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Other Significant Changes in the Appellate Rules 1981 Rules of Civil Procedure: Content and Comments.

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OTHER SIGNIFICANT CHANGES IN THE APPELLATE RULES

CLARENCE A. GUITTARD*

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Revision of the appellate timetable is not the only change in appellate practice made by the 1981 amendments to the Texas Rules of Civil Procedure. The purpose of this paper is to discuss other significant changes in the appellate rules and some of the new problems that may arise thereunder, as well as some old problems that remain unresolved.

I. MOTION TO MODIFY OR CORRECT JUDGMENT—RULE 329b

A. “Plenary Power” Over Judgments

It has long been established that a trial judge has “plenary power” over his judgments for a certain period of time, after which

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such judgments "become final."¹ Under rule 329b as it existed before the recent amendments,² the judgment became final "thirty days after the date of rendition of judgment or order overruling an original or amended motion for new trial."³ Subdivisions (d) and (e) of revised rule 329b state this principle in terms of "plenary power," as defined in the decisions, rather than in terms of "finality" of the judgment.⁴ This change is a matter of clarification only. It avoids confusion between a judgment that is "final" in terms of the court's plenary power and one that is final rather than interlocutory, for the purpose of appeal,⁵ and a judgment that is "final" in the sense that it may be a proper basis for a plea of *res judicata* after all appellate remedies have been exhausted.⁶

1. See, e.g., *Gulf, C. & S.F. Ry. v. Muse*, 109 Tex. 352, 360, 207 S.W. 897, 898 (1919); *Wood v. Wheeler*, 7 Tex. 13, 16 (1851); *Dazey v. Dazey*, 265 S.W.2d 166, 168 (Tex. Civ. App.—Galveston 1954, no writ). Formerly, the plenary power of the court was said to continue until the end of the term at which the judgment was rendered. See *Henderson v. Banks*, 70 Tex. 398, 400, 7 S.W. 815, 817 (1888); *Wood v. Wheeler*, 7 Tex. 13, 16 (1851); *Bergman v. West*, 262 S.W.2d 435, 436 (Tex. Civ. App.—Waco 1953, no writ); cf. *Gulf, C. & S.F. Ry. v. Muse*, 109 Tex. 352, 360, 207 S.W. 897, 898 (1919) (extension of term authorized by statute); *Dazey v. Dazey*, 265 S.W.2d 166, 168 (Tex. Civ. App.—Galveston 1954, no writ) (extension of term unnecessary when court is in continuous session). See also *Federal Sur. Co. v. Cook*, 119 Tex. 89, 93-94, 24 S.W.2d 394, 395-96 (1930) (court without jurisdiction to act on motion for new trial filed after expiration of term); *Ragsdale v. Green*, 36 Tex. 193, 195-96 (1872) (jurisdiction of court lost upon adjournment of term).

2. TEX. R. CIV. P. 329b (1978). Unless otherwise specified, all references to "rules" in this article are to the Texas Rules of Civil Procedure as revised by the amendments effective January 1, 1981.

3. *Mathes v. Kelton*, 569 S.W.2d 876, 878 (Tex. 1978); *Transamerican Leasing Co. v. Three Bears, Inc.*, 567 S.W.2d 799, 800 (Tex. 1978).

4. Compare TEX. R. CIV. P. 329b(d)-(e) (codifying case law interpretation of extent of court's jurisdiction) with *Gulf, C. & S.F. Ry. v. Muse*, 109 Tex. 352, 360, 207 S.W. 897, 898 (1919) (principles regarding court's plenary power) and *Bergman v. West*, 262 S.W.2d 435, 436 (Tex. Civ. App.—Waco 1953, no writ) (continuing jurisdiction prior to time judgments become final) and TEX. R. CIV. P. 329b(6)-(7) (1978) (time periods during which court retains jurisdiction).

5. See *North East Independent School Dist. v. Aldridge*, 400 S.W.2d 893, 895-98 (Tex. 1966). See also *Hearon, Appealable Judgments and Orders*, in STATE BAR OF TEXAS, APPELLATE PROCEDURE IN TEXAS § 3.4 (1979).

6. See *Permian Oil Co. v. Smith*, 129 Tex. 413, 448-49, 107 S.W.2d 564, 567 (1937); *Homeright Co. v. Exchange Warehouses, Inc.*, 526 S.W.2d 241, 245 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.); *Strickland v. Strickland*, 424 S.W.2d 725, 728 (Tex. Civ. App.—Houston [1st Dist.] 1968, no writ); *Kendrick v. Tidewater Oil Co.*, 387 S.W.2d 122, 126 (Tex. Civ. App.—Tyler 1965, writ ref'd n.r.e.).

B. *Motion to Modify, Correct, or Reform Judgment*

Although the trial judge's power over his judgment within the prescribed period was said to be "plenary" before the amendment to rule 329b, the only procedure prescribed to invoke the exercise of this power was a motion for new trial. A motion urging that the judgment be corrected in some respect, but not praying for a new trial, did not extend the time during which the trial judge could act and such motion provided no standing as a basis for appeal.⁷ Consequently, it was sometimes necessary for a party to file a motion for new trial in order to preserve a point for appeal when he did not actually desire a new trial, but only a correction of the judgment. This anomaly has been removed by subdivision (g) of the revised rule 329b, which authorizes filing of a motion to modify, correct, or reform a judgment within the same time period as a motion for new trial⁸ and provides that the filing of such a motion "shall extend the court's plenary power and the time for perfecting an appeal in the same manner as a motion for new trial."⁹ Thus, a party seeking a change in the judgment, but not a new trial, may invoke the court's power to change the judgment and may protect his position for appeal without fear that he will be inviting his opponent to join him in asking for a new trial.

Under subdivision (g) of rule 329b a timely motion to modify, correct, or reform a judgment has the same effect as a motion for new trial with respect to the period of the court's plenary power and the time for perfecting an appeal. The court's plenary power, therefore, continues until thirty days after the motion has been overruled, either by written order or by operation of law,¹⁰ and the time for perfecting an appeal is extended from thirty to ninety days after the judgment.¹¹

Rule 329b provides that if the judgment is modified, corrected, or reformed "in any respect," the time for appeal begins to run from the time the modified, corrected, or reformed judgment is

7. See *Mercer v. Band*, 454 S.W.2d 833, 836-37 (Tex. Civ. App.—Houston [14th Dist.] 1970, no writ).

8. See TEX. R. CIV. P. 329b(g); cf. TEX. R. CIV. P. 329b(a) (motion for new trial to be filed within thirty days after judgment signed).

9. TEX. R. CIV. P. 329b(g).

10. TEX. R. CIV. P. 329b(e).

11. TEX. R. CIV. P. 356(a).

signed. Within thirty days of such modification, correction, or reformation either party may file a motion for new trial or another motion to modify, correct, or reform the judgment. The phrase "in any respect" was apparently inserted to change the ruling in cases holding that a change in the judgment must be "material" in order to start the appellate timetable running again.¹² Whether this change establishes greater certainty in the time for appeal is doubtful, since the courts must now determine what is meant by a change "in any respect."¹³ If there is any uncertainty on this point, a careful lawyer will be well advised to perfect his appeal from the original judgment.

Rule 329b(g) expressly distinguishes between a motion to modify, correct, or reform a judgment, upon which the court can act only within the period of the court's plenary power, and a motion to correct a clerical error in the record of a judgment, as authorized by rules 316 and 317.¹⁴ A clerical error, as distinguished from a judicial error, may be corrected at any time by a judgment *nunc pro tunc*.¹⁵

A motion to modify, correct, or reform a judgment under rule 329b(g) should also be distinguished from a motion to modify a judgment in a suit affecting the parent-child relationship, as provided by section 14.08 of the Texas Family Code.¹⁶ Such a motion

12. See *Hamrah v. Hamrah*, 547 S.W.2d 308, 311 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.); *Talmadge Tinsley Co. v. Kerr*, 541 S.W.2d 207, 208 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.).

