Chapter 18

Preservation of Error – Appeal Tactics

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18-1 INTRODUCTION

Appellate practice is every bit as strategic as trial practice. On appeal, the appellate practitioner should look for the equities in addition to identifying the legal principles that control the case. Sometimes the equities that could sway the appellate court in your client’s favor can be found in the underlying facts of the case. Sometimes those equities can be found in the skewed nature of the way the case was tried. And sometimes those equities may be policy rationales that would influence the appellate court to want the rule of law to allow your client to recover. Of course, the equities are only the gift wrapping; the presents inside the wrapping are the legal principles on which your appeal is based. Equities should not be overlooked in handling appeals.

Another key appellate strategy is to take the “long view,” to understand that good appellate strategy really begins at the outset of the case. It is at that point where the record is developed that can support an appeal or make an appeal unwinnable. After all, winning appellate arguments must stand on the three-legged stool of error that is preserved and that is harmful. The legs of this stool must be put in place while the case is in the trial court. The fertile areas for appellate success are covered below with rules and practice pointers for setting up the successful appeal.
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Of course, in many instances, the appellate practitioner is confronted with the case for the first time after trial. But even then, postverdict and postjudgment motions may provide a vehicle to assist in setting up appellate arguments. And when the appellate practitioner is not involved until the case lands in the court of appeals, the savvy appellate lawyer can still scour the record, already made, to identify arguments that are sufficiently preserved to provide effective fodder for an appeal.

18-2 PLEADING

A great deal of action and posturing takes place before a trial begins. The plaintiff files a petition; one or more answers are filed; the parties make special exceptions; issues are litigated in motions for summary judgment; and so on. A trial court may dispose of the case in favor of either party before trial by issuing rulings such as a default judgment, a dismissal or a summary judgment. As with all rulings, these pretrial rulings may be overturned either immediately after such ruling is made or, more commonly, after the disposition of the case by an appellate court reviewing the record and appellate briefs.

Parties can easily forfeit their right to complain about errors made before trial because a party’s inaction or delay in response to an error is, in most cases, deemed to be a waiver of the party’s right to complain about the error in later stages of the case. Parties must understand the requirements of preservation of error regarding pretrial matters. Although courts strictly enforce these requirements, in most cases, the requirements for preservation of error can be reduced to a few straightforward steps—to preserve error, a party must make a timely, specific objection and obtain a ruling, on the record, from the court.

18-2:1 Petition

To start any lawsuit, the plaintiff must file a petition. The petition should include the names and addresses (if known) of the parties. Furthermore, the plaintiff must plead facts which establish personal jurisdiction and subject matter jurisdiction (including standing). In order to be effective, a petition must be served on all parties that are entitled to such notice, unless the party waives citation.

1 Tex. R. Civ. P. 79.
PLEADING

The rules allow the plaintiff to plead in the “alternative.” In other words, the plaintiff’s allegations, claims or requests for relief may be inconsistent or diametrically opposed to one another. The claims only need to be sufficient to exist independently.

Though not technically required by the Texas Rules of Civil Procedure (the Rules only require that suits actually be brought in a proper venue), a satisfactory petition should allege facts that establish that the plaintiff has brought the case in a proper venue. Typically, venue is proper in “the county in which all or a substantial part of the events or omissions giving rise to the claim occurred, in the county of the defendant’s residence at the time the cause of action accrued or, if the defendant is not a natural person, in the county of the defendant’s principal office in Texas.”

Texas follows a “fair notice” pleading standard. Under the fair notice standard, the allegations in a petition need only put the opposing party on fair notice of what claims are being asserted. The plaintiff can satisfy the fair notice standard by drafting a petition that enables the opposing party (or parties) to “ascertain . . . the nature and basic issues of the controversy and what testimony will be relevant.” A plaintiff will be limited at trial to arguing issues that are either spelled out or can be deduced from the petition.

18-2:2 Special Exceptions

In order to properly to preserve a pleading issue for appeal, a party should alert the trial court to the alleged defect by filing a “timely request, objection, or motion,” and receive a ruling on the record on such objection. Because a party without “fair notice” will, by definition, not know what the other party is attempting to allege, an objection for failure to provide fair notice may simply state that the objecting party cannot discern what the petition purports to allege. Without such an exception on the record, courts will liberally construe pleadings “as favorably as possible for the

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pleader” to include, as properly brought, claims that were either unskillfully or inartfully drafted.8

If a party does not object to a lack of fair notice (or any other pleading defect), then that objection will be waived before an appellate court.9

Thus, in order to preserve an argument that a claim or defense is not pleaded or is improperly pleaded, a party, whether it be a defendant responding to a petition or a plaintiff responding to an affirmative defense, must specially except.10 Special exceptions act to alert a court to a defect in a pleading, whereby the opposing party will be granted leave to amend the pleading before having its case dismissed.11 Key to a litigant’s interests, special exceptions serve the purpose of preserving error after a court rules on them.

**Practice Pointer:**
Special exceptions should be revisited when the court and the parties are developing the jury charge to ensure that the charge does not go beyond the pleadings or, at the very least, where the charge does go beyond the pleadings, the party makes an appropriate “no pleading” objection. Of course, the opposing party may wish to seek a trial amendment to the pleadings in the event of such “no pleading” objection. Trial amendments can be sought even postverdict and may be appropriate where the unpleaded matter was truly tried by consent.

18-2:3 Answer
An answer follows a plaintiff’s petition and, like the petition, must give fair notice of defenses that the defendant intends to assert. An answer can contain a motion to transfer venue, a special exception, a plea of abatement, or counterclaims against the plaintiff.

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9 *Tex. R. Civ. P. 90; In the Interest of K.A.F., D.A.F. and A.L.F., No. 05-12-01582-CV, 2013 WL 3024864, *14 (Tex. App.—Dallas June 14, 2013) (finding pleading which was reportedly “global” in its breadth could not be challenged on a fair notice basis where party did not properly preserve the issue for appeal.).

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The defendant should always file an answer; otherwise, the defendant is deemed to admit the material allegations stated in the petition (other than the amount of unliquidated damages) and will likely face a default judgment.\(^\text{12}\) A basic, general denial of the plaintiff’s allegations will be enough to prevent a default judgment from being brought against a defendant and will force the plaintiff to move ahead with their case.\(^\text{13}\) Still, a general denial may leave a defendant vulnerable later during trial and during the appellate stage, as the defendant may be precluded from asserting defenses not specifically raised.

Though they are defensive, affirmative defenses seek to win a case or an argument by proving something as true, rather than by denying the plaintiff’s ability to prove something as true.\(^\text{14}\) Thus, an affirmative defense asserts a reason why the defendant should prevail \emph{even if} the plaintiff is able to prove a cause of action pleaded in the petition. An affirmative defense can quickly end a case in the defendant’s favor.\(^\text{15}\) Examples of affirmative defenses include res judicata, contractual defenses, election of remedies, and the statute of limitations.\(^\text{16}\)

At times, it may be unclear whether an issue is (1) a mere denial of the plaintiff’s claim, or (2) an affirmative defense. In these situations, the defendant should err on the side of caution and plead affirmatively and clearly. The party asserting an affirmative defense will bear the burden of proof on that affirmative defense.\(^\text{17}\) But where the defendant, acting out of an abundance of caution, improperly asserts a denial as an affirmative defense, the mislabeling of the denial as an affirmative defense should not operate to shift the burden of proof to the defendant on an element of the plaintiff’s claim. For example, if the defendant in a negligence case asserted “lack of causation” as an affirmative defense, the mere assertion of the (so-called) affirmative defense would not thereby


\(^{13}\) Tex. R. Civ. P. 92.

\(^{14}\) Tex. R. Civ. P. 94.

\(^{15}\) See \textit{UL, Inc. v. Pruneda}, No. 01-09-00169-CV, 2010 WL 5060638, at *6 (Tex. App.—Houston [1st Dist.] Dec. 9, 2010, no pet.) (mem. op.).

\(^{16}\) See Tex. R. Civ. P. 94.

shift to the defendant the burden to disprove the causation element of the plaintiff’s claim.

Affirmative defenses must be pleaded with fair notice to apprise opposing parties of the matter being asserted. An affirmative defense can be pleaded in an answer or in response to a motion for summary judgment.\(^{18}\) Still, a party asserting an affirmative defense must raise it and obtain a ruling to preserve error and argue that affirmative defense before an appellate court—though this pleading requirement may be waived if the affirmative defense is litigated at trial.\(^{19}\)

A party opposing an affirmative defense must specially except or waive the right to object that the affirmative defense was not pleaded.\(^{20}\) Parties that anticipate even a slight chance that a counterparty’s pleading is raising an affirmative defense should object by filing special exceptions. Otherwise, the courts will liberally construe the defendant’s pleading and may thereby interpret the pleading to contain the affirmative defense.\(^{21}\)

**PRACTICE POINTER:**
Do not forget that answers, like petitions, are equally subject to special exceptions.

### 18-3 PRETRIAL MOTIONS

**PRACTICE POINTER:**
The “due order of pleading” is important. The special appearance must be filed before or concurrently with the answer (that is made subject to the special appearance). And, motions to transfer venue should be filed before any pleadings other than the special appearance.

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\(^{21}\) *McGraw v. Brown Realty Co.*, 195 S.W.3d 271, 275 (Tex. App.—Dallas 2006, no pet.). (“In the absence of any special exceptions, we liberally construe McGraw’s pleadings to include…affirmative defense(s).”).

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18-3:1 Special Appearance

The special appearance is a pleading by which the defendant can challenge the court’s personal jurisdiction over the defendant. If the defendant was a Texas resident at the time of the events at issue, then personal jurisdiction is a simple matter—the court will automatically have personal jurisdiction. But if the defendant is a non-resident, then two requirements must be satisfied before the court will have personal jurisdiction over that defendant. First, the Texas long-arm statute must authorize the court to exercise personal jurisdiction over the defendant. The long-arm statute is found in Chapter 17 of the Civil Practice and Remedies Code. Second, the exercise of personal jurisdiction must be consistent with constitutional standards of due process. However, the Texas long-arm statute allows courts to exercise personal jurisdiction as long as the exercise of personal jurisdiction satisfies the constitutional requirements of due process. Thus, as long as the exercise of personal jurisdiction comports with the federal due-process requirements, the Texas long-arm statute will be satisfied.

Federal due-process requirements allow state courts to exercise personal jurisdiction over a non-resident defendant that established “minimum contacts” with the state. The defendant’s contacts with the forum can give rise either to “general” jurisdiction or to “specific” jurisdiction. For general jurisdiction to apply, the defendant must have “continuous and systematic” contacts with the forum. And for specific jurisdiction to apply, “two requirements must be met: (1) the defendant’s contacts with the forum must be purposeful; and (2) the cause of action must arise from or relate to those contacts.”

In commercial litigation, personal jurisdiction can often be based on a party’s express consent, in a contract, to submit to jurisdiction in Texas. A Texas court will have personal jurisdiction

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22. American Type Culture Collection, Inc. v. Coleman, 83 S.W.3d 801, 806 (Tex. 2002).
27. American Type Culture Collection, Inc. v. Coleman, 83 S.W.3d 801, 806 (Tex. 2002).
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over a defendant that enters into a mandatory, contractual forum-selection clause agreeing that any suit would be brought in Texas.29

Under Texas jurisprudence, the parties to a case “bear shifting burdens of proof in a challenge to personal jurisdiction.”30 Initially, the plaintiff bears the burden to plead facts to establish that Texas’s long-arm statute permits the court to exercise jurisdiction over the non-resident defendant.31 The burden then shifts to the defendant to file a special appearance negating every basis for personal jurisdiction that the plaintiff alleged.32 The special appearance enables the court to make a limited ruling on personal jurisdiction.33 This ruling can be obtained either through a written opinion or an oral ruling on the record, and a party that loses on a special appearance motion but properly preserves error may litigate the substance of the personal jurisdiction issue on appeal.34

Error preservation is extremely important in challenging personal jurisdiction. Unlike subject matter jurisdiction—which, as shown below, cannot be waived—a defendant can easily waive personal jurisdiction, thus empowering a trial court to enter judgment binding the parties to the suit, even though the court did not initially have personal jurisdiction. Preserving error for personal jurisdiction is a fragile exercise because the mere hint of consent to the sitting court’s personal jurisdiction over a controversy can scuttle a party’s appellate rights on the matter. This is because a party cannot have its jurisdictional cake and eat it too by both challenging jurisdiction and also attempting to win the case on the merits. Thus, to challenge personal jurisdiction without fully submitting oneself to the trial court’s jurisdiction, a party must enter a “special appearance” filed through a sworn motion, in order to challenge a Texas court’s personal jurisdiction.35

35. Tex. R. Civ. P. 120a(1).
The special appearance must be the first substantive motion brought in a case by a defendant in order for the special appearance to be effective. Every appearance not properly brought as a special appearance will be considered a “general appearance” which will grant a court personal jurisdiction over the appearing party. The Texas Supreme Court has strictly interpreted the language of Rule 120a—the rule governing special appearances—by dictating a three part test by which a party may avoid making a general appearance. Under this test, a defendant will be deemed to have made a general appearance, and will have waived its appellate rights to challenge personal jurisdiction, if the defendant (1) invokes the judgment of the court on any question other than the court's jurisdiction, (2) recognizes by its acts that an action is properly pending or (3) seeks affirmative action from the court. An order on a special appearance may be immediately appealed by interlocutory appeal.

