

## **MEMORANDUM**

To: Appellate Rules Subcommittee, Supreme Court Advisory Committee

From: William V. Dorsaneo, III

Re: Appellate Rule Changes Concerning Civil Practice and Remedies Code  
Section 51.04 (d)-(f).

Date: December 30, 2004

Here is a redrafted version of proposed changes to Appellate Rules 12.1 and 25. These redrafts are based primarily on the August 2004, transcript of the Advisory Committee and the votes taken at the meeting. Chairman Chip Babcock has also directed us to consider whether any other changes to the Texas Rules of Appellate Procedure are required by House Bill 4. I believe that Appellate Rule 29.5 (Further Proceedings in Trial Court) needs revision because of the changes made to Section 51.014 of the Civil Practice and Remedies Code. A copy of a proposed revision to Appellate Rule 29.5 is also included at the end of this memorandum. Would all of you please look at Justice Hecht's letter of June 16, 2003 to see if any other changes are needed? I hope everyone had a Merry Christmas and wish all of you a Happy New Year.

**Rule 12.1 Docketing the Case.** On receiving a copy of the notice on appeal, the petition for permission to appeal, the petition for review, the petition for discretionary review, the petition in an original proceeding, or a certified question, the appellate clerk must:

- (a) endorse on the document the date of receipt;
- (b) collect any filing fee;
- (c) docket the case;
- (d) notify all parties of the receipt of the document; and
- (e) if the document filed is a petition for review filed in the Supreme Court, notify the court of appeals clerk of the filing of the petition.

## **Rule 25. Perfecting Appeal**

### **25.1 Civil Cases – Appeal As of Right.**

- (a) ***Notice of appeal.*** An appeal is perfected when a written notice of appeal is filed with the trial court clerk within the time allowed by Rule 26. If a notice of appeal is mistakenly filed with the appellate court, the notice is deemed to have been filed the same day with the trial court clerk, and the appellate clerk must immediately send the trial court clerk a copy of the notice.
- (b) ***Jurisdiction of appellate court.*** The filing of a notice of appeal by any party invokes the appellate court's jurisdiction over all parties to the trial court's judgment or order appealed from. Any party's failure to take any other step required by these rules, including the failure of another party to perfect an appeal under (c), does not deprive the appellate court of jurisdiction but is ground only for the appellate court to act appropriately, including dismissing the appeal.
- (c) ***Who must file notice.*** A party who seeks to alter the trial court's judgment or other appealable order must file a notice of appeal. Parties whose interests are aligned may file a joint notice of appeal. The 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.
- (d) ***Contents of notice.*** The notice of appeal must:
  - (1) identify the trial court and state the case's trial court number and style;
  - (2) state the date of the judgment or order appealed from;
  - (3) state that the party desires to appeal;
  - (4) state the court to which the appeal is taken unless the appeal is to either the First or Fourteenth Court of Appeals, in which case

the notice must state that the appeal is to either of those courts;

- (5) state the name of each party filing the notice;
- (6) in an accelerated appeal, state that the appeal is accelerated; and
- (7) in a restricted appeal:
  - (A) state that the appellant is a party affected by the trial court's judgment but did not participate—either in person or through counsel—in the hearing that resulted in the judgment complained of;
  - (B) state that the appellant did not timely file either a postjudgment motion, request for findings of fact and conclusions of law, or notice of appeal; and
  - (C) be verified by the appellant if the appellant does not have counsel.
- (e) ***Service of notice; copy filed with appellate court.*** The notice of appeal must be served on all parties to the trial court's final judgment or, in an interlocutory appeal, on all parties to the trial court proceeding. A copy of the notice of appeal must be filed with the appellate court clerk.
- (f) ***Amending the notice.*** An amended notice of appeal correcting a defect or omission in an earlier filed notice may be filed in the appellate court at any time before the appellant's brief is filed. The amended notice is subject to being struck for cause on the motion of any party affected by the amended notice. After the appellant's brief is filed, the notice may be amended only on leave of the appellate court and on such terms as the court may prescribe.
- (g) ***Enforcement of judgment not suspended by appeal.*** The filing of a notice of appeal does not suspend enforcement of the judgment. Enforcement of the judgment may proceed unless:

- (1) the judgment is superseded in accordance with Rule 24, or
- (2) the appellant is entitled to supersede the judgment without security by filing a notice of appeal.