13. As suggested in one commentary, while the rule change should provide "liberal protection" to the right of appeal, trial judges should be wary of making immaterial changes for the sole purpose of extending appeal time. See Pope & McConnico, *Practicing Law With the 1981 Texas Rules*, 32 BAYLOR L. REV. 457, 499-500 (1980). See also *Anderson v. Casebolt*, 493 S.W.2d 509, 510 (Tex. 1973) (per curiam) ("trial court may not make an order that simply affirms a former judgment and thereby enlarge the period for perfecting an appeal"); *Brown v. Vander Stucken*, 435 S.W.2d 609, 611 (Tex. Civ. App.—San Antonio 1968, no writ) ("trial court cannot enter a judgment *nunc pro tunc* simply for the purpose of enlarging the time for perfecting an appeal").

14. TEX. R. CIV. P. 329b(g); see TEX. R. CIV. P. 316, 317.

15. *Finlay v. Jones*, 435 S.W.2d 136, 138 (Tex. 1969); see *Lone Star Cement Corp. v. Fair*, 467 S.W.2d 402, 405 (Tex. 1971); *Comet Aluminum Co. v. Dibrell*, 450 S.W.2d 56, 58 (Tex. 1970); *Knox v. Long*, 152 Tex. 291, 295, 257 S.W.2d 289, 291-92 (1953). See also *Reavley & Orr, Trial Court's Power To Amend Its Judgments*, 25 BAYLOR L. REV. 191, 194-204 (1973).

16. Compare TEX. R. CIV. P. 329b(g) (general provision on filing of motions to modify, correct, or reform judgment) with TEX. FAM. CODE ANN. § 14.08 (Vernon Supp. 1980-1981) (exclusive procedure for modification of suit affecting parent-child relationship).

under the Family Code, though filed as a continuation of the original action, may be brought more than thirty days after the signing of the judgment on a showing of a material change of conditions.¹⁷ Use of the term "modify" in rule 329b(g) may be unfortunate, but little confusion need result if the different purpose of a motion under rule 329b(g) is kept in mind. Even in a suit affecting the parent-child relationship, a motion to modify, correct, or reform a judgment filed within thirty days after the judgment is signed need not be based on a change of conditions.¹⁸

The extent of the court's plenary power has one apparent limitation. The court cannot render a judgment contrary to a finding of fact made by a jury, except on a proper motion for judgment notwithstanding the verdict, because to do so would be to deny the right to a jury trial.¹⁹ This rule is not a limitation on the court's plenary power over its judgments, but rather a limitation on the power of the judge to substitute his findings for those of the jury. In a case tried without a jury the judge may change his findings and render an entirely different judgment without hearing the evidence again, so long as the period of the court's plenary power has not expired.²⁰ Furthermore, if a proper motion for judgment notwithstanding the verdict has been filed and overruled, the court may, within the period of its plenary power, set aside the former judgment and render judgment notwithstanding the verdict.

C. Vacation of Judgment

Within the period of its plenary power, the court may, in certain

17. See TEX. FAM. CODE ANN. § 14.08 (Vernon Supp. 1980-1981). The Family Code specifies a 30 days' notice requirement on motions to modify. *Id.* § 14.08(b); see Smith, *Commentary On Title 2, Texas Family Code Symposium Supplement*, 8 TEX. TECH L. REV. 19, 85-86 (1976) (requirement of service of process). See also TEX. FAM. CODE ANN. § 11.09 (Vernon Supp. 1980-1981) (Citation and Notice).

18. See *Thompson v. Thompson*, 572 S.W.2d 761, 764 (Tex. Civ. App.—Tyler 1978, no writ); *Crapps v. Crapps*, 546 S.W.2d 909, 911 (Tex. Civ. App.—Austin 1977, no writ).

19. See *Wichita Falls Traction Co. v. Cook*, 122 Tex. 446, 454-55, 60 S.W.2d 764, 767-68 (1933); *Schaffer v. Speckels*, 62 S.W.2d 85, 85-86 (Tex. Comm'n App. 1933, holding approved); *First Nat'l Bank v. Walker*, 544 S.W.2d 778, 781-82 (Tex. Civ. App.—Dallas 1976, no writ); *Beal v. Great Am. Indem. Co.*, 322 S.W.2d 399, 402-03 (Tex. Civ. App.—Texarkana 1959, no writ); *Marmion v. Herrin Transp. Co.*, 127 S.W.2d 558, 558-59 (Tex. Civ. App.—Beaumont 1939, writ ref'd).

20. See *Canales v. Salinas*, 288 S.W.2d 207, 209 (Tex. Civ. App.—San Antonio 1956, writ disp'd) (order on plea of privilege).

circumstances, vacate a judgment without granting a new trial, leaving open the question of whether the same or a different judgment will be rendered later.²¹ Whether a court can extend the time for appeal by vacating a judgment and later rendering the same judgment is doubtful in view of the prohibition in rule 5 against extending the time for appeal in any manner other than that specifically authorized by the rules.²² This uncertainty may create a dilemma for the appellant. When the judgment has been vacated, how can a party determine whether or not the same judgment will be rendered again until a subsequent judgment is actually rendered? In this situation, one court of civil appeals has held that the time for appeal does not begin to run until the new judgment is signed, even though it is identical with the original judgment.²³ Therefore, if there is any ground suggested in the record for vacation of the judgment other than to extend the time for appeal, in all probability the time for perfecting the appeal will not run until a new judgment is signed, regardless of whether the new judgment makes a change "in any respect."

Although subdivision (e) recognizes the trial court's plenary power to vacate its judgment, as well as to modify, correct, or reform the judgment or grant a new trial, no provision is made for a motion to vacate. None is necessary because if the motion is granted, vacation of the judgment would not be an appealable order; if overruled, such a motion, without an additional prayer to modify, correct, or reform or to grant a new trial, would not form a proper predicate for an appeal.

II. PREREQUISITES TO APPELLATE REVIEW

A. *Preservation of Error—Motion for New Trial—Rule 324*

Rule 324 was substantially amended in 1978 to eliminate the general requirement of a motion for new trial as a prerequisite to appeal in most jury cases.²⁴ This rule has again been amended, ap-

21. See *Transamerican Leasing Co. v. Three Bears, Inc.*, 567 S.W.2d 799, 800 (Tex. 1978).

22. TEX. R. CIV. P. 5; see *Anderson v. Casebolt*, 493 S.W.2d 509, 510 (Tex. 1973); *A.F. Jones & Sons v. Republic Supply Co.*, 151 Tex. 90, 94-95, 246 S.W.2d 853, 855-56 (1952).

23. See *Mesa Agro v. R.C. Dove & Sons*, 584 S.W.2d 506, 508 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.).

24. TEX. R. CIV. P. 324 (1978).

parently for the purpose of restricting further the vestiges of the motion for new trial requirement.²⁵ The latest amendment, though intended for clarification, raises the question of whether, in certain instances, a party must continue the practice of making his position known to the trial court in order to complain of a particular ruling on appeal.

