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Preserving Error on Appeal in Texas Civil Cases: A Practical Guide for Civil Appeals in Texas.

John Hill Cayce Jr.

PRESERVING ERROR ON APPEAL: A PRACTICAL GUIDE FOR CIVIL APPEALS IN TEXAS

JOHN HILL CAYCE, JR.*

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* Partner, Shannon, Gracey, Ratliff & Miller, Fort Worth, Texas; B.A., University of Texas (Arlington); J.D., St. Mary's University School of Law; Briefing Attorney for former Justice Charles W. Barrow, Supreme Court of Texas, 1982-83.

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I. INTRODUCTION

The chances of successfully overruling or preserving a judgment on appeal are largely dependent upon a lawyer's vigilance in following the correct procedure to preserve error in the trial court.[1] However, a lawyer's duty to preserve a complaint for appellate review does not end at the conclusion of the trial court proceedings. Nothing will be gained by protecting a complaint in the trial court if the error is waived during appeal.

The Texas Supreme Court has endeavored to eliminate many procedural traps from civil appeals.[2] The recent liberality demonstrated

1. TEX. R. APP. P. 52(a) (trial court error must be preserved by timely request, objection or motion to complain of error on appeal). *See generally* Keltner & Burke, *Protecting the Record for Appeals: A Reference Guide in Texas Civil Cases*, 17 ST. MARY'S L.J. 273 (1986) (identifying methods of preserving error for appeal in trial court). This article assumes that the foundation for appellate review has been laid in the trial court through proper and timely objections, motions, bills of exception, and the like.

2. *See, e.g.*, Donwerth v. Preston II Chrysler-Dodge, Inc., 775 S.W.2d 634, 639 (Tex. 1989) (reaffirming rule that appellee may raise cross-points without perfecting independent appeal to complain of error as between appellant and appellee); Inpetco, Inc. v. Texas Am. Bank/Houston, 729 S.W.2d 300, 300 (Tex. 1987) (holding that rebriefing should be ordered before affirming or reversing judgment based on briefing inadequacies); Pool v. Ford Motor Co., 715 S.W.2d 629, 632-33 (Tex. 1986) (relaxing briefing requirements for phrasing points of

by the supreme court toward abolishing technical and confusing rules of practice has ushered in a new era in civil appellate procedure. Nevertheless, review continues to be denied in a significant number of cases because lawyers do not abide by the rules for preserving error in the appellate court.[3]

Preservation of error in a civil appeal generally involves three interdependent concepts. First, the right to complain of the error of the trial court must be preserved by properly perfecting the appeal.[4] Second, the right to review of the error of the trial court must be preserved by properly requesting and filing a record showing reversible error.[5] Third, the error of the trial court or the court of appeals must be preserved by proper assignment in the brief, motion for rehearing, and application for writ of error.[6] The procedures embodied in these concepts are indispensable to an appeal's success.

This article is a practical guide for preserving the right to complain of error in an appeal to the Texas courts of appeals and the Supreme Court of Texas.[7] The author reviews the procedures for limiting and

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error). In 1990, the supreme court made numerous amendments to the appellate rules to liberalize and clarify certain procedures. *See, e.g.*, TEX. R. APP. P. 51(b) (amended to provide that late designation of transcript is not grounds for refusing to file transcript); TEX. R. APP. P. 52(d) (amended to clarify that certain complaints in a non-jury case need not be preserved for appellate review as other complaints); TEX. R. APP. P. 140(e) (amended to allow ordinary appeal when direct appeal denied).

3. *See, e.g.*, Schafer v. Conner, 805 S.W.2d 554, 557 (Tex App.—Beaumont 1991, no writ) (nine points of error waived because appellant made defective request for partial statement of facts); Martin v. Cohen, 804 S.W.2d 201, 202 (Tex. App.—Houston [14th Dist.] 1991, no writ) (absence of argument and authority in support of point of error resulted in waiver of point); Maronge v. Cityfed Mortgage Co., 803 S.W.2d 393, 395 (Tex. App.—Houston [14th Dist.] 1991, no writ) (four points of error waived for failure to file statement of facts).

4. *See infra* §§ III-IV discussing the rules and case law attendant to perfection of the appeal in the court of appeals.

5. *See infra* § V discussing the rules and case law attendant to presentation of the record in the court of appeals.

6. *See infra* §§ VI-VIII, X-XII discussing the rules and case law attendant to assignment of error in the briefs and other appellate pleadings.

7. The subject matter of this article is limited to Texas civil appellate practice relating to ordinary appeals, accelerated appeals, appeals by writ of error in civil cases to a Texas court of appeals, and direct appeals to the Supreme Court of Texas. Therefore, all citations are to Texas cases and the Texas Rules of Appellate Procedure and all references to the supreme court and courts of appeals are to Texas state courts. "Original proceedings" (applications for writs of habeas corpus, mandamus, prohibition and injunction) are not within the scope of this article. For a thorough reference to the procedures involved in these proceedings, see Keltner, *Original Proceedings in State Court*, UNIV. TEX. TECHNIQUES FOR HANDLING APPEALS IN STATE AND FEDERAL COURT 6 (1991).

perfecting a civil appeal and identifies the correct method of protecting the right to appellate review during each successive stage of the appeal. In addition, the article addresses the procedures for defending a judgment, and for preserving the right to a different judgment when a judgment is reversed on appeal. Although significant deadlines are indicated by the author, it is generally assumed throughout the article that all appellate procedures will be performed in a timely manner.[8]

II. PRESERVING THE RIGHT TO LIMIT THE SCOPE OF APPEAL

Prior to perfecting appeal, the advantages, if any, of limiting the issues[9] on appeal should be considered. If an appeal can be limited to a few severable issues, an appellant may limit the appeal to those issues by serving notice on all other parties in accordance with the procedure outlined in Rule 40(a)(4). Unless the appellee perfects a separate appeal of the other issues, the appeal will be restricted to the issues set out in the appellant's notice.[10]

In order to preserve the right to limit the scope of an appeal under Rule 40(a)(4), an appellant must designate the severable portion of the judgment from which the appeal is taken by *serving* the notice of limited appeal on all parties to the trial court judgment[11] within fifteen days after the judgment is signed.[12] This time limit is extended to seventy-five days when a timely motion under Texas Rule of Civil Procedure 329b(g) is filed by any party.[13] The notice should also be

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8. In presenting a civil appeal, time is critical and is jurisdictional in some instances. For an excellent discussion of deadlines and extensions of time in civil appellate litigation, *see* Patton, *Deadlines and Extension Motions in Civil Appellate Litigation*, 20 ST. MARY'S L.J. 1 (1988).

9. The appellate rules provide two procedures for limiting the scope of an appeal. Rule 40(a)(4) allows the appellant to limit the *issues* to be considered on appeal upon notice to the opposing party. TEX. R. APP. P. 40(a)(4). Rule 53(d) permits the appellant to limit the *record* by requesting a partial statement of facts and filing a list of appellate points. TEX. R. APP. P. 53(d). Although they are often used together, the two procedures have different purposes and should not be confused.

10. Great Eastern Life Ins. Co. v. Jones, 526 S.W.2d 268, 270 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.).

11. The 1990 amendments to the Texas Rules of Appellate Procedure require the parties to any appeal to serve copies of all papers filed with the clerk of the appellate court, except the statement of facts and transcript, on all parties in the trial court. TEX. R. APP. P. 40 comment. Former Rule 40(a)(4) only required service of the notice on the "adverse party." *See* TEX. R. APP. P. 40(a)(4) (Vernon 1986). The amended rule conforms with the rule governing service of papers filed in the trial court. *See* TEX. R. CIV. P. 21.

12. TEX. R. APP. P. 40(a)(4).

13. *Id.*

filed with the clerk of the trial court at the same time.[14]

The language used in a notice of limited appeal must clearly and distinctly indicate the appellant's intention to limit the appeal. The notice should be styled "Notice of Limitation of Appeal." More importantly, the notice should specify both the severable portion of the judgment from which the appeal is taken and the points to which the appeal is limited.[15]

The rules make no provision for amending a notice of limited appeal. If the form or substance of the notice is ineffective to limit the appeal, the jurisdiction of the court of appeals will be invoked as to the entire judgment upon perfection of the appeal.[16] The failure to properly limit an appeal is not grounds for dismissal of the appeal.[17]

A notice of limited appeal does not invoke an appellate court's jurisdiction or perfect the appeal. Unless the appellant is exempted from posting security for costs,[18] an appellate court's jurisdiction is invoked only by filing the appeal bond or substitute within the prescribed time periods.[19] Ideally, an appeal bond or substitute should be filed and served with the notice of the limited appeal. This practice insures the appeal is timely perfected and eliminates any confusion resulting from the different time periods for filing the notice and the bond.[20]

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14. The rule does not expressly require filing. *See* TEX. R. APP. P. 40(a)(4). This omission is presumably inadvertant. The requirement of Rule 51(a) that transcript include a "notice of limitation of appeal" assumes the notice is filed. *See* TEX. R. APP. P. 51(a). The failure to include the notice of limited appeal in the transcript would result in the loss of the right to limit the appeal, if challenged in the appellate court. *See* Hernandez v. City of Fort Worth, 617 S.W.2d 923, 924 (Tex. 1981); Prather v. McNally, 757 S.W.2d 124, 125 (Tex. App.—Dallas 1988, no writ).

15. *See* McClain v. Hickey, 418 S.W.2d 588, 592 (Tex. Civ. App.—Texarkana 1967, writ ref'd n.r.e.); Barnsdall Oil Co. v. Hubbard, 130 Tex. 476, 483, 109 S.W.2d 960, 963 (1937).

16. *Prather*, 757 S.W.2d at 125.

17. Zephyr v. Zephyr, 679 S.W.2d 553, 555 (Tex. App.—Houston [14th Dist.] writ ref'd n.r.e.), *reh'g denied*, 683 S.W.2d 18, 19 (Tex. App.—Houston [14th Dist.] 1984, no writ).

18. *See generally* W. DORSANEO, 6 TEXAS LITIGATION GUIDE § 142.01[5][b](1988) (identifying persons and entities exempt from posting bond).

19. *See infra* § III A of this paper.

20. The purpose of the shorter time period for serving the notice of limited appeal is to insure that all other parties have sufficient time to perfect an appeal of the severed issues. Anderson v. Anderson, 618 S.W.2d 927, 930 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ dism'd); O'Connor, *Perfecting the Appeal*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE B-27 (1988). Since any party may perfect an appeal within thirty days after the judgment is signed (*see* TEX. R. APP. P. 41(a)(1)), the appellee has fifteen days after service of the notice of limitation to perfect a separate appeal. Watkins & Bloch, *Limited &*

III. PRESERVING ERROR WHEN PERFECTING THE APPEAL

A. *The Appeal Bond*

1. Necessity for Timely Filed Appeal Bond

Except in those cases in which no bond is required by law,[21] a proper and timely filed appeal bond (or substitute) is mandatory and a prerequisite to invoking the appellate court's jurisdiction in civil cases.[22] The time periods for filing an appeal bond, deposit,[23] or affidavit in lieu of bond[24] are set out in Rules 41 and 42. A lawyer who takes a case on appeal must be familiar with these time requirements; if the deadline for filing the appeal bond or substitute is missed (and no extension is obtained), the right to appeal will be "irretrievably lost."[25]

In an ordinary appeal, the appeal bond or substitute must be filed with the clerk of *the district court* thirty days after the judgment is signed.[26] However, if a timely motion for new trial or a motion to modify, correct or reform the judgment has been filed by "any party,"

Cross Appeals in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE G-7 (1989).

21. Certain individuals and entities are exempt by statute from filing an appeal bond and, instead, perfect an appeal by filing a "notice of appeal." *See generally* W. DORSANEO, 6 TEXAS LITIGATION GUIDE § 142.01[5][b] (1988) (discussion of exemptions); O'Connor, *Perfecting the Appeal*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE B-43-50 (1988) (same). The procedures for perfecting appeal by filing a notice of appeal when these statutory exemptions apply is discussed *infra* at § III.

22. The appeal bond should not be confused with the supersedeas bond. The purpose of the appeal bond is to secure the trial court, appellate court, and the prevailing party in the trial court in relation to costs. It does not suspend execution of the judgment. TEX. R. APP. P. 40(a)(5). Two exceptions are where an interlocutory appeal is taken from an order authorizing a class action and when an appeal is taken in an election contest. In such cases, the filing of an appeal bond suspends the judgment or order pending appeal. *See* TEX. ELEC. CODE ANN. § 232.016 (Vernon 1986); TEX. R. APP. P. 43(a). The procedures for suspending appeals by filing a supersedeas bond or other security are not within the scope of this article and, therefore, are not addressed.

23. *See infra* § III B 2 discussing the procedures for posting bond by making deposit in lieu of bond.

24. *See infra* § III B 3 discussing the procedures for perfecting appeal by affidavit in lieu of bond.

25. Patton, *Deadlines and Extension Motions in Civil Appellate Litigation*, 20 ST. MARY'S L.J. 1, 13 (1988); *see, e.g.*, Gulf States Underwriters, Inc. v. Wilson, 753 S.W.2d 422, 431-32 (Tex. App.—Beaumont 1988, writ denied); Miller v. Presswood, 743 S.W.2d 275, 279-80 (Tex. App.—Beaumont 1987, writ denied); Fleming v. State, 704 S.W.2d 530, 531-32 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.); .

26. *See* Alvarado v. State, 656 S.W.2d 611, 612 (Tex. App.—San Antonio 1983, no writ) (dismissing appeal because bond filed in appellate court rather than trial court).

the bond must be filed within ninety days after the judgment is signed.[27] The ninety day period also applies if any party has timely filed a request for findings of fact and conclusions of law in a non-jury case.[28]

The time periods are much shorter for filing an appeal bond or substitute in accelerated appeals and appeals from election contests. In all accelerated appeals from interlocutory orders and quo warranto proceedings, the bond or substitute must be filed or made within twenty days after the judgment or order is signed.[29] In an appeal from a contested primary election, the appeal bond or substitute must be filed within five days after the judgment is signed.[30] The time period for perfecting the appeal from a contested general or special election may be accelerated upon motion of the parties.[31]

An appeal bond or substitute is timely "filed" when it is delivered to the clerk on the due date, regardless of when it is file-stamped.[32] The bond may also be timely filed by mailing it to the clerk by first-

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27. TEX. R. APP. P. 41(a)(1). The phrase "by any party" permits a party to rely on post-trial motions filed by another party in calculating appellate deadlines. *See* 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 563 at 349 (Texas Practice 1985); Hanby, *Preservation of Error on Appeal*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE E-2 (1990). Only post-judgment motions that fall under Rule 329(b) of the Texas Rules of Civil Procedure will extend the time to perfect appeal. Landmark Am. Ins. Co. v. Pulse Ambulance Serv., Inc., 34 Tex. Sup. Ct. J. 738, 739 (June 19, 1991); *see* TEX. R. CIV. P. 329(b). A motion for remittitur is a correction of the judgment and thus extends the deadline for appeal. *Landmark American Ins. Co.*, 34 Tex. Sup. Ct. J. at 739. In addition, a judgment *nunc pro tunc* extends the appellate timetable for a complaint about a matter that was not in the original judgment. *See* Escobar v. Escobar, 711 S.W.2d 230, 232 (Tex. 1986); Gonzalez v. Doctors Hosp.—East Loop, No. 01-91-0302-CV (Tex. App.—Houston [1st. Dist.], August 8, 1991, n.w.h.). Irrespective of the nature of the motion, the timetable for appeal will not be extended if the motion is filed late or under a wrong cause number. *See, e.g.*, Philbrook v. Berry, 683 S.W.2d 378, 379 (Tex. 1989); City of San Antonio v. Rodriguez, 810 S.W.2d 405, 407 (Tex. App.—San Antonio 1991, no writ); Richie v. Ranchlander Nat'l Bank, 724 S.W.2d 851, 854 (Tex. App.—Austin 1986, no writ).

28. TEX. R. APP. P. 41(a)(1). In 1990, the supreme court amended Rule 41 to make the timetable for appeals of non-jury cases conform "more" to that of jury cases. TEX. R. APP. P. 41 comment. Under the former rules, the filing of requests for findings of fact and conclusions of law did not extend the appellate timetable. *See* TEX. R. APP. P. 41(a)(1) (Vernon 1986).

29. TEX. R. APP. P. 42(a)(3).

30. TEX. ELEC. CODE ANN. § 232.014(b) (Vernon 1988).

31. *Id.* § 232.015; *see* Stevens v. McClure, 732 S.W.2d 115, 116 (Tex. App.—Amarillo 1987, no writ).

32. Biffle v. Morton Rubber Indus., Inc., 785 S.W.2d 143, 144 (Tex. 1990); *see also* Dorchester Master Ltd. v. Hunt, 790 S.W.2d 552 (Tex. 1990) (per curiam) (motion for new trial is timely filed if it would have been timely received by clerk but for delay caused by another court employee).

class United States mail[33] on or before the day it is due.[34] Since the timely filing of the appeal bond is jurisdictional, it is safer to file the bond by hand-delivery. If mailed, it should be deposited in first-class United States mail several days in advance of the deadline.[35] Even if the bond or substitute is delivered prematurely, it will be effective to perfect appeal.[36]

With the possible exception of accelerated appeals,[37] the deadlines for filing the appeal bond or substitute may be extended after filing a proper motion for extension of time within fifteen days of the deadline.[38] This fifteen day time period is jurisdictional. If no motion to

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33. *See* Carpenter v. Town & Country Bank, 806 S.W.2d 959, 960 (Tex. App.—Eastland 1991, no writ) (bond mailed by UPS does not comply with rule).

34. *See* TEX. R. APP. P. 5. (governing the computation of time for filing documents in trial court). The 1990 amendments to this rule made it conform to Rule 4(b) of the appellate rules which allows the filing of documents by depositing a document in first-class mail "on or before the last day for filing same." *Compare* TEX. R. APP. P. 5 *with* TEX. R. APP. P. 4(b).

35. *See* O'Connor, *Perfecting the Appeal*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE B-30 (1988) (bond should reach clerk by the day it is due); *see also Biffle*, 785 S.W.2d at 144 (bond "filed" when delivered to clerk under former rules). A certificate of mailing by the United States Postal Service or a "legible" postmark affixed by the post office should be obtained when filing the bond by mail. The bond will not be deemed filed in time if it arrives at the clerk's office more than ten days late. *See* TEX. R. APP. P. 4(b); TEX. R. APP. P. 5. A certificate or legible postmark is prima facie evidence of the date of mailing. TEX. R. APP. P. 4(b); TEX R. APP. P. 5. A postmark affixed by a law firm postal meter does not satisfy this requirement. *See* Patton, *Deadlines and Extension Motions in Civil Appellate Litigation*, 20 ST. MARY'S L.J. 1, 8 (1988); *see also* Perez v. State, 629 S.W.2d 834, 838 n.3 (Tex. App.—Austin 1982, no writ); Ector County Indep. School Dist. v. Hopkins, 518 S.W.2d 576, 583-84 (Tex. Civ. App.—El Paso 1974, no writ).

36. TEX. R. APP. P. 41(c), 58(a). An exception occurs when the judgment is corrected after an appeal bond is filed. In such a case, a new appeal bond must be filed to perfect appeal from the amended judgment. *See, e.g.*, Syn-Labs, Inc. v. Franz, 778 S.W.2d 202, 205 (Tex. App.—Houston [1st Dist.] 1989, no writ); A. G. Solar & Co. v. Nordyke, 744 S.W.2d 646, 647 (Tex. App.—Dallas 1988, no writ); Christopher v. Fuerst, 709 S.W.2d 266, 268 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

37. Rule 42 does not expressly provide for extending the time period for filing the bond or substitute in accelerated appeals. *See* TEX. R. APP. P. 42. Several courts have held that, for this reason, an extension of time cannot be granted in an accelerated appeal. *See, e.g.*, NCNB Nat'l Bank of Tex. v. Erwin, 769 S.W.2d 655, 655 (Tex. App.—Corpus Christi 1989, no writ); St. Louis Fed. Sav. & Loan Ass'n v. Summerhouse Joint Venture, 739 S.W.2d 441, 442 (Tex. App.—Corpus Christi 1987, no writ); Brogdon v. Ruddell, 717 S.W.2d 675, 677 (Tex. App.—Texarkana 1986, writ ref'd n.r.e.). If necessary, the clerk of the appellate court in which the case is filed should be contacted to determine whether the court grants extensions to file the appeal bond in accelerated appeals. O'Connor, *Perfecting the Appeal*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE B-38 (1988).

38. TEX. R. APP. P. 41(a)(2); *see, e.g.*, Head v. Twelfth Court of Appeals, 34 Tex. Sup. Ct. J. 747, 747 (June 19, 1991); Garcia v. Kastner Farms, Inc., 774 S.W.2d 668, 670 (Tex. 1989); *Erwin*, 769 S.W.2d at 655; *Summerhouse Joint Venture*, 739 S.W.2d at 443. It is recom-

extend is filed within fifteen days of the appeal bond filing deadline, the appeal will be dismissed.[39]

2. Who Must File an Appeal Bond

The appellate rules state that "the appellant shall execute a bond."[40] It is usually unnecessary for the "appellee"[41] to file an appeal bond merely to reply to points raised by appellant, or to assert cross-points against the appellant. However, there are two situations in which an appellee stands in an appellant's shoes and must file an appeal bond to preserve error: (1) when the appellant limits the scope of the appeal to a severable portion of the judgment and the appellee wants to complain of error in another aspect of the judgment,[42] and (2) when the appellee wants to complain of a multi-party judgment in favor of a party to the judgment who is not an appellant as to the appellee.[43] The appellee's failure to file an appeal bond or substitute in either situation forecloses the appellee from complaining of any portion of the judgment not challenged by the appellant.

Only one appeal bond is required to give an appellate court jurisdiction over the entire appeal.[44] Therefore, two or more appellants may join in the same appeal bond to perfect appeal without executing separate bonds.[45] When a joint bond is used, however, each appellant

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mended that the appeal bond be filed with the motion to extend, if possible. O'Connor, *Perfecting the Appeal*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE B-38 (1988).

39. *See, e.g.*, Villarreal v. H.E. Butt Grocery Co., 742 S.W.2d 725, 726 (Tex. App.—Corpus Christi 1987, writ dism'd w.o.j.); Cavalier Corp. v. Store Enterprises, 742 S.W.2d 785, 787 (Tex. App.—Dallas 1987, writ denied); Wadkins v. Diversified Contractors, 714 S.W.2d 136, 138 (Tex. App.—Houston [1st Dist.] 1986, no writ).

40. TEX. R. APP. P. 46(a) (emphasis supplied). " 'Appellant' is the party taking the appeal or suing out a writ of error to the court of appeals." TEX. R. APP. P. 3(a).

41. " 'Appellee' is the party adverse to 'appellant.' " TEX. R. APP. P. 3(a).

42. *E.g.*, Warren v. Tri-Land Inv. Group, 779 S.W.2d 808, 809 (Tex. 1989); Donwerth v. Preston II Chrysler-Dodge, 775 S.W.2d 634, 639 (Tex. 1989); Hernandez v. City of Fort Worth, 617 S.W.2d 923, 924 (Tex. 1981); *see also infra* §§ V B-C discussing these situations in more detail.

43. *See*, Sheldon L. Pollack Corp. v. Facon Indus., 794 S.W.2d 380, 384-85 (Tex. App.—Corpus Christi 1990, writ denied); Keystone Equity Management v. Thoen, 730 S.W.2d 339, 341 (Tex. App.—Dallas 1987, no writ). These situations are discussed *infra* §§ VII, XI.

44. Powell v. City of McKinney, 711 S.W.2d 69, 70 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

45. *See* Allen v. Aetna Casualty & Surety Co., 567 S.W.2d 547, 550 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.); Hollis v. Boone, 315 S.W.2d 350, 352 (Tex. Civ. App.—El Paso 1953, no writ).

should execute the bond as a principal.[46] The appeal bond must also be payable to the appellee if the judgment is affirmed as to any appellant.[47] An appellant who does not join the appeal bond and fails to file his own bond cannot rely on the filed bond to perfect his appeal.[48] In such a case, appellate jurisdiction is invoked only for the appeal of the appellants who file bonds or substitutes.[49]

3. Content of Appeal Bond

Although Texas courts liberally construe appeal bonds,[50] proper drafting and execution of the appeal bond can be critical to the appeal's perfection. Technical errors in the appeal bond may be cured by proper amendment.[51] However, a careless approach to drafting the bond is dangerous.[52]

a. General Requirements

Rule 46(a) requires that an appeal bond be:

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46. *See* Kittrell v. State, 382 S.W.2d 273, 274 (Tex. Civ. App.—Dallas 1964, writ ref'd n.r.e.); Henslee v. State, 375 S.W.2d 474, 475 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.). *But cf. Allen*, 567 S.W.2d at 550 (one appeal bond which shows that several appellants are participating in appeal as principals perfects appeal for all appellants even though executed by only one appellant); Warren v. Kyle, 565 S.W.2d 313, 315 (Tex. Civ. App.—Austin 1978, no writ) (appellant whose name was not shown on bond may be included under liberal construction of "et al" language).

47. *See, e.g.*, Southwestern States Gen. Corp. v. McKenzie, 658 S.W.2d 850, 852 (Tex. App.—Dallas 1983, writ dism'd); Fortune v. McElhenney 645 S.W.2d 934, 935 (Tex. App.—Austin 1983, no writ); Valerio v. Laughlin, 307 S.W.2d 352, 353 (Tex. Civ. App.—San Antonio 1957, orig. proceeding).

48. *See* Tapiador v. North Am. Lloyds of Tex., 772 S.W.2d 954, 956 (Tex. App.—Houston [1st Dist.] 1989, no writ).

49. *See, e.g.*, City of Ranger v. Commission on Law Enforcement Officer Standards & Educ., 599 S.W.2d 693, 694 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.); R. B. Butler, Inc. v. Henry, 589 S.W.2d 190, 192 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.); Vangard Equities, Inc. v. Sellers, 587 S.W.2d 521, 524 (Tex. Civ. App.—Corpus Christi 1979, no writ).

50. *See, e.g.*, Grand Prairie Indep. School Dist. v. Southern Parts Imports, Inc., 34 Tex. Sup. Ct. J. 743, 744 (June 19, 1991) (per curiam); Pharis v. Culver, 677 S.W.2d 168, 170 (Tex. App.—Houston [1st Dist.] 1984, no writ); Lopez v. Foremost Paving, Inc., 671 S.W.2d 614, 617-18 (Tex. App.—San Antonio 1984, no writ).

51. 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 556 at 335 (Texas Practice 1985).

52. *See, e.g.*, City of San Antonio v. Rodriguez, 810 S.W.2d 405, 407 (Tex. App.—San Antonio 1991, no writ) (appeal bond not timely filed due to error in the cause number); Duke v. Lloyd, 584 S.W.2d 742, 743 (Tex. Civ. App.—Waco 1979, no writ) (appellants not shown on bond denied appeal for want of jurisdiction); Yellow Cab Corp. v. Hill, 111 S.W.2d 1193, 1195 (Tex. Civ. App.—Dallas 1937, no writ) (bond drafted for appeal by writ of error insufficient to perfect ordinary appeal).

> [P]ayable to the appellee[53] in the sum of $1,000.00 . . . shall have sufficient surety and shall be conditioned that appellant shall prosecute his appeal or writ of error with effect and shall pay all costs which have accrued in the trial court and the cost of the [appellate record].[54]

The wording of a bond should track the language of Rule 46(a).[55] An appeal bond must be expressly conditioned on the premise that both the appellant and surety will pay the costs for the appellate record and all costs which accrued in the trial court.[56] A bond which secures only the appeal costs and does not secure trial costs is defective.[57]

If a notice of limited appeal is filed, it is recommended that the appeal bond or substitute perfect the appeal only as to the limited part.[58] Therefore, the bond should be drafted so as to incorporate the language contained in the notice of limited appeal. Including this limiting language in the appeal bond reinforces the appellant's intent to limit the appeal.

b. Principal

The appellant must be named as the principal on the bond,[59] and he must execute the bond as principal or have it executed by someone having legal authority to act for him.[60] This requirement is

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53. The appellant may make the bond payable to the clerk instead of the appellee. TEX. R. APP. P. 46(a).

54. *Id.* (emphasis supplied).

55. O. Hewitt, *The Appeal Bond: Drafting and Execution*, THE APPELLATE ADVOC. Fall, 1990 at 7, 8; *cf.* Smith v. Valdez, 737 S.W.2d 141, 142 (Tex. App.—San Antonio 1987, no writ) (appeal bond contained clerical errors but tracked language of rule closely enough to avoid dismissal).

56. *See, e.g.*, Alejo v. Pellegrin, 616 S.W.2d 331, 332 (Tex. Civ. App.—San Antonio 1981, writ dism'd); Washington v. A & A Constr. Co., 316 S.W.2d 808, 813 (Tex. Civ. App.—Amarillo 1958, writ ref'd n.r.e.); Slaughter v. Texas Life Ins. Co., 211 S.W. 350, 351 (Tex. Civ. App.—Austin 1919, no writ).

57. *See* Yellow Cab Corp. v. Hill, 111 S.W.2d 1193, 1195 (Tex. Civ. App.—Dallas 1937, no writ) (bond for writ of error insufficient for ordinary appeal because costs of ordinary appeal not secured); *see also* Transport Ins. Co. v. Wheeler, 420 S.W.2d 635, 637 (Tex. Civ. App.—Houston [14th Dist.] 1967, writ ref'd n.r.e.) (adopting *Hill* rationale).

58. *See* O'Connor, *Perfecting the Appeal*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE B-28 (1988).

59. *See* Governing Board v. Pannill, 561 S.W.2d 517, 521 (Tex. Civ. App.—Texarkana 1977, writ ref'd n.r.e.); TEX. R. APP. P. 3; TEX. R. APP. P. 46(a).

60. Owen v. Brown, 447 S.W.2d 883, 885 (Tex. 1969); *see* Mann v. Franklin Fed. Bancorp., 796 S.W.2d 318, 319 (Tex. App.—Austin 1990, no writ) (appeal bond executed by non-party as principal on behalf of party insufficient to invoke jurisdiction of appellate court); Bailey v. Capital City Trade & Technical School, 777 S.W.2d 558, 559 (Tex. App.—Austin 1989, no writ) (cost bond with appellant's attorney as principal insufficient to invoke jurisdic-

mandatory.[61] Only a "party of record" has a right to appeal.[62] Therefore, bonds executed by mere nominal parties, strangers, or non-parties are defective and generally do not invoke an appellate court's jurisdiction.[63] Some courts have held that the principal's signature is unnecessary if the language of the bond contains sufficient sureties and leaves no doubt that it is intended to support the appellant's appeal.[64] However, this practice invites dismissal.[65]

A joint appeal bond should name and be signed by all appellants joining in the bond. However, if one or more appellants are inadvertently omitted from the bond, the bond may be amended to add the unnamed appellants and their signatures.[66] In addition, an appeal bond that does not include the signatures of all named appellants may be sufficient to invoke the jurisdiction of the appellate court as to the named appellants who failed to sign the bond. This issue was addressed in *Allen v. Aetna Casualty & Surety Co.*[67] In *Allen*, a motion to dismiss three of four appellants was filed on the ground that only one of the appellants had signed the bond.[68] The Fort Worth Court of Appeals sustained the bond as to all appellants on the basis that the appeal bond showed that it was the intent of all appellants named on the bond to appeal the judgment of the trial court, and the bond otherwise met the statutory requirements for an appeal bond.[69]

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tion). The appellate rules contain an express exception for deceased parties. When the appellant dies after judgment and before the time the appeal must be perfected, the appeal bond or deposit may be made in the name of the original party as though he or she was living. TEX. R. APP. P. 9(a). In such a case, the appeal bond should be executed by the representative of the deceased party's estate. *See id.*

61. *See Mann*, 796 S.W.2d at 319; *Bailey*, 777 S.W.2d at 559.

62. Continental Casualty Co. v. Huizar, 740 S.W.2d 429, 430-32 (Tex. 1987) (Kilgarlin, J., concurring) (commenting on party of record policy).

63. *See Mann*, 796 S.W.2d at 319; *Pannill*, 561 S.W.2d at 522; *see generally* O. Hewitt, *The Appeal Bond: Drafting and Execution*, THE APPELLATE ADVOC., Fall 1990, at 7 (discussing requirements for appeal bond).

64. *See* Purcell v. Metropolitan Casualty Ins. Co., 260 S.W.2d 134, 137-38 (Tex. Civ. App.—Fort Worth 1953, no writ); United States v. Rose, 57 S.W.2d 350, 350 (Tex. Civ. App.—El Paso 1933, no writ).

65. *See Bailey*, 777 S.W.2d at 559 (court dismissed appeal because bond was not executed by appellant); *Pannill*, 561 S.W.2d at 522 (court entertained motion to dismiss appeal for omission of appellant from bond).

66. *See, e.g., Bailey*, 777 S.W.2d at 559; Powell v. City of McKinney, 711 S.W.2d 69, 70 (Tex. App.—Dallas 1986, writ ref'd n.r.e.); TEX. R. APP. P. 46(f).

67. 567 S.W.2d 547 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.).

68. *Id.* at 550.

69. *Id.*

If it is necessary for someone other than the appellant to execute the bond under the appellant's authority, the signor's authority must be reflected on the face of the bond.[70] The appellant's lawyer should also attach properly authenticated documentation of the signor's authority to make, execute, and deliver the bond, such as a power of attorney or guardianship papers. A bond which merely contains "signor *for* appellant" language may be sufficient to invoke the appellate court's jurisdiction,[71] but it will probably need to be amended.[72]

c. Surety

Rule 46(a) provides that an appeal bond shall have sufficient surety and that each surety shall give a post office address.[73] A "sufficient surety" is an entity or individual that is (a) not a party to the suit and who is separate from the judgment debtor,[74] and (b) who is solvent and able to pay the bond.[75] A surety can be a corporation[76] or an individual.[77]

Rule 142 of the Texas Rules of Civil Procedure appears to allow attorneys to act as surety on a client's bond without leave of court.[78] Until Rule 142 was amended in 1988, a lawyer who agreed to serve as an individual surety could do so only with prior leave of court.[79] The

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70. *See, e.g., Mann*, 796 S.W.2d at 319; *Pannill*, 561 S.W.2d at 522; Aechternacht v. Page, 429 S.W.2d 597, 602 (Tex. Civ. App.—Texarkana 1968, no writ).

71. *See* Jefferies v. Davis, 759 S.W.2d 6, 8 (Tex. App.—Corpus Christi 1988) (emphasis supplied), *writ denied*, 764 S.W.2d 559 (Tex. 1989).

72. Davis v. Jefferies, 764 S.W.2d 559, 560 (Tex. 1989); 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 553 at 332 (Texas Practice 1985).

73. TEX. R. APP. P. 46(a); *see* Campbell v. Iltis, 710 S.W.2d 95, 97 (Tex. App.—San Antonio 1986, no writ).

74. Persons cannot be a surety for themselves. *E.g.*, Bailey v. Capital City Trade & Technical School, 777 S.W.2d 558, 559 (Tex. App.—Austin 1989, no writ); Carter Real Estate & Dev. v. Builders' Serv. Co., 718 S.W.2d 828, 830 (Tex. App.—Austin 1986, no writ); Crimmins v. Lowry, 691 S.W.2d 582, 585 (Tex. 1985).

75. *See* Brown & Root, Inc. v. DeSautell, 554 S.W.2d 764, 771 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.); *see also Carter Real Estate*, 718 S.W.2d at 831 (ordering new supersedeas bond where original sureties did not own sufficient property within county to satisfy judgment); Phelan v. Settle, 431 S.W.2d 376, 377 (Tex. Civ. App.—Amarillo 1968, no writ) (discussing sufficiency of sureties on supersedeas bond).

