

CIVIL APPEALS PAMPHLET
FOR THE
PRO BONO PROJECT

SPONSORED AND ADMINISTERED BY
THE PRO BONO COMMITTEES FOR
THE STATE BAR OF TEXAS APPELLATE SECTION
AND
THE HOUSTON BAR ASSOCIATION APPELLATE SECTION
IN THE
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

DECEMBER 2009

I. INTRODUCTION

This pamphlet from the State Bar of Texas Appellate Section's Pro Bono Committee ("Committee") is designed to explain the Texas Rules of Appellate Procedure and practices that apply in civil appeals in the Court of Appeals for the First District of Texas at Houston, Texas ("First Court of Appeals" or "Court"). The Pro Bono Committee has prepared this pamphlet to help laypersons and attorneys with little or no appellate experience. But, it is not intended to replace the Texas Rules of Appellate Procedure and should not be cited as legal authority. Litigants are required to comply with the rules and the case law. Litigants should also consult the information found on the Court's website entitled, "*Practice Before the Court*," at <http://www.1stcoa.courts.state.tx.us>.

This pamphlet reflects the rules and case law as they exist in **October, 2009**. The rules and case law are always subject to change and should be consulted for changes.

All documents submitted to the court must be filed with:

In Person:

Clerk, Court of Appeals
1307 San Jacinto, 10th Floor
Houston, TX 77002

By Mail:

Clerk, First Court of Appeals
1307 San Jacinto, 10th Floor
Houston, TX 77002

A copy of all documents filed with the court must be served (mailed or hand-delivered) on all other parties to the appeal. TEX. R. APP. P. 9.5. All papers filed with the court must be 8 ½ x 11 inches. TEX. R. APP. P. 9.4(b). The typeface or font size for a computer-generated document must be at least 13-point or larger proportionally spaced typeface. TEX. R. APP. P. 9.4(e). Rule 9 contains other filing requirements.

II. WHAT IS AN APPEAL?

An appeal is a review of what happened in the trial court to determine whether error occurred and, if so, whether

the appellant¹ is entitled to relief. An appeal is not a new trial. You cannot present evidence, call witnesses, or conduct discovery in an appeal. The court of appeals decides an appeal strictly on the basis of the trial court record, briefs, and, at the Court's discretion, oral argument by the parties. Generally, a complaint about error in the trial court must have been brought to the trial court judge's attention before the court of appeals will review it. TEX. R. CIV. P. 33.1.

III. WHEN CAN YOU APPEAL?

A. Appeal as of Right

You have a right to appeal from a final judgment or final order of a trial court. A judgment or order is final if it disposes of the entire matter in litigation. If the order or judgment decides only some of the issues or claims, but not all of them, it is not final.

¹ An "appellant" is the party who files a notice of appeal. TEX. R. APP. P. 3.1(a). An "appellee" is the party adverse to the appellant. TEX. R. APP. P. 3.1(c).

However, if it decides all of the issues as to one party, that portion can be severed to become final and appealable. In addition, the judgment or order must have been intended to be the final document in litigation. This is determined by reading the judgment or order to determine whether the judge considered it to be a final judgment or planned to issue another document terminating the case. The appellate deadlines discussed below begin to run on the date the judgment or appealable order is signed by the trial court.

B. Interlocutory Appeals

Some rulings are interlocutory, meaning that they are not final and conclusive on the merits. These interlocutory orders may be appealed if the legislature has provided for an interlocutory appeal. Examples include temporary injunctions, orders appointing a receiver or trustee, or orders as to certification of class

actions.² The time for appealing in one of those cases is much shorter than in an appeal from a final judgment—typically 20 days (*see* TEX. R. APP. R. 26.1(b))—and begins to run when the trial court signs the order.