18-3:2 Motion to Transfer Venue

If a defendant believes that the case has been filed in an improper venue, then the defendant may challenge the plaintiff’s choice of venue by filing a motion to transfer venue. This objection can be based on failure to comply with a statute establishing mandatory jurisdiction in another county, the convenience of the parties, local bias or, in some situations, a contractual venue selection clause. The objection can either accept as true, and attack, the facts as alleged in the petition or the objection can specifically deny the venue facts. If the challenging party chooses the latter course, then the counter-party must establish prima facie proof of facts establishing proper venue.

The window for filing a venue objection is narrow, as the motion to transfer venue must be filed either before or concurrently with the filing of an answer to the petition. Parties are not allowed to attempt to obtain a favorable ruling before asking to transfer the

36 Dawson-Austin v. Austin, 968 S.W.2d 319, 322 (Tex. 1998).
38 Tex. R. Civ. P. 86.
39 See Tex. R. Civ. P. 87(3).
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Errors concerning venue are not considered “fundamental;” so, to preserve error, the opposing party must set a hearing (and ensure that this hearing is held) on the venue issue and obtain a ruling. If the defendant does not preserve a venue challenge, then once the trial has commenced, the defendant will be stuck trying the case in the plaintiff’s chosen venue.

18-3:3 Motion to Dismiss
Texas Rule of Civil Procedure 91a permits a party to file a motion to dismiss a petition that “has no basis in law or fact.” Under the rule, “a cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought.” And “[a] cause of action has no basis in fact if no reasonable person could believe the facts pleaded.”

PRACTICE POINTER:
A motion to dismiss must reference Rule 91a and must also (a) be filed within 60 days after the first pleading containing the challenged cause of action is served on the movant; (b) be filed at least 21 days before the motion is heard; and (c) be granted or denied within 45 days after the motion is filed.

18-3:4 Plea to the Jurisdiction
The plea to the jurisdiction is a pleading device through which the defendant can challenge the court’s jurisdiction over the subject matter of the suit. Common grounds for a challenge to subject-matter jurisdiction include sovereign or governmental immunity, standing, ripeness, mootness, and a complaint that the court lacks jurisdiction due to the amount in controversy.

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40 Tex. R. Civ. P. 86.
41 Eggert v. State, No. 03-12-00190, 2013 WL 1831614, at *1 (Tex. App.—Austin Apr. 24, 2013) (citing Tex. R. Civ. P. 87(1) (“The movant has the duty to request a setting on the motion to transfer [venue].”) (party requested, but did not set a hearing, so error was not preserved).

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Unlike most matters in civil suits, parties need not be concerned about preserving error for a court’s lack of standing or subject matter jurisdiction. This is because any trial court error regarding subject matter jurisdiction is considered a “fundamental error,” or one which cannot be waived or forfeited.\textsuperscript{45} Therefore, the defendant can challenge the court’s subject matter jurisdiction at any stage of the litigation, and can even raise a challenge to the court’s subject matter jurisdiction for the first time on appeal.

An order granting a plea to the jurisdiction results in a final judgment and can therefore be immediately appealed. However, if the court denies a plea to the jurisdiction, then no final judgment will result from the court’s decision, and, in most cases, the defendant will not be able to take an interlocutory appeal of the court’s ruling. Texas law creates an exception to this rule for the government; if the court denies a plea to the jurisdiction filed by the government, then the government may challenge the court’s ruling by interlocutory appeal.\textsuperscript{46}

\textbf{PRACTICE POINTER:}

Because a challenge to the court’s subject matter jurisdiction cannot be waived, such a challenge can be raised at any time and can even be raised for the first time on appeal.

\textbf{18-3:5 Motion to Recuse}

If a party believes that the judge is biased, disqualified or is otherwise unfit to handle the trial, then the party may move to recuse the judge, or may challenge the judge as constitutionally disqualified. To complain that a retired or visiting judge is disqualified, the movant must object either (1) on the earlier of one day before trial or (2) 7 days after notice of the judge’s hearing of the case.\textsuperscript{47} For recusal, the party must file a verified motion 10 days before trial,\textsuperscript{48} though a party may challenge the constitutional disqualification of the trial

\textsuperscript{45} See Ramsey v. Dunlop, 146 Tex. 196, 205 S.W.2d 979, 983 (1947); Texas Ass’n of Bus v. Air Control Bd., 852 S.W.2d 440, 445–46 (Tex. 1993).

\textsuperscript{46} Tex. Civ. Prac. & Rem. Code § 51.014(a)(8).

\textsuperscript{47} Tex. Gov’t Code § 74.053(a).

\textsuperscript{48} Tex. R. Civ. P. 18a.
judge at any point during the case, as soon as practicable after the movant knows of the ground stated in the motion.\textsuperscript{49}

\begin{quote}
\textbf{PRACTICE POINTER:}
This vehicle should be used very sparingly and only where there is a compelling case for recusal. Some bases for disqualification will disqualify the judge not just for the instant case but for any case. So, for example, in the famous \textit{Texaco v. Pennzoil} appeal, Texaco argued postverdict that the trial judge was disqualified based on insufficient years of service to qualify as a retired judge. Pennzoil successfully argued that such a complaint would disqualify the judge for all cases, and therefore that complaint had to be brought by a quo warranto action rather than a motion to recuse.
\end{quote}

\subsection*{18-3:6 Motion for Summary Judgment}

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\textbf{PRACTICE POINTER:}
Many appeals go to the appellate courts from orders granting summary judgments that dispose of the case. A court may enter a partial summary judgment, and there are procedures in state and federal court to certify the partial summary judgment for appeal. If the summary judgment is intended not to be partial, then you should ensure that the trial court's order disposes of the entire case, so that the judgment is an appealable, final judgment.
\end{quote}

Motions for summary judgment are filed by litigants hoping to dispose of the case on the merits before trial. Texas recognizes two types of summary judgment motions: the “traditional” summary judgment motion and the “no evidence” summary judgment motion. A traditional summary judgment motion is filed by the party who bears the burden of proof on a claim or defense; the movant asserts that there is no genuine issue regarding any material fact, and that the movant is therefore entitled to judgment as a matter of law.\textsuperscript{50} To

\textsuperscript{49} Tex. R. Civ. P. 18a(j)(2).
\textsuperscript{50} Rule 166a(c).
prevail on a traditional motion for summary judgment, the movant must conclusively prove “all essential elements” of its claim (including possible affirmative defenses) as a matter of law.51 A movant may move for summary judgment on individual issues and claims within a case, or for the entire case. Parties should not expect summary judgment to be granted if their summary judgment motion is really a “special exception”; that is, one that points out errors that can be cured by an amended pleading instead of a substantive attack on the plaintiff’s case.52 However, summary judgment can be proper if amendments are not made to a defective pleading.

A no evidence motion for summary judgment is filed by the party who does not bear the burden of proof. The movant alleges that there is “no evidence” to support a claim or element on which the other party bears the burden proof.53 After such a “no evidence” motion is properly filed, a trial court must grant the motion and dispose of the claim unless the non-movant produces a mere “scintilla” of (admissible) evidence that raises a genuine issue of material fact for trial.54

The Texas Courts of Appeals are divided over what the party filing a no evidence summary judgment motion must plead to shift to the non-movant the burden to adduce evidence. Some courts hold that a no evidence motion is effective to shift the burden if the motion gives the non-movant “fair notice” of the elements that the movant is challenging.55 But other courts have rejected this “fair notice” standard, requiring the motion specifically to list each challenged element.56 The safest practice is for the party filing the no evidence motion specifically to list each element that the opposing party allegedly has no evidence to support.

Certain allegations in pleadings require the filing of affidavits—which is a common source of disputes during the summary judgment stage of a case. The affidavit must be a “statement in writing of a

52. *In re B.I.V.*, 870 S.W.2d 12 (Tex. 1994).
53. *Tex. R. Civ. P. 166a(i).*
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fact or facts signed by the party making it, sworn to before an officer authorized to administer oaths, and officially certified to by the officer under his seal of office.” A litigant may object to the absence of a required affidavit, or the affidavit’s substance or form. In objecting to the affidavit’s form, the objection must be made on the record with a ruling obtained to preserve any alleged error. Parties do not have to object to an affidavit’s substance in order to preserve error; rather, such an error may be raised for the first time on appeal. To avoid any harm that might result from a confusion between what is formal and what is substantive, it is wise for parties to make an objection on the record.

Denials of summary judgment are interlocutory and generally not immediately appealable. Rather, interlocutory summary judgment orders are merged into a court’s final judgment and can therefore be challenged in an appeal of that final judgment. Dispositive summary judgment rulings, disposing of all the parties and issues in a suit, may be directly appealed under the “final judgment rule.” On appeal, the appellate court will review questions of law under a de novo standard, and will draw every inference in favor of the non-moving party. Litigants should remember that they generally cannot raise new issues on appeal of a summary judgment ruling. All arguments and facts need to be presented in the pleadings relating to the summary judgment motion in order for an appellate brief to incorporate and explain them to an appellate court. Raising arguments in summary judgment motions and answers will preserve them for appeal.

60. Schipf v. Exxon Corp., 644 S.W.2d 453, 454 (Tex. 1982).
18-3:7 Motion in Limine

**PRACTICE POINTER:**
Orders on motions in limine do not preserve error. It is necessary to bring the matter back up during trial and get a ruling from the trial court during trial.

An order on a motion in limine has been called a “tentative ruling” because the order merely signifies the court’s thinking at the time the order is made. Because the order does not represent the court’s final decision on the matter, motions in limine and responses thereto do not preserve error in the admission and exclusion of evidence. Thus, if the court grants a motion in limine over an opposition, the party opposing the motion in limine cannot rely on that opposition to preserve error. The party whose evidence is barred must make an offer of proof at trial to preserve error.

Likewise, if the court denies a motion in limine, then the party seeking to have evidence excluded cannot rely on the motion in limine to preserve error. Instead, the party seeking to have evidence barred must object when evidence is offered at trial—even if the court already denied a motion in limine seeking to bar the same evidence.

18-4 BENCH TRIALS

18-4:1 Overview

As the name suggests, a bench trial occurs when a case is tried not to a jury, but to the bench (the judge). The judge serves as the finder of fact, and the judge’s ruling on the merits of the case is presented in the judge’s findings of fact and conclusions of law.

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68 See § 18-6:3.2 (discussing steps required to make an offer of proof).
The findings of fact take the place of a jury verdict, while the conclusions of law provide the reasons for the judgment.70

Apart from the findings of fact and conclusions of law (and the related procedural requirements discussed below), a bench trial is similar to a jury trial: a bench trial is governed by the same rules of evidence that govern a jury trial, and, for the most part, the parties must take the same steps to preserve error in a bench trial that must be taken to preserve error in a jury trial. (One notable exception is that, following a bench trial, the appellant need not file posttrial motions to preserve a challenge to the legal and factual sufficiency of the evidence on appeal.71) The rules regarding findings of fact and conclusions of law are examined below.

