved of his or her duties by the trial court or replaced by another counsel. Tex. Code Crim. Proc. Ann. art. 26.04(j)(2) (West Supp. 2002). See *Fowler v. State*, 874 S.W.2d 112, 114 (Tex. App.—Austin 1994, pet. ref'd).
10. The Clerk will show an appearance for additional counsel who appear in a subsequent document unless the document clearly indicates that counsel is signing for an attorney who has previously appeared. The Clerk will also add the names of additional counsel on written request. Tex. R. App. P. 6.2.
11. Regardless of the appearance of additional counsel in subsequent documents tendered to the Clerk (including the brief), lead counsel shall be primarily responsible for the appellant or appellee in the cause until the designation of lead counsel is changed by written notice to the Court and all other parties in accordance with Texas Rule of Appellate Procedure 9.5. Appearance of additional counsel alone does not release existing counsel from representation.
12. The Clerk will show an appearance by all counsel for a party, but only lead counsel will receive notice. Cf. Tex. R. Civ. P. 8. The Clerk will send all communications from the Court with respect to the appeal only to lead counsel. See Tex. R. App. P. 12.1(d), 12.6, 39.9, 48.1. On written request, or based on the appellant's docketing statement, the Clerk will send notice to an attorney who is not lead counsel. Tex. R. App. P. 32.1(e), 32.2(a).
13. Appellate counsel for appellee is strongly urged to notify the Clerk of this Court in writing that counsel is appearing to represent a named party to the appeal. See Tex. R. App. P. 6.1(c). Until appellee's appellate counsel appears, the Clerk of this Court will send notice to counsel named in the docketing statement or listed on the certificate of service affixed to appellant's notice of appeal. See Tex. R. App. P. 12.1, 32.1(e).
14. Private counsel should comply with Texas Rule of Appellate Procedure 6.5 when withdrawing from representation in a cause or substituting in place of an attorney who has withdrawn. Appointed counsel in criminal cases must first obtain permission from the trial court before filing in this Court a motion to withdraw. The Court requests any motion to withdraw and substitute provide the information specified in Texas Rule of Civil Procedure 10. If the Court grants a motion to withdraw and substitute, it will normally require compliance with the notice provisions of Texas Rule of Civil Procedure 10.
15. Government counsel may tender a written notice of withdrawal and substitution of counsel and need not comply with Texas Rule of Appellate Procedure 6.5.

16. A reputable attorney who resides in and is licensed to practice in another state and who seeks permission to participate in the proceedings in a cause in this Court must first file an Application for Pro Hac Vice Admission and pay a filing fee to the Board of Law Examiners. See Tex. Gov't Code Ann. § 82.0361 (West 2005). Counsel should then file a sworn motion in compliance with Rule XIX of the Rules Governing Admission to the State Bar of Texas and Rule 10 of the Texas Rules of Appellate Procedure, accompanied by the acknowledgment letter issued by the Board of Law Examiners. See *id.* § 82.0361(e).
17. Counsel with appeals pending before the Court are requested to notify the Clerk in writing of planned vacation dates. The Court will make reasonable efforts to accommodate counsel when scheduling oral submission of causes and other requests for responses from counsel. Counsel should comply with Texas Rule of Appellate Procedure 10 when filing motions to postpone oral submission.

Fees for Costs

18. Fees for costs in civil cases and other services (no sales tax charged):

- (a) Appeal from the district and county courts.....\$195
- (b) Original proceeding such as petition for writ of mandamus, prohibition, injunction, or habeas corpus.....\$145
- (c) Motion not otherwise listed.....\$10
- (d) Motion for rehearing or for en banc reconsideration.....\$15
- (e) Exhibits for oral argument.....\$25
- (f) Administering oath with sealed certificate of oath.....\$5
- (g) Photo copying for certificate or comparing documents for certification.....\$1.00 per page
- (h) Document retrieval charges as provided by TEX. ADMIN. CODE §70.3..\$10.00

See Tex. Gov't Code Ann. § 51.207(b), (c) (West Supp. 2000); see also Texas Rules of Appellate Procedure Appendix, "Order Regarding Fees Charged in Civil Cases."

