A COMPARISON OF STATE AND FEDERAL APPELLATE PRACTICE[1]

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CHAPTER 11

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I. INTRODUCTION

Many appellate practitioners spend the majority of their time in either state or federal court, but do not spend much time practicing in the other system. There are notable differences between procedures in the Texas and federal appellate courts. In state court practice, for example, appellate practitioners are faced with numerous traps in simply proceeding from a trial court's final judgment to the point where they can begin briefing the case. On the other hand, federal appellate practitioners have a relatively simple process to undergo in order to get the case ready for briefing.

This paper will discuss the differences between state and federal appellate practice in ordinary civil appeals and provide an overview of appellate practice in both systems. Discussion of appeals in federal court will focus on practice before the Fifth Circuit. As always, the rules of procedure should be consulted (along with any potential statutory provision that may alter the rules) in seeking the answer to any specific question.

II. BEGINNING THE APPELLATE PROCESS

State:

In state court, all appellate deadlines begin running from the date the trial court *signs* the judgment. *See* TEX. R. CIV. P. 306a(1), 329b(a); TEX. R. APP. P. 26.1, 35.1. "Signed" is not synonymous with "rendered"[2] or "entered."[3] The day a judge signs the judgment is usually after the time the judgment is rendered and surely before it is entered. *Burrell v. Cornelius*, 570 S.W.2d 382, 384 (Tex. 1978); *see also Ortiz v. O.J. Beck & Sons, Inc.*, 611 S.W.2d 860, 863-64 (Tex. Civ. App.—Corpus Christi 1980, no writ). The appellate timetable depends only on the date of signing. *In re Bennett*, 960 S.W.2d 35, 38 (Tex. 1997) (per curiam); *Burrell*, 570 S.W.2d at 384.

Federal:

In federal court, on the other hand, appellate deadlines run from the date of *entry* of judgment. *See* FED. R. CIV. P. 58(b); FED. R. APP. P. 4(a)(1), (7); *Sudduth v. Texas Health & Human Services Comm'n*, 15-50764, -- F.3d --, 2016 WL 3900647, at *1 (5th Cir. July 18, 2016); *Burnley v. City of San Antonio*, 470 F.3d 189, 193-94 (5th Cir. 2006); *see also Ludgood v. Apex Marine Corp. Ship Mgmt.*, 311 F.3d 364, 368-69 (5th Cir. 2002) (timeline for appeal ran from date final judgment was entered, not the underlying memorandum and order). In the event of the filing of one of the motions listed in Rule 4(a)(4)(A)(i)-(vi), the appellate deadlines run from the date of the entry of the order disposing of the last such remaining motion. FED. R. APP. P. 4(a)(4).

III. APPELLATE MOTION PRACTICE

State:

In state court, an application for an order or other relief is made by filing with the appellate court a motion for such order or relief with proof of service on all parties. TEX. R. APP. P. 9.5, 10.1(a). The motion shall contain or be accompanied by any matter required by the rules governing the specific motion, state with particularity the grounds on which the motion is based, and set forth the order or relief sought. TEX. R. APP. P. 10.1(a)(1)-(3). If a motion is supported by briefs, affidavits, or other papers, they shall be served and filed with the motion. TEX. R. APP. P. 10.1(a)(4). Motions in civil cases (except motions for rehearing and for en banc reconsideration) must also contain or be filed with a certificate stating that the filing party conferred, or made a reasonable attempt to confer, with all other parties about the merits of the motion, and indicate whether those parties are opposed. TEX. R. APP. P. 10.1(a)(5).

Motions dependent on facts not apparent in the record, not ex officio known to the court, or not within the personal knowledge of the attorney who signs the motion must be verified and supported by affidavits or other satisfactory evidence. TEX. R. APP. P. 10.2. Counsel should check the local rules of the court of appeals for additional requirements for motions.

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[2] Rendition of judgment is the judicial act by which the court settles and declares the decision of law on the matters at issue. *Knox v. Long*, 257 S.W.2d 289, 291 (Tex. 1953), *overruled on other grounds*, *Jackson v. Hernandez*, 285 S.W.2d 184, 189-91 (Tex. 1956); *Kelley v. Pirtle*, 826 S.W.2d 653, 654 (Tex. App.—Texarkana 1992, writ denied). Judgment is rendered when the decision is officially announced either orally in open court or by memorandum filed with the clerk. *S&A Rest. Corp. v. Leal*, 892 S.W.2d 855, 857 (Tex. 1995) (per curiam); *Comet Aluminum Co. v. Dibrell*, 450 S.W.2d 56, 58 (Tex. 1970). Rendition of judgment is a present act; a judge's intention to render judgment in the future is not a present rendition of judgment. *Reese v. Piperi*, 534 S.W.2d 329, 330 (Tex. 1976); *Kelley*, 826 S.W.2d at 654. The date of rendition may be significant in some cases, although the appellate timetable runs from the date of the judgment's signature. *See, e.g., Araujo v. Araujo*, No. 04-15-00503-CV, 2016 WL 3030942, at *3 (Tex. App.–San Antonio May 25, 2016, no pet.) (order more than ministerial not "rendered" after plenary power, requiring compliance with post-judgment QDRO procedure in Family Code); *In re Dixon*, No. 12-13-00324-CV, 2014 WL 806373, at *3 (Tex. App.—Tyler Feb. 28, 2014, no pet.) (mem. op.) (no present intent to render judgment before sixty-day waiting period and Rule 11 consent withdrawn before judgment signed rendered judgment moot).

[3] Entry of judgment is the ministerial act of the clerk that affords enduring evidence of the judicial act of rendering judgment. *Knox*, 257 S.W.2d at 291; *Kelley*, 826 S.W.2d at 654.

Docketing of motions

The clerk shall file the motion under the docket number of the appeal. TEX. R. APP. P. 12.2. A motion relating to an appeal that has been perfected in the trial court, but not yet filed in the appellate court, shall be docketed and assigned a docket number, which shall also be assigned to the appeal when it is filed. TEX. R. APP. P. 12.2(d).

Responses to motions

Any party may file a response to the motion at any time before the court rules on the motion, or before any deadline for response set by the court. TEX. R. APP. P. 10.1(b). The court need not wait for a response before ruling on a motion. *Id.* However, the court generally will not resolve a motion until ten days after it is filed, unless the motion is: (1) a request for an extension of time to file a brief or a petition for review; (2) states that the parties have conferred and no party is opposed; or (3) an emergency motion. TEX. R. APP. P. 10.3(a). A party adversely affected by a premature ruling may request the court to reconsider its order. TEX. R. APP. P. 10.3(b).

Motions for extension of time

Motions for extension of time have specific requirements. *See* TEX. R. APP. P. 10.5(b). All motions, except for motions to extend time for filing a notice of appeal, must specify the following:

(A) the deadline for filing the item in question;
(B) the length of the extension sought;
(C) the facts relied upon to reasonably explain the need for an extension; and
(D) the number of previous extensions granted regarding the item in question.

TEX. R. APP. P. 10.5(b)(1).

Specific types of motions for extension are addressed *infra*. *See* Part V.C (motion for extension of time to file notice of appeal); Part IX.C (motion for extension of time to file briefs in court of appeals); Part IX.F (motion for extension of time to file motion for rehearing); Part X.A (motion for extension of time to file petition for review in the Texas Supreme Court); Part X.E (motion for extension of time to file motion for hearing in the Texas Supreme Court).

The standard of review for extensions of time is reasonable explanation. *See* TEX. R. APP. P.10.5(b)(1)(C). Reasonable explanation means any plausible statement of circumstances indicating that the failure to file within the required period was not deliberate or intentional, but was the result of inadvertence, mistake, or mischance. *Garcia v. Kastner Farms, Inc.*, 774 S.W.2d 668, 669 (Tex. 1989) (quoting *Meshwert v. Meshwert*, 549 S.W.2d 383, 384 (Tex. 1977), and interpreting former TEX. R. APP. P.54(c)). Under this liberal standard, any conduct short of deliberate or intentional noncompliance qualifies as inadvertence, mistake, or mischance. *Garcia*, 774 S.W.2d at 670 ("attorney's misunderstanding of the law" was a reasonable explanation for late filing of cost bond); *accord Verburgt v. Dorner*, 959 S.W.2d 615, 616-17 (Tex. 1997); *Boyd v. Am. Indem. Co.*, 958 S.W.2d 379, 380 (Tex. 1997) (remanding to the court of appeals for determination whether party "offered a reasonable explanation for his failure to timely file" a cost bond when counsel "had simply miscalculated the date the bond was due"). "Waiting on the outcome of a post-trial motion before perfecting an appeal is not a reasonable explanation of the need for an extension." *Morford v. Esposito Securities, LLC*, No. 05-14-01223-CV, 2015 WL 5472640, at *2 (Tex. App.—Dallas Sept. 18, 2015) (citing *Jahner v. Jahner*, No. 05-15-00225-CV, 2015 WL 1910014, at *1 (Tex. App.—Dallas Apr. 28, 2015, no pet.)); *see also Connor v. Connor*, No. 01-15-00916, 2015 WL 9303498, at *1 (Tex. App.—Houston [1st Dist.] Dec. 22 2015, no pet.) (mem. op.). But giving some additional explanation may suffice. *Morford*, 2015 WL 5472640, at *2 (deadline inadvertently missed "due to a miscommunication between counsel and a miscalculation of the date on which the notice of appeal was due").

Rulings on motions

In Texas, a single justice may grant or deny motions. TEX. R. APP. P. 10.4. This authority, however, does not extend to actions on a petition for an extraordinary writ or dismissing or determining an appeal or a motion for rehearing. *Id.*

Federal:

There is relatively little motion practice in the federal courts of appeal. Certain types of motions with specific requirements are addressed *infra*. *See* Part IX.E (motion for rehearing and for rehearing en banc in the Fifth Circuit); Part X.E (motion for rehearing in the U.S. Supreme Court).

Applications for an order or other relief are generally made by motion, unless specified by order or other rule. FED. R. APP. P. 27(a)(1). Motions must state with particularity the grounds and relief sought and the legal argument supporting such relief. FED. R. APP. P. 27(a)(2)(A). The motion must include any accompanying documents required by the appellate rules, such as an affidavit. FED. R. APP. P. 27(a)(2)(B)(i). If the motion seeks substantive relief, a copy of the trial court's or agency's decision must be attached as a separate exhibit. FED. R. APP. P. 27(a)(2)(B)(iii). The movant should not file a separate brief supporting the motion, or notice of the motion, or a proposed order. FED. R. APP. P. 27(a)(2)(C).

Except if a motion is purely procedural, the Fifth Circuit also requires that it include a certificate of interested persons, which provides the court with information regarding parties that may raise a recusal

issue. 5TH CIR. R. 27.4, 28.2.1. It must also state that the movant has contacted or attempted to contact all other parties and indicate whether an opposition will be filed. 5TH CIR. R. 27.4.

Unless otherwise specified by the court, motions are limited to twenty pages, excluding the corporate disclosure statement and any accompanying documents authorized by Rule 27(a)(2)(B). FED. R. APP. P. 27(d)(2).

Responses to motions

The non-movant has ten days after service of the motion to file a response unless the court shortens or extends the time. FED. R. APP. P. 27(a)(3)(A). A response may include a motion for affirmative relief, but the title of the response must alert the court to the request for such relief. FED. R. APP. P. 27(a)(3)(B). A party may also file a reply to a response within seven days after service of the response. FED. R. APP. P. 27(a)(3)(B)(4).

Responses are limited to twenty pages, and a reply is limited to ten pages, unless the court specifies otherwise. FED. R. CIV. P. 27(d)(2). The original and three copies of the motion must be filed, and oral argument is not permitted. FED. R. CIV. P. 27(d)(3), (e).

Motions for extension of time

Specific motions for extension of time and the standards for obtaining them are addressed *infra*. *See* Part V.C (motion for extension of time to file notice of appeal); Part IX.C (motion for extension of time to file brief in the Fifth Circuit); Part IX.F (motion for extension of time to file motion for rehearing in the Fifth Circuit); Part X.C (motion for extension of time to file brief in the U.S. Supreme Court); Part X.E (motion for extension of time to file motion for rehearing in the U.S. Supreme Court).

Emergency Motions

Emergency motions should not be filed "unless there is an emergency sufficient to justify disruption of the normal appellate process." 5TH CIR. R. 27.3. The motion must be supported by good cause, and must (1) be preceded by a phone call to the clerk's office, and to opposing counsel, advising of the intent to file an emergency motion, (2) be labeled "Emergency Motion," (3) state the nature of the emergency and the potential irreparable harm, (4) state the necessary supporting facts, (5) provide the date by which action is believed to be necessary, (6) attach relevant orders and pleadings from the lower court, and (7) be filed in the clerk's office by 2 p.m. 5TH CIR. R. 27.3.

Rulings on motions

Under the Fifth Circuit Local Rules, the clerk of court has discretion to act on, or to refer to the court, many procedural motions, including but not limited to motions for extensions of time to file briefs, to stay further proceedings on appeal, to consolidate appeals, to supplement or correct records, and for leave to file an amicus brief. 5TH CIR. R. 27.1.1 to 27.1.19. Any action by the clerk on such motions is subject to review by a single judge upon motion for reconsideration made within fourteen days (or forty-five days, if a party is the federal government or a federal agency, officer or employee listed in FED. R. APP. P. 40(a)(1)) after a ruling is made. 5TH CIR. R. 27.1.

In addition to the motions subject to review or action prescribed in Local Rule 27.1, a single judge is authorized to act on certain motions, including but not limited to motions to substitute parties, expedite appeals, or to strike nonconforming briefs, record excerpts, or other papers. 5TH CIR. R. 27.2 to 27.2.9; *see also* FED. R. APP. P. 27(c) (authorizing court of appeals to permit single-judge rulings). Single judge actions are, in turn, reviewable by a panel upon motion for reconsideration made within fourteen days (or forty five days, *see* FED. R. APP. P. 40(1)(1)) after a ruling is issued. 5TH CIR. R. 27.2.

IV. MOTION FOR NEW TRIAL

State:

Necessity of a motion for new trial to preserve error

Generally, a motion for new trial is not required to preserve error in state court. TEX. R. CIV. P. 324(a). Rule 324(b), however, requires a motion for new trial to be filed as a prerequisite to appeal in the following situations:

> (1) a complaint on which evidence must be heard, such as jury misconduct, newly discovered evidence, or failure to set aside a default judgment;
> (2) a complaint of the factual sufficiency of the evidence to support a jury finding;
> (3) a complaint that a jury finding is against the great weight and preponderance of the evidence;
> (4) a complaint of the inadequacy or excessiveness of the damages awarded by a jury; or
> (5) incurable jury argument, if not otherwise ruled on by the trial court.

TEX. R. CIV. P. 324(b).

Timing of a motion for new trial

The motion for new trial must be filed within thirty days after the judgment or order complained of is signed. TEX. R. CIV. P. 329b(a); *Miller Brewing Co. v. Villarreal*, 829 S.W.2d 770, 770-71 (Tex. 1992). This deadline cannot be extended. TEX. R. CIV. P. 5. The timely filing of a motion for new trial also extends the appellate timetable, from thirty to ninety days after the judgment is signed. *See* TEX. R. APP. P. 26.1(a)(1), 35.1(a); *see also Ryland Enters., Inc. v. Weatherspoon*, 355 S.W.3d 664,

666 (Tex. 2011); *U. S. Fire Ins. Co. v. State*, 843 S.W.2d 283, 284 (Tex. App.—Austin 1992, writ denied).

Practice Tip: There is a $15 fee for a motion for new trial. TEX. GOV'T CODE ANN. § 51.317(b)(2). Failure to pay it may forfeit consideration of the motion, although the motion nonetheless will extend the appellate timetable. *Garza v. Garcia*, 137 S.W.3d 36, 37-38 (Tex. 2004); *Tate v. E.I. DuPont de Nemours & Co.*, 934 S.W.2d 83, 84 (Tex. 1996) (per curiam); *but see Notte v. Flournoy*, 348 S.W.3d 262, 268 (Tex. App.—Texarkana 2011, pet. denied) (failure to pay fees does not deprive trial court of juridiction). Because certain issues must be raised by motion for new trial and the motion should not be heard until the fee is paid, the failure to pay the fee at all, before it is overruled, or before plenary power expires may not preserve the issues for appeal (because the trial court was not required to or did not review it). *Garcia*, 137 S.W.3d at 38.

The rules provide that a trial court cannot extend the period "for taking any action under the rules relating to new trials." TEX. R. CIV. P. 5. Therefore, a trial court cannot grant an extension of time to file a motion for new trial. *See Moritz v. Preiss*, 121 S.W.3d 715, 720 (Tex. 2003). Nevertheless, if the trial court signs a modified judgment within its period of plenary power, then the 30-day clock restarts and a party may file a motion for new trial within 30 days after the trial court signed the modified judgment. *See Mackie v. McKenzie*, 890 S.W.2d 807, 808 (Tex. 1994); *Check v. Mitchell*, 758 S.W.2d 755, 756 (Tex. 1988); *see also* Tex. R. Civ. P. 329b(h).

Ruling on a motion for new trial

A new trial order must be "understandable," "reasonably specific," "cogent," "legally appropriate," "specific enough to indicate that the trial court did not simply parrot a pro forma template," and must be able to withstand merits-based review. *See Columbia*, 290 S.W.3d at 213; *In re United Scaffolding, Inc.*, 377 S.W.3d 685, 688 (Tex. 2012) (orig. proceeding) ("*Scaffolding II*"); *In re Toyota Motor Sales USA, Inc.*, 407 S.W.3d 746, 757 (Tex. 2013) (orig. proceeding); *see also In re Whataburger Rests., L.P.*, 429 S.W.3d 597, 598-600 (Tex. 2014) (orig. proceeding) (per curiam) (granting mandamus relief after merits-based review); *In re Health Care Unlimited, Inc.*, 429 S.W.3d 600, 602-04 (Tex. 2014) (orig. proceeding) (same). For a detailed review of the facial requirements of a new trial order, see *In re Bent*, 487 S.W.3d 170 (Tex. 2016) (orig. proceeding).

In the event the motion for new trial is not determined by written order signed within seventy-five days after the judgment was signed, it shall be considered overruled by operation of law. TEX. R. CIV. P. 329b(c); *Fruehauf Corp. v. Carrillo*, 848 S.W.2d 83, 84 (Tex. 1993). The overruling of the motion for new trial by operation of law is sufficient to preserve error unless taking evidence was necessary to properly present the complaint in the trial court. TEX. R. APP. P. 33.1(b); *Cecil v. Smith*, 804 S.W.2d 509, 511 (Tex. 1991).

Federal:

Necessity of a motion for new trial to preserve error

Generally, a motion for new trial is not a prerequisite to appeal in federal court. *See Richardson v. Oldham*, 12 F.3d 1373, 1377 (5th Cir. 1994); *see also* 11 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2818, at 186 n.1 (2d ed. 1995). However, as in state court, a motion for new trial is necessary to preserve review of certain issues, including, for example, a sufficiency of evidence challenge, *see Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 399-402, 407 (2006), or the adequacy or excessiveness of damages found by a jury, *see Lebron v. United States*, 279 F.3d 321, 325 n.2 (5th Cir. 2002); *Bueno v. City of Donna*, 714 F.2d 484, 493-94 (5th Cir. 1983). For a list of grounds for a new trial in jury and non-jury cases, *see* 12-59 MOORE'S FEDERAL PRACTICE—CIVIL § 59.13 (3d ed. 2013).

Timing of a motion for new trial

A party has twenty-eight days after entry of judgment to file a motion for new trial. FED. R. CIV. P. 59(b); *see also* FED. R. CIV. P. 50(d) (allotting twenty-eight days from the date of judgment to party against whom judgment as a matter of law is rendered for filing a motion for new trial). This deadline cannot be extended. FED. R. CIV. P. 6(b)(2); *Knapp v. Dow Corning Corp.*, 941 F.2d 1336, 1338 (5th Cir. 1991) (former Rule 59(b)). Timely filing of a motion for new trial tolls the deadline for filing a notice of appeal. FED. R. APP. P. 4(a)(4)(A)(v); *Vincent v. Consol. Operating Co.*, 17 F.3d 782, 785 (5th Cir. 1994) (untimely motion for new trial does not toll the appellate timetable).

V. PERFECTING THE APPEAL

A. Instruments That Perfect the Appeal

State:

An appeal is perfected in state court by filing a notice of appeal. TEX. R. APP. P. 25.1(a). The notice is the only step necessary to invoke the appellate court's jurisdiction. TEX. R. APP. P. 25.1(b); *see also In re J.M.*, 396 S.W.3d 528, 530 (Tex. 2013) (per curiam) ("In cases challenging the validity of a notice of appeal, 'this Court has consistently held that a timely filed document, even if defective, invokes the court of appeals' jurisdiction.'") (quoting *Sweed v. Nye*, 323 S.W.3d 873, 874-75 (Tex. 2010)). The question is whether the defective document made a bona fide attempt to invoke the court's jurisdiction. *J.M.*, 396 S.W.3d at 530; *see, e.g., Walsh v.*

Woundkair Concepts, Inc., No. 02-14-00395, 2015 WL 1544004, at *5 (Tex. App.—Fort Worth Apr. 2, 2015, pet. denied) (mem. op.) (rejecting each item claimed to perfect appeal because no timely filed document made a bona fide attempt to invoke the court's jurisdiction).

Practice Tip: Courts of appeals have overlapping jurisdiction in parts or all of certain counties, which may affect where your appeal will be filed. For a detailed map of the courts of appeals districts, *see* http://www.courts.state.tx.us/courts/coa.asp.

