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**PAUL WOMACK, JUDGE
COURT OF CRIMINAL APPEALS OF TEXAS**

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To the Supreme Court Advisory Committee:

The Court of Criminal Appeals has discussed the proposed amendments to the Rules of Appellate Procedure. Our only concern is with Rule 47. We tentatively think that, for criminal cases, the designation of some opinions as Published or Unpublished should continue. A suggested modification of the committee's proposal is attached.

The Court of Criminal Appeals wishes also to change some rules that affect only criminal cases — specifically Rules 25.2, 68.4, 71.2, and 71.3. Drafts of those rules are also attached.

I welcome your comments and suggestions.

With best wishes, I am,

Yours truly,

Paul Womack, Judge

25.2 Criminal Cases.

(a) *Rights to Appeal.*

(1) The State is entitled to appeal a court's order in a criminal case as provided by Code of Criminal Procedure article 44.01.

(2) A defendant in a criminal case has the right of appeal to a court of appeals under these rules.

(A) A defendant in a plea-bargain case may appeal only:

(i) those matters that were raised by written motion filed and ruled on before trial, or

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

(B) A plea-bargain case is one in which a defendant's plea was guilty or nolo contendere and the punishment did not exceed the punishment recommended by the prosecutor and agreed to by the defendant and the defense counsel.

(b) *Perfection of appeal.* In a criminal case, appeal is perfected by timely filing a sufficient notice of appeal. In a death-penalty case, however, it is unnecessary to file a notice of appeal.

~~(b)~~(c) *Form and sufficiency of notice.*

(1) Notice must be given in writing and filed with the trial court clerk.

(2) Notice is sufficient if it shows the party's desire to appeal from the judgment or other appealable order, and:

(A) if the State is ~~the appellant~~ appealing, the notice complies with Code of Criminal Procedure article 44.01, or

(B) if the defendant is the appellant, the notice of appeal bears the trial court's certification that the appellant has the right of appeal under Rule 25.2(a)(2).

~~(3) But if the appeal is from a judgment rendered on the defendant's plea of guilty or nolo contendere under Code of Criminal Procedure article 1.15, and the punishment assessed did not exceed the punishment recommended by the prosecutor and agreed to by the defendant, the notice must~~

- ~~(A) specify that the appeal is for a jurisdictional defect;~~
- ~~(B) specify that the substance of the was raised by written motion and ruled on before trial; or~~
- ~~(C) state that the trial court granted permission to appeal.~~

~~(c)~~ **(d) Clerk's duties.** The trial court clerk must note on the copies of the notice of appeal the case number and the date when the notice was filed. The clerk must then immediately send one copy to the clerk of the appropriate court of appeals and one copy of a defendant's notice of appeal to the State's attorney.

~~(d)~~ **(e) Effect of appeal.** Once the record has been filed in the appellate court, all further proceedings in the trial court — except as provided otherwise by law or by these rules — will be suspended until the trial court receives the appellate-court mandate.

Notes and Comments

Comment on 1997 change: This is former Rule 40. In civil cases, the requirement of an appeal bond is repealed. Appeal is perfected by filing a notice of appeal. A notice must be filed by any party seeking to alter the trial court's judgment. The restricted appeal — formerly the appeal by writ of error — is perfected by filing a notice of appeal in the trial court as in other appeals. The contents of the notice of appeal is prescribed. The notice of limitation of appeal is repealed. In criminal cases, the rule is amended to apply to notices by the State, and to refer to additional statutory requirements for the State's notice. In felony cases in which the defendant waived trial by jury, pleaded guilty or nolo contendere, and received a punishment that did not exceed what the defendant agreed to in a plea bargain, the rule is amended to make clear that regardless of when the alleged error occurred, an appeal must be based on a jurisdictional defect or a written motion ruled on before trial, or be with the permission of the trial court.

Comment on 2002 change: Rule 25.2, for criminal cases, is amended. Rule 25.2 (a)(2), which replaces former Rule 25.2(b)(3), conforms to Code of Criminal Procedure article 44.02. Rule 25.2(b) is given the requirement that a notice of appeal be in "sufficient" form, which codifies the decisional law. Rule 25.2(c)(2) adds a requirement that every defendant's notice of appeal be certified by the trial judge. If the notice of appeal is not certified, the appeal has not been perfected under Rule 25.2(b). If a sufficient, certified notice of appeal is not filed after the appellate court deals with the defect (see Rule 37.1), preparation of an appellate record and representation by an appointed attorney may cease. A form of notice of appeal is provided in an appendix to these rules.

The State of Texas
v.

Defendant

[Case number]

In the _____
Court _____ of _____

County, Texas

DEFENDANT'S NOTICE OF APPEAL IN CRIMINAL CASE

This is notice of the defendant's desire to appeal to the court of appeals from the judgment or other appealable order in this case.

Defendant (if not represented by counsel)
Mailing address:
Telephone number:
Fax number (if any):

Counsel
State Bar of Texas identification number:
Mailing address:
Telephone number:
Fax number (if any):

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

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

- ☐ is not in a plea-bargain case. [or]
- ☐ is in a plea-bargain case, and is on matters that were raised by written motion filed and ruled on before trial. [or]
- ☐ is in a plea-bargain case and is taken after getting the trial court's permission to appeal.

Judge

Date Signed

("A plea-bargain case is one in which a defendant's plea was guilty or nolo contendere and the punishment did not exceed the punishment recommended by the prosecutor and agreed to by the defendant and the defense counsel." Texas Rule of Appellate Procedure 25.2(a)(2)(B).)