19. Standard paper copy of document without certificate or seal..... 1-50 pages .10¢/per page;...50+ pages .50¢/per page
20. Checks for fees in civil causes should be made payable to "State of Texas."
21. The Clerk may decline to file a record, motion, or original proceeding if a required fee is not tendered. Tex. R. App. P. 5. In addition, the Court may dismiss a cause for failure to pay a required fee. Tex. R. App. P. 42.3(c).
22. When the Court renders a judgment in a civil cause ordering a party to pay costs of the appeal and the party was excused by statute and no fee was required, the party responsible for costs should forward payment for those fees within thirty days after judgment is rendered. Although an excused party is not required to pay fees in advance, an excused party generally is not exempt from payment of costs assessed against it when judgment is rendered. See Tex. R. App. P. 5, 43.4; 51.1.

Filing Documents (Electronic and Paper Form)

23. A document presented for filing must contain a proof of service or a certificate of service. Tex. R. App. P. 9.5(d), (e). Proof of service may appear on or be affixed to the filed document. *Id.*
24. All documents (including letters) tendered to the Clerk by an attorney should contain the attorney's State Bar of Texas identification number and email address.
25. All attorneys are required to file all documents (except a document submitted under seal or subject to a motion to seal) with the Court through the efiletexas.gov electronic filing system. Persons not represented by an attorney are encouraged to e-file documents; however, e-filing is not required. Documents e-filed by a party electronically with the Third Court of Appeals must conform to Rule 9 of the Texas Rules of Appellate Procedure. In the Third Court of Appeals, an e-filer is not required to file any paper copies of an e-filed document unless specifically requested by the Court. For further instructions regarding electronic filing, please see "Electronic Filing" on our website.
26. All documents submitted to the Court must be redacted in compliance with Rule 9.9 and 9.10 of the Texas Rules of Appellate Procedure. E-filed briefs must follow the Texas Supreme Court's Redaction Guidelines.
27. If a party not represented by counsel opts not to e-file a document and to file the document in paper form instead, the original document filed with the Court must be in the form provided by Rule 9.4 of the Texas Rules of Appellate Procedure. However, the document must be unbound and one-sided and contain no hard covers, tabs, or any other item that would impede the scanning of the document. In lieu of tabs, separator pages with the title of the item immediately following should be used. A filer need only file the original document unless specifically requested by the Court. Only the original record need be filed in any proceeding. Tex. R. App. P. 9.3(c).
28. In an original proceeding the petition must include an appendix that contains a certified or sworn copy of any order complained of, or any other document showing the matter complained of. Tex. R. App. P. 52.3(j)(1)(A). If a writ of habeas corpus is sought, the appendix must contain proof that the relator is being restrained. Tex. R. App. P. 52.3(j)(1)(D). If emergency relief is requested, a statement to that effect must appear on the cover or be in a separate motion.
29. If a party files a paper document in compliance with the foregoing rules, the Clerk will mail a file marked copy of a document to a party if (1) the party tenders an additional copy of the document for filing and (2) the party provides a postage-paid, self-addressed envelope. If the postage to the return envelope is affixed by use of a postage meter, the meter stamp must not be dated. United States Postal Service, *Domestic Mail Manual* § P030.1.5(f) (issue 51, 1997).

30. Texas Procurement and Support Services picks up the Court's mail at the post office and delivers the mail to the Clerk's office. The Clerk stamps documents sent by mail "received" on the date they are delivered to the Clerk's office. If a party who has filed a paper document in compliance with the foregoing rules wishes to establish when a document was received at the Court's mailbox, the party should obtain a return receipt from the United States Postal Service.
31. A paper document that has been filed in compliance with the foregoing rules and that is received within ten days after the filing deadline is considered timely filed if: it was sent to the proper clerk by United States Postal Service first-class, express, registered, or certified mail; it was placed in an envelope or wrapper properly addressed and stamped; and it was deposited in the mail on or before the last day for filing. Tex. R. App. P. 9.2(b).

