

## MEMORANDUM

To: SCAC Members

From: Bill Dorsaneo

Date: October 19, 2006

Re: Nathan Hecht Letter 9/22/06

Several members of the Appellate Rules Subcommittee conducted a teleconference on October 11 and considered the changes suggested for Appellate Rules 13 (Court Reporters and Court Recorders), 20.1 (When Party is Indigent), 24.2 (Amount of Bond, Deposit or Security), 41 (Panel and En Banc Decision), 49 (Motion and Further Motion for Rehearing), 52 (Original Proceedings) and a possible appellate rule to govern the sealing of records in the appellate courts. Here are the subcommittee's recommendations.

**13.2 Additional Duties of Court Recorder.** The official court recorder must also:

- (a)
- (b)
- (c)
- (d)
- (e)
- (f) if requested by any party to the appeal, prepare and file a stenographic transcription of the proceedings along with the reporter's record as provided in Rule 34.6(a)(2).

### **34.6 Reporter's Record.**

- (1)
  - (a) *Contents*
    - (1) Stenographic recording.

...

(2) Electronic recording.

...

(b) *Request for preparation.*

- (1) Request to court reporter or court recorder. At or before the time for perfecting the appeal, the appellant must request in writing that the official reporter or recorder prepare the reporter's record. The request must designate the exhibits to be included. A request ~~to the court reporter but not the court recorder~~ must also designate the portions of the proceedings to be included.

**35.3 Responsibility for Filing Record**

(b) *Reporter's record.* The official or deputy court reporter or court recorder is responsible for preparing, certifying and timely filing the reporter's record if:

- (1) a notice of appeal has been filed;
- (2) the appellant has requested the reporter's record be prepared; and
- (3) the party responsible for paying for the preparation of the reporter's record has paid the reporter's or the recorder's fee, or has made satisfactory arrangements with the reporter or recorder to pay the fee, or is entitled to appeal without paying the fee.

**38.5** *Appendix for cases recorded electronically.* In cases where the proceedings were electronically recorded, the following rules apply:

(a) *Appendix.*

- (1) In general. At or before the time a party's brief is due, the party must file one copy of an appendix containing a transcription of all portions of the recording that the party considers relevant to the appellate issues or points. A transcription prepared and filed by the court recorder at the request of a party pursuant to Rules 13.2(f) and 34.6(b)(1) satisfies this requirement. Unless another party objects, the transcription will be presumed accurate.

## 20.1 Civil Cases

(a) *Establishing indigence.* A party who cannot pay the costs in an appellate court may proceed without advance payment of costs if:

- (1) the party files an affidavit of indigence in a compliance with this rule.

(b) *Contents of affidavit.*

(c) IOLTA Certificate. If the party is represented by an attorney who is providing free legal services, without contingency, because of the party's indigence and the attorney is providing services either directly or by referral from a program funded by the Interest on Lawyers Trust Accounts (IOLTA) program, the attorney may file an IOLTA certificate confirming that the IOLTA-funded program screened the party for income eligibility under the IOLTA income guidelines. A party's affidavit of inability accompanied by an attorney's IOLTA certificate may not be contested.

(d) When and Where Affidavit Filed.

- (1) Appeals. An appellant must file the affidavit of indigence in the trial court with or before the notice of appeal. The prior filing of an affidavit of indigence in the trial court pursuant to Civil Procedure Rule 145 does not meet the requirements of this rule, which requires a separate affidavit and proof of current indigence. An appellee who is required to pay part of the cost. . . must file an affidavit of indigence in the trial court within 15 days after the date when the appellee becomes responsible for paying that cost.
- (2) Extension of time. The appellate court may extend the time to file an affidavit if, within 15 days after the deadline for filing the affidavit, the party files in the appellate court a motion complying with Rule 10.5(b).

*See Higgins v. Randall County Sheriff's Office* 49 Tex. Sup. Ct. J. 645 (Tex. 2006).

## 24.2 Amount of Bond, Deposit or Security

Awaiting Prof. Carlson's draft.

#### 41.1 Decision by Panel

(a) *Constitution of panel.* Unless a court of appeals with more than three justices votes to decide a case en banc, a case must be assigned for decision to a panel of the court consisting of three justices, although not every member of the panel must be present for argument. If the case is decided without argument, three justices must participate in the decision. A majority of the panel, which constitutes a quorum, must agree on the judgment. Except as otherwise provided in these rules, a panel's opinion constitutes the court's opinion, and the court must render a judgment in accordance with the panel opinion.

(b) *When panel cannot agree on judgement.* After argument, if for any reason a member of the panel cannot participate in deciding a case, the case may be decided by the two remaining justices. If they cannot agree on a judgement, the chief justice of the court of appeals must designate another justice of the court to sit on the panel to consider the case, request the assignment of an active district court judge or a qualified retired or former justice or judge to sit on the panel to consider the case, or convene the court en banc to consider the case. The reconstituted panel or the en banc court may order the case reargued.

(c) *When court cannot agree on judgment.* After argument, if for any reason a member of a court consisting of only three justices cannot participate in deciding a case, the case may be decided by the two remaining justices. If they cannot agree on a judgment, that fact must be certified to the Chief Justice of the Supreme Court. The Chief Justice may then temporarily assign a justice of another court of appeals an active district court judge or a qualified retired or former justice or judge to sit with the court of appeals to consider the case. The reconstituted court may order the case reargued.

**49.7 En Banc Reconsideration.** A party may file a motion for en banc reconsideration, as a separate motion, with or without filing a motion for rehearing, within 15 days after the court of appeals judgment or order is rendered. Alternatively a motion for en banc reconsideration may be filed by a party no later than 15 days after the overruling of the same party's timely filed motion for rehearing or further motion for rehearing. While the court has plenary power, as provided in Rule 19, a majority of the en banc court may, with or without a motion, order en banc reconsideration of a panel's decision . . .

#### 49.8 Extension of Time

A court of appeals may extend the time for filing a motion for rehearing or a further motion for rehearing or a motion for en banc reconsideration 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.

**49.9 Not Required for Review.** A motion for rehearing is not a prerequisite to filing a motion for en banc reconsideration as provided by Rule 49.7 or a petition for review in the Supreme Court or a petition for discretionary review in the court of Criminal Appeals nor is it required to preserve error.

**52.3 Original Proceedings; Form and Content of Petition.** All factual statements in the petition, not otherwise supported by sworn testimony, affidavit or other competent evidence, must be verified by an affidavit or affidavits made on personal knowledge by affiants competent to testify to the matters stated. . .

#### 53.7 Time and Place of Filing.

(a) *Petition.* The petition must be filed with the Supreme Court within 45 days after the following:

- (1) the date the court of appeals rendered judgment, if no motion for rehearing or motion for en banc reconsideration is timely filed; or
- (2) the date of the court of appeals' last ruling on all timely filed motions for rehearing and all timely filed motions for en banc reconsideration.

N.B. Also consider amending 19.1 to differentiate motions for rehearing from motions for en banc reconsideration as follows.

**19.1 Plenary Power of Courts of Appeals.** A court of appeals' plenary power over its judgment expires:

- (a) 60 days after judgment if no timely filed motion to extend time or motion for rehearing is then pending.
- (b) 30 days after the court overrules all timely filed motions for rehearing and all timely filed motions for en banc reconsideration of a panel's decision under Rule 49.7, and timely motions to extend time to file a motion for rehearing or a motion for en banc reconsideration under Rule 49.8.