Where to file the notice of appeal

The notice of appeal must be filed with the trial court clerk. TEX. R. APP. P. 25.1(a). The trial court clerk will then send a copy of the notice of appeal to the appellate court clerk, as well as to the court reporter responsible for preparing the reporter's record. TEX. R. APP. P. 25.1(f). However, if the notice is mistakenly filed with the appellate court, it is deemed to have been filed that same day with the trial court clerk. TEX. R. APP. P. 25.1(a). In such an instance, the clerk of the appellate court must immediately send a copy of the notice to the trial court clerk. *Id.* This step is all that is required to invoke the appellate court's jurisdiction. TEX. R. APP. P. 25.1.(b).

Contents of the notice of appeal

All notices of appeal must include the following:

(1) the identity of the trial court and the case's trial court number and style;
(2) the date of judgment or ordered appealed from;
(3) a statement that the party desires to appeal;
(4) the court to which the appeal is taken, except that an appeal to the First or Fourteenth Court of Appeals must state that the appeal is to either of these courts;
(5) the name of each party filing the notice.

TEX. R. APP. P. 25.1(d)(1)-(5). As with other filings, proper service is required. TEX. R. APP. P. 9.5, 25.1(e); *see, e.g.*, *Hall v. County of Anderson*, 463 S.W.3d 673, 674 (Tex. App.—Tyler 2015, no pet.) (dismissing appeal when neither original nor amended notice of appeal reflected service to county's attorney at his mailing address).

Amending the notice of appeal

A party may amend a notice of appeal to correct defects or omissions in an earlier filed notice before the appellant's brief is filed. TEX. R. APP. P. 25.1(g). So long as the notice is timely filed, *see infra* Part V.C, even a defective notice of appeal is sufficient to invoke appellate jurisdiction. *Sweed*, 323 S.W.3d at 875. "The amended notice is subject to being struck for cause on the motion of any party affected by the amended notice. TEX. R. APP. P. 25.1(g). After the appellant's brief is filed, amendment requires leave of court. *Id.*

If the appellate clerk determines that the notice of appeal is defective, the clerk must notify the parties of the defect so that it can be remedied, if possible. TEX. R. APP. P. 37.1. If a proper notice of appeal is not filed in the trial court within thirty days of the clerk's notice, the clerk must refer the matter to the appellate court, which will make an appropriate order. *Id.* The result is generally dismissal. *See, e.g., Williams v. Williams*, No. 02-15-00341-CV, 2016 WL 1469983, at *1 (Tex. App.—Fort Worth April 14, 2016, no pet.); Order , dated December 4, 2015, in *Tchernowitz v. Gardens at Clearwater*, No. 04-15-00715-CV, Fourth Court of Appeals at San Antonio.

A party may also file an amended notice of appeal on their own or upon challenge by an appellee. For example, amendments have been allowed to add the name of an appellant. In *St. Mina Auto Sales, Inc. v. Al-Muasher*, 481 S.W.3d 661 (Tex. App.—Houston [1st Dist.] 2016, pet. denied), a notice of appeal was filed naming the plaintiff as the only appellant but also referred to a sanctions order for fees against the attorney; several weeks later the attorney filed a docketing statement and an amended notice of appeal adding his name before the brief of appellant was due. *Id.* at 665-66. The court noted Rule 25.1(b): "The filing of a notice of appeal by any party invokes the appellate court's jurisdiction over all parties to the trial court's judgment or order appealed from." The court thus found no jurisdictional defect and a bona fide attempt to invoke the court's appellate jurisdiction. *Id.* (citing *Warwick Towers Council of Co-Owners v. St. Paul Ins. Co.*, 244 S.W.3d 838, 839-40 (Tex. 2008); *see also Stumhoffer v. Perales*, 459 S.W.3d 158, 162-63 (Tex. App.—Houston [1st] 2015, pet. denied) (granting motion to amend and allowing heir to be added to notice of appeal filed by estate).

Courts have reached the opposite conclusion and refused to allow an amendment. *See, e.g.*, *In re Curtis*, 465 S.W.3d 357, 364-66 (Tex. App.—Texarkana 2015, pet. dism'd) (on motion to strike, dismissing appeal of later added corporate entity not named in original notice of appeal or docketing statement but only listed under counsel's name as represented).

Other defects may be corrected as well. *See, e.g.*, Order, dated March 19, 2015, in *Scott v. Furrow*, No. 04-15-00074-CV, Fourth Court of Appeals at San Antonio (allowing amendment to correct cause number and add order date, citing *Blankenship v. Robins*, 878 S.W.2d 138, 138-39 (Tex. 1994); Order, dated March 10, 2015, in *Boren v. Yates*, No. 04-14-00824-CV, Fourth Court of Appeals at San Antonio (refusing to dismiss for failing to state date of the orders appealed from but ordering amendment to file two notices of appeal based on severance with all required information).

Parties who must file a notice of appeal

Any party who seeks to alter the trial court's judgment or appealable order must file a notice of appeal. TEX. R. APP. P. 25.1(c). Failure to do so prevents the appeals court from granting more favorable relief than did the trial court except for just cause. *Id*; *Wagner & Brown, Ltd. v. Horwood*, 58 S.W.3d 732, 737-38 (Tex. 2001) (finding no just cause for failing to appeal the trial court's application of a four-year statute of limitations to a party's unjust enrichment claim, when the courts of appeals were divided on the issue). Parties whose interests are aligned may file a joint notice of appeal. TEX. R. APP. P. 25.1(c).

Filing fee

A fee of $205 must be paid to the appellate court. *Order Regarding Fees Charged In Civil Cases in the Supreme Court and the Courts of Appeals and Before the Judicial Panel on Multidistrict Litigation*, No. 15-9158 (Tex. Aug. 28, 2015) (appended to TEX. R. APP. P.).

Docketing statement

Promptly upon filing the notice of appeal, the appellant must file a docketing statement in the appellate court. TEX. R. APP. P. 32.1. This is for administrative purposes and does not affect the appellate court's jurisdiction. TEX. R. APP. P. 32.4. However, failure to file the statement could result in dismissal of the appeal. TEX. R. APP. P. 42.3(c) (involuntary dismissal for appellant's failure to comply with the rules).

The docketing statement must include the following:

(a) (1) if the appellant has counsel, the name of the appellant and the name, address, phone number, and fax number, if any, and State Bar of Texas identification number of the appellant's lead counsel; or
(2) if the appellant does not have counsel, the party's name, address, telephone number, and fax number, if any;

(b) the date the notice of appeal was filed in the trial court and, if mailed to the trial court clerk, the date of mailing;

(c) the trial court's name and county, the name of the judge who tried the case, and the date the judgment or order appealed from was signed;

(d) the date of filing of any motion for new trial, motion to modify the judgment, request for findings of fact, motion to reinstate, or other filing that affects the time for perfecting the appeal;

(e) the names of all other parties to the trial court's judgment or the order appealed from and:

(1) if represented by counsel, their lead counsel's names, addresses, telephone numbers, and fax numbers, if any; or

(2) if not represented by counsel, the name, address, and telephone number of the party, or a statement that the appellant diligently inquired but could not discover that information;

(f) the general nature of the case, *e.g.*, personal injury, breach of contract;

(g) whether submission of appeal should be given priority or whether the appeal is accelerated under Rule 28 or other rule or statute;

(h) whether the appellant has requested or will request a reporter's record, and whether the trial was electronically recorded;

(i) the name of the court reporter;

(j) whether the appellant intends to seek temporary or ancillary relief while the appeal is pending;

(k) (1) the date of filing of any affidavit of indigence;
(2) the date of filing of any contest;
(3) the date of any order on the contest; and
(4) whether the contest was sustained or overruled;

(l) whether the appellant has filed or will file a supersedeas bond; and

(m) any other information the appellate court requires.

TEX. R. APP. P. 32.1. Any party may file a statement supplementing or correcting the docketing statement. TEX. R. APP. P. 32.3.

Federal:

As in state court, the filing of a notice of appeal perfects an appeal in federal court.[4] *Smith v. Barry*, 502 U.S. 244, 247-48 (1992); *Resident Council of Allen Parkway Village v. U.S. Dep't of Hous. & Urban Dev.*, 980 F.2d 1043, 1048 (5th Cir. 1993); FED. R. APP. P. 3(a), 4(a); *see also* FED. R. APP. P. 3(c). Timely filing of a notice of appeal is "mandatory and jurisdictional." *Bowles v. Russell*, 551 U.S. 205, 209 (2007) (internal quotation marks and citation omitted); *see also In re Deepwater Horizon*, 785 F.3d 1003, 1009 (5th Cir. 2015); FED. R. APP. P. 3 advisory committee's note.

[4] A motion to proceed on appeal in forma pauperis does not serve as a substitute for the notice of appeal. *Cf. Mitchell v. Sheriff Dep't*, 995 F.2d 60, 62 (5th Cir. 1993). It merely relieves the pauper from paying the fees or costs of appeal or giving security therefor. *See* 28 U.S.C. § 1915; FED. R. APP. P. 24. When no notice of appeal is filed, however, a motion to proceed on appeal in forma pauperis may invoke appellate jurisdiction as the functional equivalent of a notice of appeal. *Fisher v. U. S. Dep't of Justice*, 759 F.2d 461, 464-65 (5th Cir. 1985); *see also Smith v. Barry*, 502 U.S. 244, 247-48 (1992).

Where to file the notice of appeal

The notice of appeal must be filed with the clerk of the district court. FED. R. APP. P. 3(a)(1). If the notice is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date on which it was received and send it to the district court clerk. FED. R. APP. P. 4(d). The notice is then considered filed in the district court on the date so noted.

Contents of the notice of appeal

The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order, or part thereof appealed from; and shall name the court to which the appeal is taken. FED. R. APP. P. 3(c)(1); *see also United States v. Adams*, 106 F.3d 646, 647 (5th Cir. 1997); *Cooper v. Brookshire*, 70 F.3d 377, 380 (5th Cir. 1995).

The district court clerk is tasked with serving the notice of appeal on all parties to the case. FED. R. CIV. P. 3(d). At the time of filing the notice of appeal, the appellant must furnish the clerk with sufficient copies of the notice of appeal to serve on each party. FED. R. APP. P. 3(a); *see also* FED. R. APP. P. 3(d). For the format of the notice of appeal, see Form 1 of the Appendix to the Federal Rules of Appellate Procedure, *available at* http://www.ca5.uscourts.gov (under the "Clerks Office" link to FED. R. APP. P.). *See also* FED. R. APP. P. 3(c)(5) (referencing Form 1).

Amending the notice of appeal

A party who wishes to appeal orders entered after the notice of appeal was filed should timely file an amended or new notice of appeal incorporating those orders. *See, e.g.*, FED. R. APP. P. 4(a)(4)(B)(ii) (appeal of order on post-judgment motions in Rule 4(a)(4)(A) requires filing of notice or amended notice of appeal within thirty days of order); *Fiess v. State Farm Lloyds*, 392 F.3d 802, 806-07 (5th Cir. 2004) (appellate court lacked jurisdiction over order on motion to reconsider when party failed to file new or amended notice of appeal incorporating that order); *see also Whitaker v. Garcetti*, 486 F.3d 572, 585 (9th Cir. 2007) (same with respect to subsequent order on attorney's fees).

Parties who must file a notice of appeal

Any party who wishes to appeal the judgment must file a notice of appeal. *Resident Council of Allen Parkway Village*, 980 F.2d at 1048-49 (party to case below was not an "appellant" in the court of appeals because it failed to file a notice of appeal). However, a party who does not wish to appeal unless the other side does so first is afforded additional time for filing a notice of appeal. *See infra* Part V.C (general timeline for filing notice of appeal).

Fees for filing an appeal

The appellant must pay to the district clerk a $505 fee upon filing the notice of appeal, $5 of which is a district court fee. FED. R. APP. P. 3(e); *see* 28 U.S.C. §§ 1913, 1917 (2012); 5TH CIR. R. 3 (prescribing a filing fee of $505). This fee is only assessed once, even if the notice of appeal is later amended. *Owen v. Harris County*, 617 F.3d 361, 362-63 (5th Cir. 2010) (per curiam); FED. R. APP. P. 4(a)(4)(B)(iii).[5]

Representation statement

The attorney who filed the notice of appeal must, within fourteen days after filing the notice, file a representation statement with the circuit clerk naming the parties the attorney represents on appeal. FED. R. APP. P. 12(b). In the Fifth Circuit, this requirement can be satisfied by completing the "Notice of Appearance Form" and returning it to the clerk within thirty days of filing the notice of appeal. 5TH CIR. R. 12.

B. Time to Perform the Appeal

State:

General timeline for filing the notice of appeal

The notice of appeal generally must be filed within thirty days after the final judgment is signed. *Brown Mechanical Servs., Inc. v. Mountbatten Surety Co.*, 337 S.W.3d 40, 42 (Tex. App.—Houston [1st Dist.] 2012, no pet.); *McCaskell v. Methodist Hosp.*, 856 S.W.2d 519, 521 (Tex. App.—Houston [1st Dist.] 1993, no writ); TEX. R. APP. P. 26.1. A judgment is "final" in state court so as to trigger the appellate timelines only if it disposes of all pending parties and claims. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 199-200 (Tex. 2001); *see also Farm Bureau Cnty. Mut. Ins. Co. v. Rogers*, 455 S.W.3d 161, 164 (Tex. 2015) (summary judgment movant did not request attorney's fees, award of costs did not consider the issue, and Mother Hubbard did not deny fees in the absence of evidence trial court intended to do so); *Bison Bldg. Materials, Ltd. v. Aldridge*, 263 S.W.3d 69, 73 (Tex. 2012) (order that partially confirmed but also partially vacated arbitration award based on need for additional findings of fact was not final); *McNally v. Guevara*, 52 S.W.3d 195, 196 (Tex. 2001) ("resolution of a claim for court costs did not dispose of a claim for attorney's fees and did not serve as an indicium of finality."). The time period for properly perfecting an appeal is jurisdictional. *In re K.A.F.*, 160 S.W.3d 923, 927 (Tex. 2005) (untimely notice of appeal "failed to invoke the jurisdiction of the court of appeals").

If one party timely files a notice of appeal, another party may file a notice of appeal within fourteen days

[5] Failure to pay the fee does not prevent the appeal from being docketed, but is grounds for dismissal under 5th Cir. R. 42. *See* 5th Cir. R. 3.

after the first-filed notice of appeal. TEX. R. APP. P. 26.1(d).

Effect of post-judgment motions on the timeline for filing the notice of appeal.

The following post-judgment motions extend the deadline for filing a notice of appeal to ninety days:

(1) a motion for new trial;
(2) a motion to modify the judgment;
(3) a motion to reinstate (under TEX. R. CIV. P. 165a); or
(4) a request for findings of fact and conclusions of law, if such findings and conclusions are either required by the Rules of Civil Procedure, or could properly be considered by the appellate court.

TEX. R. APP. P. 26.1(a); *see Gomez v. Tex. Dep't. of Crim. Justice*, 896 S.W.2d 176, 176-77 (Tex. 1995) (any post-judgment motion that, if granted, would result in substantive change in judgment extends time to perfect appeal); *In re V.C.*, 829 S.W.2d 772, 773 (Tex. 1992); *infra* Part VII.C (discussing when request for findings of fact and conclusions of law will not extend the appellate timetables). *Compare Ryland Enter., Inc. v. Weatherspoon*, 355 S.W.3d 664, 666-67 (Tex. 2011) (motion for judgment notwithstanding the verdict filed before judgment was signed extended deadline for notice of appeal; legal sufficiency challenge assailed judgment that was later signed, and motion also requested a new trial in the alternative), *with Penny v. Shell Oil Prods. Co., LLC*, 363 S.W.3d 694, 698-99 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (motion for clarification that order granting summary judgment was a final judgment did not extend appellate timetable).

Prematurely filed notices of appeal

A prematurely filed notice of appeal is effective and deemed filed on the day of, but after, the event that begins the period for perfecting the appeal. TEX. R. APP. P. 27.1(a). Consistent with that rule, an appellate court may treat actions taken before an appealable order is signed as relating to an appeal of that order and may give those actions effect as if they were taken after the order was signed. TEX. R. APP. P. 27.2; TEX. R. CIV. P. 306(c); *see Alvarado v. Lexington Ins. Co.*, 389 S.W.3d 544, 549 & n.5 (Tex. App.—Houston [1st Dist.] 2012, no pet.) (deeming notice of appeal filed prematurely from order granting summary judgment on claims against one party, but not others, as filed on the day of, and after, the date the trial court granted appellant's motion to sever the claims against that party and rendered a final judgment on those claims); *My Café-CCC, Ltd. v. Lunchstop, Inc.*, 107 S.W.3d 860, 863-64 (Tex. App.—Dallas 2003, no pet.) (treating notice of appeal timely filed after original judgment of dismissal was vacated, but before the trial court entered a new judgment denying the appellant's motion for new trial and again dismissing the case, as effective upon the date of the later judgment). The court may allow an appealed order that is not final to be modified so as to be made final. TEX. R. APP. P. 27.2. It may also permit the modified order and all proceedings relating to it to be included in a supplemental record. *Id.* But care should be taken that successive orders do not involve independent final orders, each of which requires a notice of appeal. *In re R.A.*, 465 S.W.3d 728, 739-40 (Tex. App.—Houston [14th Dist.] 2015, pet. denied).

If an order or judgment has been appealed but was later modified by the trial court or vacated and replaced with another appealable order or judgment, the appellate court must treat the appeal as from the subsequent order or judgment. TEX. R. APP. P. 27.3. As a protective measure, however, a party may also file a notice of appeal from the subsequent order or judgment. *Id.*; *see also* TEX. R. CIV. P. 329b(h) ("If a judgment is modified, corrected, or reformed in any respect, the time for appeal shall run from the time the modified, corrected, or reformed judgment is signed[.]"). Further, if the second judgment grants all of the relief requested by the post-trial motion that sought to modify the previous judgment, the motion does not extend the appellate deadlines after the subsequent judgment. *Brighton v. Koss*, 415 S.W.3d 864, 865 (Tex. 2013).

Federal:

General timeline for filing the notice of appeal

Except as discussed in the next two paragraphs, the notice of appeal must be filed with the clerk of the district court within thirty days after the entry of the judgment or order from which the appeal is taken.[6] *In re Deepwater Horizon*, 785 F.3d at 1011; *Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521, 527 (5th Cir. 1996); FED. R. APP. P. 4(a)(1)(A). The notice of appeal must be filed by any party within sixty days after such entry if one of the parties is the United States, a federal agency, a federal officer or employee sued in an official capacity, or a current or former federal officer employee sued in an individual capacity for acts or omissions in connection with duties performed on the government's behalf. FED. R. APP. P. 4(a)(1)(B); *see also United States v. Menendez*,

[6] The notice of appeal must be actually received by the district court clerk within the time prescribed by Rule 4 of the Federal Rules of Appellate Procedure; simply mailing the notice of appeal by that date is not sufficient. *Ludgood*, 311 F.3d at 367-68; *In re Arbuckle*, 988 F.2d 29 (5th Cir. 1993). When using electronic filing, a notice of appeal is considered "filed" when it is docketed in a district court's Case Management/Electronic Case Files (CM/ECF) system and a notice of electronic filing of that appeal is sent to counsel. *Sudduth*, -- F.3d --, 2016 WL 3900647, at *1.

48 F.3d 1401, 1408 (5th Cir. 1995); *Diaz v. McAllen State Bank*, 975 F.2d 1145, 1147 (5th Cir. 1992).

A different timeline applies if the district court fails to enter a separate document reflecting the otherwise appealable judgment or order, when required under FED. R. CIV. P. 58(a). In such cases, a notice of appeal is not due until thirty days after the expiration of 150 days from the date the judgment or order was entered. *Freudensprung v. Offshore Tech. Servs., Inc.*, 379 F.3d 327, 334-35 (5th Cir. 2004) ; *see also* FED. R. APP. P. 4(a)(7)(A)(ii). A failure to set forth a judgment or order on a separate document when required by FED. R. CIV. P. 58(a) does not affect the validity of an appeal from that judgment or order. FED. R. APP. P. 4(a)(7)(B); *Moreno v. LG Elecs., USA Inc.*, 800 F.3d 692, 696 (5th Cir. 2015).

If a timely notice of appeal is filed by one party, any other party may file a notice of appeal within fourteen days after the filing of the first notice of appeal, or within the period otherwise prescribed by Rule 4(a), whichever is later. FED. R. APP. P. 4(a)(3); *Lauderdale Cnty. Sch. Dist. v. Enter. Consol. Sch. Dist.*, 24 F.3d 671, 680-81 (5th Cir. 1994); *EEOC v. W. La. Health Servs., Inc.*, 959 F.2d 1277, 1280-81 (5th Cir. 1992).

Effect of post-judgment motions on the timeline for filing the notice of appeal

In the event that one or more post-judgment motions listed in Rule 4(a)(4)(A)(i)-(vi) are timely filed, the time for appeal for all parties will run from the entry of the order disposing of the last such motion outstanding. FED. R. APP. P. 4(a)(4)(A); *Heck v. Triche*, 775 F.3d 265, 273 (5th Cir. 2014). This holds true regardless whether the post-judgment motion was filed before or after the notice of appeal. *Ross v. Marshall*, 426 F.3d 745, 751-52 & n.12 (5th Cir. 2005). An untimely post-judgment motion, however, does not affect the time for filing an appeal. *See Midwest Emp'rs Cas. Co. v. Williams*, 161 F.3d 877, 878 (5th Cir. 1998); *Knapp*, 941 F.2d at 1338.