Sealed Records

32. Documents originating at the trial court level that have been sealed by order of the trial court should be sealed by the clerk of the trial court before the documents are tendered in this Court. The trial court's sealing order should be included in the clerk's record. Sealed portions of the clerk's and reporter's records should be segregated from unsealed portions and tendered as separate records.
33. If a party wishes to have documents sealed that were not sealed by the trial court, all such paper documents tendered in this Court should be accompanied by an electronically filed motion to seal that (1) demonstrates why the documents should not be available for public inspection and (2) requests that the documents be temporarily sealed until this Court disposes of the motion to seal. Any such motion to seal should specify this Court's authority to withhold the documents from public inspection. The motion should also demonstrate specifically why all or part of the documents are eligible to be sealed under the applicable law or rule. The Court encourages the parties to confer in advance on any motion to seal that may be tendered, but reminds the parties of the state's public policy of free access to court records and requests that this public policy concern be addressed.

Perfecting Instruments

34. In all causes, appeal is perfected by filing a written notice of appeal. Tex. R. App. P. 25.1(a), 25.2(a). In civil causes, any party who seeks to alter the trial court's judgment or other appealable order must file a notice of appeal. Tex. R. App. P. 25.1(c). The failure of any party to perfect its own appeal precludes the Court from granting that party more favorable relief than did the trial court, except for just cause. *Id.*
35. The notice of appeal in civil causes must provide the information specified in Texas Rule of Appellate Procedure 25.1(d). Appellants are encouraged to state in the notice of appeal the names of those parties adverse to them.
36. The appellant in a civil cause should electronically file a copy of the notice of appeal with the Clerk of this Court. The \$195.00 filing fee will be assessed in conjunction with this filing.

37. In civil causes, a party seeking to amend the notice of appeal to correct a defect may file the amended notice at any time before the appellant's brief is filed. Tex. R. App. P. 25.1(f). After the appellant's brief is filed, the notice can be amended only on leave of the Court. *Id.*
38. An affidavit of inability to pay the costs of appeal does not serve as a perfecting instrument. A party who seeks to proceed without prepaying costs in a civil cause must comply with Texas Rule of Appellate Procedure 20.1. An appellant in a criminal cause who cannot pay for the appellate record should follow rule 20.2.

Docketing Statements

39. The docketing statement should be filed by the appellant within ten days after perfecting the appeal. See Tex. R. App. P. 32. Because the Clerk enters information provided in the docketing statement into the Court's case management system, counsel are encouraged to complete the statement accurately. Civil and Criminal Docketing Statements are available on the Court's web site.

Record on Appeal

40. The clerk's record and the reporter's record must be prepared in compliance with Appendix C of the Texas Rules of Appellate Procedure.
41. The clerk's record must contain the items listed in Texas Rule of Appellate Procedure 34.5(a). Any party may designate specific, additional items. Tex. R. App. P. 34.5(b). In civil causes, the clerk's record should include all documents, including orders on motions for nonsuit, that collectively form the trial court's final judgment and demonstrate the proper disposition of all issues and parties in the cause. See generally *North E. Indep. Sch. Dist. v. Aldridge*, 400 S.W.2d 893 (Tex. 1966). See also *Farmer v. Ben E. Keith Co.*, 907 S.W.2d 495 (Tex. 1995).
42. In a civil cause, if a party requests that more items be included in the clerk's record than necessary, the Court may require that party to pay the costs for preparing the unnecessary part, regardless of the outcome of the appeal. Tex. R. App. P. 34.5(b)(3). If a relevant item has been omitted from the clerk's or reporter's record, this Court, the trial court, or any party may by letter direct the trial court clerk or the official court reporter, respectively, to prepare, certify, and file in the appellate court a supplement containing the omitted item. Tex. R. App. P. 34.5(c)(1), 34.6(d).
43. In active cases before the Court, an electronic copy of the Court's record may be provided to an attorney of record at no cost. All other requests for copies of records, currently in electronic form, will be provided on a CD/DVD for \$1.00. Requests for records, currently in paper form, will be provided at the courts standard copy rates (1-50 pages .10¢/per page; 50+ pages .50¢/per page). An imprisoned criminal appellant seeking access to the record who is pro se or whose counsel of record has tendered a brief indicating the appeal is frivolous under *Anders v. California*, 386 U.S. 738 (1967), may examine the record in the custody of the clerk of the trial court.

