AN OVERVIEW OF CIVIL APPEALS IN THE INTERMEDIATE COURTS OF APPEAL

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I. INTRODUCTION

A. Scope of Paper. This paper offers an overview of the appellate rules applicable to civil appeals and original proceedings in the intermediate appellate courts and includes friendly suggestions for effective appellate advocacy. The opinions are solely attributable to the authors and may not represent the opinion of each justice sitting on the Thirteenth Court of Appeals.

B. Resources. Before filing the notice of appeal or original proceeding, practitioners should investigate the rules that are specifically applicable to the court in which they seek review. Basic resources include the Texas Rules of Appellate Procedure and the officially adopted local rules, if any, for the court in which the attorney is practicing. Most appellate courts also post additional information about their policies and practices on their websites. Note that where local rules conflict with the appellate rules, the Texas Rules of Appellate Procedure will govern. TEX. R. APP. P. 1.2(a).

C. Client Communication. Practitioners should advise clients that an appeal should only be pursued in a good faith belief that the trial court has committed error or that there is a reasonable basis for the extension, modification, or reversal of existing law, or that an appeal is otherwise warranted. Counsel should explain the appellate process to their clients, including an estimate for the length of time before the appeal will be resolved. Information regarding the average disposition time for cases in the appellate courts can be found online at www.courts.state.tx.us.

D. Communication with the Court. Parties and counsel may communicate with the appellate court about a case only through the clerk. *See id.* R. 9.6. Although appellate court clerks cannot assist the parties with substantive issues concerning the specific case, the clerks can and should assist the parties with general procedural questions about practicing in their court.

II. JURISDICTION

A. Generally. Appellate jurisdiction is never presumed. *See Brashear v. Victoria Gardens of McKinney, L.L.C*., 302 S.W.3d 542, 546 (Tex. App.—Dallas 2009, no pet.). Appellate courts are required to review sua sponte issues affecting jurisdiction. *M.O. Dental Lab. v. Rape*, 139 S.W.3d 671, 673 (Tex. 2004) (per curiam). In terms of appellate jurisdiction, appellate courts only have jurisdiction to review final judgments and certain interlocutory orders identified by statute. *Lehmann v. Har-Con Corp*., 39 S.W.3d 191, 195 (Tex. 2001).

B. Orders following Trial. The Texas Supreme Court employs a "long recognized" presumption of finality for judgments that follow a trial on the merits. *Vaughn v. Drennon*, 324 S.W.3d 560, 562 (Tex. 2010) (per curiam); *Moritz v. Preiss*, 121 S.W.3d 715, 718 (Tex. 2003); *N. E. Indep. Sch. Dist. v. Aldridge*, 400 S.W.2d 893, 895 (Tex. 1966). The presumption originated in *Aldridge* and states:

> When a judgment, not intrinsically interlocutory in character, is rendered and entered in a case regularly set for a conventional trial on the merits, no order for a separate trial of issues having been entered pursuant to [our procedural rules], it will be presumed for appeal purposes that the Court intended to, and did, dispose of all parties legally before it and of all issues made by the pleadings between such parties.

400 S.W.2d at 897–98. Under this presumption, "any judgment following a conventional trial on the merits creates a presumption that the judgment is final for purposes of appeal." *Vaughn*, 324 S.W.3d at 561; *see also Nguyen v. Nguyen*, 355 S.W.3d 82, 87 (Tex. App.—Houston [1st Dist.] 2011, pet. denied); *Good v. Baker*, 339 S.W.3d 260, 265 (Tex. App.—Texarkana 2011, pet. denied).

C. Orders without Trial. In contrast, when there has been no traditional trial on the merits, no presumption arises regarding the

finality of a judgment. *Crites v. Collins*, 284 S.W.3d 839, 841 (Tex. 2009). In *Lehmann v. Har-Con Corp*., the Texas Supreme Court held that a judgment is final for purposes of appeal "if and only if either it actually disposes of all claims and parties then before the court, regardless of its language, or it states with unmistakable clarity that it is a final judgment as to all claims and all parties." 39 S.W.3d at 192–3. Where the intent to finally dispose of the case is unequivocally expressed in the words of the order itself, the order is final and appealable even if the record does not provide an adequate basis for rendition of judgment. *Id*. at 200. In such a case, an express adjudication of all parties and claims in a case is not interlocutory merely because the record does not afford a legal basis for the adjudication, and in those circumstances, the order must be appealed and reversed. *Id*. at 204. If there is any doubt as to the judgment's finality, then "[f]inality must be resolved by a determination of the intention of the court [as] gathered from the language of the decree and the record as a whole, aided on occasion by the conduct of the parties." *Id.* at 203 (internal quotations omitted). Such a fact-specific determination is made on a case-by-case basis. *See Sultan v. Mathew*, 178 S.W.3d 747, 751 (Tex. 2005).

D. Severance. As a rule, the severance of an interlocutory judgment into a separate cause makes it final. *Diversified Fin. Sys., Inc. v. Hill, Heard, O'Neal, Gilstrap & Goetz, P.C*., 63 S.W.3d 795, 795 (Tex. 2001) (per curiam) (citing *Farmer v. Ben E. Keith Co*., 907 S.W.2d 495, 496 (Tex. 1995) (per curiam)). A court can, however, "condition[] the effectiveness of the severance on a future certain event, such as . . . payment of fees associated with the severance by the party requesting it." *McRoberts v. Ryals*, 863 S.W.2d 450, 453 n.3 (Tex. 1993); *see also Diversified*, 63 S.W.3d at 795. This practice, though permitted, should be avoided because of the potential for confusion. *See, e.g., Jane Doe 1 v. Pilgrim Rest Baptist Church*, 218 S.W.3d 81, 82 (Tex. 2007) (per curiam).

E. Probate Proceedings. Probate proceedings are an exception to the "one final judgment" rule because in such cases, "multiple judgments final for purposes of appeal can be rendered on

certain discrete issues." *Lehmann*, 39 S.W.3d at 192. The need to review "controlling, intermediate decisions before an error can harm later phases of the proceeding" justifies this rule. *Brittingham-Sada de Ayala v. Mackie*, 193 S.W.3d 575, 578 (Tex. 2006); *see Crowson v. Wakeham*, 897 S.W.2d 779, 783 (Tex. 1995). In *Crowson*, the supreme court adopted the following test for probate proceedings:

> If there is an express statute, such as the one for the complete heirship judgment, declaring the phase of the probate proceedings to be final and appealable, that statute controls. Otherwise, if there is a proceeding of which the order in question may logically be considered a part, but one or more pleadings also part of that proceeding raise issues or parties not disposed of, then the probate order is interlocutory.

Id. at 783; *see Brittingham-Sada de Ayala*, 193 S.W.3d at 578.

F. Nonsuit. Appellate timetables do not run from the date a nonsuit is filed, but rather from the date the trial court signs an order of dismissal. *See In re Bennett*, 960 S.W.2d 35, 38 (Tex. 1997) (orig. proceeding) (per curiam); *see Farmer*, 907 S.W.2d at 496 ("The appellate timetable does not commence to run other than by a signed, written order, even when the signing of such an order is purely ministerial.").

III. ACCELERATED APPEALS

A. Generally. Interlocutory appeals are fairly rigid in nature. They are created solely by statute, the right to appeal under such statutes is strictly construed, the deadlines for perfecting appeal are truncated, and the scope of review on appeal is limited. The careful practitioner should be conscious that older case law construing statutes authorizing interlocutory appeals may be inapplicable to present cases given frequent statutory amendments and amendments to the appellate rules.

B. Strict Construction. Statutes providing for interlocutory appeals are to be construed strictly as exceptions to the general rule that only final judgments are appealable. *City of Houston v. Estate of Jones*, 388 S.W.3d 663, 666 (Tex. 2012) (per curiam); *Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 841 (Tex. 2007); *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 355 (Tex. 2001).

C. Definition. Accelerated appeals include appeals from interlocutory orders, when allowed by statute, appeals in quo warranto proceedings, appeals required by statute to be accelerated or expedited, and appeals required by law to be filed or perfected within less than 30 days after the date of the order subject to appeal. *See* TEX. R. APP. P. 28.1(a). An accelerated appeal is not the same as an appeal given precedence, or priority, over other appeals. An accelerated appeal generally arises from an interlocutory order, will have a limited record, and will be subject to shortened appellate deadlines. In contrast, an appeal given precedence may arise after a full trial or decision on the merits, may have a full record, and is not subject to shortened deadlines for appeal. However, according to the appellate rules, an appeal given precedence should be decided more quickly than other cases. *See id.* R. 40.1. An appeal may be accelerated or given precedence over other appeals, or both. The notice of appeal and docketing statement must both state that the appeal is accelerated. *Id.* R. 25.1(d)(6), 32.1(g).