IV. TIME LIMITS FOR APPEAL

The filing of a timely notice of appeal is necessary to give the court of appeals jurisdiction, which is the power and authority to consider your appeal. The time limits depend on the type of case being appealed. An appeal in a civil case that is not an accelerated appeal must be filed within 30 days of the date of the judgment or order appealed from. That period of time may be automatically extended to 90 days from the date of the judgment if any party timely files one or more qualifying post-judgment motions, such as a motion for new trial, a motion for judgment notwithstanding the verdict, or a request for findings of fact

² *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 51.014(a).

and conclusions of law, where appropriate.³ TEX. R. CIV. P. 26.1(a).

As noted, an interlocutory appeal must be filed within 20 days of the trial judge signing the appealable order, and this time period cannot be extended by the filing of a post-trial motion or request. TEX. R. APP. P. 26.1(b), 28.1.

Sometimes, both sides want to appeal from different alleged errors in the same judgment. If your opponent files an appeal, you may file a “cross-appeal” to assert any errors you feel the trial court made as to your side of the case. Any cross-appeal must be filed within the later of: (a) the period established for filing the notice of appeal; or (b) 14 days after the

³ The timetable is extended only when the post-judgment request is appropriate. For example it is not proper to file a request for findings of fact and conclusions of law as to a summary judgment. *See generally Ford v. City of Lubbock*, 76 S.W.3d 795, 796 (Tex. App.—Amarillo 2002, no pet.). Therefore, a request for such findings and conclusions, even if timely filed, will not extend the appellate deadline.

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

The time to file a civil appeal or cross-appeal can be extended by the appellate court by filing a motion within 15 days of the deadline for appeal and showing the grounds for the extension. TEX. R. APP. P. 10.5(b), 26.3. We recommend that you do everything you can to file your appeal within the deadlines set forth in the Rules because extensions to file a late appeal are not automatically granted.

V. HOW TO START AN APPEAL

To “perfect” or start a civil appeal, you must file the following documents with the trial court: (i) notice of appeal; (ii) designation of items to be included in the Clerk’s Record; and (iii) a request for the Reporter’s Record, if the court reporter recorded any of the events leading to the final judgment or appealable order. The latter two items are important to insure that a proper record of the trial court proceedings is provided to the Court of Appeals so that it

may consider your case. These requests are discussed further at part VI.

At the same time, you must also file a copy of the notice of appeal with the Court of Appeals. Once your case has been assigned to this Court, you must file the following documents with the Clerk: (i) Docketing Statement (with a copy of the judgment or order appealed from attached); and (ii) the filing fee. Each of these requirements will be discussed in more detail below.

A. The Notice of Appeal

A notice of appeal must be filed with the clerk of the *trial* court in which the judgment or order appealed from was entered. TEX. R. APP. P. 25.1(a). A copy of the notice of appeal must also be sent to the Clerks of the First and Fourteenth Courts of Appeals and another copy must be served (mailed or delivered by hand) on the opposing party. The notice of appeal must contain all of the following information: (1) the case name and number of the trial court

proceedings; (2) a description of the judgment or order appealed from, including the date on which it was signed; (3) a statement that the party desires to appeal the order; (4) a statement that you are appealing to the First or Fourteenth Court of Appeals; (5) the name of each party appealing; and (6) if the appeal is from an interlocutory order, a statement that it is interlocutory. TEX. R. APP. P. 25.1(d). The notice of appeal must also include a statement indicating whether a related appeal has been previously filed in either the First or Fourteenth Court of Appeal and shall include the caption, trial court case number, and appellate case number. 1st Tex. App. (Houston) Loc. R. 1.4(1). A sample form of a notice of appeal is available as Form 1.

