BROUGHT IN ON APPEAL: PRACTICAL AND LEGAL FIRST STEPS

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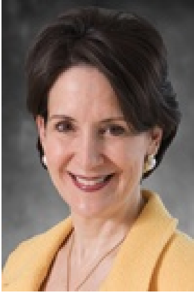
CHAPTER 11



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Areas of Practice

- Appellate
- Litigation/Trial Practice

Education

- J.D., South Texas College of Law, 1980, Alumna of the Year, 1992
- M.A., Texas A&M University - Commerce, 1978, Distinguished Alumna Citation, 2002
- B.S., Sam Houston State University, 1974, Distinguished Alumna Award, 1996

Bar Admissions

- Texas

Court Admissions

- U.S. Supreme Court
- U.S. Court of Appeals for the Fifth Circuit
- U.S. Court of Appeals for the Eleventh Circuit
- U.S. District Court for the Southern District of Texas
- U.S. District Court for the Eastern District of Texas

Judicial Clerkships

- Chief Staff Attorney, First Court of Appeals [Houston] 1981-90

Lynne Liberato has argued before the United States Supreme Court, met with the president in the Oval Office regarding judicial appointments, and lobbied Congress for funding of legal services for the poor. Whether before the highest levels of the three branches of government or at home in Houston, she dedicates herself to her clients, her profession, and her community.

Ms. Liberato has led teams in some of the most significant appeals and trials in Texas. Most recently, she handled pivotal legal issues for a major oil company in federal district court, represented a pipeline in one of the most significant energy cases before the Texas Supreme Court, and obtained a reversal of a $25.5 million judgment in the 5th Circuit.

She includes among her proudest achievements her selection as “Volunteer of the Year” for the United Way of Greater Houston, winning the Karen H. Susman ADL Jurisprudence Award, her election as president of the State Bar of Texas, and her selection as a participant in the 59th Annual Security Forum of the Air Force War College. She currently is the Community Campaign Chair for the United Way.

A prolific speaker and legal writer, she co-authored “Summary Judgments in Texas,” often called the “bible” of summary judgments. Versions of this article have appeared in five law reviews since 1989, and it has been recognized as one of the 10 most-cited articles by appellate courts nationwide. She also is a member of the board of directors for the law firm and head of its business development committee.

Professional Recognition

- Recognized by *Chambers USA* 2009-2013 as one of the leading practitioners in the United States for Appellate
- Karen H. Susman Jurisprudence Award (2013), given by the Anti-Defamation League to honor a lawyer who exhibits an exceptional commitment to equality, justice, fairness and community service
- Civilian participant, 59th Annual National Security Forum, Air Force War College (2012)
- JA Hall of Achievement Laureate (2012), Junior Achievement of Southeast Texas
- Leon Jaworski Award (2010), first woman to win community service award named for the famed Watergate special prosecutor
- Robert Kneebone Award for Volunteer of the Year (2008) and Woman of the Year (2004), United Way of Greater Houston
- Award for Outstanding Law Review Article (two-time winner) for "Summary Judgments in Texas" (2007) and for "Reasons for Reversal in Texas Courts of Appeals" (2004), presented by the Texas Bar Foundation

- Exemplary Article Award, Texas Center for the Judiciary (2005-2006) ("for contribution to judicial excellence")
- Gene Cavin Award, State Bar of Texas (2006) (highest award for excellence in continuing legal education)
- Top 100 Texas Super Lawyer, Top 50 Female Lawyer, Top 100 Houston Super Lawyer, and Appellate Super Lawyer, *Texas Monthly* magazine (2003-2012)
- Top Notch Appellate Lawyer, *Texas Lawyer* (2002 and 2007 - two of the three years the recognition was given) (recognized as one of the top five appellate lawyers in Texas)
- Named one of the Best Lawyers in America for Appellate Practice and Commercial Litigation, 2005-2013, Litigation - Intellectual Property, 2012-2013
- Martindale Hubbell® Law Directory with a Peer Review Rating of AV® Preeminent™
- Member, American Law Institute
- Board Certified in Civil Appellate Law, Texas Board of Legal Specialization

Professional Leadership

- President, State Bar of Texas (2000-2001)
- President, Houston Bar Association (1993-1994) (first woman)
- President, Texas Supreme Court Historical Society (2011-2012)
- Chair, Appellate Section, State Bar of Texas (1997-1998)
- Community Campaign Chair (2013-2014), United Way of Greater Houston; Chair of the Board (2005-2007); Board of Trustees (2003-2011, 2012-present); Chair, THRIVE Committee (2008-present); Alexis de Tocqueville Society (2001-present); Formerly Chair, Hurricane Ike Task Force; Chair, Community Goal Task Force; Chair, Hurricane Katrina/Rita Task Force; Chair/Founder, Law Firm Initiative
- Member, Board of Directors of the Greater Houston Partnership (2005-2010, 2012-2015)
- Executive Committee, South Texas College of Law Board of Directors (2005-2007); Trustee (2005-2007)
- Co-Author, *Texas Practice Guide* (West 1999 and Supp. 2011)
- Volunteer, Houston Bar Veterans Administration Clinic and Houston Volunteer Lawyers Program
- Board of Directors, United States Naval Academy Parents' Club of the Texas Gulf Coast (2005-2007)

Laurie Ratliff

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Laurie Ratliff is a board certified civil appellate lawyer who represents clients in appellate matters and partners with trial counsel for presenting legal issues in motion practice, discovery disputes, summary judgments, and other trial court matters.

Drawing on her experience working for two courts of appeals, first as a briefing attorney with the Amarillo Court of Appeals, and later as a staff attorney with the Austin Court of Appeals, and serving as lead counsel in a variety of complex appeals, Laurie represents individuals and companies in all aspects of an appeal or an original proceeding. She also assists other counsel with appellate procedural issues, brief writing, and oral argument preparation.

A frequent author and speaker on court of appeals practice and trial procedure, Laurie has written a monthly column for the *Austin Lawyer* magazine for more than twelve years, which comments on recent Third Court of Appeals' opinions. She also has co-authored an annual article for more than ten years, "Texas Supreme Court Update," for *The Appellate Advocate*, a quarterly magazine published by the State Bar Appellate Section.

In addition to her legal work, she serves on the board of The Settlement Club, a non-profit organization that supports a residential care facility for abused children, on the State Bar Appellate Section Pro Bono Committee and on the Third Court of Appeals Pro Bono Committee, screening and placing cases with volunteer attorneys. Laurie is also an active volunteer at St. Andrew's Episcopal School in the area of financial development.

Laurie has been selected as a "Super Lawyer" in Appellate Law every year since 2005. She has an AV Peer Review Rating by LexisNexis Martindale-Hubbell.

Laurie earned a B.B.A. in 1989 from the University of Texas at Austin and a J.D. in 1992 from Texas Tech University School of Law, where she served as Research Editor on the *Texas Tech Law Review*.

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BROUGHT IN ON APPEAL – PRACTICAL AND LEGAL FIRST STEPS

INTRODUCTION

The purpose of this paper is to discuss the practical steps and strategies when brought in on an appeal as well as to discuss the legal steps and strategies involved in transitioning a case from the trial court to the court of appeals. Part One of the paper addresses the practical side of arriving new to the case to handle the appeal. Part Two of the paper is devoted to the legal side of transitioning from the trial court to the appellate court and is divided into three primary sections: 1) the initial triage when presented with a final judgment or adverse order, including issues with finality, deadlines, post-judgment motions and the strategies for pursuing them, and managing client's expectations; 2) after the client decides to appeal, getting the case to the court of appeals and obtaining the appellate record; and 3) once the case is before the court of appeals, a discussion of how to navigate smoothly through the appellate process.

PART ONE - PRACTICAL CONSIDERATIONS

What happens when an appellate attorney receives the initial call from a trial attorney or a client inquiry about assisting on an appeal? The first request should always be to send the judgment or other appealable order. This allows appellate counsel to determine the deadlines for herself and understand the urgency (or not) of the case. Do not rely on the client or trial counsel's statement of when the judgment was signed. This paper assumes the appellate attorney takes the representation; it does not address the matrix for deciding whether to accept the engagement.

Three primary areas are addressed: relationship with client; relationship with trial counsel; and, collateral issues. Further, these practical considerations apply equally whether hired by appellant or appellee.

I. RELATIONSHIP WITH CLIENT

Several issues must be considered when beginning the case as new appellate counsel. What will the appellate counsel's role be in the case? What will the fee arrangement be?

A. Engagement letters and fee arrangments

The need for an engagement letter that sets out the details of the representation on appeal goes without saying. It is beyond the scope of this paper to cover an exhaustive list of the ins and outs of engagement letters. Rather, this paper points out specific issues related to appellate counsel hired in an ongoing case.

Scope of representation. The first consideration is to define the appellate attorney's role in the case. This is determined of course by the kind of case. An appeal from a judgment following a jury trial may be different than an appeal of an accelerated appeal or an original proceeding. Also, the scope may be limited to the court of appeals proceeding.

The scope of representation may also depend on whether the appellate attorney is joining the trial team or if the appellate attorney will take over as sole counsel. What role will trial counsel continue to play or not? With a complex jury trial, having trial counsel remain involved on appeal may be critical. On the other hand, appealing a summary judgment does not typically require trial counsel's continued involvement since the appeal is limited to the summary judgment record. The appellate counsel may need to encourage the client to have trial counsel continue in a complex case at least through the post-trial motion phase. Generally, we have found it most helpful to keep the trial attorney as part of the team on appeal. In fact, quite often much of the initial contact will be with the trial attorney. Our experience is that, while often "wounded" from a loss, the trial attorney is heavily invested in the case and is very helpful in working with the client (with whom he or she usually has a close relationship), quick to respond to any requests (e.g., for parts of the record or information about possible points on appeal), and generally very professional. The same is true for the winning trial attorney whose client may be hiring you to keep the win.

How specific should the appellate counsel's role be defined? If joining the trial team, the appellate attorney's role may be very broad, to "handle all appellate matters," "appeal," or "as appellate counsel." If trial counsel remains, it should be clear who is responsible for superseading the judgment, preparing post-verdict or post-judgment motions, or addressing post-judgment mediation consideration.

On the other hand, if appellate counsel is taking on a limited role in the case, the representation should be defined more narrowly. For example, if representing a client in an original proceeding or in an accelerated appeal, the appellate attorney's role could be defined as: "prepare and present an original proceeding to the court of appeals challenging court's order issuing death penalty discovery sanction."

Fee arrangement. Appellate work can be performed hourly, contingent, flat fee, or some type of a blended fee. Setting the fee again depends on the type of case. A case with a large judgment and with a rendition point on appeal may lend itself to a contingency fee. A flat fee may work in the appeal of a one-issue summary judgment or when filing a writ of mandamus. Hourly may be more appropriate in a complex jury trial case.

A blended fee with a flat fee for certain phases of the appeal could be paired with either a contingent or hourly fee.

If using an hourly rate, it makes sense to include in the engagement letter an explanation of timing of an appeal and the associated costs, including fees for legal assistants. That is, the client may not incur significant legal fees and expenses for an appeal in the beginning. The bulk of the fees and expenses will be incurred with the record review, brief writing, and oral argument preparation. It is also good to specify payment for costs, including for travel (if the case is out of the city). Regardless, our experience has taught us that the fee is always more than we think it will be at the outset, so factor that into fee estimations.

Original proceedings or accelerated appeals may require a different fee arrangement. A time-sensitive mandamus proceeding will require appellate counsel to drop all other work for the new case. Such situation demands a larger retainer if nothing else.

For more information about fee agreements, which involve complex ethical, legal, and practical issues beyond the scope of this paper, please see D. Hull Youngblood, Jr., *Seven Deadly Sins of Engagement Letters*; Mark D. White, *Fee Agreements that Work: Examples & Samples*, 35th ANNUAL ADVANCED CIVIL TRAL COURSE, ch. 26 (State Bar of Texas July 25, 2012); D. Diane Dillard, *Engagement Agreements: The Tope 20 Country Countdown with Tips for Ethical Compliance*, REAL ESTATE 101, ch. 7 (State Bar of Texas July 10, 2013), and the myriad of other papers and articles on the topic.

Retainer. A retainer can be an important part of the engagement depending on the client and the attorney's existing relationship with the client. Assuming a retainer is paid, appeals have a unique feature relevant to the retainer. Appeals involve several phases: post-trial motions and supersedeas proceedings; initiating the appeal and record issues; record review; and brief writing, etc. A client may be able to afford a large retainer that satisfies the law firm. On the other hand, it may be more important to have an "evergreen" retainer or a retainer that is tied to the phase of the appeal. For example, there could be a defined retainer for post-trial and initiating the appeal phase, and another before the record review (if a large record) or at the brief preparation phase. In any event, the engagement letter should contain a paragraph that defines the retainer and includes language that allows the attorney to request and the client to pay an additional retainer if the attorney later determines one to be necessary. Our experience has been that if a potential client balks at a reasonable retainer, later trouble on fee payment is almost guaranteed.

Other engagement letter issues. If using an hourly rate basis for the fee, it is always a good idea to include a paragraph in an engagement letter that allows for periodic review and increase of rates charged by attorneys and legal staff. Appeals can go on for years. Accordingly, the law firm should not be locked into to its original rates.

Also, consider including a paragraph that allows appellate counsel to retain experts or consultants. Finally, specify the bases on which you are allowed to withdraw.

B. Managing client expectations

After being hired, one of the important roles for appellate counsel is to manage expectations in the new landscape that results from a final judgment or other appealable order. Managing client expectations involves the decision to appeal, and if the case is appealed, educating the client on the appellate process. An actively involved trial attorney can be a big help in this regard.

Clients want to know the answers to three questions after an adverse order or judgment is signed and when considering an appeal: 1) what are the odds I will win; 2) when will it happen; and 3) how much will it cost? They also typically are quite interested in the procedures and predilections of the appellate courts.