D. Statutes. Although there are myriad statutes in various codes that allow interlocutory appeals, section 51.014 of the Texas Civil Practice and Remedies Code is the primary statutory authority for interlocutory appeals; it delineates several categories of interlocutory orders that can be appealed from a district court, county court at law, or county court. *See generally* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (West Supp. 2012).

E. Deadline to File Notice of Appeal. As a general rule, in an accelerated appeal, the notice of appeal must be filed within 20 days after the judgment or order is signed. *See* TEX. R. APP. P. 26.1(b). As in other appeals, courts may grant a fifteen day extension of time to file a notice of appeal in an accelerated

appeal. *See* TEX. R. APP. P. 28.1(b), 26.3. However, some accelerated appeals, such as appeals of orders requiring court-ordered mental health services brought under the Texas Health and Safety Code, require a shorter deadline. *See, e.g.,* TEX. HEALTH & SAFETY CODE ANN. § 574.070(b) (West 2010). Counsel should examine the statutory basis for the appeal to ensure that the deadline is not shorter than provided in the appellate rules.

F. Postjudgment Motions. Unlike in ordinary appeals, post-judgment motions will not extend the deadline to file a notice of appeal in an accelerated appeal. *See id.* R. 28.1(b) ("Filing a motion for new trial, any other post-trial motion, or a request for findings of fact will not extend the time to perfect an accelerated appeal."). "Allowing such post-order motions to automatically delay the appellate deadline is simply inconsistent with the idea of accelerating the appeal in the first place." *In re K.A.F.*, 160 S.W.3d 923, 927 (Tex. 2005) (orig. proceeding).

G. Record. The appellate record must be filed within 10 days after the judgment or appealable order was signed. TEX. R. APP. P. 35.1(c). In lieu of the clerk's record, the appellate court may hear an accelerated appeal on the original papers forwarded by the trial court or on "sworn and uncontroverted copies" of those papers. *Id.* 28.1(e). Unlike the situation in original proceedings, a party pursuing an accelerated appeal must obtain the consent of opposing parties to use a sworn record. *See In re Tex. Natural Res. Conservation Comm'n*, 85 S.W.3d 201, 207 (Tex. 2002).

H. Briefs. The appellant's brief must be filed within 20 days after the record is filed. TEX. APP. P. 38.6(a). The appellee's brief must be filed within 20 days after the appellant's brief is filed. *Id*. R. 38.6(b). The appellant's reply brief, if any, must be filed within 20 days after the appellee's brief is filed. *Id.* R. 38.6(c). Note, however, the appellate court may allow the case to be submitted without briefs. *Id.* R. 28.1(e); *see, e.g., City of McAllen v. McAllen Police Officers Union*, 221 S.W.3d 885, 891 (Tex. App.—Corpus Christi 2007, pet. denied); *City of Sherman v. Eiras*, 157 S.W.3d 931, 931 (Tex. App.—Dallas 2005, no pet.). However, "when a court does not have the benefit of briefing or argument, it must step out of its appropriate role as neutral arbiter and into the

unnatural role of advocate," and, therefore, a court will exercise its discretion to dispense with briefing only in "extraordinary circumstances." *See In re J.S.*, 136 S.W.3d 716, 717 (Tex. App.—El Paso 2004, no pet.) (citations and quotations omitted). The appellate court, not the appellant, possesses the discretion to dispense with briefing, and an appellant who believes that briefs are unnecessary must file a proper motion, accompanied by the appropriate filing fee, and must demonstrate why briefs should not be required. *See id*.

I. Scope of Review. In an interlocutory appeal, an appellate court may review only those issues made appealable by statute and may not review extraneous issues. *See, e.g., Astoria Indus. of Iowa, Inc. v. SNF, Inc.*, 223 S.W.3d 616, 627 (Tex. App.—Fort Worth 2007, pet. denied). When a litigant challenges an order that is both appealable and unappealable, an appellate court will generally review the portion of an order which is appealable and refuse to consider the portion which is not-appealable. *See e.g., Waite v. Waite*, 64 S.W.3d 217, 224 n.6 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). Note, however, that a court may also review any subsidiary issues that are necessary to a decision on the merits of the applicable order. *See Letson v. Barnes*, 979 S.W.2d 414, 417 (Tex. App.—Amarillo 1998, pet. denied) ("Yet, to the extent that the subject matter of the non-appealable interlocutory order may affect the validity of the appealable order, the non-appealable order may be considered.").

IV. PERMISSIVE APPEALS

A. Generally. Permissive interlocutory appeals are provided by statute in the Texas Civil Practice and Remedies Code. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d). The 2011 amendments to the statute, which apply only to cases commenced on or after September 1, 2011, eliminated the prior requirement that the parties agree to the appeal and reinstated a requirement that the court of appeals grant permission to appeal. Cases that were filed in the trial court before September 1, 2011 are governed by Rule 28.2. Cases filed thereafter are governed by 501.014(d)-(f), Texas Rule of Civil Procedure 168, which governs the

procedure for obtaining permission to appeal from the trial court, and Texas Rule of Appellate Procedure 28.3, which governs the procedure for obtaining appeal from the appellate court.

B. Trial Court. The trial court can grant permission for a permissive appeal on a party's motion or sua sponte. *See* TEX. R. CIV. P. 168. The permission to appeal must be included in the order subject to appeal, not separately, and must specifically identify the controlling question of law as to which there is a substantial ground for difference of opinion, and must state why an immediate appeal may materially advance the ultimate termination of the litigation. *See id.* An order previously issued may be amended to include such permission. *Id.*

C. Appellate Court. A petition for permissive appeal must include the information delineated in Rule 28.3. *See* TEX. R. APP. P. 28.3(e). The petition for permissive appeal is filed with the clerk of the appellate court within 15 days after the order to be appealed is signed. *See id.* R. 28.3(c0. If the order to be appealed is amended to include the trial court's permission to appeal, the deadline for filing the petition will run from the date of the amended order. *Id.* A party can obtain an extension of time of up to 15 days to file the petition for permissive appeal if it files a motion complying with Rule 10.5(b). *Id.* R. 28.3(d). Any other party can file a response or cross-petition within 10 days. *Id.* R. 28.3(f). A reply may be filed within 7 days. *Id.* The appellate court can extend the deadlines for responses, cross-petitions, or replies. *Id.* The petition for permissive appeal must contain a clear and concise argument regarding why the order subject to appeal involves "a controlling question of law as to which there is a substantial ground for difference of opinion;" and an immediate appeal "may materially advance the ultimate termination of the litigation." *Id.* R. 28.3(e)(4).

D. Substantive Ruling. In order to obtain a permissive appeal, the trial court must make a substantive ruling on the controlling question of law that is the subject of the agreed interlocutory appeal. *See Bank of N.Y. Mellon v. Guzman*, 390 S.W.3d 593, 595–96 (Tex. App.—Dallas 2012, no pet.); *Colonial County Mut. Ins. Co. v. Amaya*, 372 S.W.3d 308, 310–11 (Tex. App.—Dallas

2012, no pet.); *State Fair of Tex. v. Iron Mountain Information Mgmt., Inc*., 299 S.W.3d 261 264 (Tex. App.—Dallas 2009, no pet.). According to *Gulley v. State Farm Lloyds*, section 51.014(d) does not contemplate use of an immediate appeal as a mechanism to present, in effect, a "certified question" similar to the procedure used by federal appellate courts in certifying a determinative question of state law to the Texas Supreme Court. 350 S.W.3d 204, 207–08 (Tex. App.—San Antonio 2011, no pet.).

E. Limitations. Courts have refused to allow permissive appeal for pretrial evidentiary rulings or summary judgment proceedings where there are disputed issues of fact. *See, e.g., Gunter v. Empire Pipeline Corp*., No. 05-12-00249-CV, 2013 Tex. App. LEXIS 153, at **4–5 (Tex. App.—Dallas Jan. 9, 2013, no pet.) (concluding that an order granting a motion to quash deposition and protective order was neither a controlling question of law nor would it materially advance the ultimate termination of the litigation where it appeared "the parties are attempting to use an order on a motion to quash as a vehicle for obtaining a pretrial evidentiary ruling as to the ultimate admissibility of evidence"); *Diamond Prods. Int'l v. Handsel*, 142 S.W.3d 491, 494 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (construing predecessor statute) (concluding that the scope of a permissive appeal does not include an appeal of a summary judgment when the facts are disputed).