Before adoption of the rules in 1941, article 1837 authorized reversal for error "apparent upon the face of the record."²⁶ Under this statute appellate courts frequently considered and sometimes based reversals on "fundamental error,"²⁷ which included any error that "went to the foundation of the case" and could be found without examining the statement of facts,²⁸ regardless of whether the aggrieved party had brought his complaint to the attention of the trial judge.²⁹ Former rule 71a, from which the provisions of rule 324 were taken, exempted "fundamental error" from the requirement of a motion for new trial as a prerequisite for appeal.³⁰

One of the objectives of the original advisory committee, which drafted the rules adopted in 1941, appears to have been to abolish

25. See TEX. R. CIV. P. 324. This amendment to rule 324 was not included in the agenda of the Supreme Court's Advisory Committee on the Rules of Civil Procedure. See generally SUPREME COURT ADVISORY COMM., AGENDA (May 4-5, 1979).

26. TEX. REV. CIV. STAT. art. 1837 (1925), 1892 Tex. Gen. Laws, ch. 15, § 24, at 29, 10 H. GAMMEL, LAWS OF TEXAS 393 (1892). For a brief historical discussion of this article see *Ramsey v. Dunlop*, 146 Tex. 196, 200-02, 205 S.W.2d 979, 981-82 (1947).

27. See *Beasley v. Keck*, 280 S.W. 855, 855-56 (Tex. Civ. App.—Fort Worth 1926, writ *dism'd*); *Davis v. Teal*, 200 S.W. 1166, 1167 (Tex. Civ. App.—Texarkana 1918, no writ).

28. See *White v. Glengarry Oil Co.*, 137 Tex. 626, 627-28, 156 S.W.2d 523, 524 (1941); *Houston Oil Co. v. Kimball*, 103 Tex. 94, 103-04, 122 S.W. 533, 537 (1909); *Ford & Damon v. Flewellen*, 276 S.W. 903, 903 (Tex. Comm'n App. 1925, opinion adopted); *Trevino v. Kibbe*, 133 S.W.2d 206, 206 (Tex. Civ. App.—Waco 1939, no writ); *Horton v. Hill*, 95 S.W.2d 751, 753 (Tex. Civ. App.—Galveston 1936, writ *dism'd*); *Sikes v. McCullough*, 88 S.W.2d 1067, 1068 (Tex. Civ. App.—Beaumont 1935, no writ); *Kent v. National Supply Co.*, 36 S.W.2d 811, 817 (Tex. Civ. App.—Waco 1931, writ *ref'd*); *King v. Shawver*, 30 S.W.2d 930, 933-34 (Tex. Civ. App.—Fort Worth 1930, no writ); *Yardley v. Houston Oil Co.*, 288 S.W. 861, 866-67 (Tex. Civ. App.—Beaumont 1926, writ *dism'd*); *Kenedy Mercantile Co. v. Ainsworth*, 281 S.W. 637, 637 (Tex. Civ. App.—San Antonio 1926, writ *dism'd*).

29. See *Ramsey v. Dunlop*, 146 Tex. 196, 200-02, 205 S.W.2d 979, 981-82 (1947); *Marine Prod. Co. v. Richey*, 89 S.W.2d 1078, 1078 (Tex. Civ. App.—Texarkana 1936, writ *dism'd*); *Beasley v. Keck*, 280 S.W. 855, 855-56 (Tex. Civ. App.—Fort Worth 1926, writ *dism'd*); *Fidelity Union Fire Ins. Co. v. Hicks*, 250 S.W. 1084, 1090 (Tex. Civ. App.—Amarillo 1923, writ *ref'd*); *Martin v. Alexander*, 218 S.W. 653, 654 (Tex. Civ. App.—El Paso 1920, no writ); *Adams v. Faircloth*, 97 S.W. 507, 507 (Tex. Civ. App. 1906, no writ).

30. See Texas Rule 71a, reprinted in 99 S.W.2d xxx, *Rules for the District and County Courts (1937)*; W. HARRIS, RULES OF THE COURTS 184-85 (2d ed. L.K. Smoot 1921) (annotated rules). See generally TEX. R. CIV. P. ANN. 324, Historical Note (Vernon 1977).

the fundamental error exception, thereby requiring the aggrieved party to make his complaint first to the trial judge.³¹ Former article 1837 was listed among the procedural statutes repealed by adoption of the Rules,³² and no comparable rule recognizing "fundamental error" was adopted in its place. Moreover, "fundamental error" was not exempted from the requirement in rule 324 of a motion for new trial as a prerequisite of appeal.³³ The purpose of this change was to minimize reversals by giving the trial judge a better opportunity to make correct rulings, instead of permitting counsel to "sandbag" the judge and the opposing party by reserving his complaint for the appellate court. Accordingly, the supreme court restricted the concept of fundamental error to certain narrow grounds,³⁴ including lack of jurisdiction over the subject matter,³⁵ absence of an indispensable party whose interests would otherwise be prejudiced,³⁶ and errors directly and adversely affecting the public interest.³⁷

The requirement of a motion for new trial as a prerequisite to appeal in most jury cases was intended to reduce appeals by giving the trial judge an opportunity to correct his errors. It had little

31. See generally Subcommittee on Interpretation of the Rules of Civil Procedure, *Advisory Opinions*, 8 TEX. B.J. 6, 41 (1945); 39 TEXAS L. REV. 665, 667 (1961); 29 TEXAS L. REV. 369, 371 (1951).

32. 6 TEX. R. CIV. P. ANN., at 417, Table 1 (Vernon 1967) (List of Repealed Statutes).

33. See TEX. R. CIV. P. 324 (1978).

34. See *Newman v. King*, 433 S.W.2d 420, 422 (Tex. 1968); *State v. Sunland Supply Co.*, 404 S.W.2d 316, 319 (Tex. 1966); *McCauley v. Consolidated Underwriters*, 157 Tex. 475, 477-78, 304 S.W.2d 265, 266 (1957); *Martin v. Texas & N.O.R.R.*, 375 S.W.2d 554, 556 (Tex. Civ. App.—San Antonio 1964, no writ). Some of the courts of civil appeals, however, have not accepted this more restrictive view of "fundamental error." See, e.g., *Ex Parte Pummill*, 606 S.W.2d 707, 709 (Tex. Civ. App.—Fort Worth 1980, no writ); *Read v. Gee*, 551 S.W.2d 496, 501 (Tex. Civ. App.—Fort Worth), writ ref'd n.r.e. per curiam, 561 S.W.2d 777 (Tex. 1977) (declining to approve conclusion of "fundamental error"); *Stubblefield v. State*, 425 S.W.2d 699, 702 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.).

35. *McCauley v. Consolidated Underwriters*, 157 Tex. 475, 478, 304 S.W.2d 265, 266 (1957); see *Newman v. King*, 433 S.W.2d 420, 422 (Tex. 1968); *Texas Employment Comm'n v. International Union of Electrical, Radio & Mach. Workers*, 163 Tex. 135, 137, 352 S.W.2d 252, 253 (1961); *Meek v. Mitchusson*, 588 S.W.2d 665, 666 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.).

36. See *Petroleum Anchor Equip. v. Tyra*, 406 S.W.2d 891, 892 (Tex. 1966); *In re Estate of O'Hara*, 549 S.W.2d 233, 236 (Tex. Civ. App.—Dallas 1977, no writ); *Estate of Bourland v. Hanes*, 526 S.W.2d 156, 159 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.).

