IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 02–9237

FINAL 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, 29.5, 34.5(a), 34.5(c), 34.6(e), 34.6(f), 37.1, 38.6(d), 42.1, 46.5, 47, 52.7(c), 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 _____, 2002.

Thomas R. Phillips, Chief Justice

Nathan L. Hecht, Justice

Craig T. Enoch, Justice

Priscilla R. Owen, Justice

Deborah G. Hankinson, Justice

Harriet O'Neill, Justice

Wallace B. Jefferson, Justice

Michael H. Schneider, Justice

Steven Wayne Smith, Justice

JUSTICE SCHNEIDER, joined by JUSTICE O'NEILL, concurring.

We agree with the changes to the Texas Rules of Appellate Procedure the Court adopts by this Order today. However, though the Court has made helpful and thoughtful changes, we write to express our concern about a change the Court did not make despite the Supreme Court Advisory Committee's recommendation. We write not only because the change needs to be made, but also, distinguished appellate and trial judges, individual litigators, bar association groups, and the Advisory Committee support this change.

COURT REPORTERS:
PRESENCE UNLESS EXCUSED VERSUS UNLESS REQUESTED

The issue is whether Rule 13.1 should continue to require court reporters to attend and record all proceedings unless excused by agreement of all parties, or if the Court should revise Rule 13.1 to require court reporters to attend and record the proceedings only when the court or one of the parties requests. The Court's proposed change to Rule 13.1 is not substantive. Rather, the change simply moves the text "unless excused by agreement of the parties" from the end of subsection (a) to the beginning of that subsection. Consequently, Rule 13.1 continues to require court reporters to attend and record all proceedings.

To the contrary, the Advisory Committee recommended the Court change Rule 13.1 to provide: "The official court reporter or court recorder must: (a) when the court or any party to the

case requests, attend court and make a full record of the proceedings." The reasons for this requested change are evidenced in the legal community's and Advisory Committee's objections to requiring a court reporter to remain in the courtroom at all times and record every event: (1) the vast majority of trial court proceedings are made without a record, thereby raising the question of the necessity for such a rule; (2) requiring reporters to attend and record all proceedings until excused results in court reporters spending all their time in the courtroom, which, in turn, wastes time, reflects an inefficient use of the court's resources, and interferes with reporters' ability to work on records in need of transcription; (3) the Court's proposed rule is at odds with common practice throughout the State; and (4) the Court's rule is arguably inconsistent with TEX. GOV'T CODE § 52.046, which requires a court reporter to be present and record proceedings only "on request."

As former trial judges, we have first-hand knowledge of the impracticality of requiring a court reporter to be present and record matters at all times when the trial judge is on the bench. In addition to the many transcripts court reporters must prepare and put in proper form for appellate review, court reporters more often than not have other duties to the court, including helping with administrative and staff functions. Thus, because trial courts' resources are extremely limited, it is inefficient to require court reporters to be present and record all matters.

Those who contend court reporters should attend and record all proceedings argue that this prevents traps for the weary litigant who forgets to request a court reporter to transcribe such matters as voire dire, summary judgment, and final arguments. In our experience, however, most parties do

not request and apparently do not want such matters recorded based on the additional costs parties may incur in the event the matter is appealed. Moreover, we see no significant downside in requiring attorneys to preserve and protect their clients' rights on appeal by making a simple request that the court reporter transcribe such proceedings. Indeed, one of the most basic principals in appellate law is for parties, by and through their attorneys, to preserve, protect, and complain about error.

For these reasons, we agree with the Advisory Committee's recommendation to substantively change Rule 13.1. Requiring a court reporter to attend court and record proceedings upon a party's or the court's request would eliminate the problems with Rule 13.1 identified above and comport with the Government Code's plain language. TEX. GOV'T CODE § 52.046 ("On request, an official court reporter shall (1) attend all sessions of the court . . ."). The Legislature in its wisdom has established court reporters' duties; therefore, any changes to Rule 13.1 should be consistent with the Legislature's will. Accordingly, we concur with the Court's changes to the appellate rules, but disagree with the Court's decision to reject the Advisory Committee's recommended change for Rule 13.1.

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.

(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

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~~;

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 Code of Criminal Procedure article 44.02 and these rules. The trial court shall enter a certification of the defendant's right of appeal in every case in which it enters a judgment of guilt or other appealable order. 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 the party's desire to appeal from the judgment or other appealable order, and, if the State is the appellant, the notice complies with Code of Criminal Procedure article 44.01..

~~(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.~~

(d) *Certification of Defendant's Right of Appeal.* If the defendant is the appellant, the record must include 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 record when notice is filed, but may be added by timely amendment or supplementation under this rule or Rule 34.5(c)(1) or Rule 37.1 or by order of the appellate court under Rule 34.5(c)(2). The appeal must be dismissed if a certification that shows the defendant has the right of appeal has not been made part of the record under these rules.

(ee) *Clerk's Duties.* The trial court clerk must note on the copies of the notice of appeal

and the trial court's certification of the defendant's right of appeal the case number and the date when ~~the notice~~ each was filed. The clerk must then immediately send one copy of each to the clerk of the appropriate court of appeals and, if the defendant is the appellant, one copy of each to the State's attorney.

(~~d~~f) *Amending the Notice or Certification.* An amended notice of appeal or trial court's certification of the defendant's right of appeal correcting a defect or omission in an earlier filed notice or certification may be filed in the appellate court in accordance with Rule 37.1, or at any time before the ~~appellant's~~ appealing party's brief is filed if the court of appeals has not used Rule 37.1. The amended notice or certification is subject to being struck for cause on the motion of any party affected by the amended notice or certification. After the ~~appellant's~~ appealing party's brief is filed, the notice or certification may be amended only on leave of the appellate court and on such terms as the court may prescribe.