F. Disposition. Where appellate courts conclude that the requirements for a permissive appeal have not been met, some dismiss for want of jurisdiction and others simply deny permission to appeal. Some courts refuse permissive appeal but rule on the merits of the issue presented nevertheless. *See, e.g., Tex. Farmers Ins. Co. v. Minjarez*, No. 8-12-00272-CV, 2012 Tex. App. LEXIS 9043, at **3–4 (Tex. App.—El Paso Oct. 31, 2012, no pet.) (mem. op.).

V. ORIGINAL PROCEEDINGS

A. Generally. Although mandamus is not an equitable remedy, its issuance is largely controlled by equitable principles. *In re*

Southwestern Bell Tel. Co., L.P., 226 S.W.3d 400, 404 (Tex. 2007) (orig. proceeding). The format for a petition for writ of mandamus is strictly prescribed by the appellate rules, and an appellate court may deny a petition, without specifying a reason, for either technical or substantive deficiencies. *See* TEX. R. APP. P. 52.8(d) ("When denying relief, the court may hand down an opinion but is not required to do so."). To avoid such a possibility, a careful practitioner should review Rule 52 prior to filing to ensure full compliance with the requirements.

B. Standard. Mandamus relief is proper to correct a clear abuse of discretion when there is no adequate remedy by appeal. *In re Frank Kent Motor Co.*, 361 S.W.3d 628, 630 (Tex. 2012) (orig. proceeding); *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding). Appellate courts "are not divested of mandamus jurisdiction because we lack appellate jurisdiction." *In re AutoNation, Inc.*, 228 S.W.3d 663, 667 (Tex. 2007) (orig. proceeding). The relator has the burden of establishing both prerequisites to mandamus relief. *In re CSX Corp.*, 124 S.W.3d 149, 151 (Tex. 2003) (orig. proceeding). This burden is a heavy one. *See In re Epic Holdings, Inc.*, 985 S.W.2d 41 (Tex. 1998) (orig. proceeding).

C. Abuse of Discretion. A trial court abuses its discretion if it reaches a decision so arbitrary and unreasonable as to constitute a clear and prejudicial error of law or if it clearly fails to correctly analyze or apply the law. *In re Cerberus Capital Mgmt., LP*, 164 S.W.3d 379, 382 (Tex. 2005) (per curiam) (orig. proceeding); *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding). A trial court has no discretion in applying the law to the facts or determining what the law is. *In re Frank Kent Motor Co.*, 361 S.W.3d at 630–31. "To satisfy the clear abuse of discretion standard, the relator must show 'that the trial court could reasonably have reached only one decision.'" *Liberty Nat'l First Ins. Co. v. Akin*, 927 S.W.2d 627, 630 (Tex. 1996) (orig. proceeding) (quoting *Walke*r, 827 S.W.2d at 840).

D. Adequacy of Remedy by Appeal. In determining whether appeal is an adequate remedy, appellate courts consider whether the benefits outweigh the detriments of mandamus review. *In re BP*

Prods. N. Am., Inc., 244 S.W.3d 840, 845 (Tex. 2008) (orig. proceeding). This requirement "has no comprehensive definition." *In re Ford Motor Co.*, 165 S.W.3d 315, 317 (Tex. 2005) (orig. proceeding). Whether a clear abuse of discretion can be adequately remedied by appeal depends on a careful analysis of costs and benefits of interlocutory review. *In re McAllen Med. Ctr., Inc*., 275 S.W.3d 458, 464 (Tex. 2008) (orig. proceeding). As this balance depends heavily on circumstances, it must be guided by analysis of principles rather than simple rules that treat cases as categories. *Id.* An appellate remedy is adequate when any benefits to mandamus review are outweighed by the detriments. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d at 136. An appellate court should also consider whether mandamus will allow the court "to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments" and "whether mandamus will spare litigants and the public 'the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.'" *In re Team Rocket, L.P*., 256 S.W.3d 257, 262 (Tex. 2008) (orig. proceeding) (quoting *Prudential*, 148 S.W.3d at 136).

E. Format. The petition must comply with general requirements for appellate filings. TEX. R. APP. P. 9.4. A petition and a response in an original proceeding in the court of appeals must be no longer than 15,000 words if computer-generated and 50 pages if not. *Id.* R. 9.4(i)(B). The petition must contain required information "under appropriate headings and in the order here indicated," including: the identity of parties & counsel, table of contents, index of authorities, statement of the case, statement of jurisdiction, issues presented, statement of facts, argument, prayer, certification, and an appendix. *See id.* R. 52.3. Note that under the certification requirement, the person filing the petition must certify that "every factual statement in the petition is supported by competent evidence included in the appendix or record. *Id.* R. 52.3(j). The petition must contain an appendix and it must contain a certified or sworn copy of the order complained of, or any other document showing the matter complained of, any order or opinion of the court of appeals if filed in the supreme court, the text of any rule, regulation, ordinance, statute or other

law, other than case law, on which the argument is based "unless voluminous or impracticable." *Id.* R. 52.3(k). If it is a writ of habeas corpus, the petition must include proof of restraint. *Id.* The petition must also include a record. *Id.* R. 52.7. The record "must" be filed and must contain certified or sworn copies of every document that is material to the relator's claim for relief and that was filed in any underlying proceeding and "a properly authenticated transcript of any relevant testimony from any underlying proceeding, including any exhibits offered in evidence, or a statement that no testimony was adduced in connection with the matter complained." *Id*. The record can be supplemented after it is filed. *Id.* The record and any supplemental record must be served on each party "those materials not previously served on that party as part of the record in another original appellate proceeding in the same or another court," and an index. *See id.* 52.7(c)(1),(2).

F. Oral or Written Order. Texas Rule of Appellate Procedure 52.3(k)(i) requires "a certified or sworn copy of any order complained of, or any other document showing the matter complained of." Mandamus may be based upon an oral ruling. *In re Nabors*, 276 S.W.3d 190, 192 (Tex. App.—Houston [14th Dist.] 2009, orig. proceeding); *In re Bill Heard Chevrolet, Ltd.*, 209 S.W.3d 311, 314 (Tex. App.—Houston [1st Dist.] 2006, orig. proceeding); *In re Bledsoe*, 41 S.W.3d 807, 811 (Tex. App.—Fort Worth 2001, orig. proceeding). However, an oral ruling is not subject to mandamus review unless the ruling is clear, specific, enforceable, and adequately shown by the record. *In re Bledsoe*, 41 S.W.3d at 81; *In re Perritt*, 973 S.W.2d 776, 779 (Tex. App.—Texarkana 1998, orig. proceeding).

G. Emergency Relief. The court, on motion of any party, "or on its own initiative," may "without notice" grant "any just relief" pending the court's action on the petition. TEX. R. APP. P. 52.10(b). If the petition includes a motion for temporary relief, the motion must include a certificate of compliance: the relator must notify or make a diligent effort to notify all parties by expedited means that a motion for temporary relief has been filed. *Id.* R. 52.10(a). As a condition of granting emergency relief, the court may require a bond to protect the opposing party or

parties. *See id.* R. 52.10b). "Unless vacated or modified, an order granting temporary relief is effective until the case is finally decided." *Id.* Any party may move the court at any time to reconsider an order granting temporary relief. *See id*. R. 52.10(c). An original proceeding must be commenced before an appellate court obtains jurisdiction to grant relief by motion under the Texas Rules of Appellate Procedure. *See In re Ramirez*, 133 S.W.3d 664, 664–65 (Tex. App.—Corpus Christi 2003, orig. proceeding); *In re Kelleher*, 999 S.W.2d 51, 52 (Tex. App.—Amarillo 1999, orig. proceeding).

H. Response and Reply. Any party can file a response to a petition, but it is not mandatory. However, an appellate court cannot grant any relief other than temporary relief before a response has been requested by the court. *See* TEX. R. APP. P. 52.4. The relator may file a reply to the response, however, "the court may consider and decide the case before a reply brief is filed." *See id*. R. 52.5.