37. See *Ramsey v. Dunlop*, 146 Tex. 196, 202, 205 S.W.2d 979, 983 (1947); *Walker v. Walker*, 527 S.W.2d 200, 203 (Tex. Civ. App.—Fort Worth 1975, no writ); *Loper v. Andrews*, 395 S.W.2d 873, 875 (Tex. Civ. App.—Waco 1965), affirmed, 404 S.W.2d 300 (Tex. 1966).

value for that purpose, however, because the filing and overruling of the motion became largely perfunctory. Although rule 329b(4) required the proponent of the motion to "present" it to the trial court, this formality was dispensed with, particularly when no evidence was needed to support the motion, and the motion was considered overruled by operation of law forty-five days after filing.³⁸ As a result, elaborate amended motions for new trial were filed solely for the purpose of making a record for appeal. In many cases such motions were never called to the trial judge's attention, but were allowed to be overruled by operation of law, thus gaining the maximum delay of the time required for appeal.

The futility of this practice led to abolition of the general requirement in rule 324 of a motion for new trial as a prerequisite to appeal in most jury cases, under the 1978 amendments to the Texas Rules of Civil Procedure.³⁹ There was no intention at that time to revive the "fundamental error" practice or to depart from the principle that a party should be required to make his position known to the trial judge before he could complain of an adverse ruling on appeal. Accordingly, the 1978 amendment included the following sentence: "Notwithstanding the foregoing, it shall be necessary to file a motion for new trial in order to present a complaint which has not otherwise been ruled upon."⁴⁰

One exception to this principle was specified in the 1978 amendment, as follows: "A complaint that one or more of a jury's findings have insufficient support in the evidence or are against the overwhelming preponderance of the evidence as a matter of fact may be presented for the first time on appeal."⁴¹ This provision changed the earlier requirement that such a complaint must have been presented in the trial court.⁴² The justification for this change is not clear. It is arguable that the trial judge ought to have an opportunity to consider the question of factual insufficiency to support the verdict before a reversal is sought on that ground because, having heard the evidence, the trial judge is in a better posi-

38. See *Moore v. Mauldin*, 428 S.W.2d 808, 809 (Tex. 1968).

39. See TEX. R. CIV. P. 324 (1978). Reformation of the procedure applicable to a motion for new trial as a prerequisite of appeal originated in the Committee on Administration of Justice of the State Bar. See SUPREME COURT ADVISORY COMM., AGENDA 52 (March 11, 1977).

40. TEX. R. CIV. P. 324 (1978).

41. *Id.*

42. See *Meadows v. Green*, 524 S.W.2d 509, 510 (Tex. 1975).

tion than the appellate court to decide whether a new trial should be granted. A motion for new trial will ordinarily be the trial judge's only opportunity to consider the matter in view of the rule that factual insufficiency is not a ground for directing a verdict or refusing to render judgment on the verdict.⁴³ Of course, in a non-jury case, the judge has already decided the facts, and little would be accomplished by moving for a new trial on a factual insufficiency ground. Prior to the 1978 amendment a motion for new trial was not a prerequisite to appeal in a non-jury case on the ground of insufficiency of the evidence to support the judge's findings of fact or on the ground that his findings were against the overwhelming preponderance of the evidence.⁴⁴ The apparent purpose of the 1978 amendment was to make the procedure in this respect the same for jury and non-jury cases.

If such was the intent of the 1978 amendment, it was not always understood. In *Brock v. Brock*,⁴⁵ the El Paso Court of Civil Appeals held that since the rule only excepted factual complaints of "a jury's findings" from the requirement of a motion for new trial, an assignment in a motion for new trial was necessary to complain of factual insufficiency of evidence supporting a judge's findings in a non-jury case.⁴⁶ The Eastland Court of Civil Appeals reached a contrary conclusion in *Brown v. Brown*,⁴⁷ holding that a motion for new trial was not required as an appellate predicate to raise factual or legal insufficiency points.⁴⁸

This conflict was resolved by the Texas Supreme Court in *Howell v. Coca-Cola Bottling Co.*,⁴⁹ in which the court, although not having before it precisely the same question, expressly disap-

43. See *Airway Ins. Co. v. Hank's Flight Center, Inc.*, 534 S.W.2d 878, 881 (Tex. 1976); *Chemical Cleaning, Inc. v. Chemical Cleaning & Equip. Serv., Inc.*, 462 S.W.2d 276, 277 (Tex. 1970) (per curiam); *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965); *Everman Corp. v. Haws & Garrett Gen. Contractors, Inc.*, 578 S.W.2d 539, 542-43 (Tex. Civ. App.—Fort Worth 1979, no writ); *City of San Augustine v. Roy W. Green Co.*, 548 S.W.2d 467, 472 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.); *Carruth v. First Nat'l Bank*, 544 S.W.2d 678, 679 (Tex. Civ. App.—Eastland 1976, writ ref'd n.r.e.). See also TEX. R. CIV. P. 301; Calvert, "No Evidence" and "Insufficient Evidence" Points of Error, 38 TEXAS L. REV. 361, 362 (1960).

44. See *Swanson v. Swanson*, 148 Tex. 600, 603, 228 S.W.2d 156, 157-58 (1950).

45. 586 S.W.2d 927 (Tex. Civ. App.—El Paso 1979, no writ).

46. *Id.* at 930.

47. 590 S.W.2d 808 (Tex. Civ. App.—Eastland 1979, no writ).

48. *Id.* at 811.

49. 599 S.W.2d 801 (Tex. 1980) (per curiam).

proved *Brock*.⁵⁰ In *Howell*, the trial court, on sustaining a special exception asserting that the petition showed on its face that the claim was barred by limitation, proceeded to render judgment for the defendant. On appeal, the plaintiff complained that the court erred in rendering judgment without giving him leave to amend. The Amarillo Court of Civil Appeals held that plaintiff had not preserved the error because he had neither requested leave to amend, nor filed a motion for new trial or otherwise complained of denial of leave to amend in the trial court. The appellate court relied on the provision of the 1978 amendment to rule 324 that a motion for new trial was necessary "to present a complaint which has not otherwise been ruled upon."⁵¹ The supreme court refused the writ with the notation "no reversible error," but wrote a *per curiam* opinion disapproving the holding that a motion for new trial was required to preserve the error. The court observed that such a construction of rule 324 would require a motion for new trial to attack any judgment "because the trial court . . . has not previously had an opportunity to rule on the validity of the judgment itself."⁵²

The *per curiam* opinion in *Howell*, though intended for clarification, has contributed its own element of confusion. The opinion does not mention the aspect of the Amarillo court's holding regarding plaintiff's failure to preserve the point for appeal by requesting leave to amend.⁵³ Consequently, we do not know why the supreme court did not regard such a request as necessary to preserve the point. It is one thing to say that a motion for new trial is not a prerequisite to appeal if the appellant has otherwise preserved his point for appeal by presenting his position to the trial court. It is quite another to say that if he has not presented his position before judgment is rendered against him, he need not do so afterward, by motion for new trial or otherwise, in order to complain of

50. Compare *Howell v. Coca-Cola Bottling Co.*, 599 S.W.2d 801, 802 (Tex. 1980) (appellant's failure to assign error by motion for new trial on denial of opportunity to amend) with *Brock v. Brock*, 586 S.W.2d 927, 930 (Tex. Civ. App.—El Paso 1979, no writ) (appellant's failure to assign error by motion for new trial on factual insufficiency of evidence).

51. *Howell v. Coca-Cola Bottling Co.*, 595 S.W.2d 208, 213-14 (Tex. Civ. App.—Amarillo), writ *ref'd n.r.e. per curiam*, 599 S.W.2d 801 (Tex. 1980).

52. *Howell v. Coca-Cola Bottling Co.*, 599 S.W.2d 801, 802 (Tex. 1980).