B. The Docketing Statement

Upon receiving notice from the First Court of Appeals that your appeal has been assigned to the First Court, the appellant must file one (1) copy of a Docketing Statement on a form which can be found at

<http://www.1stcoa.courts.state.tx.us/forms/forms.asp>, and send a copy to the opposing party. *See, e.g.*, TEX. R. APP. P. 32.1. (A copy of the First Court of Appeals' Docketing Statement is available as Form 4). Each court of appeals has its own docketing statement, and these forms typically seek detailed information regarding the appeal, such as the names and contact information of all parties to the trial court proceeding, the trial court clerk, the court reporter, as well as ask a number of procedural and substantive questions about the case. It is important that you fill this form out accurately and completely, especially if you want your case to be considered for inclusion in the Pro Bono Program, discussed in a separate pamphlet available at the State Bar of Texas Appellate Pro Bono website, <http://www.tex-app.org/probono.php>, and the Houston Bar Association Appellate Section website,

<http://www.hba.org/folder-sections/sec-appellate.htm>s

C. Filing Fee

The appellant must also file with the docketing statement the \$175 fee for docketing the appeal. If you believe you are indigent (*i.e.* can't afford the fee), you should complete and return an affidavit of indigence (a sample form of which is available as Form 3). Texas Rule of Appellate Procedure 20.1 states the procedures for filing and contesting an affidavit of indigence.

VI. THE RECORD

The record is a compilation of papers filed in the trial court in your case. It will include such trial court documents as the pleadings, motions, briefs, and any decisions, orders or judgments filed in the trial court ("Clerk's Record"), as well as the written transcription, if any, of any pretrial and trial proceedings that are necessary to determine the appeal ("Reporter's Record"). The required and optional contents of these

records are described in Texas Rule of Appellate Procedure 34.

A. The Clerk's Record

As the appellant, you need to determine what parts of the trial court's paper record should be included in the record on appeal. At or before the time you file your notice of appeal, you should prepare a list of the pleadings, motions, briefs, and other papers you believe the Court of Appeals may need to decide your issues on appeal. In most cases, the trial court clerk's office will compile the requested documents, sequentially paginate them (so that they are more easily cited or referenced by the parties), and send them to the Court of Appeals. Therefore, in order to assist the trial court clerk, provide as much information about the documents you are requesting to be included, such as the date of filing, the complete name of the document, and docket entry number (if available). The designation of items for the Clerk's Record must be filed with the district or county trial

court clerk and served on all parties. A sample designation form is available as Form 6.

You must make arrangements with the trial court clerk to pay for the Clerk's Record before it is due in the Court of Appeals. If you believe that you qualify for a waiver of these costs, then you need to file an affidavit of indigence with the trial court at or before the time you file your notice of appeal, as explained below in part XI.

If at any time before you file your brief, you discover that additional items are needed from the trial court's file, you can submit a letter request to the trial court's clerk requesting that a supplemental record be prepared. TEX. R. APP. P. 34.5(c)(1). A sample letter request is included as Form 8.

B. The Reporter's Record

At or before the time you file your notice of appeal, you must also request the trial court's court reporter to prepare a written transcription of the trial court proceedings that will be at issue in the

appeal, if a court reporter was present during any trial court proceedings. TEX. R. APP. P. 34.6. This is known as the "Reporter's Record." *Id.*

The Reporter's Record is a word-for-word typewritten account of what was said in the trial court before the judge and/or jurors, if there was a jury. If your case was decided solely on briefs or other written documents, and there was no hearing before the trial judge, you may indicate on the Docketing Statement that the Reporter's Record is not necessary to prosecute the appeal. However, if you are challenging any part of the evidence considered in the trial court, such as the sufficiency of the evidence as to a jury's verdict or judge's finding, or otherwise need to refer in your brief to testimony or argument that was made in the trial court, you must order the Reporter's Record and make arrangements with the court reporter for payment. A sample form

for requesting the Reporter's Record is available as Form 7.

If you believe you are indigent and would like a waiver of the costs for preparation of the Reporter's Record, you should file a request for waiver of those costs in the trial court when you file your notice of appeal. See TEX. R. APP. P. 20.1 and Part XI, below.