76. *See* Southern Underwriters v. Dyche, 141 S.W.2d 674, 675 (Tex. Civ. App.—El Paso 1940, no writ).

77. *See Ex Parte* Wrather, 139 Tex. 47, 50, 161 S.W.2d 774, 775 (1942).

78. Kilgarlin, Quesada & Russell, *Practicing Law in the "New Age": The 1988 Amendments to the Texas Rules of Civil Procedure*, 19 TEX. TECH L. REV. 881, 886 (1988); *see* TEX. R. CIV. P. 142.

79. TEX. R. CIV. P. 142 (Vernon Supp. 1988); *see* Smith v. Valdez, 737 S.W.2d 141, 142

1988 amendment omitted this requirement.

d. Description of Judgment

Although the rules do not expressly require an appeal bond to describe or refer to the trial court judgment,[80] Texas cases hold that an appeal bond is defective if it does not identify the judgment from which the appeal is taken.[81] The appeal bond must contain a sufficiently detailed description of the judgment to give notice to opposing counsel and the court of the judgment from which the appeal is taken.[82] A description which correctly identifies the number of the cause, the court in which the trial took place, and the date of the judgment should be sufficient.[83] Defects and omissions in the description of the judgment are amendable.[84]

4. Amount of Appeal Bond

An appeal bond must be payable either to the appellee or to the trial court clerk in the amount of one thousand dollars, unless the trial court increases or decreases the amount.[85] A bond in the amount of one thousand dollars requires no prior court approval.[86] Prior ap-

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(Tex. App.—San Antonio 1987, no writ); Campbell v. Iltis, 710 S.W.2d 95, 97 (Tex. App.—San Antonio 1986, no writ).

80. *See* Evans v. Evans, No. 04-91-00059-CV (Tex. App.—San Antonio, April 17, 1991, n.w.h.) (there is no requirement in appellate rules that cost bond contain a trial court cause number).

81. *See* Neely v. Tarrant County, 132 Tex. 357, 364, 124 S.W.2d 101, 105 (1939) (conformed to 125 S.W.2d 659); Jack H. Brown & Co. v. Northwest Sign Co., 665 S.W.2d 219, 221 (Tex. App.—Dallas 1984, no writ).

82. *See* Pillow v. McLean, 126 Tex. 349, 352, 88 S.W.2d 702, 703 (1935); Evans v. Evans, 809 S.W.2d 573, 574 (Tex. App.—San Antonio 1991, no writ).

83. *See, e.g., Pillow*, 88 S.W.2d at 703; *Evans*, 809 S.W.2d at 574; Sun Pipe Line v. Wood, 129 S.W.2d 704, 706 (Tex. Civ. App.—Beaumont 1939, no writ).

84. *See, e.g.*, Evans v. Evans, No. 04-91-00059-CV (Tex. App.—San Antonio, April 17, 1991, n.w.h.); Ragsdale v. Progressive Voters League, 743 S.W.2d 338, 343 (Tex. App.—Dallas 1987), *aff'd in part, rev'd in part*, 801 S.W.2d 880 (Tex. 1990); Reitmeyer v. Clawson, 634 S.W.2d 379, 382 (Tex. App.—Austin 1982, no writ).

85. TEX. R. APP. P. 46(a); Campbell v. Iltis, 710 S.W.2d 95, 98 (Tex. App.—San Antonio 1986, no writ). An order increasing or decreasing the appeal bond's amount does not affect the perfection of the appeal or the jurisdiction of the appellate court. *See* Spears v. Brown, 552 S.W.2d 560, 561 (Tex. Civ. App.—Dallas 1977, no writ); TEX. R. APP. P. 46(c). However, the appellant's failure to comply with an order to increase the bond can result in dismissal of the appeal or automatic affirmance under Rule 60. Pollak v. Metroplex Consumer Center, Inc., 722 S.W.2d 512, 514 (Tex. App.—Dallas 1986, no writ); TEX. R. APP. P. 46(f); TEX. R. APP. P. 60(a)(1), (2).

86. TEX. R. APP. P. 46(a).

proval of the trial court is required to file a bond in a lesser amount.[87]

5. Notice of Filing of Appeal Bond

Notice of the filing of an appeal bond or substitute must be "promptly" served on all parties in the trial court after filing.[88] This is accomplished by sending all parties a copy of the bond or substitute, accompanied with notice of the filing date.[89] The failure to give notice of the filing of an appeal bond in strict accordance with Rule 46(d) is grounds for dismissal, or "other appropriate action," if the appellee is prejudiced by such failure.[90] Serving the appellee with a copy of the request for the transcript and statement of facts is not sufficient notice of the filing of the appeal bond under Rule 46(d).[91] A written request that the judgment include the words "defendant gives notice of appeal" also does not constitute adequate notice under Rule 46(d) that the appeal bond is filed.[92] Even a letter from the court of appeals clerk stating that "the notice of appeal" was received and filed in the trial court has been held insufficient to comply with the notice provisions of Rule 46(d).[93]

Although the "prompt" notice requirement of Rule 46(d) is not jurisdictional,[94] appellate courts are not reluctant to dismiss the ap-

87. *Id*; *see* Robison v. Kelly, 209 S.W.2d 629, 630 (Tex. Civ. App.—San Antonio 1948, no writ) (clerk may refuse to file or approve bond under $1,000 without prior court approval). The determination of whether the amount of the bond should be more or less than the statutory amount is determined by the volume of the record. Tapiador v. North Am. Lloyds of Tex., 772 S.W.2d 944, 955 (Tex. App.—Houston [1st Dist.] 1989, no writ); Shaw v. Greater Houston Transp. Co., 764 S.W.2d 390, 391 (Tex. App.—Houston [1st Dist.] 1989, no writ). In making this determination, the court must credit the appealing party with any sums previously paid to the clerk or court reporter. TEX. R. APP. P. 46(c).

88. TEX. R. APP. P. 46(d). The notice required by Rule 46(d) must not be confused with the written notice of appeal required by Rule 40(a)(2) when security for costs on appeal is not required by law. *Compare* TEX. R. APP. P. 40(a)(2) *with* TEX. R. APP. P. 46(d). The procedure for giving notice of appeal under Rule 40(a)(2) is discussed *infra* at § III C.

89. TEX. R. APP. P. 46(d).

90. *Id.*

91. *See, e.g.*, Hare v. Hare, 786 S.W.2d 747, 749 (Tex. App.—Houston [1st Dist.] 1990, no writ); Hexcel Corp. v. Conap, Inc., 738 S.W.2d 359, 361 (Tex. App.—Fort Worth 1987, writ denied); City of Irving v. Lesley, 601 S.W.2d 742, 743 (Tex. Civ. App.—Dallas 1980, no writ).

92. Texas Animal Health Comm'n v. Nunley, 598 S.W.2d 233, 234 (Tex. 1980).

93. *Hexcel Corp.*, 738 S.W.2d at 361.

94. *See, e.g.*, Smith v. Valdez, 737 S.W.2d 141, 142-43 (Tex App.—San Antonio 1987, no writ); Zephyr v. Zephyr, 683 S.W.2d 18, 19 (Tex. App.—Houston [14th Dist.] 1984, no writ); Harrison v. Harrison, 543 S.W.2d 176, 178 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ).

peal if the appellee can demonstrate that he was harmed by delayed notice.[95] In *Hare v. Hare*,[96] the appellee did not receive notice of the appeal from a decree of divorce until fourteen days after the appeal bond was filed. The appellee filed a motion to dismiss the appeal on the grounds that the late notice prevented her from obtaining temporary support pending appeal.[97] The appellate court dismissed the appeal on the grounds that the appellant had not timely notified the appellee of the cost bond's filing.[98]

Hexcel Corp. v. Conap, Inc.[99] also illustrates that the requirement of prompt service of the notice of appeal bond is more than a mere "technicality."[100] In *Hexcel*, the plaintiff sued Hexcel alleging she contracted industrial bronchitis after being exposed to products the corporation manufactured. Hexcel filed several third party claims for contribution against the appellee, B. F. Goodrich, and other parties. Consequently, B. F. Goodrich filed a fourth party claim for contribution against Synair Corporation, who allegedly manufactured the product to which the plaintiff was originally exposed. The trial court granted judgment in favor of B. F. Goodrich against Hexcel. The court also granted summary judgment in favor of Synair against B. F. Goodrich.

Hexcel timely filed an appeal bond to appeal the judgment in favor of B. F. Goodrich. However, a copy of the appeal bond was not served on B. F. Goodrich or any other party to the judgment until thirty-eight days after the filing of the bond. As a result, B. F. Goodrich did not file its own appeal bond to perfect its appeal against Synair. The Fort Worth Court of Appeals dismissed Hexcel's appeal on the grounds that B. F. Goodrich was prejudiced by Hexcel's failure to give earlier notice of the appeal bond's filing.[101]

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95. *See, e.g.*, *Hare*, 786 S.W.2d at 748; Longbine v. Corpus Christi Lodge No. 189, 730 S.W.2d 208, 209 (Tex. App.—Corpus Christi 1987, no writ); Valley Int'l Properties v. Brownsville Sav. & Loan Ass'n, 581 S.W.2d 222, 227 (Tex. Civ. App.—Corpus Christi 1979, no writ); *see also* TEX. R. APP. P. 46(d) (failure to serve all parties with notice is grounds for dismissal "if an appellee is prejudiced by such failure").

96. 786 S.W.2d 747, 748 (Tex. App.—Houston [1st Dist.] 1990, no writ).

97. *Id.* at 749.

98. *Id.*

99. 738 S.W.2d 359, 362 (Tex. App.—Fort Worth 1987, writ denied).

100. *Id.* at 362.

101. *Id.*

6. Amendments to Appeal Bond

The supreme court has adopted a policy of liberally permitting amendments to appeal bonds. In upholding this policy, the court has held that "any sort of instrument that is intended to be a bond" will invoke appellate jurisdiction and perfect the appeal.[102] When an appellant files an instrument in a "bona fide attempt" to perfect appeal, the court of appeals must allow the appellant to amend or refile the instrument required to perfect appeal.[103] A court of appeals cannot dismiss an appeal on the basis of a defective bond or substitute unless the appellant is given an opportunity to correct the error and fails to do so.[104]

If an amendment of the bond or substitute is ordered, the new bond or deposit must be filed in the trial court and a certified copy of the bond or deposit must be filed in the appellate court.[105] This should be accomplished as soon as possible. The clerk and official court reporter have no duty to prepare the statement of facts or transcript until the appealing party complies with the order increasing the bond.[106] Therefore, even if the new bond is filed within the time period set by the court's order, the delay caused by the need for an increased bond may hinder the timely filing of the appellate record.[107]

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102. Walker v. Blue Water Garden Apartments, 776 S.W.2d 578, 581 (Tex. 1989); *see also* Barrelle v. Johnson, 741 S.W.2d 590, 592 (Tex. App.—Austin 1987, no writ); Jinkins v. Bryan, 733 S.W.2d 268, 269 (Tex. App.—Amarillo 1987, no writ).

103. *E.g.*, Grand Prairie Indep. School Dist. v. Southern Parts Imports, Inc., 34 Tex. Sup. Ct. J. 743, 744 (June 19, 1991) (per curiam) (disapproving Eagle Life Ins. Co. v. Hernandez, 743 S.W.2d 671 (Tex. App.—El Paso 1987, writ denied) (per curiam)); Plano Indep. School Dist. v. Oake, 682 S.W.2d 359, 361 (Tex. App.—Dallas 1984), *rev'd on other grounds*, 692 S.W.2d 454 (Tex. 1985); Marshall v. Brown, 635 S.W.2d 578, 581 (Tex. App.—Amarillo 1982, writ ref'd n.r.e.); *see* TEX. R. APP. P. 46(f) (defective bonds may be amended "on such terms as the court may prescribe"); *see also* TEX. R. APP. P. 83 ("an appeal [shall not be] dismissed for defects or irregularities in appellate procedure . . . without allowing a reasonable time to correct or amend such defects or irregularities. . ."). If no objections are made to a defective appeal bond, the defects may be waived. Berry v. Berry, 770 S.W.2d 90, 92 (Tex. App.—Dallas 1989, writ denied); Pruet v. Coastal States Trading, 715 S.W.2d 702, 704 (Tex. App.—Houston [1st Dist.] 1986, no writ).

104. Smith v. Valdez, 737 S.W.2d 141, 142-43 (Tex. App.—San Antonio 1987, no writ); *see* Pollak v. Metroplex Consumer Center, Inc., 722 S.W.2d 512, 514 (Tex. App.—Dallas 1986, no writ).

105. TEX. R. APP. P. 46(f); *see also* TEX. R. APP. P. 49(a), (c).

106. TEX. R. APP. P. 46(c).

107. *See supra* § III A 1-4.

B. *Alternatives to Filing an Appeal Bond*

1. Use of Supersedeas Bond As Appeal Bond

The supersedeas bond or deposit may serve both to suspend execution of the judgment and to perfect the appeal.[108] If the supersedeas bond or deposit is intended to meet the dual purpose of staying execution of the judgment and perfecting the appeal, it must substantially comply with the rules for appeal bonds, i.e. it must be in an amount sufficient to secure the costs (in addition to the judgment), and it must be filed or made within the time prescribed for an appeal bond.[109] A supersedeas bond which is sufficient to secure costs will perfect the appeal, even though it fails to suspend execution of the judgment.[110]

Rule 49 authorizes the appellate court to order an additional supersedeas bond or deposit if the original security is found insufficient to secure the judgment.[111] When additional security for the judgment is ordered, Rule 49(c) gives the clerk of the trial court authority to determine whether the original supersedeas bond or deposit is sufficient to secure the costs.[112] If the clerk concludes that the original supersedeas security is insufficient, he or she must notify the appellant of the insufficiency.[113] If the appellant then fails to file a sufficient bond or deposit within twenty days after this notice, the appeal or writ of error "shall be dismissed."[114]

The language of Rule 49(c) indicates that dismissal of the appeal is mandatory if the appellant does not file an amended bond or deposit sufficient to cover the costs within the prescribed time period. However, a Dallas Court of Appeals decision interpreting Rule 46(f) sug-

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108. *See* Davis v. Jefferies, 764 S.W.2d 559, 559 (Tex. 1989); Young v. Kilroy Oil Co. of Tex., 673 S.W.2d 236, 242 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); TEX. R. APP. P. 47(a). The supersedeas bond alone does not perfect appeal. *See* TEX. R. APP. P. 40(a)(5).

109. TEX. R. APP. P. 47(a); *see* Cooper v. Bowser, 583 S.W.2d 805, 807 (Tex. Civ. App.—San Antonio 1979, no writ); *see also* Pharis v. Culver, 677 S.W.2d 168, 170 (Tex. App.—Houston [1st Dist.] 1984, orig. proceeding). Ordinarily, a supersedeas bond may be filed at any time during the pendency of the appeal. TEX. R. APP. P. 47(a); *see* 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 605 at 377 (Texas Practice 1985).

110. *Cooper*, 583 S.W.2d at 807; Durham v. Fort Worth Tent & Awning Co., 271 S.W.2d 181, 182-83 (Tex. Civ. App.—Fort Worth 1954, writ dism'd); Bachman v. Neal, 180 S.W.2d 643, 645 (Tex. Civ. App.—Fort Worth 1944, writ dism'd).

111. TEX. R. APP. P. 49(a), (c).

112. TEX. R. APP. P. 49(c).

113. *Id.* The rules do not specify the manner in which the notice is to be given. *See id.*

114. *Id.*

gests, by analogy, that the failure to timely file a new bond within the statutory time period of Rule 49(c) does not deprive the appellate court of discretion to further extend the time period for filing the increased bond.[115] In *Pollak v. Metroplex Consumer Center, Inc.*,[116] the appellant was ordered by the court of appeals to amend a defective appeal bond by August 21, 1986. The appellant not only failed to file the amended bond on the August 21 deadline, but his motion to extend time for filing the amended bond was late.[117] The appellee moved to dismiss the appeal on the ground that the appellate court lost jurisdiction over the appeal.

The Dallas Court of Appeals denied the motion to dismiss and held that its discretion under Rule 46(f) to fix the time for filing an amended bond was not exhausted by its order requiring an amended bond or by the expiration of the deadline on August 21.[118] The court reasoned that it had the discretion to reset the time period for filing an amended bond as often as necessary, with or without a timely filed motion for extension of time.[119]

The *Pollak* rationale is in line with the supreme court's policy of giving procedural rules a liberal construction in favor of the right to appeal. Nevertheless, Rule 49(c) is drawn by the supreme court in mandatory terms and does not appear to give the court of appeals the discretion to extend the twenty-day deadline for filing an increased bond. Therefore, a party who has difficulty meeting the twenty-day deadline of Rule 49(c), or who disputes the clerk's finding that the supersedeas bond or deposit is insufficient to cover costs, should file in the appellate court a proper motion for extension of time or other appropriate relief within the twenty-day time period. A second bond

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115. *See* Pollak v. Metroplex Consumer Center, Inc., 722 S.W.2d 512, 514 (Tex. App.—Dallas 1986, no writ).

116. 722 S.W.2d 512 (Tex. App.—Dallas 1986, no writ).

117. *Id.* at 513; *see also* TEX. R. APP. P. 41(a)(2) (motion for extension of time to file appeal bond must be filed within fifteen days after deadline).

118. *Pollak*, 722 S.W.2d at 514. Rule 46(f) provides, in pertinent part:

> On motion to dismiss an appeal or writ of error for a defect of substance or form in any bond or deposit given as security for costs, the appellate court may allow the filing of a new bond or the making of a new deposit in the trial court on such terms as the appellate court may prescribe.

TEX. R. APP. P. 46(f).

119. *Pollak*, 722 S.W.2d at 514. There is no rule which prescribes a fifteen day time period for filing an amended bond or a motion to extend time for filing an amended bond. *Id*; *see also* TEX. R. APP. P. 46(f) (appellate court may allow the filing of new bond "on such terms as the appellate court may prescribe").

in the amount determined by the clerk should be tendered at the same time.

2. Deposit in Lieu of Bond

In lieu of an appeal bond, an appellant may, without leave of court, deposit cash[120] or a negotiable obligation of the United States with the trial court clerk.[121] The rules also permit appellants to deposit a negotiable obligation of any federally insured bank or savings and loan association, but only with leave of court.[122] Instruments which the courts have allowed as a substitute for a surety bond include a cashier's check[123] and a certificate of deposit from a federally insured bank.[124] Letters of credit, on the other hand, are unacceptable.[125] Defective deposits may be amended under the same rules as cost and supersedeas bonds.[126]

When a deposit in lieu of bond is made, the clerk is required to prepare and file a certificate reflecting the deposit and place a copy of the certificate in the transcript.[127] A copy of the certificate must then be served on the parties in the trial court with notice of the date the deposit was made.[128] The rules do not require that the certificate be filed when the cash or other substitute is filed. It is permissible to file the certificate after the deadline for perfecting appeal.[129]

3. Affidavit of Inability to Pay Cost of Appeal

If a party is unable to pay the cost of appeal, he may pursue an

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120. The district clerks' offices of many counties will accept a lawyer's check as "cash." Others will not. Lawyers with cases on appeal should check the policies of the district clerk in the county in which the appeal will be filed before attempting to deposit a law firm check in lieu of an appeal bond.

121. TEX. R. APP. P. 46(b), 48. Interest on a negotiable obligation of the United States or of any bank or savings and loan constitutes a part of the deposit. TEX. R. APP. P. 48.

122. TEX. R. APP. P. 48.

123. Jinkins v. Bryan, 733 S.W.2d 268, 269 (Tex. App.—Amarillo 1987, no writ).

124. *See* Bank of E. Tex. v. Jones, 758 S.W.2d 293, 296 (Tex. App.—Tyler 1988, mand. overruled); Southwestern States Gen. Corp. v. McKenzie, 658 S.W.2d 850, 851-53 (Tex. App.—Dallas 1983, writ dism'd).

125. Heritage Hous. v. Ferguson, 651 S.W.2d 272, 273-74 (Tex. App.—Dallas 1988, no writ).

126. TEX. R. APP. P. 46, 49; *see also Jinkins*, 733 S.W.2d at 269.

127. TEX. R. APP. P. 46(b).

128. TEX. R. APP. P. 46(d).

129. *See* Cox v. Rosser, 579 S.W.2d 73, 74-75 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.).

appeal by filing an affidavit stating that he is unable to pay the costs of appeal (or any part thereof) or to give security for the costs.[130] The affidavit must be filed with the clerk of the trial court within the same time period prescribed for filing the appeal bond.[131]

a. Content of Affidavit

The affidavit of inability to pay cost of appeals should contain the following matters:

(1) The appellant's identity;[132]

(2) A description of the judgment;

(3) A statement that the appellant desires to appeal from the order or judgment of the court but is unable to pay the court costs;[133]

(4) The nature and amount of income, assets, debts and expenses,[134] and any other facts that support the statement that the appellant is unable to pay the costs of the appeal, e.g., the appellant is unemployed and on welfare;[135] and

(5) A jurat in which the appellant verifies under oath that the statements contained in the affidavit are true and correct.[136]

As appeal bonds, affidavits in lieu of bond are liberally construed.[137] The right to prosecute an appeal will not be denied merely because an

130. TEX. R. APP. P. 40(a)(3). Rule 145(3) of the Texas Rules of Civil Procedure also permits lawyers to file an affidavit in support of affidavits of indigency stating that the lawyer is providing free legal services to the appellant, without contingency. TEX. R. CIV. P. 145(3). The purpose of the attorney's affidavit is to assist the court in "understanding" the indigent's financial condition. *Id.* The fact that the lawyer has the case on contingency does not defeat the party's right to appeal as an indigent. Modern Living, Inc. v. Allworth, 730 S.W.2d 444, 445 (Tex. App.—Beaumont 1987, no writ).

131. TEX. R. APP. P. 40(a)(3)(A); *see* TEX. R. APP. P. 41(a)(1).

132. TEX. R. CIV. P. 145(2).

133. *Id.*

134. *Id.*

135. Lewelling v. Lewelling, 774 S.W.2d 801, 805 (Tex. App.—El Paso 1989), *rev'd on other grounds*, 796 S.W.2d 164 (Tex. 1990).

136. *See* Barrelle v. Johnson, 741 S.W.2d 590, 592 (Tex. App.—Austin 1987, no writ).

137. *See, e.g., id.*; American Communications Telecommunications, Inc. v. Commerce North Bank, 660 S.W.2d 570, 571 (Tex. App.—San Antonio 1983, no writ); Garcia v. City of Lubbock, 634 S.W.2d 776, 778 (Tex. App.—Amarillo 1982, writ ref'd n.r.e.).

affidavit is defective. Defects in the affidavit may be amended in accordance with the same procedures applicable to appeal bonds.[138]

b. Notice of Filing Affidavit

The appellant must give notice of the filing of the affidavit to the opposing party and the court reporter[139] within two days after the filing of the affidavit.[140] The failure to serve notice of the affidavit as prescribed in Rule 40(a)(3)(A) will deprive the indigent appellant of the right to a free appeal.[141]

The notice must be personally served on the opposing party and court reporter within the two-day time period or mailed to them by first-class United States mail postmarked no later than the last day it is due.[142] Merely handing the affidavit to the court reporter to be marked as an exhibit at a post-judgment hearing is insufficient to comply with the requirement of Rule 40(a)(3)(4).[143] Moreover, even though notice is timely given to opposing counsel, the appellant will not be allowed to proceed without paying costs if the notice of the affidavit is not also properly served on the court reporter.[144]

Rule 40(a)(3)(A) does not expressly require service of the notice of the filing of the affidavit on "all parties to the trial court judgment" as do the rules governing notice of other instruments perfecting ap-

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138. *See Barrelle*, 741 S.W.2d at 592; *American Communications Telecommunications*, 660 S.W.2d at 571.

139. TEX. R. APP. P. 40(a)(3)(B). The purpose of the requirement of notice to the court reporter is to allow the reporter the opportunity to file a timely written contest. Sanders v. Texas Employers Ins. Ass'n, 775 S.W.2d 762, 763 (Tex. App.—El Paso 1989, no writ); *see* Jones v. Stayman, 747 S.W.2d 369, 370 (Tex. 1987). Notice to the court reporter is not required in an appeal from a summary judgment or a non-trial disposition where no record was made or requested. *Sanders*, 775 S.W.2d at 762-63.

140. TEX. R. APP. P. 40(a)(3)(B).

141. *Id.*; *see, e.g.*, Wheeler v. Baum, 764 S.W.2d 565, 566 (Tex. App.—Houston [1st Dist.] 1988, no writ); *In re* V.G., 746 S.W.2d 500, 501 (Tex. App.—Houston [1st Dist.] 1988, no writ); Villarreal v. H.E. Butt Grocery Co., 742 S.W.2d 725, 726 (Tex. App.—Corpus Christi 1987, writ dism'd w.o.j.).

142. TEX. R. APP. P. 4, 40(a)(3)(B); *see* Bantuelle v. Renfro, 620 S.W.2d 635, 640 (Tex. Civ. App.—Dallas 1981, no writ). If the notice is mailed after the last day it is due, the appeal may be dismissed. *See* Fellowship Missionary Baptist Church v. Sigel, 749 S.W.2d 186, 187 (Tex. App.—Dallas 1988, no writ).

143. *See* Matlock v. Garza, 725 S.W.2d 527, 529 (Tex. App.—Corpus Christi 1987, no writ).

144. *See* Matlock v. Allstate Ins. Co., 729 S.W.2d 960, 960 (Tex. App.—Corpus Christi 1987, no writ).

peal.[145] Nevertheless, the indigent appellant should serve notice of the filing of the affidavit on all parties to the trial court judgment whenever feasible. Since all parties to the suit must exercise their right to contest the affidavit within ten days after notice,[146] a lack of notice may deprive a party of the opportunity to contest the affidavit.

Rule 40 contains no specific requirements for the notice's content. The supreme court has stressed that the notice provisions of Rule 40 should be construed liberally in favor of the right to appeal.[147] Whatever form the notice takes, it should inform the opposing party that an affidavit was filed and when it was filed.[148] A file-marked copy of the affidavit should suffice to give notice of these facts. Defects in the notice are waived if the opposing party and court reporter have an opportunity to object to the notice but fail to do so.[149]

c. Contest of the Affidavit

An affidavit in lieu of bond may be contested by any interested officer of the court, the court reporter, or "any party to the suit" within ten days after notice of the filing of the affidavit is received.[150] When an affidavit is contested, the affiant has the burden of proving the inability to pay costs.[151] To meet this burden, the affiant must only

145. *See* TEX. R. APP. P. 40(a)(2) (notice of appeal to be served in same manner as appeal bond); TEX. R. APP. P. 46(d) (notice of filing appeal bond or deposit must be served on "all parties in the trial court"). There is no apparent justification for limiting notice of the affidavit to "opposing" parties, other than the fact that the appellant may be too poor to afford the cost, if any, of the additional notice.

146. TEX. R. APP. P. 40(a)(3)(C), (E); *see also* Jones v. Stayman, 747 S.W.2d 369, 370 (Tex. 1987).

147. *Jones*, 747 S.W.2d at 370; Commercial Credit Corp. v. Smith, 143 Tex. 612, 616, 187 S.W.2d 363, 365 (1945).

148. *See Jones*, 747 S.W.2d at 370 (letter from indigent's attorney "sufficiently fulfilled the purpose of the rule" when construed in light of court reporter's actual knowledge that affidavit was filed and date it was filed).

149. *Id.*

150. TEX. R. APP. P. 40(a)(3)(C). The time period for contesting the affidavit may be extended for an additional twenty days after the date of the order of the extension, if a request for extension of time is made and stated within the ten-day time period. TEX. R. APP. P. 40(a)(3)(E). If no contest is filed within the prescribed ten-day period, or if no written order sustaining a timely-filed contest is signed within the ten-day time period, the affidavit's allegations will be taken as true and be automatically sustained. Varkonyi v. Troche, 802 S.W.2d 63, 64-65 (Tex. App.—El Paso 1990, no writ); Shaffer v. U.S. Companies, 704 S.W.2d 411, 412-13 (Tex. App.—Dallas 1985, no writ); *see* TEX. R. APP. P. 40(a)(3)(E).

151. Cronen v. Chambers, 697 S.W.2d 848, 849 (Tex. App.—Houston [1st Dist.] 1985, no writ).

show that he has made a good-faith effort and is unable to pay costs or a part thereof.[152] A party who can secure money from any legitimate source for the cost of appeal cannot proceed as an indigent.[153] Involuntary dependency on public charity is sufficient to establish indigency as a matter of law.[154] Uncontroverted proof that appellant's only income is food stamps is also sufficient to sustain an affidavit.[155]

If the court finds the appellant is, in fact, able to pay or give security for costs, the appellant is required to provide security for the costs to the extent of his or her ability.[156] This must be accomplished within ten days after the contest is sustained.[157] Failure to post security within the prescribed time period will result in the appeal's dismissal, unless an extension of time is obtained.[158]

C. *Notice of Appeal When No Appeal Bond Is Required*

In those situations where no security is required by law,[159] the appeal is perfected by filing with the trial court a written[160] notice of appeal within the same time period for filing and serving the appeal

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152. *See, e.g.*, Allred v. Lowry, 597 S.W.2d 353, 355 (Tex. 1980); King v. Payne 156 Tex. 105, 110, 292 S.W.2d 331, 336 (1956); Marshall v. Miller, 707 S.W.2d 231, 232-33 (Tex. App.—Dallas 1986, orig. proceeding).

153. *See* Culpepper v. Coker, 769 S.W.2d 373, 375 (Tex. App.—Houston [14th Dist.] 1989, no writ) (contest sustained on basis that appellant's attorney was source of funds for appeal).

154. *See* Goffney v. Lowry, 554 S.W.2d 157, 159 (Tex. 1977) (unskilled 19-year old mother who had received public assistance funds and who was unable to obtain loans was entitled to proceed on appeal without paying costs). On the other hand, a litigant who remains voluntarily unemployed and deliberately lives by generosity of others is not entitled a "free" appeal. *See* Keller v. Walker, 652 S.W.2d 542, 544 (Tex. App.—Dallas 1983, no writ).

155. Sansom v. Sprinkle, 799 S.W.2d 776, 778 (Tex. App.—Fort Worth 1990, orig. proceeding); *see* Lewelling v. Lewelling, 774 S.W.2d 801, 805 (Tex. App.—El Paso 1989), *rev'd on other grounds*, 796 S.W.2d 164 (Tex. 1990).

156. Some courts may permit the appellant to pay the security in installments or deferred payments. *See* Sullivan v. Sullivan, 32 Tex. Sup. Ct. J. 310, 311 (April 5, 1989) (appellant ordered to pay bond of $250 in five installments).

157. TEX. R. APP. P. 41(a)(2). The ten-day period does not apply if the court finds and recites that the affidavit was not filed in good faith. *Id.*

158. Martinez v. Llongueras, 729 S.W.2d 364, 365 (Tex. App.—Corpus Christi 1987, no writ).

159. The persons and entities exempt from posting security for costs are identified in a number of scattered statutes. *See* TEX. PROB. CODE ANN. § 12(c) (Vernon Supp. 1991); TEX. CIV. PRAC. & REM. CODE ANN. §§ 6.001(b), 6.002(b), 6.003(b), 64.091(d)(4), 104.006 (Vernon 1986 & Supp. 1991); TEX. ALCO. BEV. CODE ANN. § 5.46 (Vernon 1978).

160. "Oral notice or a recital in the judgment of notice does not comply with this [requirement]." TEX. R. APP. P. 40(a)(2); *see* J. M. C. v. State, 712 S.W.2d 237, 238 (Tex. App.—San Antonio 1986, no writ).

bond.[161] The notice must state the number and style of the case, the court in which the case is pending, and the appellant's desire "to appeal from the judgment or some designated portion thereof."[162]

Rule 40(a)(2) requires that the notice be filed and served on all parties in the same manner as notice of the filing of an appeal bond.[163] The considerations for serving notice of the filing of the appeal bond apply equally to the written notice of appeal.[164]

IV. PRESERVING ERROR IN THE PETITION FOR WRIT OF ERROR FROM THE COURT OF APPEALS[165]

A. *Perfecting Appeal by Writ of Error*

Appellate review by writ of error to the court of appeals provides a party who has not participated in the actual trial of the case the opportunity to vacate an unfair or incorrect judgment.[166] The scope of an appeal by writ of error is more limited than an ordinary appeal. The error complained of in a direct attack on a judgment by writ of error must be "apparent from the face of the record."[167]

An appeal by writ of error in the court of appeals is perfected when both the petition and the appeal bond or substitute are filed with the

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161. TEX. R. APP. P. 40(a)(2).

162. *Id.*

163. *Id.*

164. *See supra* § III A 5.

165. The author is indebted to Wendall Hall for the guidance his article on petitions for writ of error provided in the preparation of this section. *See* Hall, *Appellate Review of Default Judgments by Writ of Error*, 51 TEX. B.J. 192 (1988).

166. Flores v. H.E. Butt Grocery Co., 802 S.W.2d 53, 55 (Tex. App.—Corpus Christi 1990, no writ); TEX. R. APP. P. 45(b). "Petition for writ of error from the court of appeals" should not be confused with the procedure of the similar name used in obtaining supreme court review of a decision of a court of appeals. *See infra.* § X (discussing procedures governing applications for writ of error from the supreme court). Appeal by writ of error is not the exclusive method by which an absent party may challenge a judgment by direct attack. The alternative bill of review procedure in the trial court is also available to a party suffering an adverse judgment rendered in his absence. *See* Grayson Fire Extinguisher Co. v. Jackson, 566 S.W.2d 321, 327 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.); TEX. R. CIV. P. 329b(f). The bill of review procedure is not restricted to error appearing on the face of the record and is the appropriate remedy when extrinsic evidence is necessary to challenge judgment rendered against an absent party. *General Electric*, 34 Tex. Sup. Ct. J. at 732-33.

167. General Electric Co. v. Falcon Ridge Apartments, Joint Venture, 34 Tex. Sup. Ct. J. 731, 732 (June 19, 1991). The requirement that error appear on "the face of the record" permits the court of appeals to consider all of the papers on file in the appeal, including the statement of facts. DSC Finance Corporation v. Moffitt, 34 Tex. Sup. Ct. J. 825, 826 (September 20, 1991).

clerk of the trial court in which the judgment was rendered.[168] The petition and bond must be filed within six months after the final judgment is signed.[169] These filing requirements are jurisdictional.[170] Once the petition and appeal bond have been properly and timely filed, the appeal proceeds under the rules governing ordinary appeals.

B. *Requisites of Petition for Writ of Error*

The petition for writ of error must be signed by the party complaining of the judgment, or by his attorney, and addressed to the *clerk*[171] of the trial court in which the judgment was entered.[172] It must state the names and addresses of the parties adversely affected by the judgment,[173] even if those persons or entities were not parties to the original lawsuit in which the judgment was entered.[174] The petition must further allege that the petitioner did not participate at the trial.[175] In addition, the petition must "describe the judgment with sufficient certainty to identify it,"[176] and allege that the petitioner "desires to remove the [judgment] to the court of appeals for revision and correction."[177]

A petition for writ of error will be sufficient to invoke the jurisdiction of the court of appeals if it puts the trial court and all affected parties on notice that the petitioner wishes to obtain appellate review of the judgment.[178] Clerical errors or other defects are not jurisdic-

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168. TEX. R. APP. P. 45(d), (h).

169. TEX. CIV. PRAC. & REM. CODE ANN. § 51.013 (Vernon 1986); TEX. R. APP. P. 45(d); *see* DSC Finance Corp. v. Moffity, 797 S.W.2d 661 (Tex. 1990) (per curiam); Nueces County Hous. Assistance, Inc. v. M & M Resources, 806 S.W.2d 948, 949 (Tex. App.—Corpus Christi 1991, no writ).