18-4:2 Findings of Fact and Conclusions of Law

PRACTICE POINTER:
The findings of fact are similar to jury findings and must be challenged on appeal as you would challenge jury findings.

Within the Texas Rules of Civil Procedure, Rules 296, 297 and 298 set forth a standard by which, after a bench trial, a party can request findings of fact and conclusions of law.72 The findings of fact are separate from the judgment and form the basis of the judgment.73 If the trial court makes any findings corresponding to an element of a claim or defense, then the trial court will be presumed to have made all other findings necessary to support the judgment.74 But if the findings of fact omit every element of a claim or defense, then, on appeal, the judgment may not be supported by presuming that the trial court made any finding going to such claim or defense.75

70. Anderson v. City of Seven Points, 806 S.W.2d 791, 794 (Tex. 1991).
71. See Tex. R. App. 33.1(d).
72. See § 18-8:7.
73. Tex. R. Civ. P. 299.
75. Tex. R. Civ. P. 299.
The primary purpose of findings of fact and conclusions of law is to assist the losing party in selecting the issues to present on appeal by determining the basis for the judgment. Once the findings of fact and conclusions of law are received, the losing party should study the court’s findings and conclusions in preparing for the appeal. Specifically, the party should compare the trial court’s conclusions against the applicable law to select the best legal arguments for appeal, and the party should compare the trial court’s findings of fact against the record to choose the findings that may be susceptible to an appellate challenge (i.e., a challenge to the legal or factual sufficiency of the evidence to support a finding).

18-5  JURY SELECTION

18-5:1 Specific Questions Refused

If a court does not permit a party to ask certain questions it desires to ask the jury panel, then the party conducting the voir dire must make a record showing (1) the questions it would ask and (2) why those questions are necessary. The party must also obtain a ruling on its request to ask those questions. If the voir dire examination is on the record, then the reporter’s record will suffice. However, the entire voir dire transcript should be included in the appellate record so that the appellate court can ascertain whether the information sought was otherwise obtained or whether the questions were duplicative. If the voir dire examination is not on the record, the party denied permission to ask certain questions must make a formal bill of exceptions stating what questions it desired to ask and why those questions were necessary. The party must then obtain a ruling on the bill of exceptions.

76 Collins v. Walker, 341 S.W.3d 570, 574 (Tex. App.—Houston [14th Dist.] 2011, no pet.).
77 Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743, 753 (Tex. 2006).
78 Dickson v. Burlington Northern Railroad, 730 S.W.2d 82, 85 (Tex. App.—Fort Worth 1987, writ ref’d n.r.e.).
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18-5:2  Time Constraints

In order to complain on appeal of insufficient time in which to conduct voir dire, a party must have requested additional time and made a bill of exceptions showing what questions would have been asked if it had been allowed to continue.80 It may be necessary to show that an objectionable venire person made it onto the jury because of the lack of time to conduct voir dire.81

18-5:3  Challenges to Venire Members

A “challenge for cause” is a complaint that some member of the venire is categorically disqualified from service on the jury.82 The court decides whether to grant the challenge for cause. Parties may challenge an unlimited number of panel members for cause. When a court denies a challenge for cause, there is no harm unless that party uses all of its peremptory challenges and cannot strike the panel member challenged for cause.83

Texas law provides several grounds on which a panelist can be challenged for cause. A statute lists general qualifications for jury service, including the requirements that a person:

(1) is at least 18 years of age;
(2) is a citizen of this state and of the county in which the person is to serve as a juror;
(3) is qualified under the constitution and laws to vote in the county in which the person is to serve as a juror;
(4) is of sound mind and good moral character;
(5) is able to read and write;
(6) has not served as a petit juror for six days during the preceding three months in the county court or during the preceding six months in the district court;

82. Tex. R. Civ. P. 228.
(7) has not been convicted of misdemeanor theft or a felony; and
(8) is not under indictment or other legal accusation for misdemeanor theft or a felony.\textsuperscript{84}

Even if a person is qualified to serve on a jury as a general matter, the person may be disqualified to serve on a particular jury if the person:

(1) is a witness in the case that the jury will decide;
(2) has a direct or indirect interest in the case’s subject matter;
(3) has a close relationship to one of the parties in the case;
(4) is biased or prejudiced for or against one of the parties; or
(5) has served as a juror in a previous trial of the very same case or another case involving the same factual questions.\textsuperscript{85}

To preserve error as a result of an overruled challenge for cause, a party must inform the court that as a result of the court’s overruling the challenge for cause, an objectionable juror will remain on the jury after the party uses its last peremptory challenge, and submit the party’s peremptory strike list.\textsuperscript{86} As with most issues related to preserving error, timing is essential. The complaining party must inform the court about the remaining objectionable juror(s) no later than when it submits its peremptory strike list.\textsuperscript{87} It may be advisable to request an additional peremptory strike, as well.\textsuperscript{88}

\textsuperscript{84} Tex. Gov’t Code § 62.102.
\textsuperscript{85} Tex. Gov’t Code § 62.105.
\textsuperscript{87} Cortez v. IHCC-San Antonio, 159 S.W.3d 87, 91 (Tex. 2005).
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PRACTICE POINTER:
This is a trap for the for trial counsel who do not correctly preserve error in the overruling of a challenge for cause. When striking a jury, trial counsel may find it helpful to bring a script indicating what should be said on the record to preserve error in the overruling of a challenge for cause. For example: “Your Honor, you overruled my challenge for cause as to venire member #2. I exhausted my peremptory challenges on venire members #5, 7, 9, 11, 13 and 15. I would have used a peremptory challenge on venire member #4, but because you overruled my challenge for cause as to venire member #2, I was forced to use my last peremptory challenge on venire member #2. As a result, I was unable to exercise a peremptory challenge on #4, and #4 is on the jury.”

When there are multiple parties on either side of case, and parties on one side of the case are antagonistic on a fact issue that will be presented to the jury, the court must allocate peremptory strikes among the parties.99 Forcing antagonistic parties on one side of a case to share the same six strikes violates those parties’ right to trial by jury.90 A 2-to-1 ratio between sides approaches the maximum disparity allowed.91 To preserve error related to inequitable allocation of peremptory strikes, a party must challenge its allotment by a motion to equalize or objection to the allocation prior to exercising the strikes. A court’s failure to equalize will be reversed on appeal if the result was materially unfair.92

Venire members may not be struck because of their race or gender.93 If a party suspects that its opponent is exercising its peremptory strikes in an impermissibly discriminatory way, the party should object and point to facts that demonstrate improper use of strikes, such as all venire members of a certain race or gender

99  Patterson Dental Co. v. Dunn, 592 S.W.2d 914, 918 (Tex. 1979).
90  Patterson Dental Co. v. Dunn, 592 S.W.2d 914, 918 (Tex. 1979).
91  Patterson Dental Co. v. Dunn, 592 S.W.2d 914, 920 (Tex. 1979).
92  Patterson Dental Co. v. Dunn, 592 S.W.2d 914, 920 (Tex. 1979).
were struck, or those members were not questioned in the same way other members were. This objection must be made before the jury is empaneled and sworn, or it is waived. Ideally, however, a party objects immediately upon learning of an opponent’s peremptory strikes.

The burden then shifts to the opponent to provide race- and/or gender-neutral explanation(s) for the struck jurors. The explanation must relate to the facts of the case, but need not necessarily be persuasive. If the striking party offers race-neutral explanations, then the challenging party may point to facts that rebut the explanations. Those facts may include removing all minority members, failure to strike other venire members who share the same characteristic as the one articulated by opposing counsel, or an explanation relating to group bias that does not apply to the struck juror.

18-6 TRIAL RULINGS

18-6:1 Jury Demand

To preserve its right to a jury trial, a party must timely demand a jury trial and pay the jury fee. Requesting a jury trial and paying the fee must in every case be done at least 30 days prior to trial. A jury request made more than 30 days before trial is presumed to be timely. If a case is reset, the final trial date determines timeliness. Requesting a jury trial and paying the fee a mere 30 days in advance of trial may not be adequate if an opposing party can show that granting a jury trial would injure it, disrupt the docket or hinder the court’s handling of business.

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100. Tex. R. Civ. P. 216.
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to jury trial can be waived by, for example, not timely requesting one and paying the fee, not showing up for trial, or trying the case to the court without objecting on the record. The only time that refusal to grant a timely requested and paid-for jury trial is harmless error, as opposed to reversible error, is when there are no genuine disputes of material fact and an instructed verdict would be appropriate.

PRACTICE POINTER:
Consider whether a jury waiver is any different from other forum selection clauses.

18-6:2 Final, Appealable Judgments and Orders

Generally, a final, appealable order is required before taking an appeal. A judgment after a trial on the merits is presumed to be final and appealable. A judgment is presumed to dispose of all parties, claims and issues, unless the court orders a separate trial for a specific party, claim or issue.

An order on a motion for summary judgment is final and appealable in three instances: (1) if the order disposes of all parties and all issues; (2) if the order states “with unmistakable clarity” that it is final as to all claims and all parties; or (3) if, for a summary judgment order affecting only some claims or parties, there is a severance or merger. Severance occurs soon after the order issues, permitting immediate appeal. Merger, by contrast, occurs when a final judgment disposing of the remainder of the case issues.

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An order may be made final and appealable if the remaining claims are dismissed. A nonsuit, i.e., a voluntarily dismissal, is effective as soon as it is filed. The appellate timelines do not begin to run, however, until a court signs an order dismissing the case.

Some interlocutory orders are made appealable by statute or rule. Other interlocutory orders may be appealed if the trial court grants permission and the appropriate appellate court agrees to hear the case. A permissive appeal is available only for controlling questions of law about which there is substantial ground for difference of opinion, and the trial court’s order granting permission to appeal must note why the appeal will materially advance the ultimate termination of the litigation.

PRACTICE POINTER:
Consider seeking certification of interlocutory orders to where the appeal could be used as a vehicle for early disposition of the case.

18-6:3 Admission and Exclusion of Evidence

18-6:3.1 Objections

18-6:3.1a Objections Must Be Timely, Specific and Ruled Upon
To preserve error, objections must be made when the evidence is offered. When a question is proper, but the witness’s answer is not, an objection may be made during or immediately after the answer. If, however, the question is improper or can elicit

114. Harris County Appraisal Dist. v. Wittig, 881 S.W.2d 193, 194 (Tex. App.—Houston [1st Dist.] 1994, orig. proceeding) (op. on reh’g).
only inadmissible evidence, one should object after the question is asked but before the witness answers. Even if an objection is properly made, if substantially similar evidence is later presented to the jury without an objection, then the initial objection is waived.120

In order to give the court an opportunity to understand the challenge, and to give the opposing party an opportunity to cure the defect if possible, objections must be specific.121 Specificity requires pointing out what evidence is objectionable and which legal principle will be violated if the evidence is admitted.122

If the court overrules the objection, the error is preserved. However, if the evidence comes before the jury and the court subsequently sustains an objection to the evidence, error is not automatically preserved. “To preserve error after inadmissible evidence is allowed before the jury, a party must sequentially pursue an adverse ruling from the trial court by: (1) objecting to the complained-of evidence; (2) moving the court to strike the evidence from the record; (3) requesting the court to instruct the jury to disregard the evidence; and (4) moving for a mistrial.”123

18-6:3.1b Continuing Objections Necessary

The safest course in trial is to object every time inadmissible evidence is offered. When an objection should apply to several questions in a series, however, a party may seek a running objection.124 It is important that the running objection be specific and unambiguous.125 Running objections may be waived if the objecting party offers similar evidence,126 or does not object to similar evidence offered by another witness.127

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TRIAL RULINGS

The terms of a running objection dictate its scope. Some courts have held that a running objection may cover multiple witnesses if the objection is specifically presented as such or if the objection arises in a non-jury trial. But other courts have held that “a running objection generally will only preserve an objection in those instances where similar evidence is elicited from the same witness.” The safest approach is to request a new running objection as to each witness.

PRACTICE POINTER:
Consider seeking acknowledgment from opposing counsel on the record that counsel acknowledges that you have a running objection to particular evidence. That type of agreement may be useful if opposing counsel tries to challenge the effectiveness of the running objection on appeal.

