

Tab E

Memorandum



To: Supreme Court Advisory Committee

From: Appellate Rules Subcommittee

Date: August 15, 2023

Re: June 3, 2023 Referral Letter relating to HB 3474 and TRAP 34.5 clerk's record

I. Matter referred to subcommittee

Clerk's Record. Section 17.001 of HB 3474 adds Civil Practice and Remedies Code § 51.018 to permit appealing parties to file an appendix in lieu of the clerk's record and to prohibit a clerk from charging a fee for the appendix. The Committee should consider whether the Texas Rules of Appellate Procedure governing the clerk's record should be changed or a comment added to reference or restate the statute and draft any recommended amendments.

II. Relevant materials

HB 3474 provides that:

ARTICLE 17. APPELLATE RECORD

SECTION 17.001. (a) Subchapter B, Chapter 51, Civil Practice and Remedies Code, is amended by adding Section 51.018 to read as follows:

Sec. 51.018. APPENDIX IN LIEU OF CLERK'S RECORD. (a) Not later than the 10th day after the date that a party files a notice of appeal for a civil suit, the party may notify the trial court and the court of appeals that the party will file an appendix that replaces the clerk's record for the appeal.

(b) The party must file the appendix with the party's appellate brief. Except in an expedited proceeding or by order of the court, the brief and appendix must be filed not later than the 30th day after the later of:

- (1) the date that the party provided notice under Subsection (a); or
- (2) the date that a reporter's record, if any, is filed with the court of appeals.

(c) An appendix filed under this section must contain a file-stamped copy of each document required by Rule 34.5, Texas Rules of Appellate Procedure, for a civil suit and any other item the party intends to reference in the party's brief. The appendix may not contain a document that has not been filed with the trial court except by agreement of the parties to the appeal.

(d) An appendix filed in accordance with this section becomes part of the appellate record. A court clerk may not prepare or file a clerk's record or assess a fee for preparing a clerk's record if a party files an appendix in accordance with this section.

(b) Section 51.018, Civil Practice and Remedies Code, as added by this section, applies only to a party that files a notice of appeal on or after January 1, 2024. A party that files a notice of appeal before January 1, 2024, is governed by the law in effect on the date the notice was given, and the former law is continued in effect for that purpose.

III. Subcommittee recommendation for new Rule 34.5A

The Subcommittee recommends adding a new Rule 34.5A and a comment, as follows. Chief Justice Christopher, Chief Justice Gray, Justice Kelly, and Justice Miskel participated in the subcommittee's discussions.

34.5A Appendix in Lieu of Clerk's Record in a Civil Case

(a) *Notice of Election.* Not later than the tenth day after the date that a party files a notice of appeal for a civil suit, the party may file a notice with the trial court and the court of appeals that the party will file an appendix that replaces the clerk's record for the appeal.

(b) *Time to File Original Appendix.* The party filing a notice under subsection (a) must file the appendix with the party's appellate brief. Except by order of the court under Rule 38.6(d), the brief and appendix must be filed not later than the 30th day—or the 20th day for an accelerated appeal—after the later of: (i) the date that the party filed the notice under subsection (a); or (ii) the date that a reporter's record, if any, is filed with the court of appeals.

(c) *Supplemental or Joint Appendices.* In an appeal in which an appellant has filed a notice under subsection (a), any other party may file a supplemental appendix with that party's brief. In accordance with an agreement made under Rule 6.6, the parties may file a joint appendix.

(d) *Court-Directed Supplement.* The court may direct the appellant to file a supplemental appendix containing items described by the court. If the appellant fails to supplement as requested, and the record fails to establish the court's jurisdiction, the court may dismiss the appeal. In cases where the court has jurisdiction, and the appellant fails to supplement as requested, the court may presume that the missing items support the judgment.

(e) *Contents of Original Appendix.* The appendix filed under subsection (b) must contain a file-stamped copy of (i) each document required by Rule 34.5(a) for a civil suit, and (ii) any other item referenced in the party's brief.