170. Blair v. Lindsey, 141 S.W.2d 465, 466 (Tex. Civ. App.—Waco 1940, no writ); Yellow Cab Corp. v. Hill, 111 S.W.2d 1193, 1194 (Tex. Civ. App.—Dallas 1937, no writ).

171. TEX. R. APP. P. 45(a). The petition should not be directed to the trial court or the court of appeals. *Id.*

172. *Id.*

173. TEX. R. APP. P. 45(c).

174. *See* Procter v. Green, 673 S.W.2d 390, 392 (Tex. App.—Houston [1st Dist.] 1984, no writ); TEX. R. APP. P. 45(c).

175. TEX. R. APP. P. 45(b).

176. TEX. R. APP. P. 45(c); *see* Murphy v. Williams, 103 Tex. 155, 157, 124 S.W. 900, 900 (1910) (failure to describe judgment with sufficient particularity so as to distinguish it from other judgments precludes appeal).

177. TEX. R. APP. P. 45(c).

178. *See* Palacios v. Harris, 715 S.W.2d 418, 419 (Tex. App.—San Antonio 1986, no writ); Finley v. Finley, 410 S.W.2d 818, 820 (Tex. Civ. App.—Tyler 1966, writ ref'd n.r.e.).

tional and may be cured by amendment.[179]

C. *Notice of the Petition and Bond*

After the petition and appeal bond or substitute have been filed, the clerk must notify the parties by mailing a copy of the petition and appeal bond or substitute to all parties to the judgment.[180] The clerk's failure to give notice of the petition to the other parties has no affect on the validity of the petition.[181]

V. PRESERVING ERROR IN PRESENTING THE RECORD TO THE COURT OF APPEALS

Once the appeal bond or substitute is timely filed, the next critical step in preserving error on appeal is requesting and filing the appellate record. The record on appeal consists of a transcript and, "where necessary to the appeal," a statement of facts.[182] The burden of seeing that a record is filed which shows error requiring reversal rests entirely on the party seeking review.[183]

A. *Necessity for Timely Filed Record*

Although the absence of a record does not affect an appellate court's jurisdiction,[184] the failure to file a record will result in the waiver of error.[185] It is a long-standing rule of appellate law that a

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179. *See Palacios*, 715 S.W.2d at 419; Padgitt v. Fort Worth & R. G. Ry. Co., 104 Tex. 249, 251, 136 S.W. 442, 443 (1911).

180. TEX. R. APP. P. 45(f); *see* Carpenter v. Pink, 133 Tex. 82, 95, 124 S.W.2d 981, 987 (1939).

181. TEX. R. APP. P. 45(f).

182. TEX. R. APP. P. 50(a).

183. TEX. R. APP. P. 50(d); *see, e.g.*, Christiansen v. Prezelski, 782 S.W.2d 842, 843 (Tex. 1990); State Bar of Texas v. Grossenbacher, 781 S.W.2d 736, 737-38 (Tex. App.—San Antonio 1989, no writ); Archer v. Wood, 771 S.W.2d 631, 632 (Tex. App.—Dallas 1989, no writ); *see also infra* § VII C (discussing instances where appellee has a burden to request and file a record).

184. TEX. R. APP. P. 54(a) (failure to timely file transcript or statement of facts does not affect appellate court's jurisdiction).

185. *See, e.g.*, B.B.M.M., Ltd. v. Texas Commerce Bank-Chemical, 777 S.W.2d 193, 197 (Tex. App.—Houston [14th Dist.] 1989, no writ) (appellate court unable to find error or harm in exclusion of testimony without record of testimony); Monaghan v. Crawford, 763 S.W.2d 955, 958 (Tex. App.—San Antonio 1989, no writ) (in absence of statement of facts as to hearing, court presumes order that appellant be tested for drugs was supported by evidence); Petitt v. Laware, 715 S.W.2d 688, 690 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.) (ab-

party cannot demonstrate harmful error without a complete record.[186] Yet, there are numerous reported cases in which parties have forfeited grounds of error because they failed to file a complete record.

An appellate court has authority to consider a transcript and statement of facts only if they are timely filed or if they are filed within an extension of time granted under Rule 54(c).[187] Unless the deadline for filing the record in an ordinary appeal is extended by court order,[188] it must be filed with the appellate court within sixty days from the date the judgment is signed.[189] If any party files a timely motion to modify the judgment or for a new trial, or timely files a request for findings of fact and conclusions of law in a non-jury case, the record must be filed within 120 days after the signing of the judgment.[190]

The statement of facts and transcript, if any,[191] in an accelerated appeal must be filed within thirty days from the date the judgment or order appealed from is signed.[192] If a petition for writ of error to the court of appeals has been perfected, the record must be filed within sixty days after the date of perfection or when the petition and appeal bond are filed.[193]

The clerk of the court of appeals has no authority to file a late

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sence of motion for sanctions in transcript resulted in waiver of trial court error in refusing to issue sanctions).

186. Christiansen v. Prezelski, 782 S.W.2d 842, 843 (Tex. 1990).

187. TEX. R. APP. P. 54(a) and (c); *see* Attorney Gen. of Tex. *ex. rel.* Cal. v. Segree, 694 S.W.2d 383, 384 (Tex. App.—Corpus Christi 1985, no writ) (dismissing appeal because neither transcript nor motion for extension of time was timely filed). A motion to extend time to file the appeal bond does not extend the time to file the record. Collins v. Williamson Printing Corp., 746 S.W.2d 489, 491 (Tex. App.—Dallas 1988, no writ); Pierson v. Josef Mfg., Inc., 665 S.W.2d 193, 193 (Tex. App.—Dallas 1984, no writ).

188. Proper motions for extension of time to file the record based upon the clerk or court reporter's inability to meet the filing deadline are liberally granted. *See* Patton, *Deadlines and Extension Motions in Civil Appellate Litigation*, 20 ST. MARY'S L.J. 1, 50-53 (1988). The remedy of mandamus is also available to the appellant whose difficulty in meeting the record filing deadline stems from problems with the clerk or court reporter. *See, e.g.*, Wolters v. Wright, 623 S.W.2d 301, 305 (Tex. 1981); Foreman v. Jarrett, 796 S.W.2d 316, 317 (Tex. App.—Austin 1990, orig. proceeding); O'Neal v. County of San Saba, 577 S.W.2d 795, 796-797 (Tex. Civ. App.—Austin 1979, no writ).

189. TEX. R. APP. P. 54(a).

190. *Id.*; *see also* TEX. R. APP. P. 54(c).

191. The court may hear an accelerated appeal on the original papers filed in the trial court or on sworn and uncontroverted duplicates of such papers instead of a transcript. TEX. R. APP. P. 42(c).

192. TEX. R. APP. P. 42(a)(3). No motion for new trial is permitted in an appeal from an interlocutory order. TEX. R. APP. P. 42(a)(1).

193. TEX. R. APP. P. 54(a).

record. When the clerk receives a late transcript or statement of facts, he is required to note on it the date it was received, hold it subject to the order of the appellate court, and notify the party or his attorney tendering the late record of the action taken.[194] The clerk's file mark does not invoke the appellate court's jurisdiction.[195]

1. The Transcript

In a civil case, the "transcript" consists of the pleadings, the judgment, and all other documents filed with the clerk of the trial court.[196] This may include unofficial, unauthenticated, and gratuitously filed papers.[197]

No appeal can be reviewed without a transcript. In the absence of a transcript, the appellate court has no judgment to review.[198] The failure to file a transcript gives the appellate court grounds for dismissing the appeal, affirming the judgment, disregarding filed materials, or applying presumptions against the appellant.[199]

2. The Statement of Facts

The statement of facts is the court reporter's recordation of the testimony of the witnesses and exhibits which were received in evidence.[200] It includes voir dire, arguments of counsel, informal bills of

194. TEX. R. APP. P. 56(b).

195. *See* Blackman v. Housing Auth. of Dallas, 254 S.W.2d 103, 104 (Tex. 1953) (clerk's filing of late transcript does not confer jurisdiction).

196. TEX. R. APP. P. 51(a); *see* Pace Sports, Inc. v. Davis Bros. Publishing Co., 514 S.W.2d 247, 248 (Tex. 1974); Daylin, Inc. v. Juarez, 766 S.W.2d 347, 349 (Tex. App.—El Paso 1989, writ denied). In contrast, the "transcript" in federal court is what state courts refer to as the "statement of facts." *See* FED. R. APP. P. 16.

197. *Daylin*, 766 S.W.2d at 349; Light v. Verrips, 580 S.W.2d 157, 158-59 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ). Only file-marked documents may be included in the transcript. Munoz v. Gulf Oil Co., 732 S.W.2d 62, 64 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.).

198. *See* Harmon v. Miller, 530 S.W.2d 173, 173 (Tex. Civ. App.—Tyler 1975, no writ); Parks-Davis Auctioneers, Inc. v. L & W Tong Serv., Inc., 496 S.W.2d 679, 681 (Tex. Civ. App.—Corpus Christi 1973, no writ); *see also* 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 632 at 389 (Texas Practice Supp. 1987). As another commentator has observed: "[T]he fact that the absence of a transcript is not a jurisdictional defect does not alter the ultimate result; a party attempting to appeal without a transcript will always lose." Patton, *Deadlines and Extension Motions in Civil Appellate Litigation*, 20 ST. MARY'S L.J. 1, 20 n.114 (1988).

199. TEX. R. APP. P. 54(a).

200. *See* Insurance Co. v. Bellah, 373 S.W.2d 691, 693 (Tex. Civ. App.—Fort Worth 1963, no writ).

exception, and any other trial or pretrial proceedings taken down by the court reporter, if requested.

Most appeals will require a statement of facts for appellate review. The supreme court has held that a reviewing court cannot properly find reversible error with an incomplete statement of facts unless the appellant has requested a partial statement of facts in accordance with Rule 53(d).[201] If no statement of facts is filed, or if the statement of facts is incomplete, the appellate court must presume that the omitted evidence supports the judgment or order from which the appeal is taken.[202] Notable exceptions to the need for a statement of facts include cases involving summary judgments;[203] cases where error is apparent on the face of the pleadings;[204] appeals wherein the appellant's only contention is that the trial court entered the wrong judgment based on findings of fact;[205] an unchallenged jury verdict or an agreed case under Rule 263 of the Texas Rules of Civil Procedure;[206] appeals involving no factual dispute but "strictly questions of law";[207] and, appeals involving the jurisdiction of the trial court or fundamental error.[208]

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201. Christiansen v. Prezelski, 782 S.W.2d 842, 843 (Tex. 1990); *see* TEX. R. APP. P. 53(d) (if request for partial statement of facts includes statement of points to be relied on there shall be presumption on appeal that nothing omitted from the record is relevant to appeal).

202. *Christiansen*, 782 S.W.2d at 843; Haynes v. McIntosh, 776 S.W.2d 784, 785 (Tex. App.—Corpus Christi 1989, writ denied); Voskamp v. Arnoldy, 749 S.W.2d 113, 119-20 (Tex. App.—Houston [1st Dist.] 1987, writ denied).

203. *See* El Chico Corp. v. Poole, 732 S.W.2d 306, 308-09 (Tex. 1987).

204. *See, e.g., El Chico*, 732 S.W.2d at 309; Taylor v. Catalon, 140 Tex. 38, 42, 166 S.W.2d 102, 105 (1942); Houchin v. Godell, 635 S.W.2d 427, 429 (Tex. App.—Fort Worth 1982, no writ).

205. Willmon v. Sigma Steel, Inc., 551 S.W.2d 142, 144 (Tex. Civ. App.—Fort Worth 1977, no writ).

206. *See, e.g.*, Cowling v. Colligan, 158 Tex. 458, 464-65, 312 S.W.2d 943, 947 (1958); Harshberger v. Reliable-Aire, Inc., 619 S.W.2d 478, 479 (Tex. Civ. App.—Corpus Christi 1981, writ dism'd); McPherson v. Black, 346 S.W.2d 615, 616 (Tex. Civ. App.—Waco 1961, writ ref'd n.r.e.); *see also* TEX. R. CIV. P. 263 (parties may submit matters in controversy upon agreed statement of facts).

207. Segrest v. Segrest, 649 S.W.2d 610, 611 (Tex.), *cert. denied*, 464 U.S. 894 (1983).

208. Richardson v. First Nat'l Life Ins. Co., 419 S.W.2d 836, 839 (Tex. 1967) (jurisdiction determined from the face of the pleadings); Ramsey v. Dunlop, 146 Tex. 196, 204, 205 S.W.2d 979, 984 (1947) (fundamental error must be apparent from the record without examining a statement of facts).

B. *Requesting the Record*

1. Written Designation for Transcript

The filing of an appeal bond or substitute ensures that a transcript which includes the documents specifically enumerated in Rule 51(a) will be automatically prepared and transmitted to the appellate court.[209] In many cases, the documents listed in Rule 51(a) will be the only ones necessary for appeal. If other documents are needed, they must be requested by written designation, or by written stipulation of the parties,[210] filed with the clerk "[a]t or before the time prescribed for perfecting the appeal."[211]

The 1990 amendments to the appellate rules make it clear that an untimely request for the record is not a jurisdictional prerequisite for appellate review.[212] This does not mean the appellant can make a late request for the record with impunity. A late request for a transcript or statement of facts may preclude the appellant from obtaining an extension of time to file the record.[213] In addition, the clerk's failure to include designated matters in the transcript cannot be the basis for a complaint on appeal if the designation specifying such matter was late.[214] Thus, a late request for either a transcript or a statement of facts may be detrimental to the success of the appeal if the untimeliness of the request delays the filing of the record.

Although Rule 51(a) is self-executing, it is good practice to file a written designation of matters to be included in the transcript even when the requested documents are the same as those listed in Rule

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209. TEX. R. APP. P. 51(a), 51(c). The documents included in the bare-bones transcript which the clerk will prepare and transmit to the appellate court without request in civil cases are: (1) the live pleadings; (2) the court's docket sheet; (3) the charge of the court and the verdict of the jury, or the court's findings of fact and conclusions of law; (4) the court's judgment or other order appealed from; (5) any motions for new trial and the order of the court thereon; (6) any notice of appeal; (7) any appeal bond, affidavit in lieu of bond or clerk's certificate of a deposit in lieu of bond; (8) any notice of limitation of appeal in civil cases made pursuant to Rule 40; (9) any formal bills of exception provided for in Rule 52; and (10) a certified bill of costs, including the costs of the transcript and the statement of facts (if any), showing any credits for payments made. TEX. R. APP. P. 51(a).

210. TEX. R. APP. P. 50(b). ("The parties by written stipulation filed with the clerk of the trial court may designate the parts of the . . . evidence to be included in the record").

211. TEX. R. APP. P. 51(b).

212. TEX. R. APP. P. 51 comment; TEX. R. APP. P. 53 comment.

213. *See* TEX. R. APP. P. 54(c) (reason for late request must be explained in motion for extension of time to file record).

214. TEX. R. APP. P. 51(b).

51(a).[215] This practice may avert a misunderstanding between the lawyer and the transcript clerk regarding the documents which the lawyer expects to be included in the transcript. *Nuby v. Allied Bankers Life Ins. Co.*[216] illustrates the potential pitfalls of relying exclusively on the self-executing provisions of Rule 51(a) to fulfill the appellant's burden of filing a complete transcript. In *Nuby*, the appellants requested a partial statement of facts and filed a separate statement of points under Rule 53(d).[217] The trial court's docket sheet showed that a "statement of points to be relied on for appeal" was filed in the trial court, but the statement itself was not included in the transcript. The appellants did not realize that the statement of points had been omitted from the transcript until after submission.

In their attempt to supplement the transcript by adding the statement of points, the appellants argued that the statement of points should have been automatically included in the transcript under Rule 51(a) as "any notice of limitation of appeal."[218] The Austin Court of Appeals, however, denied the motion to supplement and pointed out that Rule 51(a) actually refers to the notice of limited appeal made pursuant to Rule 40,[219] not the statement of points made to limit the record under Rule 53(d).[220]

The written designation of transcript must be specific.[221] Rule 51(b) requires the clerk to disregard any general designations of documents such as "all papers filed in the cause."[222] When making a written designation, it is best to include the exact title of the document and the date the document was filed.[223] A copy of the designation

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215. TEX. R. APP. P. 51(c).

216. 797 S.W.2d 396, 397-99 (Tex. App.—Austin 1990, no writ).

217. *Id.*; *see* TEX. R. APP. P. 53(d) ("[i]f appellant requests or prepares a partial statement of facts, he shall include in his request or proposal a statement of the points to be relied on and shall thereafter be limited to such points"). The procedures for requesting a partial statement of facts under Rule 53(d) are discussed *infra* at § V B 3.

218. *Nuby*, 797 S.W.2d at 398; *see* TEX. R. APP. P. 51(a).

219. TEX. R. APP. P. 40(a)(4). "No attempt to limit the scope of an appeal shall be effective unless the severable portion of the judgment from which the appeal is taken is designated in a notice. . . ." *Id.*

220. *Nuby*, 797 S.W.2d at 398.

221. *See* Voskamp v. Arnoldy, 749 S.W.2d 113, 123 (Tex. App.—Houston [1st Dist.] 1987, writ denied).

222. TEX. R. APP. P. 51(b).

223. Hanby, *Preservation of Error on Appeal*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE E-6 (1990).

must be served on all parties to the trial court judgment.[224]

An appellant is entitled to a transcript containing all matters "material" to the appeal.[225] Not every document filed in the case is relevant or material to the appeal. Some documents, regardless of their perceived relevance to the appeal, are not properly included in the transcript and should not be requested.[226] Documents which should be omitted from the transcript include trial briefs and memorandums of law,[227] letters to and from the trial court and the attorneys,[228] letters between attorneys,[229] unsworn or unauthenticated documents which do not constitute pleadings,[230] unauthenticated deposition testimony,[231] and documents submitted for the first time on appeal.[232]

Although the rules state that it is the clerk's duty to prepare and transmit the transcript to the court of appeals,[233] the ultimate burden to see that the transcript is properly prepared and transmitted to the court of appeals rests on the appealing party.[234] This burden is not discharged by merely making a proper and timely request for the

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224. TEX. R. APP. P. 51(b).

225. TEX. R. APP. P. 51(a). ("the transcript on appeal shall include . . . any filed paper any party may designate as material"); *see* Benson v. Grayson County Child Welfare, 666 S.W.2d 166, 167-68 (Tex. App.—Dallas 1983, no writ).

226. TEX. R. APP. P. 53(e). If an appellant requests the inclusion of documents that are not relevant to the issues on appeal and the unnecessary papers are made part of the transcript, he or she may be charged with added costs. *Id.*; *see* Goetz v. Goetz, 534 S.W.2d 716, 720 (Tex. Civ. App.—Dallas 1976), *modified and aff'd*, 567 S.W.2d 892 (Tex. Civ. App.—Dallas 1978, no writ). Nevertheless, when the materiality of a particular document is questionable, it should be included.

227. Concrete Constr. Supply v. M.F.C., Inc., 636 S.W.2d 475, 483-84 (Tex. App.—Dallas 1982, no writ).

228. *See* Russell v. McMullen, 601 S.W.2d 812, 813-14 (Tex. Civ. App.—Fort Worth 1980, no writ).

229. Llast v. Emmett, 526 S.W.2d 288, 290 (Tex. Civ. App.—Tyler 1975, no writ).

230. *See* Robbins v. Warren, 782 S.W.2d 509, 510 (Tex. App.—Houston [1st Dist.] 1989, no writ) (unauthorized excerpts of interrogatory answers); Bokhoven v. Bokhoven, 559 S.W.2d 142, 144 (Tex. Civ. App.—Tyler 1977, no writ) (unsworn inventory and appraisement).

231. *See, e.g.*, Dyer v. Shafer, 779 S.W.2d 474, 476 (Tex. App.—El Paso 1989, writ denied); Johnson by Johnson v. Li, 762 S.W.2d 307, 308 (Tex. App.—Fort Worth 1988, writ denied); Deerfield Land Joint Venture v. Southern Union Realty, 758 S.W.2d 608, 609-10 (Tex. App.—Dallas 1988, writ denied).

232. *See, e.g., Deerfield*, 758 S.W.2d at 609-10; Perry v. Kroger Stores, Store No. 119, 741 S.W.2d 533, 535 (Tex. App.—Dallas 1987, no writ); Johnson v. J.W. Constr. Co., 717 S.W.2d 464, 466 (Tex. App.—Fort Worth 1986, no writ). Appellate courts, however, may receive affidavits to determine their own jurisdiction. Stewart v. Texco Newspapers, Inc., 734 S.W.2d 175, 177 (Tex. App.—Houston [1st Dist.] 1987, no writ).

233. TEX. R. APP. P. 51(c).

234. *See, e.g.*, Nix v. Fraze, 752 S.W.2d 118, 120 (Tex. App.—Dallas 1988, no writ);

transcript.[235] Therefore, an appellant should monitor the clerk's progress in preparing and transmitting the transcript to see that it is properly and timely submitted to the appellate court.

2. Written Request for the Statement of Facts

At or before the time prescribed for perfecting the appeal of a case requiring a statement of facts,[236] an appealing party must make a written request to the official court reporter designating the proceedings to be included in the statement of facts.[237] The request must be filed with the clerk of the trial court and a copy served on the appellee.[238] All other parties in the trial court should also be sent a copy of the request.[239]

As with requests for the transcript, the failure to make a timely request for application for the statement of facts may affect the court of appeals' consideration of a motion to grant an extension of time to file the statement of facts.[240] If the request is made at or before the time for perfecting the appeal, it is timely as a matter of law.[241] However, an appealing party should make the request for the statement of facts as soon as possible after the decision to appeal is made.[242] In one

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Speer v. Stover, 711 S.W.2d 730, 735-36 (Tex. App.—San Antonio 1986, no writ); Walker v. Horine, 695 S.W.2d 572, 579 (Tex. App.—Corpus Christi 1985, no writ).

235. *Nix*, 752 S.W.2d at 121; *Walker*, 695 S.W.2d at 579.

236. Certain appeals may be reviewed without a statement of facts. *See supra* § V A 2.

237. TEX. R. APP. P. 53(a).

238. *Id.*

239. While Rule 53(a) does not expressly require service of a copy of the request for a statement of facts on all parties to the trial court judgment, it presumes service on all parties by providing that "any party" may request additional portions of the record ten days "after service of a copy of appellant's request." *See* TEX. R. APP. P. 53(a) (copy of request shall be served "on the appellee"). Careful appellate practitioners will serve a copy of the request for a statement of facts on all parties in the trial court, notwithstanding the omission of this requirement in Rule 53(a).

240. *See, e.g.*, Container Port Servs. v. Gage, 719 S.W.2d 662, 664-65 (Tex. App.—El Paso 1986, no writ); Dillard v. Freeland, 714 S.W.2d 378, 381 (Tex. App.—Corpus Christi 1986, no writ); McKellips v. McKellips, 712 S.W.2d 540, 542 (Tex. App.—El Paso 1986, no writ); *see also* Winston Int'l Elec. v. Rio Radio Supply, 726 S.W.2d 161, 162 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.) (appeal dismissed where appellant filed unverified motion for extension without explaining delay in designating record); *cf.* TEX. R. APP. P. 54(c) (motion with reasonable explanation needed).

241. Sumner & Greener v. Carlson, 739 S.W.2d 127, 129 (Tex. App.—Fort Worth 1987, no writ).

242. Most court reporters need as much advance notice of the need to prepare a statement of facts as can possibly be given. This is particularly true where the court reporter is assigned to a court with a heavy trial docket or in cases involving lengthy trials. Many times

case, a delay of only five days resulted in the denial of a motion for extension.[243] The court of appeals in that case observed: "The diligent attorney should not wait until the ninetieth day after the judgment to file an appeal bond and request a statement of facts in a lengthy case, even though he has a right to do so."[244]

The written request for statement of facts should be in the form of a letter or motion addressed to the court reporter. If the parties can agree on the proceedings to be included in the statement of facts, the request may be in the form of a joint motion or written stipulation.[245] The request should clearly reference the cause number and style of the proceeding from which the appeal is taken and advise the court reporter of the deadline for filing the statement of facts. It should also identify the date and nature of each proceeding to be transcribed, (e.g., trial on the merits, voir dire proceedings, objections to the charge) and list the exhibits, if any, to be included.

Rule 53(c) sets the standard for determining which evidence and proceedings should be requested for inclusion in the statement of facts:

> All matters not essential to the decision of the questions presented on appeal shall be omitted. Formal parts of all exhibits and more than one copy of any document appearing in the statement of facts shall be excluded. All documents shall be abridged by omitting all irrelevant and formal portions thereof.[246]

Therefore, the stated policy of Rule 53 favors an abbreviated statement.[247] However, with the exception of the rare instances when a statement of facts is unnecessary to the appeal, or when the appellant requests a partial statement of facts pursuant to the provisions of Rule 53(d), the appellant should request the court reporter to prepare a

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the court reporter will need an extension of time to prepare the statement of facts, even if the request is timely made. *See Container*, 719 S.W.2d at 665 (granting extension motion when court reporter's affidavit demonstrated impossibility of preparing statement of facts by deadline even if appellate counsel made timely request); *see also Sumner*, 739 S.W.2d at 128 (appellate rules create time bind that has plagued courts for years).

243. *McKellips*, 712 S.W.2d at 540.

244. *Id.* at 542; *see also Container*, 719 S.W.2d at 664; *Dillard*, 714 S.W.2d at 381.

245. *See* TEX. R. APP. P. 50(b).

246. TEX. R. APP. P. 53(c).

247. O'Connor, *Perfecting the Appeal*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE B-73 (1988). To enforce this policy, Rule 53 penalizes requesting parties with payment of the cost for unnecessary portions of the statement of facts, regardless of the outcome of the appeal. *See* TEX. R. APP. P. 53(e).

complete transcription of all the proceedings, including the voir dire and jury argument if necessary.[248] Failure to include all of the evidence necessary for appellate review will trigger the presumption that all omitted evidence supports the judgment and prevent the reviewing court from finding harmful error.[249]

Once the request for a statement of facts is prepared, it then must be delivered to the court reporter at or before the time for perfecting the appeal.[250] Alternatively, the request may be mailed to the court reporter by first-class United States mail the day before the deadline for perfecting the appeal.[251] Merely filing the request with the clerk of the trial court will not suffice as notice to the court reporter.[252]

A different rule for requesting a statement of facts applies to indigent appellants. Appellants who have perfected appeal by filing an affidavit in lieu of bond request the statement of facts by filing an "application" with the trial court asking that the court order the court reporter to prepare a statement of facts and deliver it to the appellant.[253] The indigent appellant is not required to make an independent request for the statement of facts from the court reporter. Once the application is filed, it is the trial court's duty to see that the court reporter prepares a statement of facts free of charge and trans-

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248. O'Connor, *Perfecting the Appeal*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE B-74 (1988). Voir dire and jury argument may be safely omitted from the request if unchallenged on appeal. *Id.*

249. *See, e.g.*, Christiansen v. Prezelski, 782 S.W.2d 842, 843 (Tex. 1990); AT&T Communications v. Glass, 783 S.W.2d 305, 306 (Tex. App.—Tyler 1989, no writ); Cedar Crest No. 10, Inc. v. City of Dallas, 754 S.W.2d 351, 353-54 (Tex. App.—Eastland 1988, writ denied), *cert. denied*, 109 S. Ct. 2101 (1989). In some cases no record is made of a hearing or trial, yet the judgment or order complained of either recites that evidence was heard or is silent regarding the hearing of evidence. In such a case, the appellate court will presume, in the absence of a statement of facts, that evidence supporting the judgment was offered. *See, e.g.*, Lane v. Fair Stores, 243 S.W.2d 683, 685 (Tex. 1951); *AT&T Communications*, 783 S.W.2d at 306; *Cedar Crest No. 10*, 754 S.W.2d at 354. To avoid application of this presumption, the appellant should obtain an affidavit from the official court reporter stating that no record was made or that no testimony was taken in the case. *See* Castillo v. State, 733 S.W.2d 560, 561 (Tex. App.—San Antonio 1987, no writ). The affidavit must be filed and made part of the transcript. *Id.* at 561-62.

250. *See* TEX. R. APP. P. 53(a) ("The appellant, at or before the time prescribed for perfecting the appeal, shall make a written request to the official reporter designating the portion of the evidence" to be included in the record). *Id.*

251. TEX. R. CIV. P. 5.

252. Ameriphone, Inc. v. Tex-Net, Inc., 742 S.W.2d 777, 778 (Tex. App.—San Antonio 1987, no writ).

253. TEX. R. APP. P. 53(j)(1).

mits it to the appellant on a timely basis.[254]

The content of the application to the trial court for a statement of facts filed by an indigent appellant should follow the same general format as the court reporter request. The application should be directed to the trial court rather than the court reporter and request that the trial court order the court reporter to prepare the statement of facts free of charge to the appellant.[255]

3. Request for Partial Statement of Facts

Under Rule 53(d), the appellant may request a partial record limited to points of error stated in advance of the brief.[256] Rule 53(d) provides in pertinent part: "If appellant requests or prepares a partial statement of facts, he shall include in his request or proposal a statement of the points to be relied on and shall thereafter be limited to such points."[257] In order to request a partial statement under this rule, five steps must be followed:

(1) A written request for the partial statement of facts must be carefully drafted to include a "statement of the points to be relied on[258] and request that all evidence relevant to the points specified be included in the partial statement of facts."[259] The statement of points may be included in the same document as the request or drafted as a separate document;[260]

(2) The written request for partial statement of facts must be delivered to the official court reporter within the time for perfecting appeal;[261]

(3) A copy of both the request and the statement of the points must be served on all parties in the trial court within the same time period;[262]

(4) Another copy of the request and the statement of points must be

254. *Id.*

255. *Id.*

256. TEX. R. APP. P. 53(d). This procedure should not be confused with a notice of limited appeal under Rule 40(a)(4). *See* TEX. R. APP. P. 40(a)(4) ("No attempt to limit the scope of an appeal shall be effective unless the severable portion of the judgment from which the appeal is taken is designated in a notice . . .").

257. TEX. R. APP. P. 53(d).

258. *Id.*

259. *See* Candelier v. Ringstaff, 786 S.W.2d 41, 44 (Tex. App.—Beaumont 1990, writ denied).

260. Shafer v. Conner, 34 Tex. Sup. Ct. J. 748, 749 (June 19, 1991).

261. TEX. R. APP. P. 53(a); *see* Alford v. Whaley, 794 S.W.2d 920, 923 (Tex. App.—Houston [1st Dist.] 1990, no writ).

262. *See Alford*, 794 S.W.2d at 923; TEX. R. APP. P. 53(a).

simultaneously filed with the clerk of the trial court;[263] and,
(5) The request and the statement of points must be timely designated for inclusion in the transcript.[264]

When these procedures are used in an appeal that does not necessitate a review of the entire record,[265] the appellate court must presume that nothing in the omitted portions of the statement of facts is relevant to "any of the points specified or to the disposition of the appeal."[266] In order to overcome the presumption that the omitted evidence is irrelevant, the appellee may designate additional portions of the evidence to be included in the statement of facts.[267]

Strict compliance with Rule 53(d) is necessary in order to activate the presumption that the omitted portions of the record are irrelevant and to enable the reviewing court to determine whether there is harmful error.[268] Rule 53(d) is complied with "if both the request for a partial statement of facts and the statement of points to be relied upon are timely made, appear in the record, and are filed as either one or separate documents."[269] The opposite presumption that the omitted evidence is relevant and supports the judgment of the trial court will be applied when these requirements are not met.[270] Moreover, an appellate court may not properly find reversible error when the appellant has not complied with Rule 53(d).[271]

The request for a partial statement of facts and the statement of points to be relied upon must be made and filed in accordance with the specific procedures set out in Rule 53(a). This rule requires that the request be served on the official court reporter at or before the

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263. TEX. R. APP. P. 53(a).

264. Dresser Industries v. Forscan Corp., 641 S.W.2d 311, 314-15 (Tex. App.—Houston [14th Dist.] 1986, no writ).

265. Appeals challenging the sufficiency of the evidence cannot be reviewed without a complete statement of facts. Schafer v. Conner, 34 Tex. Sup. Ct. J. 748, 749 (June 19, 1991).

266. TEX. R. APP. P. 53(d); *see Schafer*, 34 Tex. Sup. Ct. J. at 749; Producer's Constr. Co. v. Muegge, 669 S.W.2d 717, 718 (Tex. 1984).

267. TEX. R. APP. P. 53(d); *see Producer's Constr. Co.*, 669 S.W.2d at 718; Phaup v. Boswell, 731 S.W.2d 625, 627 (Tex. App.—Houston [1st Dist.] 1987, no writ).

268. *See* Christiansen v. Prezelski, 782 S.W.2d 842, 843-44 (Tex. 1990); Nuby v. Allied Bankers Life Ins. Co., 797 S.W.2d 396, 399 (Tex. App.—Austin 1990, n.w.h.).

269. *Schafer*, 34 Tex. Sup. Ct. J. at 749; *accord Alford*, 794 S.W.2d at 923 (presumption is invoked when both the request and statement of points are timely made and both appear in record as one or separate documents).

270. *See* Southwestern Bell Tel. Co. v. Cafi Co., 777 S.W.2d 778, 779 (Tex. App.—Beaumont 1989, no writ).

271. *Christiansen*, 782 S.W.2d at 843-44.

time prescribed for perfecting the appeal.[272] A copy of both the request and the statement of the points must also be served on all parties in the trial court within the same time period.[273] Another copy of the request and statement of points must then be filed with the clerk of the trial court.[274] Although the literal wording of Rule 53(d) requires that the statement of points be included "in" the request for a partial statement of facts,[275] the Supreme Court of Texas has held that the statement of points may be filed as a separate document.[276]

In addition, the request for a partial statement of facts and the statement of points must be designated in writing for inclusion in a timely filed transcript.[277] This omission can be a trap for inexperienced appellate practitioners. Neither document is listed among the documents that are automatically included in the transcript without written designation.[278] In *Nuby v. Allied Bakers Life Ins. Co.*, the appellant's lawyer mistakenly believed that the request was automatically included in the transcript because of its similarity to the notice of limited appeal under Rule 40(a)(4).[279] The Dallas Court of Appeals refused to allow the appellants to supplement the transcript to include their request for partial statement of facts, even though the partial statement of facts had been filed in the appellate court.[280]

It is unclear whether a late request for partial statement of facts alone will deprive an appellant of the presumption of Rule 53(d). On its face, Rule 53(d) only requires that the request and statement of the points be "filed" to invoke the presumption.[281] Moreover, an appellant is not prevented from timely filing a statement of facts merely

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272. TEX. R. APP. P. 53(a).

273. *See Alford*, 794 S.W.2d at 923; TEX. R. APP. P. 53(a); *see also* TEX. R. APP. P. 53(b) (ten days after service of a copy of the request "any party" may request additional portions of the evidence).

274. TEX. R. APP. P. 53(a).

275. *See* TEX. R. APP. P. 53(d).

276. *Schafer*, 34 Tex. Sup. Ct. J. at 749.

277. *Dresser*, 641 S.W.2d at 315; *see Schafer*, 34 Tex. Sup. Ct. J. at 749 (request and statement must appear in appellate record).

278. *See* TEX. R. APP. P. 51(b).

279. *See Nuby*, 797 S.W.2d at 398-99 (Tex. App.—Austin 1990, no writ); *see also* TEX. R. APP. P. 51(b). "[T]he transcript on appeal shall include . . . any notice of limitation of appeal in civil cases made pursuant to Rule 40." *Id.* A "notice of limitation of appeal" pursuant to Rule 40(a)(4) is automatically included in the transcript under Rule 51(b). *See id.*

280. *Nuby*, 797 S.W.2d at 398.