18-6:3.1c When Evidence Has Limited Admissibility

Lodging a general objection to evidence that has limited admissibility is insufficient to preserve error. To be sufficient, an objection must point out specifically the objectionable portions or the impermissible applications to which evidence may be put. A party should request a limiting instruction so that evidence is put only to permissible purposes.

128. Richardson v. Green, 677 S.W.2d 497, 501 (Tex. 1984) (holding that a running objection to testimony about the first interview of someone did not apply to the second interview).
132. Tex. R. Evid. 105(a); Birchfield v. Texarkana Mem’l Hosp., 747 S.W.2d 361, 365 (Tex. 1987).
133. Tex. R. Evid. 105(a).
134. Tex. R. Evid. 105(a).
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18-6:3.2 Offers of Proof

If a party offers evidence that is excluded by the trial court, the party should request to make an offer of proof outside the presence of the jury to preserve error. The offer may be made in question-and-answer form or in the form of a summary statement. An attorney must specifically request that the testimony, exhibit or other thing offered as proof be included with the record for purposes of appeal. The offer must be made before the jury is charged, and the court may add any other information concerning the character of the evidence or the objection made to the record. The party making the offer should specify the purpose for which the evidence is being offered, and why the evidence is admissible. At the end of the offer of proof, the offering party must obtain a ruling excluding the evidence. This can be achieved simply by telling the trial court that the party would like to present the jury with the evidence contained in the offer of proof, and asking the trial court to rule on such request.

PRACTICE POINTER:
If the offer of proof is objectionable in any part, then the trial court will be within its discretion to exclude the entirety of the evidence contained within the offer of proof. Thus, counsel should limit the offer of proof to the essential evidence that counsel wants to put before the jury.

18-6:3.3 Challenges to Experts

For expert testimony to be admissible, the expert must be qualified, and the expert’s opinion must be both relevant and reliable. Expert testimony may be challenged on the basis of an expert’s qualifications or specialized knowledge, the helpfulness of

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135. Tex. R. Evid. 103.
136. Tex. R. Evid. 103(b).

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the testimony to the trier of fact or for relying on insufficient or improper facts or data. A party should object to an inadmissible expert’s opinion as soon as possible, preferably before trial. When a deficiency becomes apparent after trial or during testimony, the objection should be lodged immediately.

Expert testimony that is, on its face, conclusory and unsupported is simply not evidence; no objection is required to argue on appeal that an expert’s testimony is conclusory on its face. For example, an expert’s bare statement that a defendant acted “with conscious indifference to the rights, safety, or welfare of others” is not, in and of itself, legally sufficient evidence to support a finding of such conscious indifference—regardless of whether the appellant objected to the statement at trial. This rule is based on the notion that “it is the basis of the witness’s opinion, and not the witness’s qualifications or his bare opinions alone, that can settle an issue as a matter of law; a claim will not stand or fall on the mere ipse dixit of a credentialed witness.”

However, when the appellant wishes to challenge the “underlying methodology, technique, or foundational data” that the expert uses, the appellant must show a timely and specific objection was made. Such an objection is important (1) to avoid “trial and appeal by ambush,” i.e., to give the party proffering the expert an opportunity to cure the defect; (2) to give the trial court an opportunity to perform its gatekeeping role by investigating the merits of the objection; and (3) to allow for the creation of a robust appellate record.

18-6:3.4 Formal Bills of Exceptions

Formal bills of exception, which must be in writing, preserve error about matters outside the record. The bill should state a party’s

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140 Maritime Overseas Corp. v. Ellis, 971 S.W.2d 402, 409 (Tex. 1998).
141 General Motors Corp. v. Irahet, 161 S.W.3d 462, 471 (Tex. 2005).
142 City of San Antonio v. Pollock, 284 S.W.3d 809, 816 (Tex. 2009).
146 City of San Antonio v. Pollock, 284 S.W.3d 809, 829 (Tex. 2009).
147 Tex. R. App. P. 33.2(a).
objection, the court’s ruling and the circumstances surrounding the objection. If the parties agree, the court must sign the bill and file it. If the parties do not agree, then the court must hold a hearing and sign a bill the court determines is correct, or suggest revisions to accurately reflect the proceedings. If a party refuses to correct its bill, then the court may reject it. In that case, the court should sign a bill that, in the court’s view, accurately reflects the trial court proceedings. The offering party may file its bill with the trial court clerk.

**PRACTICE POINTER:**
Because many steps must be taken in a short period of time for a formal bill of exceptions to be filed, counsel should start the process early. The formal bill must be signed by the court and filed no later than 30 days after the filing party’s notice of appeal is filed.

**PRACTICE POINTER:**
Appellate counsel should attempt to obtain the record early on from the court reporter so as to determine whether any matters, such as important trial court rulings, did not make it into the record.

**18-6:3.5 Bystanders Bill**
A party who files a refused bill with the trial court clerk may also file a bystanders’ bill, in which three or more disinterested “bystanders” describe what they observed regarding the matter in the bill. Attorneys litigating the case are not disinterested. A party may object to or file affidavits to contradict or support any bill filed.

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152. Tex. R. App. P. 33.2(c)(1).
153. Carr v. De Witt, 171 S.W.2d 388, 392 (Tex. Civ. App.—Amarillo 1943, writ ref’d w.o.m.).
PRACTICE POINTER:
While this procedure is technically available under the rules, in practice, it is very difficult to accomplish because of the restrictions on who can qualify as a bystander.

18-6:4 Directed Verdict
In most situations, a directed verdict "is reversible error if done before the plaintiff has presented all his evidence."\(^{155}\) The Texas Supreme Court recognizes an exception to this general rule for situations in which the plaintiff would not be entitled to any of the damages sought even if the plaintiff prevailed on its claims.\(^{156}\) After the defendant rests, either party may move for a directed verdict.\(^{157}\) After both sides close, one must reurge a motion for directed verdict in order to preserve error.\(^{158}\)

An appeal of the denial of a motion for directed verdict is tantamount to challenging the legal sufficiency of the evidence.\(^{159}\) If the trial court denies a directed verdict, then appellate review is limited to the grounds laid out in the motion.\(^{160}\) Where the trial court grants the directed verdict, the court of appeals examines all evidence in the light most favorable to the party against whom the verdict was directed.

PRACTICE POINTER:
If the trial court grants the defendant a directed verdict at the close of the plaintiff’s case, then the court would normally dismiss the jury after granting the directed verdict. Thus, if the defendant has counterclaims that the defendant wants to try to the jury, then the defendant must

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156. *Tana Oil & Gas Corp. v. McCall*, 104 S.W.3d 80, 82 (Tex. 2003).
ensure that the trial court does not dismiss the jury. Once the jury is dismissed, the defendant will not be able to try its counterclaims.

18-6:5 Closing Argument

Usually, the Plaintiff argues first and last. The exception to this general rule is for instances in which a defendant has the burden of proof on all matters submitted to the jury. In closing arguments, the attorneys may argue questions of fact, urge the jury to draw particular inferences from the facts and criticize evidence. Attorneys usually suggest the correct answers to jury questions.

However, attorneys should not tell a jury the legal effect of its answers. If an attorney does tell the jury the legal effect of its answers, however, then the opposing party must object to preserve error. Nor may an attorney’s argument venture outside the evidence of record. Sidebar remarks and a party’s invocation of a privilege are impermissible forms of argument.

Generally, to preserve error in an improper jury argument, a party must object and obtain a ruling on the objection. The objection should be made immediately after the objectionable statement. Certain forms of jury argument are so egregious or prejudicial that instructing the jury to disregard will not cure the harm. For example, incurable error can occur when an attorney makes an appeal to racial prejudice; extreme, personal and unsupported attacks on the opposing party or its witnesses; or accusations of witness tampering. Those arguments, however, must be so

161. Tex. R. Civ. P. 266.
166. Tex. R. Civ. P. 269(c).

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extreme that they could persuade a typical juror to agree to a verdict they would otherwise not have.\textsuperscript{172}

\begin{quote}
\textbf{PRACTICE POINTER:}
Complaints about closing argument very rarely make successful appellate arguments. Trial counsel rarely wants to interrupt opposing counsel's closing argument by making an objection, but where complaints go to ethnicity or race, the jury argument may be incurable, such that no objection is necessary.\textsuperscript{173}
\end{quote}

18-7 \paragraph*{JURY CHARGE}

\subsection*{18-7:1 Overview of Texas Jury Charge Practice}
One of the most complicated tasks that an attorney must undertake at trial is preservation of error in a jury charge. To preserve error in a jury charge, an attorney must have a thorough understanding of the substantive law governing the case, must be aware of the myriad technical requirements set forth in the Texas Rules of Civil Procedure and must be well-versed in the cases interpreting those rules.

\subsection*{18-7:2 The Jury Charge Conference}

\subsubsection*{18-7:2.1 “Informal” and “Formal” Conferences}
Normally, the parties and the judge will finalize the jury charge at an “informal,” off-the-record jury charge conference. At an informal charge conference, the parties and the court discuss the applicable law and state their positions on how the law should be presented in the jury charge. In complex cases, the judge may hold several such discussions with the parties, and these discussions may take place before, during and after presentation of the evidence. Based on these discussions, the judge will usually indicate how he or she plans to charge the jury on some or all issues. However, decisions that the judge makes at an informal charge conference

\textsuperscript{172} \textit{Goforth v. Alvey}, 271 S.W.2d 404, 404 (Tex. 1954).
\textsuperscript{173} \textit{General Motors Corp. v. Iracheta}, 161 S.W.3d 462, 472 (Tex. 2005).
are always tentative, and counsel’s arguments and complaints at an informal charge conference do not preserve error.

Following the informal charge conference, the court will hold a “formal,” on-the-record conference for the parties to voice their objections to the jury charge. Error is preserved in the formal charge conference through objections and requests.

**PRACTICE POINTER:**
Remember that informal charge conferences are rarely on the record and do not preserve error. Be sure to repeat objections at the formal charge conference on the record.

### 18-7:2.2 Objections and Requests

Texas Rules of Civil Procedure 271 through 279 provide the requirements for preserving error in a jury charge. Under these rules, error may be preserved through two devices: (1) objections to incorrect instructions/questions and (2) requests for missing instructions/questions. The Texas Rules of Appellate procedure—and, to a greater extent, the case law interpreting those rules—require that objections and requests be used in different situations and provide the means for lodging objections and making requests.

#### 18-7:2.2a Objections

Rule 274 states that “[a] party objecting to a charge must point out distinctly the objectionable matter and the grounds of the objection.” Absent an objection, Rule 274 provides that “[a]ny complaint as to a question, definition, or instruction, on account of any defect, omission, or fault in pleading, is waived.”

Courts have interpreted this rule to mean that an objection will preserve error in a **defective** question, definition or instruction. For example, in a lawsuit for common law fraud, if the proposed charge would permit the jury to find liability based on a negligent

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misrepresentation, then the attorney could preserve error by objecting that, under Texas law, common law fraud requires a more egregious mental state than negligence.

**PRACTICE POINTER:**
Rule 272 states that objections may be either (1) “presented to the court in writing,” or (2) “dictated to the court reporter in the presence of the court and opposing counsel.” The best practice for making jury charge objections is for the attorney to read a written script of objections to the court and court reporter. By working from a written script, the attorney can ensure that he does not omit or misstate any objections. Of course, this advice conflicts with traditional wisdom holding that an attorney should never read from a script in court. But unlike most court arguments, the primary purpose of entering objections at the formal charge conference is to preserve error—not to put on a performance or to persuade an audience. The time to persuade the judge and opposing counsel is during the informal charge conference; by the time of the formal charge conference, few minds can be changed, but many errors can be waived.

To ensure that the record reflects compliance with the requirements of Rule 272, an attorney making charge objections may wish to state that the objections are being given “in the presence of court, the court reporter, and opposing counsel.” Some courts will orally rule on each objection as it is made, while other courts wish to make a global ruling after all objections have been entered. Even if the court attempts to rule on each objection as it is made, in a case with many objections, the court may inadvertently fail to rule on an objection. The attorney can ensure that error is preserved by (1) entering all of the objections, and then (2) asking the court to give, on the record, a ruling as to any objections upon which the court may not have made a ruling. Even if the attorney is confident that the court has ruled on all of the objections, to ensure error preservation, the attorney should always ask for a global ruling at the end of the objections.