1. Considerations when deciding to appeal.

When considering whether to appeal, the first step is the client's decision – does the client want to appeal? This decision requires an analysis of a number of factors, including cost.

Whether to appeal almost always hinges on the chances of prevailing. This depends of course on the type of case, the errors preserved, type of error (expert, sufficiency, etc) the applicable standard of review, and to some extent, the court of appeals to which you are appealing. It is also important to manage clients' expectations, whether an appellant or appellee. Clients need to understand the standard of review and how appellate courts review trial court judgments and errors. Are there legal issues to appeal vs. sufficiency of the evidence. Were the errors preserved? Factual sufficiency review ends at the court of appeals. Clients also need to understand the discretionary review and thus the limited role of the Texas Supreme Court in most appeals. And that likely they cannot take their case "all the way to the U.S. Supreme Court."

When discussing possible outcomes of a case with a client, a helpful article is "Reasons for Reversal in the Texas Courts of Appeals." Lynne Liberato & Kent Rutter, *Reasons for Reversal in the Texas Courts of Appeals*, 48 HOUS. L. REV. 993 (2012). This informative and practical article has numerous charts with reversal rates categorized by type of case and by

court of appeals. It provides some concrete numbers to help demonstrate to the client and the trial attorney the uphill battle of an appeal. Again, understandably, especially coming off of a hard-fought trial, the losing parties likely remain convinced of the righteousness of their case. Conversely, the winning party, may be helped in evaluating an appeal by numbers that show about a third of all cases appealed are reversed.

Post-judgment is also the time to consider settlement or perhaps only a partial appeal or perhaps going back to the trial court for some manner of changing the judgment. Factors that may weigh into the decision to settle include cost of the appeal, the cost of superseding the judgment, delay in a final resolution that is inherent in the appellate process, and the uncertainty of the result.

When addressing the cost of appeal with the client, it is important to tell the client up front that appeals are expensive. It is often easier to break down the costs associated with the stages of an appeal. For example, give an estimate of the cost to pursue post-verdict and post-judgment motions, the cost to initiate the appeal and obtain the record; give another cost for record review; another for research and brief preparation, responding to opponent's brief, and a miscellaneous motions category as well, then oral argument and motion for rehearing stage. Another cost element is the cost associated with superseding the judgment.

Breaking down the cost in this way helps explain the process and also eliminates the sticker shock with the appeal rocks along for several months with little in fees and then suddenly the brief is filed and the client gets hit with a tremendous invoice.

Another consideration for a client considering an appeal is the existence of other similar cases involving the same issues. Does the client want to be the lead case? Are there potential amicus who can add support? Does a ruling on the law affect other cases and this its business model?

Note that these considerations apply to the winning party as well. The prevailing party also needs a reality check on the costs and risks associated with an appeal.

2. <u>Educating the client about the appellate process.</u>

Part of the decision to appeal includes understanding the appellate process. If the client decides to appeal (some of these are factors that go into the decision to appeal in the first place), the client needs to have a clear understanding of the appellate process from the outset and they need to be kept informed throughout the process. Whether a corporate client or an individual client, few are familiar with the process and its accompanying differences from a trial. The exception tends to be sophisticated in-house counsel and some trial attorneys, but it is bet to be prepared to explain and take your cues from them. Even those who are sophisticated usually appreciate a detailed, yet simple, explanation.

Take time at the outset to inform the client and trial counsel on the appellate process. Appeals are a stark contrast from trials. The pace is different; the client's involvement is different. Most aspects of an appeal are out of the party's or attorney's control. There can be record problems, extensions on brief deadlines, delays due to a court's timing in getting a case submitted, and of course, the time in waiting on the opinion. One of the most obvious differences from the trial process is the amount of client involvement on appeal. Appeals do not typically involve the client as much as a trial. (As an aside, good client service should include periodic notification that "nothing is happening" on the appeal.)

The best procedure is to explain the entire process from the beginning. Explain the initial filing of the appeal; filing the record and what it includes, timing for briefs, oral argument, opinion and post-judgment issues and the delay that will certainly be involved throughout the process. This kind of discussion demonstrates the time (and expense) involved with an appeal.

Additionally, inform the client about the decision-making process at the appellate court and its inherent delay. Courts of appeals decide cases in panels. Let the client know that courts of appeals frequently deny parties' requests for oral argument and decide the case on the briefs alone. Clients also need to understand that courts of appeals often issue memorandum opinions. Also, explain the docket equalization procedure. Clients often suspect something sinister if their case is transferred to another court of appeals. Perhaps the most important misunderstanding concerns the fact that no additional evidence can be presented on appeal. All of these realities are easier to explain on the front end than after the fact.

II. RELATIONSHIP WITH TRIAL COUNSEL

As stated above, appellate counsel may be hired to step in a sole attorney role or to co-counsel with the existing trial team. In either situation, trial counsel may be suspicious of a new attorney stepping to "second guess" their work. As the new attorney, appellate counsel should work to establish and maintain a good relationship with trial counsel. Trial counsel have the institutional knowledge about the case and can get appellate counsel up to speed quickly. Further, it is a good course of action to maintain a working relationship with the trial counsel, even if the client no longer engages the trial attorney. It is vital to be extremely respectful of the trial attorney and convey that respect. It is much easier to judge in the cool comfort of our offices what should have been done than in the heat of battle. Our experience is that clients

are well-served by the teamwork and mutual respect of trial and appellant counsel. Most of the time, with the right approach by the appellate attorney, even a resentful trial attorney can be brought on-board. Make it clear that you understand that the trial and appellate attorneys have different roles and different skills. We have found that, in most cases, as the appellate process drags on, the trial attorney becomes happier and happier (or maybe just distracted by the immediacy of his or her other trial-level cases) to leave things to the appellate attorney. The point here is that it is not usually necessary to assert yourself as the lead from the start. A "teamwork" approach works best.

The relationship between trial and a new counsel brought in for the appeal may depend on whom hired the appellate counsel. If hired by the trial counsel, the relationship may be an easy one. On the other hand, if hired by the client without input from trial counsel, the appellate attorney may have an uphill battle.

Two common issues often arise when a new appellate attorney is hired and works with the trial counsel on appeal: First, dealing with errors made in the trial court, for example, waiver of an evidentiary matter or a waived error in the charge. Second, convincing the client (and trial counsel) to abandon a claim or argument that has been made throughout the case but that has never been successful.

Careful appellate counsel will tread lightly when addressing a perceived error made by the trial attorney. Find out from trial counsel the reason objectionable evidence was admitted or why the charge conference and objections were handled in a particular manner. Appellate counsel must then determine if the issue is waived and if in the scheme of the appeal it makes any difference. Virtually never does the admission or exclusion of evidence (with the exception of expert testimony) constitute reversible error. *See generally* Lynne Liberato & Kent Rutter, *Reasons for Reversal in the Texas Courts of Appeals*, 48 HOUS. L. REV. 993 (2012). If a true, significant waiver issue exists, then appellate counsel should go to the trial attorney first. The trial counsel should be made aware that it will be much easier to tell the client ahead of time rather than wait for a waiver issue to be read for the first time in the opposing party's brief.

Next, the appellate counsel's job includes ferreting out the good arguments from the bad ones. That often requires dropping arguments or claims that trial counsel or the client have been wedded to throughout the case. As the objective newcomer, appellate counsel's job is to find the points and arguments that are more likely to succeed on appeal and get a reversal and abandon the arguments that are distracting or are just plain losers. It is critical to be able to explain the standards of review to the client, the appellate process, and how appellate courts work to convince a client to abandon arguments or claims. Appellate attorneys love "waiver;" trial attorneys love "right and wrong."

III. COLLATERAL ISSUES

In addition to client and trial counsel issues, other collateral matters may also require immediate attention after an appellate attorney is hired. One issue may be media inquiries following entry of judgment. A recently hired appellate counsel may be wise to defer these inquiries to the client or to trial counsel if they are still involved in the case. Most corporations direct their attorneys not to speak to the press and have spokesperson who handle press inquiries. Cases are not won in the media and in particular by comments from attorneys who are not well-versed in the case.

Another consideration for an appellate attorney is the timing of her appearance in the case. If trial counsel is continuing on the case, there may be reasons for the appellate attorney to stay out of sight and work behind the scene. For example, there may be strategy reasons in not having another attorney available for service of pleadings. Further, a party may not want the other side to know appellate counsel has been hired.

Another issue for the new appellate counsel may be questions about the pursuing post-judgment mediation pending appeal. Texas courts of appeal will inquire about ADR once the case is filed on appeal, but clients may want to pursue mediation much sooner.

Finally, the client may have other similar cases pending in other trial courts that are waiting in the wings.

PART TWO – LEGAL CONSIDERATIONS

INITIAL CONSIDERATIONS AFTER A JUDGMENT OR ORDER IS SIGNED

Once a judgment or order is signed, an initial triage must be done. Is the judgment or order appealable? What are the applicable deadlines? Are there any available and or mandatory matters to pursue in the trial court for preservation purposes? What is the best course of action for the client in deciding whether to appeal and how can the client's expectations be managed? All of these issues converge and must be addressed simultaneously. The considerations and strategies when answering these often overlap.

These issues are not solely for the losing party to consider. Many of the same issues apply to the prevailing party. For example, managing expectations is just as critical when representing the winning party in the trial court.

I. DETERMINING FINALITY OF THE ORDER OR JUDGMENT

The initial question when confronting an order or judgment is determining if it can be appealed. What is the order or judgment under consideration? Generally,

an appeal only lies from a final order or judgment. Other orders or judgments, however, may be appealable by statute or may be appealable by taking an action to make it final. If the order cannot be appealed, can it be reviewed by mandamus.

A. Is the judgment or order final and appealable?

1. Conventional trial on the merits

The test for determining finality is well established. An order is final and appealable if it disposes of all parties and issues. *Ford v. Exxon Mobil Chem. Co.,* 235 S.W.3d 615, 617 (Tex. 2007); *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001). This is a straightforward test to apply after a conventional trial on the merits. A judgment after a conventional trial on the merits is presumed final for appellate purposes. *Vaughn v. Drennon*, 324 S.W.3d 560, 561 (Tex. 2010). A judgment entered after a conventional trial on the merits is presumed final even if it does not dispose of every party or claim. *Id.* (citing *Northeast Indep. Sch. Dist. v. Aldridge*, 400 S.W.2d 893, 895, 897-98 (Tex. 1966)). Unless the trial court orders a separate trial to resolve a specific issue, there is a presumption that the trial court's judgment disposes of all claims and all issues in the case. *Vaughn*, 324 S.W.3d at 563. A judgment does not even have to address every party and claim to be final for appellate purposes. *Id.*

Because finality is a jurisdictional matter, the court of appeals reviews *de novo* the question of finality. *IFS Sec. Group, Inc. v. Am. Equity Ins. Co.,* 175 S.W.3d 560, 562 (Tex. App.—Dallas 2005, no pet.). In determining finality, courts are to be guided by the principle of preserving the right to appeal and not destroying an appeal by "overly technical application of the law." *Lehmann*, 39 S.W.3d at 205.

2. Dispositions other than by conventional trial on the merits

The test for determining finality of an order or judgment becomes more difficult if the order or judgment is obtained from something other than a conventional trial on the merits.

Summary judgments, for example, frequently involve questions of finality. Parties move for summary judgment on only some of their claims or against only one of several parties. These kinds of summary judgments raise finality questions. A summary judgment that does not dispose of all parties and issues is interlocutory and not appealable. *Teer v. Duddlesten*, 664 S.W.2d 702, 703 (Tex. 1984).

The presumption of finality following a conventional trial on the merits does not apply to summary judgments. *Ford v. Exxon Mobil Chem. Co.*, 235 S.W.3d at 617. In *Lehmann*, the Texas Supreme Court set out the test for determining finality of judgments. To be final, a judgment issued "without a conventional trial on the merits is final for purposes of appeal if and only if either it actually disposes of all claims and parties then before the court, regardless of its language, or it states with unmistakable clarity that it is a final judgment as to all claims and all parties." *Lehmann*, 39 S.W.3d at 192-93. Under this rule, finality is determined by the language of the order as well as the appellate record to determine the claims asserted and addressed or that were intended to be addressed. *Id.* at 205-06.

In adopting the new standard in *Lehmann*, the Court changed the analysis in determining finality of summary judgments. Under then-existing law in *Mafrige*, "Mother Hubbard" language (all relief not expressly granted is denied) made an otherwise partial summary judgment final and appealable. Hon. David Hittner & Lynne Liberato, *Summary Judgments in Texas State and Federal Practice*, 46 HOUS. L. REV. 1379, 1476-77 (2010). In *Lehmann*, the Court rejected the *Mafrige* analysis for determining finality in cases disposed of other than by a conventional trial on the merits. *Lehmann*, 39 S.W.3d at 203-04.

The Court in *Lehmann* also suggested language to use in orders to indicate finality. The Court's indicated language, "this judgment finally disposes of all parties and all claims and is appealable," removes all doubt as to the court's intention to finally dispose of a case. *Lehmann*, 39 S.W.3d 206. Note that "if the language of the order is clear and unequivocal, it must be given effect despite any other indications that one or more parties did not intend the judgment to be final." *Lehmann*, 317 S.W.3d at 206. Further, "plaintiff takes nothing" language also indicates finality if there are no other claims by other parties. *Jacobs. v. Satterwhite*, 65 S.W.3d 653, 655 (Tex. 2001).