281. *See* TEX. R. APP. P. 53(d).

because the request for the statement of facts is untimely.[282] While nothing in the rules indicates that the presumption of Rule 53(d) will be denied on the basis of a late request when the partial statement of facts is filed on time, a careful appellate practitioner will timely request the partial statement of facts and see that all parties are served with the request and the statement of points within the time for perfecting the appeal.[283]

Rule 53(d) should not be used when an appellant complains of factual or legal sufficiency of the evidence. An appellant who attacks the sufficiency of the evidence has the burden of presenting a complete statement of facts to show reversible error.[284] This burden is not discharged by filing a partial statement of facts under Rule 53(d).[285] When an appellant does not file the entire record in an appeal challenging the sufficiency of the evidence, the appellate court must presume that the omitted evidence supports the trial court's judgment notwithstanding the appellant's compliance with Rule 53(d).[286]

It is important that the partial statement of facts include all evidence relevant to the points of error specified in the statement of points. The presumption of Rule 53(d) that the omitted evidence is irrelevant to the appeal may be rebutted by evidence found in this partial statement of facts, even when an appellant strictly complies with the rule. In *Candelier v. Ringstaff*, the partial statement of facts reflected a comment by the trial judge that indicated the judgment was rendered on the basis of evidence not included in the partial statement of facts.[287] Finding that the judge's comment affirmatively showed the omitted evidence was relevant to the points specified, the Beaumont Court of Appeals applied the reverse presumption that the omitted portion of the record supported the judgment:

> Appellants filed a request for a partial statement of facts which included their points of error and which requested only the hearings held in 1987

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282. *See id.*

283. *See Alford*, 794 S.W.2d at 923 (court held appellants obtained the benefit of the presumption since both the request and the statement of points were timely made and appeared in the record); *see also Schafer*, 34 Tex. Sup. Ct. J. at, 749 (the rule is complied with if the request and statement of points are "timely made" and appear in the record).

284. Englander Co. v. Kennedy, 428 S.W.2d 806, 807 (Tex. 1968).

285. *See Schafer*, 34 Tex. Sup. Ct. J. at 749; *Candelier*, 786 S.W.2d at 44.

286. *Schafer*, 34 Tex. Sup. Ct. J. at 749; *see* Haynes v. McIntosh, 776 S.W.2d 784, 785-86 (Tex. App.—Corpus Christi 1989, writ denied); Voskamp v. Arnoldy, 749 S.W.2d 113, 119-20 (Tex. App.—Houston [1st Dist.] 1987, writ denied).

287. *See Candelier*, 786 S.W.2d at 44.

> and 1988 but which excluded the trials held in 1982 and 1984. There is a presumption that nothing omitted from the record is relevant to any of the points specified or to the disposition of the appeal. TEX. R. APP. P. 53(d). This presumption is rebuttable. . . .
>
> It is clear from the record before us that the court considered the evidence produced during the entire trial in making its determination of the fact issues of good faith and just cause and not just that evidence produced during the hearings held in 1987 and 1988. . . . Without the entire statement of facts expressly relied on by the court, appellants have not met their burden of showing reversible error.[288]

As the court of appeals in *Candelier* observed, the procedures of Rule 53(d) do not remove the appellant's burden to present a sufficient record showing reversible error.[289] Therefore, even when an appellant has the benefit of the presumption of Rule 53(d) that the omitted evidence is irrelevant to the appeal, the appellant still must present enough of the record to establish error and to show that harm occurred as a result of the alleged error.[290] For this reason, a lawyer who lacks the time to make meaningful decisions about the evidence to be included in the record should not use a partial statement of facts.[291]

4. Substitutes for the "Q & A" Statement of Facts

In lieu of a statement of facts in the usual question and answer format, the appellant may have the proceedings memorialized by two other methods: a narrative statement of facts[292] or an agreed statement of the case.[293] Neither method is recommended when the appeal involves challenges to the sufficiency of the evidence because a narrative or agreed statement typically does not provide a complete record of the evidence.[294]

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288. *Id.*

289. *See* Galvin v. Gulf Oil Corp., 759 S.W.2d 167, 172-73 (Tex. App.—Dallas 1988, writ denied); TEX. R. APP. P. 50(d).

290. 290.*See, e.g.*, *Christiansen*, 782 S.W.2d at 843-44; Tapiador v. North Am. Lloyds of Tex., 772 S.W.2d 954, 955 (Tex. App.—Houston [1st Dist.] 1989, no writ); *Galvin*, 759 S.W.2d at 172-173.

291. *See* 31 J. WICKER, CIVIL TRIAL AND APPELLATE PROCEDURE § 639 at 406 (Texas Practice 1985) (noting that the time pressures of a busy law practice make it difficult to evaluate evidence for purpose of partial statement of facts).

292. TEX. R. APP. P. 53(i).

293. TEX. R. APP. P. 50(c).

294. *But cf.* Benson v. Grayson County Child Welfare, 666 S.W.2d 166, 168 (Tex. App.—Dallas 1983, no writ) (detailed narrative of facts which includes all material evidence

a. Narrative Statements

Rule 53(i) authorizes an appellant to prepare and file with the clerk of the trial court a condensed statement, in narrative form, of all or part of the evidence.[295] The narrative statement must be served on the opposing party or his counsel.[296] If an opposing party is dissatisfied with the narrative statement, it may demand that the appealing party request a question and answer statement of facts prepared by the official court reporter within ten days after receiving the statement.[297]

Generally, a narrative statement of facts should not be permitted as a substitute for a Q & A statement of facts over an opposing party's objection.[298] Nevertheless, one court did allow a narrative to be used despite the objection of an opposing party. In *Benson v. Grayson County Child Welfare*,[299] the trial court ordered the court reporter to prepare a narrative statement of facts in response to the appellant's affidavit of indigency. The appellant complained that the narrative was incomplete and that she needed a complete statement of facts to substantiate her no evidence and insufficient evidence points of error.[300] The Dallas Court of Appeals sustained the trial court's order

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does not deny meaningful review of insufficiency challenge). When an appellate court reviews a factual sufficiency challenge, it must examine the entire record. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 367-68 (1960); Hall, *Standards of Appellate Review in Civil Appeals*, 21 ST. MARY'S L.J. 865, 919 (1990). This rule of appellate review does not permit the court to disregard evidence, unless there is a presumption that the evidence is irrelevant. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 367-68 (1960); Garwood, *The Question of Insufficient Evidence on Appeal*, 30 TEX. L. REV. 803, 811 (1952); *see* Producer's Constr. Co. v. Muegge, 669 S.W.2d 717, 718 (Tex. 1984) (presumption that omitted evidence is irrelevant when partial statement of facts is requested allows court to decide evidentiary point without entire record); TEX. R. APP. P. 53(d) (presumption that omitted evidence is irrelevant applies when statement of points is contained in request for partial statement of facts). The rules do not provide for such a presumption when a narrative or agreed statement of facts is supplied.

295. TEX. R. APP. P. 53(i).

296. *Id.*

297. *Id.* A narrative statement of facts used in the trial court is not permitted as a substitute for question and answer statement of facts on appeal, even though the opposing party makes no objection to the narrative at trial. *See* Delgado v. Coca-Cola Bottling Co., 716 S.W.2d 582, 583 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).

298. TEX. R. APP. P. 53(i) ("[I]f dissatisfied with the narrative statement, [the opposing party may] . . . require the testimony in question and answer form to be substituted for all or part thereof"); *see* Wright v. Wright, 699 S.W.2d 620, 622-23 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).

299. 666 S.W.2d 166 (Tex. App.—Dallas 1983, no writ).

300. *Id.* at 168.

on the basis that the objecting party failed to show that the narrative statement was inadequate for meaningful review of the appeal.[301] The court held that any deficiencies in the statement could be cured by supplementation.[302]

b. Agreed Statements

Another substitute for the question and answer statement of facts is provided in Rule 50(c).[303] Under this rule, the parties to an appeal may agree upon a "brief statement of the case" and of the "facts proven."[304] The only procedural requirement for presenting an agreed statement of the facts is that the statement be copied into the transcript.[305]

C. *Supplementing and Correcting the Record*

1. Supplementing the Record

a. Prior to Submission

A common deficiency in an appellate record is the omission of a vital part of the transcript or statement of facts. These errors usually occur because a lawyer neglects to designate or request a material part of the record, or because the clerk or court reporter inadvertently omits a part of the record.[306] In either event, courts of appeals have a mandatory duty to permit supplementation of the transcript and statement of facts prior to submission "unless the supplementation will unreasonably delay disposition of the appeal."[307]

Rule 55(b) provides three methods for supplementing the record before submission: (1) by stipulation of the parties; (2) by an order of the trial court upon notice and hearing; or (3) by an order of the appellate court based on its own motion or the motion of a party.[308] These procedures allow a party to supplement an existing appellate

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301. *See id.* at 169.

302. *Id.*

303. TEX. R. APP. P. 50(c).

304. *Id.*

305. *Id.*

306. Watson & Hunt, *Rescuing the Record (Appellate First Aid)* in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE Q-2 (1990).

307. TEX. R. APP. P. 55(b) (court "shall" permit supplementation unlesss it unreasonably delays appeal).

308. *Id.* Narrative and agreed statements may also be supplemented. *See* Benson v. Grayson County Child Welfare, 666 S.W.2d 166, 168 (Tex. App.—Dallas 1983, no writ).

record; they do not apply if no appellate record has been filed in the first instance.[309]

Supplementing the record by stipulation of the parties usually requires nothing more than a written stipulation setting out the parties' agreement, accompanied by the omitted portion of the transcript or statement of facts as prepared by the clerk or court reporter.[310] However, some clerks will not prepare or transmit a supplemental transcript after the deadline for filing the record without a court order directing them to do so. In such a case, the parties should submit a joint motion to the trial court or the court of appeals requesting that an agreed order be entered which permits the supplementation and which directs the clerk to prepare and file the supplemental record.

A party whose request for a supplemental record is opposed must file a motion in the trial court or the court of appeals.[311] The motion to supplement the record should demonstrate that the supplement will not delay the court's disposition of the appeal.[312] The motion should also specifically describe the omitted evidence and show why it is "material" to the disposition of the appeal.[313] If materiality is not demonstrated, the court can refuse the supplement even if it will not delay the appeal.[314] In cases where delay is likely to occur, the motion should contain any exonerating reasons for omitting the evidence from the original record such as neglect or inadvertence of the clerk or court reporter.[315]

A motion to supplement may be filed directly in the court of ap-

309. *See, e.g.*, Graham v. Pazos, No. 13-90-332-CV, 1991 WL 114026, at 3 (Tex. App.—Corpus Christi, April 11, 1991, n.w.h.); Rodriquez v. American Gen. Fire & Casualty Co., 788 S.W.2d 581, 582 (Tex. App.—El Paso 1989, no writ); Peart v. Marr's Short Stops, Inc., 670 S.W.2d 769, 770 (Tex. App.—Fort Worth 1984, no writ).

310. Patton, *Perfecting the Imperfect Appeal—Rescuing the Record and Appellate Motion Practice in State Court*, in UNIVERSITY OF TEXAS SCHOOL OF LAW, TECHNIQUES FOR HANDLING APPEALS IN STATE AND FEDERAL COURT 6 (June 1991).

311. *See* TEX. R. APP. P. 55(b).

312. *See id.*

313. Goldsmith v. Stephenson, 634 S.W.2d 331, 332 (Tex. App.—Dallas 1982, no writ); *see* TEX. R. APP. P. 55(b) ("If anything material to either party is omitted . . ." the record may be supplemented to include the omitted matter).

314. *See* Johnson by Johnson v. Li, 762 S.W.2d 307, 310 (Tex. App.—Fort Worth 1988, writ denied); Deerfield Land Joint Venture v. Southern Union Realty, 758 S.W.2d 608, 609-10 (Tex. App.—Dallas 1988, writ denied).

315. *See* Jackson v. S.P. Leasing Corp., 774 S.W.2d 673, 677 (Tex. App.—Texarkana 1989, writ denied) (fact that documents were omitted because clerk mistakenly filed them in another case warranted post-submission supplementation).

peals.[316] If the motion is filed in the trial court, it should contain an additional request that the supplement be certified and transmitted to the appellate court for filing once it is prepared.[317] Supplementing the record in the trial court may also necessitate the filing of an additional motion to supplement in the court of appeals.[318]

b. After Submission

Once the case is under submission, the rules governing supplementation are more restrictive. Supplementation of the record is disfavored after the case is submitted and will be permitted only upon order of the appellate court.[319] Courts of appeals are particularly reluctant to permit supplementation after an opinion has been written. Post-opinion supplementation is generally not permitted absent "unusual circumstances."[320]

Cases in which an appellate court has permitted supplementation after submission are rare.[321] The controlling factors cited by the courts in those cases as justification for permitting supplementation of the record after submission are: a) the omitted evidence would alter the disposition of the appeal or otherwise serve the interests of justice;[322] b) the omission resulted through no fault of the movant;[323] c) the movant neither knew nor should have known of the omission prior to submission;[324] and d) the opposing party did not object to the

316. TEX. R. APP. P. 55(b).

317. Watson & Hunt, *Rescuing the Record (Appellate First Aid)* in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE Q-3 (1990).

318. Patton, *Perfecting the Imperfect Appeal—Rescuing the Record and Appellate Motion Practice in State Court*, in UNIVERSITY OF TEXAS SCHOOL OF LAW, TECHNIQUES FOR HANDLING APPEALS IN STATE AND FEDERAL COURT 6 (June 1991).

319. TEX. R. APP. P. 55(c); *see* Elkins v. Auto Recovery Bureau, 649 S.W.2d 73, 76 (Tex. App.—Dallas 1982, writ ref'd n.r.e.) (courts of appeals have discretion to deny post-submission supplementation).

320. *See, e.g.*, Chapman v. Mitsui Eng'g & Shipping Co., 781 S.W.2d 312, 317-18 (Tex. App.—Houston [1st Dist.] 1989, writ denied); Jackson v. S.P. Leasing Corp., 774 S.W.2d 673, 677 (Tex. App.—Texarkana 1989, writ denied); McCrea v. Cabilla Condominium Corp., 769 S.W.2d 261, 264-65 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

321. *See generally* Watson & Hunt, *Rescuing the Record (Appellate First Aid)* in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE Q-4 (1990) (noting that only one reported case in 1989 permitted supplementation after submission).

322. *See Jackson*, 774 S.W.2d at 677-78; Perry v. Kroger Stores, 741 S.W.2d 533, 535 (Tex. App.—Dallas 1987, no writ).

323. *See Jackson*, 774 S.W.2d at 677-78 (documents omitted from transcript because clerk filed them in another case).

324. *See id.*; *see also* K & S Interests, Inc. v. Texas Am. Bank/Dallas, 749 S.W.2d 887,

supplementation.[325] A motion to supplement the record after an opinion has been issued must allege and prove these or similar facts to prevail.[326]

2. Correcting Inaccuracies in the Statement of Facts[327]

Another common deficiency in an appellate record is an inaccurate statement of facts. "[T]ypographical, spelling or word choice inaccuracies can be overlooked."[328] However, errors which are material to the disposition of the appeal should be corrected as soon as they are discovered.

Rule 55(a) encourages parties to correct inaccuracies in a statement of facts by agreement.[329] If agreement can be reached, it is recommended that the parties file a joint motion or stipulation.[330] If the controversy over the statement of facts cannot be resolved by agreement of the parties, the appellate court must remand the matter to the trial court *sua sponte* or on the motion of a party.[331] Upon submitting a dispute regarding any inaccuracy in a statement of facts to the trial court, the appellate court may abate the appeal pending resolution of the dispute by the trial court.[332] After notice to the parties and a

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892 (Tex. App.—Dallas 1988, writ denied) (lack of knowledge of lawyer will not suffice if lawyer should have known of need for additional part of record); Watson & Hunt, *Rescuing the Record (Appellate First Aid)*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE Q-4 (1990) (attorney's lack of knowledge of the need to supplement may constitute "unusual circumstance").

325. *See Perry*, 741 S.W.2d at 535.

326. *See generally* Patton, *Perfecting the Imperfect Appeal—Rescuing the Record and Appellate Motion Practice in State Court*, in UNIVERSITY OF TEXAS SCHOOL OF LAW, TECHNIQUES FOR HANDLING APPEALS IN STATE AND FEDERAL COURT 8 (June 1991) (discussing cases involving post-opinion supplementation).

327. *See* TEX. R. APP. P. 55(a) (governing methods for correcting the statement of facts). The rule does not specifically refer to correcting inaccuracies in the transcript. *Id.* Nevertheless, it has been suggested that transcript inaccuracies are correctable through the methods specified in Rule 55(a). Patton, *Perfecting the Imperfect Appeal—Rescuing the Record and Appellate Motion Practice in State Court*, in UNIVERSITY OF TEXAS SCHOOL OF LAW, TECHNIQUES FOR HANDLING APPEALS IN STATE AND FEDERAL COURT 4 (June 1991).

328. Watson & Hunt, *Rescuing the Record (Appellate First Aid)* in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE Q-1 (1990).

329. *See id.*; TEX. R. APP. P. 55(a).

330. Patton, *Perfecting the Imperfect Appeal—Rescuing the Record and Appellate Motion Practice in State Court*, in UNIVERSITY OF TEXAS SCHOOL OF LAW, TECHNIQUES FOR HANDLING APPEALS IN STATE AND FEDERAL COURT 2 (June 1991).

331. TEX. R. APP. P. 55(a).

332. *See* West Tex. State Bank v. General Resources Management Corp., 717 S.W.2d 766, 767 (Tex. App.—Austin 1986, no writ).

hearing, the trial court will then settle the dispute and make the statement of facts conform to what occurred in the trial court.[333]

In correcting inaccuracies in the statement of facts, the trial court has no authority to hear new evidence or otherwise alter the record that existed at the time the judgment was granted.[334] Rule 55 only empowers the trial judges and appellate courts to correct, amend or supplement the existing trial court record when the appellate record has omitted something of importance.[335] As one court has explained:

> As we read the rule, it seeks to ensure that the *existing* trial court record be correctly transmitted to [the appellate] court. . . . Rule 55 authorizes trial judges and appellate courts to correct the *appellate* record on their own initiative, or at the request of counsel; it does not allow the creation of a new trial court record.[336]

Therefore, Rule 55 cannot be used to change a trial court record by introducing matters raised for the first time during an appeal.[337]

There is no specific time period for resolving disputes regarding inaccuracies in a statement of facts. However, they should be corrected prior to oral submission, if at all possible. Corrections to a statement of facts will not be allowed after submission absent unusual circumstances.[338]

3. Lost or Destroyed Records

Occasionally, a party discovers after an appeal is perfected that all or a portion of a trial court record has been lost or destroyed. Rule 50(e) discusses the procedure for replacing a missing record:

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333. TEX. R. APP. P. 55(a).

334. *E.g.*, Gerdes v. Marion State Bank, 774 S.W.2d 63, 65-66 (Tex. App.—San Antonio 1989, writ denied); First Bank v. Deer Park Indep. School Dist., 770 S.W.2d 849, 852 (Tex. App.—Texarkana 1989, writ denied); Zaragoza v. De Le Paz Morales, 616 S.W.2d 295, 296 (Tex. Civ. App.—Eastland 1981, writ ref'd n.r.e.).

335. *Gerdes*, 774 S.W.2d at 65-66; *see* Southern Pac. Transp. Co. v. Hernandez, 804 S.W.2d 557, 560-61 (Tex. App.—San Antonio 1991, writ denied).

336. *Gerdes*, 774 S.W.2d at 65.

337. *See* Voskamp v. Arnoldy, 749 S.W.2d 113, 127 (Tex. App.—Houston [1st Dist.] 1987, writ denied). Where new matters are raised during the appeal, a bill of review proceeding may be conducted simultaneously with the appellate process. *Id.*; *see, e.g.*, American Standard Life Ins. Co. v. Denwitty, 256 S.W.2d 864, 868 (Tex. Civ. App.—Dallas 1953, writ dism'd); Smith v. Rogers, 129 S.W.2d 776, 777 (Tex. Civ. App.—Galveston 1939, orig. proceeding); 4 R. MCDONALD, TEXAS CIVIL PRACTICE IN DISTRICT AND COUNTY COURTS § 18.27.6 (rev. 1984).

338. *See* Chapman v. Mitsui Eng'g & Shipbuilding Co., 781 S.W.2d 312, 317-18 (Tex. App.—Houston [1st Dist.] 1989, writ denied).

> When the record or any portion thereof is lost or destroyed, it may be substituted in the trial court, and when so substituted the record may be prepared and transmitted to the appellate court as in other cases. If the appellant has made a timely request for a statement of facts, but the court reporter's notes and records have been lost or destroyed without appellant's fault, the appellant is entitled to a new trial unless the parties agree on a statement of facts.[339]

The applicable procedures for remedying the loss or destruction of a record under Rule 50(e) depend upon whether the record involves the transcript or the statement of facts. Lost or destroyed transcript documents may be recreated in the trial court by using one of three procedures: (1) substituting the missing transcript documents by stipulation of the parties;[340] (2) by submitting copies of the missing documents for filing in the trial court in the manner prescribed by Rule 77 of the Texas Rules of Civil Procedure, while the trial court has jurisdiction;[341] or (3) upon a hearing conducted by the trial court on remand from the appellate court.[342] Rule 50(e) appears to permit lost or destroyed exhibits to be substituted with copies and made part of the appellate record by the same methods.[343]

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339. TEX. R. APP. P. 50(e).

340. *See* Southern Pac. Transp. Co. v. Hernandez, 804 S.W.2d 557, 560 (Tex. App.—San Antonio 1991, writ denied); *see also* TEX. R. APP. P. 50(e) (lost record may be substituted in the trial court).

341. *See* Benjamin Franklin Sav. Ass'n v. Kotrla, 751 S.W.2d 218, 223 (Tex. App.—Houston [14th Dist.] 1988, no writ). Texas Rule of Civil Procedure 77 provides:

> When any papers or records are lost or destroyed during the pendency of a suit, the parties may, with the approval of the judge, agree in writing on a brief statement of the matters contained therein; or either party may supply such lost records or papers as follows:
>
> a. After three days' notice to the adverse party or his attorney, make written sworn motion before the court stating the loss or destruction of such record or papers, accompanied by certified copies of the originals if obtainable, or by substantial copies thereof.
>
> b. If, upon hearing, the court be satisfied that they are substantial copies of the original, an order shall be made substituting such copies or brief statement for the originals.
>
> c. Such substituted copies or brief statement shall be filed with the clerk, constitute a part of the cause, and have the force and effect of the originals.

TEX. R. CIV. P. 77.

342. Patton, *Perfecting the Imperfect Appeal—Rescuing the Record and Appellate Motion Practice in State Court*, in UNIVERSITY OF TEXAS SCHOOL OF LAW, TECHNIQUES FOR HANDLING APPEALS IN STATE AND FEDERAL COURT 9 (June 1991); *see* Mead v. State, 759 S.W.2d 437, 441-42 (Tex. App.—Fort Worth 1988, writ granted).

343. TEX. R. APP. P. 50(e) ("record" may be substituted in the trial court); *see Southern Pac. Transp. Co.*, 804 S.W.2d at 560.

The loss or destruction of a statement of facts is more difficult to remedy because testimonial evidence cannot be recreated with any degree of precision. The only procedure authorized by the appellate rules for remaking testimony for appellate review is by agreement of the parties.[344] If the parties can agree on a statement of facts, the appellate court will accept the agreed statement in lieu of the original record.[345] If no agreement can be reached, Rule 50(e) entitles the appellant to a new trial upon showing: (1) that a timely request for the statement of facts was made, and (2) that the loss or destruction of the court reporter's notes and records occurred through no fault of the appellant.[346] When these two requirements are met, the rule mandates that the appellate court remand the case to the trial court for a new trial on the entire case or on any severable issues which cannot be reviewed on appeal due to the testimony's destruction.[347]

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344. TEX. R. APP. P. 50(e). The rules of civil procedure permit the trial court to hear additional evidence under certain circumstances. TEX. R. CIV. P. 270. Rule 270 provides:

> When it clearly appears to be necessary to the due administration of justice, the court may permit *additional* evidence to be offered at any time; provided that in a jury case no evidence on a controversial matter shall be received after the verdict of the jury.

Id. (emphasis added). As currently worded, Rule 50(e) does not permit the use of this procedure for replacing a statement of facts. TEX. R. APP. P. 50(e).

345. Where the parties are able to agree on the events which occurred in the trial court, the appellant is not harmed by not having the original record. *Southern Pac. Transp. Co.*, 804 S.W.2d at 560. However, an appellant may refuse to agree merely to gain an automatic new trial. One court has held that the rule does not require "the disagreement to be based on reasonable grounds or allow the trial court or the appellate court to review the reason for the disagreement." Hildalgo, Chambers & Co. v. FDIC, 790 S.W.2d 700, 702 (Tex. App.—Waco 1990, writ denied). The lack of agreement, however, should not discourage a party from seeking an order permitting supplementation of the testimonial evidence. In Mead v. State, 759 S.W.2d 437, 441-43 (Tex. App.—Fort Worth 1988, writ granted), the court of appeals ordered supplementation of a lost "exhibit" pursuant to Rule 50(e) even though the appellant complained of his lack of agreement and asserted his supposed right to an automatic new trial. *Mead*, 759 S.W.2d at 441-43; *but see Hildalgo*, 790 S.W.2d at 703 (distinguishing *Mead* on basis that substituted record must have been included in "formal bill and transcript" and not a part of the statement of facts). The better rule is stated in *Mead*, since a literal interpretation of the rule would allow an appellant to decline "with impunity" to agree on missing evidence and gain an automatic new trial. Watson & Hunt, *Rescuing the Record (Appellate First Aid)* in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE Q-5-6 (1990).

346. TEX. R. APP. P. 50(e); *see Hildalgo*, 790 S.W.2d at 703; Vickers v. Sunrise Lumber Co., 759 S.W.2d 747, 748 (Tex. App.—El Paso 1988, writ denied). The rule does not expressly require that the appellant use diligence in replacing a missing statement. Nevertheless, some courts have applied a "due diligence" standard to the appellant's efforts to obtain a proper record. *See* Wilkins v. Reisman, 803 S.W.2d 822, 825 (Tex. App.—Houston [14th Dist.] 1991, writ denied); Hoyt v. INA of Tex., 752 S.W.2d 628, 629 (Tex. App.—Waco 1988, writ denied).

347. Automatic reversal based on a missing statement of facts would be inappropriate in certain circumstances. A missing statement is obviously immaterial when the court of appeals

VI. PRESERVING ERROR IN THE APPELLANT'S BRIEF[348]

In order to preserve the right to complain of the trial court judgment after perfecting the appeal and filing the record, the appellant must prepare and file a brief which substantially complies with Rule 74.[349] A specific complaint of trial court error is preserved by a brief which includes: (1) a point of error addressing the complaint; (2) record references showing the pertinent facts and where in the record the error occurred; (3) argument and legal authority supporting the point of error; and (4) a request for the appropriate relief.[350] These minimal requirements for the appellant's brief are separately discussed in the following sections.

A. *Necessity for Timely Filed Appellant's Brief*

A competently prepared brief is essential to the correct disposition of an appeal. The overriding purpose of a brief is defined in Rule 74: "The purpose of briefs [is] to acquaint the court with the points relied upon, the manner in which they arose, together with such argument of facts and law as will enable the court to decide the same."[351] If a party's brief fails to achieve this purpose, the appellate court may require the party to rebrief, overrule the points of error, or refuse to

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lacks jurisdiction over the appeal. In addition, there are some cases which an appellate court may review in the absence of a statement of facts. *See generally* Stine v. Koga, 790 S.W.2d 412, 413 (Tex. App.—Beaumont 1990, writ dism'd by agr.) (listing six categories of cases which may be decided without reference to statement of facts). Moreover, cases occasionally may be decided with a partial record, without prejudice to the appellant. *See* Houston Lighting & Power Co. v. Klein Indep. School Dist., 739 S.W.2d 508, 520 (Tex. App.—Houston [14th Dist.] 1987, writ denied) (missing record not material because judgment was affirmed on other grounds). One commentator has pointed out that omissions in the record are often supplied by findings that the omitted evidence is uncontroverted, waived or within common knowledge. *See* Patton, *Perfecting the Imperfect Appeal—Rescuing the Record and Appellate Motion Practice in State Court*, in UNIVERSITY OF TEXAS SCHOOL OF LAW, TECHNIQUES FOR HANDLING APPEALS IN STATE AND FEDERAL COURT 11-15 (June 1991).

348. The purpose of this section is to explain the provisions of the pertinent rules and case law relating to the procedures for presenting a brief in the court of appeals. It is not intended to instruct in legal research and analysis, nor teach effective written advocacy.

349. *See* Weaver v. Southwest Nat'l Bank, 34 Tex. Sup. Ct. J. 629, 630 (June 8, 1991) (per curiam) (substantial compliance with briefing requirements sufficient for appellate review of points of error); TEX. R. APP. P. 74(p) ("a substantial compliance with [Rule 74] will suffice" to fulfill purpose of briefs).

350. Hanby, *Preservation of Error on Appeal* in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE E-10 (1990); *see* TEX. R. APP. P. 74.

351. TEX. R. APP. P. 74(p).

submit the appeal altogether.[352]

The appellant's brief must be filed within thirty days after the transcript and statement of facts, if any, are filed.[353] In accelerated appeals, the appellant's brief is due twenty days after the judgment or order is signed.[354] Appellate courts have broad discretion in extending the time period for filing briefs upon reasonable explanation.[355]

In most appeals, the failure to file an appellant's brief will result in dismissal of the appeal for want of prosecution.[356] Dismissal may be avoided by showing both a reasonable explanation for not filing the brief within the prescribed time period and that the appellee has not suffered "material injury" as a result of the failure to file the brief.[357] However, an appellate court does have the discretion to consider and dispose of an appeal's merits without an appellant's brief. When no brief is tendered and no reasonable explanation is offered, an appellate

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352. *See* Inpetco, Inc. v. Texas Am. Bank/Houston, 729 S.W.2d 300, 300 (Tex. 1987) (per curiam) (court may dispose of appeal on basis of briefing defects if party given opportunity to rebrief); TEX. R. APP. P. 55(c) (court may refuse to submit appeal if not properly presented in the brief); TEX. R. APP. P. 74(p) (court may order rebriefing if brief does not substantially comply with rules).

353. TEX. R. APP. P. 74(k). The time for filing the appellant's brief runs from the date of the *filing* of the transcript and statement of facts, not from the last date upon which they could have been filed in a timely manner. *Id.* In appeals where the time for filing the transcript and statement of facts has been modified to allow their filing on separate dates, such as where the time for filing the statement of facts has been extended and the time for filing the transcript has not, the time for filing the appellant's brief should run from the date of the last filed record. *See id.* (appellant's brief is due "within thirty days after the filing of the transcript *and* statement of facts, if any . . .") (emphasis supplied).

354. This time period may be shortened. TEX. R. APP. P. 42(c). Some accelerated appeals also may be submitted without briefs. *Id.*

355. TEX. R. APP. P. 74(n); *see* Darley v. Texas Uvaton, Inc., 741 S.W.2d 200, 204 (Tex. App.—Dallas 1987, no writ); Castillo v. Sears, Roebuck & Co., 663 S.W.2d 60, 62 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.). A reasonable explanation requires only a plausible statement of circumstances indicating that the failure to file within the required period was not deliberate or intentional, but was the result of inadvertence, mistake, or mischance. *Castillo*, 663 S.W.2d at 62; *see also Darley*, 741 S.W.2d at 203-04; *see generally* Patton, *Deadlines and Extension Motions in Civil Appellate Litigation*, 20 ST. MARY'S L.J. 7, 38 (1988) (discussing requirements for obtaining extension of time to file brief).

356. 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 702 at 464 (Texas Practice 1985); *see* Seminole, Inc. v. Oak Hollow Property Owners' Ass'n, 669 S.W.2d 872, 872 (Tex. App.—Corpus Christi 1984, no writ); *see also* TEX. R. APP. P. 74(l)(1) ("when the appellant has failed to file his brief in the time prescribed, the appellate court may dismiss the appeal for want of prosecution").

357. TEX. R. APP. P. 74(l)(1); *see* Coulson v. Lake LBJ Mun. Util. Dist., 678 S.W.2d 943, 944 (Tex. 1984).

court may give such direction to the appeal "as it may deem proper."[358]

B. *Minimum Briefing Requirements*

1. Preliminary Statement

An appellant's brief should contain a short statement of the nature of the case. The example provided in Rule 74(c) suggests the use of phrases such as, "This is a suit for damages on a note."[359] The rule also requires that the statement advise the appellate court of the result of the suit.[360] The maximum length of the statement should seldom exceed one-half page.[361]

2. Points of Error

a. Necessity for Points of Error

Rule 74(d) requires that an appellant's brief contain "[a] statement of the points upon which the appeal is predicated."[362] In the absence of fundamental error,[363] trial court error which is not assigned in a point of error is waived and cannot be reviewed on appeal.[364]

b. Phrasing Points of Error

(1) Properly Worded Points of Error

The language used in a point of error is determined by its function:

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358. TEX. R. APP. P. 74(l)(1); *see, e.g.*, Green v. City of Lubbock, 627 S.W.2d 868, 873 (Tex. App.—Amarillo 1981, writ ref'd n.r.e.); Akers v. City of Grand Prairie, 572 S.W.2d 22, 23-24 (Tex. Civ. App.—Dallas 1978, no writ); Shepard v. Shepard, 546 S.W.2d 888, 889 (Tex. Civ. App.—Fort Worth 1977, no writ).

359. *See* TEX. R. APP. P. 74(c).

360. *Id.*

361. *Id.*

362. TEX. R. APP. P. 74(d).

363. There are certain matters which the appellate court may consider without a point of error. These include lack of jurisdiction by the trial court or the court of appeals, *see* Texas Alcoholic Beverage Comm'n v. Sfair, 786 S.W.2d 26, 27 (Tex. App.—San Antonio 1990, writ denied); that the order from which the appeal is taken is void, *see* Permian Chemical Co. v. State, 746 S.W.2d 873, 874 (Tex. App.—El Paso 1988, writ dism'd); Arrechea v. Plantowsky, 705 S.W.2d 186, 189 (Tex. App.—Houston [14th Dist.] 1985, no writ); and, error which directly and adversely affects the public interest, *see* Pirtle v. Gregory, 629 S.W.2d 919, 920 (Tex. 1982).

364. Alright, Inc. v. Pearson, 735 S.W.2d 240, 240 (Tex. 1987); Benavidez v. Isles Constr. Co., 726 S.W.2d 23, 25 (Tex. 1987); *see* All Valley Acceptance Co. v. Durfey, 800 S.W.2d 672, 676 (Tex. App.—Austin 1990, writ denied) (no evidence complaint waived because appellants failed to advance a "no evidence" point of error).

to succinctly identify or describe the act or omission in the trial court that was erroneous and explain why the act or omission is reversible error.[365] As observed by the Texas Supreme Court almost fifty years ago:

> The object of a "point" in the brief . . . is to call the Court's attention to the questions raised and discussed in the brief. It is intended that the "point" shall be short or in a few words. It is not necessary that a "point" be complete within itself, in the sense that it must, on its face, show that the matter complained of presents reversible error. If a "point" is sufficient to direct the Court's attention to the matter complained of, the Court will look to the "point" and the statement and argument thereunder to determine the question of reversible error.[366]

All points of error should be drafted with this purpose in mind.