Practice Tip: Be sure to challenge the timeliness of post-judgment motions, both in the district court and the appellate court. According to some courts—although not the Fifth Circuit—failure to do so waives any objection to tolling the appellate timetable under FED. R. APP. P. 4(a)(4)(A).[7]

A notice of appeal filed after announcement or entry of the judgment, but before the disposition of the motions listed in Rule 4(a)(4)(A)(i)-(vi), becomes effective to appeal from the judgment or order specified in the notice of appeal only upon entry of the order disposing of the last such remaining motion. FED. R. APP. P. 4(a)(4)(B)(i); *Long v. Simmons*, 77 F.3d 878, 879 n.5 (5th Cir. 1996). Appellate review of an order disposing of any of the motions listed in Rule 4(a)(4)(A) requires timely filing of a notice of appeal or an amended notice of appeal. FED. R. APP. P. 4(a)(4)(B)(ii); *see, e.g., Bann v. Ingram Micro, Inc.*, 108 F.3d 625, 626 (5th Cir. 1997); *Quave v. Progress Marine*, 912 F.2d 798, 801 (5th Cir. 1990).

Prematurely-filed notices of appeal

A notice of appeal filed after the court announces a final decision or order, but before the entry of the judgment or order, is treated as if filed on the date of, but after, the entry of the judgment or order. *FirsTier Mortgage Co. v. Investors Mortgage Ins. Co.*, 498 U.S. 269, 272-77 (1991); *Resolution Trust Corp. v. Northpark Joint Venture*, 958 F.2d 1313, 1317 (5th Cir. 1992); FED. R. APP. P. 4(a)(2). Note, however, that this rule only applies if the "appealing party is fully certain of the court's disposition, such that the entry of final judgment is predictably a formality." *United States v. Cooper*, 135 F.3d 960, 962-63 (5th Cir. 1998) (magistrate judge's report and recommendation "can never be a final decision" that disposes of claims; thus, party's premature filing of a notice of appeal upon issuance of the report was improper); *Wheat v. Pfizer, Inc.*, 31 F.3d 340, 342 (5th Cir. 1994). Thus, the decision must have been appealable if it were immediately followed by entry of judgment. *Cooper*, 135 F.3d at 963.

[7] *Art Attacks Inc. LLC v. MGA Entm't Inc.*, 581 F.3d 1138, 1143 (9th Cir. 2009) (holding deadline for post-judgment motion for judgment as a matter of law under FED. R. CIV. P. 50(b) is non-jurisdictional and, thus, waivable); *Nat'l Ecological Found. v. Alexander*, 496 F.3d 466, 475-76 (6th Cir. 2007) (challenge to untimely motion to alter or amend judgment was forfeited at the district court level); *Wilburn v. Robinson*, 480 F.3d 1140, 1146-48 (D.C. Cir. 2007) (party forfeited objection to untimely motion for relief from judgment by failing to raise issue in initial merits brief). *But see Blue v. Int'l Bhd. of Elec. Workers Local Union 159*, 676 F.3d 579, 582-83 (7th Cir. 2012) (disagreeing that failure to object to timeliness of post-judgment makes it timely); *Lizardo v. United States*, 619 F.3d 273, 280 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 2444 (2011) ("[A]n untimely [motion to alter or amend judgment], even one that was not objected to in the district court, does not toll the time to file a notice of appeal under Rule 4(a)(4)(A)"); *Vincent*, 17 F.3d at 785 (examining *sua sponte* whether motion for new trial was timely so as to toll the timeline for appeal).

Practice Tip: Beware that some courts have held a prematurely-filed notice of appeal does not encompass subsequent orders that are not specified in the notice of appeal. *See, e.g.*, *Bonner v. Perry*, 564 F.3d 424, 429-30 (6th Cir. 2009) (premature notice of appeal from specific order dismissing claims against one party did not confer appellate jurisdiction over later order dismissing claims against another party); *Bogle v. Orange Cnty. Bd. of Comm'rs*, 162 F.3d 653, 661 (11th Cir. 1998) (amended or second notice of appeal after denial of motion for reconsideration was required to appeal that order); *Nolan v. U.S. Dep't of Justice*, 973 F.2d 843, 846 (10th Cir. 1992) (ripened notice of appeal covers decisions identified in the premature notice, but not "subsequent appeals arising out of the same case"). To be safe, a party should file a new notice of appeal or amended notice specifying its appeal of the final judgment.

C. Extension of Time for Filing an Appeal

State:

Where to file a motion for an extension

In state court, a request for an extension of time to file an appeal must be presented to the court of appeals. TEX. R. APP. P. 10.5(b).

Timeline for requesting an extension

A motion for extension must be filed within fifteen days after the deadline for filing the notice of appeal. TEX. R. APP. P. 26.3. To obtain an extension, a party generally must file a notice of appeal in the trial court and file a motion for extension in the appellate court. *Id.* The court of appeals does not have authority to further extend the time limits for perfecting an appeal. *Revier v. Spragins*, 810 S.W.2d 298, 302 (Tex. App.—Fort Worth 1991, no writ); *Stevens v. McClure*, 732 S.W.2d 115, 117 (Tex. App.—Amarillo 1987, no writ).

However, a motion for extension of time is implied by an appellant's good faith effort to file an instrument to perfect an appeal within the fifteen-day grace period for requesting an extension. *Verburgt v. Dorner*, 959 S.W.2d 615, 615, 617 (Tex. 1998) (addressing a party's late filing of a cost bond under former Rule 41(a)(2)); *see also Hone v. Hanafin*, 104 S.W.3d 884, 886-87 (Tex. 2003) (per curiam) (applying *Verburgt* to current Rule 26.3). The appellant must still provide a reasonable explanation for the late filing to avoid dismissal of the appeal. *Hone*, 104 S.W.3d at 886-88; *In re G.J.P.*, 314 S.W.3d 217, 221 (Tex. App.—Texarkana 2010, pet. denied); *City of Dallas v. Hillis*, 308 S.W.3d 526, 529-30 (Tex. App.—Dallas 2010, pet. denied); *Hernandez v. Lopez*, 288 S.W.3d 180, 184 (Tex. App.—Houston [1st Dist.] 2009, no pet.).

If a party did not receive notice or acquire actual knowledge that the judgment was signed within twenty days after the signing, then the time for filing a notice of appeal runs from the earlier of the date when the party receives notice or acquires actual knowledge of the signing. TEX. R. APP. P. 4.2(a)(1); *see also* TEX. R. CIV. P. 306a.3 (requiring the trial court clerk to give notice that judgment was signed). However, this extension is limited to ninety days after the judgment was signed. TEX. R. APP. P. 4.2(a)(1). To avail itself of such an extension, a party must file a motion in the trial court as prescribed in TEX. R. CIV. P. 306a.5.

Contents of a motion for an extension

A motion to extend time for filing a notice of appeal must state:

(A) the deadline for filing the notice of appeal, and the facts relied upon to reasonably explain the need for an extension;
(B) the identity of the trial court;
(C) the date of the trial court's judgment or appealable order; and
(D) the case number and style of the case before the trial court.

TEX. R. APP. P. 10.5(b)(2).

Standard for obtaining an extension

The standard of review is reasonable explanation. TEX. R. APP. P. 10.5(b)(1)(C), (b)(2); *Hone*, 104 S.W.3d at 886-87 (party need not concede that its filing of a notice of appeal was untimely; plausible good faith justification for late filing is sufficient); *Garcia v. Kastner Farms, Inc.*, 774 S.W.2d 668, 669 (Tex. 1989); *Meshwert v. Meshwert*, 549 S.W.2d 383, 383-84 (Tex. 1977). As noted above, "[w]aiting on the outcome of a post-trial motion before perfecting an appeal is not a reasonable explanation of the need for an extension." *Morford*, 2015 WL 5472640, at *2; *Connor*, 2015 WL 9303498, at *1. *See also supra* Part III (motions for extension of time).

Federal:

Where to file a request for extension

A request for an extension of time to file the notice of appeal in federal court is filed in the district court. FED. R. APP. P. 4(a)(5); *see Lee v. Coahoma Cnty.*, 937 F.2d 220, 223 (5th Cir. 1991), *opinion modified*, 37 F.3d 1068 (5th Cir. 1993). The appellate court lacks authority to extend this time. *In re Lacey*, 114 F.3d 556, 557 (5th Cir. 1997); FED. R. APP. P. 26(b)(1).

Timeline for requesting an extension

A motion to extend the time for filing a notice of appeal must be filed not later than thirty days after the time the notice was due. *Lackey v. Atlantic Richfield Co.*, 990 F.2d 202, 206 (5th Cir. 1993); *Britt v. Whitmire*, 956 F.2d 509, 511 (5th Cir. 1992); FED. R. APP. P. 4(a)(5)(A)(i).

The extension cannot exceed the later of thirty days after the notice was due or fourteen days from the date of the order granting the motion. FED. R. APP. P. 4(a)(5)(C); *see Harrington v. State Farm Fire & Cas. Co.*, 563 F.3d 141, 146 (5th Cir. 2009); *Cyrak v. Lemon*, 919 F.2d 320, 323 (5th Cir. 1990).

In limited circumstances, the district court has discretion to reopen the time for appeal for fourteen days from the date of an order reopening the appeal period. FED. R. APP. P. 4(a)(6). Three conditions must be met: (A) the court must find that the party did not receive notice under FED. R. CIV. P. 77(d) that the judgment or order sought to be appealed was entered within twenty-one days after entry; (B) the party files a motion within 180 days of entry of the judgment or order, or seven days of receipt of notice of the judgment or order, whichever is earlier; and (C) the court finds that no party would be prejudiced. *Resendiz v. Dretke*, 452 F.3d 356, 361-62 (5th Cir. 2006); *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199, 1202 (5th Cir. 1993); *In re Jones*, 970 F.2d 36, 38-39 (5th Cir. 1992); FED. R. APP. P. 4(a)(6); *see also* FED. R. CIV. P. 77(d).

Standard for obtaining an extension

To obtain an extension of time to appeal, a party must show "excusable neglect or good cause." FED. R. APP. P. 4(a)(5)(A)(ii); *Sudduth*, -- F.3d --, 2016 WL 3900647, at *2. "Good cause" and "excusable neglect" are "not interchangeable, and one is not inclusive of the other." FED. R. APP. P. 4(a)(5)(A)(ii), 2002 Amendments, Adv. Comm. Notes.

"Excusable neglect" applies in situations where there is fault, and "the need for an extension is usually occasioned by something within the control of the movant." *Id.* The "good cause" standard, in contrast, applied where there is no fault, and the extension "is usually occasioned by something that is not within the control of the movant." *Id.* The "excusable neglect" standard takes into account all the relevant circumstances, including the danger of prejudice, length of delay, potential impact on judicial proceedings, reason for delay and whether it was within the movant's reasonable control, and whether the movant acted in good faith. *See, e.g., Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1992). Except in rare circumstances, a mistaken interpretation of unambiguous rules governing the timeline for appeal does not constitute excusable neglect. *Midwest*, 161 F.3d at 879-80. Review of the district court's "excusable neglect" determination is limited to abuse of discretion. *Stotter v. Univ. of Tex. at San Antonio*, 508 F.3d 812, 820 (5th Cir. 2007).

The "good cause" standard applies only to requests made before the expiration of the thirty-day appeal period. *Latham*, 987 F.2d at 1202 n.6; *Britt*, 956 F.2d at 511. A showing of good cause generally requires "some showing of good faith on the parties seeking enlargement *and* some reasonable basis for noncompliance within the time specified." *Kersh v. Derozier*, 851 F.2d 1509, 1512 (5th Cir. 1988) (quoting *Winters v. Teledyne*, 776 F.2d 1304, 1306 (5th Cir. 1985)) (internal quotation marks and citation omitted).

VI. SUPERSEDING THE JUDGMENT

State:

Perfecting an appeal does not suspend enforcement of a state trial court's judgment pending appeal (for nongovernmental entities). TEX. R. APP. P. 25.1(h). Unless otherwise provided, a judgment debtor may suspend execution on the judgment by filing with the trial court clerk a written agreement with the judgment creditor for suspending enforcement of the judgment, by filing a "good and sufficient bond," by making a deposit in lieu of a bond, or providing alternate security as ordered by the court. TEX. R. APP. P. 24.1(a)(1)-(4).

In the case of a money judgment, the amount of the bond or deposit must be at least the amount of the compensatory damages, interest, and costs. TEX. R. APP. P. 24.2(a)(1); *see Gullo-Haas Toyota, Inc. v. Davidson, Eagleson & Co.*, 832 S.W.2d 418, 419 (Tex. App.—Houston [1st Dist.] 1992, no writ). This amount is capped at the lesser of 50 percent of the judgment debtor's current net worth or $25 million. TEX. R. APP. P. 24.2(a)(1). *Huff Energy Fund, L.P. v. Longview*, No. 04-12-00630-CV, 2014 WL 661710, at *4 (Tex. App.—San Antonio Feb, 12, 2014, no pet. h.) [mand. pending]. ($25 million cap applied per judgment, not per judgment debtor).

Attorney's fees incurred in prosecuting a suit (and interest thereon) generally are not "compensatory damages" or "costs" that must be secured. *In re Corral-Lerma*, 451 S.W.3d 385, 387-88 (Tex. 2014); *In re Nalle Plastics Family Ltd. P'ship*, 406 S.W.3d 168, 170 (Tex. 2013). The trial court can lower the amount of security required to an amount that will not cause the judgment debtor substantial economic harm if, after notice and a hearing, the court finds that posting the requisite amount is likely to cause the judgment debtor substantial economic harm. TEX. R. APP. P. 24.2(b).

Supersedeas bonds for other types of judgments are specifically covered in Rule 24.2. TEX. R. APP. P. 24.2(a)(2)-(5). A governmental entity is generally not required to supersede a judgment. TEX. CIV. PRAC. & REM. CODE § 6.001. Thus, a governmental entity's notice of appeal is generally considered to stay enforcement. But general suspension does not deprive a trial court of the discretion to suspend enforcement of a judgment for something other than money if the appellee posts security under Rule 24.2(a)(3). *See, e.g., In re State Bd. For Educator Certification*, 452 S.W.3d 802, 809 (Tex. 2014) (orig. proceeding) (affirming suspension of trial court's reversal of Board's administrative license revocation such that Board could not enforce revocation pending appeal).

On any party's motion, an appellate court may review the sufficiency or excessiveness of the amount of security and the trial courts exercise of discretion in setting the amount of security. See TEX. R. APP. P. 24.4. The trial court's determination of the amount of security is reviewed for an abuse of discretion. *See, e.g.*, *Imagine Automotive Group, Inc. v. Boardwalk Motor Cars, LLC*, 356 S.W.3d 716, 718 (Tex. App.—Dallas 2011, no pet.).

Federal:

The taking of an appeal in federal court usually does not suspend enforcement of the judgment. However, money judgments are automatically stayed for fourteen days after judgment is entered. FED. R. CIV. P. 62(a). The district court also has discretion, "[o]n appropriate terms for the opposing party's security," to stay execution of a judgment pending disposition of certain post-judgment motions, including a motion for new trial. FED. R. CIV. P. 62(b)(1)-(4).

A judgment debtor may stay execution of a money judgment pending appeal by posting a supersedeas bond. *MM Steel, L.P. v. JSW Steel (USA) Inc., 771 F.3d 301, 303 (5th Cir. 2014);* FED. R. CIV. P. 62(d). The bond may be posted at or after the time of filing of the notice of appeal. FED. R. CIV. P. 62(d). Application for approval of the supersedeas bond must ordinarily be made in the district court. FED. R. APP. P. 8(a)(1)(B). The stay is effective when the supersedeas bond is approved by the court. FED. R. CIV. P. 62(d). Approval of the bond entitles a party to a stay as a matter of right. *See Am. Mfrs. Mut. Ins. Co. v. Am. Broadcasting-Paramount Theatres, Inc.*, 87 S. Ct. 1, 3 (1966) (Harlan, J., in chambers).

In its discretion, the court may waive the posting of a bond or require a bond for less than the full amount in staying the judgment pending appeal. *See Poplar Grove Planting & Ref. Co. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979); *see also Enserch Corp. v. Shand Morahan & Co.*, 918 F.2d 462, 464 (5th Cir. 1990). The burden of demonstrating reasons for departure from the bond requirement rests on the judgment debtor. *Poplar Grove*, 600 F.2d at 1191. *See also E.E.O.C. v. Service Temps., Inc.*, 782 F. Supp. 2d 288, 289 n.1 (N.D. Tex. 2011).

VII. RECORD ON APPEAL

A. Terminology

State:

The appellate record consists of two parts: the "clerk's record" and, if necessary to the appeal, the "reporter's record." TEX. R. APP. P. 34.1. Pleadings and other documents filed with the trial court comprise the "clerk's record." TEX. R. APP. P. 34.5(a). The "reporter's record" consists of the court report's transcriptions—electronic or otherwise—of proceedings and any exhibits. TEX. R. APP. P. 34.6(a).

Federal:

The terms used to describe the record on appeal in federal court are very different. The "record on appeal" consists of the transcript of proceedings, if any, the original papers and exhibits filed in the district court, and a certified copy of the docket entries. FED. R. APP. P. 10(a). The court reporter's transcription of proceedings and any accompanying exhibits comprise the "transcript."

B. Requesting and Filing the Record

1. Pleadings

State:

Who prepares the clerk's record

The trial court clerk is responsible for filing the clerk's record, not the parties. TEX. R. APP. P. 35.3. If a notice of appeal has been filed, and the appellant has paid or made arrangements to pay the requisite fee, or is entitled to appeal without paying it, the trial court clerk is responsible for preparing, certifying, and timely filing the clerk's record. TEX. R. APP. P. 35.3(a); *see also* TEX. R. APP. P. 20.1(k) (waiver of fee upon establishing indigence). If the record is not filed because the appellant failed to pay for or request it, the appellate court must afford the parties a "reasonable opportunity to cure" before it may dismiss the appeal for want of prosecution. TEX. R. APP. P. 37.3(b).

Practice Tip: Be aware that although the onus of preparing the record rests on the trial court clerk, it is the appellant who bears the burden to show that the record is sufficient to support reversal. *Christiansen v. Prezelski*, 782 S.W.2d 842, 843 (Tex. 1990).

Contents of the clerk's record

The parties may agree on the contents of the appellate record, which would be presumed to contain all evidence and filings relevant to the appeal. TEX. R. APP. P. 34.2. Otherwise, the record must include the following:

(1) all pleadings on which the trial was held;
(2) the court's docket sheet;
(3) the court's charge and the jury's verdict, or the court's findings of fact and conclusions of law;
(4) the court's judgment or other order that is being appealed;
(5) any request for findings of fact and conclusions of law, any post-judgment motion, and the court's order on the motion;
(6) the notice of appeal;
(7) any formal bill of exception;
(8) any request for a reporter's record, including any statement of points or issues under Rule 34.6(c);
(9) any request for preparation of the clerk's record; and

(10) a certified bill of costs, including the cost of preparing the clerk's record, showing credits for payments made.

TEX. R. APP. P. 34.5(a)(1), (3)-(11). At any time before the clerk's record is prepared, a party may file with the trial court clerk a written designation specifying additional items to be included in the record. TEX. R. APP. P. 34.5(b).

To supplement the clerk's record, the trial court, appellate court, or any party may by letter direct the trial court clerk to prepare, certify, and file a supplement containing an omitted item. TEX. R. APP. P. 34.5(c)(1). The supplemental clerk's record then becomes part of the record. TEX. R. APP. P. 34.5(c)(3); *see also* TEX. R. APP. P. 34.5(b)(4). The trial court clerk is responsible for correcting defects or inaccuracies in the record. TEX. R. APP. P. 34.5(d), 37.2.

When the clerk's record is filed

The clerk's record must be filed in the appellate court within sixty days after the judgment is signed. TEX. R. APP. P. 35.1. That deadline is extended to 120 days if a party files a motion listed in Rule 26.1(a), *i.e.*, a motion for new trial, to modify the judgment, to reinstate under TEX. R. CIV. P. 165a, or request for findings of fact and conclusions of law. TEX. R. APP. P. 35.1(a). The appellate clerk must notify the parties when the clerk's record is filed. TEX. R. APP. P. 37.2.

Federal:

Who prepares the record on appeal

In federal court, the clerk of the district court prepares the pleadings and documents to be included in the record on appeal. FED. R. APP. P. 11(b)(2). The record is transmitted in paper form[8] and on disc, if available in electronic form. 5TH CIR. R. 10.2.

When the record on appeal is filed

If the clerk of the district court cannot complete the record and transmit it to the court of appeals within fifteen days of the later of the filing of the notice of appeal or the filing of the transcript of trial proceedings if one has been ordered, the clerk of the district court shall notify the clerk of the Fifth Circuit of the reason for delay and request an enlarged date for filing. 5TH CIR. R. 11.3. The appellate clerk may grant an extension of up to forty-five days; requests for longer extensions are referred to a single judge. *Id.* On receipt of the record, the clerk of the court of appeals must file it and give notice to the parties. FED. R. APP. P. 12(c).

2. Trial Proceedings

State:

Who prepares the reporter's record

As with the clerk's record, the parties are not responsible for filing the transcripts of court proceedings. Rather, this responsibility rests on the court reporter or court recorder, although the appellant must request preparation of the reporter's record and pay or make arrangements to pay the requisite fee, unless the appellant is entitled to waive it. TEX. R. APP. P. 35.3(b). Failure to do so may result in dismissal of the appeal, provided the appellant is first afforded a reasonable opportunity to cure. TEX. R. APP. P. 37.3(c).

Requesting the reporter's record

The appellant must make a written request to prepare the reporter's record that designates the exhibits to be included. TEX. R. APP. P. 34.6(b)(1). A request to the court reporter must also designate the portions of proceedings to be included. *Id.*

A copy of the request must be filed with the trial court clerk. TEX. R. APP. P. 34.6(b)(2). Although the appellant generally must make the request at or before the time for perfecting the appeal, the appellate court cannot refuse to file the record even if the request is not timely made. TEX. R. APP. P. 34.6(b)(1), (3).

Supplementing the reporter's record generally works the same way as supplementing the clerk's record. The trial court, appellate court, or any party may, by letter, direct the court reporter to prepare, certify, and file a supplemental reporter's record containing any omitted material. TEX. R. APP. P. 34.6(d). The supplemental reporter's record is then filed as part of the appellate record. *Id.*; *see also* TEX. R. APP. P. 34.6(b)(3) (prohibiting the appellate court from refusing a supplemental reporter's record because the request was untimely).