I. Ministerial Duty. A writ of mandamus will issue to compel a public official to perform a ministerial act. *Anderson v. Seven Points*, 806 S.W.2d 791, 793 (Tex. 1991). An act is ministerial when the law clearly spells out the duty to be performed by the official with sufficient certainty that nothing is left to the exercise of discretion. *Id.* A writ of mandamus will not issue to compel a public official to perform an act which involves an exercise of discretion. *Id.* However, this rule is not without exception – a writ of mandamus may issue in a proper case to correct a clear abuse of discretion by a public official. *Id.*

J. Factual Disputes. If there are factual disputes, relief by mandamus is not appropriate. Appellate courts may not deal with disputed areas of fact in a mandamus proceeding. *In re Pirelli Tire, L.L.C*., 247 S.W.3d 670, 676 (Tex. 2007) (orig. proceeding); *In re Angelini*, 186 S.W.3d 558, 560 (Tex. 2006) (orig. proceeding).

K. Justiciable Interest. The relator must show a justiciable interest in the underlying controversy. *Terrazas v. Ramirez*, 829 S.W.2d

712, 723 (Tex. 1991). However, one does not have to be a party to the underlying litigation to seek relief. *Id.*

L. Demand and Refusal. As a general rule, mandamus will not issue to compel an action that has not first been demanded and refused. *See In re Perritt*, 992 S.W.2d 444, 446 (Tex. 1999) (orig. proceeding); *Terrazas v. Ramirez*, 829 S.W.2d 712, 723 (Tex. 1991) (orig. proceeding). This requirement can be excused if the request would be futile. *Terrazas*, 829 S.W.2d at 723.

M. Deadline. Although the rules do not provide a specific deadline for filing a petition for writ of mandamus, courts can deny relief on grounds the relator waited too long before filing the petition, even if the opposing party does not assert lack of diligence as ground for denying relief. The rationale for this principle is that although mandamus is not an equitable remedy, its issuance is controlled largely by equitable principles. *In re Users Sys. Servs., Inc*., 22 S.W.3d 331, 337 (Tex. 1999) (orig. proceeding); *Rivercenter Assocs. v*. *River*a, 858 S.W.2d 366, 367 (Tex. 1993). One such principle is that "equity aids the diligent and not those who slumber on their rights." *Rivercenter*, 858 S.W.2d at 367 (quoting *Callahan v. Giles*, 137 Tex. 571, 155 S.W.2d 793, 795 (Tex. 1941)). Thus, delaying the filing of a petition for mandamus relief may waive the right to mandamus unless the relator can justify the delay. *See In re Int'l Profit Assocs*., 274 S.W.3d 672, 676 (Tex. 2009) (orig. proceeding). Courts generally look for anything that constitutes a reasonable explanation for the delay. For instance, the Texas Supreme Court accepted relator's explanation for a six-month delay based on the length of time need to compile the reporter's record and relator's desire to file related matters at the same time. *In re SCI Tex. Funeral Servs*., 236 S.W.3d 759, 761 (Tex. 2007) (orig. proceeding). The Texas Supreme Court has also found it a reasonable explanation for delay where the relator delayed a year to file its mandamus petition because much of that time the action was stayed due to removal to federal court. *In re Southwestern Bell Tel. Co., L.P*., 235 S.W.3d 619, 624 (Tex. 2007) (orig. proceeding).

N. Jurisdiction. Petitions must be presented to the court of appeals before being presented to the supreme court where the courts

have concurrent jurisdiction "unless there is a compelling reason not to do so." TEX. R. APP. P. 52.3(e). If filing in the supreme court before filing in the intermediate appellate court, the petition must state the compelling reason why it was not first presented to the intermediate court. *See id.*

O. Subsequent Appeal. The writ of mandamus is a discretionary writ, and its denial, without comment on the merits, cannot deprive another appellate court from considering the matter in a subsequent appeal. *See Chambers v. O'Quinn*, 242 S.W.3d 30, 32 (Tex. 2007) (per curiam); *see also In re AIU Ins. Co.*, 148 S.W.3d 109, 119 (Tex. 2004) (orig. proceeding) (noting that "failure to grant a petition for writ of mandamus is not an adjudication of, nor even a comment on, the merits of a case in any respect, including whether mandamus relief was available").

P. Suggestions for Filing an Original Proceeding.

1. Follow Rule 52 precisely in original proceedings. Ensure that the record and appendix contain all essential documents for consideration by the court. Ensure that the certification is supported by evidence included in the appendix or record.

2. Use original proceedings sparingly.

3. Do the necessary research: do not file a petition for mandamus when there is a remedy by appeal.

4. If seeking emergency relief, consider telephoning the clerk's office and giving the court advance notice.

5. If seeking emergency relief, act promptly. Do not file a petition for writ of mandamus on the Friday before a Monday trial to complain about an order that was entered six months earlier.

VI. DOCUMENTS: GENERALLY

A. Adoption by Reference. Rule 9.7 allows any party to join in or adopt by reference all or any part of a brief, petition, response, motion, or other document filed in an appellate court by another party in the same case. *See* TEX. R. APP. P. 9.7.

B. Attorneys of Record. Lead counsel and other counsel of record are determined pursuant to Rule 6. *See id.* R. 6. If an out-of-state attorney wishes to practice before an appellate court, that attorney should file a motion in compliance with the government code requesting leave to appear. *See* TEX. R. GOV. BAR ADMIS. XIX (2012); TEX. GOV'T CODE ANN. § 82.0361 (West 2005).

C. Number. The number of documents required by each court varies, so check the local rules before filing to determine the number of paper copies required to be filed and any e-filing requirements. Unless modified by local rule, the Texas Rules of Appellate Procedure require an original and three copies of all documents in an original proceeding, an original and two copies of all motions in an appellate proceeding, and the original and five copies of all other documents. TEX. R. APP. P. 9.3(a)(1).

D. Form. The appellate rules have recently been amended regarding font size, length of documents, and an additional requirement for a certificate of compliance for certain computer-generated documents. *See generally id.* R. 9.4. A document filed with the court, unless the court accepts another form "in the interest of justice," must be on 8 ½ by 11 inch white or nearly white opaque paper with margins of at least one inch on all sides. *Id*. R. 9.4(b). The text must be double spaced, but footnotes, block quotations, short lists, and issues or points of error may be single spaced. *Id.* R. 9.4(d). A document produced on a computer must be printed in a conventional typeface no smaller than 14-point except for footnotes, which must be no smaller than 12-point. *Id*. R. 9.4(e). A typewritten document must be printed in standard 10-character-per-inch monospaced typeface. *Id.* Rule 9.4(i) governs the length of documents that may be filed and specifies what portions of the document are included and excluded in calculating length. *Id*. R. 9.4(i). A computer generated document that is subject to a word limit must include a "certificate of compliance" stating the number of words in the

document. *Id*. The person certifying may rely on the word count of the computer program used to prepare the document. *Id.*

E. Binding. A document must be stapled once in the top left hand corner or be bound so that it will lie flat when open. *Id.* R. 9.4(f). A petition or brief must have durable front and back covers which must not be plastic or be red, black, or dark blue. *Id.* The document's front cover must contain the style, number, title, name of the party filing the document, and the name, mailing address, phone number, fax number and State Bar number of the lead counsel for the filing party. *Id*. R. 9.4(g). If the party is requesting oral argument, the request must appear on the front cover of that party's first brief. *Id*. Appendices may be bound with their related documents or separately. *Id*. R. 9.4(h).

F. Service. Except for the record, the filing party must serve a copy of a filed document on all parties to the proceedings at or before the time of filing. *Id.* R. 9.5(a). Service on a party represented by counsel must be made on that party's lead counsel by personal service, mail, commercial delivery service, or by fax. *Id*. R. 9.5(b). Documents must contain proof of service in the form of an acknowledgment of service or a certificate of service. *Id.* R. 9.5(d) The certificate of service must be signed and contain the date and manner of service, the name and address of each person served, and if the person served is a party's attorney, the name of the party represented by that attorney. *Id*. R. 9.5(e).

G. Defects. As a general rule, appellate courts notify the parties of any defects and allow sufficient time for correction. *See generally id.* R. 44.3 ("A court of appeals must not affirm or reverse a judgment or dismiss an appeal for formal defects or irregularities in appellate procedure without allowing a reasonable time to correct or amend the defects or irregularities."). "[D]isposing of appeals for harmless procedural defects is disfavored." *Perry v. Cohen*, 272 S.W.3d 585, 587 (Tex. 2008) (per curiam). Nevertheless, counsel should attempt to cure any defect immediately. Failure of an attorney to cure a defect within the prescribed time may result in dismissal of the case. *See* TEX. R. APP. P. 42.3(b),(c).

H. Protection of Minor's Identity. In parental-rights termination cases and juvenile court cases, Rule 9.8 requires the redaction of a minor's identity in specified filings. However, note that "[n]othing in this rule permits alteration of the original appellate record except as specifically authorized by court order." *See id*. R. 9.8.