(eg) *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 to 2002 change: Rule 25.2, for criminal cases, is amended. Subdivision 25.2(a) states the parties' rights of appeal that are established by Code of Criminal Procedure article 44.01 and by article 44.02, the proviso of which was repealed when rulemaking power was given to the Court of Criminal Appeals. Subdivision 25.2(b) is given the requirement that a notice of appeal be in "sufficient" form, which codifies the decisional law. The requirement in former subdivision 25.2(b)(3) that a plea-bargaining appellant's notice of appeal specify the right of appeal is replaced by a requirement in subdivision 25.2(d) that the trial court certify the defendant's right of appeal in every case in which a judgment or other appealable order is entered. The certificate should be signed at the time the judgment or other appealable order is pronounced. The form of certification of the defendant's right of appeal is provided in an appendix to these rules. If the record does not include the trial court's certification that the defendant has the right of appeal, the appeal must be dismissed. If a sufficient notice of appeal or certification is not filed after the appellate court deals with the defect (see Rules 34.5(c) and 37.1), preparation of an appellate record and representation by an appointed attorney may cease.

[Form to be included in Appendix:]

No. _____

The State of Texas In the _____ Court

v. of

_____, Defendant _____ County, Texas

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

I, judge of the trial court, certify this criminal case:

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

☐ is a plea-bargain case, but matters were raised by written motion filed and ruled on before trial and not withdrawn or waived, and the defendant has the right of appeal. [*or*]

☐ is a plea-bargain case, but the trial court has given permission to appeal, and the defendant

has the right of appeal. [*or*]

☐ is a plea-bargain case, and the defendant has NO right of appeal. [*or*]

☐ the defendant has waived the right of appeal.

_____ _____

Judge Date Signed

I have received a copy of this certification.

_____ _____

Defendant (if not represented by counsel) Defendant's Counsel

Mailing address: State Bar of Texas identification number:

Telephone number: Mailing address:

Fax number (if any): Telephone number:

Fax number (if any):

*"A defendant in a criminal case has the right of appeal under these rules. The trial court shall enter

a certification of the defendant's right to appeal in every case in which it enters a judgment of guilt or other appealable order. 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).

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 in substance.

34.5. Clerk's Record.

(a) *Contents.* Unless the parties designate the filings in the appellate record by agreement under Rule 34.2, the record must include copies of the following:

(1) in civil cases, all pleadings on which the trial was held;

(2) in criminal cases, the indictment or information, any special plea or defense motion that was presented to the court and overruled, any written waiver, any written stipulation, and, in cases in which a plea of guilty or nolo contendere has been entered, any documents executed for the plea;

(3) the court's docket sheet;

(4) the court's charge and the jury's verdict, or the court's findings of fact and conclusions of law;

(5) the court's judgment or other order that is being appealed;

(6) any request for findings of fact and conclusions of law, any post-judgment motion, and the court's order on the motion;

(7) the notice of appeal;

(8) any formal bill of exception;

(9) any request for a reporter's record, including any statement of points or issues

under Rule 34.6(c);

(10) any request for preparation of the clerk's record;

(11) in civil cases, a certified bill of costs including the cost of preparing the clerk's record, showing credits for payments made; ~~and~~

(12) in crimina cases the tria court's certificatio o th defendant' righ of appeal under Rule 25.2; and

(~~12~~13) subject to (b), any filing that a party designates to have included in the record.

* * *

(c) *Supplementation.*

(1) If a relevant item has been omitted from the clerk's record, the trial court, the appellate court, or any party may by letter direct the trial court clerk to prepare, certify, and file in the appellate court a supplement containing the omitted item.

(2) If the appellate court in a criminal case orders the trial court to prepare and

file findings of fact and conclusions of law as required by law, or certification of the defendant's right of appeal as required by these rules, the trial court clerk must prepare, certify, and file in the appellate court a supplemental clerk's record containing those findings and conclusions.

(3) Any supplemental clerk's record will be part of the appellate record.

Notes and Comments

Comment to 2002 change: Rule 34.5(a) is amended to require that the record in a criminal case include the certification of defendant's right of appeal, see Rule 25.2(d). Rule 34.5(c) is amended to make clear that an appellate court may order the trial court to make such a certification for inclusion in a supplemental clerk's record.

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~~ If the court finds any inaccuracy, it must order the court reporter to conform the reporter's record (including text and any exhibits) to what occurred in the trial court, and to ~~certify and~~ file certified corrections 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~~ proceed as under subparagraph (e)(2).

(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)(2) referring to the text of the record is simplified without substantive change. Subparagraph (e)(3) incorporates the procedures specified in (e)(2). 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.

37.1. On Receiving the Notice of Appeal. If the appellate clerk determines that the notice of appeal or certification of defendant's right of appeal in a criminal case is defective, the clerk must notify the parties of the defect so that it can be remedied, if possible. If a proper notice of appeal or certification of a criminal defendant's right of appeal is not filed in the trial court within 30 days of the date of the clerk's notice, the clerk must refer the matter to the appellate court, which will make an appropriate order under this rule or Rule 34.5(c)(2).

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 court must accept the remittitur ~~must be accepted~~ and reform and affirm the trial court judgment ~~affirmed~~ in accordance with the remittitur.

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, PUBLICATION, 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. Designation and Signing of Opinions; Participating Justices.

(a) *Civil and Criminal Cases.* Each opinion of 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 the 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)." Of course, whenever an opinion not readily available is cited, copies should be furnished to the court and opposing counsel.

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 catchline 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.