53. Compare *id.* at 801-02 with *Howell v. Coca-Cola Bottling Co.*, 595 S.W.2d 208, 213-14 (Tex. Civ. App.—Amarillo), writ *ref'd n.r.e. per curiam*, 599 S.W.2d 801 (Tex. 1980).

the judgment. Every appeal involves a complaint of the judgment, although the particular ruling challenged may have been made earlier. If the opinion is read as dispensing with the requirement that a party must make known his position to the trial court before complaining of an adverse judgment, then a major uncertainty has been created concerning the extent of complaints that may be raised on appeal without presentation in the trial court.

Such a reading of the *Howell* opinion, however, probably would be mistaken, as the supreme court's concern seems to have been focused on the conflict between *Brock* and *Brown* in regard to the necessity of a motion for new trial to complain of fact findings by the trial court.⁵⁴ Inasmuch as a judge who has decided the facts must necessarily have considered the question of whether his findings are supported by the evidence, no motion for new trial should be required to give him another opportunity to rule on that question. The holding in *Howell* should not be interpreted as extending beyond that point.

The *per curiam* opinion of *Howell* throws light on the 1981 amendment to rule 324 which deleted both the general requirement of the 1978 amendment with respect to complaints "which have not otherwise been ruled upon" and the exception concerning factual challenges to jury findings. Deletion of the latter exception probably is not intended to reinstate the previous rule that a motion for new trial is a prerequisite to present factual challenges on appeal;⁵⁵ such rule was based on the earlier general requirement of a motion for new trial as a prerequisite to appeal in most jury cases, which has not been restored. The intent, rather, was apparently to avoid the implication drawn in *Brock*, and subsequently disapproved in *Howell*, that a motion for new trial was required to complain of factual challenges in non-jury cases.

More uncertainty arises from deletion of the requirement that a motion for a new trial is necessary "to present a complaint that has not otherwise been ruled upon" and the insertion of a provision that such a motion is necessary "to present a complaint upon which evidence must be heard, such as one of jury misconduct or

54. See *Howell v. Coca-Cola Bottling Co.*, 599 S.W.2d 801, 802 (Tex. 1980) (*per curiam*); Pope & McConnico, *Practicing Law With the 1981 Texas Rules*, 32 BAYLOR L. REV. 457, 498 (1980).

55. See *Meadows v. Green*, 524 S.W.2d 509, 510 (Tex. 1975).

of newly discovered evidence.”⁵⁶ Does this change mean that other complaints can be presented on appeal without appellant’s position having been presented to the trial judge by objection or otherwise? Such an interpretation would be unfortunate in that it would lead to some of the same problems as did the former “fundamental error” practice. It is more reasonable to suppose that the 1981 amendments to rule 324 represent a further commitment of the supreme court to the objective, which also underlay the 1978 amendment, to eliminate the motion for new trial requirement as a useless formality. This interpretation is consistent with rule 373, which provides as follows:

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.⁵⁷

This rule strongly implies and evidently assumes that in order to complain on appeal of the trial court’s failure to act in a particular manner, the complaining party must make known to the judge “the action which he desires the court to take or his objection to the action of the court,”⁵⁸ thereby giving the trial judge a fair opportunity to rule in his favor before seeking reversal on appeal. Therefore, cases standing for this principle are probably still good law.⁵⁹ Consistent with this principle are cases holding that failure to object in trial court precludes a party from complaining on appeal of an unauthorized award of an attorney’s fee⁶⁰ and of a judg-

56. TEX. R. CIV. P. 324.

57. TEX. R. CIV. P. 373; *cf.* FED. R. CIV. P. 46 (source of Texas Rule 373).

58. TEX. R. CIV. P. 373.

59. *See* National Lloyds Ins. Co. v. McCasland, 566 S.W.2d 565, 568-69 (Tex. 1978) (objection to evidence on ground not stated to trial court); Lewis v. Texas Employers’ Ins. Ass’n, 151 Tex. 95, 99, 246 S.W.2d 599, 600 (1952) (objection to reception of partial verdict not made until after discharge of jury).

60. *Alsop v. Mercantile Nat’l Bank*, 591 S.W.2d 308, 311 (Tex. Civ. App.—Corpus Christi 1979, no writ); *Miller v. Patterson*, 537 S.W.2d 360, 364 (Tex. Civ. App.—Fort Worth 1976, no writ); *Cobb v. Texas Distribs., Inc.*, 524 S.W.2d 342, 345-46 (Tex. Civ. App.—Dallas 1975, no writ).

ment in excess of the amount prayed for.⁶¹ In such instances a party who previously has made no objection may now preserve his position for review by a motion to correct or reform the judgment under amended rule 329b(g), without filing a motion for new trial. It is still conceivable that a party may need to file a motion for new trial in order to preserve a point that has not otherwise been presented to the trial judge, notwithstanding the apparent contrary indication in *Howell*.⁶² At least counsel would be well advised not to assume that *Howell* authorizes him to save his objection for the appellate court.

B. *Filing the Transcript*

One of the perennial problems of appellate review is delay in bringing the trial court record before the appellate court. With respect to the pleadings, verdict, judgment, and other filed papers, it would be a simple matter for the clerk of the trial court, as soon as the appeal is perfected, to transmit to the appellate court the original papers designated by the appellant. This is the practice in some jurisdictions.⁶³ In Texas the appellant has long had the responsibility to obtain from the clerk a certified "transcript" containing copies of the pertinent papers and file it with the clerk of the appellate court within a specified period of time.⁶⁴ Filing this transcript within the required time, or within such additional time as the appellate court might allow on a timely and sufficient motion, was treated as essential to the jurisdiction of the appellate court.⁶⁵ Such a motion was required by rule 386 in language carried forward from its predecessor statute,⁶⁶ to make a strict showing of

61. *Wm. S. Baker, Inc. v. Sims*, 589 S.W.2d 492, 493 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.); *Magic Chef, Inc. v. Sibley*, 546 S.W.2d 851, 859 (Tex. Civ. App.—San Antonio 1977, writ ref'd n.r.e.).

62. See notes 49-58 *supra* and accompanying text.

63. See, e.g., FLA. APP. R. 3.6 (1967); MASS. APP. P.R. 8-9 (1980); MINN. CIV. APP. P.R. 110.01, 111.01 (1980).

64. TEX. REV. CIV. STAT. art. 2278 (1925), 1846 Tex. Gen. Laws, An Act To Regulate Proceedings in the District Courts § 139, at 400, 2 H. GAMMEL, LAWS OF TEXAS 1706 (1846).

65. *Home Fund, Inc. v. Denton Fed. Sav. & Loan Ass'n*, 485 S.W.2d 845, 847 (Tex. Civ. App.—Fort Worth 1972, no writ); *Douglass v. Sims*, 387 S.W.2d 156, 157 (Tex. Civ. App.—Dallas 1965, no writ); *Newsfoto Publishing Co. v. Ezzell*, 320 S.W.2d 711, 712 (Tex. Civ. App.—Austin 1959, writ ref'd).

66. See TEX. REV. CIV. STAT. art. 2278 (1925), 1846 Tex. Gen. Laws, An Act To Regulate Proceedings in the District Courts § 139, at 400, 2 H. GAMMEL, LAWS OF TEXAS 1706

“good cause” why the record could not be filed in time.⁶⁷

This practice was unsatisfactory because of frequent failures of appellant’s counsel to file the transcript within the time required. Consequently, in 1975, in order to avoid loss of appeals on grounds unrelated to the merits, the “good cause” requirement of rule 386 was replaced by rule 21c, which requires instead a “reasonable explanation” for the delay.⁶⁸ This language has been the subject of varying interpretation,⁶⁹ but has been construed authoritatively by the supreme court to include “any plausible statement of circumstances indicating that failure to file within the sixty-day period was not deliberate or intentional, but was the result of inadvertance, mistake, and mischance.”⁷⁰

Relaxation of the “good cause” requirement has not solved the problem entirely; as long as the responsibility rests on appellant or his counsel, cases will always arise in which the explanation for late filing cannot be accepted as “reasonable.”⁷¹ Another possible solution is to place the responsibility on the clerk of the trial court as well as on the appellant. A step in this direction was taken with

(1846).