I. Docketing Statements. An appellant must file a docketing statement "[u]pon perfecting the appeal in a civil case." *Id.* R. 32.1. The docketing statement serves administrative purposes and does not affect the appellate court's jurisdiction. *See id*. R. 32.4. The docketing statement must include all specific information required by Rule 32.1. Failure to file a docketing statement after receiving notice that one is required could be grounds for dismissing the appeal. *Id.* R. 42.3(c)(appeal subject to dismissal where appellant has failed to comply with the rules, a court order, or a notice from the clerk requiring a response or other action within specified time). Docketing statements are used, inter alia, to consider the viability of ordering the appeal to mediation and to identify any potential jurisdictional problems with an appeal.

J. Suggestions for Filing.

1. Parties should ensure that their service of documents is prompt and as expeditious as possible, particularly when seeking emergency relief. Ideally, other parties should receive service of appellate filings at the same time as the appellate court; otherwise, slow service may result in sanctions.

2. Use the same color cover for the original brief and any subsequent briefs.

VII. NOTICE OF APPEAL

A. Generally. The timely filing of a notice of appeal vests the court of appeals with jurisdiction over the appeal. *See Sweed v. Nye*, 323 S.W.3d 873, 875 (Tex. 2010). An appeal is perfected when

a written notice of appeal is filed with the trial court clerk. TEX. R. APP. P. 25.1(a).

B. Who Files It. Texas Rule of Appellate Procedure 25.1 requires that "[a] party who seeks to alter the trial court's judgment or other appealable order must file a notice of appeal." *See id.* R. 25.1(c). The rule further provides that "[t]he appellate court may not grant a party who does not file a notice of appeal more favorable relief than did the trial court except for just cause." *Id.* A litigant must file a notice of appeal if it seeks greater relief than awarded in the judgment. *See City of Austin v. Whittington*, 384 S.W.3d 766, 789 (Tex. 2012).

C. Required Contents. The notice of appeal must include particular information about the appeal. *See* TEX. R. APP. P. 25.1(d). Specifically, the notice must identify the trial court and state the trial court number and style, state the date of the judgment or order appealed from; state that the party desires to appeal; state the court to which the appeal is taken; state the name of each party filing the notice of appeal; and include specific information regarding whether the appeal is accelerated or restricted, or brought by an indigent appellant. *See id.*

D. Deadlines. Appellate deadlines begin on the date that the trial court signs the judgment or other appealable order. *See* TEX. R. APP. P. 26.1(a)–(c); *Farmer v. Ben E. Keith Co.*, 907 S.W.2d 495, 496 (Tex. 1995). The notice of appeal must be filed within a certain number of days after the judgment or order is signed: 20 days for an accelerated appeal whether or not there are postjudgment motions, 30 days for a regular appeal with none of the requisite post judgment motions, 90 days for a regular appeal with specified post judgment motions, or 6 months for a restricted appeal. *See id.* R. 26.1. Texas Rule of Appellate Procedure 26.1 provides that an appeal is perfected when notice of appeal is filed within thirty days after the judgment is signed, unless a motion for new trial or other specified post-judgment motion is timely filed. TEX. R. APP. P. 26.1(a)(1). If a motion for new trial or other specified post-judgment motion is timely filed, the notice of appeal is due within ninety days after the judgment is signed. *See id.* R. 26.1(a)(1)–(4); *Lane Bank Equip. Co. v. Smith S.*

Equip., Inc., 10 S.W.3d 308, 310 (Tex. 2000) (holding that any post-judgment motion, no matter what it is called, will extend plenary power if it seeks a substantive change in the judgment and is filed within the time limits for a motion for new trial). A motion that extends the appellate deadlines must be filed within thirty days after the judgment or other order complained of is signed. TEX. R. CIV. P. 329b(a) (providing a thirty day deadline to file a motion for new trial); *Padilla v. LaFrance*, 907 S.W.2d 454, 458 (Tex. 1995); *see In re Brookshire Grocery Co*., 250 S.W.3d 66, 69-70 (Tex. 2008) (orig. proceeding) (holding that an amended or supplemental motion for new trial is timely, and may be filed without leave of court, if it is filed within thirty days of the judgment and the trial court has not overruled the earlier motion for new trial). Note, however, that not all post judgment motions will extend the time to file a notice of appeal (e.g., a request for findings of fact will not extend the time to file a notice of appeal from a summary judgment).

E. Extension of Time. Note that an extension of time to file the notice of appeal may be obtained under certain circumstances if the notice of appeal is filed within 15 days after that deadline. *See id.* R. 26.3, 10.5(b). The appellant must offer a "reasonable" explanation for the late filing. *Id.* R. 10.5(b); *Verburgt v. Dorner*, 959 S.W.2d 615, 617 (Tex. 1997). The Texas Supreme Court has stated that a reasonable explanation is "any plausible statement of circumstance indicating that [a timely] failure to file . . . was not deliberate or intentional, but was the result of inadvertence, mistake, or mischance." *Hone v. Hanafin*, 104 S.W.3d 884, 886 (Tex. 2003). The court has also clarified that "under the liberal standard of review applied in these cases, any conduct short of deliberate or intentional noncompliance qualifies as inadvertence, mistake or mischance . . . ." *Id.* at 886–87 (internal citations omitted).

F. No Notice of Judgment. If a potential appellant failed to receive notice of the trial court's judgment in a civil case, the party may be able to obtain additional time to file its notice of appeal. *See* TEX. R. APP. P. 4.2. When a party adversely affected by the judgment does not receive notice within twenty days of judgment, the period for filing the appeal begins to run from the date the

party received notice, provided no more than ninety days have elapsed since the date the judgment was signed. *See id.* R. 4.2(a)(1). To modify the periods under the Texas Rules of Appellate procedure for perfecting an appeal, appellants are required to prove in the trial court, on sworn motion and notice, the date on which the party or the party's attorney first either received a notice of the judgment or acquired actual knowledge of the signing, and to obtain a signed order from the trial court finding the date when the party or the party's attorney first received notice or acquired actual knowledge. *See id.* R. 4.2(c) (trial court must sign written order finding date of notice); TEX. R. CIV. P. 306a(5) (party must prove date in trial court on sworn motion and notice); *Florance v. State*, 352 S.W.3d 867, 873 (Tex. App.—Dallas 2011, no pet.).

VII. RESTRICTED APPEAL

A. Generally. Restricted appeals are governed by Texas Rule of Appellate Procedure 30. *See* TEX. R. APP. P. 30; *see also* R. 25.1(d)(7), 26.1(c), 35.1(c). A party can prevail in a restricted appeal only if: (1) it filed notice of the restricted appeal within six months after the judgment was signed; (2) it was a party to the underlying lawsuit; (3) it did not participate in the hearing that resulted in the judgment complained of and did not timely file any postjudgment motions or requests for findings of fact and conclusions of law; and (4) error is apparent on the face of the record. *Ins. Co. v. Lejeune*, 297 S.W.3d 254, 255 (Tex. 2009) (per curiam); *Alexander v. Lynda's Boutique*, 134 S.W.3d 845, 848 (Tex. 2004).

B. Face of the Record. For purposes of a restricted appeal, "the face of the record" refers to "all the papers on file in the appeal, including the reporter's record." *Norman Commc'ns v. Tex. Eastman Co.*, 955 S.W.2d 269, 270 (Tex. 1997) (per curiam). The face of the record is limited; however, to documents that were before the court at the time a challenged order was signed. *See Gen. Elec. Co. v. Falcon Ridge Apartments*, *Joint Venture*, 811 S.W.2d 942, 944 (Tex. 1991).

C. Scope of Review. In a restricted appeal, an appellate court is limited to considering only the face of the record, but its scope of review is otherwise the same as that in an ordinary appeal. *See Norman Commc'ns*, 955 S.W.2d at 270.

IX. BILL OF REVIEW

A. Generally. A bill of review is an independent equitable proceeding brought by a party to a former action who seeks to set aside a judgment that is no longer subject to challenge by appeal. *PNS Stores, Inc. v. Rivera*, 379 S.W.3d 267, 270 n.1 (Tex. 2012); *Caldwell v. Barnes*, 975 S.W.2d 535, 537 (Tex. 1998); *see generally* TEX. R. CIV. P. 329b(f).