An interlocutory summary judgment may be made final if severed from the remaining unadjudicated parties and issues. *Teer v. Duddlesten*, 664 S.W.2d at 703. Without a severance, an interlocutory summary judgment is not appealable. *Hood v. Amarillo Nat. Bank*, 815 S.W.2d 545, 547 (Tex. 1991). Similarly, a party against whom an interlocutory summary judgment has been rendered can appeal when the partial summary judgment is merged into a final judgment disposing of the entire case. *Id.*; *Pan American Petroleum Corp. v. Texas Pac. Coal & Oil Co.*, 159 Tex. 550, 324 S.W.2d 200, 200-01 (1959).

3. Other finality issues

What about judgments that state all relief not granted is denied? In *In re Daredia*, the Texas Supreme Court applied *Lehmann* to conclude that a default judgment against only one of two defendants that contained the language all relief not granted is denied and that the judgment disposes of all parties and claims and is therefore final, was "unequivocal, and therefore effective" as a final judgment. 317 S.W.3d

247, 249 (Tex. 2010). In *Daredia*, after plenary power expired, plaintiff tried to correct the judgment by a nunc pro tunc to allow its case to proceed against the other, non-defaulting defendant. As the Court pointed out, "even if the dismissal was inadvertent, as American Express insists, it was nonetheless unequivocal, and therefore effective." *Id.*

What about a judgment that expressly rules on one of two issues presented in the case but also states that the judgment disposes of all claims and all parties? In *Bray v. Tejas Toyota, Inc.*, 363 S.W.3d 777, 786-87 (Tex. App.—Austin 2012, no pet.). Tejas presented the form judgment to the trial court and did not note any disagreement with the judgment. *Id.* The judgment expressly ruled on a notice issue but did not expressly rule on Tejas's good faith and fair dealings claim. On appeal, Tejas attempted to raise its good faith and fair dealings issue. The court of appeals concluded Tejas waived the issue by presenting a form judgment that impliedly denied the good faith issue and by not noting Tejas's disagreement with the judgment. *Id.* (citing *First Nat'l Bank v. Fojtik*, 775 S.W.2d 632, 633 (Tex. 1989)); *see also Smith v. East*, __ S.W.3d __, 2013 WL 692456 at *7 (Tex. App.—Austin February 22, 2013, pet. denied) (appellant waived error of factual sufficiency by moving unqualifiedly for judgment on the verdict).

Saying an order is "final" does not make it so. In *Guajardo*, a trial court order described a prior summary judgment order as "final." *Guajardo v. Conwell*, 46 S.W.3d 862, 864 (Tex. 2001). Applying *Lehmann*, the Court explained that simply describing the prior order as final did not make it final. The Court reviewed the record and determined that the summary judgment did not dispose of all parties and issues and was thus not a final judgment. *Id.*

What happens if a trial court grants summary judgment on more issues than were presented in the motion for summary judgment? For example, a defendant moves for summary judgment on one of two of the plaintiff's claims and the trial court grants summary judgment and includes "plaintiff takes nothing" language in the judgment. The take nothing language renders the judgment final for purposes of appeal, albeit an erroneous judgment. *Jacobs. v. Satterwhite*, 65 S.W.3d at 655. A movant for summary judgment cannot be granted judgment as a matter of law on a cause of action not addressed in a summary judgment proceeding. *Id.*; TEX. R. CIV. P. 166a(c). Granting summary judgment on a claim not addressed in a motion for summary judgment is generally reversible error on the claim not raised in the trial court. *G & H Towing Co. v. Magee*, 347 S.W.3d 293, 297 (Tex. 2011). The court of appeals must consider all matters raised on appeal and reverse only those portions of the judgment that were rendered in error. *Page v. Geller*, 941 S.W.2d 101, 102 (Tex. 1997).

There is a narrow exemption to the general rule. If a summary judgment is granted on a cause of action not expressly presented by written motion, the error is harmless when the omitted cause of action is precluded as a matter of law by other grounds raised in the case. *G & H Towing*, 347 S.W.3d at 297-98. For example, a summary judgment can be affirmed on a cause of action not specifically in the motion when reversal would be meaningless because the omitted cause of action was precluded as a matter of law. *Id.*

This issue raises a preservation point for the non-movant. An appellant must raise an issue on appeal when a motion for summary judgment raises fewer than all the issues in the case and the trial court grants a final summary judgment. *Uribe v. Houston Gen. Ins. Co.*, 849 S.W.2d 447, 450, n.3 (Tex. App.—San Antonio 1993, no writ).

B. Can an order or judgment be made final and appealable?

An order or judgment that is not final may still be appealable. Otherwise not final judgments and orders may be made final by the doctrine of merger, nonsuit and order of dismissal and by severance.

1. <u>Merger</u>

An interlocutory order becomes final and appealable when it is merged into a final judgment that resolves all remaining issues and parties. *Webb v. Jorns*, 488 S.W.2d 407, 408-09 (Tex. 1973). Interlocutory orders are merged into a final judgment even if such orders are not specifically mentioned in the final judgment. *Id.* When a trial court disposes of all parties and claims, previous interlocutory judgments and orders are merged into the final judgment. *In re Miller*, 299 S.W.3d 179, 184 (Tex. App.—Dallas 2009, no pet.).

2. <u>Nonsuit and dismissal</u>

An interlocutory order may be made final and appealable if remaining claims are dismissed. A nonsuit and order of dismissal can make an interlocutory order final. Rule 162 provides that a plaintiff "at any time before the plaintiff has introduced all of his evidence other than rebuttal evidence, the plaintiff may dismiss a case, or take a non-suit, which shall be entered in the minutes." TEX. R. CIV. P. 162. A plaintiff has an absolute right to nonsuit. *BHP Pet. Co. v. Millard,* 800 S.W.2d 838, 840 (Tex. 1990); *Shadowbrook Apts. v. Abu–Ahmad,* 783 S.W.2d 210, 211 (Tex. 1990). A nonsuit is effective as soon as it is filed or made in open court. *The University of Tex. Med. Branch at Galveston v. Estate of Blackmon*, 195 S.W.3d 98, 100 (Tex. 2006).

A trial court has no discretion to refuse to sign a dismissal after a nonsuit is filed. *In re Bennett*, 960 S.W.2d 35, 38 (Tex. 1997). When a trial court signs an

order granting a nonsuit, it is a ministerial act. *Greenberg v. Brookshire,* 640 S.W.2d 870, 872 (Tex.1982).

While a trial court does not have to sign an order of dismissal for a nonsuit to take effect, the signing of such order is significant. When an order of dismissal is signed begins the trial court's plenary power period and starts the appellate deadlines. *Harris County Appraisal Dist. v. Wittig*, 881 S.W.2d 193, 194 (Tex. App.—Houston [1st Dist.] 1994, orig. proceeding) (order granting non-suit, not filing of non-suit, commences plenary power period and triggers appellate deadlines). A party may obtain mandamus relief if a trial court refuses to sign an order of dismissal on a motion for nonsuit when there are no claims for affirmative relief. *In re Greater Houston Orthopaedic Specialists, Inc*., 295 S.W.3d 323, 325-26 (Tex. 2009).

3. Severance

A commonly used method of making an interlocutory order final and appealable is filing a motion for severance. Texas courts have recognized that severance of interlocutory orders into separate actions makes the interlocutory order final as a long as all parties and issues are disposed of. *Nichols v. Nichols*, 331 S.W.3d 800, 803 (Tex. App.—Fort Worth 2010, no pet.). Any claim against a party may be severed and proceeded with separately. TEX. R. CIV. P. 41.

That a claim may be severed does not necessarily mean that it must be severed. *In re Texas Farm Bureau Underwriters*, 374 S.W.3d 651, 656 (Tex. App.—Tyler 2012, orig. proceeding). The decision to grant is a severance is within the trial court's discretion. *Id.*

A claim is severable only if: 1) the controversy involves multiple causes of action; 2) the severed claim could properly be asserted in an independent lawsuit; and 3) the severed claim is not so interwoven with the remaining claims that they involve the same facts and issues. *Id.* The "controlling reasons for a severance are to do justice, avoid prejudice, and further convenience." *Id.*

Note the difference between a severance and a separate or bifurcated trial. Severance and separate trial are distinct procedural devices. *Hall v. City of Austin*, 450 S.W.2d 836, 837-38 (Tex. 1970). A severance divides a lawsuit into two or more separate and independent causes. *Id.* After a severance is granted, a severed cause proceeds separately and a judgment which disposes of all parties and issues in a severed cause is final and appealable. *Id.* A lawsuit that is severed into separate causes proceed separately and are heard by different juries. *Liberty Nat'l Fire Ins. v. Akin*, 927 S.W.2d 627, 630 (Tex. 1996). A judgment that disposes of all parties and issues in one of the severed causes is final and appealable. *In re K.F.*, 351 S.W.3d 108, 113 (Tex. App.—San Antonio 2011, no pet.).

A separate or bifurcated trial, on the other hand, leaves the lawsuit intact but allows certain issues to be decided first. *Liberty Nat'l*, 927 S.W.2d at 630; TEX. R. CIV. P. 40(b) (court may order separate trials). An order entered at the end of a separate trial on a particular issue is generally interlocutory. *Transportation Ins. Co. v. Moriel,* 879 S .W.2d 10, 30 (Tex. 1994). In a separate trial scenario, the same jury hears both parts of a bifurcated trial. *Id.*

A severance order may not necessarily render a partial summary judgment final. The terms of the severance order control. For example, a severance order may tie the severed action to proceedings in the main action, thus precluding a final judgment in the severed action. *Diversified Fin. Sys., Inc. v. Hill, Heard, O'Neal, Gilstrap & Goetz, P.C.*, 63 S.W.3d 795, 795 (Tex. 2001); *see also Doe v. Pilgrim Rest Baptist Church*, 218 S.W.3d 81, 82 (Tex. 2007) (conditioning severance on payment of fees associated with severance not final until condition occurred). With a conditional severance, an abatement may be necessary to allow the parties to obtain a final judgment. *See Hegwood v. American Habilitation Servs., Inc.*, 294 S.W.3d 603, 605-06 (Tex. App.—Houston [1st Dist.] 2009, no pet.).

When a judgment is interlocutory because there are unadjudicated claims or parties, if a party moves to have such unadjudicated claims or parties removed by severance, dismissal, or nonsuit, the appellate deadlines run from the signing of the judgment or order disposing of those claims or parties. *Farmer v. Ben E. Keith Co.*, 907 S.W.2d 495, 496 (Tex. 1995).

Although a severance order itself is not a final judgment, it may result in a final judgment. *Beckham Group, P.C. v. Snyder*, 315 S.W.3d 244, 245 (Tex. 2010). A party must file a mandamus to challenge an interlocutory severance order. *Id.*; *In re State Farm Mut. Auto. Ins.*, 395S.W.3d 229, 233 (Tex. App.—El Paso 2012, orig. proceeding).

C. Appealable interlocutory orders

Another factor to consider in the initial post-adverse order stage is whether the order is appealable by statute or rule. Some interlocutory orders are made appealable by statute or rule. It is well-established that interlocutory orders are not appealable unless "specifically made so by statute." *Pioneer American Ins. Co. v. Knox*, 199 S.W.2d 711, 712 (Tex. Civ. App.—Austin 1947, writ ref'd); s*ee Lehmann v. Har-Con Corp.*, 39 S.W.3d at 206. Without jurisdiction, an appellate court's only option is dismissal. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d at 195.

One statute that makes certain interlocutory orders appealable is TEX. CIV. PRAC. & REM. §51.014. Under

that statute, appellate courts have jurisdiction over certain orders, including those that appointment of a receiver or trustee, class certification orders, orders that grant or deny a governmental entities' plea to the jurisdiction, orders granting or refusing to grant temporary injunctive relief, and orders that grant or deny a special appearance under Rule 120a.[1] TEX. CIV. PRAC. & REM. CODE §51.014(a).

Section 51.014 is strictly construed. The Texas Supreme Court has noted that it strictly construes section 51.014(a) as "a narrow exception to the general rule that only final judgments are appealable." *Texas A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 841 (Tex. 2007) (citing *Bally Total Fitness Corp. v. Jackson,* 53 S.W.3d 352, 355 (Tex. 2001)); *see also Austin Indep. Sch. Dist. v. Lowery*, 212 S.W.3d 827, 834 (Tex. App.—Austin 2006, pet. denied) (section 51.014 is a narrow exception to the general rule that only final judgments and orders are appealable; court strictly construes what may be an interlocutory order).

The supreme court recently addressed the impact of an amended plea to the jurisdiction. In *City of Houston v. Estate of Jones*, the City's original and then first amended pleas to the jurisdiction were unsuccessful. 388 S.W.3d 663, 665 (Tex. 2012). Later the City filed a second amended plea that raised no new grounds but raised an additional argument in support of one of its previously raised grounds. *Id*. at 665-66. The supreme court construed the second amended plea to the jurisdiction as a motion to reconsider the earlier denied plea to the jurisdiction when the time to file an interlocutory appeal had long expired. *Id*. at 667. Accordingly, the supreme court concluded that the court of appeals lacked jurisdiction to consider the merits of the appeal. *Id.*

Section 51.014 also provides for a permissive interlocutory appeal. TEX. CIV. PRAC. REM. CODE §51.014(d)-(f). Even when an order is not appealable, parties may attempt to appeal by permission. *See id.* For cases filed after September 1, 2011, a party can request permission from the court of appeals to appeal an interlocutory order. The motion must identify a controlling question of law about which there is substantial ground for difference of opinion and state why an immediate appeal may materially advance the ultimate termination of the litigation. *Id.* § 51.014(d). The trial court must include its permission to appeal in the order to be appealed. TEX. R. CIV. P. 168. The trial court's order must also state the controlling question of law as to which there is a substantial ground for difference of opinion and state why the immediate appeal may ultimately terminate the litigation. *Id.*

In a recent case, the Austin Court of Appeals refused to accept an appeal when the order did not comply with Rule 168. *Long v. State*, No. 03-12-00437-CV, 2012 WL 3055510 (Tex. App.—Austin July 25, 2012, no pet. h.) (mem. op.). In that case, the trial court order granting permission to appeal failed recite the requirements of Rule 168 and the court of appeals refused to infer the record the grounds for the permissive appeal. *Id.* at *1-2.