67. *Watson v. Sellers*, 477 S.W.2d 678, 680 (Tex. Civ. App.—Houston [14th Dist.] 1972, no writ); see *Matlock v. Matlock*, 151 Tex. 308, 311, 249 S.W.2d 587, 589 (1952); Tex. R. Civ. P. 386 (1973).

68. Compare Tex. R. Civ. P. 386 (1973) with Tex. R. Civ. P. 21c (1976).

69. Some courts have construed “reasonable explanation” to require a showing of diligence for the entire sixty day period. See *City of Wichita Falls v. Hollis*, 539 S.W.2d 180, 181 (Tex. Civ. App.—Fort Worth 1976, writ ref’d n.r.e.); *Sloan v. Passman*, 536 S.W.2d 575, 577 (Tex. Civ. App.—Dallas 1976, no writ). But see *Sloan v. Passman*, 538 S.W.2d 1, 1-2 (Tex. Civ. App.—Dallas 1976, no writ) (dissenting opinion) (“reasonable explanation” not synonymous with reasonable diligence). Other courts have applied a less-strict standard of “reasonable explanation.” See *United States Fire Ins. Co. v. Stricklin*, 547 S.W.2d 338, 340 (Tex. Civ. App.—Dallas 1977, no writ); *Hildyard v. Fannel Studio, Inc.*, 547 S.W.2d 332, 334-35 (Tex. Civ. App.—Corpus Christi 1977, writ ref’d n.r.e.); *Gallegos v. Truck Ins. Exch.*, 539 S.W.2d 353, 354 (Tex. Civ. App.—San Antonio 1976, no writ); *Mulloy v. Mulloy*, 538 S.W.2d 818, 819 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref’d n.r.e.); *Stieler v. Stieler*, 537 S.W.2d 954, 955-57 (Tex. Civ. App.—Austin 1976, writ ref’d n.r.e.).

70. *Meshwert v. Meshwert*, 549 S.W.2d 383, 384 (Tex. 1977).

71. See *Guillen v. Claybrook*, 590 S.W.2d 146, 147 (Tex. Civ. App.—San Antonio 1979, no writ) (awaiting hearing setting by appellee on contest of appellant’s pauper oath affidavit); *Rutherford v. Jones*, 584 S.W.2d 710, 711-12 (Tex. Civ. App.—Tyler 1979, no writ) (appellants temporarily residing in another city); *Brice v. Brice*, 581 S.W.2d 699, 701 (Tex. Civ. App.—Dallas, no writ), cert. denied, 444 U.S. 901 (1979) (reliance on misinformation from clerk; preoccupation of counsel in other litigation, Christmas season); *Stanford v. Greggton Motor Serv., Inc.*, 579 S.W.2d 526, 526-27 (Tex. Civ. App.—Tyler 1979, no writ) (per curiam) (attorney’s failure to request statement of facts from court reporter).

the 1978 amendment of rule 376, which attempted to eliminate the delay in appellant's requesting the transcript from the clerk by imposing on the clerk the duty to prepare the transcript "upon the filing of the cost bond or deposit."⁷² This measure, however, was not successful because the rule required the clerk to include, in addition to the papers specified by the rule, "any filed paper either party may designate as material."⁷³ In view of such provision, some clerks continued the practice of waiting for a request from appellant's counsel before beginning preparation of the transcript. Moreover, the responsibility still rested on the appellant rather than on the clerk to transmit the record to the appellate court; if appellant relied on the clerk to transmit the record, he made the clerk his agent and was responsible for the clerk's delay.⁷⁴

The 1981 amendment of rule 376 undertakes to relieve appellant's counsel of responsibility for filing the transcript by requiring the clerk to "immediately transmit to the appellate court designated by the appealing party" a transcript containing the documents specified in the rule.⁷⁵ The rule, however, still provides that the clerk shall include "any filed paper either party may designate as material."⁷⁶ Thus, if counsel for appellant neglects to make a prompt designation of additional papers to be included, and also, when applicable, a designation of a specific appellate court, the clerk may still have an excuse to delay preparation of the transcript until such a request is received.

To give the amendment its desired effect, the clerk should not wait for a designation by either counsel, but should treat the filing of the bond as a request for a transcript containing the papers specified in the rule, prepare the transcript accordingly, and transmit it immediately to the appellate court. If the clerk receives a designation of additional papers before the transcript is complete, he should include them. Counsel for the appellant should make this request when bond is filed. Any papers not designated in time for inclusion in the original transcript should be included in a sup-

72. See *Tex. R. Civ. P.* 376 (1978).

73. *Id.*

74. *Sears v. State*, 605 S.W.2d 375, 376-77 (Tex. Civ. App.—Austin) (per curiam), *interlocutory review denied per curiam*, 24 Tex. Sup. Ct. J. 57 (Nov. 1, 1980).

75. *Tex. R. Civ. P.* 376.

76. *Id.*

plemental transcript, as authorized by rule 428.⁷⁷ Filing of such supplemental transcript is no longer a matter of discretion with the appellate court, since rule 428 has been amended to provide: "If the appellate court deems the omitted matter material, it shall permit it to be filed unless the supplementation will unreasonably delay disposition of the appeal."⁷⁸ Under this provision, filing of supplemental transcript probably will be allowed routinely unless objection is made to the materiality or the delay would require filing of additional briefs.

Observance of the amendment to rule 376 will have several advantages. Preparation of the transcript promptly after filing of the bond and immediate transmission to the appellate court will obviate motions to extend the time for filing the transcript under rule 21c. Accordingly, the rule amendment should prevent problems that might otherwise develop from abolition of the requirement of timely filing of the transcript as a jurisdictional prerequisite for appeal.⁷⁹ Early filing also will permit the appellate court to docket the appeal at an earlier stage, thus enabling application by the court of modern docket management techniques, such as preargument conferences, early checking for jurisdictional defects, and differential treatment of appeals according to probable difficulty of the subject matter. If the 1981 amendment is ineffective as an expeditious measure, consideration should be given to a further amendment explicitly requiring the clerk of the trial court to prepare and transmit the transcript immediately after filing of the bond, without any designation by the parties of the papers to be included.

It should be noted that rule 390 still provides that either party may file the transcript for which he has applied, and each party has the sole right to that transcript until it has been filed.⁸⁰ This rule is no longer applicable and should be repealed in view of the transfer of responsibility to the clerk of the trial court for transmission of the transcript under amended rule 376.