Partial reporter's record

If the appellant requests only a partial reporter's record, the appellate court must presume that it constitutes the entire record for purposes of reviewing the issues or points raised. TEX. R. APP. P. 34.6(c)(4). This is true even if the appellant raises factual or legal insufficiency points. *Id.* A request for a partial reporter's record must include in the request a statement of points or issues on appeal. TEX. R. APP. P. 34.6(c)(1). Review will then be limited to those points or issues. *Id.*; *Bennett v. Cochran*, 96 S.W.3d 227, 229 (Tex. 2002); *see also DeWolf v. Kohler*, 452 S.W.3d 373, 394 (Tex. App.—Houston [14th Dist.] 2015, no pet.). Of course, any other party may designate additional exhibits or portions of testimony to be

[8] Note that, unless otherwise directed by the parties or the circuit clerk, the district clerk will not send to the court of appeals unusually heavy or bulky documents, physical exhibits other than documents, or parts of the record designated for omission by the court of appeals. FED. R. APP. P. 11(b)(2). A party must make special arrangement with the clerks for delivery of such items. *Id.*

included, generally at the appellant's cost. TEX. R. APP. P. 34.6(c)(2), (3). But if the trial court deems any additions unnecessary to the appeal, it may shift those costs to the requesting party. TEX. R. APP. P. 34.6(c)(3). The appellate court retains discretion to tax costs differently. *Id.*

When the reporter's record is filed

The timeline for filing the reporter's record is the same as the clerk's record. TEX. R. APP. P. 35.1. The reporter's record must be filed sixty days after judgment is signed. That deadline is extended to 120 days if one of the post-judgment motions listed in Rule 26.1(a) was filed. *Id.* Once the record is received and filed, the appellate clerk must give notice to the parties. TEX. R. APP. P. 37.2.

Lost or destroyed reporter's record

In rare circumstances, loss or destruction of the reporter's record may entitle the appellant to a new trial. TEX. R. APP. P.34.6(f). This occurs only if the record was timely requested, a "significant exhibit" or "significant portion" of the reporter's notes or records or the recorder's recordings was lost or destroyed—through no fault of the appellant—and which exhibit or portion was necessary to resolving the appeal and cannot be replaced either by agreement of the parties or with a copy determined by the trial court with reasonable certainty to be an accurate duplicate of the original. TEX. R. APP. P. 34.6(f)(1)-(4). "[I]n order to obtain the benefit of the rule, an appellant must have taken steps to ensure that stale notes are not destroyed as permitted by statute." *Piotrowski v. Minns*, 873 S.W.2d 368, 370-71 (Tex. 1993). That is, the litigant must exercise some diligence to avoid routine destruction of records. *Id.* (record requested nine years after notes taken, which were destroyed after three years); *see also Sarro v. Sarro*, No. 04-15-00392-CV, 2016 WL 3342340, at *2-3 (Tex. App.—San Antonio June 15, 2016, no pet.)

Federal:

Who prepares the transcript of proceedings

Although the court reporter is responsible for preparing the transcript of proceedings in federal court, the appellant is responsible for requesting it or for filing a certificate stating that no transcript will be ordered. FED. R. APP. P. 10(b)(1)(A), (B), 11(b)(1); *see also* 5TH CIR. R. 10.1 (prescribing form for ordering of transcript). Within fourteen days after filing the notice of appeal or entry of an order disposing of the last of any post-judgment motions listed in Rule 4(a)(4)(A), whichever is later, the appellant in federal court must make a written request for the transcript from the court reporter and make arrangements to pay the reporter. FED. R. APP. P. 10(b)(1)(A), (b)(4). The order must be made on the form prescribed by the appellate court clerk. 5TH CIR. R. 10.1.

Partial transcript

If the appellant chooses not to order the entire transcript, it must file a statement of issues presented on appeal within fourteen days after filing its notice of appeal or entry of an order disposing of the last of any remaining post-judgment motion specified in Rule 4(a)(4)(A), whichever is later. FED. R. APP. P. 10(b)(3)(A). Note, however, that if the appellant contends that a finding or conclusion is unsupported by or is contrary to the evidence, it must include a transcript of all evidence relevant to that finding or conclusion. FED. R. APP. P. 10(b)(2). Failure to do so may result in dismissal of the appeal. *Richardson v. Henry*, 902 F.2d 414, 415-16 (5th Cir. 1990) (dismissing factual sufficiency argument for failure to include relevant portions of the transcript).

The appellee may request additions to the transcript by filing and serving on the appellant, within ten days after service of the order or certificate and statement of issues, a designation of additional parts to be ordered. FED. R. APP. P. 10(b)(3)(B). If the appellant fails to order the additional parts requested within fourteen days of receiving the appellee's designation, the appellee within the next fourteen days may either order the parts itself or move in the district court for an order requiring the appellant to do so. FED. R. APP. P. 10(b)(3)(C).

When the transcript is filed

On receipt of the transcript order, the reporter shall note when the reporter expects to have the transcript completed and shall transmit this information with the order to the clerk of the court of appeals. FED. R. APP. P. 11(b)(1)(A). If the reporter cannot complete the transcript within thirty days of the receipt of the order, the reporter shall request an extension of time from the clerk of the court of appeals. FED. R. APP. P. 11(b)(1)(B); 5TH CIR. R. 11.2. When the transcript is completed, the reporter shall file it with the clerk of the district court and notify the clerk of the court of appeals that it has been filed. FED. R. APP. P. 11(b)(1)(C). When the record is complete for purposes of the appeal, the clerk of the district court shall transmit it to the clerk of the court of appeals. FED. R. APP. P. 11(b)(2). On receipt of the record, the clerk of the court of appeals shall file it and give notice to the parties. FED. R. APP. P. 12(c).

3. Extension of Time to File the Record

State:

As noted above, the responsibility of ensuring timely filing of the appellate record rests on the trial and appellate courts, not the parties. TEX. R. APP. P. 35.3(c). Thus, the parties are not required to request extension of time to file the record. TEX. R. APP. P. 35.3 cmt. (explaining the trial court clerk and court reporter should make arrangements with the court of appeals for additional time to file the record). The appellate court may extend the deadline to file the record if requested by

the clerk or reporter, but each extension must not exceed thirty days. TEX. R. APP. P. 35.3(c).

If the delay is not the appellant's fault, the appellate court *must* permit late filing of the record. *Id.* Even if the appellant is at fault for the delay, the court has discretion to permit late filing. *Id.* The court may enter any order necessary to ensure timely filing of the record. *Id.*

Federal:

Extensions of time to file the record in federal court can be requested by the court reporter or the clerk of the district court. FED. R. APP. P. 11(b); 5TH CIR. R. 11.2, 11.3. Counsel should not have to request an extension for filing the record. 5TH CIR. LOC. R. 11 I.O.P.

C. Findings of Fact and Conclusions of Law

State:

Although the rules for obtaining findings of fact and conclusions of law in state court appear simple, this often is not the case. Practitioners must use care to avoid running afoul of these rather technical rules. To preserve a more favorable standard of review on appeal, it is critical to obtain findings and conclusions or preserve error trying.

When to request findings and conclusions

Any party may request the district or county court to state in writing its findings of fact and conclusions of law in a case tried without a jury. TEX. R. CIV. P. 296; *see also IKB Indus. (Nigeria) Ltd. v. Pro-Line Corp.*, 938 S.W.2d 440, 442 (Tex. 1997). Such a request must be explicit and must be filed within twenty days after the judgment is signed. TEX. R. CIV. P. 296.

A timely request for findings of fact and conclusions of law extends the time for filing a notice of appeal if such findings and conclusions "could properly be considered by the appellate court." TEX. R. APP. P. 26.1(a)(4); *see also Starks v. Tex. Dep't of Crim. Justice*, 153 S.W.3d 621, 624 (Tex. App.—Amarillo 2004, no pet.) (untimely request did not extend timeline for filing notice of appeal). Findings and conclusions could properly be considered on appeal from "any judgment based in part on an evidentiary hearing." *IKB Indus.*, 938 S.W.2d at 443. On the other hand, a request for findings and conclusions is improper where findings and conclusions would serve no purpose or where such findings have no place. *Id.* (listing numerous examples, including summary judgment, judgment after directed verdict, and various types of dismissals without evidentiary hearing); *Linwood v. NCNB Tex.*, 885 S.W.2d 102, 103 (Tex. 1994) (per curiam) (request for findings of fact and conclusions of law inappropriate in summary judgment proceeding).

Trial court's duty to file findings and conclusions

The trial court has a mandatory duty to file findings and conclusions upon a proper request and must do so within twenty days after the request was filed. *Cherne Indus., Inc. v. Magallanes*, 763 S.W.2d 768, 772 (Tex. 1989) (citing *Wagner v. Riske*, 178 S.W.2d 117, 119 (1944)); TEX. R. CIV. P. 297. The findings are to be filed as a separate document and should not be recited in the judgment. TEX. R. CIV. P. 299a. Even so, findings recited in an order or judgment are accorded probative value as long as they do not conflict with findings in the separate document. *See Gonzalez v. Razi*, 338 S.W.3d 167, 175 (Tex. App.—Houston [1st Dist.] 2011, pet. denied) (quoting *In re Sigmar*, 270 S.W.3d 289, 295 n.2 (Tex. App.—Waco 2008, orig. proceeding)); *In re U.P.*, 105 S.W.3d 222, 229 n.3 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

To complain on appeal about a trial court's failure to make a specific finding of fact or conclusion of law, a party must request additional or amended findings and conclusions within ten days after the court's findings and conclusions are filed. TEX. R. CIV. P. 298. Failure to make such a request waives any challenge to the failure to make a finding or conclusion. *Robles v. Robles*, 965 S.W.2d 605, 611 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

Notice of past due findings and conclusions

A problem arises when the trial court, despite proper request, nevertheless fails to file findings and conclusions. In this situation, a notice of past due findings and conclusions must be filed within thirty days after the filing of the original request. TEX. R. CIV. P. 297; *In re Guthrie*, 45 S.W.3d 719, 722 (Tex. App.—Dallas 2001, pet. denied). Failure to do so will waive the right to complain that the trial court failed to file findings and conclusions. *Sonnier v. Sonnier*, 331 S.W.3d 211, 216 (Tex. App.—Beaumont 2011, no pet.); *Rourk v. Cameron Appraisal Dist.*, 305 S.W.3d 231, 234 n.2 (Tex. App.—Corpus Christi 2009, pet. denied). The reminder notice should be filed with the clerk and must state the date the original request was filed and the date the findings and conclusions were due. TEX. R. CIV. P. 297, 298. The due date for the findings and conclusions is then extended until forty days from the date the original request was filed. TEX. R. CIV. P. 297.

Request for additional findings and conclusions

If the trial court files its findings and conclusions, any party may within ten days after the filing of the findings and conclusions request additional or amended findings or conclusions. TEX. R. CIV. P. 298. Proposed additional findings and conclusions should also be submitted. *Alvarez v. Espinoza*, 844 S.W.2d 238, 241 (Tex. App.—San Antonio 1992, writ dism'd w.o.j.) (per curiam) ("A bare request [for additional or amended

findings] is not sufficient."). The appellant cannot challenge the lack of findings or conclusions where it failed to timely request additional or amended findings or conclusions. *Smith v. Abbott*, 311 S.W.3d 62, 73 (Tex. App.—Austin 2010, pet. denied).

Generally, the trial court is required to make findings only on ultimate, controlling, and material issues, not findings that merely relate to an evidentiary point. *Buckeye Ret. Co. v. Bank of Am., N.A.*, 239 S.W.3d 394, 402 (Tex. App.—Dallas 2007, no pet.); *Limbaugh v. Limbaugh*, 71 S.W.3d 1, 6-7 (Tex. App.—Waco 2002, no pet.). In stating its conclusions, the trial court is not required to set out in minute detail each and every theory or reason for having reached the conclusions. *Limbaugh*, 71 S.W.3d at 11. General findings and conclusions necessarily encompass all of the more specific findings and conclusions on which they are based. *See Exxon Corp. v. Tidwell*, 816 S.W.2d 455, 458 (Tex. App.—Dallas 1991), *rev'd on other grounds*, 867 S.W.2d 19 (Tex. 1993).

Requesting additional findings is necessary to prevent a ground of recovery or defense, no element of which is included in the findings, from being waived. TEX. R. CIV. P. 299; *Stanley Works v. Wichita Falls Indep. Sch. Dist.*, 366 S.W.3d 816, 824 (Tex. App.—El Paso 2012, pet. denied); *Intec Sys., Inc. v. Lowrey*, 230 S.W.3d 913, 919 (Tex. App.—Dallas 2007, no pet.). When one or more elements of a ground of recovery or defense has been found by the trial court, omitted unrequested elements that have support in the evidence will be supplied by presumption in support of the judgment. TEX. R. CIV. P. 299; *Long v. Long*, 234 S.W.3d 34, 42 (Tex. App.—El Paso 2007, pet. denied). On the other hand, findings or conclusions will not be presumed by the trial court's failure to file those requested additional findings or conclusions. TEX. R. CIV. P. 298.

Missed Deadline in Requesting Findings and Conclusions

Failure to meet the deadlines in requesting findings and conclusions can be fatal to an attack on the trial court's failure to file them. The rules regarding deadlines for requesting findings and conclusions are usually strictly applied. *See Las Vegas Pecan & Cattle Co. v. Zavala Cnty.*, 682 S.W.2d 254, 255-56 (Tex. 1984); *Williams v. Kaufman*, 275 S.W.3d 637, 642 (Tex. App.—Beaumont 2009, no pet.).

Practice Tip: If you miss the deadline for requesting findings and conclusions, file a motion for enlargement of time under TEX. R. CIV. P. 5 showing good cause for extending the deadline.

Appellate review of trial court's failure to file findings and conclusions

An appellant obtains a more favorable standard of review of a trial court's judgment if findings and conclusions are filed. Thus, to preserve a more favorable standard of review on appeal, it is critical to either obtain findings and conclusions or preserve the right to complain on appeal of the trial court's failure to file them.

When the trial court fails to file findings and conclusions despite a proper request, the test for harm is whether the appellant would be required to guess the reasons that the trial court ruled against it. *Larry F. Smith, Inc. v. The Weber Co.*, 110 S.W.3d 611, 614 (Tex. App.—Dallas 2003, pet. denied); *Nevada Gold & Silver, Inc. v. Andrews Indep. Sch. Dist.*, 225 S.W.3d 68, 77 (Tex. App.—El Paso 2005, no pet.); *see also* TEX. R. APP. P. 44.1(a)(2). The appellant should not be forced to guess the trial court's reasoning. *See Larry F. Smith*,110 S.W.3d at 614.

The failure of the trial court to respond to a proper request for findings and conclusions is presumed harmful unless the record affirmatively shows that the complaining party has suffered no injury. *Tenery v. Tenery*, 932 S.W.2d 29, 30 (Tex. 1996) (per curiam); *Cherne Indus.*, 763 S.W.2d at 772. In situations when there are two or more possible grounds on which the trial court might have ruled, the inference of harm cannot be defeated because to do so would place an undue burden on the appellant. *Rafferty v. Finstad*, 903 S.W.2d 374, 380-81 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

The trial court's failure to file findings and conclusions is not reversible error as a matter of law. *Guzman v. Guzman*, 827 S.W.2d 445, 446-47 (Tex. App.—Corpus Christi), *writ denied per curiam*, 843 S.W.2d 486 (Tex. 1992). Even if the failure to make findings and conclusions was harmful, the preferred remedy is abatement of the appeal.[9] *Panchal v. Panchal*, 132 S.W.3d 465, 467 (Tex. App.—Eastland 2003, no pet.); *see also 2900 Smith, Ltd. v. Constellation NewEnergy, Inc.*, 301 S.W.3d 741, 744 n.6 (Tex. App.—Houston [14th Dist.] 2009, no pet.); TEX. R. APP. P. 44.4. If the appeal is abated, the appellant should renew its

[9] Whereas abatement for entry of findings of fact and conclusions of law is appropriate if the judge who handled the case resigned, *see 2900 Smith, Ltd. v. Constellation NewEnergy, Inc.*, 301 S.W.3d 741, 744 n.6 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (citing, *inter alia*, TEX. R. CIV. P. 18), reversal and remand may be required if the judge was replaced as a result of an election, *Liberty Mut. Fire Ins. v. Laca*, 243 S.W.3d 791, 796 (Tex. App.—El Paso 2007, no pet.) (reversing and remanding for lack of findings when original judge was replaced after election, citing TEX. R. CIV. P. 18; TEX. CIV. PRAC. & REM. CODE ANN. § 30.002); *Larry F. Smith, Inc.*, 110 S.W.3d at 616 (same).

requests for findings and conclusions and, once findings and conclusions are made, move to amend its brief on appeal to incorporate them.

Practice Tip: Raise the trial court's failure to file findings and conclusions as a point of error and in the initial brief. The appellate court may sustain this point even before oral argument.

Conclusion

A summary of the deadlines for requesting findings and conclusions is as follows:

Action	Deadline
request for findings and conclusions	20 days from date judgment signed
Findings and conclusions due	20 days from date of request
notice of past due findings and conclusions	30 days from date of request
late findings and conclusions due	40 days from date of original request
request for additional findings and conclusions	10 days from date findings and conclusions filed
additional findings and conclusions due	10 days from date of request

Federal:

In all cases tried without a jury or with an advisory jury, the district court must set forth its findings of fact and conclusions of law. *Chandler v. City of Dallas*, 958 F.2d 85, 88 (5th Cir. 1992); FED. R. CIV. P. 52(a). It is sufficient if the findings and conclusions are stated orally on the record or appear in an opinion or memorandum of the court. *Chandler*, 958 F.2d at 89; FED. R. CIV. P. 52(a). The sufficiency of the district court's findings and conclusions depends on whether the appellate court can obtain a full understanding of the issues on appeal. *Chandler*, 958 F.2d at 90. Mechanical adoption of the successful party's findings is disapproved. *Anderson v. City of Bessemer City*, 470 U.S. 564, 572 (1985); *see Falcon Constr. Co. v. Economy Forms Corp.*, 805 F.2d 1229, 1232 (5th Cir. 1986).

A party may move the district court to amend its findings or make additional findings. FED. R. CIV. P. 52(a). The motion to amend findings or make additional findings must be filed not later than twenty-eight days after entry of judgment. FED. R. CIV. P. 52(b). This deadline is jurisdictional and cannot be extended. *In re Tex. Extrusion Corp.*, 836 F.2d 217, 220 (5th Cir.), *order aff'd*, 844 F.2d 1142, *cert. denied*, 488 U.S. 926 (1988); *Gribble v. Harris*, 625 F.2d 1173, 1174 (5th Cir. Unit A 1980).

If specific factual findings were not made but were supported by the evidence, the reviewing court may assume they were impliedly made consistent with the district court's general holding. *Century Marine Inc. v. United States*, 153 F.3d 225, 231 (5th Cir. 1998). However, when the district court fails to determine essential facts on which it based its judgment, the court of appeals cannot make such findings of fact. *Pullman-Standard v. Swint*, 456 U.S. 273, 291-93 (1982). If the court of appeals cannot determine whether the record supports the district court's judgment because of the absence of findings or conclusions, the court of appeals should remand the case for entry of findings and conclusions. *Pullman-Standard*, 456 U.S. at 291; *Sierra Club, Lone Star Chapter v. FDIC*, 992 F.2d 545, 551 (5th Cir. 1993); *Chandler* 958 F.2d at 90.

VIII. SUFFICIENCY OF THE EVIDENCE REVIEW

A. Preservation of Error

State:

Error can be a preserved in state court for a legal sufficiency challenge by the following:

(1) a motion for instructed verdict;
(2) a motion for judgment notwithstanding the verdict;
(3) an objection to the submission of the issue to the jury;
(4) a motion to disregard the jury's answer; or
(5) a motion for new trial.

Cecil v. Smith, 804 S.W.2d 509, 510-11 (Tex. 1991) (citing *Aero Energy, Inc. v. Circle C Drilling Co.*, 699 S.W.2d 821, 822 (Tex. 1985)).

A factual sufficiency challenge must be raised in a motion for new trial to preserve a complaint that a jury finding is against the overwhelming weight of the evidence. *Cecil*, 804 S.W.2d at 510; TEX. R. CIV. P. 324(b)(2)-(3). The overruling of the motion for new trial by operation of law is sufficient to preserve error, unless taking of evidence was necessary to properly present the complaint in the trial court. TEX. R. APP. P. 33.1(b). In a non-jury case, however, a motion for new trial is not necessary to challenge the factual sufficiency of the evidence. TEX. R. CIV. P. 324(b); *In re E.G.*, 212 S.W.3d 536, 538 n.1 (Tex. App.—Austin 2006, no pet.); *Nelson v. Najm*, 127 S.W.3d 170, 176 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

Practice Tip: Although raising a no-evidence point in a motion for new trial preserves it for appeal, the appellate court cannot render judgment—only remand—if the point is raised *only* in a motion for new trial. *Werner v. Colwell*, 909 S.W.2d 866, 870 n.1 (Tex. 1995); *Horrocks v. Tex. Dep't. of Transp.*, 852 S.W.2d 498, 499 (Tex. 1993) (per curiam).

Federal:

The appellate standard of review for a sufficiency of the evidence challenge to a federal jury verdict depends on whether error has been properly preserved for review on appeal. Failure to properly preserve error will result in the appellate court applying a far narrower standard of review.

The sufficiency of the evidence supporting a jury verdict may only be attacked by a motion for judgment as a matter of law and a renewed motion for judgment as a matter of law. Thus, understanding the interplay between these motions is crucial to preserving error for a sufficiency of the evidence challenge on appeal.