If the trial court grants permission to appeal, a party must then petition the court of appeals for permission to appeal. TEX. CIV. PRAC. & REM. CODE §51.014(f); TEX. R. APP. P. 28.3.

For cases filed before September 1, 2011, a permissive appeal requires the parties to agree to an order for an interlocutory appeal. TEX. R. APP. P. 28.2

If a statute or rule makes an interlocutory order appealable, what is the effect? Appealable interlocutory orders are considered accelerated appeals under TRAP 28. Appeals of interlocutory orders under 51.014, appeals of parental termination orders, and primary election contests are examples of accelerated appeals.

If an appeal is accelerated, there are several important distinctions from an ordinary appeal. First, if an accelerated appeal, as set out below, all deadlines are condensed. TEX. R. APP. P. 26.1(b); 35.1(b) & 38.6(a), (b). Another significant difference with accelerated appeals is the application and effect of post-judgment motions. A motion for new trial does not extend the appellate deadlines in an accelerated appeal. TRAP 28.1(b). Further, when appealing an interlocutory order, a party may request the trial court to enter findings of fact and conclusions of law. The filing of findings of fact in an accelerated appeal, however, is not mandatory. TEX. R. APP. P. 28.1(c) ("trial court need not file findings of fact and conclusions of law but may do so within 30 days after the order is signed."); *Niehaus v. Cedar Bridge, Inc.*, 208 S.W.3d 575, 579, n.5 (Tex. App.—Austin 2006, no pet.); *Tom James of Dallas, Inc. v. Cobb*, 109 S.W.3d 877, 884 (Tex. App.—Dallas 2003, no pet.). A request for findings of fact and conclusions of law in an accelerated appeal does not extend the time to perfect an accelerated appeal. TEX. R. APP. P. 28.1(b).

D. Mandamus review

Finally, if the order is not final and cannot be made final, and it is not an appealable interlocutory appeal, can or should it be challenged by mandamus? To obtain mandamus relief, the relator must show a clear abuse of discretion or the violation of a duty imposed by law, and no adequate remedy at law. *Walker v. Packer,* 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding). An appeal is not an adequate

[1] For a discussion of the statutes authorizing appeals of interlocutory orders see Kent Rutter, *Interlocutory Appeals: Who, What, When, Where, Why, and How,* CIVIL APPELLATE PRACTICE 101, ch. 9 (State Bar of Texas, Sept. 1, 2010).

remedy if: 1) an appellate court cannot remedy the error, *In re Dana Corp.*, 138 S.W.3d 298, 301 (Tex. 2004) (orig. proceeding); 2) a party stands to lose a substantial right, *Walker*, 827 S.W.2d at 842; and 3) a party's ability to present a viable claim or defense is vitiated or severely compromised. *In re Ford Motor Co.,* 988 S.W.2d 714, 721 (Tex. 1998) (orig. proceeding). The court must also consider whether "any benefits to mandamus review are outweighed by the detriments" of delaying or interrupting a particular proceeding. *In re Prudential Ins. Co. of America*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding).

The rules do not provide a deadline for filing a petition for writ of mandamus. The best practice is to file the petition soon after the trial court's order.

II. INITIAL CONSIDERATIONS OF THE DEADLINES

As part of the initial review, when analyzing the finality of a judgment or order, the strategy must always consider the applicable deadlines. As soon as it is determined that the order or judgment is appealable, the applicable deadlines must be determined. What is the applicable deadline and can or should it be extended? While the typical deadline ingrained in every attorney's brain is "thirty days," it is critical to recognize the situations when deadline is less than thirty days.

A. 20-day deadlines

If the appeal is of an appealable interlocutory order or other accelerated appeals, the entire appellate process and deadlines are condensed. *See supra* I. C. (interlocutory appeal discussion). The notice of appeal in an accelerated appeal must be filed within twenty days after the judgment or order is signed. TEX. R. APP. P. 26.1(b).

Another 20-day deadline that is often missed is the deadline for requesting findings of fact. If appealing a nonjury trial, a request for findings of fact and conclusions of law which are virtually always necessary for a successful nonjury appeal, must be filed within twenty days after the judgment is signed. TEX. R. CIV. P. 296; *see infra* IV. D. (findings of fact discussion).

B. 30-day deadlines

The notice of appeal in an ordinary appeal must be filed within thirty days after the judgment is signed. TEX. R. APP. P. 26.1(a). The other relevant thirty-day deadline is for the filing of post-judgment motions. Post-judgment motions, including a motion for new trial and a motion to modify must be filed thirty days after the judgment is signed. TEX. R. CIV. P. 329b(a); (g).

When calculating the post-judgment deadlines, it is also important to be aware of the date from which to start counting. A judgment goes through the following stages: rendition, signing, and entry. *General Elec. Capital Auto Financial Leasing Servs. v. Stanfield*, 71 S.W.3d 351, 354 (Tex. App.—Tyler 2001, pet. denied). A judgment is "rendered" by the court when a matter submitted for adjudication is officially announced either orally in open court or by written memorandum filed with the clerk. *In re Marriage of Wilburn*, 18 S.W.3d 837, 840-41 (Tex. App.—Tyler 2000, pet denied.). A judgment is effective upon rendition. *General Elec. Capital*, 71 S.W.3d at 854. It is the signing of the judgment, not the rendition, that is the effective date for the beginning of the appellate deadlines and the beginning of the trial court's plenary power. *Id.*; TEX. R. CIV. P. 306a(1); 329b(d); TEX. R. APP. P. 26.1 While the rules require that a judgment be entered of record, under state practice, the date of entry of judgment has no legal significance for the parties. *General Elec.*, 71 S.W.3d at 354.

IV. POST-TRIAL MOTIONS: CONSIDERATIONS AND OPTIONS

Another factor in the initial considerations post-judgment is whether there are post-judgment motions that can or must be filed. Post-trial preservation involves balancing competing purposes: persuasion, preservation, extend appellate deadlines. *See generally* Laurie Ratliff, *Post-Trial Preservation of Error: Practice, Procedure and Strategy*, CIVIL APPELLATE PRACTICE 101, ch. 5 (State Bar of Texas, Sept. 7, 2011). On one hand, post-trial motions provide one last chance to try to persuade the trial court to accept your view of the facts and law and perhaps avoid an appeal. Perhaps a new decision has been issued that impacts the case. On the other hand, post-trial motions are the opportunity to preserve error with an eye toward an appeal. Certain post-judgment motions are required to preserve error. Others may be filed simply to delay an appeal and allow time to explore settlement.

A. Motion to reset notice of judgment under Rule 306a

This is a motion that may avoid an appeal altogether. A Rule 306a motion restarts the deadlines for filing post-trial motions and for the appeal by requesting the trial court to find the date a party obtained notice of a judgment. A Rule 306a motion can be used when notice of a judgment or other appealable order is received more than 20 days after, but within 90 days of the judgment being signed. This motion can be used with non-jury and jury trials.

The date a judgment is signed determines the beginning of the trial court's plenary power and beginning point to calculate post-judgment deadlines. TEX. R. CIV. P. 306a(1). As long as a party or her attorney receive notice of a judgment or appealable

order within 20 days of it being signed, then the judgment signed date starts the periods running for plenary power and for the appellate deadlines. TEX. R. CIV. P. 306a(4).

Rule 306a(4) provides a means of shifting the "effective" date of a judgment to the date a party or her attorney became aware of the judgment when there is not timely notice of the judgment. If a party or her attorney does not have written notice or have acquired actual knowledge of a judgment within 20 days after an appealable order or judgment is signed, then the date for starting the post-judgment timeline is moved. *Id.*; *see also* TEX. R. APP. P. 4.2. The deadlines shall begin on the date the party or her attorney receives actual notice or acquires actual knowledge of the signing of the judgment, whichever is earlier. TEX. R. CIV. P. 306a(4). The period cannot begin more than 90 days after the original judgment was signed. *Id.*

1. Impact on appellate deadlines and plenary power

The effect of a Rule 306a motion is to restart the trial court's plenary power and to re-start the post-judgment and appellate deadlines. *In re Lynd Co.*, 195 S.W.3d 682, 686-87 (Tex. 2006) (orig. proceeding). If successful, the late-notice of judgment motion can breathe life back into a case. If a movant meets Rule 306a(5), then the appellate deadlines and plenary power commence from the date of notice of the judgment not from the date the judgment was actually signed. TEX. R. CIV. P. 306a(4); *In re Bokeloh*, 21 S.W.3d 784, 791 (Tex. App—Houston [14th Dist.] 2000, orig. proceeding).

2. Mechanics of the motion and procedure to follow

Form of the motion. To establish the late-notice of judgment and the actual date of notice for starting the deadlines, a party must prove on sworn motion and with notice, the date the party or her attorney first received notice of the judgment or acquired actual knowledge of the signing of the judgment. *Id.* 306a(5); *In re Lynd Co.*, 195 S.W.3d at 685. The party must also establish that its date of notice was more than 20 days after the judgment was signed. TEX. R. CIV. P. 306a(5); *Lynd* 195 S.W.3d at 685. The movant needs to request a hearing on the motion to establish late notice of a judgment under Rule 306a.

The respondent should challenge the evidentiary allegations and set out proof of service or proof of notice of the judgment.

Deadline for filing. Rule 306a does not contain a deadline for filing a motion to establish late notice of judgment. *John v. Marshall Health Servs., Inc.*, 58 S.W.3d 738, 741 (Tex. 2001). The motion, however, must be filed while the trial court retains plenary power. *Lynd*, 195 S.W.3d at 685. The filing of a Rule 306a motion invokes the trial court's jurisdiction to consider the motion and to determine the date the party received notice. *In re Bokeloh*, 21 S.W.3d at 791. Plenary power is calculated from the date a party or her attorney receives notice of the judgment. The trial court has 30 days of plenary power from the date the party or her attorney receives notice of the judgment to rule on a Rule 306a motion. If the party also files another motion that extends plenary power like a motion for new trial, then plenary power is extended up to 75 days from the date the party or her attorney received notice.

An appellate rule also addresses the issue of late notice of a trial court's judgment. *See* TEX. R. APP. P. 4.2. Unlike TRCP 306a which does not mention a signed order from the trial court, Rule 4.2 of the Appellate Rules of Procedure requires a written order finding the date the party or its attorney first received notice or acquired actual knowledge of the judgment. *Id.* If the trial court fails to issue a signed order finding the date a party received notice of a judgment, the finding may be implied. *Lynd*, 195 S.W.3d at 686; *but see Nedd-Johnson v. Wells Fargo Bank, N.A.*, 338 S.W.3d 612, 613 (Tex. App.—Dallas 2010, no pet.) (distinguishing *Lynd* and holding that there must be an actual finding by the trial court on date notice was actually received).

3. Practice points and strategy considerations

If in the situation of receiving late notice of a judgment, as part of the triage, file a notice of appeal and a motion for new trial. The moving party must obtain a written order on a Rule 306a motion to establish the date a party or her attorney received notice of the judgment. If notice of a judgment or appealable order is received more than 90 days after it is signed, the losing party could challenge the judgment by a restricted appeal or by a bill of review.

B. Motion for new trial

The purpose of a motion for new trial is to allow a trial court an opportunity to cure errors in the trial and avoid an appeal. *In re C.O.S.*, 988 S.W.2d 760, 765 (Tex. 1999). A motion for new trial can be filed after a jury trial or bench trial.

By rule, a motion for new trial is required for certain errors to be preserved. TEX. R. CIV. P. 324. A motion for new trial also serves the purpose of extending the trial court's plenary power and extending the deadlines for filing an appeal. *Lane Bank*, 10 S.W.3d at 310, 313; TEX. R. CIV. P. 329b(g); TEX. R. APP. P. 26.1(a)(1).

1. Impact on appellate deadlines and plenary power

A timely filed motion for new trial extends the trial court's plenary power to act on the judgment or order for up to 75 days after the judgment or order is signed. TEX. R. CIV. P. 329b(c). The trial court retains

plenary power for 30 days after a motion for new trial is overruled by written order or if overruled by operation of law. TEX. R. CIV. P. 329b(c), (e). If a new trial is granted, the trial court has plenary power to set aside a new trial order any time before a subsequent judgment is signed. *In re Baylor Med. Ctr.*, 280 S.W.3d 227, 230-31 (Tex. 2008).

A timely filed motion for new trial also extends the deadline to file a notice of appeal to 90 days after the judgment or order is signed. TEX. R. APP. P. 26.1(a)(1).

A motion for new trial can be filed solely to extend the appellate deadlines and to extend the trial court's plenary power. *Pearson v. Stewart*, 314 S.W.3d 242, 245 (Tex. App.—Fort Worth 2010, no pet.); *Old Republic Ins. v. Scott*, 846 S.W.2d 832, 833 (Tex. 1993).

A defective motion for new trial still extends the appellate deadlines and plenary power although a trial court does not err in refusing to grant it. *Rabb International, Inc. v. SHL Thai Food Serv. LLC*, 346 S.W.3d 208, 210-11(Tex. App.—Houston [14th Dist.] 2011, no pet.). In *Rabb*, a non-attorney timely filed a motion for new trial on behalf of a corporation. Corporations cannot appear in court without being represented by a licensed attorney. *Id.* at 210. The Houston Court Fourteenth concluded the motion for new trial was defective but concluded that the motion still served to extend both the appellate deadlines and the trial court's plenary power. *Id.* at 210-11.

2. When a motion for new trial is required

A motion for new trial is not required to preserve error in a non-jury or jury trial except as provided in Rule 324(b). TEX. R. CIV. P. 324(a). However, as discussed below, Rule 324(b) sets out the following scenarios when a motion for new trial must be filed to preserve error and avoid waiver on appeal.