VII. BRIEFS

A. The Appellant's Brief

Once the Clerk's Record and the Reporter's Record, if any, have been filed in the Court of Appeals, the briefing schedule begins. The filing date for the appellant's opening brief runs from the date on which the record is complete with the Court of Appeals, meaning that both the Clerk's Record and the Reporter's Record (if requested) have been filed.

You must file your appellant's opening brief with the Court of Appeals no later than 30 days—20 days in an

accelerated (interlocutory) appeal—after the record is complete. TEX. R. APP. P. 38.6(a).

The appellant's brief is a written document explaining why you are appealing and what you think was wrong with the trial court's decision. Texas Rule of Appellate Procedure 38.1 describes the necessary parts of an appellant's brief. Your brief must have:

- (1) A list of the identities of parties and counsel in both the trial and appellate courts;
- (2) A table of contents and a table of cases, statutes, and other legal authorities discussed in your brief (The cases must be listed in alphabetical order.);
- (3) A statement of the case that concisely indicates the nature of the case, the course of proceedings below, and the trial court's disposition;
- (4) A statement of the issues or points of error presented for review;
- (5) A statement of the facts supported by record references;
- (6) A summary of the argument;

(7) An argument section;
and

(8) A “prayer” or short conclusion that tells the Court what relief you are seeking.

TEX. R. APP. P. 38.1. In addition, you must either include with your brief or separately bind an “Appendix,” which contains certain required portions of the trial court’s record, such as the order appealed from and the text of any rule or statute on which the argument is based. The Appendix can also contain optional contents that you believe may be helpful to the Court when reviewing your brief. TEX. R. APP. P. 38.1(j). A good example is a copy of any contract between the parties if that contract forms the basis of the dispute.

Generally speaking, the Statement of the Facts should explain to the Court what the case is about and what happened in the trial court in objective terms—*i.e.*, without taking sides or making arguments. It should only present the facts from the trial court

record that are relevant to the issues to be decided on appeal. ***You may not discuss facts that were never presented to the trial court or that are not included in the record.***

Every Statement of Facts must be accompanied by an appropriate reference to the record. As noted, the trial court clerk typically paginates the Clerk’s Record to make it easier to cite to specific pages.

When referring to the parties in your brief, you should use their names, rather than referring to their party designations. For example, use “Jane Smith” not “the appellant.” Doing so makes it easier for the Court to follow your arguments.

The appellant’s brief cannot be longer than 50 typewritten pages. TEX. R. APP. P. 38.4. However, only the statement of the facts, the summary of argument and argument sections, and the prayer count toward the 50-page limit. TEX. R. APP. P. 38.4.

The brief must be printed on 8½ by 11 inch paper that is white (or nearly white) and opaque, meaning that it is not transparent. TEX. R. APP. P. 9.4(b). The text must be double-spaced (except as to block quotes, which can be single-spaced), with a one-inch margin on all sides. TEX. R. APP. P. 9.4(c) & (d). As noted above, you must use 13-point or larger font in preparing your brief. TEX. R. APP. P. 9.4(e). Each brief must be signed by the person filing it. TEX. R. APP. P. 9.1.

B. The Appellee's Brief

After the appellant's opening brief is filed, the time for filing the appellee's brief begins to run. The appellee must file his or her brief 30 days—20 days in an interlocutory appeal—from the date of service of the appellant's brief. TEX. R. APP. P. 38.6(b).

If you are the appellee, and oral argument is not scheduled in the appeal, your appellee's brief is your only opportunity to tell the court why the trial

court's decision should be affirmed or allowed to stand. The appellee's brief must have the same parts as the appellant's brief, *except* that a statement of the issues, a statement of the case, and an appendix are optional. TEX. R. APP. P. 38.2. The page limit or word limit for the appellee's brief is the same as that for the appellant's brief. TEX. R. APP. P. 38.4. A signature by the person filing the brief is also required. TEX. R. APP. P. 9.1.