A point of error does not require magical words.[367] Rule 74(d) states that "[a] point is sufficient if it directs the attention of the appellate court to the error about which complaint is made."[368] In addition, a point of error must include parenthetical references to the location of the error in the appellate record.[369] The only express limitation the rules place on the terminology of a point is that it be stated "in short form without argument."[370]

A "who/what/why" formula will produce a sufficient point of error in most appeals.[371] Points of error phrased according to this formula will correctly identify "who" committed the error, "what" the precise nature of the erroneous ruling is, and "why" the ruling is

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365. National Carloading v. Kitchen Designs, Inc., 471 S.W.2d 90, 93 (Tex. Civ. App.—Texarkana 1971, no writ); *see* TEX. R. APP. P. 74(d), 131(e); Calvert, *How an Errorless Judgment Can Become Erroneous*, 20 ST. MARY'S L.J. 229, 234 (1989).

366. Fambrough v. Wagley, 140 Tex. 577, 585, 169 S.W.2d 478, 482 (1943).

367. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 361-62, 371 (1960). "The controlling consideration with an appellate court in passing on a point of error directed at the state of the evidence is not whether the point uses the preferable, or even the proper, terminology, but whether the point is based upon and related to a particular procedural step in the trial and appellate process and is a proper predicate for the relief sought." *Id.* at 361-62; *see* Sterner v. Marathon Oil Co., 767 S.W.2d 686, 690 (Tex. 1989), *on remand*, 777 S.W.2d 128 (Tex. App.—Houston [14th Dist.] 1989, no writ); Pool v. Ford Motor Co., 715 S.W.2d 629, 633 (Tex. 1986).

368. TEX. R. APP. P. 74(d).

369. *Id.*

370. TEX. R. APP. P. 74(d).

371. Hatchell, *Proper and Effective Points of Error on Appeal* in STATE BAR OF TEXAS, ST. MARY'S EIGHTH ANNUAL PROCEDURAL INSTITUTE: APPELLATE PRACTICE G-5 (1986). It is recommended that points of error attacking a summary judgment be phrased according to a different format. *See infra* at n.419.

error.[372] Such a point (with appropriate parenthetical record references) may appear as follows:

> [WHO?] The trial court [DID WHAT?] erred in overruling defendant's motion for judgment n.o.v. [WHY?] because the evidence establishes conclusively that the cause of action is barred by limitations. (Germane to Tr. 1, 2; S.F. 4, 5, 6).[373]

Texas courts are required to give a liberal construction to points of error "in order to obtain the just, fair and equitable adjudication of the rights of litigants."[374] If the reviewing court cannot understand the point of error, it must look "to the argument under each point to determine as best [it] can the intent of the party."[375] Therefore, an inexpertly worded point of error will not affect the disposition of an appeal if the appellate court is able to ascertain the nature of the complaint from other parts of the brief.

The extent to which the Supreme Court of Texas will go to liberally construe points of error is indicated in *Williams v. Khalaf*.[376] In *Williams*, the court of appeals erroneously held that the appellee's amended counterclaim for fraud was barred by the two year statute of limitations although the applicable limitations period is four years.[377] Rather than challenge the court's application of the wrong limitations period in his application for writ of error, the appellant presented a point of error which challenged the court of appeals' holding that the amended counterclaim was barred because it did not "relate back" to the time the original breach of contract counterclaim was filed.[378]

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372. *Id.*; *see* Whitaker v. Vastine, 601 S.W.2d 398, 400-01 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.); *National Carloading*, 471 S.W.2d at 93.

373. Other model points for challenging a variety of errors are provided in Nichols, O'Connor & Alexander, *Points of Error: Form and Content*,in STATE BAR OF TEXAS, FIFTH ANNUAL ADVANCED CIVIL APPELLATE PRACTICE COURSE (September 1991).

374. *Pool*, 715 S.W.2d at 633 (citing Holly v. Watts, 629 S.W.2d 694, 696 (Tex. 1982)); *see Sterner*, 767 S.W.2d at 690.

375. *Pool*, 715 S.W.2d at 633.

376. 802 S.W.2d 651 (Tex. 1990).

377. *See* Khalaf v. Williams, 763 S.W.2d 868, 869-70 (Tex. App.—Houston [1st Dist.] 1988), *rev'd*, 802 S.W.2d 651 (Tex. 1990).

378. *Williams*, 802 S.W.2d at 658. The point was worded as follows: "The court of appeals erred in holding that Williams' counterclaim was barred by the statute of limitations *because it was not filed timely in accordance with § 16.068 of the Civil Practice & Remedies Code.*" *Id.* (emphasis supplied). Section 16.068 permits the filing of amended counterclaims which would be barred by limitations as separate actions, if the amendment relates to a timely filed pleading and does not arise from a different set of facts. TEX. CIV. PRAC. & REM. CODE ANN. § 16.068 (Vernon 1986).

The supreme court held that the point of error was "sufficiently broad" to preserve the issue regarding the appropriate statute of limitations.[379]

(2) Multifarious Points

A point of error should present no more than one legal question or ground of error.[380] A point which embraces more than one ground of error is "multifarious."[381] A multifarious point is technically improper and is most likely to be rejected by an appellate court if it combines "disparate, unrelated complaints" which result in different relief.[382]

There are two exceptions to the briefing rule discouraging multifarious points. Rule 74(d) expressly authorizes an appellant to combine a complaint that the evidence is legally or factually insufficient to support one or more findings of fact with a complaint about any legal conclusion the trial court may have made on the basis of the challenged fact finding.[383] The same rule permits an appellant to challenge several findings of fact in a single point when the findings relate

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379. *Williams*, 802 S.W.2d at 658. An alternative ground for the supreme court's decision was that the appellant correctly raised the limitations issue in a supplemental letter brief. *Id.*

380. *See* Wheat v. Delcourt, 708 S.W.2d 897, 901 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.); Clancy v. Zale Corp., 705 S.W.2d 820, 824 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

381. *See, e.g., Clancy*, 705 S.W.2d at 823; Pooser v. Lovett Square Townhomes Owners' Ass'n, 702 S.W.2d 226, 228 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.); Atlantic Mut. Ins. Co. v. Middleland, 661 S.W.2d 182, 188 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.). The following is an example of a multifarious point of error which an appellate court *refused* to consider:

> The trial court erred in affirming an agency decision based upon inadequate and improper findings of fact because:
>
> a. The findings cannot be supported without reliance on hearsay.
> b. The findings are not supported by substantial evidence.
> c. The findings do not cover all the required statutory considerations, and are not relevant to any specific statutory or administrative guide.
> d. The findings are not sufficient to support the specific standards, requirements, conditions and parameters of the proposed permit.
> e. The findings do not support the conclusions of law adopted.

Hooks v. Texas Dept. of Water Resources, 645 S.W.2d 874, 877 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (citations omitted).

382. Hatchell, *Proper and Effective Points of Error on Appeal* in STATE BAR OF TEXAS, ST. MARY'S EIGHTH ANNUAL PROCEDURAL INSTITUTE: APPELLATE PRACTICE G-12 (1986).

383. TEX. R. APP. P. 74(d).

to one ground of recovery or defense.[384]

(3) Abstract and Unduly Vague Points

A point of error should "particularize and direct the appellate court's attention to a specific error in the trial proceeding."[385] Unless the error is clearly explained in the argument, points which make an abstract or general complaint without focusing on specific error will not be reviewed by appellate courts.[386] Points of error found to be abstract or too vague for appellate review include a point which merely asserts that there is no evidence or factually insufficient evidence to support the judgment;[387] a point which complains of the omission of a question, but fails to specify the omitted question or explain the harm resulting from the omission;[388] a point which simply asserts that the trial court erred in refusing to submit a question without explaining why;[389] and a point which merely states an abstract proposition of law.[390]

c. Number of Points

The rules set no limit on the number of points of error that may be raised in an appeal. An appellant may assert as many points as deemed essential to adequately challenge a judgment. It is, however,

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384. *Id.*

385. National Carloading Corp. v. Kitchen Designs, Inc., 471 S.W.2d 90, 93 (Tex. Civ. App.—Texarkana 1971, no writ); *see* Calvert, *How an Errorless Judgment Can Become Erroneous*, 20 ST. MARY'S L.J. 229, 236 (1989).

386. *See, e.g.*, Pope v. Darcey, 667 S.W.2d 270, 273 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (points of error must complain about a specific action of the lower court); Porter v. Irvine, 658 S.W.2d 711, 715 (Tex. App.—Houston [1st Dist.] 1983, no writ) (rule against abstract points applies to cross-points); Powell v. Powell, 604 S.W.2d 491, 493 (Tex. Civ. App.—Dallas 1980, no writ) (point of error needs to be more than mere abstract position of law).

387. *See, e.g.*, Security S.W. Life Ins. Co. v. Gomez, 768 S.W.2d 505, 507 (Tex. App.—El Paso 1989, no writ) (point of error must specifically attack the verdict); Fiduciary Mortgage Co. v. City Nat'l Bank, 762 S.W.2d 196, 204 (Tex. App.—Dallas 1988, no writ) (points of error generally attacking verdict do not present justiciable questions); Liberty Mut. Fire Ins. Co. v. McDonough, 734 S.W.2d 66, 70 (Tex. App.—El Paso 1987, no writ) (broad challenges to verdict are non-justiciable).

388. *See* Champion v. Wright, 740 S.W.2d 848, 850-51 (Tex. App.—San Antonio 1987, writ denied); Ortiz v. Spann, 671 S.W.2d 909, 914 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.).

389. *See Porter*, 658 S.W.2d at 714.

390. *See Pope*, 667 S.W.2d at 272-73; *Powell*, 604 S.W.2d at 493.

unnecessary to allege a "separately numbered"[391] point of error for each erroneous trial court ruling.[392] Rather, a separate point should be presented for each legal question involved in the appeal.[393] All erroneous trial court rulings based on the same legal ground may be challenged in one point.[394]

In determining the points of error to present in an appeal, every independent ground for the judgment must be considered. An appeal from a judgment supported by more than one ground or theory of recovery should include distinct points of error attacking each ground.[395] Any unchallenged ground may serve as a basis for affirming the judgment.[396]

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391. TEX. R. APP. P. 74(d) (points of error "upon which an appeal is predicated shall be . . . separately numbered").

392. *See* Hanby, *Preservation of Error on Appeal* in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE E-12 (1990).

393. Miller Management Co. v. State, 159 S.W.2d 218, 221 (Tex. Civ. App.—Galveston), *aff'd*, 140 Tex. 370, 167 S.W.2d 728 (1942).

394. For example, a point of error couched in the following terms was found to be adequate to preserve a complaint that the trial court erred in submitting an issue, overruling a motion for judgment n.o.v. and entering judgment on the verdict on no evidence grounds: "The trial court erred in submitting Question No. 1 over appellant's objection, in overruling appellant's motion for judgment n.o.v., and in entering judgment for appellee on the verdict because there is no evidence to support the submission of Question No. 1." Shwiff v. Priest, 650 S.W.2d 894, 897-98 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.) (per curiam).

395. *See* Midway Nat'l Bank v. West Tex. Wholesale Supply Co., 453 S.W.2d 460, 461 (Tex. 1970); Service Lloyd's Ins. Co. v. Greenhalgh, 771 S.W.2d 688, 690 (Tex. App.—Austin 1989), *modified on other grounds*, 787 S.W.2d 938 (Tex. 1990). When a trial court sustains a dispositive motion such as a motion for summary judgment or a motion for instructed verdict without stating its reasons for granting the motion, the court is presumed to have sustained all grounds contained in the motion. *See, e.g.*, Malooly Brothers, Inc. v. Napier, 461 S.W.2d 119, 120 (Tex. 1970) (summary judgment); McKelvey v. Barber, 381 S.W.2d 59, 61 (Tex. 1964) (instructed verdict); ECC Parkway Joint Venture v. Baldwin, 765 S.W.2d 504, 508 (Tex. App.—Dallas 1989, writ denied) (summary judgment). Conversely, when the trial court does specify the basis for the judgment the appellant is only required to challenge the stated grounds for the judgment. Carlisle v. Philip Morris Inc., 805 S.W.2d 498, 518 (Tex. App.—Austin 1991, no writ). *But see* Veytin v. Seiter, 740 S.W.2d 64 (Tex. App.—San Antonio 1987) (court affirmed summary judgment on unspecified ground), *aff'd on other grounds*, 756 S.W.2d 303 (Tex. 1988). These same principles apply to judgments based on jury verdicts supporting two or more theories of recovery. *See* Service Lloyd's Ins. Co. v. Greenhalgh, 771 S.W.2d at 690; *see also* Texas Dep't of Human Resources v. Orr, 730 S.W.2d 435, 436 (Tex. App.—Austin 1987, no writ).

396. *Midway Nat'l Bank*, 453 S.W.2d at 461; Bailey v. Rosers, 631 S.W.2d 784, 786 (Tex. App.—Austin 1982, no writ). Summary judgments are an exception. It is generally unnecessary to include a distinct point of error on each ground in an appeal from a summary judgment. *See Malooly Brothers*, 461 S.W.2d at 120-21. A single point challenging the judgment, supported by argument and authority attacking each ground for judgment, will usually be sufficient in summary judgment appeals. *Id.* at 121; *see infra* § VI B 1 e.

d. Evidentiary Points

An unchallenged fact finding is generally binding on the appellate court if there is any evidence to support it.[397] The evidence supporting a fact finding is reviewed on appeal under two standards of review: legal sufficiency and factual sufficiency.[398] Points of error challenging either legal or factual sufficiency of the evidence may be raised in appeals from both jury and non-jury trials.[399] Both evidentiary complaints may be combined in a single point of error if the complaints are directed to the same issue or finding.[400]

(1) No Evidence Point

A legal insufficiency or "no evidence" point asserts "a complete lack of evidence on an issue."[401] It is designated as a "no evidence" or a "matter of law" point, depending upon whether the appealing party had the burden of proof.[402] Under a no evidence point, the appellant complains that there is no competent evidence to support an adverse finding of an issue on which the appellant did not have the burden of proof.[403] When reviewing the point, the appellate court considers

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397. *E.g.*, Federal Deposit Ins. v. K-D. Leasing Co., 743 S.W.2d 774, 775 (Tex. App.—El Paso 1988, no writ); Carter v. Carter, 736 S.W.2d 775, 777 (Tex. App.—Houston [14th Dist.] 1987, no writ); Larrumbide v. Doctors Health Facilities, 734 S.W.2d 685, 688 (Tex. App.—Dallas 1987, writ denied). Unchallenged findings of fact are not conclusive on appeal if a statement of facts appears in the record. *See, e.g.*, Zac Smith & Co. v. Otis Elevator Co., 734 S.W.2d 662, 666 (Tex. 1987); Valero Transmission Co. v. Wagner & Brown, 787 S.W.2d 611, 615 (Tex. App.—El Paso 1990, writ dism'd by agr.); Uvalde County v. Barrier, 710 S.W.2d 740, 743 (Tex. App.—San Antonio 1986, no writ).

398. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 366 (1960); Powers & Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence"*, 69 TEX. L. REV. 515, 517-19 (1991). The sufficiency of the evidence to support *implied* findings may be challenged on appeal the same as actual findings. Roberson v. Robinson, 768 S.W.2d 280, 281 (Tex. 1989); *see* J.M.R. v. A.M., 683 S.W.2d 552, 554 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.). Damage findings may also be attacked under the same sufficiency of the evidence standards. *See* Pope v. Moore, 711 S.W.2d 622, 624 (Tex. 1986).

399. *E.g.*, *Roberson*, 768 S.W.2d at 281; Las Vegas Pecan & Cattle Co. v. Zavala County, 682 S.W.2d 254, 256 (Tex. 1984); Burnett v. Motyka, 610 S.W.2d 735, 736 (Tex. 1980).

400. *See* TEX. R. APP. P. 74(d) ("complaints that the evidence is legally or factually insufficient to support a particular issue or finding . . . may be combined under a single point of error").

401. Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co., 766 S.W.2d 264, 275 (Tex. App.—Amarillo 1988, writ denied).

402. Hall, *Standards of Appellate Review in Civil Appeals*, 21 ST. MARY'S L.J. 865, 906 (1990); *see generally* O'Connor, *Appealing Jury Findings*, 12 HOUS. L. REV. 65-82 (1974) (discussion of concepts applicable to points of error challenging jury findings).

403. Hall, *Standards of Appellate Review in Civil Appeals*, 21 ST. MARY'S L.J. 865, 906

only the evidence and reasonable inferences that tend to support the finding and disregards all contrary evidence and inferences.[404] If sustained, a no evidence point entitles the appellant to rendition.[405]

A "matter of law" point is used when there is an adverse finding on an issue which the appellant had the burden of proving and the issue is conclusively established by the evidence.[406] In reviewing an as a matter of law challenge, the appellate court first examines the record for evidence that supports the adverse finding and ignores all evidence to the contrary.[407] If no evidence supports the finding, the reviewing court then examines the entire record to determine whether the evidence conclusively established all vital facts in support of the proposition as a matter of law.[408] If the issue is established conclusively by the evidence, the point must be sustained.[409]

Proper use of the terms "no evidence" and "matter of law" in phrasing a point of error helps the reviewing court identify the nature of the error and the applicable standard of review. However, appellate courts will review an incorrectly phrased point if the other portions of the brief sufficiently apprise the court of the nature of the

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(1990); *see* Texas Dept. of Human Servs. v. Penn, 786 S.W.2d 28, 29 (Tex. App.—Beaumont 1990, writ denied); Neily v. Arron, 724 S.W.2d 908, 913 (Tex. App.—Fort Worth 1987, no writ); *see also* Glockzin v. Rhea, 760 S.W.2d 665, 666 (Tex. App.—Houston [1st Dist.] 1988, writ denied); Rose v. Intercontinental Bank N.A., 705 S.W.2d 752, 754 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

404. *E.g.*, Davis v. City of San Antonio, 752 S.W.2d 518, 522 (Tex. 1988); Alm v. Aluminum Co. of Am., 717 S.W.2d 588, 593 (Tex. 1986); King v. Bauer, 688 S.W.2d 845, 846 (Tex. 1985); *see also* Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 364-68 (1960) (discussing standard of review for no evidence points).

405. Under some circumstances, however, the appellate court may remand "in the interest of justice." Porras v. Craig, 675 S.W.2d 503, 506 (Tex. 1984); *see* TEX. R. APP. P. 80(c) (the court of appeals "may make any other appropriate order, as the law and the nature of the case may require"); TEX. R. APP. P. 81(c) (court may remand when necessary "for further proceedings").

406. Hall, *Standards of Appellate Review in Civil Appeals*, 21 ST. MARY'S L.J. 907-08 (1990); *see, e.g.*, Sterner v. Marathon Oil Co., 767 S.W.2d 686, 690 (Tex. 1989); *Penn*, 786 S.W.2d at 29-30; Fenwal, Inc. v. Mencio Sec., Inc., 686 S.W.2d 660, 665 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).

407. Guerra v. Brown, 800 S.W.2d 343, 345 (Tex. App.—Corpus Christi 1990, no writ); *see generally* Townsend, Hall & DeWoody, *Standard of Review and Reversible Error*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE F-18 (1990) (discussing standards of appellate review).

408. *E.g.*, *Sterner*, 767 S.W.2d at 690; McGalliard v. Kuhlmann, 722 S.W.2d 694, 696-97 (Tex. 1986); Holly v. Watts, 629 S.W.2d 694, 696-97 (Tex. 1982).

409. Meydland Community Improvement Ass'n v. Temple, 700 S.W.2d 263, 267 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

error.[410]

(2) Factual Insufficiency Point

Factual insufficiency points of error are phrased in terms of either "factual insufficiency" or "great weight and preponderance." Again, the determination of which designation to use depends upon which party had the burden of proof.[411] When the court of appeals reviews a factual insufficiency challenge, it must examine the entire record to determine whether the evidence supporting a finding is too weak or whether the evidence supporting the finding is overwhelmingly outweighed by other evidence.[412] If sustained, factual insufficiency challenges entitle the appellant to a new trial.[413] They are not reviewable by the supreme court.[414]

A factual insufficiency complaint is not preserved by a point of error which merely alleges legal insufficiency.[415] If an appealing party intends to attack the factual sufficiency of an adverse finding to an issue on which he did not have the burden of proof, he must do so by alleging in a point that the evidence supporting the finding is "factually insufficient."[416] If the evidence is factually insufficient to support an adverse finding on an issue on which the appealing party had the burden of proof, he should state in a point of error that the finding is

410. *See Sterner*, 767 S.W.2d at 690 (a point of error which erroneously complained of no evidence to support a failure to find was sufficient to preserve a complaint that the fact was established as a matter of law); Pool v. Ford Motor Co., 715 S.W.2d 629, 633 (Tex. 1986) (court will look to other parts of brief to construe incorrectly phrased point).

411. Hall, *Standards of Appellate Review in Civil Appeals*, 21 ST. MARY'S L.J. 865, 908 (1990); O'Connor, *Appealing Jury Findings*, 12 HOUS. L. REV. 65, 65-82 (1974).

412. Hall, *Standards of Appellate Review in Civil Appeals*, 21 ST. MARY'S L.J. 865, 908-09 (1990); *see, e.g.*, Lofton v. Texas Brine Corp., 720 S.W.2d 804, 805 (Tex. 1986); Coleman v. Smallwood, 800 S.W.2d 353, 356 (Tex. App.—El Paso 1990, no writ); Raw Hide Oil & Gas v. Maxus Exploration Co., 766 S.W.2d 264, 275 (Tex. App.—Amarillo 1988, writ denied).

413. Townsend, Hall & DeWoody, *Standards of Review and Reversible Error*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE F-20 (1990).

414. *See* TEX. CONST. art. V, § 6; TEX. GOV'T CODE ANN. § 22.225(a) (Vernon 1988). Nevertheless, the Supreme Court may review whether the court of appeals has applied the correct "standard" in weighing the factual insufficiency of the evidence. *See, e.g.*, Aluminum Co. of Am. v. Alm, 785 S.W.2d 137, 137 (Tex. 1990); *Lofton*, 777 S.W.2d at 387-88; Pool v. Ford Motor Co., 715 S.W.2d 629, 634 (Tex. 1986).

415. *E.g.*, McDonald v. New York Cent. Mut. Fire Ins., 380 S.W.2d 545, 548 (Tex. 1964); Davis v. Williams, 136 Tex. 49, 52, 146 S.W.2d 982, 982 (1941); Texas Farm Prod. Co. v. Stock, 657 S.W.2d 494, 497 (Tex. App.—Tyler 1983, writ ref'd n.r.e.).

416. Townsend, Hall & DeWoody, *Standard of Review and Reversible Error*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE F-21 (1990).

against "the great weight and preponderance of the evidence."[417]

When a factual insufficiency complaint is combined in a single point with a legal insufficiency complaint, the distinction between the two complaints should be evident in the language of the point. The failure to distinguish between "legal" insufficiency and "factual" insufficiency in phrasing a point of error may lead the reviewing court to apply the wrong standard of review to the evidence.[418]

e. Summary Judgment Points

The Supreme Court of Texas has told appellants how to word a point of error in a summary judgment case. The simple statement that "THE TRIAL COURT ERRED IN GRANTING THE MOTION FOR SUMMARY JUDGMENT" is sufficient.[419] This broad language allows for argument on all grounds for the judgment. A narrower point may result in affirmance of the judgment because it fails to attack other independent grounds for the trial court's ruling.[420]

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417. Traylor v. Goulding, 497 S.W.2d 944, 945 (Tex. 1973); *see* Reveia v. Marine Drilling Co., 800 S.W.2d 252, 254 (Tex. App.—Corpus Christi 1990, no writ); Garcia v. City of Houston, 799 S.W.2d 496, 497 (Tex. App.—El Paso 1990, no writ).

418. *See* Westend API, Ltd. v. Rothpletz, 732 S.W.2d 371, 374 (Tex. App.—Dallas 1987, writ ref'd n.r.e.) (court construed inartfully draw point as no evidence point even though argument appeared to raise both complaints).

419. Malooly Bros., Inc. v. Napier, 461 S.W.2d 119, 121 (Tex. 1970); *see* Davis v. Pletcher, 727 S.W.2d 29, 32 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.); Hanby, *Preservation of Error on Appeal*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE E-21 (1990); Hittner & Liberato, *Summary Judgment in Texas*, 20 ST. MARY'S L.J. 243, 284 (1989). The practice of attacking a summary judgment with a single point of error has been criticized in a complex case involving a voluminous record. *See* A. C. Collins Ford v. Ford Motor Co., 807 S.W.2d 755, 758 (Tex. App.—El Paso 1991, writ requested). As an alternative, specific grounds of error may be separately alleged in additional points or subpoints with parenthetical record references. *See Malooly Bros.*, 461 S.W.2d at 121; *see also* Vaughn v. Grand Prairie Indep. School Dist., 784 S.W.2d 474, 478 (Tex. Civ. App.—Dallas 1989, no writ); *Davis*, 727 S.W.2d at 32; Texas Farm Products Co. v. Stock, 657 S.W.2d 494, 497 (Tex. App.—Tyler 1983, writ ref'd n.r.e.). For example:

> The trial court erred in granting Smith's motion for summary judgment. (Germane to Tr. 1, 2, 3).
>
> a. The trial court erred in granting Smith's motion for summary judgment because there is a genuine issue of material fact as to whether Smith is a holder of the note. (Germane to Tr. 1; Dx 1).
>
> b. The trial court erred in granting Smith's motion for summary judgment because Smith's action is barred by limitations. (Germane to Tr. 1; Dx 2).

420. Hittner & Liberato, *Summary Judgment in Texas*, 20 ST. MARY'S L.J. 243, 284 (1989). When an order granting summary judgment does not state the specific ground on which it was granted, the summary judgment may be affirmed on any ground presented in the

Summary judgment proceedings often involve competing motions where the trial court grants one motion and denies the other. The appealing party in such a case should not only assert a point of error complaining of the granting of the other party's motion for summary judgment, but should also assert a point attacking the trial court's denial of his motion for summary judgment. If this is not done, trial court error in denying the motion for summary judgment will be waived.[421] A single point of error complaining of the granting of the opposing motion for summary judgment does not preserve error in the denial of the appealing party's motion for summary judgment.[422]

f. Abuse of Discretion Points

The abuse of discretion standard of review governs numerous matters ranging from default judgments to motions for new trial.[423] Generally, a trial court abuses its discretion when it acts in an unreasonable or arbitrary manner.[424] An abuse of discretion occurs when the law has been "misapplied to established facts";[425] where the trial court exercises its "vested power in a manner that is contrary to law or reason";[426] or when the trial court acts "without reference to any guiding rules and principles."[427]

In phrasing an abuse of discretion point, the words "abuse of discretion" should be used. One appellate court found that a point of

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motion for summary judgment. Carlisle v. Philip Morris, Inc., 805 S.W.2d 498, 518 (Tex. App.—Austin 1991, no writ); Woomer v. City of Galveston, 765 S.W.2d 836, 837-38 (Tex. App.—Houston [1st Dist.] 1988, writ denied). Consequently, the party appealing the judgment is not limited to a specific ground and must show that each independent ground alleged in the motion for summary judgment is insufficient to support the judgment. *Woomer*, 765 S.W.2d at 837. On the other hand, when the summary judgment order specifies the ground on which it is based, the party appealing need not refute other independent grounds on which summary judgment was sought. *Carlisle*, 805 S.W.2d at 518.

421. City of Denison v. Odle, 808 S.W.2d 153, 156-57 (Tex. App.—Dallas, 1991 n.w.h.).

422. *Id.*

423. For a list of virtually every trial court ruling reviewed under the abuse of discretion standard, *see* Hall, *Standards of Appellate Review in Civil Appeals*, 21 ST. MARY'S L.J. 865, 865 (1990).

424. Beaumont Bank, N.A. v. Buller, 806 S.W.2d 223, 226 (Tex. 1991); Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 242 (Tex. 1985), *cert. denied*, 476 U.S. 1159 (1986).

425. State v. Southwestern Bell Tel. Co., 526 S.W.2d 526, 528 (Tex. 1975).

426. Landon v. Jean-Paul Buttinger, Inc., 724 S.W.2d 931, 935 (Tex. App.—Austin 1987, no writ).

427. Craddock v. Sunshine Bus Lines, 134 Tex. 388, 391, 133 S.W.2d 124, 126 (1939); *Downer*, 701 S.W.2d at 241-42; Welex v. Broom, 806 S.W.2d 855, 860 (Tex. App.—San Antonio 1991, no writ).

error complaining of an abuse of discretion was defective because "there was no mention of abuse of judicial discretion in appellant's point."[428] However, the absence of abuse of discretion terms will not be fatal to the appeal where the point otherwise directs the appellate court to the error complained of and the place in the record where the error occurred and was preserved.[429]

3. Argument

Rule 74(f) provides the ingredients for the argument. According to this rule, the argument must include: "(1) a fair, condensed statement of the facts pertinent to the points of error, with reference to the pages in the record where the facts may be found; and (2) such discussion of the facts and the authorities relied upon as may be required to maintain the point of error at issue."[430] Points of error not supported by argument are waived.[431]

a. Statement of the Facts[432]

Rule 74 requires that the "statement of the facts" be briefed in connection with the points to which they pertain.[433] This may be done by a single statement of facts relevant to all points, by a separate fact

428. Costa v. Storm, 682 S.W.2d 599, 605 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). This hypertechnical holding is inconsistent with the liberal point of error law espoused more recently by the Texas Supreme Court. *See* Pool v. Ford Motor Co., 715 S.W.2d 629, 633 (Tex. 1986); *see also* Hatchell, *Proper and Effective Points of Error on Appeal* in STATE BAR OF TEXAS, ST. MARY'S EIGHTH ANNUAL PROCEDURAL INSTITUTE: APPELLATE PRACTICE G-16 (1986) (suggesting that *Costa* is an aberration).

429. *See* McKinney v. National Union Fire Ins. Co., 747 S.W.2d 907, 909 (Tex. App.—Fort Worth 1988), *aff'd*, 772 S.W.2d 72 (Tex. 1989).

430. TEX. R. APP. P. 74(f); *see* Weaver v. Southwest Nat'l Bank, 34 Tex. Sup. Ct. J. 629, 630 (June 5, 1991) (per curiam).

431. *E.g.*, Trenholm v. Ratcliff, 646 S.W.2d 927, 933-34 (Tex. 1983); Welex v. Broom, 806 S.W.2d 855, 870 (Tex. App.—San Antonio 1991, no writ); Rent Am., Inc. v. Amarillo Nat'l Bank, 785 S.W.2d 190, 195 (Tex. App.—Amarillo 1990, writ denied); *see* Barnett v. City of Colleyville, 737 S.W.2d 603, 605 (Tex. App.—Fort Worth 1987, writ denied). *But cf.* Williams v. Khalaf, 802 S.W.2d 651, 658 (Tex. 1990) (court of appeals should apply correct law even if point not briefed).

432. The statement of the facts discussed in this section is different than the "preliminary statement" in which the appellant is required to briefly describe the nature of the case, "i.e., whether it is suit for damages on a note," and the result in the trial court. TEX. R. APP. P. 74(c); *see supra* § VI B 1.

433. TEX. R. APP. P. 74(c) ("details . . . should be reserved and stated in connection with the points to which they are pertinent"); TEX. R. APP. P. 74(f) ("argument shall include . . . a fair, condensed statement of the facts pertinent to such points").

statement under each point of error, or by an appropriate variation of these methods.[434] If one broad fact statement is used to allege all facts relied upon for the appeal, the rules do not require that the facts be separately restated under each point of error. In *Weaver v. Southwest National Bank*,[435] the appellants submitted a brief consisting of a section entitled "Fact Statement" which included all facts relied upon for the five points of error raised in the appeal. The facts were not formally restated in the argument under each point of error. A majority of the supreme court held that the appellants had complied with the briefing requirements of Rule 74 notwithstanding his failure to restate the facts under each point of error.[436]

A statement of the facts must contain record references.[437] The failure to include proper record references in an appellant's brief is often cited as a ground for overruling a point of error.[438] Appellate courts will not search through the record to locate error.[439] Therefore, in order to avoid waiver of a point of error for failing to include sufficient record references, each disputed material statement of fact should be followed by parenthetical record references.

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434. Dubose & Duggan, *Appellate Briefs for Texas Courts* in UNIVERSITY OF TEXAS SCHOOL OF LAW, TECHNIQUES FOR HANDLING APPEALS IN STATE AND FEDERAL COURT 7 (June 1991).

435. 34 Tex. Sup. Ct. J. 629 (June 8, 1991) (per curiam).

436. *Id.* at 630. The court's holding in *Weaver* should not be read as eliminating the requirement of discussing the facts and authorities under each point of error to demonstrate reversible error. *See* TEX. R. APP. P. 74(f) (in addition to a "statement of the facts" argument shall include "such discussion of the facts and the authorities relied upon as may be requisite to maintain the point [of error] at issue"); *see also infra* § VI A 3 b (addressing the requirements for the "discussion of facts and the authorities").

437. TEX. R. APP. P. 74(f) (argument shall include "a fair condensed statement of the facts . . . with reference to the pages in the record where the same may be found").

438. *See, e.g.*, State Bar of Texas v. Evans, 774 S.W.2d 656, 657 n.3 (Tex. 1989); Peterson v. Dean Witter Reynolds, Inc., 805 S.W.2d 541, 549 (Tex. App.—Dallas 1991, no writ); Murrco Agency, Inc. v. Ryan, 800 S.W.2d 601, 607 (Tex. App.—Dallas 1990, no writ).

439. *See, e.g.*, Service Lloyd's Ins. Co. v. Greenhalgh, 771 S.W.2d 688, 694 (Tex. App.—Austin 1989), *modified on other grounds*, 787 S.W.2d 938 (Tex. 1990); Most Worshipful Prince Hall Grand Lodge v. Jackson, 732 S.W.2d 407, 411-12 (Tex. App.—Dallas 1987, writ ref'd n.r.e.); Dodson v. Kung, 717 S.W.2d 385, 390 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.); *see also* Cissne v. Robertson, 782 S.W.2d 912, 923 (Tex. App.—Dallas 1989, writ denied) ("[t]his Court has no duty to independently search the statement of facts in an attempt to determine if the asserted error has merit"); Shenandoah Assocs. v. J & K Properties, Inc., 741 S.W.2d 470, 492 (Tex. App.—Dallas 1987, writ denied) ("[t]his Court declines to make an independent search of thirty-eight hundred pages of testimony in an attempt to support Shenandoah's claims").

b. Discussion of Facts and Authorities

In addition to a statement of the facts, it is mandatory that the brief include a discussion of the facts and authority (often referred to as "argument and authority") supporting each point of error.[440] The discussion of facts and law is the "heart of the brief."[441] Without argument and authority to support a point of error, the point will be waived.[442]

Although the rules strongly encourage brevity in the argument,[443] the argument must meet minimal pleading requirements and provide the appellate court with enough information to enable it to discern the basis of the complaint.[444] The argument should be specific,[445] indicate the point(s) of error to which it relates,[446] and contain a discussion of the facts and authorities supporting the point of error.[447] An argument which merely states conclusions and does not refer the court to specific error is insufficient.[448]

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440. TEX. R. APP. P. 74(f).

441. 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 709 at 479 (Texas Practice 1985).

442. *Id.* at 479-80; *see, e.g.*, Olson v. Central Power & Light Co., 803 S.W.2d 808, 813 (Tex. App.—Corpus Christi 1991, no writ); Gomez v. Hartford Co., 803 S.W.2d 438, 442 (Tex. App.—El Paso 1991, no writ); Taylor v. Bonilla, 801 S.W.2d 553, 561 n.5 (Tex. App.—Austin 1990, writ denied).