44. If a party has filed a supersedeas bond with the trial-court clerk, the supersedeas bond should be included in the original clerk's record or a supplement thereto. Counsel for appellee should pray in the brief for rendition of judgment against the sureties on appellant's supersedeas bond. See Tex. R. App. P. 24.1(d), 43.5.
45. Original papers or exhibits tendered in this Court must be accompanied by a trial-court order that complies with Texas Rule of Appellate Procedure 34.5(f), 34.6(g)(2). The Clerk's office does not verify that original papers or exhibits were properly admitted into the trial-court record. A party should examine the original papers or exhibits to ensure that they are properly a part of the record on appeal.
46. The agency record in administrative appeals is specifically provided for by the appellate rules. In administrative appeals, the agency record may be transmitted to this Court as part of the clerk's record or the reporter's record. Tex. R. App. P. 36.2; *Nueces Canyon Consol. Indep. Sch. Dist. v. Central Educ. Agency*, 917 S.W.2d 773, 776 (Tex. 1996).

Motions

47. All motions must comply with Texas Rule of Appellate Procedure 10.1 unless another rule or statute dictates otherwise.
48. Motions dependent on facts not in the record, not ex officio known to the Court, and not within the personal knowledge of the attorney signing the motion must be supported by affidavit or other satisfactory evidence. Tex. R. App. P. 10.2. If counsel tender copies of documents filed in or issued by other courts or governmental agencies, counsel should whenever possible tender copies certified by the appropriate court clerk or custodian of records.
49. Apart from extension motions to file a brief, the Court generally will not hear or determine a motion until ten days after it is filed, as required by Texas Rule of Appellate Procedure 10.3(a).
50. The justice assigned to handle presubmission motions generally acts daily on those motions that are ready to be determined. See Tex. R. App. P. 10.4(a). The panel to which the cause has been submitted generally acts on postsubmission motions after the expiration of the ten-day period.
51. A motion to extend the time to perfect appeal must comply with Texas Rule of Appellate Procedure 10.1(a) and must also (1) state the deadline for filing the notice of appeal, (2) state the facts reasonably explaining the need for the extension, (3) identify the trial court, (4) state the date of the trial court's judgment, and (5) state the case number and the style of the case in the trial court. Tex. R. App. P. 10.5(b)(2). In addition, the motion must contain the date the notice of appeal was filed in the trial court. See Tex. R. App. P. 26.3(a). The date of filing the notice of appeal, if not known personally by the attorney, must be supported by affidavit or other satisfactory evidence. Tex. R. App. P. 10.2.
52. All extension motions other than extension motions to perfect appeal should comply with Rule 10.5(b)(1). Motions for extension of time to file the clerk's or reporter's record are not permitted

and will not be filed. See Tex. R. App. P. 37.3. Motions to supplement the clerk's or reporter's records are not required and will not be filed. Tex. R. App. P. 34.5(c) and 34.6(d).

53. Motions to dismiss should indicate: (1) whether the appeal or the cause is to be dismissed; (2) how costs should be allocated; and (3) whether the mandate should be issued early. See Tex. R. App. P. 18.1(c). There is a difference between dismissing the appeal or dismissing the cause. Dismissal of an appeal returns the cause to the status before the appeal was perfected and does not disturb the trial court's judgment; dismissal of the cause vacates the trial court's judgment. Counsel should comply with Texas Rule of Appellate Procedure 10 when filing a motion to dismiss for want of jurisdiction.
54. Motions in civil cases must certify that the filing party conferred, or reasonably attempted to confer, with all other parties regarding the merits of the motion and whether those parties oppose the motion. Tex. R. App. P. 10.1(a)(5). The Clerk may decline to file a motion that does not contain a certificate of conference. Motions without opposition should bear the word "unopposed" in their caption. The Court will consider such unopposed motions as soon as practicable. See Tex. R. App. P. 10.3(a)(2). Agreed or joint motions must be signed by all parties or their counsel. See Tex. R. App. P. 6.6.
55. Counsel who want a motion disposed of before the ten days required by Texas Rule of Appellate Procedure 10.3(a) should tender a separate motion to expedite. The certificate of service for both the underlying motion and the motion to expedite should reflect service on all other parties. An alternate way to avoid the ten-day period is to tender an unopposed motion.