77. See TEX. R. CIV. P. 428.

78. *Id.*

79. See TEX. R. CIV. P. 386. Rule 386 reads, in part: "Failure to file either the transcript or the statement of facts within such time shall not affect the jurisdiction of the court or its authority to consider material filed late" *Id.*

80. See TEX. R. CIV. P. 390.

C. *Delay in Filing Record*

No similar responsibility has been transferred to the official reporter for transmission of the statement of facts. Rule 377, as amended, still imposes on the appellant the responsibility for ordering and filing the statement of facts,⁸¹ notwithstanding any difficulty he may have in obtaining it from the reporter. Formerly, the appellate court had no authority to consider a statement of facts filed late unless the sixty-day period for filing was extended by the appellate court on motion showing a "reasonable explanation" under rule 21c.⁸² The requirement has been relaxed, along with a similar requirement concerning the filing of the transcript, so that the appellate court now has the authority to accept late filing of either document.⁸³ To this end rule 386 has been amended to provide:

Failure to file either the transcript or the statement of facts within such time shall not affect the jurisdiction of the court or its authority to consider material filed late, but shall be ground for dismissing the appeal, affirming the judgment appealed from, disregarding materials filed late, or applying presumptions against the appellant, either on motion or on the court's own motion, as the court shall determine.⁸⁴

A similar change has been made in rule 385(d) with respect to accelerated appeals.⁸⁵

The procedure applicable in case of late filing of the record is prescribed by the amendment to rule 387.⁸⁶ Prior to its amendment, this rule provided a procedure for summary affirmance on

81. TEX. R. CIV. P. 377; see *Hyatt Corp. v. Trahan*, 521 S.W.2d 149, 150 (Tex. Civ. App.—Dallas 1975, no writ); *Texas Employers Ins. Ass'n v. Champion*, 236 S.W.2d 193, 197 (Tex. Civ. App.—Austin 1950, no writ) (per curiam) (on motion for rehearing).

82. See *Spinks v. Simmons*, 548 S.W.2d 810, 811 (Tex. Civ. App.—Austin 1977, no writ); *City of Wichita Falls v. Hollis*, 539 S.W.2d 180, 181 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.). See also *Raub v. Hilshire Village*, 463 S.W.2d 261, 262 (Tex. Civ. App.—Houston [14th Dist.] 1971, writ ref'd n.r.e.); *Root v. Hester*, 309 S.W.2d 480, 481-82 (Tex. Civ. App.—Eastland 1958, writ ref'd); *Jennings v. Fredericks*, 190 S.W.2d 707-08 (Tex. Civ. App.—Galveston 1945, writ ref'd); notes 68-71 *supra* and accompanying text.

83. See *Sears v. State*, 24 Tex. Sup. Ct. J. 57, 57 (Nov. 1, 1980) ("[a]fter January 1, 1981, timely filing the transcript or statement of facts is no longer jurisdictional") (per curiam).

84. TEX. R. CIV. P. 386.

85. See TEX. R. CIV. P. 385(d).

86. See TEX. R. CIV. P. 387.

certificate when the appeal had been perfected by filing a bond, but no transcript had been filed in the time required.⁸⁷ The amendment specifies that if the appeal has been perfected, but is subject to dismissal for want of jurisdiction or for lack of compliance with the rules, the appellee may file a motion for dismissal or for summary affirmance, or the appellate court may on its own motion give the parties notice that the appeal will be dismissed unless a response is filed within ten days showing grounds for continuing the appeal.

The rule does not set out what grounds shall be considered sufficient for continuing the appeal if the transcript or statement of facts has not been filed within the time prescribed and no timely motion for extension has been filed under rule 21c. Presumably the requirements for considering such late-filed documents will be more onerous than the "reasonable explanation" standard of rule 21c,⁸⁸ and perhaps a showing of no prejudice to the appellee will be required. The length of the delay may also be material. The appellate court will probably be more inclined to consider a record tendered on the first day after expiration of the fifteen-day period prescribed by rule 21c than one tendered several months later. The longer the delay, the less likely the court will be to accept the late filing and the stronger the appellant's ground must be, until a point is reached at which no ground for the delay is acceptable. This point is not specified; it may vary from case to case, and any attempt to specify an ultimate time beyond which no delay will be permitted would create the impression that any delay short of that time may be excused. In this respect, a delay in filing the transcript or statement of facts may now be treated as a lack of diligent prosecution, such as in a delay in filing of appellant's brief. In such case rule 415 has long given the court the option to decline to dismiss the appeal and "give such direction to the appeal as it may deem proper."⁸⁹

These changes, however, should not open the door to intolerable delays. The responsibility now resting on the clerk of the trial

87. TEX. R. CIV. P. 387 (1978).

88. See notes 68-71, 81-83 *supra* and accompanying text.

89. TEX. R. CIV. P. 415; see *Hoke v. Poser*, 384 S.W.2d 335, 336 (Tex. 1964); *Akers v. City of Grand Prairie*, 572 S.W.2d 222, 223-24 (Tex. Civ. App.—Dallas 1978, no writ). See also *Awad Texas Enterprises, Inc. v. Homart Dev.*, 589 S.W.2d 817, 819 (Tex. Civ. App.—Dallas 1979, no writ).

court to prepare and transmit the transcript immediately after perfection of the appeal probably will obviate most dismissals for late filing of the transcript; the appellate court will have to take responsibility for requiring prompt filing of the statement of facts, as well as for the filing of briefs. These amendments are evidence of a basic change of policy, so that responsibility for each step of the appellate process now rests on the appellate court as well as on counsel. The court must keep track of all pending appeals and organize its staff so that notices to counsel may be issued immediately when a deadline passes without filing of the necessary document, whether it is a statement of facts or the brief of either party. If no response is received within the time specified, the appeal may be dismissed or other appropriate action taken under rule 387, and if a response is filed, the court may make whatever orders it considers appropriate to control further proceedings. The appellate court can no longer escape this responsibility under amended rules 385, 386, and 387.

The question remains as to what remedy is available to an appellee who would be prejudiced by late filing of the record. He would be well advised not to rely wholly on the appellant's failure to file a motion to extend within the fifteen-day period prescribed by rule 21c, but to file a detailed sworn answer to a late-filed motion showing how prejudice would ensue. If the appellate court permits late filing of the record without a timely motion and then reverses the judgment, the appellee may seek review in the supreme court under the provision of rule 21c providing that any order of the intermediate court granting or denying a motion for late filing of the transcript or statement of facts "shall be reviewable by the supreme court for arbitrary action or abuse of discretion."⁹⁰ Although that rule appears to apply only to timely motions, it is reasonable to suppose that the supreme court also will review an order granting a motion filed after the fifteen-day period. By this means the supreme court may exercise sufficient supervision to prevent any intolerable delay. If, however, the intermediate court refuses to accept a late filing, the supreme court would rarely, if ever, be expected to find an abuse of discretion.

90. TEX. R. CIV. P. 21c.

III. ORIGINAL PROCEEDINGS

A. *General*

The practice in original proceedings before the appellate courts has been codified and defined by the 1981 amendments. Rule 383⁹¹ governs mandamus, prohibition, and original injunction proceedings in the courts of civil appeals, and rule 383a⁹² governs habeas corpus proceedings in those courts. Rules 474 and 475⁹³ direct the corresponding proceedings in the supreme court. These rules now provide detailed directions for each step in the process. They should be studied and followed meticulously by the attorney seeking this kind of extraordinary relief.

These rules make only two distinctions between the procedure in the courts of civil appeals and that in the supreme court. Since the jurisdiction of the courts of civil appeals is more limited than that of the supreme court,⁹⁴ a petition for mandamus or other original relief in the court of civil appeals should state the ground of that court's jurisdiction.⁹⁵ Moreover, if the proceeding is one of which the court of civil appeals and the supreme court have concurrent jurisdiction, the matter must first be presented to the court of civil appeals. A motion for leave to file or a petition for habeas corpus in the supreme court must state the date of presentation to the court of civil appeals and that court's action, or (except for habeas corpus) a compelling reason why a motion for leave was not filed in the court of civil appeals.⁹⁶

B. *Parties*

The problem of parties which has sometimes arisen in original proceedings appears to have been solved by the amended rules. The supreme court repeatedly has held that all persons whose interests will be directly affected by the official action sought to be enforced are necessary parties, and therefore, when a writ of mandamus is sought against a judge to require him to perform an act

91. TEX. R. CIV. P. 383.

92. TEX. R. CIV. P. 383a.

93. TEX. R. CIV. P. 474, 475.

94. *Johnson v. Court of Civil Appeals*, 162 Tex. 613, 614-15, 350 S.W.2d 330, 331 (1961); *see Crofts v. Court of Civil Appeals*, 362 S.W.2d 101, 104 (Tex. 1962).