Occasionally, a lawyer or judge may propose that, for the sake of efficiency, the court charge the jury, and the attorneys make their jury charge objections while the jury is deliberating. This is a
trap. Under Rule 274, objections must be made “before the charge is read to the jury.” Thus, any objections or requests made after the jury is charged are waived. The parties must ensure that all objections are made before the court charges the jury.

**PRACTICE POINTER:**
Because charge objections must be made in the presence of the court, do not accept invitation to make the objections to the court reporter, but outside of the presence of the court. Also, objections must be made before the jury is charged; so, do not accept any invitation to make objections while the jury is deliberating.

### 18-7:2.2b Requests

Under Texas Rule of Civil Procedure 278, a “[f]ailure to submit a definition or instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or instruction has been requested in writing and tendered by the party complaining of the judgment.” Thus, if the charge omits a definition or instruction, then counsel must request a correct definition or instruction. For example, in a suit for common law fraud, if the court’s proposed charge omits the element that the misrepresentation must be material, then an attorney could preserve error by requesting an instruction stating that the jury must find a material misrepresentation. When in doubt, counsel should object and request.

Requests must be tendered in writing and should contain blanks for the judge to mark them as granted, refused or given as modified. The safest way to preserve error in a request is to verify that the trial court endorses requests as “Refused” or “Modified as follows” and signs the same. But endorsement is not the only way to preserve

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177. Tex. R. Civ. P. 278.
178. Texas Gen. Indem. Co. v. Moreno, 638 S.W.2d 908, 914 (Tex. App.—Houston [1st Dist.] 1982, no writ) (“Only if an instruction is omitted is a request a prerequisite to preserving the complaint.”).
179. Tex. R. Civ. P. 276; Collins v. Beste, 840 S.W.2d 788, 791 (Tex. App.—Fort Worth 1992, writ denied) (“Because the trial judge endorsed the request ‘refused’ and signed the same officially, Collins fulfilled this final error preservation requirement.”).
error, and it may be possible to preserve error if the court notes on
the record that the requests are refused. 180

Under Rule 278, requests must be given to the court in
“substantially correct wording.” 181 “If the request is not in
substantially correct wording, it does not preserve error.” 182

PRACTICE POINTER:

Because any error in a request will justify refusal of the entire request,
it is not recommended to submit an entire jury charge, or even an
entire question, as a single “request.” The best practice is to submit
each requested question, instruction or definition on a separate sheet
of paper so that the judge can separately accept, refuse or modify each
questioned question, instruction or definition.

The rules require attorneys to use good judgment in deciding
which complaints to submit to the court as charge objections
and requests. Under Rule 274, “[w]hen the complaining party’s
objection, or requested question, definition, or instruction is,
in the opinion of the appellate court, obscured or concealed by
voluminous unfounded objections, minute differentiations or
numerous unnecessary requests, such objection or request shall be
untenable.”

18-7:2.3 Relaxing the Error Preservation Rules

Over the last 30 years, the Texas Supreme Court has somewhat
relaxed these traditional rules for objections and requests in an
attempt to simplify jury charge practice and to prevent parties
from falling into “technical traps.” 183 Perhaps the most notable
shift in the Court’s interpretation of the Rules came in State
Department of Highways & Public Transportation v. Payne. 184

181 Tex. R. Civ. P. 278.
182 Pitman v. Lightfoot, 937 S.W.2d 496, 514 (Tex. App.—San Antonio 1996, writ
denied).
183 First Valley Bank of Los Fresnos v. Martin, 144 S.W.3d 466, 474 (Tex. 2004)
(Wainwright, J., concurring).
184 State Department of Highways & Public Transportation v. Payne, 838 S.W.2d 235, 240
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Payne, the respondent argued that the petitioner had waived a jury charge complaint by submitting a request, rather than lodging an objection, as a way to complain about a defective instruction. The Texas Supreme Court criticized the requirements for preservation of charge error as being “difficult,” “complex,” “unpredictable,” and even “flaw[ed],” and commented that preservation of charge error “ought to be simpler.”

In an attempt to simplify charge practice, the Court explained that “[t]here should be but one test for determining if a party has preserved error in the jury charge, and that is whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling.” The Texas Supreme Court held that the petitioner’s request had preserved charge error because the request “clearly called the trial court’s attention to the [petitioner’s] complaint.”

PRACTICE POINTER:
Despite Payne’s promise of simplifying jury charge practice, the Texas Supreme Court, following Payne, has not revised the Texas Rules of Civil Procedure governing jury charge practice. Until the rules are revised to provide a new substantive standard, the best practice is to continue following the rules, outlined above, for when to object and request, and to rely on the looser principles of Payne only if a question arises as to whether a request or objection was adequate to preserve error.

18-7:3 Special Issues

18-7:3.1 Valid and Invalid Theories of Recovery
Rule 277 requires that a case be submitted “upon broad form questions” “whenever feasible.” A broad form verdict is a verdict

that submits multiple theories under a single question to which a jury gives a “yes” or “no” answer.

Broad form submission may be inappropriate in some situations. For example, if a single question would commingle both valid and invalid theories of liability, then broad form submission is inappropriate.\(^{189}\) The attorney should object and ask for the liability theories to be presented in separate questions. Similarly, if a damages question asks the jury to award a singular figure of damages based upon the jury’s assessment of several elements of damages, but no evidence supports any amount of damages under one of the elements, then counsel should object and ask that the jury be required to make damages findings for each element of damages.\(^ {190}\)

**18-7:3.2 Importance of Error Preservation**

Preserving error in the jury charge is often a prerequisite to complaining about the sufficiency of the evidence on appeal. An appellate court will normally measure the sufficiency of the evidence against the law stated in the jury charge, regardless of whether the law stated in the jury charge correctly reflects Texas law.\(^{191}\) To preserve complaint that there is no evidence under law that differs from that in the charge, a party must preserve a charge error complaint.\(^{192}\) If the appellant properly preserves charge error, then the appellant can seek rendition of judgment on appeal by demonstrating that (1) the law stated in the jury charge was erroneous, and (2) there is no legally sufficient evidence to support an essential finding under a correct statement of the law—even if that correct statement of the law was never, in fact, presented to the jury.\(^ {193}\)

**18-7:3.3 Deemed Findings**

Under Rule 279, the jury is deemed to have found any element of a claim that is omitted from the jury charge if such a finding

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\(^ {190}\) **Harris County v. Smith**, 96 S.W.3d 230 (Tex. 2002).


is needed to support the judgment. Thus, if a liability question omits an essential element of a claim, then the defendant cannot sit back, allow the jury to return a verdict, and then complain on appeal that the plaintiff failed to obtain a finding on an essential element of its claim. As long as the claim was submitted to the jury, any omitted elements of the claim are deemed to have been found, whether stated in the jury charge or not. To preserve a complaint that the charge omits an element, or to complain on appeal that there is no legally sufficient evidence to support an omitted element, the complaining party must show that it properly preserved charge error.

18-7:3.4 Incomplete Verdicts and Inconsistent Findings

Once the jury returns a verdict, Rule 295 allows the trial court to submit additional instructions to the jury and require the jury to deliberate if needed. Rule 295 states that, if a verdict “is incomplete, or not responsive to the questions in the court’s charge, or the answers to the questions are in conflict,” then “the court shall in writing instruct the jury in open court of the nature of the incompleteness, unresponsiveness, or conflict, provide the jury such instructions as may be proper, and retire the jury for further deliberations.”

PRACTICE POINTER:

Rule 295 places a significant burden on counsel quickly to review a verdict in detail the moment the verdict is returned. If the verdict includes incomplete, inconsistent or conflicting answers that can be cured by further deliberation, then, to preserve any error, any party that wishes to complain about the verdict must object on the record before the jury is dismissed. Once the jury is discharged, any error due to incomplete or inconsistent findings is waived. If the court orders the jury to deliberate further, an objecting party must ensure that the record contains the jury’s answers from the first and second deliberations.

18-8 POSTTRIAL MOTIONS

18-8:1 Motion for Judgment on the Verdict

18-8:1.1 Overview and Procedure
A motion for judgment on the verdict is not required, but a party can request that the trial court enter judgment based on the jury's verdict. Common practice is for the party to prepare a proposed judgment for the court to sign. In the motion for judgment on the verdict, the party should request anything to which it may be entitled based on the jury verdict—damages, attorney's fees, costs or other relief. If a party wants to move for judgment that is inconsistent with the jury's verdict, it should file a motion for judgment notwithstanding the verdict.¹⁹⁵ Should the parties settle the case, they should file a joint motion for judgment on the settlement agreement.

18-8:1.2 Appellate Review
When a party moves for judgment on the verdict, the party usually waives any challenges to the judgment that the party proposes.¹⁹⁶ Thus, counsel must exercise extreme caution in asking the court to enter judgment and should never propose a judgment with which the party disagrees. Moving for judgment preserves error should the trial court reject or modify the proposed judgment. The losing party can also move for judgment on the verdict without waiving its objections to that judgment. To do this, the party must state in the motion for judgment on the verdict that it disagrees with the content and substance of the judgment; that it agrees only to the form of the judgment; and that it will challenge the judgment on appeal.¹⁹⁷ This allows the losing party to preserve its objections to the verdict and, in course, preserve its right to appeal from the judgment. If a party moves for judgment on the verdict, then that party cannot challenge the sufficiency of the evidence to support the jury's findings.¹⁹⁸

¹⁹⁵ See § 18-8:2.
¹⁹⁶ Bray v. Tejas Toyota, Inc., 363 S.W.3d 777, 787 (Tex. App.—Austin 2012, no pet.).

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verdict, the party must be sure to challenge whatever jury findings it wants to challenge on appeal.

**PRACTICE POINTER:**
At least one court of appeals has held that if a party moves for judgment on the verdict, that party loses its alternative new trial complaints that it preserved during trial.199 In light of this court of appeals’ opinion, the safe practice would be also to note, in moving for judgment on the verdict, that you are preserving all of your alternative new trial complaints, in addition to all other error that you want to preserve.

18-8:2  Motion for Judgment Notwithstanding the Verdict

18-8:2.1  Overview
A motion for judgment notwithstanding the verdict (JNOV) functions like a directed verdict after the verdict. As such, a JNOV can only be granted when a directed verdict would have been proper.200 Importantly, a motion for JNOV does not preserve error for a factual-sufficiency challenge; a motion for new trial is a prerequisite for a factual-sufficiency challenge.201 Rather, a JNOV preserves error for legal insufficiency, i.e., no evidence or as-a-matter-of-law challenges.202 Specific grounds for a JNOV include: no evidence to support the jury's finding; jury finding is contrary to an issue established as a matter of law; legal bar that prevents party from prevailing on its claims; and disregard of an immaterial jury finding.203


203. See Tiller v. McLure, 121 S.W.3d 709, 713 (Tex. 2003) (no evidence); John Masek Corp. v. Davis, 848 S.W.2d 170, 173–74 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (established as a matter of law); United Parcel Serv. v. Tasemiroglu, 25 S.W.3d 914, 916 n.4

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18-8:2.2 Procedure
Unlike other posttrial motions, a motion for JNOV does not have
a filing deadline (nor does it have a deadline for the court to rule).
204 The safest course is to follow the 30-day filing deadline prescribed
for a motion for new trial (see below). The trial court can grant or
deny the JNOV motion either orally or in writing, but granting the
motion will require the court to sign a final judgment.