## **25.2 Civil Cases – Appeal By Permission**

### **(a) *Petition for permission to appeal.***

- (1) To request permission to appeal an interlocutory order that is not otherwise appealable as of right in accordance with Section 51.014(d)-(f) of the Civil Practice and Remedies Code, any party to the trial court proceeding must file a petition for permission to appeal with the clerk of the appellate court that has appellate jurisdiction over the action.
- (2) The petition must be filed not later than the 10<sup>th</sup> day after the date a district court signs a written order granting permission to appeal. The appellate court may extend the time to file the petition if within 15 days after the deadline for filing the petition, the petitioner:
  - (A) files the petition in the appellate court, and
  - (B) files in the appellate court a motion complying with Rule 10.5(b)

### **(b) *Contents of petition; service; response or cross-petition***

- (1) The petition must:
  - (A) identify the trial court and state the case's trial court number and style;
  - (B) give a complete list of all parties to the trial court proceeding and the names and addresses of all trial and

appellate counsel;

- (C) identify the district court's order granting permission to appeal by stating the date of the order and attaching a copy of the order to the petition;
- (D) state that all parties agree to the district court's order granting permission to appeal;
- (E) identify the written order sought to be appealed by stating the date of the order and attaching a copy of the order to the petition;
- (F) state concisely the issues or points presented, the facts necessary to understand the issues or points presented, the reasons why the order complained of involves a controlling question of law as to which there is substantial ground for difference of opinion, why an immediate appeal may materially advance the ultimate termination of the litigation, and the relief sought.

(2) The petition must be served on all parties to the trial court proceeding.

(3) If any party timely files a petition, any other party may file a response or a cross-petition not later than 7 days after the initial petition is served. Any response or cross-petition must be served on all parties to the trial court proceeding.

**(c) Form of papers; number of copies:**

All papers must conform to Rule 9. Except by the appellate court's permission, a petition, response, or cross-petition may not exceed 10 pages, exclusive of pages containing the identity of parties and counsel, any table of contents, any index of authorities, the issues presented, the signature and proof of service and the accompanying documents required to be attached to the petition. An original and 3 copies must

be filed unless the appellate court requires a different number by local rule or by order in a particular case.

**(d) *Submission of petition; appellate court's order.*** Unless the court of appeals orders otherwise, the petition and response or cross-petition will be submitted to the appellate court without oral argument. A copy of the appellate court's order granting or denying permission to appeal, dismissing the petition, or otherwise directing the parties to take further action, must be served on all parties to the trial court proceedings. No motion for rehearing may be filed.

**(e) *Grant of petition; prosecution of appeal***

- (1)** Within 10 days after the entry of the appellate court's order granting permission to appeal, in order to perfect an appeal under these rules, any party to the trial court proceeding must file a notice of accelerated appeal with the district clerk and the clerk of the appellate court in conformity with Rule 25.1 together with a docketing statement as provided in Rule 32. The provisions of Rule 26.3 apply to such a notice.
- (2)** After perfection of the appeal, the appeal may be prosecuted in the same manner as any other accelerated appeal.

[Alternative (e)]

**(e) *Grant of petition; prosecution of appeal***

- (1)** Within 10 days after the entry of the order granting permission to appeal, any party to the trial court proceeding must:
  - (A)** file a notice of accelerated appeal with the district clerk to perfect the appeal,
  - (B)** file with the clerk of the court of appeals a copy of the notice of accelerated appeal and a docketing statement in accordance with Rule 32, and

(C) pay all required fees

(2) After perfection of the appeal, the appeal may be prosecuted in the same manner as my other accelerated appeal.

### **25.3 Criminal Cases.**

#### **Rule 29 Orders Pending Interlocutory Appeal in Civil Cases.**

#### **Rule 29.5 Further Proceedings in Trial Court.**

While an appeal from an interlocutory order is pending, the trial court retains jurisdiction of the case. Unless prohibited by statute, the trial court ~~and~~ may make further orders, including one dissolving the order appealed from and, unless prohibited by statute, the court may proceed with a trial on the merits. But the court must not make an order that:

- (a) is inconsistent with any appellate court temporary order; or
- (b) interferes with or impairs the jurisdiction of the appellate court or effectiveness of any relief sought or that may be granted on appeal

COMMENT to 2004 change. Rule 29.5 is amended to conform to Sections 51.014 (b), (c) and (e) of the Civil Practice and Remedies Code.