

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 [REDACTED] 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 [REDACTED] from the clerk or acquire actual knowledge of the rendition of the judgment [REDACTED].
- (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 [REDACTED] 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 [REDACTED] 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 [REDACTED] 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

[REDACTED]

obtain additional time to file documents when the party fails to receive notice not only of an appellate court judgment, but of 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~~. But a party need not serve a copy of the record.

Notes and Comments

[Redacted]

[Redacted]

Notes and Comments

[Redacted]

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

[REDACTED]

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, [REDACTED] or [REDACTED] order of the court to all parties to the proceeding.

Notes and Comments

[REDACTED]

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

- (a) [REDACTED] 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

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 parties to the proceeding when one of the following periods expires:

Notes and Comments

Comment to 2002 change:
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 and motions to extend time to file a motion for rehearing.

Notes and Comments

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)

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

(ab) *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.

(bc) *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~~ 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:

- (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 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.
- (ee) *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.
- (ef) *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

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 (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): _____

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

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

Judge

Date Signed

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.* ~~The~~ notice of appeal ~~must~~ must be filed within 15 days after the day the trial court enters the order, ruling, or sentence to be appealed.

Notes and Comments

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

[REDACTED]

33.1 Preservation; How Shown. . . .

[REDACTED]

Notes and Comments

[REDACTED]

34.6 Reporter's Record. . . .

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

- (1) Correction [REDACTED] by Agreement. The parties may agree to correct an inaccuracy in the reporter's record [REDACTED] without the court reporter's recertification.
- (2) Correction [REDACTED] 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~~ [REDACTED], the trial court must — after notice and hearing — settle the dispute.

After doing so, the court must order the court reporter to conform the reporter's record to what occurred in the trial court, 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

Notes and Comments

38.2 Appellee's Brief.

- (a) *Form of Brief.*

- (1) An appellee's brief must conform to the requirements of subdivision 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

[Redacted]

Rule 42. Dismissal; Settlement

42.1. Voluntary Dismissal and Settlement in Civil Cases.

- (a) [Redacted] 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.~~

[Redacted]

[Redacted]

- (A) render judgment effectuating the parties' agreement;

[Redacted]

(C)

- (b) [REDACTED] A severable portion of the proceeding may be disposed of under (a) if it will not prejudice the remaining parties.
- (c) [REDACTED] 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

[REDACTED]

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

[REDACTED]

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

[REDACTED]

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 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 ~~_____~~. 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) ~~_____~~

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.

~~_____~~
An opinion should be published only if _____ it does any of the following:

- (a) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases;
- (b) involves a _____ legal issues _____ of continuing public interest _____ ;
- (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 _____ 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. _____ Unpublished Opinions. Opinions not designated for publication by the court of appeals _____ have no precedential value and must not _____ be cited as authority by counsel or by a court _____

Notes and Comments

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. . . .

[REDACTED]

Notes and Comments

[REDACTED]

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. [REDACTED] briefs.

Notes and Comments

[REDACTED]

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 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.

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

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

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.

- 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