18-8:2.3 Appellate Review
The court of appeals reviews an order on a JNOV motion for legal
sufficiency, i.e., reviewing the evidence presented at trial in the light
most favorable to the jury’s verdict, crediting evidence favorable to
that party if reasonable jurors could, and disregarding contrary
evidence unless reasonable jurors could not.205 The appellee should
include as cross-points any additional reasons the court of appeals
should affirm the trial court’s ruling on the JNOV motion because
those issues are otherwise waived if they are not raised.206 When
the court of appeals finds error in the trial court’s JNOV ruling, it
will often reverse and render judgment. Remand is only required
for necessary further proceedings (like figuring out attorney’s fees)
or if the interests of justice require a new trial.207

18-8:3 Motion for New Trial

18-8:3.1 Overview
A motion for new trial serves the important purpose of allowing
the trial court to correct any errors in the trial.208 Usually, a motion
for new trial is not required to preserve error, but in certain situations
it is.209 Under Rule 324(b), a motion for new trial is required to
preserve the following complaints: (1) a complaint where evidence
must be heard (e.g., jury misconduct, newly discovered evidence,
or setting aside a default judgment); (2) a complaint of factual insufficiency of the evidence to support a jury finding; (3) a complaint that a jury finding is against the great weight of the evidence; (4) a complaint on the inadequacy or excessiveness of the jury’s damages award; and (5) incurable jury argument that was not otherwise ruled upon by the trial court. A trial court can also grant a new trial “in the interest of justice,” but in doing so the court should set out the specific reasons for setting aside the verdict and granting a new trial.\textsuperscript{210} The courts of appeals may, by mandamus, review the merits of a trial court’s reasons for granting a new trial.\textsuperscript{211}

**Practice Pointer:**

When moving for a new trial, provide the trial court with an order stating reasons that could be sustained on a mandamus review as a basis for new trial.

### 18-8.3.2 Procedure

A motion for new trial must be filed prior to or within 30 days of the signing of the judgment.\textsuperscript{212} A motion for new trial can be filed before the judgment is signed, in which case the motion will be deemed filed the day of but after the judgment is signed.\textsuperscript{213} The 30-day deadline cannot be extended.\textsuperscript{214} A late-filed motion for new trial does not extend appellate filing deadlines (see below) or provide a basis for appellate review, but the trial court can consider the motion and grant a new trial so long as it still has plenary power over the judgment.\textsuperscript{215} A party can amend its motion for new trial so long as the amendment is within the 30-day filing window and so long as the original motion has not been overruled.\textsuperscript{216}

\textsuperscript{210} Tex. R. Civ. P. 320; *In re Columbia Med. Ctr. of Las Colinas*, 290 S.W.3d 204, 206 (Tex. 2009).


\textsuperscript{212} Tex. R. Civ. P. 329b(a).

\textsuperscript{213} Tex. R. Civ. P. 306c.

\textsuperscript{214} Tex. R. Civ. P. 5.


\textsuperscript{216} Tex. R. Civ. P. 329b(b).
The motion itself must be written and signed and, if evidence is being offered, verified. The motion must state the specific errors as to which the party is complaining; the party cannot rely on a general objections. The trial court is required to provide a written order on the motion for new trial; an oral ruling combined with a docket entry is insufficient. If the trial court does not issue a written order on the motion for new trial within 75 days after the judgment is signed, the motion for new trial is deemed overruled as a matter of law after that 75-day period.

**PRACTICE POINTER:**
The grant of a motion for new trial can be “ungranted” while the trial court still has plenary power.

### 18-8:3.3 Appellate Review
A timely filed motion for new trial extends the trial court’s plenary power over the judgment for up to 75 days after the judgment. The trial court retains plenary power for 30 days after a motion for new trial is overruled either by order or by operation of law. A motion for new trial extends the deadlines for filing a notice of appeal to 90 days after the judgment is signed. A motion for new trial can be filed for the sole purpose of extending appellate deadlines.

Courts of appeals review an order denying a motion for new trial under the abuse of discretion standard. If the trial court grants a motion for new trial, the opposing party cannot appeal because the order is interlocutory—there is no final judgment; review can

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221. Fruehauf Corp. v. Carrillo, 848 S.W.2d 83, 83 (Tex. 1993) (per curiam).
222. Tex. R. Civ. P. 329b(c).
come only via mandamus or through appeal after a final judgment
is entered following the new trial.227

18-8:4 Motion to Modify, Correct or Reform the Judgment

18-8:4.1 Overview
A motion to modify, correct or reform the judgment asks the
trial court to change the judgment. The grounds for such a motion
include the court’s failure to award a party all the relief to which
it was entitled and the court’s award of too much relief to a party.
This is often the case with attorney’s fees, costs, and interest.

18-8:4.2 Procedure
A motion to modify, correct or reform the judgment must (1) be
in writing and signed by counsel or the party; (2) specify the respects
in which the judgment should be modified; and (3) be filed within
30 days of the date the judgment is signed.228 This is the same filing
deadline as a motion for new trial. A party can amend the motion
to modify within the 30-day window so long as the court has not
overruled the original motion to modify.229 The motion cannot be
amended if the 30-day window has passed.230 Also, a party can
file a motion to modify after the court has denied a motion for
new trial, again so long as the motion is filed within the 30-day
window.231 An early-filed motion (i.e., a motion that is filed before
the judgment is signed) is deemed filed the day of, but immediately
after, the judgment is signed.232 A party can file a motion to modify
after the 30-day deadline, and the court can correct any error, so
long as the court still has plenary power over the judgment. A late-
filed motion to modify does not preserve error or extend appellate
deadlines, however.

The court’s obligations on a motion to modify are the same
as with a motion for new trial. An order granting the motion to

228. Tex. R. Civ. P. 329b(a), (g).
231. Tex. R. Civ. P. 329b(g); see In re Brookshire Grocery Co., 250 S.W.3d 66, 72
(Tex. 2008).
232. Tex. R. Civ. P. 306c, 329b(g).
modify must be in writing and signed by the trial court. The court must sign any order granting a motion to modify within 75 days after the date the judgment was signed.\textsuperscript{233} The trial court can also overrule the motion to modify, but the motion is overruled by operation of law on the 76th day after the judgment was signed.\textsuperscript{234} The trial court retains plenary power over the judgment for 30 days after the motion to modify is overruled.\textsuperscript{235}

18-8:4.3 Appellate Review

Like a motion for new trial, a motion to modify (so long as the motion seeks more than just correcting a clerical error) pushes back the date on which the judgment becomes final.\textsuperscript{236} This effectively pushes back the appellate deadlines, even if the motion is denied.\textsuperscript{237} Moreover any change made to the judgment while the trial court retains plenary power over the judgment will restart the appellate deadlines (unless it is apparent from the face of the record that the trial court signed the modified judgment solely to restart the appellate deadlines).\textsuperscript{238}

18-8:5 Motion for Remittitur

18-8:5.1 Overview

A remittitur allows a party to ask the court (either the trial court or the court of appeals) to reduce the amount of damages awarded to the prevailing party.\textsuperscript{239} A court does not “grant” or “order” a remittitur; rather, it suggests that one party make the remittitur. If that party declines the court’s suggestion, then the court will order a new trial.\textsuperscript{240} By contrast to a remittitur, some jurisdictions use the concept of an “additur” to increase damages. Texas courts do not have authority to order an additur.

\textsuperscript{233} Tex. R. Civ. P. 329b(c).
\textsuperscript{234} Tex. R. Civ. P. 329b(c).
\textsuperscript{235} Tex. R. Civ. P. 329b(c).
\textsuperscript{236} Tex. R. Civ. P. 329b(g).
\textsuperscript{237} Tex. R. Civ. P. 329b(g).
\textsuperscript{238} Tex. R. Civ. P. 329b(h); \textit{Mackie v. McKenzie}, 890 S.W.2d 807, 808 (Tex. 1994).
\textsuperscript{239} See Tex. R. Civ. P. 315.
\textsuperscript{240} \textit{Arkoma Basin Explor. Co. v. FMF Assocs. 1990-A, Ltd.}, 249 S.W.3d 380, 390 (Tex. 2008).
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18-8:5.2 Procedure

Because a motion for remittitur is related to a motion for new trial, it should be filed within the time frame for filing a motion for new trial. Often a motion for remittitur is included with a motion for new trial, but a motion for remittitur filed separately must be filed within the same time frame and be filed before the motion for new trial is overruled. Failure to request remittitur in a postjudgment motion waives a party’s complaint.

The trial court reviews the motion for remittitur for factual sufficiency of the evidence for the damages awarded. The court should suggest remitting damages only if the evidence supporting the damages award is so factually insufficient or so against the great weight and preponderance of the evidence as to make the damages award manifestly unjust. If the court finds that a portion of the damages award is against the great weight and preponderance of the evidence, it can suggest a remittitur. The party who received damages then has the choice whether to accept or reject the suggestion. The party can accept by remitting that portion of the damages award/judgment either in open court or by filing a signed, acknowledged, written remittitur with the clerk. The trial court will then reform the judgment so that it is in accordance with the remittitur. If the party rejects the suggestion of remittitur, then the trial court will grant a new trial.

18-8:5.3 Appellate Review

A trial court’s suggestion of remittitur restarts the appellate deadlines because that suggestion functions as a modified judgment, and if the court later withdraws its remittitur suggestion order, the

241. See Tex. R. Civ. P. 320 (“New trials may be granted when the damages are manifestly too small or too large.”).
appellate timetables start again because the withdrawal is also a modification of the judgment. Should the party benefiting from remittitur file an appeal, the remitting party may perfect its own appeal against the remittitur itself.

The court of appeals reviews a remittitur motion or appeal under the same standard as the trial court—that standard being review for factual sufficiency of the evidence to support damages—and can sustain the trial court’s remittitur suggestion or make its own remittitur suggestion. If the court of appeals suggests remittitur, the remitting party can file a remittitur with the court of appeals, and the court of appeals will reform the trial court’s judgment and affirm, which allows the remitting party to appeal to the Texas Supreme Court. If the remitting party rejects the court of appeals’ suggestion, the court of appeals reverses the trial court’s judgment and remands for a new trial. If the court of appeals determines that the trial court should not have suggested remittitur, the court of appeals renders the judgment the trial court should have rendered.

Under Texas Rule of Appellate Procedure 46.5, a party receiving damages can make a voluntary remittitur when the court of appeals determines that legal error affects part of the judgment. In that case, within 15 days of the court of appeals’ judgment, the remitting party may voluntarily remit the amount of the damages award that it thinks will cure the legal error highlighted in the court of appeals’ judgment. The court of appeals then determines whether that remittitur is sufficient to cure the legal error that led to an over-award of damages. If the voluntary remittitur cures the legal error, then the court of appeals accepts the remittitur and reforms and affirms the trial court’s judgment. If the voluntary remittitur is insufficient, then the court of appeals suggests the appropriate remittitur.

250 Tex. R. App. P. 46.2.
251 Pope v. Moore, 711 S.W.2d 622, 624 (Tex. 1986).
253 Tex. R. App. P. 46.3.
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The Texas Supreme Court does not have authority to review factual sufficiency challenges; thus, it cannot review remittitur challenges.\footnote{Maritime Overseas Corp. v. Ellis, 971 S.W.2d 402, 407 (Tex. 1998).} That said, the Texas Supreme Court can review whether the court of appeals exceeded its authority and can remand for the determination of an appropriate remittitur if the Court finds that the awarded damages are unconstitutional.\footnote{Redman Homes, Inc. v. Ivy, 920 S.W.2d 664, 669 (Tex. 1996).} The Texas Rules of Appellate Procedure do not provide for remitter orders by the Texas Supreme Court.\footnote{Redman Homes, Inc. v. Ivy, 920 S.W.2d 664, 669 (Tex. 1996); Tony Gallo Motors I, L. P. v. Chapa, 212 S.W.3d 299, 310 (Tex. 2006).}

18-8:6 Motion for Judgment Nunc Pro Tunc

18-8:6.1 Overview

Judgment nunc pro tunc serves the singular purpose of correcting clerical errors in the judgment after the trial court has lost plenary power over the judgment.\footnote{See Tex. R. Civ. P. 316.} A judgment nunc pro tunc cannot be used to correct substantive or judicial errors.\footnote{Escobar v. Escobar, 711 S.W.2d 230, 231 ( Tex. 1986).} Whether an error is clerical or judicial turns on whether it was the result of judicial reasoning and determination.\footnote{Andrews v. Koch, 702 S.W.2d 584, 585-86 (Tex. 1986).} In other words, judicial errors occur in the rendition of the judgment rather than the entry of that judgment.\footnote{Escobar v. Escobar, 711 S.W.2d 230, 231 (Tex. 1986).} If an error is not the result of judicial reasoning and determination, the error is clerical and can be corrected by the trial court through a judgment nunc pro tunc even though the original judgment is final.\footnote{Andrews v. Koch, 702 S.W.2d 584, 585 (Tex. 1986).} If the error does result from judicial reasoning and determination, then the error is judicial and is outside the scope of the trial court’s corrective abilities once the trial court has lost plenary power. Whether an error is judicial or clerical is a question of law.\footnote{Escobar v. Escobar, 711 S.W.2d 230, 232 (Tex. 1986).}
18-8.6.2 Procedure
Unlike the 30-day deadline for a motion to modify the judgment, there is no deadline to file a motion for judgment nunc pro tunc. A motion for judgment nunc pro tunc, however, cannot be filed before the day after the trial court loses plenary power over its judgment (before the trial court loses plenary power clerical errors can be corrected via a motion to modify/correct/reform the judgment under Tex. R. Civ. P. 329b). The party moving for judgment nunc pro tunc must serve notice on all interested parties, and if an interested party does not receive notice, the judgment nunc pro tunc is a nullity.