(f) *Contents of All Appendices.* An appendix filed in accordance with this rule must not contain a document that was not filed with the trial court, except by agreement of the parties filed in accordance with Rule 6.6. An appendix filed in accordance with this rule becomes part of the appellate record under Rule 34.1.

(g) *Filing Requirements.* An appendix filed in accordance with this rule must be filed separately from any other document, and the pages must be consecutively numbered. An appendix must meet applicable filing requirements of Rules 9.4, 9.8, and 9.9. A nonconforming appendix is subject to court action under Rule 9.4(k).

(h) *No Clerk's Record.* A court clerk may not prepare or file a clerk's record or assess a fee for preparing a clerk's record if a party files an appendix in accordance with this rule.

Comment to 2023 Change: This rule is added to comply with Texas Civil Practice and Remedies Code section 51.018, as added by HB 3474 in 2023. This new rule allows the parties in a civil case to file appendices in lieu of a clerk's record. This new rule applies only to an appeal in which a party files a notice of appeal on or after January 1, 2024. An appeal in which the notice of appeal was filed before January 1, 2024 is governed by the law in effect on the date the notice was filed, and the former law is continued in effect for that purpose.

IV. Conforming amendments to Rules 35.3(a) and 38.6(a)

The subcommittee suggests the following conforming amendments to Rules 35.3(a) and 38.6(a):

35.3. Responsibility for Filing Record

(a) *Clerk's Record.* Except in an appeal governed by Rule 34.5A, ~~The~~ the trial court clerk is responsible for preparing, certifying, and timely filing the clerk's record if:

(1) a notice of appeal has been filed, and in criminal proceedings, the trial court has certified the defendant's right of appeal, as required by Rule 25.2(d); and

(2) the party responsible for paying for the preparation of the clerk's record has paid the clerk's fee, has made satisfactory arrangements with the clerk to pay the fee, or is entitled to appeal without paying the fee.

38.6. Time to File Briefs

(a) *Appellant's Filing Date*. Except in a habeas corpus or bail appeal, which is governed by Rule 31.1, or an appeal governed by Rule 34.5A, an appellant must file a brief within 30 days--20 days in an accelerated appeal--after the later of:

- (1) the date the clerk's record was filed; or
- (2) the date the reporter's record was filed.

V. Discussion

1. The subcommittee believes that adding a new Rule 34.5A is the best way to implement HB 3474. The subcommittee believes that embedding the new provisions into existing Rule 34.5 is not optimal, since HB 3474 is intended to create a process that supplants, rather than supplements, the process for requesting and filing a clerk's record. This draft rule is largely taken verbatim from HB 3474.

2. HB 3474 contains no language allowing an appellee or any other party to file an appendix. Since it can be expected that the appellant's appendix will not always include everything that other parties may want to cite, the proposed rule supplements HB 3474 by adding subsection (c), which allows any other party to file a supplemental appendix with its brief. Subsection (c) also allows the parties to agree to a joint appendix.

3. The subcommittee also added subsection (d), which allows the court to direct the appellant to file a supplemental appendix. This might occur, for example, when the court has reason to question its jurisdiction, including finality of the judgment. If the appellant fails to file the requested supplement, the court may apply the presumption that the missing items support the judgment.

4. Another gap-filler to HB 3474 is to add subsection (g), which specifies filing requirements for appendices.

5. HB 3473 appears to provide that the appellant's election controls whether the appeal will be decided based on appendices rather than a clerk's record. HB 3474 does not address what happens when there are multiple appellants or multiple appellees. Nor does it address what happens when there is a cross-appeal. It is possible that the Legislature intended that the election made by the first-to-file appellant will control in all circumstances. Rather than attempting to address all possible permutations, the subcommittee decided to stick with the text of HB 3474. Presumably, courts will have the ability to make case-by-case determinations about how to handle the record in multi-party appeals and cross-appeals.