Complaints on which evidence must be heard. Rule 324(b)(1) identifies three complaints on which evidence must be heard: jury misconduct, newly discovered evidence, and the failure to set aside a default judgment. *Id.*

Complaints about the factual sufficiency of evidence in support of a jury finding. Rule 324(b) provides that challenges to the factual sufficiency of the evidence to support a jury finding or about a finding being against the overwhelming weight of the evidence must be preserved in a motion for new trial. TEX. R. CIV. P. 324(b)(2) & (3).

In this type of motion for new trial, a movant challenges the evidence supporting a jury finding as "factually insufficient" if she did not have the burden of proof. *Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co.*, 766 S.W.2d 264, 275-76 (Tex. App.—Amarillo 1988, writ denied). If she had the burden of proof, then the factual sufficiency challenge is couched as the jury's finding is "against the great weight of the evidence." *Id.*

When drafting a motion for new trial complaining of factual insufficiency, keep the standard of review on appeal in mind. In making a factual sufficiency review, the court of appeals considers all the evidence both supporting and contradictory to the finding. *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 445 (Tex. 1989). A finding is set aside only if the supporting evidence is so weak as to be clearly wrong and manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). Thus, a motion for new trial raising factual insufficiency should recount the evidence on both sides to demonstrate why the finding should be set aside.

Note that a motion for new trial can also raise a legal insufficiency challenge if not otherwise raised by a motion for instructed verdict, motion for jnov, object to the charge, or motion to disregard a jury's finding. *Steves Sash & Door Co. v. Ceco Corp.*, 751 S.W.2d 473, 477 (Tex. 1988). Raising a legal sufficiency point in a motion for new trial, however, is not optimal. A complaint of the legal sufficiency raised in a motion for new trial will only result in a remand for new trial and not a rendition of judgment. *El-Khoury v. Kheir*, 241 S.W.3d 82, 90 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

Complaints about the inadequacy or excessiveness of damages. A trial court and an appellate court cannot order remittitur. *Arkoma Basin Exploration. Co. v. FMF Assocs. 1990-A, Ltd.*, 249 S.W.3d 380, 390 (Tex. 2008). The trial court and court of appeals can suggest a remittitur conditioned that if the plaintiff refuses, a new trial will be granted. *Id.*

A court can suggest remittitur if the damages are not supported by factually sufficient evidence. *Pope v. Moore*, 711 S.W.2d 622, 624 (Tex. 1986). If part of a damage verdict is lacks sufficient evidentiary support, remittitur of a portion of the damages is proper. *Comstock Silversmiths, Inc. v. Carey*, 894 S.W.2d 56, 58 (Tex. App.—San Antonio 1995, no writ); *see* TEX. R. CIV. P. 324(b)(4).

If the trial court signs an order suggesting remittitur, it is a modification of the earlier judgment that restarts the appellate deadlines. *Comstock*, 894 S.W.2d at 390-91. If a party files a voluntary remittitur without any trial court order or suggestion, the original judgment remains in place and the deadlines remained tied to the original judgment. *Id.* at 390.

Complaints about incurable jury argument. A complaint about incurable jury argument can be raised through a motion for new trial even when no objection was raised during trial. Tex. R. Civ. P. 324(b)(5); *Phillips v. Bramlett*, 288 S.W.3d 876, 883 (Tex. 2009).

3. Mechanics of the motion for new trial and procedure to follow

Form of the motion. Rules 320-329 govern the specifics of motions for new trial. A motion for new trial must be in writing and signed by the party or her attorney. TEX. R. CIV. P. 320. The motion shall set out the points upon which it relies to show the error of which the party complains. TEX. R. CIV. P. 321. A motion for new trial cannot rely on general objections, such as "the court erred in its charge," "the verdict of the jury is contrary to law." TEX. R. CIV. P. 322. For example, a motion for new trial that stated the trial court erred in failing to grant defendant's motion for instructed verdict failed to preserve error. *Tennell v. Esteve Cotton Co.*, 546 S.W.2d 346, 352 (Tex. Civ. App.—Amarillo 1976, writ ref'd n.r.e.). The motion must "clearly specify each ground of error" or risk waiver on appeal. *Id.*

The motion may need to be verified or supported by affidavits when raising newly discovered evidence or other matters that require evidence. *See* TEX. R. CIV. P. 324(b)(1). For example, a motion for new trial on jury misconduct requires supporting evidence. *See id.*

Motions for new trial have a statutory filing fee of $15. TEX. GOV. CODE §51.317(b)(2). Always check with the particular county where filing a motion for new trial. Some counties add an addition fee. A motion for new trial is considered "conditionally filed" if submitted without the filing fee. *Garza v. Garcia*, 137 S.W.3d 36, 37 (Tex. 2004); *Jamar v. Patterson*, 868 S.W.2d 318, 319 (Tex. 1993). The appellate deadlines, however, are still extended by the motion. *Id.* Note that a trial court is not obligated to consider a motion for new trial filed without the fee. *Garza*, 137 S.W.3d at 38. Such motion also does not preserve error. *Id.* Paying the filing fee after the court loses plenary power does not preserve error. *Id.* Paying before the court loses plenary power may preserve error.

Deadline for filing. The deadline to file a motion for new trial is 30 days after the judgment or order is signed about which the complaint is made. TEX. R. CIV. P. 329b(a). Motions for new trial can be filed earlier. A motion for new trial is one of the motions listed in Rule 306c as being timely filed even if the motion is filed prematurely. TEX. R. CIV. P. 306c. If filed earlier, the motion is deemed filed the day of but after the judgment is signed. *Id.*

While a motion for new trial can be filed early; the deadline for filing cannot be moved. The deadline for filing a motion for new trial cannot be extended. TEX. R. CIV. P. 5; *Rabb Int'l, Inc. v. SHL Thai Food Serv., LLC*, 346 S.W.3d at 211; *see Moritz v. Preiss*, 121 S.W.3d 715, 720 (Tex. 2003). Although a late-filed motion for new trial does not extend the appellate deadlines or the trial court's plenary power, it may nonetheless be persuasive. If it is filed while the trial court has plenary power, the trial court could grant a new trial using the grounds in the motion to grant a new trial while acting under its inherent power. *Moritz*, 121 S.W.3d at 720 (trial court may look to a late-filed motion for new trial for guidance in exercising its inherent authority).

The movant filing a motion for new trial should request a hearing on the motion. When motion for new trial requires a hearing, the movant must ask the court for a setting and not allow the motion to be overruled by operation of law before the motion is heard. *See Shamrock Roofing Supply, Inc. v. Mercantile Nat'l Bank*, 703 S.W.2d 356, 357-58 (Tex. App.—Dallas 1985, no writ).

Rule 329b(c) requires a written order ruling on a motion for new trial. TEX. R. CIV. P. 329b(c); *In re Lovito-Nelson*, 278 S.W.3d 773, 775 (Tex. 2009). A trial court's oral pronouncement granting a new trial and a docket entry showing a new trial was granted do not substitute for the requirement in Rule 329b(c) for a written order. *Olmos v. Olmos*, 355 S.W.3d 306, 310 (Tex. App.—El Paso 2011, no pet.) (citing *Faulkner v. Culver*, 851 S.W.2d 187, 188 (Tex. 1993)).

Limit - two. There is a limit on the number of motions for new trial that can be filed. No more than two new trials can be granted for either party because of the insufficiency or weight of the evidence. TEX. R. CIV. P. 326.

A motion for new trial can be amended within the thirty days after the judgment is signed. Rule 329b(b) provides that an amended motion for new trial may be filed without leave of court when a preceding motion has not been overruled and if the amended motion is filed within 30 days of the judgment. TEX. R. CIV. P. 329b(b).

What about filing a second motion for new trial after the trial court has overruled a first new trial motion? A second motion for new trial filed within 30 days but after a first motion is overruled is not timely to extend plenary power even if the trial court has granted leave for the filing. *In re Brookshire Grocery Co.*, 250 S.W.3d at 69-71. The losing party is not without options to extend plenary power. After a first motion for new trial is overruled, a party may file a motion to modify, correct or reform the judgment so long as the motion to modify is filed within 30 days after the judgment is signed. Also, while a second motion for new trial does not operate to extend plenary power, the trial court still retains plenary power to change the judgment as long as done within 30 days of the first motion for new trial being overruled. *Brookshire*, 250 S.W.3d at 72.

4. Other grounds for motions for new trial

In addition to the motion for new trial grounds in Rule 324, there are two other bases for new trials to

include in all motions for new trial. A trial court can grant a new trial "in the interest of justice." *In re Columbia Med. Ctr. of Las Colinas*, 290 S.W.3d 204, 213 (Tex. 2009) (citing *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985)). As the supreme court held, a trial court that grants a new trial "in the interest of justice" must give its reasons. The trial court's reasons in granting a new trial should be "clearly identified and reasonably specific." *Id.* "In the interest of justice" is not sufficiently specific. *Id.* The trial court's broad discretion "should not, and does not, permit a trial judge to substitute his or her own views for that of the jury without a valid basis." *Id.* at 212.

The Texas Supreme Court further elaborated on *In re Columbia Medical Center* in *In re United Scaffolding, Inc.*, 377 S.W.3d 685, 688-89 (Tex. 2012). There, the supreme court held that a trial court does not abuse its discretion in granting a new trial so long as its stated reasons for granting a new trial are legally appropriate and specific enough to show that the trial court did not use a template but rather derived articulated reasons from the facts and issues in the case. *Id.*

A trial court can also grant a new trial or for "good cause" on the court's own motion or on the motion of a party. TEX. R. CIV. P. 320; *In re Columbia Med. Ctr.*, 290 S.W.3d at 210, n.3. As the supreme court noted in *Columbia Medical Center*, "good cause" in granting a new trial is not defined in the rules of procedure. *Columbia Med. Ctr.*, 290 S.W.3d at 210, n.3. According to the supreme court, "good cause" means more than just "any cause." *Id.* Given the importance of the right to trial by jury, trial courts should not set aside jury verdicts without "specific, significant, and proper reasons." *Id.*

C. Motion to modify, correct or reform a judgment

A motion to modify, correct or reform a judgment is used to correct errors in the rendition of judgment when a party does not seek to vacate the findings and when a party does not want a new trial. This motion can be used to raise the failure to award all of the relief to which a party is entitled or when an opponent has been awarded more than they are entitled to. For example, a motion to modify could raise errors in the award of court costs or attorneys' fees. A motion to modify, correct or reform a judgment can be filed following a jury trial or a bench trial.

1. Impact on appellate deadlines and plenary power

The impact of a motion to modify, correct or reform a judgment depends on whether the motion raises a substantive change in the judgment. A motion to modify if raising a substantive change in the judgment extends the trial court's plenary power and extends the time for perfecting an appeal. TEX. R. CIV. P. 329b(g), (h); TEX. R. APP. P. 26.1(a)(2); *Lane Bank Equip. Co. v. Smith Southern Equip., Inc.*, 10 S.W.3d at 310. If a motion seeks only a clerical change in a judgment it is not a Rule 329b(g) motion to modify and will not extend plenary power or the appellate deadlines. *Lane Bank*, 10 S.W.3d at 313.

Like a motion for new trial, a timely filed motion to modify under Rule 329b(g) that seeks a substantive change in the judgment extends the trial court's plenary power of the judgment up to 75 days after the signing of the judgment. *Lane Bank*, 10 S.W.3d at 310; TEX. R. CIV. P. 329b(e).

If the trial court modifies, corrects or reforms the judgment in any respect, the deadline to file a notice of appeal runs from the modified, corrected or reformed judgment. TEX. R. CIV. P. 329b(h); TEX. R. APP. P. 4.3(a); *Arkoma Basin Exploration Co. v. FMF Associates 1990-A, Ltd.*, 249 S.W.3d at 390-91 (order suggesting remittitur modifies a judgment and restarts appellate deadlines); *Lank Bank*, 10 S.W.3d at 313.

2. Mechanics of the motion to modify and procedure to follow

Form of the motion. The motion shall be in writing, signed by counsel or the party and shall specify the respects in which the judgment should be modified, reformed or corrected. TEX. R. CIV. P. 329b(g). The motion to modify does not need to be verified. TEX. R. CIV. P. 329b(g). A respondent should raise any jurisdictional or plenary power issues to defeat the motion.

Deadline for filing. The motion shall be filed within 30 days of the judgment being signed. TEX. R. CIV. P. 329b(a), (g). An amended motion to modify, correct or reform a judgment can be filed without leave of court if filed before any preceding motion is overruled and if filed within 30 days of the judgment or order complained of is signed. TEX. R. CIV. P. 329b(b).

Like a motion for new trial, the motion to modify, correct or reform a judgment must be ruled on by the trial court within 75 days after the judgment is signed or it is overruled by operation of law. TEX. R. CIV. P. 329b(c), (g). The trial court retains plenary power for 30 days after the motion to modify is overruled either by written order or by operation of law. *Id.* 329b(e). The trial court's determination of a motion to modify must be by written order. TEX. R. CIV. P. 329b(c).

3. Practice points and strategy considerations

The overruling of a motion to modify does not preclude the filing of a motion for new trial. TEX. R. CIV. P. 329b(g). Similarly, the overruling of a motion for new trial court does not preclude the filing of a motion to modify. *Id.* These motions would have to be filed within 30 days of the judgment. *In re*

Brookshire Grocery Co., 250 S.W.3d 66, 69-71 (Tex. 2008).

Remember that a motion seeking only a clerical change does not serve as a Rule 329b(g) motion to modify to extend the appellate deadlines and plenary power. File a motion for new trial to extend plenary power and the appellate deadlines.