443. TEX. R. APP. P. 74 ("[b]riefs *shall* be brief") (emphasis supplied); TEX. R. APP. P. 74(f) ("[r]epetition or prolixity of . . . argument *must* be avoided") (emphasis supplied). A verbose argument violates the letter of Rule 74; *see* Dubose, *Writing Appellate Briefs: Format, Style and Process* in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE J-14 (1989) ("[t]he most commonly violated sentence in all of the Texas Rules of Appellate Procedure is the first sentence of Rule 74 . . ."). Repetition and verbosity in the argument also disserves the client's interest in a favorable outcome on appeal. *See id.* (appellate judges will be more favorably disposed to shorter briefs).

444. *See* West v. Carver, 712 S.W.2d 569, 574 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.) ("three sentence" argument insufficient to apprise court of complaint).

445. *See* Catherman v. First State Bank of Smithville, 796 S.W.2d 299, 304 (Tex. App.—Austin 1990, no writ); Lewis v. Deaf Smith Electric Co-Op, Inc., 768 S.W.2d 511, 513 (Tex. App.—Amarillo 1989, no writ).

446. TEX. R. APP. P. 74(f); *see* La Sara Grain Co. v. First Nat'l Bank, 673 S.W.2d 558, 568 (Tex. 1984); Champion v. Wright, 740 S.W.2d 848, 850 (Tex. App.—San Antonio 1987, writ denied).

447. TEX. R. APP. P. 74(f); *see also* Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768, 815 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.) (points of authority not supported by argument are waived).

448. *See, e.g.*, Smith v. Valdez, 764 S.W.2d 26, 27 (Tex. App.—San Antonio 1989, writ denied); Inpetco v. Texas Am. Bank/Houston, 722 S.W.2d 721, 722 (Tex. App.—Houston [14th Dist.] 1986), *writ ref'd n.r.e.*, 729 S.W.2d 300 (Tex. 1987) (per curiam); Alright, Inc. v. Pearson, 711 S.W.2d 665, 688 (Tex. App.—Dallas 1986, no writ).

The argument must demonstrate harm.[449] Rule 81 states, in pertinent part, that:

> No judgment shall be reversed on appeal . . . unless the appellate court shall be of the opinion that the error complained of amounted to such a denial of the rights of the appellant as was reasonably calculated to cause and probably did cause rendition of an improper judgment in the case, or was such as probably prevented the appellant from making a proper presentation of the case to the appellate court.[450]

Therefore, argument and authority which fails to address the consequences of the trial court error will not sustain a point of error.[451]

In order to show reversible error, an argument must contain legal authority, record references, and a discussion demonstrating that the cited authority and record references support the point.[452] A mere list of record references or citations to legal authorities will not suffice,[453] nor will a naked argument which contains no cited authority or record references.[454] If no authorities support a proposition, such as in a case of "first impression," the careful appellate lawyer will support the argument with analogous case law and references to statutes or treatises, if any.[455] While some imprudent lawyers attempt to use unpublished opinions as legal precedent, this practice is expressly pro-

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449. *See* Naydan v. Naydan, 800 S.W.2d 637, 642 (Tex. App.—Dallas 1990, no writ); Paramount Nat'l Life Ins. v. Williams, 772 S.W.2d 255, 269 (Tex. App.—Houston [14th Dist.] 1989, writ denied); *see also* TEX. R. APP. P. 81(b)(1).

450. TEX. R. APP. P. 81(b)(1).

451. *Naydan*, 800 S.W.2d at 642; *see, e.g.*, *Smith*, 764 S.W.2d at 26; Liberty Mut. Fire Ins. v. McDonough, 734 S.W.2d 66, 70-71 (Tex. App.—El Paso 1987, no writ); Larrumbide v. Doctor's Health Facilities, 734 S.W.2d 685, 687-88 (Tex. App.—Dallas 1987, writ denied).

452. *E.g.*, *Gomez*, 803 S.W.2d at 442; Murrco Agency, Inc. v. Ryan, 800 S.W.2d 600, 607 (Tex. App.—Dallas 1990, no writ); Gaulden v. Johnson, 801 S.W.2d 561 (Tex. App.—Dallas 1990, no writ); *see* TEX. R. APP. P. 74(f) (brief must contain "such discussion of facts and authorities" as needed to maintain a point); *see also* Scott v. Scott, 805 S.W.2d 835, 841 n.3 (Tex. App.—Waco 1991, no writ) (failure to "discuss" error constitutes waiver of error even though point is stated broadly enough to raise error).

453. *See Alright*, 711 S.W.2d at 688; Trinity River Auth. v. Williams, 659 S.W.2d 714, 721-22 (Tex. App.—Beaumont 1983), *aff'd in part, rev'd in part*, 689 S.W.2d 883 (Tex. 1985).

454. *See, e.g.*, Catherman v. First State Bank, 796 S.W.2d 299, 304 (Tex. App.—Austin 1990, no writ); Connors v. Connors, 796 S.W.2d 233, 236-37 (Tex. App.—Fort Worth 1990, no writ); Henry S. Miller Management Corp. v. Houston State Assocs., 792 S.W.2d 128, 131 (Tex. App.—Houston [1st Dist.] 1990, writ denied). *But cf.* Chapa v. Herbster, 653 S.W.2d 594, 599 (Tex. App.—Tyler 1983, no writ) (although appellant failed to cite authorities under a point of error, reviewing court applied liberal rules of construction and addressed the point).

455. Hatchell, *Proper and Effective Points of Error on Appeal*, in STATE BAR OF TEXAS, ST. MARY'S EIGHTH ANNUAL PROCEDURAL INSTITUTE: APPELLATE PRACTICE G-8 (1986).

hibited by the rules.[456] Citations to unpublished authority constitute facts outside the appellate record and may be stricken.[457]

There are special rules for arguments supporting complaints about the sufficiency of the evidence. Arguments challenging the sufficiency of the evidence require minimal legal authority.[458] A sufficiency of the evidence argument is adequate if it contains a discussion of the applicable standard of review and an explanation of why the evidence does or does not meet the standard in the context of the pertinent legal theory.[459] The supreme court has suggested a format for argument supporting a factual insufficiency point:

> In order that this court may in the future determine if a correct standard of review of factual insufficiency points has been utilized, courts of appeals, when reversing on insufficiency grounds, should, in their opinions, *detail the evidence relevant to the issue in consideration and clearly state why the jury's finding is factually insufficient or is so against the great weight and preponderance as to be manifestly unjust; why it shocks the conscience; or clearly demonstrates bias.* Further, those courts, in their opinions, should *state in what regard the contrary evidence greatly outweighs the evidence in support of the verdict.* It is only in this way that we will be able to determine if the requirements of *In Re King's Estate* have been satisfied.[460]

Although these instructions are directed to courts of appeals, cautious appellate lawyers will heed them in drafting a factual sufficiency argument.

Rule 74 contains additional requirements for arguments involving a complaint about the correctness of the charge and complaints about the improper admission or exclusion of evidence.[461] In an argument involving either complaint, the part of the charge and the substance of the evidence complained about must be set out "in full" with refer-

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456. TEX. R. APP. P. 90(i).

457. Carlisle v. Philip Morris, Inc., 805 S.W.2d 498, 499 (Tex. App.—Austin 1991, no writ). Attaching to the brief unpublished orders, judgments and similar materials from other courts does not make the material part of the appellate record. *Id.*

458. *See* Rogers v. Stephens, 697 S.W.2d 75, 78 (Tex. App.—Fort Worth 1985, writ dism'd). Evidentiary points are based on facts adduced at trial and the question is simply whether there is any evidence to support the findings. *Id.*

459. *See* Hanby, *Preservation of Error on Appeal*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE E-16 (1990).

460. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986) (emphasis supplied).

461. TEX. R. APP. P. 74(f).

ences to the pages of the record where they may be found.[462] This requirement may be satisfied by including the objectionable matters in an appendix, whenever appropriate.[463]

4. Prayer for Relief

Every appellant's brief must contain a prayer which clearly states the nature of the relief sought.[464] The appellant's prayer typically requests the appellate court to enter judgment reversing the trial court's judgment and, depending on the nature of errors asserted, either render judgment for the appellant or remand the case for new trial.[465] The prayer should also include specific requests for "any other appropriate order, as the law and nature of the case may require,"[466] such as a modification of the judgment, dismissal, partial reversal or affirmance, or relief from or request for a suggestion of remittitur.[467]

In drafting the prayer, the appellate lawyer should be careful to include all possible relief to which the appellant may be entitled under one or more points of error. Some courts have held that the prayer is dispositive of the nature of relief awarded upon reversal of the judgment.[468] In *Hampton v. State Farm Mutual Automobile Insurance Co.*,[469] the Corpus Christi Court of Appeals reversed a judgment n.o.v. and rendered judgment for the appellant but refused to award the appellant the prejudgment interest pleaded in the trial court because the appellant failed to pray for the interest on appeal.[470] In

462. *Id.*

463. *See* Dubose and Duggan, *Appellate Briefs for Texas Courts*, in UNIVERSITY OF TEXAS SCHOOL OF LAW, TECHNIQUES FOR HANDLING APPEALS IN STATE AND FEDERAL COURT 12 (June 1991) ("[a]ppropriate uses of an appendix include . . . contested jury questions or instructions, and critical pages from the appellate record").

464. TEX. R. APP. P. 74(g); *see* Westend API, Ltd. v. Rothpletz, 732 S.W.2d 371, 374 (Tex. App.—Dallas 1987, writ ref'd n.r.e.).

465. TEX. R. APP. P. 80(b).

466. TEX. R. APP. P. 80(c).

467. F. Knapp, *The Appellant's Brief*, in APPELLATE PROCEDURE IN TEXAS at 311 (2d Edition); *see* TEX. R. APP. P. 80(b) (court of appeals may affirm, reverse, modify or dismiss appeal); TEX. R. APP. P. 85(b) (court of appeals may suggest, reverse or sustain remittitur).

468. *See* Hampton v. State Farm Mut. Automobile Ins. Co., 778 S.W.2d 476, 480 (Tex. App.—Corpus Christi 1989, no writ); *Westend API, Ltd.*, 732 S.W.2d at 374.

469. 778 S.W.2d 476 (Tex. App.—Corpus Christi 1989, no writ).

470. *Id.* at 480. This appears to be in direct conflict with the mandate of Rule 81(c) which provides: "When the judgment or decree of the court below shall be reversed, *the court shall proceed to render such judgment or decree as the court below should have rendered*, except when it is necessary to remand to the court below for further proceedings." TEX. R. APP. P. 81(c) (emphasis supplied). Rule 81 was not discussed in the *Hampton* opinion.

another case, the Dallas Court of Appeals refused to address a factual sufficiency point of error that would have entitled the appellants to a remand on the grounds that the appellants only prayed for a rendition of the judgment.[471]

A more just approach to construing the prayer is found in cases where courts have held that the nature of relief supported by the point of error controls over the prayer's wording.[472] In *Resource Savings Association v. Neury*,[473] the appellant appealed from the granting of a summary judgment but did not appeal from the denial of its own motion for summary judgment. In its prayer for relief, the appellant asked only for rendition. The Dallas Court of Appeals ignored the erroneous prayer and remanded the case for trial.[474] *Kaspar v. Thorne* involved the reverse situation. The appellant in *Kaspar* obtained a rendition even though his prayer for relief asked only for a remand.[475]

5. Request for Oral Argument

Rule 75 requires that if "a party to the appeal" desires oral argument, the lawyer must file a request for oral argument at the time the brief is filed.[476] The rule expressly states that the failure to file a request for oral argument is deemed a waiver of the right to argue the case.[477]

The rules do not specify how the request for oral argument should be made. The local rules of an appellate court may contain instructions for making the request and should be consulted prior to filing the brief.[478] If there is no local rule which provides for the manner of

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471. *Westend API*, 732 S.W.2d at 373.

472. *See* Resource Sav. Ass'n v. Neury, 782 S.W.2d 897, 903-04 (Tex. App.—Dallas 1989, writ denied); Kaspar v. Thorne, 755 S.W.2d 151, 157 (Tex. App.—Dallas, 1988, no writ); *see also* Olincory v. Dyson, 678 S.W.2d 650, 657 (Tex. App.—Houston [14th Dist.] 1984), *rev'd on other grounds*, 692 S.W.2d 456 (Tex. 1985) (prayer for relief should be an aid to understanding the point of error).

473. 782 S.W.2d 897 (Tex. App.—Dallas 1989, writ denied).

474. *Id.* at 903-04.

475. *Kaspar*, 755 S.W.2d at 157. The court suggested that the failure of the *appellee* to request a remand rather than an affirmance also required that the case be rendered. *Id.*

476. TEX. R. APP. P. 75(f).

477. *Id.*; *see* Green v. Texas Elec. Wholesalers, 647 S.W.2d 1, 11 (Tex. App.—Houston [1st Dist.] 1982, no writ). Even though a party waives his right to oral argument, the court of appeals may nevertheless direct the party to appear and submit oral argument on the submission date of the case. TEX. R. APP. P. 75(f).

478. *See* TEX. APP.—FORT WORTH LOCAL R. 1A(5) (request must appear on cover of brief).

requesting oral argument, the preferred method for making the request is putting the words "oral argument requested" on the cover of the brief.[479] Another acceptable method of requesting oral argument is to put the request in the transmittal letter accompanying the brief.[480] Either procedure should suffice to preserve the right to argue the case.

Lawyers occasionally overlook the requirements of Rule 75 when preparing and filing their brief. When a lawyer discovers that he failed to request oral argument, he should immediately file a motion for leave to request oral argument which states the reasons why the request was not timely made and that oral argument would "materially aid" the court in the determination of the issues of law and fact presented in the appeal.[481] Most appellate courts liberally grant leave to request oral argument when the omission of the request was inadvertent.

C. *Amending or Supplementing the Brief*

There is no absolute right to amend or supplement a brief.[482] Rule 74 permits briefs to be amended or supplemented "at any time when justice requires and upon reasonable terms as the court may prescribe."[483] In general, appellate courts liberally accept amended or supplemental briefs prior to submission. Post-submission briefs are routinely accepted on issues raised at oral argument,[484] but most courts decline briefs which add points of error or inject new issues

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479. Dubose, *Writing Appellate Briefs: Format, Style and Process*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE J-2-3 (1989).

480. *Id.*

481. *See* TEX. R. APP. P. 75(e) (court has discretion to permit argument notwithstanding waiver). Even when both parties request oral argument, the court of appeals may decide to submit the case without argument because it doubts oral argument would "materially aid the court in the determination of the issues of law and fact presented in the appeal." TEX. R. APP. P. 75(f). When this happens, notice must be given by the clerk in writing to all parties at least 21 days prior to the submission date. *Id.* The date of notice is deemed to be the date the notice is placed in the mail. *Id.* If a lawyer disagrees with the court's decision to decide a case without argument, he should make objection by a written motion which substantially complies with Rule 19 immediately after receiving notice of submission. *See* TEX. R. APP. P. 19(a).

482. *See* 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 718 at 498 (Texas Practice 1985).

483. TEX. R. APP. P. 74(o).

484. Patton, *Perfecting the Imperfect Appeal—Rescuing the Record and Appellate Motion Practice in State Court*, in UNIVERSITY OF TEXAS SCHOOL OF LAW, TECHNIQUES FOR HANDLING APPEALS IN STATE AND FEDERAL COURT 60 (June 1991).

into an appeal at or after submission.[485]

The appellate rules contain no specific procedures governing the filing of amended and supplemental briefs. Some courts of appeals have local rules for filing amended and supplemental briefs which should be consulted.[486] If the procedure for filing a brief is not addressed in the local rules of the reviewing court, then it is suggested that a motion for leave which complies with Rule 19 be filed with the brief explaining the need for additional briefing.[487]

If a court of appeals determines that a briefing error constitutes a "flagrant violation" of Rule 74, it may order a party to rebrief without a request by the party.[488] The threshold standard for determining whether rebriefing is permitted or required in the court of appeals is found in Rule 83, which provides: "A judgment shall not be affirmed or reversed or an appeal dismissed for defects or irregularities, in appellate procedure, either of form or substance, without allowing a reasonable time to correct or amend such defects or irregularities."[489] This rule was first interpreted by the Texas Supreme Court in *Inpetco,*

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485. *See, e.g.*, Haynes v. MacIntosh, 776 S.W.2d 784, 788 (Tex. App.—Corpus Christi 1989, writ denied); Canales v. National Union Fire Ins., 763 S.W.2d 20, 23 (Tex. App.—Corpus Christi 1988, writ denied); Darley v. Texas Uvatan, 741 S.W.2d 200, 205 (Tex. App.—Dallas 1987, no writ); *see* 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 718 at 498 (Texas Practice 1985) (motion to amend or supplement brief filed on eve or after oral argument may be denied); *see generally*, Patton, *Perfecting the Imperfect Appeal—Rescuing the Record and Appellate Motion Practice in State Court*, in UNIVERSITY OF TEXAS SCHOOL OF LAW, TECHNIQUES FOR HANDLING APPEALS IN STATE AND FEDERAL COURT 60 (June 1991) (discussing attitudes of various courts of appeals toward filing of amended or supplemental briefs). The court of appeals in King v. Graham Holding Co., 762 S.W.2d 296 (Tex. App.—Houston [14th Dist.] 1988, no writ), refused to permit a post-submission amendment to cure inadequacies in eleven points of error. *Id.* at 298. In overruling the points, the court said:

> It would be intolerable for an appellate court to be forced to spend an inordinate amount of time preparing for submission of a case to hear oral arguments without the benefit of proper study, and then to be required to send the cause back to the beginning of the process for rebriefing—and perhaps reargument. Although the wheels of justice turn slowly, they need not roll over the same ground twice.

Id. at 299.

486. *See, e.g.*, TEX. APP.—CORPUS CHRISTI LOCAL R. V(B); TEX. APP.—SAN ANTONIO LOCAL R. 1(C); TEX. APP.—TYLER LOCAL R. V(F).

487. Patton, *Perfecting the Imperfect Appeal—Rescuing the Record and Appellate Motion Practice in State Court*, in UNIVERSITY OF TEXAS SCHOOL OF LAW, TECHNIQUES FOR HANDLING APPEALS IN STATE AND FEDERAL COURT 60 (June 1991); *see* TEX. R. APP. P. 19.

488. TEX. R. APP. P. 74(p).

489. TEX. R. APP. P. 83; *see* Inpetco v. Texas Am. Bank/Houston, 729 S.W.2d 300, 300 (Tex. 1986) (per curiam). Rule 185 is the supreme court counterpart to Rule 83. *See* TEX. R. APP. P. 185.

Inc. v. Texas American Bank/Houston.[490] *Inpetco* involved an appeal from a summary judgment. In refusing the application for writ of error, no reversible error, a majority of the court disapproved of "that portion of the court of appeals opinion which states Inpetco waived its point of error by failing to comply with the briefing requirements of Texas Rules of Appellate Procedure 74."[491] Importantly, the court said Rule 74 should be read in conjunction with Rule 83 and found that the court of appeals erred in affirming the summary judgment on the basis of Inpetco's briefing inadequacies "without first ordering Inpetco to rebrief."[492]

Not long after *Inpetco* was decided, a sharply divided supreme court refused to apply the rule of *Inpetco* to a post-submission amendment adding a request for alternative relief.[493] In *Davis v. City of San Antonio*,[494] the City asserted factual insufficiency cross-points in the court of appeals. The cross-points were not addressed by the court of appeals because the City prevailed on other grounds. In its response to the application for writ of error in the supreme court, the City did not mention the cross-points or request that the case be remanded to the court of appeals for consideration of the cross-points in the event of reversal. The supreme court reversed and refused to permit the City to amend in order to request remand of the cross-points.[495] The court distinguished *Inpetco* on the following grounds:

> [W]e are not affirming or reversing a judgment "for defects or irregularities in appellate procedure" within the language of Tex. R. App. P. 185. Our judgment of reversal is not based on irregularities in appellate procedure but rather on the City's failure in the trial court to affirmatively plead its immunity defense.[496]

Although *Davis* is not a square holding restricting *Inpetco*, it is frequently cited by courts of appeals as a basis for refusing amendments

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490. 729 S.W.2d 300 (Tex. 1987) (per curiam).

491. *Id.*

492. *Id*; *see* TEX. R. APP. P. 74(p) (court of appeals "may require the case to be rebriefed" for violation of briefing rules).

493. Davis v. City of San Antonio, 752 S.W.2d 518, 521 (Tex. 1988).

494. 752 S.W.2d 518 (Tex. 1988).

495. *Id.* at 521. This ruling also represented a significant departure from the supreme court's previous practice in remanding cross-points. *See infra* § XI B 3.

496. *Davis*, 752 S.W.2d at 521. In a concurring and dissenting opinion, Justice Gonzalez criticized the majority in *Davis* for departing from *Inpetco*. *See id.* at 523 (Gonzalez, J., concurring and dissenting, joined by Phillips, C.J., Wallace and Culver, J.J.).

to correct briefing defects.[497] Relying on the rationale of *Davis*, an appellate court may decline rebriefing unless the briefing error constitutes the only basis for the judgment on appeal. As one court of appeals has reasoned:

> Overruling some, but not all, points of error because of procedural defects is not the same as affirming a judgment due to procedural defects. The difference is that the appellant may still get complete or partial relief on other points not waived by procedural defects.
>
> We hold that Rule 83 does not require a court to grant time to amend defective points of error, unless as in *Inpetco*, *all* the points are defective and overruling them on that basis would constitute an affirmance for defects in appellate procedure.[498]

It has also been held that *Inpetco* does not require appellate courts to order rebriefing of a point which was not briefed initially. In *Smith v. United States National Bank*,[499] the appellant made no argument and cited no authority in support of one of his points of error. The Tyler Court of Appeals explained its refusal to order rebriefing of the point as follows:

> We believe that *Inpetco* should be construed to allow rebriefing in those instances where a point is so generally briefed, in such a careless or cursory manner, that an appellate court cannot ascertain the argument. It does not necessarily follow that in all instances in which a point is raised and not briefed at all that an appellate court should be compelled to order rebriefing. Where there is no discussion of the facts and authorities relied upon, the court has no duty to independently search the statement of facts to ascertain if a point has merit. In this case, to order that the case be rebriefed on the constructive trust point does not appear judicially economical nor fair to the other parties. Under the circumstances here, we conclude that the point of error should be deemed to have been waived.[500]

Since *Inpetco*, the Texas Supreme Court has reaffirmed that all

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497. *See, e.g.*, Henry S. Miller Management Corp. v. Houston State Assocs., 792 S.W.2d 128, 134 (Tex. App.—Houston [1st Dist.] 1990, writ denied); Cissne v. Robertson, 782 S.W.2d 912, 924 (Tex. App.—Dallas 1989, writ denied); Smith v. United States Nat'l Bank, 767 S.W.2d 820, 824 (Tex. App—Texarkana 1989, writ denied).

498. *Henry S. Miller*, 792 S.W.2d at 134 (emphasis supplied).

499. *Smith*, 767 S.W.2d at 821.

500. *Id.* at 824; *see also* King v. Graham Holding Co., Inc., 762 S.W.2d 296, 299 (Tex. 1988); Rent America, Inc. v. Amarillo Nat'l Bank, 785 S.W.2d 190, 195 (Tex. App.—Amarillo 1990, writ denied).

briefs must be in substantial compliance with Rule 74.[501] Although briefing inadequacies alone cannot serve as the basis for denying an appeal unless there has been an opportunity to rebrief, the limited mandate of *Inpetco* does not deprive appellate courts of the discretion to overrule points which are not properly briefed. Consequently, no brief should be submitted in violation of the briefing rules on the assumption that an appellate court will search for hidden error or allow rebriefing before overruling a potentially valid point.

VII. PRESERVING ERROR AS AN APPELLEE

There are three common situations in which an appellee has a burden to act in the court of appeals in order to protect a judgment or avoid waiver of trial court error: (1) when reply and cross points must be asserted in a responsive brief; (2) when it is necessary to perfect a separate appeal; and (3) when an appellee must request or object to a record.

A. *The Appellee's Brief*

1. Necessity for Timely Filed Appellee's Brief

In an ordinary appeal, the appellee is required to file his brief within twenty-five days after the date of the filing of the appellant's brief.[502] The appellee's brief is due twenty days after the filing of the appellant's brief in accelerated appeals.[503] Although the rules do not impose any specific penalty on the appellee for failing to timely file a brief, "self-interest dictates that he do so."[504]

Several matters may be waived if not raised in an appellee's brief. Objections to inaccurate statements of fact in the appellant's brief may be waived unless challenged in the appellee's brief.[505] Thus, in preparing an appellee's brief a lawyer must be careful to challenge any

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501. *See* Weaver v. Southwest Nat'l Bank, 34 Tex. Sup. Ct. J. 629, 629 (June 8, 1991).

502. TEX. R. APP. P. 74(m). This time period may be extended upon a timely and proper motion for extension. *See* Darley v. Texas Uvaton, 741 S.W.2d 200, 203 (Tex. App.—Dallas 1987, no writ).

503. TEX. R. APP. P. 42(a)(3). The court of appeals may shorten the time for the filing of briefs in accelerated appeals or permit a case to be submitted without briefs. *Id.* 42(c).

504. Chadick, *An Effective Appellate Brief*, 26 TEX. B.J. 923, 923 (1963).

505. TEX. R. APP. P. 74(f) ("Any statement made by appellant in his original brief as to the facts or the record may be accepted by the court as correct unless challenged by the opposing party."); *see, e.g.*, San Antonio Villa Del Sol Homeowners Ass'n v. Miller, 761 S.W.2d 460, 462 (Tex. App.—San Antonio 1988, no writ); Navistar Int'l Corp. v. Valles, 740 S.W.2d 4, 6

misstatements of fact (and law) found in the appellant's brief. The challenges must be directed to specific matters. A general objection that "all" allegations in the appellant's brief are incorrect may not preclude the appellate court from accepting specific allegations as true.[506]

An appellant's failure to preserve error in the trial court should also be addressed in the appellee's brief. Although it is normally an appellant's burden to show that error was preserved in the trial court, some appellate courts have held that an appellee's failure to complain of an appellant's failure to preserve a complaint for appellate review constitutes waiver of the error.[507] Unless it is raised by the appellee, an appellate court may miss a procedural defect in the appellant's case which would otherwise preclude review of a point of error.

In addition, the appellee's brief should include all independent grounds pleaded and proved in the trial court which support the judgment. Appellate courts can affirm a judgment on any independent ground which the trial court may have rejected in rendering judgment.[508] However, an independent ground for affirmance may be

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(Tex. App.—El Paso 1987, no writ); Great State Petroleum, Inc. v. Arrow Rig Serv., 714 S.W.2d 429, 432 (Tex. App.—Fort Worth 1986, no writ).

506. *See* Hercules, Inc. v. Eilers, 458 S.W.2d 221, 227 (Tex. Civ. App.—Beaumont 1970, writ ref'd n.r.e.) (challenge must be in direct response to specific statement). *But see* Coleman v. Pacific Employers Ins. Co., 484 S.W.2d 449, 452 (Tex. Civ. App.—Tyler 1972, writ ref'd n.r.e.) (general challenge to all statements in appellant's brief will suffice to put all matters in dispute). Moreover, such broad statements are not in keeping with the obligation of Texas lawyers to identify all undisputed material facts. Texas Lawyers Creed § III at 15 ("I will readily stipulate to undisputed facts in order to avoid needless costs or inconvenience for any party").

507. *See, e.g.*, Ford Motor Co. v. Tidwell, 563 S.W.2d 831, 836 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.) (court reviewed factual sufficiency points which were not raised in motion for new trial where appellee's objection was not raised in brief); Sanders v. Davila, 550 S.W.2d 709, 713 (Tex. Civ. App.—Amarillo) (court sustained point on erroneous instruction notwithstanding appellant's failure to object to instruction because appellee did not object to review of point in brief), *writ ref'd n.r.e.*, 557 S.W.2d 770 (Tex. 1977); Thomas v. Morrison, 537 S.W.2d 274, 279-81 (Tex. Civ. App.—El Paso 1976, writ ref'd n.r.e.) (appellee's failure to raise appellant's failure to object to submission of issue resulted in waiver of argument on appeal that point should not be considered). The supreme court has declined to express an opinion on the question of whether an appellee waives an argument that the appellant did not properly preserve error in the trial court by failing to address the issue in the appellee's brief. State *ex rel.* Hightower v. Smith, 671 S.W.2d 32, 33 (Tex. 1984).

508. *See, e.g.*, Lassiter v. Bliss, 559 S.W.2d 353, 358 (Tex. 1977); Jackson v. Ewton, 411 S.W.2d 715, 717-18 (Tex. 1967); Jack v. Jack, 796 S.W.2d 543, 550 (Tex. App.—Dallas 1990, no writ); City of San Antonio v. Dunn, 796 S.W.2d 258, 262 (Tex. App.—San Antonio 1990, no writ).

waived if not briefed by the appellee.[509]

When an appellant fails to file a brief, the appellee should file a motion to dismiss the appeal for want of prosecution.[510] Occasionally, an appellate court may decline to dismiss the appeal.[511] In such a case, the appellee should protect the judgment by filing a brief.[512] In the absence of an appellant's brief, an appellate court may regard the statements in the appellee's brief as a correct presentation of the case and affirm the judgment without examining the record.[513]

2. Minimum Requirements for Appellee's Brief

The brief of an appellee should follow the general format of the appellant's brief.[514] When no cross-points are raised in the brief, Rule 74(e) requires that the appellee's brief "reply to the points relied upon by the appellant."[515] It is mandatory that the brief follow "substantially the form of the brief for the appellant" when cross-points are asserted.[516]

a. Reply Points

The main purpose of "reply points"[517] is to answer the points raised by the appellant and explain why those points are not valid.[518] In

509. *Jackson*, 411 S.W.2d at 717.

510. *See* TEX. R. APP. P. 74(L)(1) ("when the appellant has failed to file his brief in the time prescribed, the appellate court may dismiss the appeal for want of prosecution").

511. *Id.*

512. 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 711 at 483 (Texas Practice 1985); *see* TEX. R. APP. P. 74(m) ("when appellant has failed to file his brief . . . appellee may, prior to the call of the case, file his brief . . .").

513. TEX. R. APP. P. 74(m).

514. *See* Skaggs & Denison, *The Appellee's Brief*, in APPELLATE PROCEDURE IN TEXAS § 15.9 at 333, 2d ed. (1979); *see generally* Dubose & Duggan, *Appellate Briefs for Texas Courts*, in UNIVERSITY OF TEXAS SCHOOL OF LAW, TECHNIQUES FOR HANDLING APPEALS IN STATE AND FEDERAL COURTS (June 1991) (discussing uniform briefing requirements for appellate briefs). A discussion of the briefing requirements for the appellant's brief are highlighted in § VI of this article. The rules governing amendments and supplements to the appellant's brief also apply to the appellee's brief. *See* text *supra* at § VI C.

515. TEX. R. APP. P. 74(e).

516. *See id.*; Hecht, *Limited and Cross Appeals*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE H-1 (1987).

517. Reply points are sometimes referred to as "counter-points." The Supreme Court of Texas recommends the term "reply point" as less likely to be confused with cross-points. Jackson v. Ewton, 411 S.W.2d 715, 717 (Tex. 1967). The current rules exclusively use the terms "reply points" or "reply to the points relied upon by the appellant." TEX. R. APP. P. 74(e); TEX. R. APP. P. 136(d).

518. *Jackson*, 411 S.W.2d at 717; *see* TEX. R. APP. P. 74(e); *see generally* 31 J. WICKER,

addition, reply points should provide any independent grounds for affirmance of the judgment.[519]

Reply points should be concisely stated, separately numbered, and answer the appellant's points "in due order when practicable."[520] This does not mean that the appellee must frame a separate reply point for each of the appellant's points in the exact order in which the appellant has chosen to brief his case. An appellant's points of error can be addressed (separately or grouped) in numerical sequence, or in a different sequence if doing so will make the brief more effective.[521]

b. Cross-Points

If an appellee intends to complain that the trial court committed harmful error, he generally must do so in a "cross-point" presented in the appellee's brief.[522] Two of the three common types of cross-points are waived if not raised in the appellee's brief: a cross-point which seeks a more favorable judgment and a cross-point which complains of error that would vitiate the verdict or prevent affirmance of the

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CIVIL TRIAL & APPELLATE PROCEDURE § 711 at 483 (Texas Practice 1985) (discussing nature and purpose of reply points).

519. Arguments which support the judgment of the lower court should be labelled reply points. Watkins & Bloch, *Limited & Cross Appeals* in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE G-2 (1989); *see* Donwerth v. Preston II Chrysler-Dodge, Inc., 775 S.W.2d 634, 640 n.2 (Tex. 1989) (Ray, J., joined by Gonzalez and Cook, J.J., concurring). It is appropriate to argue as a reply point that even if the point of error presented by the appellant is sustained, the judgment should be affirmed on the basis of an independent ground for affirmance which was rejected by the trial court. *See* Watkins & Bloch, *Limited & Cross Appeals*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE G-2 (1989); 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 711 at 98-99 (Texas Practice Supp. 1987). Any argument which if sustained would result in the reversal or modification of any portion of the judgment of the lower court should be stated as a cross-point. Watkins & Bloch, *Limited & Cross Appeals*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE G-3 (1989); *see* discussion *infra* at § VII A 2 b.

520. TEX. R. APP. P. 74(e).

521. Skaggs & Denison, *The Appellee's Brief*, in APPELLATE PROCEDURE IN TEXAS § 15.10 at 334. Any potential confusion caused by the sequence in which a reply point is listed may be eliminated by directing the appellate court's attention to the pertinent point(s) of error within a parenthetical following the reply point. For example: "Reply Point One (In Reply To Points Of Error One, Two and Three)."

522. Jackson v. Ewton, 411 S.W.2d 715, 717 (Tex. 1967). Cross-points must be preserved in the trial court by the appellee in the same manner as points of error. *See, e.g.*, Port Distrib. Corp. v. Fritz Chem. Co., 775 S.W.2d 669, 671 (Tex. App.—Dallas 1988, no writ); Ayotte v. Central Educ. Agency, 729 S.W.2d 385, 388 (Tex. App.—Austin 1987, no writ); Western Constr. Co. v. Valero Transmission Co., 655 S.W.2d 251, 256 (Tex. App.—Corpus Christi 1983, no writ).

judgment had one been entered on the verdict.[523] The supreme court has held that the third type of cross-point—one which seeks a less favorable judgment based upon an alternative ground of recovery—may be called to the court of appeals' attention for the first time in a motion for rehearing without being waived.[524] In *Chesshir v. First State Bank*,[525] the appellees obtained a favorable verdict on their Deceptive Trade Practices Act (DTPA) cause of action and an alternative cause of action for conversion. Judgment was rendered only on the DTPA verdict. The court of appeals reversed and rendered judgment that the appellees take nothing on the DTPA action. In their motion for rehearing to the court of appeals, the Chesshirs argued that the trial court's judgment should be modified and rendered in their favor on the conversion verdict.[526] The court of appeals, however, refused to review the request for alternative relief because it was not advanced in the Chesshirs' original brief.

The supreme court reversed and remanded to the court of appeals for consideration of the conversion cross-point. The court said:

> In *McKelvy v. Barber*, 381 S.W.2d 59 (Tex. 1964), we excused a respondent from carrying forward a cross-point in its reply brief which was aimed toward a judgment less favorable to him than the one he received in the court of civil appeals. Similarly, in *Tanner Development Co. v. Ferguson*, 561 S.W.2d 777 (Tex. 1977), we considered the points argued by respondent in his brief to the court of civil appeals but not argued in this court until respondent filed his motion for rehearing. *Accord Campbell v. Northwestern Nat'l Life Ins. Co.*, 573 S.W.2d 496 (Tex. 1978); *Taggert v. Taggert*, 552 S.W.2d 422 (Tex. 1977).[527]
>
> The failure of the court of civil appeals to consider the Chesshirs' arguments on conversion is in conflict with the rule of *McKelvy v. Bar-*

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523. *See* Warren v. Triland Inv. Group, 779 S.W.2d 808, 809 (Tex. 1989) (per curiam) (cross-points seeking more favorable judgment); *Jackson*, 411 S.W.2d at 717-18 (cross-points preventing judgment on verdict); *see also* TEX. R. CIV. P. 324(c) ("failure to bring forward by cross-points such grounds as would vitiate the verdict shall be deemed a waiver thereof").