Motion for judgment as a matter of law

A motion for judgment as a matter of law is the first step toward preserving a challenge to the sufficiency of the evidence. FED. R. CIV. P. 50(a). The basis for such a motion is that there is insufficient evidence to create a fact issue, thereby requiring that the issue be taken from the jury. *See Janvey v. Romero*, 817 F.3d 184, 187 (5th Cir. 2016).

A motion for judgment as a matter of law should be made at the close of the evidence offered by the movant's opponent, although the motion may be made at any time before the case is submitted to the jury. FED. R. CIV. P. 50(a)(2); *MacArthur v. Univ. of Tex. Health Ctr. at Tyler*, 45 F.3d 890, 896 (5th Cir. 1995). The motion must state the law and facts that entitle the moving party to judgment. FED. R. CIV. P. 50(a)(2); *see also Huss v. Gayden*, 571 F.3d 442, 456 (5th Cir. 2009); *McCann v. Tex. City Refining, Inc.*, 984 F.2d 667, 670 n.4 (5th Cir. 1993).

The reason for requiring a party to move for judgment as a matter of law in the district court is that the party should not be allowed to gamble on the jury's verdict and then later question the sufficiency of the evidence on appeal. *House of Koscot Dev. Corp. v. Am. Line Cosmetics, Inc.*, 468 F.2d 64, 67 (5th Cir. 1972). Further, the party that has not moved for judgment as a matter of law in the district court must have been of the view that the evidence was sufficient to create a fact issue and should not be permitted on appeal to impute error to the district court for sharing that view. *Little v. Bankers Life & Cas. Co.*, 426 F.2d 509, 511 (5th Cir. 1970).

Renewal of motion for judgment as a matter of law

A party also is required to renew the motion for judgment as a matter of law to preserve its sufficiency challenge, even if the initial motion for judgment as a matter of law was denied. FED. R. CIV. P. 50(b); *Unitherm Food Sys.*, 546 U.S. at 400-01, 407; *Colonial Penn. Ins. v. Mkt. Planners Ins. Agency, Inc.*, 157 F.3d 1032, 1036 n.3 (5th Cir. 1998). Of course, a prerequisite to *renewing* a motion for judgment is moving for judgment as a matter of law in the first instance. *See Seidman v. Am. Airlines, Inc.*, 923 F.2d 1134, 1137 (5th Cir. 1991); FED. R. CIV. P. 50(b). A party may only base a renewal of the motion on a ground included in a prior motion for judgment as a matter of law. *In re Isbell Records, Inc.*, 774 F.3d 859, 867 (5th Cir. 2014); *Allied Bank-West, N.A. v. Stein*, 996 F.2d 111, 115 (5th Cir. 1993). *But see Thompson & Wallace of Memphis, Inc. v. Falconwood Corp.*, 100 F.3d 429, 435 (5th Cir. 1996) (failure to challenge absence of Rule 50(a)(1) motion to support post-trial Rule 50(b) motion waives this forfeiture claim on appeal); *see also Arsement v. Spinnaker Exploration Co., LLC*, 400 F.3d 238, 435 (5th Cir. 2005) (applying waiver rule in *Thompson*).

The motion made after trial is simply a renewal of the prior motion for judgment as a matter of law. FED. R. CIV. P. 50(b). It should be renewed by service and filing not later than twenty-eight days after entry of judgment. *Id.* This timeline is jurisdictional and cannot be extended by the district court. *U.S. Leather, Inc. v. H & W P'shp*, 60 F.3d 222, 225 (5th Cir. 1995); *Vincent*, 17 F.3d at 785.

The requirement of a post-verdict motion for judgment as a matter of law is not only an essential part of Rule 50(b), it allows the district court—which "saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart"—to re-examine the question of the sufficiency of the evidence as a matter of law if the jury returns a verdict contrary to the movant. *Unitherm Food Sys.*, 546 U.S. at 401 (internal quotation marks and citation omitted). In ruling on a motion, the district court may (1) allow the judgment on the verdict, (2) order a new trial, or (3) direct the entry of judgment as a matter of law. FED. R. CIV. P. 50(b).

B. Standards of Review

State:

Jury verdict

A jury verdict in state court can be reviewed for legal and factual sufficiency.[10] The type of sufficiency of the evidence challenge to be made depends on which party had the burden of proof at trial.

[10] When both legal and factual sufficiency points are raised, the court should rule on the no evidence point first. *Glover v. Texas Gen. Indem. Co.*, 619 S.W.2d 400, 401 (Tex. 1981); *see also Havner v. E-Z Mart Stores, Inc.*, 825 S.W.2d 456, 462 (Tex. 1992).

Legal sufficiency: "no evidence" or "as a matter of law"

When the challenging party did not have the burden of proof at trial, the legal sufficiency challenge is a no evidence challenge. *Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983). The standard of review for a no-evidence challenge is both inclusive and exclusive. *City of Keller v. Wilson*, 168 S.W.3d 802, 809 (Tex. 2005); *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989) (setting out the inclusive and exclusive standards). Under the "inclusive" standard, the appellate court must consider "all the evidence in the light favorable to the verdict." *City of Keller*, 168 S.W.3d at 809 (internal quotation marks and citation omitted); *see also Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 24-25 (Tex. 1994) ("In evaluating legal sufficiency, we are required to determine whether the proffered evidence as a whole raises to a level that would enable reasonable and fair-minded people to differ in their conclusions."). The "exclusive" standard considers only the evidence and inferences that tend to support the finding, disregarding all contrary evidence and inferences. *City of Keller*, 168 S.W.3d at 809; *see also Wal-Mart Stores, Inc. v. Canchola*, 121 S.W.3d 735, 739 (Tex. 2003) (per curiam).

Properly applied, both the inclusive and exclusive standards should "arrive at the same point." *City of Keller*, 168 S.W.3d at 807. Thus, when reviewing a no-evidence challenge,

> appellate courts must view the evidence in the light favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not.

Id. If there is any evidence of probative force to support the finding, it must be upheld. *In re King's Estate*, 244 S.W.2d 660, 661 (1951). Thus, if there is more than a scintilla of evidence to support the finding, the no evidence challenge fails. *Stafford v. Stafford*, 726 S.W.2d 14, 16 (Tex. 1987), *overruled in part on other grounds*, *Price v. Price*, 732 S.W.2d 316, 319-20 (Tex. 1987).

When the challenging party had the burden of proof at trial, the legal sufficiency challenge is an "as a matter of law" challenge. When reviewing an "as a matter of law" point, the court must examine the record for evidence that supports the finding and ignore the evidence to the contrary. *Sterner*, 767 S.W.2d at 690. If there is no evidence to support the finding, the court must consider all of the evidence in the record to see if the contrary proposition is established conclusively, as a matter of law. *Id.; see also Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam) ("When a party attacks the legal sufficiency of an adverse finding on an issue on which she has the burden of proof, she must demonstrate on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue.").

Factual sufficiency

The proper factual sufficiency challenge when the challenging party did not have the burden of proof of trial is an insufficient evidence challenge. In reviewing the factual sufficiency of the evidence, the court must consider all of the evidence in the record. *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 445 (Tex. 1989). The jury finding should be set aside only if the evidence is so weak as to be clearly wrong and manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986).

Against the great weight and preponderance

The factual sufficiency challenge when the challenging party had the burden of proof of trial is a challenge that the finding is against the great weight and preponderance of the evidence. *Dow*, 46 S.W.3d at 242 (citing *Croucher*, 660 S.W.2d at 58). In reviewing a great weight point, the court must consider and weigh all of the evidence. *Traylor v. Goulding*, 497 S.W.2d 944, 945 (Tex. 1973); *In re King's Estate*, 244 S.W.2d at 661. The court should reverse the judgment of the trial court if the finding is so against the great weight and preponderance of the evidence as to be manifestly unjust. *Traylor*, 497 S.W.2d at 945. This is true regardless of whether the record contains some evidence in support of the finding. *In re King's Estate*, 244 S.W.2d at 661.

Trial court's findings and conclusions

The standard of review applied to a trial court's findings is the same as that applied to a jury's verdict. *Holt Atherton Indus. v. Heine*, 835 S.W.2d 80, 83 (Tex. 1992); *Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991). Findings of fact are of the same force and dignity as a jury's verdict. *Leax v. Leax*, 305 S.W.3d 22, 28 (Tex. App.—Houston [1st Dist.] 2009, pet. denied); *Ayers v. Mitchell*, 167 S.W.3d 924, 927 (Tex. App.—Texarkana 2005, no pet.).

When no findings or conclusions are filed, the trial court is presumed to have made all the findings necessary to support its judgment. *Holt Atherton Indus., Inc.*, 835 S.W.2d at 83; *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990). The appellant must show that the trial court's judgment was not supported by any legal theory raised by the evidence. *Black v. Dallas Cnty. Child Welfare Unit*, 835 S.W.2d 626, 630 n.10 (Tex. 1992); *Point Lookout W., Inc. v. Whorton*, 742 S.W.2d 277, 279 (Tex. 1987). Conclusions of law are reviewed de novo as legal questions.[11] *Pendergraft v. Carrillo*, 273 S.W.3d

[11] A party may waive its challenge to erroneous conclusions of law by incorrectly attacking them on sufficiency of the evidence grounds. *See Whitehead v. Univ. of Tex. Health Science Ctr.*, 854 S.W.2d 175, 178 (Tex. App.—San Antonio

362, 365 (Tex. App.—Eastland 2008, pet. denied). This is true even if a legal conclusion is mischaracterized as a finding of fact. *Ray v. Farmers' State Bank of Hart*, 576 S.W.2d 607, 608 n.1 (Tex. 1979) (trial court's designation as a finding of fact "is not controlling"). However, a judgment that is supported by sufficient evidence and findings of fact will be upheld even though there are errors in the conclusions of law. *Black*, 835 S.W.2d at 630 n.10.

Federal:

Jury finding—error preserved

In the Fifth Circuit, the standard of review for a sufficiency of evidence challenge that was properly preserved is the same as that applied by the district court. *Urban Developers LLC v. City of Jackson*, 468 F.3d 281, 296-97 (5th Cir. 2006). As articulated in *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc), *overruled on other grounds*, *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 336 (5th Cir. 1997) (en banc):

> [T]he Court should consider all of the evidence—not just that evidence which supports the non-movers case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions . . . should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict.

Id.; *see also Brown v. Sudduth*, 675 F.3d 472, 477 (5th Cir. 2012). The standards for reviewing a motion for judgment as a matter of law and a renewed motion for judgment as a matter of law are the same. *Foradori v. Harris*, 523 F.3d 477, 485 n.8 (5th Cir. 2008); *Fields v. J.C. Penney Co.*, 968 F.2d 533, 536 (5th Cir. 1992).

After a jury trial, the court's standard of review is "especially deferential" to the verdict. *Janvey*, 817 F.3d at 187. Thus, a jury verdict must be upheld "unless there is no legally sufficient evidentiary basis for a reasonable jury to find as the jury did." *McCaig v. Wells Fargo Bank (Texas), N.A.*, 788 F.3d 463, 472 (5th Cir. 2015.

Jury finding—error not preserved

The Supreme Court's *Unitherm* decision suggests that *no review* is available for sufficiency-of-evidence challenges that were not properly renewed under Rule 50(b). 546 U.S. at 407 ("[F]ailure to comply with Rule 50(b) forecloses [the appellant's] challenge to the sufficiency of the evidence . . . ."). *Unitherm* also made clear that appellate courts cannot even order a new trial if a party failed to file a Rule 50(b) motion following a jury verdict. *Id.* at 401-02.

Yet Fifth Circuit decisions are not consistent as to whether *Unitherm* bars review entirely, as opposed to limiting review to plain error. *Compare Downey v. Strain*, 510 F.3d 534, 543-44 (5th Cir. 2007) ("Because Strain failed to make a Rule 50(b) motion, there is no basis for this court to review his challenge to the sufficiency of the evidence."), *with Shepherd v. Dallas Cnty.*, 591 F.3d 445, 455-56 (5th Cir. 2009) (applying plain error standard in absence of renewed sufficiency challenge). Because the *Downey* case is the earlier decision, its prohibition of appellate review should control. *See Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008) (rule of orderliness). The Fifth Circuit recently recognized this discrepancy, but noted that it had never applied the plain error standard to *grant* an unpreserved sufficiency challenge. *See McLendon v. Big Lots Stores*, 749 F.3d 373, 375 n.2 (5th Cir 2014).

Even if plain error review applies, its scope is not co-extensive with that of the district court. *Stewart v. Thigpen*, 730 F.2d 1002, 1007 (5th Cir. 1984). Any evaluation or weighing of the evidence is prohibited. *Bunch v. Walter*, 673 F.2d 127, 130 n.4 (5th Cir. 1982); *see also Urti v. Transp. Commercial Corp.*, 479 F.2d 766, 769 (5th Cir. 1973). Rather, the appellate court reviews the evidence only to ascertain whether there was *any* evidence to support the jury's verdict, irrespective of its sufficiency, or whether plain error was committed which, if not noticed, would result in a manifest miscarriage of justice. *See Shepherd*, 591 F.3d at 456; *Lincoln v. Case*, 340 F.3d 283, 290 (5th Cir. 2003); *see also Maryland Cas. Co. v. Acceptance Indem.*, 639 F.3d 701, 708 (5th Cir. 2011). This standard of review has been described as "Draconian." *Scheib v. Williams-McWilliams Co.*, 628 F.2d 509, 512 (5th Cir. Unit A 1980); *see also Crist v. Dickson Welding, Inc.*, 957 F.2d 1281, 1285 (5th Cir. 1992) (describing review as "extremely limited").

1993, no writ); *see also Lawrence v. Kohl*, 853 S.W.2d 697, 699 (Tex. App.—Houston [1st Dist.] 1993, no writ).

Practice Tip: Other courts of appeal agree with the Fifth Circuit's *Downey* decision, holding that failure to renew a sufficiency challenge post-trial forfeits appellate review. *See, e.g., Consumer Prods. Research & Design, Inc. v. Jensen*, 572 F.3d 436, 437-38 (7th Cir. 2009); *Hertz v. Woodbury Cnty.*, 566 F.3d 775, 780-81 (8th Cir. 2009); *A Helping Hand, LLC v. Baltimore Cnty.*, 515 F.3d 356, 370 (4th Cir. 2008); *Nitco Holding Corp. v. Boujikian*, 491 F.3d 1086, 1089 (9th Cir. 2007); *Fed. Ins. Co. v. HPSC, Inc.*, 480 F.3d 26, 32 (1st Cir. 2007); *HI Ltd. P'ship v. Winghouse of Fla., Inc.*, 451 F.3d 1300, 1301-02 (11th Cir. 2006).

District court's findings and conclusions

In a nonjury case, the district court's findings of fact will not be set aside unless "clearly erroneous." *Becker v. Tidewater, Inc.*, 586 F.3d 358, 365 (5th Cir. 2009); *Flint Hills Res. LP v. Jag Energy, Inc.*, 559 F.3d 373, 375 (5th Cir. 2009); FED. R. CIV. P. 52(a). The burden of establishing a finding as clearly erroneous is stringent; the reviewing court must be left with the definite and firm conviction that a mistake has been committed. *Guzman v. Hacienda Records & Recording Studio, Inc.*, 808 F.3d 1031, 1036 (5th Cir. 2015); *In re Monnig's Dep't Stores, Inc.*, 929 F.2d 197, 200-01 (5th Cir. 1991).

Conclusion

Failure to properly preserve error likely will bar all review of a sufficiency challenge. Even in the best-case scenario, review is limited to the "any evidence" or "plain error" standard of review, a result that practitioners should seek to avoid. By following the steps outlined above, however, the more favorable *Boeing* standard of review will be applied to sufficiency of the evidence challenges on appeal.

IX. PRACTICE IN THE COURT OF APPEALS

A. Record

State:

The state courts of appeals will consider the case on the record prepared by the trial court clerk, *i.e.*, the clerk's record, and, if necessary, the court reporter, *i.e.*, the reporter's record. Record excerpts are not filed.

Briefs in civil cases must be accompanied by an appendix. TEX. R. APP. P. 38.1(k)(1), (2). Unless voluminous or impractical, the appendix must include a copy of:

(A) the trial court's judgment or other appealable order from which relief is sought;
(B) the jury charge and verdict, if any, or the trial court's findings of fact and conclusions of law, if any; and
(C) the text of any rule, regulation, ordinance, statute, constitutional provision, or other law (excluding case law) on which the argument is based, and the text of any contract or other document that is central to the argument.

TEX. R. APP. P. 38.1(k)(1). Although the appendix *may* include other items pertinent to the issues or points for review, a party should not include items in the appendix to circumvent page limitations for the brief. TEX. R. APP. P. 38.1(k)(2). A paper appendix may be bound with the brief or bound separately. TEX. R. APP. P. 9.4(h). It should also be tabbed and indexed. *Id.* An appendix filed electronically must be bookmarked. *Id.*

Federal:

In the Fifth Circuit, the case is decided on the original record that is transmitted by the clerk of the district court. 5TH CIR. R. 30.1. The clerk of the court of appeals will give the parties notice of the filing date. FED. R. APP. P. 12(c).

Additionally, the appellant must file record excerpts along with its brief. 5TH CIR. R. 30.1 (noting record excerpts are filed "in lieu of" the appendix specified in FED. R. APP. P. 30). The record excerpts are "intended primarily to assist the judges in making the screening decision on the need for oral argument, and in preparing for oral argument," and the excerpts should therefore include "only those parts of the record that will assist in these functions." 5TH CIR. R. 30.1.1.

The excerpts must contain the following items from the district court record:

(a) the docket sheet;
(b) the notice of appeal;
(c) the verdict of the jury;
(d) the judgment or interlocutory order appealed;
(e) any other orders or rulings sought to be reviewed;
(f) any relevant magistrate's report and recommendation; and
(g) any supporting opinion or findings of fact and conclusions of law filed, or transcript pages of any such opinion or findings and conclusions delivered orally.

5TH CIR. R. 30.1.4. There is no page limit on the mandatory contents of the record excerpts. The appellant or the appellee may also include certain optional contents listed in Rule 30.1.5 of the Fifth Circuit Local Rules. In addition, the record excerpts may also include the following optional contents:

1. Essential pleadings or relevant portions thereof;
2. Relevant parts of a pretrial order;

3. Any jury instruction given or refused that presents an issue on appeal, along with objections to the court's ruling;
4. Copies of the relevant pages of a transcript when the appeal challenges the admission or exclusion of evidence or any other interlocutory ruling or order; and
5. The relevant parts of any exhibits that present an issue on appeal.

5TH CIR. R. 30.1.5. Although there is no page limit on the mandatory contents of the record excerpts, the optional record excerpts cannot exceed forty pages without the court's permission. 5TH CIR. R. 30.1.6.

The record excerpts must include a numbered table of contents and be tabbed accordingly, be on letter-size paper, and be bound to lie flat. 5TH CIR. R. 30.1.7. The cover must be white, not the color of the brief. 5TH CIR. R. 30.1.7(d). The appellant must file four copies of the record excerpts with its brief and serve one copy on counsel for each party separately represented. 5TH CIR. R. 30.1.2.

Practice Tip: Consider including copies of key documents or testimony in your record excerpts. This is important because the full record is not automatically sent to the oral argument panel before argument occurs. However, the clerk does send the judges copies of the record excerpts.

B. Briefs

State:

Content of briefs

Briefs in the state courts of appeals must comply with the requirements of TEX. R. APP. P. 38. The appellant's brief must contain the following items:

(a) identity of all parties to the judgment and their counsel;
(b) table of contents;
(c) index of authorities;
(d) statement of the case;
(e) issues or points of error presented;
(f) statement of facts;
(g) summary of the argument;
(h) argument;
(i) prayer; and
(k) the appendix.

TEX. R. APP. P. 38.1(a)-(d), (f)-(k). A statement regarding oral argument not to exceed one page may be included. TEX. R. APP. P. 38.1(e). The brief must also include a certificate of service as prescribed in TEX. R. APP. P. 9.5(e).

The appellee's brief must conform with Rule 38.1, except it may omit:

(a) the list of parties, unless necessary to supplement or correct the appellant's list;
(b) statement of the case, issues presented, or statement of the facts, unless the appellee is dissatisfied with the appellant's presentations of those portions; and
(c) items already included in the appellant's appendix.

TEX. R. APP. P. 38.2(a)(1). When practicable, the appellee should respond to the appellant's issues or points in the order they are presented by the appellant. TEX. R. APP. P. 38.2(a)(2).

Length of briefs

The appellant's and appellee's briefs are limited to 15,000 words; replies are limited to 7,500 words. TEX. R. APP. P. 9.4(i)(2)(B), (C). Note, too, that there is an absolute maximum of 27,000 words for all computer-generated briefs filed by a party (or 90 pages, if not computer-generated), even when there is a cross-appeal. TEX. R. APP. P. 9.4(i)(2)(B). The appellate court may strike briefs that exceed these limits or, on motion, grant leave to file a longer brief. TEX. R. APP. P. 9.4(i)(4), (ii).

Every word in the brief counts toward the word-count limitations, including headings, footnotes, and quotations, but excluding the following sections: the caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, issues presented, signature, proof of service, certificate of service, certificate of compliance, and the appendix. TEX. R. APP. P. 9.4(i)(1). Computer-generated briefs must include a certificate of compliance stating the number of words in the document, which may rely on the word-count feature of the word-processing software. TEX. R. APP. P. 9.4(i)(3).

Other formal requirements for briefs

Computer-generated briefs must be 14-point font or larger, with 12-point font for footnotes. TEX. R. APP. P. 9.4(e). Typewritten documents must be printed in 10-character-per-inch monospaced typeface. *Id.* Rule 9.4 further details the information that must be disclosed on the cover. TEX. R. APP. P. 9.4(g). No particular color is required for the brief covers on paper briefs, although plastic covers and the colors red, black, and dark blue are prohibited. TEX. R. APP. P. 9.4(f).