D. Request for findings of fact and conclusions of law

Following nonjury matters, findings of fact and conclusions of law are critical for a successful appeal. *See generally* Laurie Ratliff, *Appealing Bench Trials,* CIVIL APPELLATE PRACTICE 101, ch. 6 (State Bar of Texas, Sept. 1, 2010). Findings of fact take the place of a jury's verdict and provide the factual framework for the court's judgment. Findings of fact in a bench trial have the "same force and dignity" as a jury's answers to jury questions. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991); *Keisling v. Landrum*, 218 S.W.3d 737, 740 (Tex. App.—Fort Worth 2007, pet. denied). Conclusions of law identify the legal basis for the judgment based on the facts found. Findings of fact and conclusions of law narrow the issues for appeal and provide a basis for attacking the judgment. *Vickery v. Commission for Lawyer Discipline*, 5 S.W.3d 241, 252, 255 (Tex. App.—Houston [14th Dist.], pet. denied).

Findings of fact and conclusions of law are critical for appeals in bench trials. However, not every bench trial or hearing is a candidate for findings of fact and conclusions of law. Under Rule 296, "in any case tried in the district or county court without a jury, any party may request the court to state in writing its findings of fact and conclusions of law." TEX. R. CIV. P. 296. Rule 296 gives a party a right to findings of fact and conclusions of law following a final adjudication after a conventional trial on the merits before the court. *IKB Indus. v. Pro-Line Corp.*, 938 S.W.2d 440, 442 (Tex. 1997); *Haddix v. American Zurich Ins. Co.*, 253 S.W.3d 339, 345(Tex. App.—Eastland 2008, no pet.). A case is "tried" when a court holds an evidentiary hearing. *Haddix*, 253 S.W.3d at 345. In such cases, findings of fact and conclusions of law are mandatory under Rule 296 and 297.

In addition to Rule 296 findings, the supreme court has identified proceedings where findings of fact, although not required under Rule 296, could be considered on appeal: a default judgment on a claim for unliquidated damages, judgment rendered as sanctions, and any judgment based in any part on an evidentiary hearing. *IKB*, 938 S.W.2d at 443.

Accelerated appeals where findings of fact may be requested include appeals from interlocutory orders when by statute an appeal is allowed, quo warranto proceedings, appeals required by statute to be accelerated or expedited, and appeals required by law to be filed or perfected less than 30 days after the order or judgment. TEX. R. APP. P. 28.1(a). Accordingly, the appealable orders listed in Tex. Civ. Prac. & Remedies Code §51.014(a) are matters where findings of fact could be filed. TEX. CIV. PRAC. & REM. CODE §51.014(a).

Not all proceedings result in a party being able to obtain findings of fact and conclusions of law. In cases where there are no facts to find and a trial court rules as a matter of law, findings of fact and conclusions of law serve no purpose and should not be requested. *IKB*, 938 S.W.2d at 442. Findings of fact are not appropriate in the following kinds of cases: summary judgments, directed verdicts, jnov's, default judgment awarding liquidated damages, dismissal for want of prosecution without an evidentiary hearing, dismissal based on the pleadings or special exceptions, and any judgment rendered without an evidentiary hearing. *Id.*

1. <u>Impact on appellate deadlines and plenary power</u>

A request for findings of fact and conclusions of law made in an appropriate case (required under Rule 296 or when can be considered on appeal) will extend the deadlines for perfecting an appeal. TEX. R. APP. P. 26.1(a)(4); *see IKB*, 938 S.W.2d at 442-43. If findings of fact are not appropriate and could not considered in a particular case, filing a request for findings does not extend the appellate deadlines. *IKB*, 938 S.W.2d at 443; *International Union v. General Motors Corp.*, 104 S.W.3d 126, 128-29 (Tex. App.—Fort Worth 2003, no pet.). If unsure if findings of fact will extend the appellate deadlines, file a motion for new trial. *See, e.g.*, *Ford v. City of Lubbock*, 76 S.W.3d 795, 798 (Tex. App.—Amarillo 2002, no pet.).

A request for findings of fact does not extend plenary power. *See* TEX. R. CIV. P. 329b File a motion for new trial or a motion to modify the judgment if seeking to extend the court's plenary power. *Id.* 329b(e), (g).

2. <u>Mechanics of the request for findings of fact and procedure</u>

Requesting findings of fact and conclusions of law is a three-step process. All three steps are critical in preserving error and in presenting a case on appeal.

The first step in the procedure for obtaining findings of fact and conclusions of law is to file a written "Request for Findings of Fact and Conclusions of Law." TEX. R. CIV. P. 296. The request must be filed with the clerk within twenty days after the judgment is signed and must be served on all parties according to Rule 21a. TEX. R. CIV. P. 296. There is no procedure for extending this 20-day deadline. *Id.* A request for findings of fact can be filed early. A prematurely filed request for findings of fact is effective and deemed filed on the date of but after the signing of the judgment. TEX. R. CIV. P. 306c. The

clerk must immediately notify the trial court of the request. TEX. R. CIV. P. 296.

The second step in the procedure for obtaining findings of fact and conclusions of law is to file a notice past due findings and conclusions if the trial court fails to timely file findings of fact and conclusions of law. If the court fails to timely file findings of fact and conclusions of law within 20 days after the request is filed, the party who requested findings of fact must file a "Notice of Past Due Findings of Fact and Conclusions of Law." The notice of past due must be filed within thirty days after the original request was filed. TEX. R. CIV. P. 297. The notice of past due findings must state the date the original request was filed and the date the findings and conclusions were due. TEX. R. CIV. P. 297. The clerk is required to immediately inform the court of the late notice. *Id.*

With the filing of past due notice, the trial court's deadline to file findings and conclusions is extended to forty days from the date the original request was filed. *Id.* The failure to file a notice of past due findings waives the right to complain about the failure to file findings. *Gnerer v. Johnson*, 227 S.W.3d 385, 389 (Tex. App.—Texarkana 2007, no pet.).

Do not file the notice of past due findings early. Some courts of appeals have concluded that a notice of past due findings request filed early is *not* timely and an appellant waived complaint regarding the trial court's failure to file findings of fact. *Estate of Gorski v. Welch*, 993 S.W.2d 298, 301 (Tex. App.—San Antonio 1999, pet. denied). The courts reasoned that Rule 306c lists only the request for findings of fact, not the notice of past due findings of fact, as a document that can be filed early and still be effective. TEX. R. CIV. P. 306c.

The rules require that findings of fact and conclusions of law be in writing and in a separate document from the judgment. TEX. R. CIV. P. 296, 299a. The trial court's finding of fact "shall not be recited in a judgment." TEX. R. CIV. P. 299a. Findings of fact shall be filed with the district clerk separate and apart from the judgment. *Id.*

The final step in the procedure for obtaining findings of fact and conclusions of law is the filing of a request for additional findings and conclusions. TEX. R. CIV. P. 298. A request for additional findings of fact and conclusions of law must be made within ten days after the original findings and conclusions are filed by the court. TEX. R. CIV. P. 298. The court then has ten days to file additional findings and conclusions. *Id.* ("court shall file any additional or amended findings and conclusions that are appropriate within ten days after the request is filed.") The rule also provides that no findings or conclusions "shall be deemed or presumed by any failure of the court to make additional findings or conclusions." *Id.*

While the request for additional findings applies to both parties, for the appellant, the request for additional findings of fact is critical and the primary avenue to preserve error. A request for additional findings is similar to an objection. *Vickery*, 5 S.W.3d at 255-56. Thus, the request for additional findings, like an objection, needs to be specific. *Id.* A request for additional findings of fact has significance unrelated to the trial court actually filing additional findings of fact. To raise an issue on appeal, a party must have requested a finding of fact on the issue or the issue must be in the court's findings. *Park v. Payne*, 381 S.W.3d 615, 618-19 (Tex. App.—Eastland 2012, no pet.) (when trial court does not enter findings that establish any element of grounds of a defense, party relying on defense must request additional findings to avoid waiver); TEX. R. CIV. P. 299; *see also Kohannim v. Katoli*, __ S.W.3d __, 2013 WL 3943078 at *6 (Tex. App.—El Paso July 24, 2013, no pet. h.) (cannot imply on appeal finding of fact that was requested and refused).

Note that Rule 298 starts the deadline to file a request for additional findings from a different date than most rules. Rule 298 ties the deadline for requesting additional or amended findings to the date the trial court *files* it findings of fact, not the day the court signs the findings. TEX. R. CIV. P. 298. Failing to timely request additional findings of fact and conclusions of law waives the right to complain of the trial court's failure to enter the additional findings. *Heritage Res., Inc. v. Hill*, 104 S.W.3d 612, 620 (Tex. App.—El Paso 2003, no pet.).

3. Role in preservation of error

Having findings of fact and conclusions of law provides the most favorable appellate review. Findings of fact are reviewed for factual and legal sufficiency of the evidence; conclusions of law are reviewed *de novo*. *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996); *Perry Homes v. Cull*, 258 S.W.3d 580, 598 (Tex. 2008); *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994).

If no findings of fact and conclusions of law are filed or requested, all questions of fact will be presumed and found in support of the judgment. *Zac Smith & Co. v. Otis Elevator Co.*, 734 S.W.2d 662, 666 (Tex. 1987); *Treuil v. Treuil*, 311 S.W.3d 114, 130 (Tex. App.—Beaumont 2010, no pet.) If there are no findings of fact requested and none filed, the appellate court must affirm the judgment if any legal theory that is supported by the evidence. *Schoeffler v. Denton*, 813 S.W.2d 742, 744 (Tex. App.—Houston [14th Dist.] 1991, no writ).

To raise a complaint about the lack of findings of fact and conclusions of law, an appellant must have filed a timely request for findings of fact and conclusions of law and a timely notice of past due

findings of fact and conclusions of law. TEX. R. CIV. P. 296, 297. If properly requested and in an appropriate case, it is mandatory for the trial court file findings of fact and conclusions of law. *Cherne Indus., Inc. v. Magallanes*, 763 S.W.2d 786, 772 (Tex. 1989). When a trial court fails to file findings, it is presumed harmful, unless the record affirmatively shows no harm. *Id.*

The remedy for a trial court's failure to file findings of fact when required is to ask the court of appeals to abate the appeal and direct the trial court to correct the error. *Id.* at 773; TEX. R. APP. P. 44.4(a). Mandamus is not an available remedy to compel a trial court to file findings of fact and conclusions of law. *In re Sheshtawy*, 161 S.W.3d 1, 2 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding).

E. Motion for Judgment Nunc Pro Tunc

A nunc pro tunc judgment is to correct clerical errors that occur in the entry of the judgment. TEX. R. CIV. P. 316.

1. Impact on appellate deadlines

If the trial court grants a motion for judgment nunc pro tunc while it retains plenary power over the judgment, the deadlines for filing a notice of appeal run from the date of the nunc pro tunc judgment. *Lane Bank*, 10 S.W.3d at 313.

As set out in Rule 306a(6), if the trial court signs a corrected judgment after its plenary power has expired, the deadline to appeal the corrected judgment begins from the date the nunc pro tunc was signed for complaints that were not applicable to the original judgment. TEX. R. CIV. P. 306a(6); TEX. R. APP. P. 4.3(b). A judgment nunc pro tunc does not extend the appellate deadlines for matters in the original judgment. *Id.*; *Gonzales v. Rickman*, 762 S.W.2d 277, 278 (Tex. App.—Austin 1988, no writ).

2. Mechanics of the motion for judgment nunc pro tunc and procedure

Form of the motion. There is no particular form for a motion for judgment nunc pro tunc. The critical point in nunc pro tunc motions is that only clerical errors can be corrected. Substantive or judicial errors cannot be corrected through this motion. *Escobar v. Escobar*, 711 S.W.2d 230, 231 (Tex. 1986).

Only clerical errors can be corrected through a nunc pro tunc. A judicial error is one that occurs in the rendition of judgment as opposed to the entry of a judgment. *Id.* A judicial error arises from a mistake of fact or law that requires judicial reasoning to correct. *Barton v. Gillespie*, 178 S.W.3d 121, 126 (Tex. App.—Houston [1st Dist.] 2005, no pet.); *see also In re Daredia*, 317 S.W.3d at 249-50 (error in default judgment stating that all relief not granted is denied and that it is a final judgment could not be corrected by nunc pro tunc after plenary power expired). Judgments that correct judicial errors after plenary power has expired are void. *Hernandez v. Lopez*, 288 S.W.3d 180, 185 (Tex. App.—Houston [1st Dist.] 2009, no pet.).

A clerical error is one that occurs in the entering of a judgment or order. *Escobar*, 711 S.W.2d at 231. A clerical error is one that is not the result of judicial reasoning or determination. *Andrews v. Koch*, 702 S.W.2d at 585. Determining whether an error is judicial or clerical is a question of law. *Escobar*, 711 S.W.2d at 232. In making its determination, courts must review the judgment actually rendered, not the judgment that should have been rendered. *Id.* at 231.

A judgment nunc pro tunc cannot be signed solely to extend appellate deadlines. *Anderson v. Casebolt*, 493 S.W.2d 509, 510 (Tex. 1973).

There is no deadline for filing a motion for judgment nunc pro tunc. TEX. R. CIV. P. 329b(f) (clerical errors can be corrected at any time). It is used to correct clerical errors after the trial court has lost plenary power over the judgment.

PERFECTING THE APPEAL AND OBTAINING THE RECORD

The decision has been made to appeal and the post-trial motions have been done and it's now time to move to the court of appeals. Below are the steps for initiating the appellate process.

I. NOTICE OF APPEAL

A. Invoking appellate court jurisdiction

Perfecting an appeal is a simple process. An appeal is perfected when a written notice of appeal is filed with the trial court clerk. TEX. R. APP. P. 25.1(a); *Sweed v. Nye*, 323 S.W.3d 873, 874 (Tex. 2010). The filing of the notice of appeal alone invokes the court of appeals' jurisdiction over all parties to the trial court's order or judgment. TEX. R. APP. P. 25.1(b). The Texas Supreme Court reiterated that even a timely filed attempt to appeal, even if defective, invokes the court of appeals' jurisdiction. *Sweed*, 323 S.W.3d at 875.