524. *E.g.*, Boyce Iron Works, Inc. v. Southwestern Bell Tel. Co., 747 S.W.2d 785, 787 (Tex. 1988); Chesshir v. First State Bank, 620 S.W.2d 101, 101 (Tex. 1981) (per curiam).

525. 620 S.W.2d 101 (Tex. 1981) (per curiam).

526. *Id.* at 101. The conversion claim would have resulted in a less favorable judgment because the appellees would not have recovered treble damages as they would had the DTPA verdict been affirmed. *Id.*

527. *Id.* at 101-02. The supreme court may no longer consider a cross-point which is not raised in the brief in response to an application for writ of error. *See* Davis v. City of San Antonio, 752 S.W.2d 518, 521; TEX. R. APP. P. 136(d); *see generally infra* at § XI B(3) (discussing requirements for assertion cross-points in supreme court).

ber, supra.[528]

Although it is acceptable under *Chesshir* to withhold a cross-point for a less favorable judgment until the trial court judgment is reversed,[529] it remains better practice to raise cross-points for a less favorable judgment in the appellee's brief.[530] Presenting cross-points for this relief in the brief will more effectively call the point to the court of appeals' attention.[531] Adherence to a uniform practice in asserting cross-points may also eliminate the danger of confusing a cross-point for a lesser judgment with a cross-point which is waived if not raised in the brief.

The benefit of a cross-point should be carefully weighed before including it in an appellee's brief. An appellee's attempt to condition consideration of a cross-point on "the event that [the appellate court] reverses the judgment of the trial court on appeal" is ineffective to limit or condition the appeal.[532] Therefore, once a cross-point is presented to an appellate court it is before the court for all purposes.[533] When error in a judgment is raised by a cross-point, there are situations in which the appellate court may reverse the judgment even though it overrules the appellant's points of error.[534]

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528. *Chesshir*, 620 S.W.2d at 101-02.

529. *See Boyce Iron Works*, 747 S.W.2d at 787 (reaffirming *Chesshir* and holding that appellee is not required to raise a cross-point seeking a less favorable judgment until court of appeals renders judgment reversing the more favorable judgment).

530. Hanby, *Preservation of Error on Appeal*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE E-25 (1990).

531. *See* Taggert v. Taggert, 552 S.W.2d 422, 424 (Tex. 1977); *Jackson*, 411 S.W.2d at 717.

532. Unitarian Universalist Serv. v. Lebrecht, 670 S.W.2d 402, 403 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.). There is no provision in the rules for "conditional" appeals in the court of appeals as in the supreme court. Conditional applications for writ of error to the supreme court permit respondents to condition the supreme court's determination of cross-points on the action it takes on the petitioner's application. *See infra* at § XI C.

533. *See Unitarian Universalist Serv.*, 670 S.W.2d at 403; Payne v. Lucas, 517 S.W.2d 602, 608 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.).

534. *See Unitarian Universalist Serv.*, 670 S.W.2d at 403. A cross-point should not be omitted merely because the appellant requests the same relief sought by the cross-point. *See* Hanby, *Preservation of Error on Appeal*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE E-25 (1990). In Kaspar v. Thorne, 755 S.W.2d 151, 156 (Tex. App.—Dallas 1988, no writ), the appellant asked only for a *remand* in his prayer for relief. *Id.* at 156; *see* TEX. R. APP. P. 81. The appellee did not make a request for a remand in a cross-point. In *rendering* judgment for the appellant, the Dallas Court of Appeals said it assumed that the appellee had no grounds for remand because none were raised in the appellee's brief. *Kaspar*, 755 S.W.2d at 158; *see* Texas Prudential Ins. Co. v. Dillard, 158 Tex. 15, 18, 307 S.W.2d 242, 252 (1957) (judgment rendered rather than remanded because respondent did not request

B. *Preserving Error Through Separate Appeal*

In two situations the appellee must perfect its own appeal to complain of error in the trial court: (1) when the appellant limits its appeal to a severable portion of the judgment pursuant to Rule 40(a)(4), and (2) when the appellee complains of a multi-party judgment in favor of a party who is not an appellant as to the appellee. In each case, the appellee assumes the burdens of an "appellant" and must timely comply with all procedures applicable to appellants discussed in §§ II-VI.

1. Appeal Against Appellant in Limited Appeal

The supreme court has held that a separate appeal is necessary for an appellee to complain of error as between an appellant and an appellee when an appellant limits the appeal under Rule 40(a)(4).[535] This rule was positively articulated by the supreme court in *Donwerth v. Preston II Chrysler-Dodge, Inc.*, as follows:[536] "Unless an appellant limits his appeal pursuant to Texas Rule of Appellate Procedure 40(a)(4), an appellee may complain by cross-point in his brief in the court of appeals, without perfecting an independent appeal, of any error in the trial court as between appellant and appellee."[537] According to this rule, when the appellant limits its appeal to a severable[538] portion of the judgment, the appellee is required to perfect a

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remand); *see also* TEX. R. APP. P. 81(c) ("[w]hen the judgment or decree of the court below shall be reversed, the court shall proceed to render such judgment or decree as the court below should have rendered, except when it is necessary to remand to the court below for further proceedings.").

535. *See, e.g.*, Warren v. Triland Inv. Group , 779 S.W.2d 808, 808 (Tex. 1989); Donwerth v. Preston II Chrysler-Dodge, Inc., 775 S.W.2d 634, 639 (Tex. 1989); Hernandez v. City of Fort Worth, 617 S.W.2d 923, 924 (Tex. 1981); *see also* Responsive Terminal Sys. v. Boy Scouts of Am., 774 S.W.2d 666, 667 (Tex. 1989). If a party does not limit its appeal, the entire case is before the court of appeals and a separate appeal is unnecessary. Gerst v. Guardian Sav. & Loan Ass'n, 425 S.W.2d 382, 391 (Tex. Civ. App.—Austin), *modified*, 434 S.W.2d 113 (Tex. 1968).

536. 775 S.W.2d 634 (Tex. 1989).

537. *Id.* at 634. The rule operates differently in the Texas Supreme Court for points seeking a more favorable judgment. When a party seeks a different and *more favorable* judgment than the one rendered by the court of appeals, the party's point must be brought to the supreme court by that party's own application for writ of error. *Id.* at 639 n.5, 640; *see* Responsive Terminal Sys. v. Boy Scouts of Am., 774 S.W.2d 666, 667-68 (Tex. 1989) (per curiam); Archuleta v. International Ins. Co., 667 S.W.2d 120, 123 (Tex. 1984). Cross and conditional applications for writ of error are discussed *infra* at § XI C.

538. The term "severable" means that the cause could have been brought as a separate suit. *Donwerth*, 775 S.W.2d at 642 ; *see* Kansas Univ. Endowment Ass'n v. King, 162 Tex.

separate appeal to complain of other portions of the judgment.[539]

There may be an exception to this rule for cross-points involving a remittitur. Rule 85(b) expressly allows an appellee to present cross-points challenging remittitur without perfecting a separate appeal when the party benefitting from the remittitur appeals. Rule 85 provides:

> (b) Cross-Points on Remittitur. Whenever the trial court shall direct a remittitur in any action, and the same is made, and the party for whose benefit it is made shall appeal in said action, then the party remitting shall not be barred from contending in the appellate court that said remittitur should not have been required either in whole or in part, and if the appellate court sustains such contention it shall render such judgment as the trial court should have rendered without respect to said remittitur.[540]

It is unclear whether a separate appeal would be required to raise a remittitur cross-point under this rule when the appellant excludes the issue of remittitur by limiting his appeal under Rule 40(a)(4). The mandatory language of Rule 85(b) that "the party remitting shall not be barred," appears to be an exception to the rule requiring appellees to perfect a separate appeal to complain of issues excluded by the appellant's compliance with the limited appeal procedures.[541] If an appellee is confronted with this situation, the safest method for protecting the remittitur complaint is a separate appeal.

2. Appeal Against a Party to Multi-Party Judgment Who Is Not an Appellant As to Appellee

Another exception to an appellee's right to complain of trial court error without perfecting a separate appeal is when the appellee raises a complaint of trial court error in a multi-party case which affects the interest of a party to the judgment who has not perfected an appeal

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599, 611-12, 350 S.W.2d 11, 19 (1961). A separate appeal is unnecessary when an appellant's attempt to limit an appeal under Rule 40(a)(4) fails for lack of severability. *See Donwerth*, 775 S.W.2d at 642; Archer v. Griffith, 390 S.W.2d 735, 742-43 (Tex. 1964).

539. *See* Hernandez v. City of Fort Worth, 617 S.W.2d 923, 924 (Tex. 1981); Duff v. Union Tex. Petroleum Corp., 770 S.W.2d 615, 620 (Tex. App.—Houston [14th Dist.] 1989, no writ); *see also* Carpenter & Assoc. v. Nader Inv. N.V., 738 S.W.2d 351, 354 (Tex. App.—Austin 1987, writ denied).

540. TEX. R. APP. P. 85(b).

541. *See* Watkins & Bloch, *Limited & Cross Appeals*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE G-18 (1989).

against the appellee.[542] The operation of this rule is best illustrated by the following examples:

> EXAMPLE 1: An appellee has sued multiple defendants and one defendant obtains a take-nothing judgment against the appellee. The appellee, however, obtains a judgment against the other defendants. If the losing defendants alone perfect appeal, the appellee must perfect a separate appeal in order to complain of the take-nothing judgment in favor of the other defendant.[543]
>
> EXAMPLE 2: The appellee is one of several defendants and has filed a cross-action against one or more defendants. The plaintiff obtains judgment against the cross-defendants, but not the appellee. However the appellee's cross-action is denied. If a losing cross-defendant perfects appeal, the appellee must perfect a separate appeal to complain of the cross-action's denial.[544]

In both examples, a separate appeal is required because the appellee is complaining of error in the trial court judgment in favor of a non-appealing party, or a party who has not appealed against the appellee.[545]

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542. *See, e.g.*, Sheldon L. Pollack Corp. v. Falcon Ind., Inc., 794 S.W.2d 380, 385 (Tex. App.—Corpus Christi 1990, writ denied); Gulf States Underwriters of La. v. Wilson, 753 S.W.2d 422, 431-32 (Tex. App.—Beaumont 1988, writ denied); Southwestern Bell Tel. Co. v. Aston, 737 S.W.2d 130, 131 (Tex. App.—San Antonio 1987, no writ). Some courts and observers have suggested that the criterion for determining whether an appellee must perfect a separate appeal in a multi-party case is whether the appellee's complaint "affects the interest of the appellant, or bears upon matters presented in the appeal." *Sheldon L. Pollack Corp.*. 794 S.W.2d at 385; Young v. Kilroy Oil Co. of Texas, Inc., 673 S.W.2d 236, 241 (Tex.App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Watkins & Bloch, *Limited & Cross Appeals*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE J-12 (1991). This rule has created a great deal of confusion in this area of the law and its current validity is questionable. *See Donwerth*, 775 S.W.2d at 641-42 (problems with rule discussed in concurring opinion); *see generally* Hecht, *Limited and Cross Appeals*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE (1987) (discussing history of confusion in cross-point law).

543. *See, e.g., Gulf States Underwriters*, 753 S.W.2d at 431-32; Yates Ford, Inc. v. Benevides, 684 S.W.2d 736, 740 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.); Marshbank v. Austin Bridge Co., 669 S.W.2d 129, 137 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.).

544. *See Aston*, 737 S.W.2d at 131; Carr v. Hunt, 651 S.W.2d 875, 883 (Tex. App.—Dallas 1983, writ ref. n.r.e.).

545. *See Donwerth*, 775 S.W.2d at 641-42; *see also* Plas-Tex, Inc., v. U.S. Steel Corp., 772 S.W.2d 442, 446 (Tex. 1989) (judgment became final as to one of several defendants because appellee did not appeal judgment in favor of non-appealing defendant). The concurrence in *Donwerth* suggests an exception to this rule in instances where the rights of the non-appealing party are so "intertwined" with the appellant's that if the judgment is reversed as to the appellant, it would have to be reversed as to the non-appealing party. *See Donwerth*, 775 S.W.2d at 642 (citing Turner, Collie & Bruden, Inc. v. Brookhollow, 642 S.W.2d 160, 166 (Tex. 1982)

In 1990, the supreme court amended the appellate rules to require that copies of all papers filed in the appeal be served on all parties to the trial court judgment.[546] This amendment indicates that the supreme court may intend to make all parties to the trial court judgment parties to any appeal from the judgment.[547] If so, this would effectively consolidate all appeals from the same judgment in one appeal and eliminate much of the confusion surrounding the rules which require separate appeals from the same judgment.[548]

C. *Requesting the Record As Appellee*

While the appellant must always see that a sufficient record showing reversible error is filed in the appellate court, there are at least three situations when an appellee must present an adequate record to preserve error: (1) when the appellee perfects a separate appeal;[549] (2) when cross-points are raised and an appellant fails to bring up portions of the record that are needed to support the cross-points;[550] and

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and Thompson v. Kelley, 100 Tex. 536, 537, 101 S.W. 1074, 1075-076 (1907)). It is not thought that the concurring justices in *Donwerth* intended this principle to be a consideration in an appellee's decision to perfect a separate appeal. Irrespective of the interest a party may have in an appellant's rights, an appellee should not waive appeal on the bare assumption that an appellant's appeal will protect him from an adverse judgment.

546. *See, e.g.*, TEX. R. APP. P. 40(F)(4) (affidavit and notice of limited appeal); TEX. R. APP. P. 46 (notice of appeal bond or substitute); TEX. R. APP. P. 74(q) (briefs); TEX. R. APP. P. 131 (application for writ of error).

547. Hanby, *Preservation of Error on Appeal*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE E-5-6 (1990); *see* Warren v. Triland Invest. Group, 779 S.W.2d 808, 809 (Tex. 1989) (prior to rule change, court held appellee could file cross-points against non-appealing party because appellant did not limit the appeal); *Donwerth*, 775 S.W.2d at 643-44 (noting need to change rules requiring separate appeals from same judgment). The policy considerations which require the consolidation of actions in the trial court stemming from the same occurrence and involving the same parties apply equally to appeals. Hanby, *Preservation of Error on Appeal*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE E 5-6 (1990).

548. *See* Hecht, *Limited and Cross Appeals*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE (1987). The need for such a rule is illustrated by Gulf States Underwriters of La. v. Wilson, 753 S.W.2d 422, 431-32 (Tex. App.—Beaumont 1988, writ denied). In *Wilson*, the appellee urged in a cross-point that it was entitled to recover a joint and several judgment against both the appellant *and* another party who was not a party to the appeal. The Beaumont Court of Appeals held that it lacked jurisdiction to hear the complaint as to the non-appealing party because the appellee failed to perfect a separate appeal against that party. The stated rationale for the court's holding was that the cross-point against the non-appealing party affected "no real interest" of the appellant. *Id.* at 431.

549. *See* text *supra* at § VII B.

550. *See* text *supra* at § VII A 2 b. The appellee who brings cross-points against the appellant without perfecting a separate appeal has the burden to see that a sufficient record is

(3) when an appellant requests a partial record under Rule 53(d) and the appellee needs to designate additional portions of the evidence to avoid the rule's presumption against excluded evidence.[551] An appellee may also wish to have evidence included in the record to support a reply point.[552] In each situation, an appellee's failure to timely request or file a record may result in the reversal of a favorable judgment, or the waiver of a complaint which would entitle the appellee to a different judgment.

When an appellee perfects a separate appeal, all procedures applicable to appellants must be followed for requesting and filing an appellate record.[553] As an alternative to filing a separate record, however, an appellee may request that a separate appeal be consolidated under the same cause as the appeal perfected by the appellant.[554] Appellate courts will permit consolidation for the purpose of judicial economy on the motion of a party or on its own motion.[555] Courts, however, require that motions to consolidate be filed with reasonable diligence.[556] Therefore, the motion should be filed at or shortly after the time for perfecting the separate appeal.

Rules 51(b) and 53(b) govern an appellee's request for a record in all cases in which the appellee does not perfect a separate appeal. Rule 53(b) allows the appellee ten days from the receipt of the appellant's request for statement of facts to request additional portions of the proceedings be included in the statement of facts.[557] There is no corresponding provision in the rules which expressly authorizes an

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presented for the cross-point. *See* Fullerton v. Holliman, 730 S.W.2d 168, 171 (Tex. App.—Eastland 1987, writ ref'd n.r.e.); Bass v. Metzger, 569 S.W.2d 917, 924-25 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.); *see also* TEX. R. APP. P. 50(d). A cross-point which is unsupported by the record will not be reviewed. *See Fullerton*, 730 S.W.2d at 171.

551. *See* TEX. R. APP. P. 53(d); *see generally supra* at § V C (discussing presumption that applies when partial record is filed under Rule 53(d) and no additional record is requested).

552. *See supra* at § VII A 2(a).

553. These procedures are discussed in detail in §§ II-VI *supra*.

554. Starr Gas Co. v. McAlister Trucking, 436 S.W.2d 192, 192 (Tex. Civ. App.—El Paso 1968, writ dism'd); *see generally* Patton, *Motion Practice in Appellate Courts*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE P-29 (1990) (discussing circumstances in which courts permit consolidation).

555. *Cf.* American Indemnity v. Jenkins, 554 S.W.2d 219, 220 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ) (convenience of handling two related proceedings as single cause cited as potential ground for consolidation).

556. Patton, *Motion Practice in Appellate Courts*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE P-30 (1990); *see* Peter Co. v. Green, 42 S.W.2d 1054, 1055 (Tex. Civ. App.—Austin 1931, writ dism'd).

557. TEX. R. APP. P. 53(b).

appellee to request additional transcript material after an appeal is perfected. Rule 51(b) merely requires that a written designation for the transcript be made "at or before the time prescribed for perfecting the appeal."[558] Since the appellee is often unaware that an appeal is contemplated until notice of the appeal is received, application of this deadline to an appellee is impractical. Therefore, a prudent lawyer who represents an appellee will adhere to the ten-day rule of Rule 53(b) in designating additional transcript documents. In most cases, this practice will give the transcript clerk sufficient time to include the requested material in the transcript before it is filed.

D. *Objecting to "Informalities" in the Record*

Under Rule 71, an appellee has a burden to object to waivable[559] procedural defects in the way the appellant has perfected the appeal or presented the record.[560] Objections relating to such defects or "informalities" in the record must be made by motion filed within thirty days after the filing of the transcript in the court of appeals.[561] "Informalities" subject to Rule 71 include defects in the appeal bond,[562] an unsworn record on appeal,[563] and similar procedural deficiencies.[564] If an objection is not made by motion in the court of appeals within the prescribed thirty-day time period, the objection will be

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558. TEX. R. APP. P. 51(b).

559. Rule 71 only pertains to defects in procedure which can be waived. TEX. R. APP. P. 71 (an objection to informalities must be objected to or it will be waived, "if it can be waived by the party"). Defects or informalities which cannot be waived include defects which defeat the appellate court's jurisdiction and fundamental error. *See* Valdez v. Gill, 537 S.W.2d 477, 478 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.).

560. TEX. R. APP. P. 71.

561. *Id.*

562. *See* Pfeffer v. Meissner, 286 S.W.2d 241, 250-51 (Tex. Civ. App.—Galveston 1956, writ dism'd).

563. *See, e.g.*, Thermex Energy Corp. v. Rantel Corp., 766 S.W.2d 402, 405-406 (Tex. App.—Dallas 1989, no writ); Alexander v. Russell, 682 S.W.2d 370, 373 (Tex. App.—El Paso 1984), *rev'd on other grounds*, 699 S.W.2d 209 (Tex. 1985); Hauling Contractors Corp. v. Rose Sales Co., 565 S.W.2d 241, 242 (Tex. Civ. App.—Corpus Christi 1978, no writ).

564. Patton, *Motion Practice in Appellate Courts*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE P-39 (1990); *see generally* 31 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 754 at 504 (Texas Practice 1985) (discussing procedural defects subject to objection). Rule 71 does not apply to inaccuracies or omissions of material matters from the record. *See* Roberson Farm Equip. Co. v. Hill, 514 S.W.2d 796, 799 (Tex. Civ. App.—Texarkana 1973, writ ref'd n.r.e.). Nor does it apply to the violation of a mandatory deadline. *See* B.D. Click Co. v. Safari Drilling Corp., 638 S.W.2d 860, 862 (Tex. 1982).

deemed waived, assuming the objecting party can waive the defect.[565]

An appellee who discovers the appellant is relying on a defective record should file a motion to strike the defective instrument, or a motion to dismiss, within the thirty-day deadline established by Rule 71.[566] An appellate court will usually require an appellant to correct a defect by a certain date.[567] If the appellant fails to correct the defect, the appellate court may dismiss the appeal.[568]

VIII. PRESERVING ERROR IN THE MOTION AND FURTHER MOTION FOR REHEARING IN THE COURT OF APPEALS

A. *Necessity for Timely Filed Motion for Rehearing*

A timely filed motion for rehearing is an indispensable prerequisite to bringing an appeal to the Texas Supreme Court by application for writ of error.[569] The party who is dissatisfied with the court of appeals' decision must file a motion for rehearing in the court of appeals fifteen days after the date of the opinion.[570] The failure to complain of any decision of the court of appeals (including a ruling on motions relating to an appeal) by a written motion for rehearing filed within the prescribed time period precludes further appeal.[571]

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565. TEX. R. APP. P. 71; *see Thermex Energy*, 766 S.W.2d at 405 (court may consider unauthenticated statement of facts if no objection made to lack of authentication); Pruet v. Coastal States Trading, 715 S.W.2d 702, 706 (Tex. App.—Houston [1st Dist.] 1986, no writ) (defect in appeal bond waived because no timely objection made).

566. Patton, *Motion Practice in Appellate Courts*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE P-39 (1990).

567. *Id.*

568. *See* Smith v. Valdez, 737 S.W.2d 141, 142-43 (Tex. App.—San Antonio 1987, no writ); Van Horn State Bank v. Bennett, 428 S.W.2d 468, 469 (Tex. Civ. App.—El Paso 1968, writ dism'd).

569. Albright v. City of Houston, 677 S.W.2d 487, 488 (Tex. 1984); Smith v. Baldwin, 611 S.W.2d 611, 618 (Tex. 1980). In an appeal from an election contest, the court of appeals may refuse to permit the filing of a motion for rehearing. TEX. ELEC. CODE ANN. § 232.014(e) (Vernon 1975).

570. TEX. R. APP. P. 100(a). This deadline may be extended if a motion for extension of time reasonably explaining the need for an extension is filed within fifteen days of the opinion. TEX. R. APP. P. 100(g). If the court of appeals denies a request for an extension of time to file a motion for rehearing, the supreme court may review the ruling in an interlocutory appeal. *See* Banales v. Jackson, 610 S.W.2d 732, 733 (Tex. 1980). No other extensions of time may be reviewed in this manner. *See* Sears v. State, 610 S.W.2d 734, 735 (Tex. 1980).

571. *See, e.g.*, Aviation Office of Am., Inc. v. Alexander & Alexander of Tex., Inc., 751 S.W.2d 179, 179-80 (Tex. 1988); Doctors Hosp. Facilities v. Fifth Court of Appeals, 750 S.W.2d 177, 178 (Tex. 1988); E. F. Hutton & Co. v. Youngblood, 741 S.W.2d 363, 364 (Tex. 1987). No reply to a motion for rehearing is necessary unless requested by the court. TEX. R.

A motion for rehearing is also a prerequisite for so-called "cross" and "conditional" applications for writ of error.[572] Thus, the prevailing party in the court of appeals must also take care in deciding whether to file a motion for rehearing. The court of appeals often will grant relief to an appellant on a point of error which requires the case to be remanded for new trial and overrule a point of error requesting rendition. In such a situation, the appellant has been harmed by the refusal to render, even though he prevailed in all other respects. If the appellant intends to complain of the court of appeals' refusal to render, he must file a motion for rehearing to preserve the complaint for review by the supreme court.[573]

B. *Basic Content of Motion for Rehearing*

The function of the motion for rehearing is to present to the appellate court the errors of law which have allegedly been committed by that court, together with such argument, authorities, and statements from the record which may support the motion.[574] Only matters which have been "determined" by the court of appeals may be raised in a motion for rehearing.[575] Arguments raised for the first time in the motion for rehearing will not be considered by the court of appeals or the supreme court,[576] except those that involve fundamental error or alternative requests for a lesser judgment.[577]

The points relied upon for the rehearing must be "distinctly specified"[578] and should challenge the error committed by the court of ap-

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APP. P. 100(b); *see* Edwards v. Lone Star Gas Co., 769 S.W.2d 568, 568 (Tex. App.—Amarillo 1988), *rev'd on other grounds*, 782 S.W.2d 840 (Tex. 1990).

572. Donwerth v. Preston II Chrysler-Dodge, Inc., 775 S.W.2d 634, 643 n.6 (Tex. 1989) (Ray, J., joined by Gonzalez and Cook, J.J., concurring); *see infra* at § XI C.

573. *See, e.g., Donwerth*, 775 S.W.2d at 643 n.6; Wich v. Fleming, 652 S.W.2d 353, 356 (Tex. 1983); Pruit v. Republic Banker's Life Ins. Co., 491 S.W.2d 109, 112 (Tex. 1973).

574. *See* K & S Interests v. Texas Am. Bank/Dallas, 749 S.W.2d 887, 891-92 (Tex. App.—Dallas 1988, writ denied).

575. TEX. R. APP. P. 100(a) ("Any party desiring a rehearing of any matter determined by a court of appeals . . . must . . . file . . . a motion in writing for a rehearing . . . ").

576. *See, e.g.*, Morrison v. Chan, 699 S.W.2d 205, 206-07 (Tex. 1985); Langston v. Eagle Publishing, 719 S.W.2d 612, 625 (Tex. App.—Waco 1986, writ ref'd n.r.e.); Washington v. Walker Co., 708 S.W.2d 493, 497-98 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

577. Smiley v. Johnson, 763 S.W.2d 1, 4 (Tex. App.—Dallas 1988, writ denied); Gillen v. Diadrill, Inc., 624 S.W.2d 259, 264 (Tex. Civ. App.—Corpus Christi 1981, writ dism'd).

578. TEX. R. APP. P. 100(a).

peals in reviewing the trial court proceedings.[579] Merely repeating the same points of error in the motion for rehearing upon which the appeal was taken will not preserve the court of appeals' error for review by the supreme court.[580] In addition to holdings encompassed by the points of error, the court of appeals' opinion itself may establish an independent ground of error. A classic example is the application of an incorrect standard of review in overruling a point of error.[581] This independent ground of error must be assigned as error in a motion for rehearing or it will be waived.[582]

The motion should also contain a brief argument to clarify the points of error, without merely reiterating the arguments in the briefs. The movant's argument should demonstrate the incorrectness of the result reached by the court of appeals. Of course, criticisms of the court of appeals decision should be respectfully phrased. A motion which fails to comport with the lawyer's creed of professional conduct may be stricken *sua sponte* and ordered to be amended.[583]

Errors and omissions in a motion for rehearing may be corrected by amendment without leave of court as "a matter of right" any time before the expiration of the fifteen day time period allowed for filing it.[584] Leave of court is required to amend the motion after the fifteen day time period.[585]

C. *Further Motion for Rehearing*

When the court of appeals modifies its judgment, vacates and renders a new judgment, or issues a new opinion in response to motion for rehearing, all parties have the right to file a "further" motion for rehearing.[586] The second motion must be filed within fifteen days af-

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579. *K & S Interests*, 749 S.W.2d at 891 ("function of a motion for rehearing is present to the court the errors of law which have been committed by the [appellate] court").

580. Hatchell, *Proper and Effective Points of Error on Appeal*, in STATE BAR OF TEXAS, ST. MARY'S EIGHTH ANNUAL PROCEDURAL INSTITUTE: APPELLATE PRACTICE G-4 (1986); *See* Albright v. City of Houston, 677 S.W.2d 487, 488 (Tex. 1984).

581. *See* Pool v. Ford Motor Co., 715 S.W.2d 629, 634-35 (Tex. 1986); *see also In re* King's Estate, 150 Tex. 662, 663, 244 S.W.2d 660, 661 (1951).

582. *See* TEX. R. APP. P. 131(e) (error originating in court of appeals must be assigned in motion for rehearing).

583. *See* Dewey v. Amarillo Nat'l Bank, 382 S.W.2d 524, 528 (Tex. Civ. App.—Amarillo 1964) (on rehearing), *cert. denied*, 382 U.S. 821 (1965).

584. TEX. R. APP. P. 100(e).

585. *Id.*

586. TEX. R. APP. P. 100(d); *see* Doctor's Hosp. Facilities v. Fifth Court of Appeals, 750

ter the date of the new judgment or opinion.[587]

A second motion for rehearing is not permitted to complain of any point overruled by the court of appeals in a prior motion for rehearing, or to raise an argument which should have been made in the first motion for rehearing.[588] However, when a new judgment or opinion of a court of appeals raises matters which were not addressed in the first motion for rehearing, a second motion for rehearing is mandatory to preserve error for further appeal of the new matters.[589] If there is any doubt as to whether a point of error was overruled by a new judgment or subsequent opinion, the lawyer should reassert the point in a further motion for rehearing.

IX. PRESERVING ERROR IN THE MOTION TO CERTIFY QUESTION TO THE SUPREME COURT

Certified question practice has fallen into disuse. Nevertheless, in "exceptional" cases which urgently require an accelerated disposition of an appeal, the current rules do permit the court of appeals to certify one or more controlling questions of law to the supreme court.[590] The certification of questions to the supreme court is most often used when two criteria are met: 1) where the jurisdiction of the case is final in the courts of appeals and the controlling question would have importance throughout the state as precedent,[591] and 2) when some

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S.W.2d 177, 178 (Tex. 1988); *see generally* O'Connor *Perfecting the Appeal*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE B-96 (1989) (discussing necessity for second motion for rehearing in certain cases).

587. TEX. R. APP. P. 100(d).

588. *See* E. F. Hutton v. Youngblood, 741 S.W.2d 363, 364 (Tex. 1987) (issue raised for first time in second motion for rehearing is waived); TEX. R. APP. P. 100(d) (second motion not required for points overruled in first motion).

589. *Doctor's Hosp. Facilities*, 750 S.W.2d at 178; Stoner v. Massey, 586 S.W.2d 843, 845 (Tex. 1979).

590. TEX. R. APP. P. 110(a); *see* 32 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 932 at 105-06 (Texas Practice 1985); *see generally* W. Dorsaneo, 6 TEXAS LITIGATION GUIDE §§ 151.07, 152.04 (1991) (discussing procedures for certifying question to supreme court).

591. *See, e.g.*, City of Stamford v. Ballard, 344 S.W.2d 861, 861 (Tex. 1961); Morris v. Scaling, 344 S.W.2d 161, 163 (Tex. 1961); Tigner v. First Nat'l Bank of Angleton, 153 Tex. 69, 71, 264 S.W.2d 85, 88 (Tex. 1954); *see also* Calvert, *The Mechanics of Judgment Making in the Supreme Court of Texas*, 21 BAYLOR L. REV. 439, 444 (1969). Jurisdiction of an appeal is final in the court of appeals in the following cases: appeal from a county court or district court when under the constitution a county court would have had original or appellate jurisdiction; cases of slander; contested elections; appeals from interlocutory orders appointing a receiver or trustee; and appeals from temporary injunctions. TEX. GOV'T CODE ANN. § 22.225(b)

emergency situation exists and the certified question procedure will be more expeditious than a writ-of-error review.[592] The supreme court may refuse to review by certification any case it decides should be presented by application for writ of error.[593]

The procedures for requesting certification of a question must be strictly followed or the certified question will be dismissed.[594] In order to obtain certification of a question to the supreme court, the court of appeals[595] or party may file a motion asking the court of appeals to certify a question to the supreme court within fifteen days after the judgment is rendered in the court of appeals.[596] If a timely motion for rehearing has been filed, the fifteen day period begins when the motion for rehearing is overruled.[597] The motion must clearly identify the question to be certified and request that the record (or any part thereof), the briefs of the parties, and a proposed opinion of the court of appeals be transmitted to the supreme court with the court of appeals certificate.[598] The supreme court will refuse to certify a question in the absence of these documents.[599]

(Vernon 1988). However, even in these cases the supreme court has jurisdiction where there is a dissent or conflict. *Id.* § 22.225(c).

592. *See* Norvell, *Certification of Questions*, in APPELLATE PROCEDURE § 28.2 at 618; O'Connor, *Perfecting the Appeal*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE B-97 (1989).

593. TEX. R. APP. P. 110(a); *see* Willis v. City of Fort Worth, 380 S.W.2d 814, 814 (Tex. 1964); Thompson v. McAllen Federated Womens Bldg. Corp., 273 S.W.2d 105, 110 (Tex. Civ. App.—San Antonio 1954, writ dism'd). *See generally* Norvell, *Certification of Questions*, APPELLATE PROCEDURE § 28.2 at 618 (discussing situations when case should be reviewed by application for writ of error).

594. TEX. R. APP. P. 111 ("If [supreme] court should determine that the question is not properly certified under the statute and these rules so as to give jurisdiction to answer it, it will be dismissed without a hearing.").

595. The court of appeals may certify a question to the supreme court on its own motion. TEX. R. APP. P. 110(c).

596. TEX. R. APP. P. 110(b).

597. *See* 32 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 934 at 110 (Texas Practice 1985).

598. TEX. R. APP. P. 110(c).

599. *See* Texas State Teacher's Ass'n v. State, 711 S.W.2d 134, 135 (Tex. App.—Austin 1986, no writ) (supreme court refused to certify a question in absence of tentative opinion of the court of appeals); TEX. R. APP. P. 110(c) (certificate "shall" be accompanied by briefs, proposed opinion and any part of record requested by a party).

X. PRESERVING ERROR IN THE APPLICATION FOR WRIT OF ERROR TO THE SUPREME COURT[600]

A. *Necessity for Timely Filed Application for Writ of Error*

The Texas Supreme Court reviews final judgments of the court of appeals upon writ of error.[601] Timely filing of the application for writ of error is jurisdictional.[602] The failure to file an application on time effectively ends the appeal.

An application for writ of error must be filed in the court of appeals within thirty days after the overruling of the last timely filed motion for rehearing by any party.[603] If one party files a timely application, any other party entitled to file an application "may do so within forty days after the overruling of the last timely motion for rehearing filed by any party."[604] An application will not be forwarded to the clerk of the supreme court until the court of appeals has ruled on all timely filed motions for rehearing.[605]

An extension of time may be granted for late filing of an application for writ of error, if a motion "reasonably explaining the need therefor"[606] is filed in the supreme court within fifteen days after the last date for filing an application provided in Rule 130(b).[607] A copy of

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600. The parties to a writ of error proceeding in the supreme court are designated as "petitioner" and "respondent." *See* TEX. R. APP. P. 131.

601. TEX. R. APP. P. 130(a).

602. Honeycutt v. Doss, 410 S.W.2d 772, 773 (Tex. 1967).

603. TEX. R. APP. P. 130(b). Rule 130 was amended in 1990 to expressly provide that the filing of an application for writ of error by one party does not preclude another party from filing a timely motion for rehearing or preclude a court of appeals from ruling on any timely filed motion for rehearing. *Id.*; *see* TEX. R. APP. P. 130 comment. An application filed prior to the last ruling on all timely filed motions for rehearing is deemed to have been filed after the ruling. TEX. R. APP. P. 130(b).