B. Due Diligence. Although it is an equitable proceeding, the fact that an injustice has occurred is not sufficient by itself to justify relief by bill of review. *Wembley Inv. Co. v. Herrera*, 11 S.W.3d 924, 926 (Tex. 1999); *Alexander v. Hagedorn*, 148 Tex. 565, 226 S.W.2d 996, 998 (Tex. 1950). Generally, bill of review relief is available only if a party has exercised due diligence in pursuing all adequate legal remedies against a former judgment and, through no fault of its own, has been prevented from making a meritorious claim or defense by the fraud, accident, or wrongful act of the opposing party. *Wembley Inv. Co*., 11 S.W.3d at 926; *Tice v. City of Pasadena*, 767 S.W.2d 700, 702 (Tex. 1989). If legal remedies were available but ignored, relief by equitable bill of review is unavailable. *See Caldwell*, 975 S.W.2d at 537.

C. Standard of Review. We review a trial court's ruling on a bill of review for an abuse of discretion. *See Ramsey v. D*avis, 261 S.W.3d 811, 815 (Tex. App.—Dallas 2008, pet. denied); *Manley v. Parsons*, 112 S.W.3d 335, 337 (Tex. App.—Corpus Christi 2003, pet. denied).

X. APPELLATE MOTIONS

A. Generally. Unless the appellate rules prescribe another form, a party must apply by motion for an order or other relief. TEX. R. APP. P. 10.1(a).

B. Required Contents. The motion must: (1) contain or be accompanied by any matter specifically required by a rule governing such a motion; (2) state with particularity the grounds on which it is based; (3) set forth the order or relief sought; (4) be served and filed with any brief, affidavit, or other paper filed in support of the motion; and (5) contain or be accompanied by 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 whether those parties oppose the motion. *Id.* R. 10.1(a). All motions should be accompanied by a certificate of service. *See id.* R. 9.5.

C. Evidence. A motion need not be verified unless it depends on facts which are: (a) not in the record; (b) not within the court's knowledge in its official capacity; or (c) not within the personal knowledge of the attorney signing the motion. *See id.* R. 10.2. In such cases, the appellate rules provide that the motion must be supported by affidavit "or other satisfactory evidence." *Id.*

D. Response or Opposition to Motions. A party may file a response to a motion at any time before the court rules on the motion or by any deadline set by the court. *Id.* R. 10.1(b). However, the court may determine certain kinds of motions before a response is filed. *Id.*

E. Rulings. A court should not hear or determine a motion until ten days after the motion is filed unless: (1) the motion is to extend time to file a brief, a petition for review, or a petition for discretionary review; (2) the motion states that the parties have conferred and that no party opposes the motion; or (3) the motion is an emergency. *Id.* R. 10.3. Note that courts rarely grant oral argument on motions. A single justice may grant or deny a motion, but a single justice may not act on a petition for an extraordinary writ or rule on a motion for rehearing. *Id.* R. 10.4.

F. Motions for Extension of Time. All motions to extend time, except a motion to extend time for filing a notice of appeal, must state: (1) the deadline for filing the item in question; (2) the length of the extension sought: (3) the facts relied on to reasonably explain the need for an extension; and (4) the number of previous

extensions granted regarding the item in question. *Id.* R. 10.5(b)(1). Motions should state an accurate estimate of the time necessary for completion of the document. *See id.* R. 10.5(b).

G. Suggestions for Filing Appellate Motions.

1. If asking the court for any relief or asking the court to do something, file a motion, not a letter and not a notice. Do not include motions within a brief—file them separately.

2. Do not forget to include citations to applicable authorities in all motions.

3. File any motions regarding procedural or substantive issues affecting the appeal early in the case.

4. Respond to motions. Sometimes motions concern important, even dispositive matters, yet non-movants do not reply.

5. If requesting an extension of time, be realistic in the request: an appellate court is more likely to look favorably on one request for a thirty day extension than six requests for five days each.

6. Include a certificate of conference on all motions, especially motions for extensions of time, except for motions seeking rehearing or reconsideration.

7. As a procedural matter, if requesting emergency relief or expedited handling, notify the court's staff verbally or telephonically so that they ensure that the emergency motion is handled as expeditiously as possible.

8. As a substantive matter, if requesting emergency relief or expedited handling, promptly seek such relief.

XI. THE RECORD

A. Generally. The appellate record consists of the clerks' record and, if necessary to the appeal, the reporter's record. TEX. R. APP. P. 34.1. An appellate court will not consider documents that are attached to briefs as exhibits or appendices that were not part of the trial court record and are not formally included in the appellate record. *Guajardo v. Conwell*, 46 S.W.3d 862, 864 (Tex. 2001); *Paselk v. Rabun*, 293 S.W.3d 600, 612 n.12 (Tex. App.—Texarkana 2009, pet. denied). Note, however, that an appellate court may consider extra-record materials to determine its jurisdiction over an appeal. TEX. R. APP. P. 19(d); *see* TEX. GOV'T CODE ANN. § 22.220(c) (West Supp. 2011).

B. Contents of Clerk's Record. The rules provide the standard contents for the clerk's record in Rule 34.5(a)(2). *See* TEX. R. APP. P. 34.5(a)(2). If a party wants to include additional materials in the record, that party must specifically request those additional items.

C. Contents of Reporter's Record. The appellant must ask for the reporter's record at or before the time for perfecting the appeal. *See id.* R. 34.6(b)(1). The appellant must designate the exhibits to be included and must designate the portions of the proceedings to be included. *Id.* The reporter's record may consist of a partial record, but if the record is incomplete, the appellant must include in the request a statement of the points or issues to be presented on appeal and will then be limited to those points or issues. *Id.* R. 34.6(c). With a partial record, the appellate court presumes that the partial reporter's record constitutes the entire record for purposes of reviewing the issues, even where an issue complains about factual insufficiency of the evidence. *Id.* 34.6(c)(4). Under certain circumstances, the court may consider the appeal without the benefit of the reporter's record. *See id*. R. 37.3(c).

D. Deadline. Specific deadlines for filing the record depend on what kind of appeal is being filed and what kind of post-judgment motions were filed. *See generally id.* R. 35.1. Note that the deadlines are much shorter for interlocutory appeals. *Id.* R. 35.1(b). If the record is not timely filed, the appellate court clerk sends notice to the official responsible for its preparation, stating

that the record is late and requesting that the record be filed within ten days. *Id.* R. 37.3(a)(1). If the record is not filed within this additional period of time, the matter is referred to the appellate court which "must make whatever order is appropriate to avoid further delay and to preserve the parties' rights." *Id*. R. 37.3(a)(1). The court must allow an untimely record to be filed when the delay is not the appellant's fault, and "may" do so when the delay is the appellant's fault. *Id*. R. 35.3(c). Further, the appellate court may enter "any order necessary to ensure the timely filing of the appellate record." *Id.*

E. Correction and Supplementation. Parties should follow Rule 34.5(c), (e) (clerk's record) and Rule 34.6(d), (e) (reporter's record) to correct and supplement the record on appeal. *See id.* R. 34.5(c),(e), 34.6(d),(e). The rules are generally forgiving: the clerk's record or reporter's record can generally be corrected or supplemented when necessary.

F. Lost or Destroyed Records. The rules treat clerk's records and reporter's records differently when they are lost or destroyed. When a part of the clerk's record has been lost or destroyed, the parties can by written stipulation, send the item or items to the clerk for inclusion in the record. *Id.* R. 34.5(e). If the parties cannot agree, the trial court "must" determine what constitutes an accurate copy of the missing item and order it to be included in the clerk's record or a supplement. *Id.* In contrast, where the reporter's record is involved, an appellant can get a new trial if: (1) the record was timely requested; (2) a "significant" exhibit or portion of the record has been lost or destroyed or is inaudible; (3) the lost or destroyed part of the record or exhibit is "necessary to the appeal's resolution;" and (4) the lost or destroyed portion of the record cannot be replaced by agreement of the parties, or a lost or destroyed exhibit cannot be replaced by agreement of the parties or with a copy determined by the trial court to accurately depict the original with reasonable certainty. *Id.* R. 34.6(f).

G. Agreed Records. Note that the parties can agree on the contents of the appellate record by "written stipulation filed with the trial court clerk." *Id.* R. 34.2. An agreed record is presumed to

contain all evidence and filings relevant to the appeal. *Id.* Similarly, in lieu of a reporter's record, the parties may agree on a "brief statement of the case," which must be filed with the trial court clerk and included in the appellate record. *See id*. R. 34.3.