18-8.6.3 Appellate Review
A judgment nunc pro tunc does not restart the deadlines for complaints about the original judgment, but the time period for complaints about the correction made in the judgment nunc pro tunc (or complaints that were not applicable to that original judgment) begins when the trial court signs the judgment nunc pro tunc. Denial of a motion for judgment nunc pro tunc is not a final appealable judgment; thus, a party cannot appeal when its motion is denied. However, that denial may be reviewable by a mandamus action.

PRACTICE POINTER:
Because a party’s time to file the appeal is not impacted by a true nunc pro tunc order, the real issue is whether the court’s change to the judgment is substantive or is clerical. If the change to the judgment is substantive, then the order changing the judgment can restart the clock for appeal.

266. Gonzales v. Rickman, 762 S.W.2d 277, 278 (Tex. App.—Austin, 1988, no writ).
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18-8:7  Request for Findings of Fact and Conclusions of Law

18-8:7.1 Overview
Under Texas Rule of Civil Procedure 296, when a case is tried to the court rather than a jury, the parties ask the trial court to enter findings of fact and conclusions of law. Such findings of fact have the “same force and dignity” as answers to jury questions would. A case is “tried” before the court, such that the parties are entitled to request findings of fact and conclusions of law under Rule 296, when the court holds an evidentiary hearing.

18-8:7.2 Procedure
The request for findings of fact and conclusions of law must be filed within 20 days after the date the judgment is signed by the trial court. Although a party can file a request for findings of fact and conclusions of law before the final judgment is signed, that request will be deemed filed on the day of, but immediately after, the signing of the judgment. The party requesting findings of fact and conclusions of law must serve the other parties in accordance with Tex. R. Civ. P. 21a. Once a party files a request for findings of fact and conclusions of law, the clerk of the trial court must immediately notify the trial judge of the request. The trial court’s findings of fact and conclusions of law are due within 20 days from after the date of the request and must be mailed to all parties.

If a party does not receive findings of fact and conclusions of law within the 20-day period following the first request, the party should file a Notice of Past Due Findings of Fact and Conclusions of Law stating the date the first request was filed and the date the findings of fact and conclusions of law were due. This second

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request must be filed within 30 days after the date the party filed its first request for findings of fact and conclusions of law, 277 and failure to file a second request waives the party’s right to complain about the court’s failure to file findings of fact and conclusions of law. 278 After a party files a second request for findings of fact and conclusions of law, the trial judge has 40 days after the date the first request was filed to file findings of fact and conclusions of law. 279

After the trial court files findings of fact and conclusions of law, either party may request additional or amended findings of fact and conclusions of law within 10 days after the filing of the findings of fact and conclusions of law. 280 A party should not file this third request before the findings of fact and conclusions of law are actually filed because that premature request is likely ineffective. 281 A party must submit specific proposed findings of fact with the third request. 282 The trial court must file any amended or additional findings of fact and conclusions of law within 10 days after the third request is filed. 283

18-8:7.3 Appellate Review

A request for findings of fact and conclusions of law extends the time for perfecting an appeal when findings of fact and conclusions of law are required under Rule 296 or when an evidentiary hearing is held and the findings of fact and conclusions of law can be reviewed by the court of appeals. 284 Where findings of fact and conclusions of law are not appropriate, filing a request for them will not extend the time to perfect an appeal. 285

285. IKB Indus, 938 S.W.2d at 443.
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Findings of fact are analogous to jury answers and can be challenged for legal and factual sufficiency of the evidence.286 When a party has requested findings of fact and the trial court finds them, the court of appeals can presume omitted findings to support the judgment only in certain situations.287 If findings of fact are not requested or filed, then the judgment implies all findings necessary to support it. If a Reporter’s Record is filed, then any such implied findings are not conclusive and can be challenged for legal and factual sufficiency.288 A complaint that the trial court failed to make a finding of fact is reviewed for harmful error.289 When properly requested, findings of fact are mandatory; thus, when a trial court does not file them, harmful error to the requesting party is presumed.290 There is usually harm if a court of appeals has to guess why the trial court reached its decision.291 Conclusions of law are not afforded any deference and are reviewed de novo, but a court of appeals can uphold a judgment supported by the evidence under any correct legal theory.292

18-9  APPEALS

18-9:1  Appellate Jurisdiction

PRACTICE POINTER:
In Houston, there are two courts of appeals, and cases are randomly assigned to one court of appeals versus the other. However, if one court of appeals has already disposed of, or has before it, a related matter, a party may wish to ask that the appeal be assigned to that same court of appeals.

Texas has 14 intermediate courts of appeals, located in the following cities: Houston (two), Fort Worth, Austin, San Antonio, Dallas,

Texarkana, Amarillo, El Paso, Beaumont, Waco, Eastland, Tyler, and Corpus Christi. Each of these courts has the authority to review any judgment or appealable order of the district and county courts located within that court’s district (subject to a monetary minimum of $250). The court of appeals obtains jurisdiction when the appeal is perfected.

In the court of appeals, the same principles of subject matter jurisdiction apply as in the trial court (e.g., standing, mootness, ripeness, advisory opinions, etc.). Lack of subject matter jurisdiction can be raised for the first time on appeal—either by a party or by the court sua sponte—even if the issue was never considered by the trial court. If the court finds that it lacks subject matter jurisdiction for any reason, it must dismiss the appeal.

18-9:2 Types of Appeals

Not all trial court decisions are appealable. Generally speaking, an appeal can be taken only from a final judgment. But the law also allows appeals from certain interlocutory orders (often referred to as “accelerated appeals,” although strictly speaking, an “accelerated appeal” under the appellate rules encompasses more than just appeals from interlocutory orders). The details and requirements for each type of appeal are discussed below.

18-9:2.1 Appeals From Final Judgments

A party may appeal from a final judgment. A final judgment is one that disposes of all issues and parties in the case. As a threshold matter, a judgment must be written and signed for it to be final.

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295. See § 18-9:3.
300. See, e.g., Grant v. Am. Nat’l Ins., 808 S.W.2d 181, 184 (Tex. App.—Houston [14th Dist.] 1991, no writ); see also Tex. R. App. P. 26.1 (establishing that appellate deadlines begin from the date the appealable “judgment or order is signed”).

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Although it is not always easy to tell whether a judgment is final, the answer is clearer in certain situations than others. When the judgment was issued after a conventional trial on the merits and the trial court has not entered an order for separate trials, the judgment is presumed to be final. This is true for both jury and bench trials.

If the judgment was not rendered after a conventional trial on the merits, the presumption of finality does not apply. In those cases, finality must be determined by looking at the specific language of the judgment. A final judgment need not take any particular form, but it must either (1) state with unmistakable clarity that it is a final judgment for all issues and parties, or (2) actually dispose of all issues and parties—based on the record—regardless of what it actually says on its face.

As to the first of these two possibilities, a judgment that unequivocally expresses the court’s intent to dispose of all issues and parties is final even if it actually fails to dispose of certain issues or parties or is otherwise interlocutory. Thus, for instance, a judgment is final—albeit erroneous—if it grants more relief than the movant requested, as long as the judgment’s language indicates a clear intent to dispose of all issues and parties. Put another way, even if an order is substantively interlocutory, the court’s language alone can turn it into a final judgment.

As to the second possibility, a judgment is final if it actually disposes of all issues and parties, even if its language does not claim to do so (or indeed, even if its language expressly states that the judgment is

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304. See, e.g., Lehmann v. Har-Con Corp., 39 S.W.3d 191, 200 (Tex. 2001) (judgment final where it stated “this judgment finally disposes of all claims and parties and is appealable”); Jacobs v. Satterwhite, 65 S.W.3d 653, 65 (Tex. 2001) (judgment final where it stated that plaintiff “take nothing” because there were no claims by other parties); Rehab 2112, L.L.C. v. Audio Images Int’l, 168 S.W.3d 308, 311 (Tex. App.—Dallas 2005, no pet.) (judgment final because it unequivocally stated that it disposed of all issues and parties, even though it failed to dispose of counterclaim).

305. See Lehmann v. Har-Con Corp., 39 S.W.3d 191, 200 (Tex. 2001) (explaining that a judgment would be final if it ordered that the plaintiff “take nothing on all claims asserted,” even if the defendant had only moved for summary judgment on one out of four claims by plaintiff).

not final). Thus, although the court’s language can make a non-final judgment final (as just discussed), the converse is not true. For example, if the court dismisses all claims in a case but one, and the court later signs an order dismissing that last claim, the latter order is a final, appealable judgment, even if it does not contain any language to that effect. Notably, the court is not required to assess costs for a judgment to be final, as costs are not a claim for affirmative relief.

A partial judgment or interlocutory order can become final and appealable in two different ways. First, if the court later renders a final judgment in the case, the issues or parties covered by the earlier interlocutory order are subsumed into the final judgment and become appealable as part of the judgment. Second, if the trial court signs a severance order splitting off the issues and parties covered by the interlocutory order, the interlocutory order becomes final (this is because, once severed, the formerly interlocutory order now disposes of all claims and parties within the severed case).

18-9:2.2 When Is Judgment “Rendered”

“Judgment is rendered when the trial court officially announces its decision in open court or by written memorandum filed with the clerk.”

PRACTICE POINTER:
Consent to a settlement can be withdrawn any time before judgment is rendered on the settlement, although the opposing party could bring a claim for breach of the settlement agreement.


312. See Harris Cnty. Flood Control Dist. v. Adam, 66 S.W.3d 265, 266 (Tex. 2001); see also Doe 1 v. Pilgrim Baptist Church, 218 S.W.3d 81, 82 (Tex. 2007).


314. See S & A Rest. Corp. v. Leal, 892 S.W.2d 855, 857 (Tex. 1995) (per curiam), for an illustration of the issues that can arise when one party believe it has been defrauded into a settlement during trial.
18-9:2.3 Interlocutory Appeals

As noted above, interlocutory orders—i.e., orders that do not dispose of all issues and claims—are not typically appealable. As a general rule, a party wishing to appeal from such an order either must wait until the court issues a final judgment or must seek and receive severance of the interlocutory order.

Of course, there are exceptions to this general rule. Certain types of interlocutory orders are immediately appealable by statute or rule (discussed in detail below); to appeal one of those orders, a party need not wait for a final judgment. When an interlocutory appeal is taken under one of these statutes or rules, the court of appeals is generally limited to reviewing only those issues for which the statute or rule authorizes the interlocutory appeal. This limitation applies only to the intermediate courts of appeals. When the Supreme Court of Texas has jurisdiction over an interlocutory appeal, it has jurisdiction over the entire case, including issues not covered by the statute or rule authorizing the interlocutory appeal.

The appellate rules provide that any interlocutory appeal allowed by statute is an “accelerated appeal.” This means the appellate deadlines are different than in a normal appeal. Most importantly, the notice of appeal must be filed within 20 days (rather than 30) after the order is signed. Similarly, the filing deadlines for the appellant’s brief and appellee’s brief are accelerated from 30 days to 20 days. The specifics of these briefing deadlines are discussed below.