Briefs

56. The briefs must contain the information specified in Texas Rule of Appellate Procedure 38.1 and 38.2.
57. The Court will expect appellees' briefs to be filed within thirty (30) days after the filing of appellants' briefs (or within twenty (20) days if the appeal is accelerated). Appellants' reply brief are due twenty (20) days after the filing of appellees' briefs. See Tex. R. App. P. 38.6. If a brief cannot be filed within the dates prescribed by the Rules of Appellate Procedure, a motion for extension of time to file the brief will be required. See Tex. R. App. P. 38.7.
58. All post-submission briefs, including letter briefs, with the exception of those requested by the Court in oral argument, must be accompanied by a separate motion for leave to file the same. See Tex. R. App. P. 38.7.
59. The Court will usually dismiss a civil appeal for want of prosecution if the appellant fails to file a brief or motion for extension of time. See Tex. R. App. P. 38.8(a)(1). A notice to that effect will be sent promptly after the expiration of the due date for the appellant's brief. Although generally a criminal appeal cannot be dismissed for want of prosecution, the Court is of the opinion that this prohibition does not apply to the State. See Tex. R. App. P. 38.8(b); *State v. Sanchez*, 764 S.W.2d 920 (Tex. App.- Austin 1989, no pet.).

Oral Argument

60. The Clerk calls the Court into session promptly at 9:00 a.m. and 1:30 p.m. unless an alternative time has been designated.
61. The presiding justice calls the Docket. As the cause number is announced, the attorneys involved should stand, state their name and which party they represent, and indicate to the Court if they are ready to proceed. Failure to respond at Docket call constitutes a waiver of oral argument by that party.
62. After calling all of the causes to be submitted that day, the presiding justice will call the individual causes in order. Participants in later proceedings may wait outside the courtroom but must be present when their case is called.
63. Oral argument is limited to twenty minutes total for each side unless additional time is granted pursuant to motion. The Court will reserve five minutes for the appellant's rebuttal unless a different amount of rebuttal time is requested. A yellow summation light is displayed when two minutes remain in each argument. When the time expires, a red light is displayed and the argument should end.
64. After the appellant's rebuttal argument, the cause is officially submitted for decision and the attorneys are free to leave. Please note, however, that others will be presenting arguments to the Court and everyone should exit the courtroom with as little disruption as possible.
65. The court does not allow operation of broadcasting or recording devices in the court-room during oral argument, i.e., no photographs, video recordings, or audio recordings may be made of oral arguments.
66. All cellular telephones, beepers, and other devices which emit an audio alert signal must be turned off or set to a silent mode while in the courtroom.

Mandate

67. The Clerk will issue the mandate to the clerk of the trial court according to the time periods provided by Texas Rule of Appellate Procedure 18.1. A party may request a stay of the mandate pending the United States Supreme Court's disposition of a petition for writ of certiorari. Tex. R. App. P. 18.2.

Bankruptcy

68. If a notice of bankruptcy is filed, the appeal is suspended. Tex. R. App. P. 8.1, 8.2; 11 U.S.C. § 362 (2000). The Court will take no further action in the cause other than to receive and hold with the other papers in the cause any documents tendered during the period of suspension. Tex. R. App. P. 8.2. A document filed by a party while the proceeding is suspended will be

deemed filed on the same day, but after, the Court reinstates or severs the appeal and will not be considered ineffective because it was filed while the proceeding was suspended. *Id.* Unless a party successfully moves for reinstatement or severance, the Clerk's office will show the appeal as an inactive cause on the Court's docket. Tex. R. App. P. 8.3(a), (b).

69. If at any time it appears to the Court that a bankruptcy problem may exist, the Clerk of the court will request clarification from the parties, and, if necessary, a notice of bankruptcy complying with Texas Rule of Appellate Procedure 8.1.

Suggestions

The Court welcomes suggestions concerning this memorandum. Please address any comments to the Clerk.