H. Withdrawal. The appellate court clerk may permit the record or other filed item to be taken from the clerk's office at any time, on the following conditions: (1) the clerk must have a receipt for the record or item; (2) the clerk should make reasonable conditions to ensure that the withdrawn record or item is preserved and returned; (3) the clerk may demand the return of the record or item at any time; (4) after the case is submitted to the court and before the court's decision, the record cannot be withdrawn; (5) after the court's decision, the losing party must be given priority in withdrawing the record; (6) the clerk may not allow original documents filed under Rule 34.5(f) or original exhibits filed under Rule 34.6(g) to be taken from the clerk's office; (7) if the court allows an original document or exhibit to be taken by a party and it is not returned, the court may accept the opposing party's statement concerning the document's or exhibit's nature and contents; (8) withdrawn material must not be removed from the court's jurisdiction; and (9) the court may, on the motion of any party or its own initiative, modify any of these conditions. *See id.* R. 12.4. Note, however, that the record may not be withdrawn after submission and before the court's decision. *See id.* R. 12.4(d).

I. Suggestions for the Appellate Record.

1. Timely request both the clerk's and reporter's record (if applicable), and timely pay for them.

2. Many problems on appeal arise from not obtaining a complete reporter's record. Specifically request the court reporter to make a record of all relevant proceedings, including, e.g., bench conferences.

3. Ensure that the clerk's record contains all documents necessary to affirmatively reflect the court's jurisdiction.

4. Where multiple parties seek to utilize the record to prepare briefing, they should attempt to enter an appropriate "sharing" agreement regarding use of the record.

5. If a party has checked out the record, that party should return it in a timely manner. Otherwise, it is likely to come to the immediate attention of the justices who will be working on the case.

6. Review relevant documents for completeness and legibility. If critical documents are handwritten or otherwise difficult to read, work with opposing counsel to furnish the court with a typewritten "translation" of the documents.

XII. BRIEFS

A. Generally. A good brief is essential to winning on appeal. Present the court with an organized, clearly written brief.

B. Format and Length. Briefs should comply with the general format specified in the rules for all documents. *See* TEX. R. APP. P. 9.4. An appellant's or appellee's brief must be no longer than 15,000 words if computer-generated and 50 pages if not. *Id.* R. 9.4(i)(B). A reply brief must be no longer than 7,500 words if computer-generated, and 90 pages if not. *Id.* But in a civil case, the aggregate of all briefs must not exceed 27,000 words if computer-generated and 90 pages if not. *Id.* A court may, on motion, permit a document that exceeds the prescribed length. *Id.*

C. Appellant's Brief. Under Rule 38.1(a)-(k), appellant's brief must, under appropriate headings and in the order indicated, contain the following:

1. Identity of Parties and Counsel. The identity of parties and counsel is typically used to screen the case for any recusal and disqualification issues.

2. Table of Contents. The table of contents should provide, in complete sentences, the issues and the reasons for reversal. It should orient the reader regarding the substance of the appeal in an outline format.

3. Index of Authorities. Different appellate courts utilize different citation systems and different research data bases. Check with the appellate court to determine which resource to use or cite. Always include writ and petition history.

4. Statement of the Case. The statement of the case should provide the court with a "nutshell" view of the proceedings–what kind of case is it and what happened? It must include the nature of the case (e.g., breach of contract, personal injury, appeal of arbitration award), the course of the proceedings (e.g., disposition on motion, bench trial, or jury trial), and the disposition of the case. Do not include argument or a discussion of the facts, but do include record references. This section should "seldom exceed one-half page."

5. Statement Regarding Oral Argument. Remember that the request for oral argument must appear on the front cover of that party's first brief. *Id.* R. 9.4(g). The statement regarding oral argument "must not exceed one page and should address how the court's decisional process would, or would not, be aided by oral argument." *See id*. R. 38.1(e).

6. Issues Presented. The brief must state concisely all issues or points presented for review. "The statement of an issue or point will be treated as covering every subsidiary question that is fairly included." Generally speaking, an appellant should start with the strongest issues, although when a party presents multiple grounds for reversal of a judgment on appeal, appellate courts will generally first address errors that would require rendition, or, in other words, those issues that would give appellant the greatest relief. *Id.* R. 43.3.

7. Statement of Facts. The statement of facts should not contain argument and should be fully supported by record references. In a civil case, the appellate court will "accept as true" the facts stated unless another party contradicts them.

8. Summary of the Argument. This section contemplates a succinct clear and accurate summary of the arguments made in the brief that is more than a simple restatement of the issues presented.

9. Argument. The brief must contain a "clear and concise argument for the contentions made, with appropriate citations to authorities and the record. If an issue is inadequately briefed under the appellate rules, it will be waived. *See generally ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 880 (Tex. 2010).

10. Prayer. The brief must contain a short conclusion that clearly states the nature of the relief sought, e.g., rendition or remand. Note that different legal issues have different remedies, so the appellant may need to seek relief in the alternative.

11. Appendix. Note that the appellant's brief is required to have an appendix in a civil appeal. Unless voluminous or impractical, the appendix must contain a copy of the judgment or order, the charge and verdict or findings of fact and conclusions of law, the text of any rule, statute, or regulation on which argument is based, and any document that is central to the argument.

D. Appellee's Brief. An appellee's brief must conform to the requirements applicable to an appellant's brief; however, an appellee can omit the list of parties and counsel, the statement of the case, a statement of the issues presented, and the statement of facts, unless necessary to supplement or correct the appellant's version of same. *See id.* R. 38.2(a). Similarly,

the appellee's appendix does not need to include any materials already provided in appellant's brief.

E. Amicus Curiae Briefs. An appellate court may receive, but not file, an amicus curiae brief. *See id.* R. 11. A court may refuse to consider an amicus brief and order that it be returned for "good cause." *Id.*

F. Reply Briefs. A reply brief, if any, must be filed within 20 days after the date the appellee's brief was filed. *Id.* R. 38.6(c). A reply brief must be no longer than 7,500 pages if computer generated, and 90 pages if not. *Id.* R. 9.4(i)(B).

G. Amendment or Supplementation. A brief may be amended or supplemented "whenever justice requires, on whatever reasonable terms the court may prescribe." *Id.* R. 38.7. The party requesting amendment or supplementation should make its request by motion.

H. Extension to File Brief. An appellate court may extend the time for filing a brief and may postpone submission of the case. *Id.* R. 38.6(d). The motion for extension is due before or after the date the brief is due. *Id.* The court may also, "in the interests of justice," shorten the time for filing briefs and for submission of the case. *Id.*

I. Suggestions for Appellate Briefs.

1. A party should not ask for relief from the trial court's judgment if the party did not perfect its own appeal. Any party who seeks to alter the trial court's judgment or other appealable order must file a notice of appeal.

2. Include the appropriate standard of review for the challenged matter. *See, e.g.*, W. Wendell Hall, *Standards of Review in Texas*, 29 ST. MARY'S L. J. 351 (1998).

3. Look for decisions from the court in which the appeal is pending that support the party's arguments. Once the

members of the panel have been identified, specifically look for relevant opinions authored by panel members.

4. Research the applicability of the requested relief–is the appellant entitled to rendition, remand, or remittitur? *See* TEX. R. APP. P. 43 (judgment of the court of appeals); *Id.* R. 44 (reversible error affecting part of case or remediable error of the trial court); *Id.* R. 46 (remittitur in civil cases).

5. Draft, organize, research, and edit. Use headings and subheadings. Use diagrams, maps, or flowcharts if applicable. Use an active voice. Consistently label the parties (i.e., appellant/appellee, Jones/Smith). Use pinpoint citations, use introductory signals, order the authority correctly, and provide a case's petition or writ history. Shepardize!

6. Check to see whether error was preserved on the relevant issue. If preservation of error is in issue, cite the court to the exact page(s) where error was or was not preserved.

7. Make sure that all factual assertions are supported by the record. Do not include any factual recitations that lack record references.

8. Use the appendix as a tool: include all necessary documents and include the documents that the court needs to see to rule in the party's favor.

9. If appellee, respond to the appellant's issues in the order in which appellant presented them, or at least identify which of appellant's issues is being addressed.

10. Acknowledge when the opposing party has made a good point. Acknowledge the opponent's favorable facts and favorable law. Parties have an ethical obligation to point out contrary authority, and will lose credibility with the court when they fail to do so. Distinguish all contrary authority and discuss distinctions and similarities between cases.

11. Do not make disingenuous arguments; rather–concede the point. Do not throw in a questionable issue just for the sake of volume.