95. *See* TEX. R. CIV. P. 383(1)(b)(3).

96. TEX. R. CIV. P. 474(1)(a), 475(3).

in his official capacity, the proceeding must be dismissed unless adverse litigants are joined as parties.⁹⁷ More recently, however, the supreme court has held that when mandamus is sought to require performance of a ministerial rather than a judicial duty, other parties need not be joined, even when the act in question is that of a judge and affects the parties in pending litigation.⁹⁸ It is arguable that the nature of the duty in question is immaterial to the issue of whether other persons should have an opportunity to be heard.⁹⁹ To say that other persons whose interests would be affected need not be made parties when the duty is ministerial seems to assume the point at issue, if they are not given an opportunity to appear and protect their interests by showing that the duty is discretionary rather than ministerial. The question may appear in a different light if the real party in interest appears and presents his argument.

Under revised rules 383 and 474, all directly interested persons must be named and given notice of the proceeding. Both rules provide that the "opposite party" shall be denominated respondent.¹⁰⁰ The rules do not state whether this term includes adverse litigants in other litigation that would be affected by issuance of the writ. The rules, however, provide that if a "court, tribunal, or other respondent in the discharge of duties of a public character is named as respondent, the petition shall disclose the name of the real party in interest, if any, or the party whose interest would be directly affected by the proceeding"¹⁰¹ and that the relator "shall promptly serve upon respondent and each real party in interest a copy of the motion, petition and brief."¹⁰² The rules also specify that all real parties in interest must be notified of the filing of the petition and of the hearing and have the same right as the respondent to file opposing statements and briefs, and presumably, to

97. *Lanford v. Smith*, 128 Tex. 373, 375, 99 S.W.2d 593, 594 (1936); *Miller v. Stine*, 127 Tex. 22, 23, 91 S.W.2d 315, 315 (1936); *Goebel v. Carter*, 124 Tex. 314, 314-15, 77 S.W.2d 215, 215 (1934); *Williams v. Wray*, 123 Tex. 466, 466, 72 S.W.2d 577, 577 (1934).

98. *State Bar of Texas v. Heard*, 603 S.W.2d 829, 832 (Tex. 1980); cf. *Dick v. Kazen*, 156 Tex. 122, 127-29, 292 S.W.2d 913, 916-17 (1956) (mandamus against county executive committee of political party).

99. See *Dick v. Kazen*, 156 Tex. 122, 129-37, 292 S.W.2d 913, 918-23 (1956) (Calvert, J., dissenting).

100. TEX. R. CIV. P. 383(1)(b)(1), 474(1)(b)(1).

101. TEX. R. CIV. P. 383(1)(b)(2), 474(1)(b)(2).

102. TEX. R. CIV. P. 383(2), 474(2).

present oral argument.¹⁰³ Similar provisions are included in the rules governing petitions for habeas corpus.¹⁰⁴ It is apparent, therefore, that any person whose interests would be affected, though he need not be named as a "respondent," must nevertheless be named and treated as a party for all practical purposes, and that the proceeding cannot properly continue without him. This result is required whether the official duty sought to be enforced is ministerial or judicial, notwithstanding contrary holdings before the effective date of the amendments.¹⁰⁵

C. *Interlocutory Review of Denial of Motion to Extend Time*

A recent opinion of the supreme court raises another question with respect to original proceedings. In *Banales v. Jackson*,¹⁰⁶ the supreme court granted leave to file what it characterized as an "interlocutory appeal" from an order of the court of civil appeals overruling a motion for extension of the time for filing a motion for rehearing under rule 21c.¹⁰⁷ The supreme court, in a *per curiam* opinion, declared such procedure "appropriate and one that complies with rule 21c and within this court's constitutional grant of power to issue such writs as are necessary to enforce this court's jurisdiction," citing article V, section 3 of the Texas Constitution.¹⁰⁸ Reliance on the constitutional power to issue writs indicates that the supreme court was exercising original rather than appellate jurisdiction. Also, its granting "leave" to file the proceeding indicates original jurisdiction. Yet the court did not mention the requirements of rule 474, which then governed original proceedings in the supreme court.¹⁰⁹ In the future, therefore, such "interlocutory appeals" will probably not be subject to the more detailed requirements of amended rule 474. The opinion indicates that if the court of civil appeals has improperly overruled a motion

103. See Tex. R. Civ. P. 383(5)-(6), 474(5)-(6).

104. See Tex. R. Civ. P. 383a(2)(b), (4)-(5), 475(2)(b), (5)-(6).

105. See note 98 *supra* and accompanying text.

106. 24 Tex. Sup. Ct. J. 56 (Nov. 1, 1980) (*per curiam*).

107. *Id.* at 57.

108. *Id.* at 57. The section of the constitution referred to confers on the supreme court "power to issue writs of habeas corpus, and, under such regulations as may be prescribed by law, . . . the writs of mandamus, procedendo, certiorari and such other writs as may be necessary to enforce its jurisdiction." TEX. CONST. art. V, §3.

109. See Tex. R. Civ. P. 474 (1978).

for extension of the time to file a motion for rehearing, the supreme court will not issue an original writ requiring the intermediate court to set aside its order denying the extension, but will reverse the order and remand the case to the intermediate court with instructions to consider and decide the motion for rehearing on its merits.¹¹⁰

In this respect, apparently, the supreme court has recognized a new category of appellate jurisdiction, one for which no rule of procedure has been provided. The court is careful to point out, however, that such interlocutory review is limited to cases in which the court of civil appeals has denied a motion to extend the time for filing a motion for rehearing.¹¹¹ No such interlocutory procedure is available to review the rulings of the intermediate court on motions under rule 21c to extend the time for filing the transcript or the statement of facts; such rulings may be reviewed on application for writ of error after the final judgment of the intermediate court.¹¹² The question may arise, however, with respect to whether an interlocutory review is available if the court of civil appeals denies a motion under the amended rule 356¹¹³ to extend the time for filing an appeal bond. The intermediate court would have no occasion to render a final order dismissing the appeal after deciding that no appeal had been perfected. In such a situation, the supreme court may have original jurisdiction to issue a writ of mandamus. Conceivably, it may also, under the *Banales* rationale, review such a ruling by an "interlocutory appeal."

IV. CONCLUSION

The 1981 amendments to the appellate rules demonstrate that rules of procedure are not static, but are constantly undergoing change to meet new situations and deal with new problems. Most of these amendments are the result of inadequacies perceived by the appellate judges themselves. There is good reason to believe that they will solve more problems than they raise. Only one thing is certain. The rules can never be expected to reach a perfect and final form. One of the principal advantages of court-made rules is

110. See *Banales v. Jackson*, 24 Tex. Sup. Ct. J. 56, 57 (Nov. 1, 1980) (per curiam).

111. *Id.* at 57.

112. *Sears v. State*, 24 Tex. Sup. Ct. J. 57, 57 (Nov. 1, 1980) (per curiam).

113. TEX. R. CIV. P. 356.

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that they are subject to change when change is needed. Consequently, the practitioner is well advised to be aware of this ongoing process and to ensure that he is familiar with the current provisions of the applicable rules at every stage of the appeal.