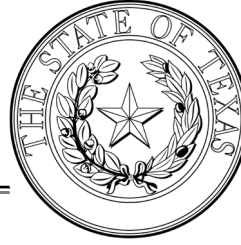


# Memorandum



---

**To:** Supreme Court Advisory Committee

**From:** Appellate Rules Subcommittee

**Date:** August 13, 2020

**Re:** May 18 Referral Relating to TRAP 34.5(a) Contents of Clerk's Record on Appeal

---

## **I. Matter referred to subcommittee**

The Court's May 18, 2020 referral letter and Chairman Babcock's May 20 letter refer the following matter to our committee:

**Texas Rule of Appellate Procedure 34.5(a).** In the attached email, Ben Taylor recommends amending Rule 34.5(a) to require the trial court clerk to automatically include any supersedeas bond in the clerk's record. The Committee should review and make recommendations.

A copy of Ben Taylor's email is attached as Appendix A.

## **II. Subcommittee Recommendation**

Amend TRAP 34.5(a) to add a new subsection to require the trial court clerk to automatically include any supersedeas bond in the clerk's record.

## **III. Background**

Ben Taylor's email states the following reasons for requesting the change:

As appellee's counsel our clients repeatedly have had to mess with supplementing clerk's records to get supersedeas bond or deposit information added in supplemental clerk's records (and charged for it too). It seems to me that in any appealed case there is no reason why the trial court clerk should not AUTOMATICALLY be required to include this hugely important document in the ORIGINAL clerk's record, since the appellate court certainly needs it in the event the trial court's judgment is affirmed (TRAP 43.5).

Currently TRAP 34.5(a) provides for the following items to be automatically included in the clerk's record on appeal without special designation by a party:

- (1) in civil cases, all pleadings on which the trial was held;
- (2) in criminal cases, the indictment or information, any special plea or defense motion that was presented to the court and overruled, any written waiver, any written stipulation, and, in cases in which a plea of guilty or nolo contendere has been entered, any documents executed for the plea;
- (3) the court's docket sheet;
- (4) the court's charge and the jury's verdict, or the court's findings of fact and conclusions of law;
- (5) the court's judgment or other order that is being appealed;
- (6) any request for findings of fact and conclusions of law, any post-judgment motion, and the court's order on the motion;
- (7) the notice of appeal;
- (8) any formal bill of exception;
- (9) any request for a reporter's record, including any statement of points or issues under Rule 34.6(c);
- (10) any request for preparation of the clerk's record;
- (11) in civil cases, a certified bill of costs, including the cost of preparing the clerk's record, showing credits for payments made;
- (12) in criminal cases, the trial court's certification of the defendant's right of appeal under Rule 25.2; and
- (13) subject to (b), any filing that a party designates to have included in the record.

Appellate courts need information about any supersedeas bond to formulate a judgment in certain cases. If the court of appeals affirms a judgment or modifies and renders judgment against the appellant, it must also render judgment against the sureties for the judgment and any costs assessed against the appellant. TRAP 43.5. The Supreme Court is similarly required to render judgment against sureties in affirming, modifying, or rendering a judgment against a party that was appellant in the court of appeals. TRAP 60.5. Judgment must also be rendered against any surety when the appellate court denies habeas relief to a relator who has been released on bond. TRAP 52.8. Copies of each of these rules is attached as Appendix B.

The supersedeas bond information is similar to a certified bill of costs which is also needed to prepare the judgment on appeal. The bill of costs is automatically included in the clerk's record, likely for that reason.

The subcommittee asked for input from Blake Hawthorne, clerk of the Supreme Court of Texas, and Michael Cruz, clerk of the Fourth Court of Appeals in San Antonio. Both agreed that inclusion of the supersedeas bond in the clerk's record would be helpful. Michael Cruz observed that its absence does slow down formulation of a judgment.

#### IV. Proposed amendment to TRAP 34.5(a)

The subcommittee recommends that TRAP 34.5(a) be amended as follows to require that any supersedeas bond be automatically included in the clerk's record on appeal without special designation by a party:

##### 34.5. Clerk's Record

(a) *Contents.* Unless the parties designate the filings in the appellate record by agreement under Rule 34.2, the record must include copies of the following:

- (1) in civil cases, all pleadings on which the trial was held;
- (2) in criminal cases, the indictment or information, any special plea or defense motion that was presented to the court and overruled, any written waiver, any written stipulation, and, in cases in which a plea of guilty or nolo contendere has been entered, any documents executed for the plea;
- (3) the court's docket sheet;
- (4) the court's charge and the jury's verdict, or the court's findings of fact and conclusions of law;
- (5) the court's judgment or other order that is being appealed;
- (6) any request for findings of fact and conclusions of law, any post-judgment motion, and the court's order on the motion;
- (7) the notice of appeal;
- (8) any formal bill of exception;
- (9) any request for a reporter's record, including any statement of points or issues under Rule 34.6(c);
- (10) any request for preparation of the clerk's record;
- (11) in civil cases, a certified bill of costs, including the cost of preparing the clerk's record, showing credits for payments made;
- (12) in criminal cases, the trial court's certification of the defendant's right of appeal under Rule 25.2; ~~and~~
- (13) in civil cases, any supersedeas bond; and
- (14) subject to (b), any filing that a party designates to have included in the record.

# Appendix A

**From:** Taylor, Ben  
**Sent:** Thursday, February 14, 2013 11:59 AM  
**To:** Nathan L. Hecht ([nlhecht@att.net](mailto:nlhecht@att.net))  
**Cc:** Elaine Carlson ([elainecarlson@comcast.net](mailto:elainecarlson@comcast.net))  
**Subject:** Default Clerk's Record / Supersedeas Suggestion  
**Importance:** Low

Dear Justice Hecht,

At Elaine Carson's suggestion, I am writing you in your capacity as the Court's rules liason.

I wish the Court would consider amending TRAP 34.5(a) requiring trial court clerks AUTOMATICALLY to include any supersedeas bond or certificate of deposit in lieu of bond. As appellee's counsel our clients repeatedly have had to mess with supplementing clerk's records to get supedeas bond or deposit information added in supplemental clerk's records (and charged for it too). It seems to me that in any appealed case there is no reason why the trial court clerk should not AUTOMATICALLY be required to include this hugely important document in the ORIGINAL clerk's record, since the appellate court certainly needs it in the event the trial court's judgment is affirmed (TRAP 43.5).

Thanks for your consideration.

Respectfully, Bt

## **Appendix B. TRAP Rules Relating to Judgments Against Sureties**

### **43.5. Judgment Against Sureties in Civil Cases**

When a court of appeals affirms the trial court judgment, or modifies that judgment and renders judgment against the appellant, the court of appeals must render judgment against the sureties on the appellant's supersedeas bond, if any, for the performance of the judgment and for any costs taxed against the appellant.

### **52.8. Action on Petition**

(a) Relief Denied. If the court determines from the petition and any response and reply that the relator is not entitled to the relief sought, the court must deny the petition. If the relator in a habeas corpus proceeding has been released on bond, the court must remand the relator to custody and issue an order of commitment. If the relator is not returned to custody, the court may declare the bond to be forfeited and render judgment against the surety.

### **60.5. Judgment Against Sureties**

When affirming, modifying, or rendering a judgment against the party who was the appellant in the court of appeals, the Supreme Court must render judgment against the sureties on that party's supersedeas bond, if any, for the performance of the judgment. If the Supreme Court taxes costs against the party who was the appellant in the court of appeals, the Court must render judgment for those costs against the sureties on that party's supersedeas bond, if any.