RULE 47. OPINIONS AND PUBLICATION

- 47.1 Written Opinions.** The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal.
- 47.2 Designation and Signing Court Opinions; Participating Justices.** Each opinion of the court must be designated either an “opinion” or a “Memorandum Opinion.” A majority of the justices who participate in considering the case must determine whether the opinion will be signed by a justice or will be per curiam and whether it will be designated an opinion or memorandum opinion. The names of the participating justices must be noted on all written opinions or orders of the court or a panel of the court.
- 47.3 Distribution of Opinions.** All opinions of the courts of appeals must be made available to public reporting services, print or electronic.
- 47.4 Designation of ~~Memorandum~~ Opinions.**
- (a) *Memorandum opinions.* If the issues are settled, the court should write a brief memorandum opinion no longer than necessary to advise the parties of the court’s decision and the basic reasons for it. An opinion may not be designated a memorandum is the author of a concurrence or dissent opposes that designation. An opinion must be designated a memorandum opinion unless it does any of the following:
 - ~~(a)~~ (1) 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)~~ (2) involves issues of constitutional law or other legal issues important to the jurisprudence of Texas;
 - ~~(c)~~ (3) criticizes existing law; or
 - ~~(d)~~ (4) resolves an apparent conflict of authority.
 - (b) *Publication in Criminal Cases.*
 - (1) A majority of the justices who participate in considering a criminal case must determine — before the opinion is handed down — whether the opinion should be published.
 - (2) A notation stating “publish” or “do not publish” must be made on each opinion.
 - (3) Any party may move the appellate court to reconsider its decision regarding

publication of an opinion, but the court of appeals must not order any unpublished opinion to be published after the Court of Criminal Appeals has acted on any party's petition for discretionary review or other request for relief.

(4) The Court of Criminal Appeals may, at any time, order a court of appeals' opinion published.

- 47.5 Concurring and Dissenting Opinions.** Only a justice who participated in the decision of a case may file or join in an opinion concurring in or dissenting from the judgment of the court of appeals. Any justice on the court may file an opinion in connection with a denial of a hearing or rehearing en banc.
- 47.6 Change in Designation by En Banc Court.** A court en banc may change a panel's designation of an opinion.
- 47.7 Citation of Unpublished Opinions.** Opinions not designated for publication by the court of appeals under these or prior rules have no precedential value and must not be cited as authority by counsel or by a court.

Notes and Comments

Comment to 1997 change: This is former Rule 90. Subdivision 47.1 makes clear that a memorandum opinion should not be any longer than necessary. Subdivision 47.5 is amended to make clear that only justices who participated in the decision may file an opinion in the case. Judges who are not on a panel may file an opinion only in respect to a hearing or rehearing en banc. Former Rule 90(h), regarding publication of opinions after the Supreme Court grants review, is repealed.

Comment to 2002 change: The rule is substantively changed to discontinue the use of the "do not publish" designation in civil cases, to require that all opinions of the courts of appeals be made available to public reporting services, and to remove prospectively and prohibition against the citation of opinions as authority in civil cases. The rule favors the use of "memorandum opinions" designated as such except in certain types of cases but does not change other requirements, such as those in *Pool* and ———. An opinion previously designated "do not publish" has no precedential value and may not be cited as authority.

RULE 68. DISCRETIONARY REVIEW WITH PETITION

...

68.4 Contents of Petition. A petition for discretionary review must be as brief as possible. It must be addressed to the “Court of Criminal Appeals of Texas” and must state the name of the party or parties applying for review. The petition must contain the following items:

...

- (g) ~~*Reasons for review*~~ **Argument.** The petition must contain a direct and concise argument, with supporting authorities, amplifying the reasons for granting review. *See* Rule 66.3. The court of appeals' opinions will be considered with the petition, and statements in those opinions need not be repeated if counsel accepts them as correct.

Notes and Comments

Comment to 1997 change: ...

Comment to 2002 change: The original catchline of 68.4(g) was “Reasons for review,” which caused confusion because of its similarity to the catchline in 66.3 (“Reasons for Granting Review”). It is changed to “Argument.”

RULE 71. DIRECT APPEALS

- 71.1 Direct Appeal.** Cases in which the death penalty has been assessed under Code of Criminal Procedure 37.071, and cases in which bail has been denied in non-capital cases under Article I, Section 11a of the Constitution, are appealed directly to the Court of Criminal Appeals.
- 71.2 Record.** The appellate record should be prepared and filed in accordance with Rules 31, 32, 34, 35 and 37, except that the record must be filed in the Court of Criminal Appeals. After disposition of the appeal, the Court may discard copies of juror information cards or other portions of the clerk's record that are not relevant to an issue on appeal.
- 71.3 Briefs.** Briefs in a direct appeal should be prepared and filed in accordance with Rule 38, except that the brief need not contain an appendix (Rule 38.1(j)), and the brief in a case in which the death penalty has been assessed may not exceed 125 pages. All briefs must be filed in the Court of Criminal Appeals. The brief must include a short statement of why oral argument would be helpful, or a statement that oral argument is waived.

Notes and Comments

Comment to 1997 change: This is former Rule 210. The rule is extended to all direct appeals. A page limit is added for death penalty cases. Other nonsubstantive changes are made.

Comment to 2002 change: A requirement that briefs include a statement regarding oral argument is added.