C. The Appellant's Reply Brief

The appellant's reply brief may be no longer than 25 pages. TEX. R. APP. P. 38.4. It must be filed within 20 days of service of the appellee's brief. TEX. R. APP. P. 38.6(c). If you are the appellant, and you do not intend to submit a reply brief, you should alert the Court that a reply brief will not be filed.

D. Number of Briefs

You must file an original and five (5) copies of your brief and appendix with the

First Court of Appeals and serve the other party or parties with one copy each.

E. Brief Covers

Each brief or appendix must have opaque, durable front and back covers, which should not be plastic or dark colored (*e.g.*, red, black, or dark blue) so that the Clerk can affix a permanent and legible file-stamp to the cover showing the date of the filing. TEX. R. APP. P. 9.4(f). If you file your appendix as a separate document, rather than attaching it at the back of your brief, it must also have a durable light-colored cover. TEX. R. APP. P. 9.4(h). The front cover of every copy of your brief (and the cover for any separately bound appendix) must list:

(1) the style of the case (the names of the parties on appeal);

(2) the case number assigned by the Court of Appeals;

(3) the title of the document and the name of the party filing it;

(4) the name, mailing address, telephone, facsimile number, and any State Bar identification number for the lead counsel, if any, filing the brief; and

(5) *if you want to request oral argument*, you must state “ORAL ARGUMENT REQUESTED” on the cover of the brief. TEX. R. APP. P. 9.4(g). It is also advisable to identify the trial court and trial court cause number on the cover of your brief.

A brief must be securely bound “so as to ensure that it will not lose its cover and fall apart in regular use.” TEX. R. APP. P. 9.4(f). We recommend either using a heavy strength staple on the left top corner or durable GBC binding along the left side of the brief. Rule 9.4(f) requires that it be bound in such a way that it lays flat when opened.

VIII. MOTIONS

A motion is a written request asking the Court to make a special ruling in the appeal. Either the appellant or the appellee

may file a motion with the Court. For example, if you want to obtain an extension of time to file your brief, you would make your request by filing a motion (original and two copies) with the Court of Appeals and serve a copy of the motion on the other party or parties to the appeal. See Tex. R. App. P. 9.3(a)(1)(B) and 9.5. Your motion must state the reasons why you are making a particular request. TEX. R. APP. P. 10.1. Be specific about what relief you need and why you need it. Rule 10.5 sets forth specific requirements for motions for extensions of time.

If your motion will not be opposed, you should state that it is “Unopposed” in the title of the motion. Every motion must contain a certificate of conference stating that you have conferred with the other parties and that they do or do not oppose the relief sought. TEX. R. APP. P. 10.1(a)(5). If you are unable to reach your opposing party or their counsel (if they are represented),

then state in your certificate that you have made reasonable attempts to confer with the other parties to determine their position on the substance of the motion. Motions can be rejected by the Clerk’s office if the certificate of service or certificate of conference is not included. Do not submit a proposed order. A sample motion for extension of time to file a brief is available as Form 9.

The Court will inform you of its decision by mailing you and the other parties to the appeal notice of the order granting or denying your motion. The Court’s rulings are also posted on the Court’s website under the case information/docket sheet for the appeal.

IX. THE DECISION PROCESS

Once briefs have been filed by both sides to the appeal and any oral argument has occurred, the case will be submitted to the court for decision. The First Court of Appeals’ website has a special page showing the submission dates for cases submitted

with oral argument as well as those to be submitted on the briefs. See <http://www.1stcoa.courts.state.tx.us/opinion/s/submission.asp>.

A. Oral Argument

Because of the large number of cases filed in the First Court of Appeals, the Court does not schedule oral argument in every case. In the majority of cases, the appeal will be decided upon review and consideration of the briefs and record alone, without an oral hearing before the judges.

If the Court believes that oral argument will assist its decision, it will advise the parties. The person presenting oral argument should be thoroughly familiar with the record, the legal issues and arguments presented, and the authorities cited by both parties. Remember that the purpose of the argument is to answer the Court's questions, not to make a speech about why you should win.