Rule 25.1 contains a savings clause. If the notice of appeal is filed by mistake in the court of appeals instead of the trial court, it is deemed timely filed the same day with the trial court. TEX. R. APP. P. 25.1(a).

In *Roccaforte v. Jefferson County*, 341 S.W.3d 919, 924 (Tex. 2011) the Court noted that it has "repeatedly held that the right of appeal should not be lost due to procedural technicalities." Roccaforte filed an interlocutory appeal of an order dismissing a governmental entity, and later filed an appeal after the final judgment. Roccaforte, however, did not raise the arguments from his interlocutory appeal in his appeal from the final judgment. The trial court did not sever the interlocutory order and denied "all relief not granted" in its final judgment. The Court explained

that ordinarily in such circumstances, the appellant would have to have complained about the interlocutory order (the dismissal) in the appeal of the final judgment. Relying on TRAP 27.3, the Court concluded that the final judgment implicitly modified the interlocutory order. The claims against the governmental entity had not been severed and thus it remained a party. *Id.* The Court treated the appeal of the interlocutory order as an appeal of the final judgment and thus allowed the Court to reach the merits of the interlocutory appeal. *Id.* at 924-25.

The supreme court recently reiterated that timely filed attempts to appeal will be treated as a notice of appeal. In *In re J.M.*, appellant filed a document styled, "Motion for New Trial, or in the Alternative, Notice of Appeal." 396 S.W.2d 528, 540 (Tex. 2013). The court of appeals concluded the document was not a notice of appeal. The Texas Supreme Court disagreed. The document was styled "notice of appeal" and expressed a desire to appeal. *Id*. at 531. The court held that the appellant properly invoked appellate jurisdiction. *Id.*

1. Contents of the notice of appeal

The notice of appeal must contain the trial court case cause number, the style of the trial court case, the date the judgment or order was signed, name the appealing party and that the party desires to appeal, the court of appeals to which appealing (unless in Houston then list both First and Fourteenth), and if the appellant is presumed indigent and may proceed without paying costs. TEX. R. APP. P. 25.1(d).

If an accelerated appeal, the notice of appeal must also state that the appeal is accelerated in the notice and whether it is a parental termination or child protection case. *Id*. 25.1(d)(6).

If a restricted appeal, the notice of appeal must state that the appellant did not participate in person or through an attorney in the hearing of which complaint is made; that appellant did not timely file any post-judgment motions, request for findings of fact or a notice of appeal. *Id.* 25.1(d)(7). If the appellant is not represented on appeal, the notice of appeal in a restricted appeal must be verified by appellant. *Id.* 25.1(d)(7)(C).

The best practice is to attach the order or judgment being appealed to the notice of appeal. Further, it is also the best practice to include in the notice of appeal a statement that the party desires to appeal the judgment and all orders/rulings leading up to the judgment.

2. Deadline to file a notice of appeal

A notice of appeal must be filed within 30 days after the judgment is signed. TEX. R. APP. P. 26.1. The deadline for filing a notice of appeal is extended to 90 days after the judgment is signed if any party timely files a motion for new trial, a motion to modify the judgment, a motion to reinstate a dismissal under TRCP 165a, or filed a request for findings of fact and conclusions of law if required under the rules or such findings could properly be considered by the court of appeals. *Id.* 26.1(a)(1-4).

A notice of appeal in an accelerated appeal must be filed within 20 days after the judgment or order is signed. *Id.* 26.1(b). In a restricted appeal, the notice of appeal must be filed within six months after the judgment or order is signed. *Id.* 26.1(c). Note that a motion for new trial, motion to modify, or a request for findings of fact do not extend the deadline to file a notice of appeal in an accelerated appeal. *In re K.A.F.*, 160 S.W.3d 923, 928 (Tex. 2005).

If any party timely files a notice of appeal, any other party may file a notice of appeal within the applicable deadlines in TRAP 26.1 or 14 days after the first filed notice of appeal, whichever is later. TEX. R. APP. P. 26.1(d).

What if both parties are appealing? Who should file first? Filing first grants status as appellant who can then open and close in the briefs and in oral argument.

3. Who needs to file a Notice of Appeal?

Any party who seeks to alter the trial court's judgment or seek more favorable relief on appeal than awarded in the trial court must file a notice of appeal. TRAP 25.1(c); *City of Austin v. Whittington*, 384 S.W.3d 766, 789 (Tex. 2012); *Epps v. Fowler*, 351 S.W.3d 862, 871-72 (Tex. 2011). For example, if a trial court grants relief to a party on the merits of their claim but denies an attorney's fees award, the "prevailing" party must file a notice of appeal to challenge the denial of its attorney's fees award. An appellee cannot rely on a cross point to seek to alter the trial court's judgment. TRAP 25.1(c). However, under TRAP 38.2(b)(1), if a trial court grants a JNOV, the appellee may bring a cross issue on any issue that would have vitiated the verdict or that would have prevented affirmance if the trial court had rendered judgment on the verdict. TEX. R. APP. P. 38.2(b)(1).

If a party seeking to alter a trial court's judgment does not file a notice of appeal, the court of appeals cannot grant the party more favorable relief than the trial court did except for just cause. Tex. R. App. P. 25.1(c); *see also Brooks v. Northglen Ass'n,* 141 S.W.3d 158, 171 (Tex. 2004) (citing *Dean v. Lafayette Place (Section One) Council of Co–Owners, Inc.,* 999 S.W.2d 814, 818 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

An appellee does not need to file a notice of appeal to present additional, independent grounds for affirming the trial court's judgment. *Dean*, 999 S.W.1d at 818. An independent ground for affirmance is properly raised in a cross issue as long as the appellee

is not requesting greater relief than that awarded by the trial court. *Id.*

An appellee who fails to file a notice of appeal when required to do so waives the issue. *Mid–Century Ins. Co. of Tex. v. Daniel,* 223 S.W.3d 586, 589 (Tex. App.-Amarillo 2007, pet. denied); *see, e.g., Wagner & Brown, Ltd. v. Horwood,* 58 S.W.3d 732, 737–38 (Tex. 2001) (appellee satisfied with judgment, despite erroneous application of four-year limitations period to unjust enrichment claims, waived right to appeal statute of limitations issue where no notice of appeal of that issue was filed).

This situation also arises with alternative grounds of recovery. A party is not required to raise an alternative theory of recovery until a judgment in her favor about which she has no complaint is reversed. *DiGiuseppe v. Lawler*, 269 S.W.3d 588, 603 (Tex. 2008). When the court of appeals reverses the judgment, that party can then raise the alternative theory. The issue is not waived. The party is now allowed to present her alternative ground for recovery to the trial court for a determination in the first instance as to whether she should recover under that alternative theory. *Id.*

Failure to file a notice of appeal when it is required by the prevailing party results in waiver of the issue. *Lubbock County v. Trammel's Lubbock Bail Bonds*, 80 S.W.2d 580, 584 (Tex. 2002); *Texas Bd. of Chiropractic Examiners v. Texas Med. Assoc.*, 375 S.W.3d 464, 492 (Tex. App.—Austin 2012, pet. denied). In *Texas Board of Chiropractic*, appellees raised as a cross-point an issue they raised in a motion for summary judgment that the trial court denied. *Texas Bd. of Chiropractic*, 375 S.W.3d at 491-92. The court of appeals concluded that the cross-point sought relief beyond which they were granted in the district court's judgment. Thus, the appellees should have filed a notice of appeal. Accordingly, the court of appeals dismissed the issue for lack of jurisdiction. *Id.*

Remittitur may also require both parties to file notices of appeal. If a party remits at the trial court's suggestion the benefitting party still appeals, the remitting party can complain on appeal that some or all of the remittitur should not have been ordered. To raise this argument, the remitting party must file a notice of appeal. TEX. R. APP. P. 46.2.

A filing fee of $175 to the court of appeals clerk is also due with the filing of a notice of appeal.

4. <u>Serving the notice of appeal</u>

The notice of appeal must be served on all parties to the final judgment. TEX. R. APP. P. 25.1(e). In an interlocutory appeal, the notice of appeal must be served on all parties to the trial court proceeding. *Id.* By a recent amendment to Rule 25.1, a party is no longer required to file a copy of the notice of appeal with the court of appeals. *Id.*

5. <u>Amending the notice of appeal</u>

A notice of appeal may be amended to correct defect or omission contained in an earlier filed notice and may be filed at any time before the appellant's brief is filed. TRAP 25.1(g); *Sweed v. Nye*, 323 S.W.3d 874-75. The court of appeals may strike the amended notice for cause on motion filed by any party affected by the amended notice. TEX. R. APP. P. 25.1(g). A notice of appeal can only be amended after appellant's brief is filed upon leave of court and upon such terms as the court may prescribe. *Id.*

An amended notice of appeal can correct name or cause number defects. *Id.* An amended notice of appeal, however, cannot correct a late-filed notice. Filing a notice of appeal after the deadline and after the fifteen-day period in TRAP 26.3 cannot be cured with an amended notice of appeal. Similarly, a party cannot amend a notice of appeals to change the order being appealed. *Rainbow Group, Ltd. v. Wagoner*, 219 S.W.3d 485, 492 (Tex. App.—Austin 2007, pet. denied). A notice of appeal also cannot be amended to add appealing parties after the deadline. *Bahar v. Baumann*, No. 03-09-00691, 2011 WL 4424294 at * 2-3 (Tex. App.—Austin September 23, 2011, pet. denied) (mem. op.).

6. <u>Motions to extend time to file a notice of appeal</u>

Missing the deadline to file a notice of appeal is not necessarily fatal. The court of appeals may extend the deadline to file a notice of appeal, if within 15 days after the deadline for filing the notice of appeal, a party files the notice of appeal in the trial court and files a motion for extension of time to file the notice of appeal in compliance with TRAP 10.5(b). TEX. R. APP. P. 26.3. The motion for extension of time to file a notice of appeal must state the deadline for the notice of appeal, facts reasonably explaining the need for an extension, the trial court from which appeal is taken, the date of the judgment or order and the style and cause number of the case. *Id.* 10.5(b)(2). The motion for extension must also contain a certificate of conference. *Id.* 10.1(a)(5).

The Texas Supreme Court has stated that a reasonable explanation is any plausible statement of facts indicating that the failure to timely file was not deliberate or intentional, but rather was the result of "inadvertence, mistake or mischance." *Hone v. Hanafin*, 104 S.W.3d 884, 886 (Tex. 2003).

In another recent case the Houston First Court of Appeals noted that "any reason short of deliberate or intentional noncompliance qualifies as reasonable," including a misunderstanding of the law and the appellate deadlines. *Easton v. Phelan*, No. 01-10-01067-CV, 2012 WL 1650024 at *6-7 (Tex. App. – Houston [1st Dist.] May 10, 2012, no pet.) (mem. op.). In *Easton*, appellant's counsel believed the notice of appeal deadline was 30 days after the denial of a

motion for new trial. *Id.* at 7. The court of appeals considered the mistake a reasonable explanation and granted the motion for extension of time to file a notice of appeal. *Id.*

As the Texas Supreme Court pointed out, is has "consistently treated minor procedural mishaps with leniency, preserving the right to appeal." *Ryland Enter., Inc. v. Weatherspoon*, 355 S.W.3d 664, 665 (Tex. 2011). Post verdict but before the trial court signed a judgment, Ryland filed a JNOV raising legal sufficiency and requesting a new trial. Ryland filed its notice of appeal sixty-five days after the judgment was signed. The court of appeals dismissed the appeal, concluding that a JNOV does not extend the appellate deadlines if filed before the judgment is signed. The Texas Supreme Court reversed. The Court pointed to several procedural rules extending appellate deadlines. *Id.* at 665-66. The Court characterized Ryland's JNOV motion as a motion for new trial and as a motion to modify. Prematurely filed motions for new trial or motions to modify extend the appellate deadlines. *Id.* at 666. The substance of the pleading and the relief sought control notwithstanding the style of the pleading. The JNOV triggered TRAP 26.1(a)'s extension of the appellate deadlines. *Id.* at 666.

7. Trial court clerk's duties

Under the recent amendments to Rule 25, the trial court clerk is now required to immediately send a copy of the notice of appeal to the court of appeals clerk and to the court report responsible for preparing the record. TEX. R. APP. P. 25.1(f).

8. Problems with timing of the filing of a notice of appeal

What happens if a notice of appeal is filed prematurely? The notice is effective and deemed filed on the day of but after the event that begins the period for perfecting the appeal. TEX. R. APP. P. 27.1(a).

Problems may also rise when a trial court modifies a judgment after a notice of appeal has been filed, invoking the court of appeals jurisdiction. If the trial court modifies or vacates an order or judgment after the order or judgment has been appealed, the court of appeals must treat the appeal as being from the subsequent order or judgment. *Id.* 27.3. The court of appeals may treat actions relating to the first appeal as relating to the subsequent order or judgment. *Id.* The parties may request a supplemental record to include matters relating to the subsequent judgment or order. *Id.* Further, the rule allows that any party may simply file a new notice of appeal from the subsequent order or judgment. *Id.*

9. Notice of appeal does not suspend the judgment; must supersede the judgment to prevent enforcement.

The filing of a notice of appeal does not suspend enforcement of a judgment. TEX. R. APP. P. 25.1(h). The prevailing party may enforce the judgment unless the judgment is superseded under TRAP 24 or the appellant is entitled to supersede without security with the filing of a notice of appeal. TEX. R. APP. P. 25.1(h)(1), (2).