604. TEX. R. APP. P. 130(c). The prior rule required other parties to file their applications for writ of error within ten days from the date of the filing of "any preceding application." TEX. R. APP. P. 130(c) (Vernon Supp. 1988). The 1990 amendment to the rule should correct the situations which resulted from the prior rule which allowed parties to file an application for writ of error while other parties still had a pending motion for rehearing. For example, *see* Rose v. Fifth Court of Appeals, 778 S.W.2d 66, 66 (Tex. 1989); Doctors Hosp. Facilities v. Fifth Court of Appeals, 750 S.W.2d 177, 179-80 (Tex. 1988); Wadsworth Business Center v. Connell, 775 S.W.2d 663, 664-67 (Tex. App.—Dallas 1989, writ denied).

605. TEX. R. APP. P. 132(a).

606. TEX. R. APP. P. 130(d); *see* Garcia v. Casner Farms, Inc., 774 S.W.2d 668, 670 (Tex. 1989) (a reasonable explanation is furnished by any conduct short of deliberate or intentional non-compliance, even if the conduct could also be characterized as professional negligence).

607. TEX. R. APP. P. 130(d); *see generally* Patton, *Deadlines and Extension Motions in*

the motion for extension must be filed at the same time in the court of appeals.[608] It is advisable that the application be filed with the motion.[609]

B. *Minimum Requirements for Application for Writ of Error*

Rule 131 governs the form and content of applications for writ of error to the supreme court.[610] The requirements of Rule 131 are similar to briefs filed in the court of appeals.[611] The following discussion will address only the significant differences in the two procedures.

1. Statement of the Case

An application for writ of error must contain a brief general statement of the nature of the suit. In contrast to the "preliminary statement" in an appellant's brief which merely states the nature of the case and the result in the trial court,[612] the "statement of the case" in an application must state whether the court of appeals' rendition of the case is correct and, if not, explain the specific inaccuracies in the court of appeals' opinion.[613] Rule 131(c) contains the following example of such a statement:[614]

> This is a suit for damages in excess of $1,000.00 for personal injuries growing out of an automobile collision. The opinion of the court of appeals correctly states the nature and results of the suit, except in the following particulars: (If any.)

The failure to object to inaccuracies in the court of appeals' opinion may lead the supreme court to assume the court of appeals' version of the case is correct.[615]

2. Statement of Jurisdiction

Jurisdiction is not presumed in the supreme court as it is in the

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Civil Appellate Litigation, 20 ST. MARY'S L.J. 1 (1988) (discussing deadlines and grounds for extension for filing applications for writ of error).

608. TEX. R. APP. P. 130(d).

609. *See Meshwert*, 549 S.W.2d at 385 (Reavley, J., concurring).

610. TEX. R. APP. P. 131.

611. *Compare id. with* TEX. R. APP. P. 74.

612. *See* TEX. R. APP. P. 74(c); *see also* discussion *supra* at VI B(1).

613. TEX. R. APP. P. 131(c).

614. *Id.*

615. *See* TEX. R. APP. P. 131(f) ("opinion of court of appeals will be considered with the application, and statements therein, if accepted by counsel as correct, need not be repeated").

court of appeals. Consequently, the supreme court requires a petitioner to set forth the jurisdictional grounds in the application for writ of error.[616] This generally entails listing one or more of the six subdivisions of § 22.001 of the Texas Government Code[617] in the following form: "The Supreme Court has jurisdiction of this suit under subsection (a)(6) of section 22.001 of the Government Code."[618]

Although the current rules of appellate procedure do not expressly require it, a petitioner seeking discretionary review of an application for writ of error should do more than give a bare citation to one of the jurisdictional grounds in the Government Code. As a court of discretionary review, the supreme court is not required to correct a court of appeals' error.[619] Simply demonstrating harmful error in the court of appeals may not be sufficient to warrant supreme court review.[620] Therefore, it is "strategically mandated" that the statement of jurisdiction point out to the court why the error of the court of appeals is of such importance to the jurisprudence of the state as to require correction.[621]

A petitioner must also elaborate on a cited ground for jurisdiction in the supreme court when jurisdiction is based on a conflict of decisions.[622] In this instance, a petitioner must explain the conflict on the

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616. TEX. R. APP. P. 131(d).

617. The six jurisdictional grounds included in § 22.001 are:

(1) a case in which the justices of a court of appeals disagree on a question of law material to the decision; (2) a case in which one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court on a question of law material to a decision of the case; (3) a case involving the construction or validity of a statute necessary to a determination of the case; (4) a case involving state revenue; (5) a case in which the railroad commission is a party; and (6) any other case in which it appears that an error of law has been committed by the court of appeals, and that error is of such importance to the jurisprudence of the state that, in the opinion of the supreme court, it requires correction, but excluding those cases in which the jurisdiction of the court of appeals is made final by statute.

TEX. GOV'T CODE ANN. § 22.001(a)(1)-(6) (Vernon 1988). Jurisdiction of the supreme court is not within the ambit of this article.

618. TEX. R. APP. P. 131(d).

619. Carlson and Garcia, *Discretionary Review Powers of the Texas Supreme Court*, 50 TEX. B.J. 1201, 1204 (1987).

620. Harris, *Supreme Court Practice: A Practical Approach*, THE APPELLATE ADVOCATE, Winter 1990, at 4.

621. Carlson and Garcia, *Discretionary Review Powers of the Texas Supreme Court*, 50 TEX. B.J. 1201, 1204 (1987); *see* TEX. GOV'T CODE ANN. § 22.001(a)(6) (Vernon 1988) (correction of court of appeals' error must be necessary to jurisprudence of state).

622. *See* TEX. GOV'T CODE ANN. § 22.001(a)(2) (Vernon 1988).

question of law in detail.[623] Identifying the question of law and briefly explaining the conflicting holdings of each court should suffice.

3. Points of Error

The point of error rules governing the application for writ of error to the supreme court are chiefly the same as the rules governing points in the court of appeals.[624] The principal difference in the supreme court rules is the omission of the phrase that points of error may contain "complaints that the evidence is legally or factually insufficient to support a particular issue or finding."[625] This difference is explained by the fact that the supreme court does not have jurisdiction to consider findings under factual sufficiency standards.[626] As a result, factual insufficiency points of error are improper in the supreme court.

An application for writ of error should contain a point of error challenging each ground for a court of appeals' judgment, not merely the holding itself.[627] Many court of appeals' holdings turn on two or

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623. TEX. R. APP. P. 131(d); *see* State v. Wynn, 157 Tex. 200, 202, 301 S.W.2d 76, 79 (1957).

624. *Compare* TEX. R. APP. P. 74(d) *with* TEX. R. APP. P. 131(e); *see generally* Hatchell, *Proper and Effective Points of Error on Appeal*, in ST. MARY'S EIGHTH ANNUAL PROCEDURAL INSTITUTE: APPELLATE PRACTICE (1986) (discussing differences between points of error in courts of appeal and points of error in supreme court). Use of the "who/what/why" formula applies as effectively in drafting points of error in the supreme court as it does for points of error in the court of appeals. This formula is discussed *supra* at VI B 2 a. Of course, points in an application for writ of error should complain of the *court of appeals'* error in reviewing the trial court proceedings. In addition, the record reference following the points of error in the application should include a reference showing that the point was preserved in the motion for rehearing filed in the court of appeals. *See* TEX. R. APP. P. 131(e) ("whether the matter complained of originates in the trial court or in the court of appeals, it shall be assigned as error in the motion for rehearing in the court of appeals").

625. *Compare* TEX. R. APP. P. 74(d) *with* TEX. R. APP. P. 131(e).

626. Hatchell, *Proper and Effective Points of Error on Appeal*, in ST. MARY'S EIGHTH ANNUAL PROCEDURAL INSTITUTE: APPELLATE PRACTICE (1986) G-3-4; *see* Herbert v. Herbert, 754 S.W.2d 141, 144 (Tex. 1988). The supreme court may, however, review the court of appeals decision on factual sufficiency points to determine whether the court of appeals properly applied the correct standard of review in disposing of the points. *See* Pool v. Ford Motor Co., 715 S.W.2d 629, 634-35 (Tex. 1986).

627. *See, e.g.*, McKelvy v. Barber, 381 S.W.2d 59, 65 (Tex. 1964); City of Deer Park v. State *ex rel.* Shell Oil Co., 154 Tex. 174, 177, 275 S.W.2d 77, 84 (1955); Hatchell, *Proper and Effective Points of Error on Appeal*, in ST. MARY'S EIGHTH ANNUAL PROCEDURAL INSTITUTE: APPELLATE PRACTICE G-5 (1986). On the other hand, if there were other grounds before the court of appeals which could have formed the basis for its judgment, but the opinion of the court of appeals either rejects those grounds or does not address them, it is unnecessary to challenge them in the application for writ of error. *See* Porter v. Wilson, 389 S.W.2d 650,

more alternate grounds. An example is where the court of appeals overrules a no evidence point of error on the ground that some evidence supports a challenged jury finding, and on an alternative ground that the point was waived because the appellant did not move for a judgment notwithstanding the verdict. Both grounds for the court of appeals' ruling must be raised by a point of error in the application to the supreme court to avoid affirmance of the appeal on the unchallenged ground.[628]

In addition, if a court of appeals overlooks or refuses to consider a point of error, the application for writ of error should include a point of error complaining of the court of appeals' failure to consider the point of error.[629] The latter situation often arises when a court of appeals affirms a judgment supported by multiple grounds and declines to rule on some points after overruling others. When this occurs, a petitioner must assert a point of error which complains of the court of appeals' refusal to consider the unaddressed points. Otherwise, the points will be waived.[630]

C. *Presenting the Record in the Supreme Court*

Upon the timely filing of an application for writ of error, and after the court of appeals has ruled on all timely filed motions for rehearing, the clerk of the court of appeals is required to forward the application to the clerk of the supreme court with the original record, the opinion of the court of appeals, and all other papers pertaining to the appeal.[631] At the time an application is filed, the party applying for the writ of error must deposit with the clerk of the court of appeals a sum sufficient to pay the postage for the record. The clerk of the supreme court is not required to receive the application or the record unless the postage has been paid.[632]

D. *Amending or Redrawing the Application for Writ of Error*

The rules governing amendments of applications are essentially the

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653 (Tex. 1965). *But see* McKelvey v. Barber, 381 S.W.2d 59, 65 (Tex. 1964) ("careful and seasoned appellate practitioner" will challenge all possible grounds).

628. *See City of Deer Park*, 154 Tex. at 177, 275 S.W.2d at 84.

629. *See McKelvy*, 381 S.W.2d at 64.

630. *See id.*

631. TEX. R. APP. P. 132(a).

632. TEX. R. APP. P. 132(c).

same as those which apply to briefs in the court of appeals, with one exception: there is no express authority for "supplementing" briefs in the supreme court.[633] In *Davis v. City of San Antonio*,[634] the supreme court construed the respondent's "supplemented" response brief as a motion to amend the brief.[635] The court advised that the proper procedure to correct or supplement an application in the supreme court is to file a motion to amend.[636]

The supreme court may also order the petitioner to redraw the application if it is not prepared in conformity with the rules.[637] The failure to comply with an order to redraw an application will result in the striking of an application and dismissal of the appeal.[638]

XI. PRESERVING ERROR AS RESPONDENT TO APPLICATION FOR WRIT OF ERROR FROM THE SUPREME COURT

A respondent to an application for writ of error in the supreme court faces as much danger of waiving error as a petitioner.[639] In addition to the practical necessity of filing a brief in response to the application, there are two instances when a respondent must act in the supreme court to avoid waiver: (1) when cross-points must be asserted in the response to the application for writ of error, and (2) when the respondent must file an application for writ of error.

A. *Necessity for Timely Filed Brief in Response to the Application for Writ of Error*

The respondent should always file a brief in response to an applica-

633. *See* Davis v. City of San Antonio, 752 S.W.2d 518, 522 (Tex. 1988); *compare* TEX. R. APP. P. 131(h) (providing for amendment of application without mentioning right to supplement) *with* TEX. R. APP. P. 74(o) ("[b]riefs may be amended or supplemented . . . at any time when justice requires"). Response briefs in the supreme court may be amended pursuant to a similar rule. *See* TEX. R. APP. P. 136(g) ("The brief in response may be amended at any time when justice requires . . .").

634. 752 S.W.2d 518 (Tex. 1988).

635. *Id.* at 522.

636. *Id.*

637. TEX. R. APP. P. 131(j).

638. *See* White Budd Van Ness Partnership v. Major-Gladys Drive Joint Venture, 34 Tex. Sup. Ct. J. 446, 446 (March 20, 1991); Buffalo v. Robbins, 34 Tex. Sup. Ct. J. 446, 446 (March 20, 1991).

639. *See* Hanby, *Preservation of Error on Appeal*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE E-31 (1990).

tion for writ of error even though the rules do not require it.[640] A respondent who does not answer an application leaves the petitioner's allegations wholly uncontested and takes the risk that independent grounds for affirming the judgment will be "missed."[641]

Briefs in response to the application for writ of error must be filed with the clerk of the supreme court fifteen days after the application for writ of error is transmitted by the clerk of the court of appeals and filed in the supreme court.[642] Additional time to file the response brief may be granted upon a motion for extension of time which complies with Rule 160.[643]

Rule 136 provides an alternative procedure for responding to an application for writ of error by permitting a respondent to rely on his court of appeals' brief.[644] If this procedure is used, twelve legible copies of the brief must be filed in the supreme court within the time period as a response brief. The court of appeals' brief should be accompanied by a document identifying the number and style of the cause in the supreme court and the points of error to which the court of appeals' brief pertains.

B. *Basic Content of Respondent's Brief*

The brief of the respondent must comply with the provisions of the rules prescribed for an application for writ of error.[645] The principal differences between the two documents are discussed below.

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640. 32 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 861 at 69 (Texas Practice Supp. 1987).

641. Harris, *Supreme Court Practice: A Practical Approach*, THE APPELLATE ADVOCATE, Winter 1990, at 4; *see* Donwerth v. Preston II Chrysler-Dodge, Inc., 775 S.W.2d 634, 643 n.7 (Tex. 1989) (Ray, J., joined by Gonzalez and Cook, J.J., concurring) (a "careful and seasoned appellate practitioner" will bring independent grounds for affirming a judgment to the attention of the supreme court).

642. TEX. R. APP. P. 136(a). Although the application for writ of error is initially filed in the court of appeals, the fifteen day requirement for filing the response runs from the date of the filing of the application in the supreme court, *not* the court of appeals. *See id.*

643. TEX. R. APP. P. 136(a); *see* TEX. R. APP. P. at 160. Neither Rule 136(a) nor Rule 160 contain an express requirement that an extension of time for filing a brief in response (as opposed to an application for writ of error) be made upon a motion for extension of time. However, it is recommended that the respondent comply with the motion for extension of time requisite set forth in Rule 160 notwithstanding the fact that the rules do not expressly require it.

644. TEX. R. APP. P. 136(f).

645. TEX. R. APP. P. 136(b).

1. Objections to Jurisdiction

Assuming the grounds asserted by the petitioner for jurisdiction are invalid, Rule 136(c) requires that the respondent state in the brief any reasons that the supreme court has no jurisdiction.[646] As a court of discretionary jurisdiction, the supreme court may decline to review court of appeals' error. Therefore, in addition to asserting objections to specific jurisdictional grounds (e.g., conflict of decisions) every response brief should contain a statement which demonstrates why the alleged error by the court of appeals is not of such importance to the jurisprudence of the state so as to require correction.[647]

2. Reply Points

Rule 136(d) defines "reply points" as points that "answer the point in the application for writ of error or that provide independent grounds for affirmance."[648] Reply points in a response to an application for writ of error serve the same function as reply points asserted in the court of appeals—to answer the points of error and show why the lower court judgment should be affirmed.[649] The rules pertaining to reply points in the court of appeals should be referred to in constructing points in response to an application for writ of error.[650]

A respondent who fails to raise a reply point alleging independent grounds for an equal or lesser judgment may be rescued by the supreme court's liberal policy of looking for such grounds in the briefs filed in the court of appeals.[651] This situation often arises when the court of appeals affirms a trial court judgment supported by multiple independent grounds of recovery, but declines to rule on the appel-

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646. TEX. R. APP. P. 136(c). An example of a statement which may be used in the brief in response is:

OBJECTIONS TO JURISDICTION

Respondent would respectfully show that the Supreme Court has no jurisdiction of this suit under subsection (a)(6) of § 22.001 of the Government Code because [statement of reasons why no jurisdiction exists].

647. Harris, *Supreme Court Practice: A Practical Approach*, THE APPELLATE ADVOCATE, Winter 1990, at 4.

648. TEX. R. APP. P. 136(d).

649. *See* 32 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 863 at 70 (Texas Practice 1985); *see also supra* at VII A 2(a).

650. *See supra* at § VII A 2(a).

651. *See, e.g.*, Capital Brick, Inc. v. Fleming Mfg. Co., 722 S.W.2d 399, 402 (Tex. 1986); Roark v. Allen, 633 S.W.2d 804, 811 (Tex. 1982); DeAnda v. Home Ins. Co., 618 S.W.2d 529, 534 (Tex. 1980); *see also* Taggert v. Taggert, 552 S.W.2d 422, 424 (Tex. 1977).

lant's remaining points of error after overruling other points of error that attack a single ground of recovery.[652] In such situations, the supreme court will consider an independent ground for affirmance even if it is raised for the first time in a motion for rehearing.[653] However, "careful and seasoned" appellate lawyers will raise independent grounds for affirmance in their reply points to ensure that the grounds are directly brought to the supreme court's attention.[654]

3. Cross-Points

Cross-points in the supreme court seek different and lesser relief (such as the rendition of a less favorable judgment or a remand in the event of reversal) on a ground that the court of appeals rejected or refused to consider.[655] All cross-points raised in the supreme court must have been preserved in the court of appeals.[656]

Cross-points which are not raised in a respondent's brief will be deemed waived. Rule 136(d) provides that the Respondent "shall confine his brief . . . to such cross-points that respondent has preserved and that establish respondent's rights."[657] A five to four majority of the supreme court strictly construed this rule in *Davis v. City of San Antonio*.[658] In *Davis*, the petitioner sued the respondent for malicious prosecution. Although the respondent did not raise the defense of governmental immunity until after the verdict, the trial court rendered a judgment n.o.v. on that ground. In affirming the judgment

652. Donwerth v. Preston II Chrysler-Dodge, Inc., 775 S.W.2d 634, 643 n.7 (Tex. 1989) (Ray, J., joined by Gonzalez and Cook, J.J., concurring); *see* McKelvy v. Barber, 381 S.W.2d 59, 64-65 (Tex. 1964).

653. *See* Tanner Dev. Co. v. Ferguson, 561 S.W.2d 777, 778 (Tex. 1977).

654. *Donwerth*, 775 S.W.2d at 643 n.7.

655. Hatchell & Calvert, *Some Problems of Supreme Court Review*, 6 ST. MARY'S L.J. 303, 321 (1974); *see* Donwerth v. Preston II Chrysler-Dodge, Inc., 775 S.W.2d 634, 643 n.7 (Tex 1984); *see generally* 32 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 864 at 71 (Texas Practice 1985) (discussing nature of cross-points in supreme court). Requests for more favorable relief than awarded by the court of appeals must be brought forward by cross or conditional application for writ of error. *See Donwerth*, 775 S.W.2d at 639 n.5. Points which seek affirmance of the judgment should be phrased as reply points. *Id.* at 643 n.7; TEX. R. APP. P. 136(d) ("respondent shall confine his brief to reply points . . . that provide independent grounds for affirmance . . .").

656. Doctors Hosp. Facilities v. Fifth Court of Appeals, 750 S.W.2d 177, 178-79 (Tex. 1988); *see* TEX. R. APP. P. 136(d) ("respondent shall confine his brief to . . . cross-points that respondent has preserved . . .").

657. TEX. R. APP. P. 136(d).

658. Davis v. City of San Antonio, 752 S.W.2d 518, 520-22 (Tex. 1988).

n.o.v., the court of appeals did not address the respondent's factual insufficiency cross-points.

In its brief in response to the application for writ of error in the supreme court, the respondent did not request a remand of its factual insufficiency points in the event the supreme court reversed the case. The supreme court subsequently did reverse the case, but with instructions to the trial court to render judgment for the petitioner. The deeply divided court held that the respondent had waived its factual sufficiency points because its response brief did not list the factual sufficiency points as cross-points.[659] The *Davis* dissenters characterized the majority's refusal to remand the case as violating a "long-standing" rule that required the court to remand the cause to the court of appeals for consideration of the points not disposed of by the court of appeals.[660]

The rule adopted in the *Davis* case is, indeed, a significant departure from prior law. Under the former rules of supreme court review, the court would examine the respondent's brief in the court of appeals and if there were factual insufficiency points which the court of appeals did not consider, then the supreme court would review the points within its jurisdiction and remand the factual insufficiency points to the court of appeals.[661] The court would do this even though there were no cross-points raising the factual sufficiency points.[662]

Under the supreme court's current interpretation of Rule 136(d), the respondent must now raise all cross-points in the response brief if he wants the supreme court to review them.[663] The cases which pre-

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659. *Id.* at 521.

660. *Id.* at 523 (Gonzalez, J., dissenting and joined by Phillips, C.J., Wallace and Culver, J.J., concurring and dissenting); *see also* Tanner Dev. Co. v. Ferguson, 561 S.W.2d 777, 788 (Tex. 1977); Taggert v. Taggert, 552 S.W.2d 422, 424 (Tex. 1977); McKelvy v. Barber, 381 S.W.2d 59, 65 (Tex. 1964).

661. *See, e.g.*, Jones v. DRG Fin. Corp., 722 S.W.2d 402, 406 (Tex. 1987); Byrom v. Pendley, 717 S.W.2d 602, 605-06 (Tex. 1986); King v. Skelly, 452 S.W.2d 691, 699 (Tex. 1970).

662. *See, e.g., Byrom*, 717 S.W.2d at 606; Campbell v. Northwest Nat'l Life Ins. Co., 573 S.W.2d 496, 498 (Tex. 1978); Schwartz Jordan, Inc. v. DeLisle Constr. Co., 569 S.W.2d 878, 882 (Tex. 1978).

663. As noted above, the respondent may rely on his brief in the court of appeals if it is properly filed in the supreme court. TEX. R. APP. P. 136(f). *Davis* does not appear to preclude a respondent from utilizing this procedure to present a cross-point. If a respondent intends to rely on a court of appeals' brief, the brief must be sufficient to direct the supreme court's attention to the error of which complaint is made. TEX. R. APP. P. 131(e), (f).

date *Davis* can no longer be relied upon in determining the respondent's burden in raising cross-points to the supreme court.

C. *Cross and Conditional Applications for Writ of Error*

Respondents must file a "cross-application" for writ of error when seeking a different and more favorable judgment than that rendered by the court of appeals.[664] A common example of this is where the respondent, as appellant before the court of appeals, sought rendition of a judgment but the court of appeals remanded the case for new trial. A cross-application is necessary to complain of the remand.[665] Another example is where the respondent won on one cause of action in the court of appeals, but lost on another more favorable independent cause of action. In such a case, a cross-action is required.[666]

A "conditional application" for writ of error seeks review of the court of appeals judgment only in the event an application by the opposing party is filed and granted.[667] A conditional application is commonly used when a respondent is aggrieved by the court of appeals' judgment in some minor respect, but does not want to file an application for writ of error which may disrupt the entire judgment. By making an application conditional, a respondent may protect the right to have the adverse ruling reviewed in the event the petitioner files an application.[668]

Cross and conditional applications for writ of error are governed by the same rules as ordinary applications for writ of error. According to those rules, a respondent who does not wish to file an application until he is sure that another party is going to file an application has forty days after the overruling of the last timely filed motion for rehearing to file an application.[669]

In addition to the matters required by Rule 131 to be contained in

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664. Archuleth v. Int'l Ins. Co., 667 S.W.2d 120, 123 (Tex. 1984); Montford v. Jeeter, 567 S.W.2d 498, 500 (Tex. 1978).

665. *Montford*, 567 S.W.2d at 500; Pruitt v. Banker's Life Ins. Co., 491 S.W.2d 109, 112 (Tex. 1973).

666. Nagle v. Nagle, 633 S.W.2d 796, 798 (Tex. 1982).

667. Hatchell & Calvert, *Some Problems of Supreme Court Review*, 6 ST. MARY'S L.J. 303, 312 (1974).

668. *Id.* at 312.

669. *See* TEX. R. APP. P. 130(c) ("If any party files an application within the time specified . . . any other party who was entitled to file an application may do so within forty days after the overruling of the last timely motion for rehearing filed by any party").

an application, a conditional application for writ of error should include language which advises the supreme court that it is "conditional" on the granting of the petitioner's application for writ of error. It has been recommended that a "preliminary statement" may be incorporated in the conditional application immediately before the "statement of the case" which contains the following language:

> PRELIMINARY STATEMENT
> Petitioner would respectfully show the court that, although he is not satisfied with the entire judgment of the court of civil appeals, he is willing to accept it conditionally. Thus, Petitioner requests that this application for writ of error be granted only in the event that an application for writ of error on behalf of the [opposing party] is filed herein and granted.[670]

The same allegation should be included in the prayer at the conclusion of the application.[671]

XII. PRESERVING ERROR IN THE MOTION FOR REHEARING IN THE SUPREME COURT

Although the majority of motions for rehearing in the supreme court are overruled, motions for rehearing are read by the supreme court and can be used to change results in a case. Either party may file a motion for rehearing complaining of supreme court error within fifteen days from the date the supreme court renders a judgment or opinion, or from the date the supreme court refuses or dismisses an application for writ of error.[672] The motion must clearly state the points relied upon for the rehearing and state the names and addresses of the attorneys of record.[673] In all other respects, a motion for re-

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670. Hatchell & Calvert, *Some Problems of Supreme Court Review*, 6 ST. MARY'S L.J. 303, 312 n.44 (1974).

671. *Id.*

672. TEX. R. APP. P. 190(a). The time period for filing the motion for rehearing may be extended in the same manner as other deadlines in the appellate courts, if a motion reasonably explaining the need for the extension is filed with the supreme court not later than fifteen days after the last date for filing the motion. TEX. R. APP. P. 190(e). The court may also shorten the time period for filing the motion if the ends of justice require. TEX. R. APP. P. 190(a),(d). Opposing parties may file an answer to the motion for rehearing within five days after receiving notice from the supreme court clerk that a motion has been filed. TEX. R. APP. P. 190(d).

673. *See* TEX. R. APP. P. 190(b) (points "shall be distinctly specified" in motion and motion shall state names and addresses of attorneys or parties); *see generally* Harris, *Supreme Court Practice: A Practical Approach*, THE APPELLATE ADVOCATE, Winter 1990, at 4 (discussing content of motion for rehearing in supreme court).

hearing in the supreme court should abide by the same briefing principles for motions for rehearing in the court of appeals.[674]

There are three notable differences between motion for rehearing practice in the court of appeals and in the supreme court. The most significant difference is that the right to file a motion for rehearing is not absolute in the supreme court as it is in the courts of appeal. While the courts of appeals do not have the discretion to refuse to consider a timely filed motion for rehearing,[675] the supreme court can deny the right to file the motion altogether for "good cause." [676] The express language of Rule 190 also provides that second motions for rehearing will not be entertained in the supreme court.[677] However, it is presumed that this rule is not intended to bar further motions for rehearing when the court has vacated a prior judgment.[678]

Another difference between the motion for rehearing rules of the supreme court and the rules governing motions for rehearing in the courts of appeals pertains to the practice for amending the motions. Motions for rehearing in the courts of appeals may be amended "as a matter of right" within the fifteen day time period for filing the motion, and with leave of court thereafter.[679] There is no similar provision in Rule 190 for amending motions for rehearing in the supreme court. If an amendment is necessary in the supreme court, a motion for leave to file the amendment should be filed with the amended motion for rehearing.

XIII. PRESERVING ERROR IN DIRECT APPEALS TO THE SUPREME COURT

The rule governing direct appeals to the supreme court was completely rewritten in 1990. The two most significant changes to Rule 140 are that supreme court review over a direct appeal of an "inter-

674. *See supra* at § VIII.

675. Cowan v. Fourth Court of Appeals, 722 S.W.2d 843, 846-67 (Tex. 1987).

676. TEX. R. APP. P. 190(a), (d); *see* Texas Democratic Executive Committee v. Rains, 756 S.W.2d 306, 307 (Tex. 1988) (motion for rehearing disallowed in mandamus action involving general election due to "impending deadline for printing the ballot . . .").

677. TEX. R. APP. P. 190(d); *see* Edgewood Indep. School Dist. v. Kirby, 804 S.W.2d 491, 500 (Tex. 1991) (opinion on motion for rehearing).

678. *Cf.* TEX. R. APP. P. 100(d) (providing for "further motion for rehearing" to complain of new judgment or opinion in courts of appeals).

679. TEX. R. APP. P. 100(e).

locutory order" is now discretionary,[680] and the appellant may now file an ordinary appeal in the court of appeals in the event a direct appeal to the supreme court is dismissed.[681] In addition, there is no restriction on the filing of a statement of facts as existed under former Rule 140.[682]

Direct appeals to the supreme court are governed by the same procedures for ordinary appeals to the courts of appeals, "except when inconsistent with statute or this rule."[683] This means that the appellant[684] in a direct appeal must strictly follow the deadlines and other filing requirements applicable to appeals in the courts of appeals.[685] Of course, appropriate changes must be made to the language of the appeal bond, record requests, and briefs to reflect that the appeal is to the supreme court rather than a court of appeals.

There is one requirement an appellant must satisfy in pursuing a direct appeal which is not required in an ordinary appeal. A direct appeal will be dismissed for lack of jurisdiction unless the appellant files a "statement of jurisdiction" *with the record* which "fully, clearly and plainly" demonstrates probable jurisdiction in the supreme court.[686] Unlike the statement of jurisdiction in an application for writ of error, the statement in a direct appeal is filed as a separate document. The statement of jurisdiction in a direct appeal should: a) identify the district or county court from which the appeal is taken; b) state that the direct appeal does not require the determination of any question of fact; and c) demonstrate why the case is of such impor-

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680. *See* TEX. R. APP. P. 140(b) (supreme court may decline to exercise jurisdiction over appeal if record inadequately developed and decision would be advisory or case unimportant to state's jurisprudence).

681. TEX. R. APP. P. 140(e). Prior to the 1990 amendment, a direct appeal was taken in lieu of an appeal to the court of appeals. *See* TEX. R. APP. P. 140(c) (Vernon Supp. 1988).

682. TEX. R. APP. P. 140(c). In direct appeals under former Rule 140, a statement of facts was not permitted in a direct appeal, "except to the extent it is necessary to show that the appellant has an interest in the subject matter of the appeal." TEX. R. APP. P. 140(c) (Vernon Supp. 1988).

683. TEX. R. APP. P. 140(d).

684. Rule 140 indicates that the parties should be designated "appellant" and "appellee" rather than petitioner and respondent. *See* TEX. R. APP. P. 140(c), (e) (referring to parties in direct appeal as "appellant" and "appellee").

685. O'Connor, *Perfecting the Appeal*, in STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE B-109 (1989); 32 J. WICKER, CIVIL TRIAL & APPELLATE PROCEDURE § 922 at 102 (Texas Practice 1985).

686. TEX. R. APP. P. 140(c). The deadline for filing the statement of jurisdiction coincides with the deadline for filing the transcript and statement of facts, if any. *Id.* (appellant "shall" file statement "with the record").

tance to the jurisprudence of the state that a direct appeal should be allowed.[687] Even if these matters are established, the supreme court may decline to exercise jurisdiction over a direct appeal from an interlocutory order if the record is not "adequately developed," or if its decision would be advisory.[688]

Under former Rule 140, if the supreme court dismissed a direct appeal for want of jurisdiction, the appellant could not pursue a regular appeal in the court of appeals.[689] This prompted some appellants to simultaneously seek relief in the court of appeals in the event the direct appeal failed. When a simultaneous appeal to a court of appeals was attempted, the first court in which the transcript was filed acquired exclusive jurisdiction of the appeal.[690]

Simultaneous appeals to the courts of appeals are expressly prohibited under Rule 140 as amended in 1990.[691] However, the new rule permits the appellant to pursue a subsequent appeal to the court of appeals in the event the direct appeal is denied, assuming an appellant has a right to perfect an ordinary appeal when the direct appeal was perfected.[692] A subsequent appeal must be perfected within the standard time period for appeal "exclusive of the days during which the direct appeal was pending."[693]

XIV. CONCLUSION

Avoiding fatal error under the current appellate rules is not oner-

687. TEX. R. APP. P. 140(b) (supreme court may not take jurisdiction over direct appeal from any court other than district or county court, or of any question of fact, or if case is not important to jurisprudence of state); *see e.g.*, O'Quinn v. State Bar of Texas, 763 S.W.2d 397, 399 (Tex. 1988); Querner Truck Lines v. State, 652 S.W.2d 367, 368 (Tex. 1983); Mitchell v. Purolator Security, Inc., 515 S.W.2d 101, 103 (Tex. 1974); *see also* TEX. CONST. art. V, § 3-B.

688. TEX. R. APP. P. 140(b). Objections to the statement of jurisdiction must be made in a response filed by the appellee within ten days after the statement is filed. TEX. R. APP. P. 140(c).

689. Railroad Comm'n v. Shell Oil, 206 S.W.2d 235, 238-39 (Tex. 1947); Industrial Accident Bd. of Tex. v. Magana, 742 S.W.2d 799, 800 (Tex. App.—Houston [14th Dist.] 1987, no writ).

690. *See, e.g.*, Texas State Bd. of Pharmacy v. Gibson Discount Centers, Inc., 539 S.W.2d 141, 142 (Tex. 1976), *on remand*, 541 S.W.2d 884 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.); Young v. DeGueria, 580 S.W.2d 171, 173 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ); *see also* City of Corpus Christi v. Public Util. Comm'n, 572 S.W.2d 290, 293 (Tex. 1978).

691. TEX. R. APP. P. 140(e).

692. *Id.*

693. *Id.*

ous, even for lawyers who rarely handle an appeal. Yet, the Southwestern Reporters are full of cases decided on procedural grounds rather than substantive ones. Future amendments to the rules may make appellate practice easier, but no meaningful set of rules will ever promise "error-free" appeals.

This article has highlighted the remaining traps for lawyers contained in the rules of civil appellate procedure. Appellate lawyers who have mastered the rules are wary of these traps and will seldom risk losing the opportunity to have a client's appeal decided on the merits. A less experienced lawyer can avert the pitfalls of a civil appeal if he or she is willing to invest the time necessary to study and to follow cautiously the complex procedures for appeal.

A lawyer who is defending a judgment on appeal must have equal command of the rules of appellate procedure. In order to protect a judgment or preserve the right to a different judgment, a lawyer must know when and in what manner to request an additional record, assert reply and cross-points, or perfect a separate appeal. The failure to follow correct procedure in these areas can result in reversal of a judgment or the waiver of error which may entitle a client to a more favorable judgment.

All appellate lawyers make mistakes. However, one of the niceties of appellate practice is that, unlike trial proceedings where split-second decisions must be made and the lawyer often has no chance to correct an error made in the heat of trial, an appellate lawyer typically does have an opportunity to cure errors made in prosecuting an appeal. The modern appellate rules allow lawyers to correct procedural errors of every stripe. Moreover, the Supreme Court of Texas requires that appellate courts endeavor to decide cases on their merits rather than procedural defects. Therefore, few errors on appeal are fatal, assuming they are recognized soon enough. If a lawyer is careful, virtually any error in procedure can be corrected and turned into a mere embarrassment rather than a fatal mistake.