B. Opinion

Decisions in most appeals are made by a panel of three judges of the Court. The judges who consider your appeal will prepare a written opinion or order explaining the Court's final decision. This decision will be mailed to you. You can also sign up for the "Case Mail" service on the Court's website, which will send you an email notice when certain events occur with respect to your case, such as the issuance of an opinion.

X. COSTS IN THE COURT OF APPEALS

Texas Rule of Appellate Procedure 43.4 explains the procedure for awarding costs by the Court of Appeals. "Prevailing parties" are generally awarded their costs on the appeal. TEX. R. APP. P. 43.4. Consequently, if you are the appellant, and the Court of Appeals reverses the trial court's judgment or order, it should award you your appeal costs from the appellee. If you are the appellee, and the Court

dismisses the appeal or affirms the trial court's judgment or order, the Court will probably order that you recover your costs from the appellant. The Court may decide not to award costs to either side if the trial court's order is affirmed in part and reversed in part. It also has the discretion to tax costs otherwise as required by law or for good cause. TEX. R. APP. P. 43.4.

You need to check the judgment, which is a separate document from the Court's opinion, to insure that costs were awarded appropriately. If you want to request the Court to reconsider the award of costs, you must do so in the form of a motion for rehearing, which must be filed within 15 days after the Court of Appeals' judgment is rendered. TEX. R. APP. P. 49.1

Recoverable costs include:

- (1) Fees charged by the Clerk of the Court;
- (2) Cost of the preparation of the Clerk's Record and Reporter's Record;

(3) Other costs as directed by the Court.

If the Court of Appeals finds that an appeal or cross-appeal is frivolous, it can award the successful party its costs, fees and reasonable attorney fees on appeal.

XI. INDIGENCE—INABILITY TO PAY COSTS OF APPEAL

If you believe you cannot pay the costs of an appeal—meaning the filing fee, Clerk's Record, and/or Reporter's Record—you may be permitted to proceed on appeal without paying these costs in advance by filing what is called an affidavit of indigence. Texas Rule of Appellate Procedure 20.1 sets forth the procedure and requirements for establishing indigence, or inability to pay.

If you have not previously filed an affidavit of indigence in the trial court, you must do so either with or before the time for filing your notice of appeal. TEX. R. APP. P. 20.1(c)(1). The mandatory contents of that

affidavit are listed in Rule 20.1(b), and a suggested form is available as Form 3.

The trial court clerk and court reporter and any party may challenge your claim of indigence by filing a contest to the affidavit. If such a contest is filed, then it is your burden to prove that you are entitled to proceed on appeal without paying these costs. TEX. R. APP. P. 20.1(e) & (g). If the trial court determines that you can pay or give security for some of the costs, it will order you to do so. TEX. R. APP. P. 20.1(k).

If your claim of indigence is not challenged or if the trial court sustains your claim against a contest—by a written order—and you file a timely notice of appeal, then you may proceed without paying the costs of appeal in advance. TEX. R. APP. P. 20.1(a).

XII. VOLUNTARY DISMISSAL

If an appellant desires to dismiss his or her appeal at any time prior to a decision, the parties can agree to such dismissal or the appellant can file a motion for voluntary

dismissal. TEX. R. APP. P. 42.1. The dismissal will usually be granted unless it would prevent the other party from seeking relief to which it is entitled. TEX. R. APP. P. 42.1(a). Unless the parties otherwise agree, the Court will tax costs against the appellant. TEX. R. APP. P. 42.1(d).

XIII. ADDITIONAL INFORMATION

Appellate forms and information about the pro bono appellate programs are available at the State Bar of Texas Appellate Pro Bono website, <http://www.tex-app.org/probono.php>, and the Houston Bar Association Appellate Section website, <http://www.hba.org/folder-sections/sec-appellate.htm>.