As provided in TRAP 24, unless the law or these rules provide otherwise, a judgment debtor may supersede a judgment by filing with the trial court clerk a written agreement with the judgment creditor for suspending the judgment; filing a deposit with the clerk in lieu of a bond; filing a good and sufficient bond; or providing alternate security as ordered by the court. TEX. R. APP. P. 24.1(a)(1-4). Enforcement of a judgment is suspended if the judgment is superseded. TEX. R. APP. P. 24.1(f).

Rule 24 covers the specifics of the amount and calculation of a bond for money judgments and other types of judgments. *See* TEX. R. APP. P. 24.2(a)-(d). The court may reduce the amount of security if the court finds the amount of the bond calculated in TRAP 24.2(a) will cause substantial economic harm to the judgment debtor. TEX. R. APP. P. 24.2(b).

B. Docketing statement

Along with the notice of appeal, an appellant must "promptly" file a docketing statement with the court of appeals. TEX. R. APP. P. 32.1. In addition to the recent amendment adding "promptly" to the opening requirement of filing the docketing statement with the notice of appeal, the rule was also amended to mirror the TRAP 25.1 amend of identifying the docketing statement whether the appeal involves parental termination or a child protection case. *Id.* 32.1(g).

The docketing statement provides information for the court of appeals clerk's office to set up the case in its system. Docketing statements are on the courts of appeals' websites and can be downloaded. The docketing statement is now uniform among the courts of appeals.

II. THE APPELLATE RECORD

A. General points

While the clerks are responsible for the timely filing of the appellate record, it is the parties' responsibility to ensure the record is accurate and complete. There are often problems with the clerk's record or the reporter's record requiring the parties' intervention. The best practice is to obtain the record early to check for omissions, errors to allow time to supplement. It is not uncommon for critical matters to be omitted from both the clerk's record and the reporter's record. For example, some trial court clerk's

do not maintain unsigned, proposed motions or proposed findings of fact. These may have to be recreated through a lost or destroyed record. Similarly, court reporter's may miss bills of exception or other documentary exhibits. It is important to check the attachments to filed documents to confirm that all the attachments are included in the record.

When reviewing the record, consider the fact that it will be in an electronic format. Confirm that documents are legible after they have been scanned.

The trial court and the court of appeals are jointly responsible for ensuring that the appellate record is timely filed. TEX. R. APP. P. 35.3(c). The trial court clerk is responsible for preparing and timely filing the clerk's record so long as a notice of appeal has been filed and the fee for such record has been paid, the party has made arrangements to pay for the record, or the party is entitled to proceed without payment. TEX. R. APP. P. 35.3(a). Similarly, the court reporter is responsible for preparing and timely filing the reporter's record so long as a notice of appeal has been filed, appellant has requested preparation of the reporter's record and the fee for such record has been paid, the party has made arrangements to pay for the record, or the party is entitled to proceed without payment. TEX. R. APP. P. 35.3(b).

The court of appeals clerk is required to review the notice of appeal and the appellate record and determine if they comply with the applicable rules. *Id.* 37.1; 37.2. If there are deficiencies, the court of appeals clerk must notice the party or the trial court clerk or the court reporter of the defects to have them remedied. *Id.* 37.1; 37.2. The court of appeals must give an appellant a reasonable opportunity to cure any defect before dismissal. *Id.* 37.3(b).

Note that the rules allow an agreed record to allow the parties to agree on the contents of the record. *Id.* 34.2 The court of appeals will presume that the agreed record contains all of the evidence and filings relevant to the appeal. *Id.* The parties may also provide an agreed statement of the case in lieu of filing a reporter's record. *Id.* 34.3. The agreed statement must be filed in the trial court and included in the appellate record. *Id.* Counsel should proceed with caution in agreeing to a partial record.

B. Clerk's Record

The rules list documents to be included in the clerk's record. *Id.* 34.5(a). The best practice, however, is to prepare a designation of matters to be included in the clerk's record. In that request a party can specifically identify the document, the date it was filed, and any attachments it has. For example, the request might list the following to be included in the clerk's record: "Defendant's Motion for Summary Judgment with attached exhibits A-H, filed May 1, 2006." This kinds of detailed request makes the clerk's job much easier when assembling the record.

It is optimal if the trial court clerk will allow a party to review the index of the record before it is filed in the court of appeals. This can catch many errors in the record and allow time to correct them before the record is filed with the court of appeals.

At any time before the clerk's record is prepared, any party may request additional items to be included in the record. *Id.* 34.5(b). A request for unnecessary items may result in the party requesting such items to pay for the costs of the unneeded portions of the record. *Id.* 34.5(b)(3).

C. Reporter's Record

When perfecting the appeal, the appellant must make a written request to the court reporter to prepare the reporter's record. *Id.* 34.6(b)(1). The request must designate the exhibits to be included and the portions of the proceeding to be recorded. *Id.* The request must be filed with the trial court clerk. *Id.* 34.6(b)(2). While the rule requires a request for a reporter's record when perfecting an appeal, the court of appeals may not refuse to file a reporter's record because of an untimely request to prepare the record. *Id.* 34.6(b)(3).

Consider requesting the original exhibits if it will be helpful on review. With difficult to read documents, the originals are critical. The original exhibits also save on the cost of the record.

An appellant may proceed on appeal with a partial record. If an appellant requests a partial reporter's record, the appellant must include a statement of issues to be appealed and must restrict the appeal to only those issues. *Id.* 34.6(c)(1). Other parties may request additional portions of the record. *Id.* 34.6(c)(2). If proceeding on a partial record, the court of appeals presumes that the partial record constitutes the entire record on appeal. *Id.* 34.6(c)(4). Again, counsel should proceed with caution in using a partial record.

D. Correcting record problems TRAP 34.5(c)-(e) and 34.6(d)-(f)

The appellate rules are liberal on supplementing the record. If there is an omission, request a supplemental record to include the omitted document. *See generally In re Arrendell*, 213 S.W.3d 496, 499-500 (Tex. App.—Texarkana 2006, no pet.). If a document has been lost or destroyed, the parties can submit it by agreement or if cannot agree, go to the trial court for the court to determine. *Id.* at 501-03.

E. Deadlines for filing the Appellate Record

The deadline to file the appellate record in an ordinary appeal is within 60 days after the judgment is signed. TEX. R. APP. P. 35.1. The deadline to file the appellate record is extended to 120 days after the judgment is signed if a motion for new trial, motion to

modify or a request for findings of fact (if such are appropriate in the particular case). *Id.* 35.1(a).

The record in an accelerated appeal is due within 10 after the notice of appeal is filed. *Id.* 35.1(b). The record in a restricted appeal is due 30 days after the notice of appeal is filed. *Id.* 35.1(c).

Rule 35.3 was recently amended to allow the court of appeals to extend the deadlines to file the record upon the request of the clerk or the court reporter. TEX. R. APP. P. 35.3(c). Each extension, however, cannot exceed 30 days in an ordinary or restricted appeal, or 10 days in an accelerated appeal. *Id.*

F. Formal bill of exception

Remember TRAP 33.2. Rule 33.2 sets out the procedure for filing a formal bill of exception to preserve errors about matters that would not otherwise appear in the record. *Id.* 33.2. The detailed procedure allows parties to add to the appellate record evidence or testimony not a part of the record or to clarify rulings or proceedings. It can be significant tool for adding to the record evidentiary rulings that, because they occurred at a bench conference, were not recorded by the court reporter. The deadline to file a formal bill of exception is 30 days after notice of appeal is filed.

MOTION PRACTICE IN THE COURTS OF APPEALS

Below are some practical considerations for advocacy once a case is in the court of appeals. Courts of appeals are required to consider all appeals property filed with the court. Courts of appeals do not have an automatic denial mechanism to expedite disposition, like the petition for review process in the Texas Supreme Court. Courts of appeal have to hear an appeal whether important to the jurisprudence or not. Also, with criminal jurisdiction, courts of appeals have sizable dockets. Together, these factors mean a high volume of cases. These factors impact advocacy and are a part of the information to tell the client.

I. MOTIONS IN THE COURT OF APPEALS

Find out about the court of appeals' procedures for ruling on motions in advance. Courts of appeals have internal procedures and deadlines for ruling on motions. For example, some courts issue rulings on Thursdays and require motions to be filed no later than Monday to be on that week's Thursday orders. Also, some matters can be addressed by a letter and do not require a motion. The best advice: when in doubt, call and ask.

A. General requirements for all motions

Rule 10 sets out the requirements for all motions in the appellate courts. All motions other than motions for rehearing and for en ban rehearing must have a certificate of conference. TEX. R. APP. P. 10.1(a). The motion must set out "with particularity the grounds on which it is based." *Id.* 10.1(a)(2). In general, motions do not need to be verified. Facts that must be verified are those not in the record, not within court's knowledge, and those not within attorney's personal knowledge. *Id.* 10.2. All motions have a filing fee the amount of which can be found on court's websites.

The court can rule on a motion before a response is filed. *Id.* 10.1(b). Thus, if filing a response, it is best to inform the court that a response will be filed and give a date by which it will be filed. Similarly, if replying to a response, let the court know and file it quickly.

B. Practical considerations for all motions.

When drafting motions in the courts of appeals, consider the audience and the time in which they have to consider the motion. The court and its staff are not familiar with the case and have a limited amount of time to devote to a motion. With those factors in mind, the following will assist in the court's review of a motion:

- Be creative in the style of the motion: e.g. "Motion for Rehearing based on recently issued case holding that ____" instead of "Motion for Rehearing" or "Motion to Strike Appellant's Appendix that includes matters outside the record" instead of "Motion to Strike Appendix"
- Include in the style of the motion if it is unopposed or agreed
- State at the beginning of the motion the relief sought
- Indicate if the motion is time-sensitive or requires immediate action
- Attach relevant exhibits from the record to the motion

C. Particular motions - requirements and practical considerations

1. <u>Motions relating to the record</u>

If there are problems with the record, a motion must be filed within 30 days after the record is filed. TEX. R. APP. P. 10.5(a). This rule relates to procedural defects in the form of the record. *Waite v. Waite*, 150 S.W.3d 797, 802 (Tex. App.—Houston [14th Dist.] 2004, pet. denied). The failure to object, if the error is waivable, waives the error. TEX. R. APP. P. 10.5(a).

2. <u>Motions for extension of time to file briefs.</u>

One of the most routinely filed motions is a motion to extend the deadline to file a brief. In addition to the general motion requirements, motions

for extension of time must state the current deadline, the length of extension sought, facts that reasonably explain the need for an extension and the number of previous extensions granted. TEX. R. APP. P. 10.5(b).

Most courts of appeals have a specific procedure for determining extensions of time for briefs. Often the first one is "free" and granted by the clerk's office. With a second or third motion, the court is likely to require a good explanation for the need for more time. The best practice is to take seriously the court's letters that say no more extensions.

3. Motions to postpone oral argument

Unlike motions for extension of time that only require a reasonable explanation for an extension, motions to postpone oral argument have a higher standard. A motion to postpone oral argument "must be supported by sufficient cause" unless the motion is agreed or the sufficient cause is apparent to the court. TEX. R. APP. P. 10.5(c).

If you must postpone argument, whether agreed or opposed, file the motion as soon as possible. Rule 39.9 requires only 21 days notice of oral argument. TEX. R. APP. P. 39.9. Many courts provide little more than 21 days notice, so if there is a conflict let the court know immediately. This allows the court to place another case on its oral argument docket. Some courts of appeals may submit your case on briefs if oral argument is postponed.

As it relates to oral argument, find out about the court's method for setting cases. Find out if the court conducts oral argument at a satellite location in addition to the court's physical location. The Eastland Court hears cases in Midland, the Austin Court hears cases in San Angelo and the Texarkana Court hears cases in Longview, to name a few.

If your case originates in an outlying county (Tom Green County, for example), it is worth inquiring if and when the Austin Court intends to travel to San Angelo for arguments. Waiting for the court to travel to an outlying county can cause more delay. Consider asking the court whether, if the parties agree, the court will submit the case in the court's location to speed up submission. The same is true with cases that are transferred to another court of appeals. Inform the court if the parties are willing to travel to the transferee court location rather than waiting for the court of appeals to travel to the transferor court location to hear arguments.

4. Motions to dismiss the appeal

If your case settles or an appellant no longer desires to appeal, file a motion to dismiss. TEX. R. APP. P. 42.1(a). Do not wait for the court of appeals to dismiss it. If the case settles, include the disposition you want the court to make. TEX. R. APP. P. 42.1(a)(2) (court may render judgment effectuating parties' agreement; set aside trial court judgment without regard to merits and remand to enter judgment as agreed; or abate appeal to allow proceedings in trial court to effectuate agreement). Also, include the allocation of costs of the appeal. TEX. R. APP. P. 42.1(d).

If the court has issued its opinion and a motion to dismiss is filed, the court determines whether to withdraw the opinion. TEX. R. APP. P. 42.1(c). The parties cannot condition a settlement or dismissal on the court's withdrawal of an opinion. TEX. R. APP. P. 42.1(c).

5. Motions for rehearing

Rule 49 sets out the procedures for motions for rehearing. *See* TEX. R. APP. P. 49. Note that Rule 10.1(a)(5) has been amended and no longer requires a certificate of conference with motions for rehearing and for motions for en banc reconsideration of a panel decision. TEX. R. APP. P. 10.1(a)(5); 49.11.

Some practical points to remember include:

- Effective motions for rehearing need new arguments. Rehashing arguments in the original briefs is not helpful.
- Both sides should always check the judgment for errors that need to be addressed on rehearing.
- The rule does not require the prevailing party to respond to a motion for rehearing unless the court requests a response. TEX. R. APP. P. 49.2. The prevailing party, however, should consider filing a short response even if not requested, to point out that the motion for rehearing has no new arguments. Similarly, when a motion for rehearing has merit and raises new authority or argument, the winner might consider a quick response.
- Be careful what you wish for: a rehearing can add significant delay.