Timeline for filing briefs

The appellant's brief is due thirty days after the later of the date the clerk's or reporter's record was filed. TEX. R. APP. P. 38.6(a). The appellee shall file its brief thirty

days after the filing of the appellant's brief. TEX. R. APP. P. 38.6(b). A reply brief, if any, must be filed within twenty days after the appellee's brief was filed. TEX. R. APP. P. 38.6(c). Briefs may be amended or supplemented as justice requires, or on whatever reasonable terms are specified by the court. TEX. R. APP. P. 38.7.

Electronic Filing

Effective January 1, 2014 electronic filing became mandatory in Texas appellate courts. Rule 9.9 provides privacy protection for all documents, both paper and electronic, filed in civil cases in appellate courts.

Federal:

Contents of briefs

Briefs in the Fifth Circuit must comply with Federal Rules of Appellate Procedure 28 and 32 and Fifth Circuit Local Rules 28 and 32. In the Fifth Circuit, an appellant's brief must contain, *in the following order*:

(1) certificate of interested persons[12];
(2) statement regarding oral argument;
(3) table of contents with page references;
(4) table of authorities;
(5) statement of jurisdiction;
(6) statement of the issues;
(7) A concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record[13];
(8) summary of the argument;
(9) argument, including standards of review;
(10) conclusion stating the relief sought;
(11) certificate of service; and
(12) certificate of compliance, if required by FED. R. APP. P. 32(a)(7) and 5TH CIR. R. 32.3.

FED. R. APP. P. 28(a); 5TH CIR. R. 28.3. The appellee's brief must conform with the same requirements, except it need not include a conclusion stating the relief sought, and need not include a statement of jurisdiction, statement of the issues, statement of the case, statement of facts, and statement of the standard of review, unless the appellee is dissatisfied with the appellant's statements. FED. R. APP. P. 28(b); 5TH CIR. R. 28.3.

Reply briefs must contain a table of contents, table of authorities, certificate of service, and a certificate of compliance, if required. FED. R. APP. P. 28(c); 5TH CIR. R. 28.3.

Length of briefs

There are two alternatives for complying with the limitations on length of briefs: the straightforward page-limit approach, or the "type-volume" limitation.

The simple option limits principal briefs to thirty pages. FED. R. APP. P. 32(a)(7)(A). This limit applies to briefs for the appellant, the appellee, and the appellee/cross-appellant, and to the cross-appellee's reply brief. 5TH CIR. R. 32.2. Under this approach, reply briefs, including the reply briefs of the appellant or cross-appellant, are limited to fifteen pages. FED. R. APP. P. 32(a)(7)(A).

The second option, which permits much longer briefs, is the "type-volume" limitation. Under this alternative, principal briefs using proportional type are limited to 14,000 words, and reply briefs are limited to 7,000 words. FED. R. APP. P. 32(a)(7)(B). These limits include headings and footnotes but exclude the corporate disclosure statement, table of contents, table of authorities, statement regarding oral argument, any addendum containing statutes, rules, or regulations, certificate of counsel, and—in the Fifth Circuit—the certificate of interested persons. *Id.* If non-proportional typeface is used, principal briefs are limited to 1,300 lines of text and reply briefs, to 650 lines of text. FED. R. APP. P. 32(a)(7)(B)(iii). 5TH CIR. R. 32.2.

A party may file a motion to extend these limitations at least ten days before the brief's due date, although the court views such motions with "great disfavor" and will grant them only for "extraordinary and compelling reasons." 5TH CIR. R. 32.4.

A party utilizing the type-volume method must include a certificate of compliance stating and certifying either the number of words in the brief or number of lines of monospaced type. FED. R. APP. P. 32(a)(7)(C); 5TH CIR. R. 32.3. The person preparing the certificate may rely on the word or line-count of the word-processing system used to prepare the brief. FED. R. APP. P. 32(a)(7)(C). Material misrepresentations in the certificate of compliance can result in striking of the brief and sanctions against the person who signed it. 5TH CIR. R. 32.3. See the recommended Form 6 for a certificate of compliance in the Appendix to the Federal Rules of Appellate Procedure, *available at* http://www.ca5.uscourts.gov (under the "Clerks Office" link to FED. R. APP. P.). *See* FED. R. APP. P. 32(a)(7)(C)(ii) (referencing Form 6, which "must be regarded as sufficient" to meet the requirement of a certificate of compliance).

[12] The certificate of interested parties is broader in scope than the corporate disclosure statement required under the Federal Rules of Appellate Procedure.

[13] As of December 2013, this requirement replaces the separate statement of the case and statement of facts; now, all relevant factual and procedural background may be combined into one section.

Other formal requirements for briefs

There are two options for typeface. If proportionally-spaced typeface is used, it must include serifs (except in headings and captions) and must be 14-point or larger font. FED. R. APP. P. 32(a)(5)(A). Footnotes must be in at least 12-point font. 5TH CIR. R. 32.1. Text in monospaced typeface cannot contain more than 10½ characters per inch, and footnotes must be in no more than 12½ characters per inch. FED. R. APP. P. 32(a)(5)(B); 5TH CIR. R. 32.1.

Except for footnotes, headings, and quotations exceeding two lines, all text must be double-spaced. FED. R. APP. P. 32(a)(4). Briefs must have one-inch margins on all sides. *Id.* Plain roman-style font must be used, although italics or boldface may be used for emphasis. *Id.*

> The colors of the brief covers must be as follows:
> appellant—blue
> appellee—red
> reply brief—gray

FED. R. APP. P. 32(a); *see also* 5th Cir. R. 32.1. Rule 32(a) of the Federal Rules of Appellate Procedure specifies the contents of the brief cover, which includes the name of the court below.

Timeline for filing briefs

The appellant's brief must be filed[14] forty days after the date of the briefing notice. FED. R. APP. P. 31(a); 5TH CIR. R. 31.3. The appellee generally must file its brief thirty days after service of appellant's brief. FED. R. APP. P. 31(a)(1).

The Fifth Circuit now requires counsel to register for electronic filing and to file all briefs electronically, absent good cause. 5TH CIR. R. 25.2.1.[15]

If the appellant filed its brief electronically, and the other parties to the appeal are registered as "Filing Users" with the court's electronic system, then the court's electronic notice of docketing activity constitutes service of the filed brief. 5TH CIR. R. 25.2.5. If the appellant served its brief by mail, the appellee has thirty-three days from the date of the certificate of service to file the brief electronically, place its brief in the mail, or to give it to a third-party commercial carrier for delivery within three days. 5TH CIR. R. 31.3; *see also* FED. R. APP. P. 26(c). The appellant's reply brief must be filed within fourteen days after service of the appellee's brief. FED. R. APP. P. 31(a).

Number of copies of briefs

Seven copies of briefs must be filed with the court. 5TH CIR. R. 31.1. Two copies of briefs must be served on counsel for each party separately represented. FED. R. APP. P. 31(b). Counsel exempt from the court's electronic filing requirements must also submit an electronic version of the brief on a CD, diskette, or other electronic medium authorized by the clerk. 5TH CIR. R. 31.1.

Supplemental briefing

A party wishing to file a supplemental brief must obtain leave of court. 5TH CIR. R. 28.4. Occasionally, however, the court may call for supplemental briefs on specific issues, *e.g.*, after oral argument. *Id.*

A party may file a letter—not a brief—under FED. R. APP. P. 28(j) to apprise the court of intervening decisions or new developments after the party's brief was filed. *See* 5TH CIR. R. 28.4. Such a letter must state the reasons for the supplemental citations, with references to the page of the brief or oral argument point. FED. R. APP. P. 28(j); 5TH CIR. R. 28.4. The letter must also be served on all parties. It cannot exceed 350 words. FED. R. APP. P. 28(j). Responses to Rule 28(j) letters are likewise limited to 350 words. *Id.*

C. Extension of Time for Briefs

State:

A motion for extension of time to file the brief in state court may be granted upon a written motion that complies with Rule 10.5(b) and provides a "reasonable explanation" of the need for more time. TEX. R. APP. P. 10.5(b); *see supra* Part III (motions for extension of time, generally).

[14] The Fifth Circuit requires counsel to register for electronic filing and to file briefs electronically, unless counsel has good cause to be excused from these requirements. 5TH CIR. R. 25.2.1. Transmission of a document to the electronic filing system in accordance with the court's rules, together with the court's transmission of a Notice of Docket Activity, constitutes filing and entry of the document. 5TH CIR. R. 25.2.4. The Notice of Docket Activity also constitutes service of the filed document on all persons who are registered e-filers. 5TH CIR. R. 25.2.5.

If filed via mail, briefs and appendices are deemed filed on the day of mailing or delivery to a third-party commercial carrier for delivery within three calendar days. FED. R. APP. P. 25(a)(2); 5TH CIR. R. 26.1. To invoke this "mailbox rule," a party must state in its certificate of service "the date and manner by which the document was mailed or dispatched to the clerk." FED. R. APP. P. 25(d)(2). However, all other papers are not timely filed unless they are actually received by the clerk within the time for filing. FED. R. APP. P. 25(a)(2)(A); 5TH CIR. LOC. R. 26.1.

[15] Whenever possible, all electronically filed documents should be in PDF format. *See* 5th Cir. R. 30.

Federal:

In the Fifth Circuit, a request for an extension of time to file a brief must be made at least seven days before the date the brief is due, unless the movant demonstrates in detail that the facts forming the basis of the request either did not exist earlier or were not and could not, with due diligence, have been known earlier. 5TH CIR. R. 31.4.1(a). The requesting party must indicate that all other parties have been contacted and whether the request is opposed. 5TH CIR. R. 31.4.1.(b).

The Fifth Circuit classifies requests for extensions of time to file briefs into two levels. Level One extensions include requests for extensions of one to thirty days from the original due date and require a showing of good cause. 5TH CIR. R. 31.4.1(a), 31.4.3, 31.4.31; *see also* FED. R. APP. P. 26(b). A Level One extension, if unopposed, can be obtained from the clerk without the necessity of a motion. 5TH CIR. R. 31.4.3.1. An opposed Level One request must be made by written motion that sets forth why there is good cause, the initial due date of the brief, whether any extension previously was granted, the length of the requested extension, and which parties oppose the request. *Id.*

Level Two extensions are requests for extensions of more than 30 days from the original due date and will be granted only in the most extraordinary circumstances and upon showing of diligence, substantial need, and a detailed explanation why a Level One extension is insufficient. 5TH CIR. R. 31.4.3.2; *see also* 5TH CIR. R. 31.4.2. It is generally not sufficient to state that the motion is "not for delay," or that counsel is simply "too busy." 5TH CIR. R. 31.4.2. Rather, reasons for extension include (1) counsel is engaged in other litigation that cannot be deferred, (2) the matter is so complex that an adequate brief cannot be reasonably prepared by the due date, or (3) extreme hardship will result unless an extension is granted. 5TH CIR. R. 31.4.2(a)-(c). These requests must be made by written motion, served on all parties, and state the initial due date, any previous extensions that were granted, the length of the extension, and whether the motion is opposed. 5TH CIR. R. 31.4.3.2.

Extensions of time to file reply briefs are disfavored. 5TH CIR. R. 31.4.4. However, a party usually can obtain a short extension upon request.

D. Oral Argument

State:

A party in state court desiring oral argument must note that request on the cover of the brief. TEX. R. APP. P. 38.1(e), 39.7. A one-page explanation regarding why argument would or would not aid the court's decisional process may be included as a section in the brief. TEX. R. APP. P. 38.1(e). The court of appeals may submit the case without oral argument where argument would not significantly aid the court in the determination of the issues of law and fact presented in the appeal. TEX. R. APP. P. 39.1.

The clerk shall give notice to the parties of the oral argument date or date for submission without oral argument at least twenty-one days prior to the date the case is set for argument or submission. TEX. R. APP. P. 39.8. If a party objects to the submission of the case without oral argument, it should immediately after receiving the notice of submission file a motion objecting to the submission and requesting oral argument. *See* TEX. R. APP. P. 10.1.

The time allotted for oral argument is set by each court of appeals. TEX. R. APP. P. 39.3; *see, e.g.*, 2D TEX. APP. (FORT WORTH) R. 3(C) (fifteen minutes each side, additional five minutes for appellant's rebuttal); 4TH TEX. APP. (SAN ANTONIO) R. 9.1 (twenty minutes each side, additional ten minutes for appellant's rebuttal); 5TH TEX. APP. (DALLAS) R. 6 (twenty minutes per side, additional 5 minutes for rebuttal). Additionally, a court of appeals may alter the length of oral argument in a particular case.

Federal:

In the Fifth Circuit, oral argument is allowed in only a minority of cases. In 2015, the Fifth Circuit granted oral argument in just 748 of the 2,750 cases screened for oral argument. *See* Judicial Workload Statistics, United States Court of Appeals for the Fifth Circuit, at 8 (2015), available at http://www.ca5.uscourts.gov/clerk/docs/arstats.pdf.

Oral argument will be allowed unless the panel unanimously determines that:

(1) the appeal is frivolous;
(2) the dispositive issue or set of issues has been recently and authoritatively decided; or
(3) the facts and legal arguments are adequately presented in the briefs and the record and the decisional process would not be significantly aided by oral argument.

FED. R. APP. P. 34(a); *see also* 5TH CIR. R. 34.2.

Whether the court will grant oral argument generally is determined at two junctures. First, the case is screened by a three-judge panel. At that time, the judges may determine that the case is suitable for disposition without oral argument. However, any single judge of the screening panel may designate the case for argument. If that occurs, the case will be assigned to an oral argument panel. Upon reviewing the briefs, that panel occasionally will determine that oral argument is unwarranted. In such a case, the parties will receive notice that argument is cancelled. Although not required, the clerk generally attempts to provide counsel sixty days advance notice of the cases set for oral argument. 5TH CIR. R. 34 I.O.P.

Practice Tip: Although the composition of oral argument panels is determined in advance of each court year, cases are not assigned to particular Fifth Circuit panels until approximately six weeks before each sitting. These assignments are not disclosed to the public until a week before the sitting. *See* 5TH CIR. R. 34 I.O.P. Even after the cases are assigned, the panel may determine that oral argument is not necessary.

Most cases are allotted twenty minutes per side for argument. 5TH CIR. R. 34.11. The appellant opens and concludes the oral argument. FED. R. APP. P. 34(c). Each side is allotted twenty minutes (including rebuttal) to present its argument. 5TH CIR. R. 34.11. A request for additional time should be made in a motion or letter to the clerk filed well in advance of the oral argument. 5TH CIR. R. 34.12.

E. Rehearing

State:

A motion for rehearing in the court of appeals is not a jurisdictional prerequisite to filing a petition for review, nor is it required to preserve error. TEX. R. APP. P. 49.9. A motion for rehearing must be filed within fifteen days of the date the court of appeal's judgment or order is rendered. TEX. R. APP. P. 49.1. Such a motion is limited to 4,500 words, if computer-generated (and 15 pages if not). TEX. R. APP. P. 9.4(i)(2)(C). No response is necessary unless requested by the court. TEX. R. APP. P. 49.2. A majority of the justices of the court en banc may order en banc reconsideration with or without a motion. TEX. R. APP. P. 49.7.

A party may file a further motion for rehearing within fifteen days of the court's action if the court of appeals modifies its judgment, vacates its judgment and renders a new judgment, or issues an opinion overruling a motion for rehearing. TEX. R. APP. P. 49.5.

Federal:

A petition for rehearing is not a prerequisite to the filing of a petition for writ of certiorari in the Supreme Court. 5TH CIR. R. 40 I.O.P. A petition for panel rehearing is due within fourteen days after entry of judgment. FED. R. APP. P. 40(a). If one of the parties is the United States, a federal agency, a federal officer or employee sued in an official capacity, or a current or former federal officer or employee sued in an individual capacity for an act or omission that occurred in connection with performing duties on the government's behalf, the petition for rehearing is due within forty-five days after entry of judgment. FED. R. APP. P. 40(a)(1). It must be received by the clerk within that time.[16] FED. R. APP. P. 25(a)(2)(A); 5TH CIR. R. 26.1, 40.4.

A petition for rehearing shall not exceed fifteen pages in length and must comply with the formatting requirements in FED. R. APP. P. 32. *See* FED. R. APP. P. 40(b). The petition must "state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition." FED. R. APP. P. 40(a)(2). The petition should not be used to reargue "the issue previously presented" to the court. 5TH CIR. R. 40.2. Oral argument is not allowed on a petition for panel rehearing, and no response is permitted unless requested by the court. FED. R. APP. P. 40(a)(3). The rules do not specify whether the exclusion of certain sections from the length limitation in Rule 32 extends to motions for rehearing. *See* 5TH CIR. R. 40.3 (referencing FED. R. APP. P. 40(b)); FED. R. APP. P. 40(b) (requiring compliance with Rule 32 without specifying whether any sections are excluded from the page limitation). A copy of the opinion or order sought to be reviewed shall be attached to the petition for rehearing. 5TH CIR. R. 40.1. Four copies of the petition for rehearing must be filed. 5TH CIR. LOC. R. 40.1.

A majority of the circuit judges who are in regular active service may order that an appeal be heard en banc. FED. R. APP. P. 35(a). A party may suggest en banc consideration within fourteen days after entry of judgment. FED. R. APP. P. 35(b)-(c); *see also* 5TH CIR. R. 35 & I.O.P. In the Fifth Circuit, such a petition for rehearing en banc must be a separate document from a petition for panel rehearing. 5TH CIR. R. 35.2. Such a petition is addressed to all circuit judges in active service who are not otherwise disqualified. FED. R. APP. P. 35(a). The Fifth Circuit, however, strongly disfavors petitions for rehearing en banc, and cautions that "manifest abuse" of the procedure could result in sanctions. 5TH CIR. R. 35.1. Fewer than 1% of all cases decided on the merits are reheard en banc, and many rehearings are initiated by a member of the court *sua sponte*, rather than by a petition. 5TH CIR. R. 35 I.O.P. An en banc petition should be filed only where (1) the panel decision conflicts with a decision of the U.S. Supreme Court or with a prior decision of the Fifth Circuit, or (2) where the proceeding "involves one or more questions of exceptional importance." FED. R. APP. P. 35(b)(1). A statement explaining why the petition fits either of these prerequisites must appear at the beginning of any petition. FED. R. APP. P. 35(b)(1)

A petition for rehearing en banc cannot exceed fifteen pages in length. 5TH CIR. R. 35.5 (citing FED. R. APP. P. 35(b)(2)). No response to an en banc petition is permitted unless the court orders one. FED. R. APP. P.

[16] The clerk is authorized to accept filing by facsimile in an emergency or other compelling circumstances. 5TH CIR. R. 25.1.

35(e). Parts excluded from the word count in FED. R. APP. P. 32(7)(B)(iii) are excluded from this page limit. FED. R. APP. P. 35(b)(2). Twenty copies must be filed. 5TH CIR. R. 35.2.

Once an en banc rehearing petition is filed, any active, non-disqualified judge may call for a vote. FED. R. APP. P. 35(f). The petition will be granted, and the case reheard en banc, only if a majority of all active non-disqualified judges vote in favor of such rehearing. FED. R. APP. P. 35(a). The en banc court is composed of all active judges on the court plus any senior judge of the court who participated in the panel decision, and elects to participate in the en banc consideration. 5TH CIR. R. 35.6.

F. Extension of Time for Rehearing

State:

An extension of time to file the motion for rehearing may be granted if a motion reasonably explaining the need for the extension is filed with the court of appeals not later than fifteen days after the last date for filing the motion for rehearing. TEX. R. APP. P. 49.8; *see also* TEX. R. APP. P. 10.5(b).

Federal:

The Fifth Circuit discourages counsel from requesting extension of time to file a petition for rehearing except for "compelling reasons." 5TH CIR. R. 35.4. The clerk may grant a motion for an extension of up to fourteen days to file a petition for rehearing or rehearing en banc, or it may refer such a motion to the court. *See* 5TH CIR. R. 27.1. I.O.P. Motions for longer extensions generally must be resolved by the authoring judge. *See* 5TH CIR. R. 27 I.O.P.

X. PRACTICE IN THE SUPREME COURT[17]

A. Petitions for Review or Writ of Certiorari

State:

The Texas Supreme Court is a court of discretionary jurisdiction that reviews judgments of the courts of appeals upon petition for review. TEX. R. APP. P. 53.1. A party must file petition for review when it seeks a different and more favorable judgment than the judgment rendered by the court of appeals. *Id.*

Timeline for filing a petition for review

Generally, a petition for review with the Texas Supreme Court must be filed within forty-five days of either the date the court of appeals rendered judgment, if no timely motion for rehearing or en banc reconsideration was filed, or the date of the court of appeals' last ruling on all timely motions for rehearing or en banc reconsideration. TEX. R. APP. P. 53.7(a). If one party timely files a petition for review, however, any other party may file a petition within forty-five days after the last timely motion for rehearing is overruled or within thirty days after any preceding petition is filed, whichever is later. TEX. R. APP. P. 53.7(c). A petition for review is timely filed if e-filed at any time before midnight (in the Court's time zone) on the date on which the petition is due. TEX. R. APP. P. 9.2(c).

Extension of time to file a petition for review

The Texas Supreme Court may extend the forty-five-day timeline for filing a petition for review if a party files a motion complying with Rule 10.5(b) no later than fifteen days after the last day for filing a petition. TEX. R. APP. P. 53.7(f). In addition to meeting the requirements in Rule 10.5(b)(2), a motion for extension of time to file a petition for review must also specify:

(a) the court of appeals;
(b) the date of the court of appeals' judgment;
(c) the number and style of the case in the court of appeals;
(d) the filing date of every motion for rehearing or for en banc reconsideration, and either the date and ruling on every such motion, or that it remains pending.

TEX. R. APP. P. 10.5(b)(3). There is a $10 filing fee for a motion for extension.