12. Avoid ad hominem attacks against opposing counsel, opposing parties, and the trial court. Such comments serve no purpose in the appellate process. Exclamation points, underlining, and statements of moral outrage have little, if any, positive effect on those reading the brief. Save the "argument" for the jury.

13. Advise the court of controlling legal authorities.

14. When it analyzes an appeal, the court is not limited to the briefing and it independently researches the issues that are presented; therefore, include and distinguish adverse authority, and inform the court of similar cases pending before our sister courts and the court of criminal appeals.

15. Supplement the briefing if the law changes.

16. If a party has found a great case, that party should include a copy of the case in its appendix or give it to the panel at oral argument.

XIII. SUBMISSION AND ORAL ARGUMENT

A. Generally. A case is submitted to the court for decision either on the briefs or by oral argument. A party is entitled to oral argument unless the court decides it is unnecessary because (1) the appeal is frivolous, (2) the dispositive issues have been authoritatively decided; (3) the facts and legal arguments are adequately presented in the briefs and record; or (4) the decisional process would not be significantly aided by oral argument. *See* TEX. R. APP. P. 39.1. If a request for oral argument is denied and the requesting party strongly believes that oral argument will significantly aid the decisional process, the party should file a motion for reconsideration with the court.

B. Notice. The clerk must send notice of submission at least 21 days prior to submission. *Id.* R. 39.8. The notice includes whether or not the oral argument has been granted, the date or argument or submission, the time allotted for argument if granted, and the names of the members of the panel to which the case will be argued or submitted.

C. Time Allowed. The time allotted for oral argument varies from court to court and case to case. Check with the court to see how much time is allowed. For appellants, be prepared to split the allotted time between opening and rebuttal. To request additional time for argument, or permission for an attorney to argue other than the attorney of record, a written request must be filed with the clerk well in advance of the date of oral submission.

D. Rescheduling. Do not ask to reschedule oral argument unless it is absolutely necessary. Requests to reschedule oral argument should be made by written motion filed well in advance of the date scheduled for oral argument. Unless all parties agree, or unless sufficient cause is apparent to the Court, a motion to postpone oral argument must be supported by sufficient cause. *Id.* R. 10.5(c).

E. Recording. Courts may make digital recordings of oral arguments. If so, one can typically obtain copies by request from the clerk.

F. Who May Present Argument. Except on leave of court, no more than two attorneys on each side may argue, and only one attorney may argue in rebuttal. *Id.* R. 39.4. Amicus curiae, with leave of court obtained prior to argument and with a party's consent, may share allotted time for oral argument with that party. *See id*. R. 39.5. Otherwise, counsel for amicus may not present oral argument. *Id.* Courts generally assume that lead counsel as identified on the briefs will be presenting argument. If other counsel will be arguing, they should notify the court accordingly.

G. Broadcasting. An appellate court may permit courtroom proceedings to be broadcast, televised, recorded, or

photographed in accordance with Rule 14. *Id.* R. 14.1. Parties should obtain permission by filing a request pursuant to Rule 14.2(a)(1). Note that in deciding whether to allow coverage, the court "may consider information known ex parte to the court." *See id*. R. 14.2(d).

H. Suggestions for Oral Argument.

1. The court has read the briefs and performed preliminary research, so do not merely rehash the arguments raised in the briefs.

2. If a member of the court asks a question, answer it! Parties who are unable to adequately respond should consider asking the court for leave to file a post-submission brief in response to the question.

3. Consider utilizing charts or other demonstrative evidence.

4. If citing cases that are not contained in the brief, furnish copies of the case to the members of the panel and opposing counsel.

5. Obtain permission to file any post-submission briefs.

6. Do not wait until submission day to notify the court if there are any circumstances that prevent a justice on the panel from hearing the case.

XIV. OPINIONS AND ORDERS

A. Generally. Court decisions may be issued as "opinions" or "memorandum opinions." Under Rule 47.1, regarding "written opinions," the court is directed to "hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal." *See* TEX. R. APP. P. 47.1. In contrast, under Rule 47.4, if "the issues are settled," the court is directed to draft a memorandum opinion that is "no longer than necessary to advise the parties of the court's decision and the basic reasons for it." *Id.* R. 47.4. An opinion

must be designated a memorandum opinion unless it (a) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (b) involves issues of constitutional law or other legal issues important to the jurisprudence of Texas; (c) criticizes existing law; or (d) resolves an apparent conflict of authority. *Id.* The decision regarding whether an opinion will be designated as an opinion or memorandum opinion will be made by a majority of the justices who participate in considering the case. *Id.* R. 47.2(a). An author of a concurrence or a dissent can prevent an opinion from being designated as a memorandum opinion. *Id.* R. 47.4. The court sitting en banc can change an opinion's designation. *Id.* R. 47.6.

B. Panel Composition. Note that if a case is decided without argument, three justices must participate in the decision; whereas only two justices must participate if the case is submitted at oral argument. *Id.* R. 41.1(a),(b).

C. En Banc Opinions. En banc opinions are disfavored in the rules "unless necessary to secure or maintain uniformity of the court's decisions or unless extraordinary circumstances require en banc consideration." *Id.* R. 41.2(c).

D. Dispositions. Note that the possible dispositions of a case are delineated by Rule 43.2, which specifies the judgments that may be issued by an appellate court, or, in the case of a voluntary settlement, by Rule 42.1(a). *See id.* R. 43.2, 42.1(a).

E. Precedent in Transferred Cases. If an appeal is transferred to another court of appeals, the transferee court must apply the precedent of the transferor court under stare decisis if the transferee court's decision would otherwise be inconsistent with that precedent. *see id.* R. 41.3.

F. Publication. In civil cases, opinions are not designated as "publish" or "do not publish." Opinions that were issued prior to January 1, 2003 and were not designated for publication may be cited but have no precedential value. *Id.* R. 47.7.

G. Orders from the Court. Courts may issue their directives either through formal orders or through correspondence from the clerk of the court: failure to comply with directives issued by the clerk of the court can result in dismissal of the appeal or other appropriate sanctions.

H. Notice. In any proceeding, the clerk of an appellate court must promptly send a notice of any judgment, mandate, or other court order to all parties to the proceeding. *Id.* R. 12.6.

XV. REHEARING

A. Generally. Panel motions for rehearing and en banc motions for reconsideration are handled separately under the appellate rules. Note that certificates of conference are not required for motions for rehearing or en banc reconsideration. *See id.* R. 49.12.

B. Motion for Rehearing. The motion "must clearly state the points relied on for the rehearing." *See id.* R. 49.1. The motion must be no longer than 4,500 words if computer-generated and 15 pages if not. *See id*. R. 9.4(i)(D).

C. Deadline. Motions for rehearing must be filed within 15 days after the court's judgment or order is rendered. *Id.* R. 49.1. A court of appeals may extend the time for filing a motion for rehearing if a party files a motion complying with rule 10.5(b) no later than 15 days after the last date for filing the motion for rehearing. *See id.* R. 49.8. However, in an accelerated appeal, the appellate court can shorten the time to file a motion for rehearing or disallow it altogether. *See id.* R. 49.4.

D. Response. A response to a motion for rehearing is not required unless the court requests one. *Id.* R. 49.2. A response, if filed, must be no longer than 4,500 words if computer-generated and 15 pages if not. *See id*. R. 9.4(i)(D). However, a motion for

rehearing will not be granted unless a response has been filed or requested by the court. *See id.* R. 49.2.

E. Relief. A motion for rehearing may be granted by a majority of the justices who participated in the decision of the case; otherwise it must be denied. *Id.* R. 49.3. If rehearing is granted, the court may dispose of the case with or without rebriefing and oral argument. *See id*. R. 49.3.

F. En Banc Reconsideration. Rule 49.7 provides that an en banc motion for reconsideration may be filed separately from a panel motion for rehearing. The deadline for filing a motion for en banc reconsideration is 15 days after the appellate judgment issues, or 15 days after a timely filed motion for rehearing is denied. *Id.* However, a party who files a petition for review may not file a subsequent motion for rehearing unless the court of appeals issues a new opinion after the petition for review is filed. *See id*. R. 49.11.

G. Suggestions when Seeking Rehearing.

1. Focus on any inaccuracies in the court's opinion and look for any potential departures from the court's precedent.

2. A motion for rehearing should, with clear references to the record and proper authority, explain why the court should re-consider its opinion. It should not be snarky, insulting, or sarcastic.

H. Recent Statistics of MFRs Granted

Fiscal Year	Civil	Criminal	Total
2016	0	1	1
2015	3	1	4
2014	3	2	5
2013	2	3	5
2012	4	3	7