Formal requirements for the petition for review

The petition for review in the Texas Supreme Court must comply with the requirements of TEX. R. APP. P. 53.2. The petition shall contain the following:

(a) names of all parties and counsel;
(b) table of contents;
(c) index of authorities;
(d) statement of the case;
(e) statement of jurisdiction;
(f) issues presented;
(g) statement of facts;
(h) summary of the argument;
(i) argument;
(j) prayer for relief; and
(k) appendix.

TEX. R. APP. P. 53.2(a)-(k).

The petition shall not exceed 4,500 words in length if computer-generated (and 15 pages if not), excluding pages containing the identity of parties and counsel, the table of contents, index of authorities, statement of the

[17] For a further guide to Texas Supreme Court practice, *see* Blake A. Hawthorne, *Supreme Court of Texas Internal Operating Procedures*, *in* State Bar of Texas, PRACTICE BEFORE THE TEXAS SUPREME COURT (2016). For a general guide to practice in the United States Supreme Court, *see* EUGENE GRESSMAN, ET AL., SUPREME COURT PRACTICE (9th ed. 2007).

case, statement of jurisdiction, issues presented, signature, proof of service, certificate of compliance with the word-count limitations, and the appendix. TEX. R. APP. P. 9.4(i)(2)(D). The same printing, paper type, typeface and other formal requirements that apply to briefs filed in the court of appeals apply to petitions for review. TEX. R. APP. P. 9.4(e). Red, black, dark blue, and plastic covers are prohibited for any paper copies filed. TEX. R. APP. P. 9.4(f).

The petitioner must also pay an initial filing fee of $155.00 and an additional $75.00 fee if the petition is granted. *See* Table of Supreme Court Filing Fees, *available at* http://www.txcourts.gov/supreme/practice-before-the-court/fees.aspx.

Responses to and replies in support of petition for review

A response to the petition for review is not mandatory. TEX. R. APP. P. 53.3. Rather, a party may choose to file a response, file a waiver of response, or do nothing. If no response is timely filed, or if a party files a waiver of response, the Court will consider the petition without a response. *Id.* However, no petition will be granted before a response has been filed or requested by the Court. *Id.* Filing a waiver of response does not waive a party's right to file a response if the Court requests one.

Any response must be filed within thirty days after the petition is filed, and a reply is due fifteen days after the response is filed. TEX. R. APP. P. 53.7(d), (e). The contents of a response largely track the requirements for a petition for review, except that a response need not include certain portions unless the respondent is dissatisfied with the petitioner's presentation. TEX. R. APP. P. 53.3(a)-(f). Responses are limited to 4,500 words, and replies are limited to 2,400 words, excluding certain items listed in the rule. TEX. R. APP. P. 9.4(i)(1), (2)(D), (2)(E).[18] Non-computer-generated responses and replies are limited to 15 pages and 8 pages, respectively. *Id.* The Court may rule on the petition before a reply brief is filed. TEX. R. APP. P. 53.5.

Filing the record

The Texas Supreme Court may request that the clerk of the court of appeals forward the record to the clerk of the supreme court, even if it has not granted the petition for review. TEX. R. APP. P. 54.1. The clerk of the court of appeals cannot send the record to the Texas Supreme Court unless it is requested. TEX. R. APP. P. 54.2.

Once the record is requested, the clerk of the court of appeals must promptly send the original record, any motion filed in the court of appeals, copies of all orders of the court of appeals, and copies of all opinions and the judgment of the court of appeals. TEX. R. APP. P. 54.2(a). Nondocumentary exhibits will not be sent unless the Supreme Court requests them. TEX. R. APP. P. 54.2(b).

The petitioner must pay to the court of appeals clerk the cost of transmitting the record. TEX. R. APP. P. 54.3. The clerk of the Supreme Court may refuse the record if the requisite charges have not been paid. TEX. R. APP. P. 54.4.

Disposition of the petition for review

Petitions for review are held by the clerk of the Supreme Court for thirty days before they are forwarded to the justices, unless a response or waiver of response is filed before that period expires. *See* Blake A. Hawthorne, *Supreme Court of Texas Internal Operating Procedures*, at 9-13, in STATE BAR OF TEXAS, PRACTICE BEFORE THE TEXAS SUPREME COURT (2015). Once the petition is ripe, it is forwarded along with the appendix, response or response waiver, and other materials in a package that includes a pink vote sheet for that particular case. *Id.* The pink vote sheet contains blanks reflecting possible actions that a justice may choose, *e.g.*, deny, request response, discuss at conference, or request study memo. *Id.*. The petition package also includes a purple vote sheet listing all the matters forwarded to the justices that week that contains the same blanks for possible dispositions. *Id.*

Once received by the justices, the petition is moved along a "conveyer belt." Unless a justice affirmatively removes the petition from the conveyer belt by casting a vote to take an action other than denying it, it is automatically denied thirty-one days later in the court's Friday orders. *Id.*. A justice's failure to mark a vote is treated as a vote to deny the petition. *Id.*. It takes one vote to call for a response if one has not been filed. Three votes are required to call for briefs on the merits. *Id.*

If three or more justices determine that the petition warrants further study, it will be assigned by rotation to a chambers for preparation of a study memo by a law clerk that will examine the issues and arguments on both sides and recommend a disposition. *Id.*. Such a memo generally is due within thirty days of the filing of a response brief on the merits. *Id.* Four votes are required to grant a petition for review.

Federal:

The U.S. Supreme Court hears an exceedingly small fraction of all cases presented to it, deciding which cases it will review largely on the basis of petitions for writ of certiorari. The Court has complete discretion over whether to grant a petition, and in recent years has granted just 3.5% percent of all paid (non *in forma pauperis*) petitions.[19] The Court is concerned not with

[18] A certificate of compliance is required, stating the number of words in the response or reply brief. TEX. R. APP. P. 9.4(i)(3).

[19] *See, e.g.*, Likelihood of a Petition Being Granted, available at http://dailywrit.com/2013/01/likelihood-of-a-petition-being-

error-correction, but with resolving conflicts between lower courts on issues of federal law, resolving constitutional or federal issues with broad impact, and exercising supervisory authority over the lower federal courts. Considerations that guide the Court's determination whether to grant review are discussed below. *See infra* (disposition of the petition for writ of certiorari).

Timeline for filing a petition for writ of certiorari

A petition for writ of certiorari generally must be filed within ninety days of the entry of judgment or order sought to be reviewed—not the date the mandate was issued. 28 U.S.C. § 2101(c) (2012); SUP. CT. R. 13.1, 13.3. A petition seeking review of a judgment of a lower state court that is subject to discretionary review by the state supreme court is timely if it is filed within ninety days after entry of an order denying discretionary review. Sup. Ct. R. 13.1. This ninety-day period begins to run on the day *after* the judgment or order is entered. Sup. Ct. R. 30.1. If one party timely filed a petition for rehearing, or the court of appeals either appropriately entertained an untimely petition for rehearing or considered rehearing *sua sponte*, the timeline for filing the petition for writ of certiorari for all parties will run from the date rehearing was denied or, if rehearing was granted, from the subsequent entry of judgment. SUP. CT. R. 13.3.

The ninety-day timeline for filing a petition for writ of certiorari begins to run on the day *after* the judgment or order was entered. SUP. CT. R. 30.1. The last day of the period is not counted if it falls on a weekend, federal holiday, or any day on which the Court is closed by order of the Chief Justice or the Court, in which the period is extended to the next day not excluded under this rule. *Id.*

A party may file a cross-petition for certiorari either within the ninety-day period from entry of judgment, or thirty days "after a case has been placed on the docket." SUP. CT. R. 12.5. Under the latter option, the cover of the cross-petition must expressly indicate that it is a conditional cross-petition. *Id.* Such a cross-petition will not be granted unless the Court grants another party's timely petition for writ of certiorari. SUP. CT. R. 13.4.

The Supreme Court does not accept electronic filing of certiorari petitions. Rather, petitions must be printed and filed in hard copy. Under the U.S. Supreme Court's version of the "mailbox rule," a petition is considered timely filed if (1) it is received by the clerk within the time specified, regardless of the method of delivery; (2) if it is sent through the U.S. Postal Service by first-class mail and bears a postmark showing that the document was mailed on or before the last day for filing; or (3) if it was delivered on or before the last day for filing to a third-party commercial carrier for delivery to the clerk within three calendar days. SUP. CT. R. 29.2. Although the Supreme Court has not yet adopted electronic filing, the Rules now require that a filing party also transmit an electronic version of the document to all other parties. SUP. CT. R. 29.3.

Extension of time to file a petition for writ of certiorari

Applications to extend the time for filing a petition for writ of certiorari generally are disfavored. SUP. CT. R. 13.5. However, "[f]or good cause," a Justice may extend the time for filing a petition for writ of certiorari for up to sixty days. SUP. CT. R. 13.1 (ninety days after entry of judgment to file a petition for writ of certiorari); *id.* 13.5 (extensions of time to file petition). Such an application must be made to the Justice assigned to the court of appeals where the appeal originated and must be filed at least ten days before the specified filing date under the rules. SUP. CT. R. 30.2, 30.3. An application for an extension will not be granted except in "the most extraordinary circumstances" if filed less than ten days before the deadline. *Id.* If the application is denied, it cannot be renewed. SUP. CT. R. 30.3. Note that there are no extensions for filing a conditional cross-petition. SUP. CT. R. 12.5.

An application for extension of time must (1) set out the basis for the Supreme Court's jurisdiction, (2) identify the judgment sought to be reviewed, (3) include a copy of the opinion and any order respecting rehearing, and (4) set out specific reasons why an extension of time is justified. SUP. CT. R. 13.5. Moreover, the application must clearly identify each party for whom an extension is being sought, as any extension that might be granted would apply solely to the party or parties named in the application. *Id.*

Formal requirements for the petition for writ of certiorari

The petition for writ of certiorari must comply with Rule 14 of the Supreme Court Rules. The petition shall contain:

(a) the questions presented for review;
(b) a list of all parties;
(c) a table of contents and table of authorities;
(d) citations of the unofficial and official reports of the opinions and orders entered in the case by courts or administrative agencies;
(e) a statement of the basis of jurisdiction showing:

  (i) the date the judgment or order to be reviewed was entered,
  (ii) the date of any order requesting rehearing and the date and terms of any order

granted/; *see also* U.S. Supreme Court Journal, Statistics, available at http://www.supremecourt.gov/orders/journal/jnl14.pdf, https://www.supremecourt.gov/orders/journal/jnl13.pdf.

granting an extension of time to file the petition for writ of certiorari,

(iii) if a cross-petition under Rule 12.5, reference to the rule and the date of docketing of the petition in connection with which the cross-petition is filed,

(iv) the statutory provision conferring jurisdiction, and

(v) in a case challenging the validity of a federal or state statute, a statement that either the U.S. Solicitor General or the relevant state attorney general has been served with notice;

(f) the constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case;

(g) a concise statement of the case which includes one of the following:

(i) if review of a state court judgment, the stage of the proceedings at which the federal questions were raised; or

(ii) if review of a judgment of a United States court of appeals, the basis for federal jurisdiction in the court of first instance;

(h) the argument; and

(i) the appendix.

SUP. CT. R. 14.1. The petition must include a corporate disclosure statement identifying any parent corporations and listing any publicly-held company that owns 10% or more of the corporation's stock. SUP. CT. R. 29.6.

The petition must be formatted in accordance with Rule 33 of the Supreme Court Rules, either printed in a 6 1/9- by 9 ¼-inch booklet format or typewritten on 8 ½- by 11-inch paper. *See* SUP. CT. R. 14.3, 33.1, 33.2. The text of every booklet-format document "shall be typeset in a Century family (e. g., Century Expanded, New Century Schoolbook, or Century Schoolbook) 12-point type," quotations of more than fifty words must be intended as a block quote, and footnotes must be set in 10-point font. The text of the document must appear on both sides of the page. SUP. CT. R. 33.1(b). Printed booklets are limited to 9,000 words, excluding specified parts but including footnotes, and must be accompanied by a certificate representing that the petition complies with the word limitation. SUP. CT. R. 33.1(d), (g), (h). Petitions typed on standard paper are limited to forty pages. SUP. CT. R. 33.2(b). Other formal requirements are specified in SUP. CT. R. 33 and 34. The cover to the printed booklet must be white. SUP. CT. R. 33.1(g).

Forty copies of each brief must be filed. SUP. CT. R. 12.1, 15.3, 15.6. Three copies shall be served on each party separately represented, and a separate proof of service must also be presented to the clerk. SUP. CT. R. 29.3, 29.5. A $300 fee must be paid when the petition is filed. SUP. CT. R. 38(a).

Briefs in opposition to and replies in support of a petition for writ of certiorari

The respondent has thirty days after a case has been placed on the docket to file its brief in opposition and, if it wishes, a cross-petition. SUP. CT. R.12.5, 15.3. A brief in opposition, however, is "not mandatory," and some respondents choose not to file one. SUP. CT. R. 15.1. The petitioner may file a reply brief, but this will not delay the distribution of the petition and brief in opposition to the Court for consideration. SUP. CT. R.15.6.

The formal requirements for briefs in Rule 33 of the Supreme Court Rules apply to opposition and reply briefs. *See* SUP. CT. R. 15.2, 15.6. A printed opposition brief must have an orange cover and is limited to 9,000 words or to forty pages if typed on standard paper. SUP. CT. R. 33.1(g), 33.2(b). A reply brief must have a tan cover and is limited to 4,000 words or to fifteen pages if typed. SUP. CT. R. 33.1(g), 33.2(b). Forty copies of the opposition and any reply must also be filed. SUP. CT. R. 15.3, 15.6.

Filing the record

The United States Supreme Court rules on most petitions for writ of certiorari without having the record. However, any Justice or the clerk can ask for the record to be brought from the lower court. *See* SUP. CT. R. 12.7. When the Court grants a petition, the clerk will request the record if it has not previously been filed. SUP. CT. R. 16.2.

As noted above, the petition for writ of certiorari must include an appendix that contains the following:

(i) the opinions, orders, findings of fact, and conclusions of law, whether written or orally given and transcribed, entered in conjunction with the judgment sought to be reviewed;

(ii) any other opinions, orders, findings of fact, and conclusions of law entered in the case by courts or administrative agencies, and, if reference thereto is necessary to ascertain the grounds of the judgment, of those in companion cases;

(iii) any order on rehearing;

(iv) the judgment sought to be reviewed if the date of its entry is different from the date of the opinion or order required in paragraph (i) above;

(v) the constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, set out verbatim with appropriate citation, and if review of a state court judgment is sought, portions of the record, if too voluminous to set forth in the statement of the

case, showing how and when a federal question was timely and properly raised and any rulings relevant to jurisdiction; and

(vi) any other appended materials.

SUP. CT. R. 14.1(*i*).

If the petition for writ of certiorari is granted, the petitioner must file a joint appendix within forty-five days after entry of the order granting the writ. SUP. CT. R. 26.1. On the parties' request, the clerk may allow preparation of the joint appendix to be deferred until after the briefs have been filed. SUP. CT. R. 26.4(a). In that event, the petitioner must file the joint appendix within fourteen days after receipt of the respondent's brief. *Id*. The joint appendix shall contain the following:

(1) the relevant docket entries in all the courts below;
(2) any relevant pleadings, jury instructions, findings, conclusions, or opinions;
(3) the judgment, order, or decision under review; and
(4) any other parts of the record that the parties wish to bring to the Court's attention.

SUP. CT. R. 26.1. If the parties are unable to agree on the contents of the joint appendix, the parties must designate parts of the record to be included in the joint appendix. SUP. CT. R. 26.2. The joint appendix must also be prefaced by a table of contents. SUP. CT. R. 26.5. It must be printed in accordance with Rule 33 of the Supreme Court Rules. *See* SUP. CT. R. 26.1. The petitioner shall file forty copies of the joint appendix. *Id*. Three copies must be served on each of the other parties to the proceeding. *Id*.

Disposition of the petition for writ of certiorari

Four affirmative votes are required to grant a petition for writ of certiorari. Although neither determinative nor exhaustive, factors considered by the Court in deciding whether to grant a petition include:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision of a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of the Supreme Court's supervisory power;
(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; and
(c) a state court or United States court of appeals has decided an important question of federal law that has not been, but should be, settled by the Supreme Court, or has decided an important federal question in a way that conflicts with the relevant decisions of the Supreme Court.

SUP. CT. R. 10. If the Court grants the petition, the case will be scheduled for briefing and oral argument. SUP. CT. R. 16.2. Variations to this treatment, including limited grants of certiorari, summary dispositions, and summary reconsideration orders, are discussed in Gressman, *supra* note 13 ¶¶ 5.10-5.15, at 339-62. Alternatively, the Court may order a summary disposition of the petition for writ of certiorari on the merits or deny the petition. SUP. CT. R.16.1, 16.3.

B. Briefs on the Merits

State:

Constructing the Brief on the Merits

A brief on the merits may not be filed unless requested by the supreme court. TEX. R. APP. P. 55. A request will issue on the vote of three justices. A request from the court for briefing on the merits does not grant the petition of review. The court will issue an order that grants, denies, dismisses, or refuses the petition after the court receives full briefing and reviews an internal study memo prepared by a law clerk. Thus, the brief on the merits will have a significant effect on whether review is granted. While the odds of the court granting the case are increased when the court requests briefs on the merits, there is still no guarantee.

1. Basic formatting requirements for briefs on the merits

Texas Rule of Appellate Procedure 9 provides formatting requirements for all briefs, including briefs on the merits. These requirements are basic, but must be followed. The margins in a brief on the merits should be one-inch on both sides and on the top and the bottom. TEX. R. APP. P. 9.4(c). The text must be double-spaced; however, footnotes, block quotations, short lists, and issues may be single-spaced. TEX. R. APP. P. 9.4(d). Proportionally spaced typeface, such as Times New Roman, must be in 13-point or larger font. TEX. R. APP. P. 9.4(e). The brief on the merits must be bound and should have durable front and back covers that may not be plastic, red, black, or dark blue. TEX. R. APP. P. 9.4(f). Rule 9.4(g) provides the required contents for brief covers. If your brief on the merits does not conform to these requirements, the Court may strike the brief. TEX. R. APP. P. 9.4(i).

2. Length of briefs on the merits

The petitioner's brief on the merits and the response brief may not exceed 15,000 words, if computer-generated, and 50 pages if not. TEX. R. APP. P. 9.4(i)(2)(B). Computer-generated reply briefs are limited to 7,500 words, and typewritten ones, to twenty-five pages. TEX. R. APP. P. 9.4(i)(2)(C). However, these limits do not include the caption, identity of parties and counsel, the table of contents, the index of authorities, the statement of the case, the statement of jurisdiction, the issues presented, the signature, and the proof of service, or certificate of compliance. TEX. R. APP. P. 9.4(i)(1). The Court may permit a longer brief on a party's motion. TEX. R. APP. P. 9.4(i)(4). However, it is unlikely that such a request will be granted

3. Contents of briefs on the merits

When drafting a brief on the merits, Texas Rule of Appellate Procedure 55 should be the starting place. Rule 55.2 specifies the requirements for a petitioner's brief on the merits and should be closely followed. Importantly, a petitioner's brief on the merits must be confined to the issues contained in the petition for review and must, under appropriate headings, contain the items listed below in the following order. TEX. R. APP. P. 55.2. Notably, the components of the petitioner's brief on the merits are the same as those found in the petition for review. *Compare* TEX. R. APP. P. 53.2, *with* TEX. R. APP. P. 55.2. However, it is expected that the brief on the merits will fully address all issues stated in the petition for review.

a. Identity of parties and counsel

The brief must contain a complete list of all parties to the trial court's final judgment and the names and addresses of all trial and appellate counsel. TEX. R. APP. P. 55.2(a). This list makes it easy for the Court to identify the parties and provides the necessary information for a conflict of interest check. The respondent's brief on the merits should not include this list unless needed to supplement or correct the petitioner's list. TEX. R. APP. P. 55.3(a).

Practice Tip: It may be helpful to utilize separate headings for each party and counsel. It is also useful to indicate each party's procedural posture throughout the case, *i.e.*, plaintiff/appellant/petitioner.

b. Table of contents

A brief on the merits must include a table of contents with references to the pages of the brief where each required section begins. TEX. R. APP. P. 55.2(b), 55.3. The rules also require that the table of contents indicates the subject matter of each issue, or group of issues. TEX. R. APP. P. 55.2(b). The table of contents should list the exact text of each issue presented as well as the headings and subheadings of the argument section.

Practice Tip: The table of contents is a tremendous aid to the justices in understanding the arguments and determining whether to grant a case. The table of contents can be used to check that the arguments are presented in a logical and organized format that is easy to read. The table of contents provides the justices with an outline of your entire argument in one place.

c. Index of authorities

Briefs on the merits must have an index of the authorities cited in the brief. TEX. R. APP. P. 55.2(c). The authorities must be listed in alphabetical order and indicate the pages of the brief where the authorities are cited. *Id.*

Practice Tip: Bluebook and Green Book citation format should be followed. Double-check your table after running it with a software program. Corrections are generally required.

d. Statement of the case

The rules regarding the requirements for the petitioner's statement of the case are very specific and should be carefully followed. The statement of the case must include the following items:

(1) a concise description of the nature of the case;
(2) the name of the judge who signed the order or judgment appealed from;
(3) the designation of the trial court and the county in which it is located;
(4) the disposition of the case by the trial court;
(5) the parties in the court of appeals;
(6) the district of the court of appeals;
(7) the names of the Justices who participated in the decision in the court of appeals, the author of the opinion for the court, and the author of any separate opinion;
(8) the citation for the court of appeals' opinion, if available, or a statement that the opinion was unpublished; and
(9) the disposition of the case by the court of appeals.

TEX. R. APP. P. 55.2(d). The statement of the case should rarely exceed one page and is merely intended to convey basic information regarding the case. *Id.* Facts should not be discussed or argued in this section. *Id.*

The rules do not require that the respondent's brief on the merits contain a statement of the case unless the respondent is dissatisfied with that portion of the petitioner's brief. TEX. R. APP. P. 55.3(b). As a practical matter, however, a respondent should usually be dissatisfied with the petitioner's statement of the case and include its own statement.

Practice Tip: Many justices prefer the statement of the case to be presented in a table format as opposed to a narrative format. Using a table format also makes it easier to comply with the one-page limit suggested by the rules.

e. Statement of jurisdiction

The petitioner's brief on the merits must state, without argument, the basis of the supreme court's jurisdiction. TEX. R. APP. P. 55.2(e). The bases for the supreme court's appellate jurisdiction are found in section 22.001 of the Government Code and include:

(1) a case in which the justices of a court of appeals disagree on a question of law material to the decision;
(2) a case in which one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court on a question of law material to a decision of the case;
(3) a case involving the construction or validity of a statute necessary to a determination of the case;
(4) a case involving state revenue;
(5) a case in which the railroad commission is a party; and
(6) any other case in which it appears that an error of law has been committed by the court of appeals, and that error is of such importance to the jurisprudence of the state that, in the opinion of the supreme court, it requires correction, but excluding those cases in which the jurisdiction of the court of appeals is made final by statute.

TEX. GOV'T CODE ANN. § 22.001(a).

Under the rules, a respondent need only include a statement of jurisdiction if the petitioner fails to assert valid grounds for jurisdiction. TEX. R. APP. P. 55.3(d). Many respondents, however, include a response to the petitioner's statement of jurisdiction.

Practice Tip: When the court requests briefs on the merits, it also assigns a study memo to be prepared by a law clerk. This memo recommends to the court the disposition of the case. To aid the clerk in drafting the study memo, it is important to make the basis for jurisdiction clear because this is the first issue the law clerk must address. If there is doubt regarding the court's jurisdiction, the law clerk will have to spend more time addressing that issue in the study memo and less time focusing on the merits of the case.

f. Issues presented

The brief must state concisely the issues presented for review. TEX. R. APP. P. 55.2(f). The statement of an issue will be treated as covering every subsidiary question that is fairly included. *Id.* If the matter complained of originated in the trial court, the issue must have been presented to the court of appeals and assigned as error. TEX. R. APP. P. 53.2(f).

The issues do not need to be phrased identically to the statement of issues in the petition for review, but the brief may not raise additional issues or change the substance of the issues presented in the petition for review. TEX. R. APP. P. 55.2(f). Further, although the petitioner may preserve issues for review by raising them in the petition and reserving briefing on them for the brief on the merits, TEX. R. APP. P. 53.2(f), (i), if the petitioner intends to further preserve an issue for review, that issue must be fully briefed and argued in the brief on the merits.

The respondent's brief on the merits does not need to include a statement of issues presented unless:

(1) the respondent is dissatisfied with the statement made in the petitioner's brief;
(2) the respondent is asserting independent grounds for affirmance of the court of appeals' judgment; or
(3) the respondent is asserting grounds that establish the respondent's right to a judgment that is less favorable to the respondent than the judgment rendered by the court of appeals but more favorable to the respondent than the judgment that might be awarded to the petitioner (e.g., a remand for a new trial rather than a rendition of judgment in favor of the petitioner).

TEX. R. APP. P. 55.3(c).

Practice Tip: The issues should be framed so that they provide the Court with the pertinent legal question and reveal the importance of the question to the jurisprudence of the state. *See* Deborah G. Hankinson, Warren W. Harris & Tracy C. Temple, *Issue Drafting/Issue Spotting*, in STATE BAR OF TEXAS 17TH ANNUAL ADVANCED CIVIL APPELLATE PRACTICE COURSE (2003) for examples of concise statements of issues presented. Further, it may be helpful to rewrite the issues in a persuasive form to suggest an answer, especially if you have phrased them neutrally in your petition for review. Finally, do not go overboard with the number of issues presented. If your brief lists too many issues, the important ones become diluted.

g. Statement of facts

A brief on the merits must state concisely and without argument the factual and procedural background of the case. TEX. R. APP. P. 55.2(g). The facts to be included are those that are pertinent to the issues. The brief must indicate agreement with the court of appeals' rendition of the facts or specify which facts are disputed. *Id.* However, it is not advisable to rely solely on the statement of facts provided in the court of appeals' opinion. The statement of facts can be used to tell your side of the story, an important purpose, which should not be overlooked. Each fact must, of course, be supported by record references. *Id.*

A respondent's brief on the merits is not required to contain a statement of facts unless the respondent is dissatisfied with that portion of the petitioner's brief. TEX. R. APP. P. 55.3(b). It is rarely the case, however, that the respondent is satisfied with the petitioner's statement of facts.

Practice Tip: Do not misstate the record or omit critical facts that support the respondent. You lose credibility.

h. Summary of the argument

Briefs on the merits must contain a summary of the argument. TEX. R. APP. P. 55.2(h). The summary must be succinct, clear, and accurately state the arguments contained in the body of the brief. *Id.* The summary should not merely repeat the issues presented for review, but should be used to explain the theme of the case and to summarize the arguments to be made. It is the time to present your best arguments in a short statement about why your side should win. The summary should not usually exceed one or two pages.

i. Argument

The brief must include a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record. TEX. R. APP. P. 55.2(i). Further, the argument section should state the reasons the supreme court should hear the case, with specific reference to the factors listed in Rule 56.1(a). TEX. R. APP. P. 56.1(a).

A separate section detailing the reasons why the case is important to the jurisprudence of the state may be included. It is also helpful to explain how the opinion of the court of appeals will affect other litigants in addition to the petitioner. Cases of first impression are often taken by the supreme court.

The argument section should then discuss the substantive arguments made in the brief. Narrative labels are helpful and persuasive.

The respondent's argument must be limited to the issues in the petitioner's brief or issues asserted by the respondent in its statement of issues. TEX. R. APP. P. 55.3(e).

j. Prayer

A short conclusion that clearly states the nature of the relief sought is also required. TEX. R. APP. P. 55.2(j). The prayer should be specific. The Court cannot grant relief that is not requested in the brief. *See In re Columbia Med. Ctr. of Las Colinas*, 306 S.W.3d 246 (Tex. 2010) (orig. proceeding) (per curiam); *Cont'l Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 455 (Tex. 1996).

Practice Tip: A petitioner should be sure to analyze whether it is seeking rendition, remand, or both and specifically state the relief requested in the prayer. Remand to the court of appeals should be considered.

k. Certificate of service

The certificate of service required on briefs filed in appellate courts must include more detailed information than is typical in general trial practice. The certificate of service must be signed by the person who made the service and must state the following:

(1) the date and manner of service;
(2) the name and address of each person served; and
(3) if the person served is a party's attorney, the name of the party represented by that attorney.

TEX. R. APP. P. 9.5(e). Further, the brief must be served on all parties to the appeal. TEX. R. APP. P. 9.5(a).

l. Certificate of compliance

The certificate of compliance relates to the word-count limitations for briefs in Rule 9.4. TEX. R. APP. P. 9.4. All computer-generated briefs must certify the number of words in the document. *Id.* This may be calculated based on the word-count tool of the computer program. *Id.*

m. Appendix

The supreme court usually reviews a petition for review without having the record on appeal, although any justice can request that the record from the court of appeals be filed with the clerk of the supreme court at any time. TEX. R. APP. P. 54.1; *see* Hawthorne, *Supreme Court of Texas Internal Operating Procedures*, *supra*, at 12. Because the supreme court does not usually have the record at that time, the rules require that an appendix must be filed with the petition for review.

There are no rules regarding an appendix for briefs on the merits; thus, an appendix is not required. *See* TEX. R. APP. P. 55. This is because the court usually requests the record at the same time it requests briefs on the merits.

4. Importance to the jurisprudence of the state

When drafting the petitioner's brief on the merits, it is essential to include a discussion of how the issues raised in the brief are important to the jurisprudence of the state. *See generally* Elizabeth V. "Ginger" Rodd, *What is Important to the State's Jurisprudence?*, in STATE BAR OF TEXAS, PRACTICE BEFORE THE SUPREME COURT (2003). The supreme court considers several factors in determining what issues are important to the jurisprudence of the state to warrant review. These factors include:

(1) whether the justices of the court of appeals disagree on an important point of law;
(2) whether there is a conflict between the courts of appeals on an important legal issue raised in the brief;
(3) whether the case involves the construction or validity of a statute;
(4) whether the case involves a constitutional issue;
(5) whether the court of appeals appears to have committed an error of law of such importance to the state's jurisprudence that it should be corrected; and
(6) whether the court of appeals decided an important question of state law that should be, but has not been, resolved by the Supreme Court.

TEX. R. APP. P. 56.1(a); *see also* TEX. GOV'T CODE ANN. § 22.001. It is important to keep these factors in mind when drafting the brief on the merits so that you are able to sufficiently demonstrate the importance of the issues to the jurisprudence of the state.

Practice Tip: Remember that at the time you are filing the petitioner's brief on the merits, your case has not yet been granted. Therefore, you must make sure to clearly explain the importance of the issues to the jurisprudence of the state.

5. Filing requirements for petitioner's brief on the merits

Briefs on the merits are to be filed in accordance with the schedule set forth in the clerk's notice that the Court has requested briefs on the merits. TEX. R. APP. P. 55.7. If a schedule is not stated in the notice, the petitioner must file a brief on the merits within thirty days after the date of the notice. *Id.* The respondent must file a brief in response within twenty days after receiving the petitioner's brief. *Id.* The petitioner then must file any reply brief within fifteen days after receiving the respondent's brief on the merits. *Id.* To request an extension of time to file a merits brief, a party must file a motion that complies with TEX. R. APP. P. 10.5(b) either before or after the brief is due. TEX. R. APP. P. 55.7; *see also supra* Part III (motion for extension, generally); Part IX.C (motion for extension of time to file brief in the court of appeals). The briefs on the merits must be filed with the supreme court clerk. *See* TEX. R. APP. P. 53.7(a).

6. Electronic filing

a. Electronic filing requirements

E-filed documents are considered timely filed if e-filed at any time before midnight (central time) on the date the document is due. TEX. R. APP. P. 9.2(c). Generally, e-filed documents are deemed filed when the document is transmitted to the e-filer's EFSP. *Id.* There are exceptions, however. If a document is filed on a weekend or legal holiday, it will be deemed filed on the next business day that is not a holiday. *Id.* If a document requires a motion and order permitting its filing, it will be deemed filed on the date the motion is granted. *Id.* A party make seek relief from the court if a filing is untimely due to a technical failure or system outage. *Id.* A document is considered timely filed if it is e-filed at any time before midnight (in the Court's time zone) on the date on which the document is due. *Id.*

b. Format of electronic documents

An e-filed document must be formatted in accordance with Texas Rule of Appellate Procedure 9.4. The "paper" requirements in Rule 9.4(b)-(c) apply equally to a "page" of the e-filed document. An e-filed document must be in text-searchable PDF format, compatible with the latest version of Adobe Reader. Appendix materials may be scanned if necessary, but scanning should be avoided. An appendix must be combined into one computer file with the document it is associated with, unless the combined file would exceed the size limits. If an appendix contains more than one item, it must include a table of contents and either bookmarks or separator pages with the title of the item immediately following and any number or letter associated with the item in the table of contents. Any scanned document must be searchable. An e-filed document may contain hyperlinks. Hyperlinks within the appendix are also permitted. Notably, the court

may strike an e-filed document for non-compliance with these rules.

c. Texas Appeals Management and eFiling System ("TAMES")

The court's case management gives lawyers the ability to locate cases and case documents with a single search. The system provides instant dissemination of records to the judges handling appeals, and it will enable judges to circulate, discuss, and vote on opinions.

d. Tips for improving the electronic version of briefs on the merits

Some helpful tips for improving your electronic brief can be found in the article, *Guide to Creating Electronic Appellate Briefs* by Blake A. Hawthorne, the clerk of the Court. Some tips include:

- converting documents directly to PDF instead of scanning, including the appendix;
- effectively using bookmarks to assist in locating appendix materials;
- creating hyperlinks to internet resources; and
- including a picture or video if helpful to your case.

The full article is available at http://www.supreme.courts.state.tx.us/pdf/guidetocreatingelectronicappellatebriefs.pdf.

Federal:

Formal requirements for merits briefs

The brief on the merits must conform with Rule 24 of the Supreme Court Rules. The brief must contain:

(a) the questions presented for review;
(b) a list of all parties;
(c) a table of contents and table of cited authorities (if the brief exceeds 1500 words);
(d) citations of the official and unofficial reports of the opinions and orders entered in the case by courts and administrative agencies;
(e) a statement of the grounds of jurisdiction;
(f) the constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case;
(g) a concise statement of the case;
(h) a summary of the argument;
(i) the argument; and
(j) a conclusion.

SUP. CT. R. 24.1. Additionally, all briefs must include a corporate disclosure statement unless such a statement was included in documents previously filed with the Court, in which case the earlier document can be referenced, except where such statement appeared in a document typewritten on standard paper pursuant to SUP. CT. R. 33.2. If there are no entities that must be disclosed, the document must include a notation to that effect. *Id.*

The brief, the response, and any reply must be printed in accordance with Rule 33 of the Supreme Court Rules. *Id*. The brief and response are limited to 15,000 words, and a reply brief is limited to 6,000 words, excluding certain specified parts. SUP. CT. R. 33.1(d), (g). The brief, response, and reply require a certificate of compliance with the word-count limitation. SUP. CT. R. 24.3, 33.1(h). The colors of the brief covers must be as follows:

brief on the merits - light blue
response to brief on the merits - light red
reply brief on the merits - yellow

SUP. CT. R. 33.1(g). Forty copies of each brief must be filed and three copies shall be served on each party separately represented. SUP. CT. R. 25.1-.3, 29.3. A separate proof of service must also be presented to the clerk. SUP. CT. R. 25.7, 29.5.

Once the printed versions of the briefs have been filed, the Supreme Court Rules now require that an "electronic version of every brief on the merits" also be transmitted to the Clerk of the Court, and to opposing counsel. SUP. CT. R. 29.3; *see also* SUP. CT. R. 25.9.

Timeline for filing merits briefs

The brief on the merits is due within forty-five days of the order granting the writ of certiorari. SUP. CT. R. 25.1. The response to the brief on the merits is due within thirty days after receipt of the brief on the merits. SUP. CT. R. 25.2. The reply brief must be filed within thirty days after receipt of the response to the brief on the merits, but any reply brief must actually be received by the clerk no later than 2:00 p.m. one week before the date of oral argument. SUP. CT. R. 25.3.

Extension of time to file merits briefs

The time for filing the brief on the merits and response may be enlarged upon application seeking an extension, although such extensions generally are disfavored. SUP. CT. R. 25.4. For good cause shown, the time limits for filing the joint appendix may also be enlarged. SUP. CT. R. 26.8.

The application for extension must be filed within the period sought to be extended. SUP. CT. R. 30.2. The application may be presented in the form of a letter to the clerk. SUP. CT. R. 30.3, 30.4. However, an application to extend the time within which to file the reply brief on the merits must be directed to the Justice who oversees the court of appeals from which the case originated. SUP. CT. R. 30.3. The application must be filed on or before the due date for the reply brief. SUP. CT. R. 30.2.

C. Oral Argument

State:

If four justices vote to grant the petition for review, it is usually set for oral argument. *See* TEX. R. APP. P. 58.7(b), 59.2. After the court grants nine petitions, the justices draw for their opinions. *See* Hawthorne, *Supreme Court of Texas Internal Operating Procedures*, *supra*, at 19. After the court grants a petition, copies of the briefs are distributed to the entire court. Generally, by the time of oral argument, most of the justices have read the briefs.

The clerk will notify counsel that the application was granted and the date that the cause is scheduled for submission. TEX. R. APP. P. 56.4, 59.2. The court normally allows twenty minutes per side for argument, but often varies the amount of time depending on the complexity of the case. *See* TEX. R. APP. P. 59.4. Not more than two counsel on each side will be heard except on leave of court. TEX. R. APP. P. 59.5.

After oral argument, the court discusses the cause at the next conference. The assigned author will usually have drafted a post-submission memo detailing his or her views on the main issues. At conference, the assigned author will first discuss his or her thoughts on the case, then the court proceeds around the conference table, with each justice sharing his or her opinion.

If the assigned author is clearly in the minority, that justice may agree to circulate the first opinion as a dissent. The assigned author generally has sixteen weeks to circulate a draft opinion. Otherwise, any justice may circulate a draft. The assigned author has eight weeks to circulate a redraft, and any other justice has six weeks to write a concurrence or dissent.

The court may also submit the case without oral argument and issue a per curiam opinion on the affirmative vote of at least six Justices. TEX. R. APP. P. 59.1; *see also City of McAllen v. De La Garza*, 898 S.W.2d 808, 812 (Tex. 1995) (Cornyn, J., dissenting). If, however, four justices also vote to grant the petition, it will be granted as a regular cause and be submitted in the matter discussed above rather than by per curiam disposition. A per curiam opinion is normally written by the justice who prepared the study memo; the authoring justice has thirty days to circulate a draft of the opinion or the case will be automatically returned to the application agenda.

A per curiam opinion may state that it is the opinion of a majority of the court; the names of the justices not voting for a per curiam opinion are not listed. If a member of the court wants to file a dissenting or concurring opinion, the per curiam opinion is changed to a regular signed opinion. *E.g.*, *Brownsville Navigation Dist. v. Izaguirre*, 829 S.W.2d 159 (Tex. 1992); *Scott v. Twelfth Court of Appeals*, 843 S.W.2d 439 (Tex. 1992) (orig. proceeding). The court also uses per curiam opinions for other opinions, such as concurring opinions. *See, e.g.*, *Hines v. Hash*, 843 S.W.2d 464 (Tex. 1992); *Greathouse v. Charter Nat'l Bank-Southwest*, 851 S.W.2d 173 (Tex. 1992); *Delaney v. Univ. of Houston*, 835 S.W.2d 56 (Tex. 1992).

Per curiam opinions may involve a court of appeals' opinion that conflicts with a Texas Supreme Court decision or a rule of procedure. Per curiam opinions are usually short, often only two or three pages in length, and normally reverse the judgment of the court of appeals on one dispositive point of error. *See generally* R. Michael Northrup, *Per Curiam Review in the Supreme Court*, THE APPELLATE ADVOCATE, at 5 (1990).[20]

Federal:

Although the scheduling of oral argument is within the Court's discretion, a case generally will not be called for argument less than two weeks after the respondent's brief on the merits is due. SUP. CT. R. 27.1.

The Court usually allows thirty minutes per side for oral argument. SUP. CT. R. 28.3. Only one attorney will be allowed to argue for each side except in unusual circumstances. SUP. CT. R. 28.4. Requests for additional argument time must be made no later than seven days after the respondent's brief on the merits is filed, but such requests are "rarely" granted. SUP. CT. R. 28.3.

D. Rehearing

State:

Motions for rehearing are limited to 4500 words (or 15 pages if not computer generated) and must be filed within fifteen days after the court's judgment or order disposing of a petition for review. TEX. R. APP. P. 52.9, 64.1. The affirmative vote of four justices is required to grant a motion for rehearing on denial of a petition for review and the vote of five justices to grant rehearing on a cause. The fee for the motion for rehearing is $15.

No response to a motion for rehearing need be filed unless requested by the court. TEX. R. APP. P. 64.3. Although a motion for rehearing generally will not be granted unless a response is requested or filed, the court in exceptional cases may deny the right to file a response and act on the motion any time after it is filed. *Id*; *see also Terrazas v. Ramirez*, 829 S.W.2d 712, 755 (Tex. 1991) (orig. proceeding) (opinion on motion for leave to file motion for rehearing). The court will not entertain a second motion for rehearing on the same judgment. TEX. R. APP. P. 64.4.

A motion for rehearing on a petition is sent to every member of the court. However, it assigned to the Justice who prepared the majority opinion. The Court allows the justice to whom the motion is assigned to prepare a conference memorandum on the motion for rehearing.

[20] Although this article predates the 1990 and 1997 rules changes, it provides an excellent discussion of the Texas Supreme Court's use of per curiam disposition.

The motion is then placed on the court conference agenda.

Federal:

A petition for rehearing of any judgment or decision of the Court on the merits or of an order of the Court denying a petition for writ of certiorari must be filed within twenty-five days after the entry of the judgment or decision or order of denial. SUP. CT. R. 44.1, 44.2. The fee for a petition for rehearing is $200. SUP. CT. R. 38(b). No response should be filed unless requested by the Court. SUP. CT. R. 44.3. Forty copies of the petition for rehearing must be filed. SUP. CT. R. 44.1. The color of the cover must be tan and the petition cannot exceed 3,000 words. SUP. CT. R. 33.1(g).

A petition for rehearing is not subject to oral argument and the petition will not be granted "except by a majority of the Court, at the instance of a Justice who concurred in the judgment or decision." SUP. CT. R. 44.1.

E. Extension of Time for Rehearing

State:

An extension of time to file the motion for rehearing may be granted if a motion that complies with Rule 10.5(b) reasonably explaining the need for the extension is filed with the supreme court not later than fifteen days after the last day for filing the motion for rehearing. TEX. R. APP. P. 10.5(b), 64.5. The fee for such a motion for extension is $10.

Federal:

An application to enlarge the time to file a petition for rehearing must be acted on by the Supreme Court or a Justice. SUP. CT. R. 44.1; *see* SUP. CT. R. 30.3. The application must be filed on or before the due date for the petition for rehearing. SUP. CT. R. 30.2.

XI. CONCLUSION

While state and federal appellate practice have grown increasingly similar, differences remain. Timetables for appeal are triggered by different events, the terminology is different, and the deadlines and procedures for appeal are different. Making assumptions about the procedure in one appellate system based on familiarity with the other appellate system will often prove fatal.