The primary interlocutory appeal statute is section 51.014(a) of the Civil Practices and Remedies Code. It authorizes interlocutory appeals from 11 different types of orders entered by a district court, county court or county court at law: (1) an order appointing a receiver or trustee; (2) an order overruling a motion to vacate an order that appoints a receiver or trustee; (3) an order certifying


319. Tex. R. App. P. 38.6(a)-(b).
or refusing to certify a class in a class-action suit; (4) an order granting or refusing to grant a temporary injunction, or an order overruling a motion to dissolve a temporary injunction as provided by Chapter 65 of the Civil Practices and Remedies Code; (5) an order denying a motion for summary judgment based on official immunity of an officer or employee of the state or its subdivisions; (6) an order denying a motion for summary judgment that is based in whole or in part on a claim against or defense by a media defendant, where such claim or defense arises under the free-speech or free-press clauses of the U.S. or Texas constitutions; (7) an order granting or denying a special appearance, except in suits under the Family Code; (8) an order granting or denying a plea to the jurisdiction by a governmental unit; (9) an order denying all or part of the relief sought by a motion under section 74.351(b), which deals with failure to timely serve plaintiff’s expert report on a defendant physician or health-care provider in a health-care liability case; (10) an order granting relief under section 74.351(l), which allows a party to challenge the adequacy of an expert report in a health-care liability case; (11) an order denying a motion to dismiss under section 90.007, which deals with asbestos and silica-related claims.

There is tension in the case law about whether a party may elect to wait for a final judgment to appeal the interlocutory orders enumerated in section 51.014(a), instead of appealing them on an interlocutory basis. Some decisions have held that some of the enumerated orders must be appealed on an interlocutory basis, or else the ability to appeal them is waived. But the Texas Supreme Court has also held that a party need not take an interlocutory appeal of an order denying an objection to an expert report under section 51.014(a)(9). In other words, the party can wait for a final judgment to appeal the issue. It is unclear whether the logic of Hernandez applies to other interlocutory orders enumerated

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in section 51.014. Similarly, there is a distinct split in authority on whether special appearance rulings under section 51.014(a)(7) must be appealed on an interlocutory basis.  

In 2011, the Texas Legislature amended the interlocutory appeal statute to provide for a new type of appeal called a “permissive” appeal. Under this new provision, in cases filed after September 1, 2011, the court on its own initiative or on a party’s motion can allow an interlocutory appeal from an otherwise unappealable order. This permissive appeal mechanism is limited to orders that involve a controlling question of law about which there is a substantial difference in opinion, where an immediate appeal would materially advance the ultimate termination of the case. For cases filed before September 1, 2011, the old system remains in place, which was to allow an immediate appeal of an otherwise unappealable order if the parties agreed (known as “agreed appeals”).  

18-9:3 Perfecting the Appeal

18-9:3.1 Notice of Appeal

The timely filing of a notice of appeal by any party invokes the court of appeals’ jurisdiction and perfects the appeal. Which party or parties must file a notice of appeal depends on the appellate relief sought. Any party who lost in the trial court and wishes to challenge the judgment—i.e., an appellant or cross-appellant—must file a

324 Compare GJP, Inc. v. Ghosh, 251 S.W.3d. 854, 866 & n.15 (Tex. App.—Austin 2008, no pet.) (special appearance ruling can be appealed after final judgment; interlocutory appeal not required), with Matis v. Golden, 228 S.W.3d 301, 305 (Tex. App.—Waco 2007, no pet.) (appeal from special-appearance ruling must be taken immediately; appellant cannot wait for final judgment).


notice of appeal.\textsuperscript{330} Parties whose interests are aligned may file a joint notice of appeal but should list separately the name of each party who desires to appeal.\textsuperscript{331}

In some instances, an appellee must also file its own notice of appeal. This is true when the appellee seeks to change the trial court’s judgment or to obtain greater relief than the relief granted by the trial court.\textsuperscript{332} If an appellee does not file a notice of appeal and later seeks greater relief than what the trial court granted, the appellate court cannot grant that greater relief except for “just cause.”\textsuperscript{333} In contrast, an appellee need not file a notice of appeal if he does not wish to change the judgment,\textsuperscript{334} and he may assert alternative grounds for affirming the judgment without filing a notice of appeal.\textsuperscript{335}

The notice of appeal must be in writing and must contain the following information: (1) the identity of the trial court in which the case is proceeding; (2) the style of the case; (3) the cause number; (4) the date of the trial court judgment or order being appealed; (5) a statement that the party desires to appeal; (6) the identity of the court of appeals to which the appeal is being taken; (7) the name of the party filing the appeal; and (8) if applicable, a statement that the party appealing is indigent and takes the appeal without paying costs in advance.\textsuperscript{336} In an accelerated appeal, the notice of appeal must also contain additional information—the notice must state that the appeal is accelerated and whether the appeal is a parental termination case or a child protection case, as defined in Rule 28.4.\textsuperscript{337}

The notice of appeal must be filed with the clerk of the trial court—not the court of appeals.\textsuperscript{338} Once filed, the trial clerk will send a copy to the clerk of the court of appeals and to the court

\textsuperscript{330} Tex. R. App. P. 25.1(c).
\textsuperscript{331} Tex. R. App. P. 25.1(a)-(b); 25.1(d)(5); see also Benavides v. Knapp Chevrolet, Inc., No. 01-08-00212-CV, 2009 WL 349813, at *3 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (mem. op.).
\textsuperscript{332} See Tex. R. App. P. 25.1(c).
\textsuperscript{333} See Tex. R. App. P. 25.1(c).
\textsuperscript{334} See Tex. R. App. P. 25.1(c).
\textsuperscript{335} See DiGiuseppe v. Lawler, 269 S.W.3d 588, 603 (Tex. 2008).
\textsuperscript{336} Tex. R. App. P. 25(d)(1)-(5), (8).
\textsuperscript{337} Tex. R. App. P. 25(d)(6).
\textsuperscript{338} Tex. R. App. P. 25.1(a).
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reporter who will be preparing the reporter’s record.\textsuperscript{339} If the notice of appeal is mistakenly filed in the court of appeals instead of the trial court, however, this does not prevent the appeal from being perfected. Instead, the notice of appeal is deemed to have been filed in the trial court on the same day, and the court of appeals clerk will send a copy of the notice to the trial court clerk.\textsuperscript{340}

Because the notice of appeal is jurisdictional, it must be timely filed to be effective.\textsuperscript{341} If the notice is not timely filed, the court of appeals does acquire jurisdiction and must dismiss the appeal.\textsuperscript{342} The clock starts ticking on the date the trial court’s order or judgment is signed (not when it is filed),\textsuperscript{343} and the number of days to file depends on a handful of factors. By default, the party has 30 days to file the notice of appeal.\textsuperscript{344} However, this is extended to 90 days from the signing of the judgment if any of the following is filed: (1) a motion for new trial; (2) a motion to modify the judgment; (3) a motion to reinstate, or (4) a request for findings of fact and conclusions of law.\textsuperscript{345} In an accelerated appeal, the party has only 20 days to file the notice of appeal.\textsuperscript{346} Finally, once any party has filed a notice of appeal, any other party can also file a notice of appeal before the applicable deadline above or 14 days after the first notice of appeal was filed, whichever is later.\textsuperscript{347}

The party filing a notice of appeal must serve copies of the notice on all parties to the trial court’s final judgment.\textsuperscript{348} If the appeal is interlocutory, the party filing the notice of appeal must serve copies of the notice on all parties to the trial court proceeding.\textsuperscript{349}

\begin{itemize}
\item \textsuperscript{339} Tex. R. App. P. 25.1(f).
\item \textsuperscript{340} Tex. R. App. P. 25.1(f).
\item \textsuperscript{341} See Buts v. Capitol City Nursing Home, Inc., 705 S.W.2d 696, 697 (Tex. 1986).
\item \textsuperscript{342} See Brown Mechanical Servs., Inc. v. Mountbatten Sur. Co., Inc., 377 S.W.3d 40, 41 (Tex. App.—Houston [1st Dist.] 2012, no pet.).
\item \textsuperscript{343} See Tex. R. App. P. 26.1.
\item \textsuperscript{344} See Tex. R. App. P. 26.1(a).
\item \textsuperscript{345} See Tex. R. App. P. 26.1(b).
\item \textsuperscript{346} See Tex. R. App. P. 26.1(b).
\item \textsuperscript{347} See Tex. R. App. P. 26.1(d).
\item \textsuperscript{348} Tex. R. App. P. 25.1(c).
\item \textsuperscript{349} Tex. R. App. P. 25.1(c).
\end{itemize}

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18-9:3.2 Docketing Statement
The appellant is responsible for filing a docketing statement in the court of appeals. The docketing statement provides the court of appeals clerk with information about the appeal, including the identities of the parties, their attorneys, contact information, and the type of order or judgment being appealed. Each of Texas’s intermediate courts of appeal has a form docketing statement available on its website. It is recommended that the appellant use this form when completing and filing the docketing statement, as this will help ensure that all the information required by Rule 32.1 is included.

There is no firm deadline for the docketing statement, but it must be filed “promptly” upon the filing of the notice of appeal. Unlike the notice of appeal, the docketing statement is not jurisdictional. But it is mandatory, and the failure to file it may result in dismissal of the appeal.

PRACTICE POINTER:
The docketing statement does not limit the legal issues that can be presented on appeal, but it should be timely filed and accurately completed.

18-9:4 Appellate Record
The record is an indispensable part of the appellate process. With a few exceptions, the appellate court’s review cannot go outside the record. The record consists of two parts: the clerk’s record and, when necessary, the reporter’s record.

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352. *Tex. R. App. P. 32.4* (“The docketing statement is for administrative purposes and does not affect the appellate court’s jurisdiction.”).
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18-9:4.1 Clerk’s Record

The trial court clerk is responsible for preparing and certifying the clerk’s record and filing it with the court of appeals, as long as a notice of appeal has been filed and the party responsible for paying for the clerk’s record has either made arrangements to pay for it or is entitled to appeal without paying fees.\footnote{Tex. R. App. P. 35.3(a).} Rule 34.5(a) contains a list of items the clerk’s record will contain by default, including: the parties’ pleadings and motions, the trial court’s docket sheet, the judgment or order being appealed, the jury charge and verdict (if any), findings of fact and conclusions of law (if any), and the notice of appeal. This list applies unless the parties by agreement designate the contents of the clerk’s record.

Any party may request that the clerk’s record contain additional items not listed in Rule 34.5(a).\footnote{Tex. R. App. P. 34.5(b).} This request must be specific and can be made at any time before the clerk’s record is filed.\footnote{Tex. R. App. P. 34.5(b)(1)–(2).} Also, if a relevant item is omitted from the clerk’s record, any party, the trial court or the appellate court may send a letter to the trial court clerk directing the clerk to prepare and file a supplemental record containing the omitted item or items.\footnote{Tex. R. App. P. 34.5(c).} If the clerk’s record contains defects or inaccuracies, the appellate clerk must instruct the trial court clerk to correct the problem.\footnote{Tex R. App. P. 34.5(d).}

If no postjudgment motions extending the appellate deadlines were filed, then the trial court clerk must file the clerk’s record in the court of appeals within 60 days after the judgment is signed.\footnote{Tex. R. App. P. 35.1.} If postjudgment motions extending the deadlines were filed, the trial court clerk must file it within 120 days after the judgment is signed.\footnote{Tex. R. App. P. 35.1(a).} In an accelerated appeal, the trial court clerk must file it within 10 days after the notice of appeal is filed.\footnote{Tex. R. App. P. 35.1(b).} If the trial court clerk fails to timely file the record, the appellate court clerk will send a notice saying that the record is late and asking for it

to be filed within 30 days (for ordinary appeals) or 10 days (for accelerated appeals). 364

18-9:4.2 Reporter’s Record

The official or deputy reporter is responsible for preparing and filing the reporter’s record, as long as (1) the notice of appeal has been filed; (2) the appellant has requested the reporter’s record; and (3) the party responsible for paying for the reporter’s record has either made arrangements to pay for it or is entitled to appeal without paying fees. 365 If stenographically recorded—as is typically the case—the reporter’s record contains the evidence received and transcripts of the proceedings designated for inclusion in the reporter’s record. 366

Unlike with the clerk’s record, the reporter’s record is not prepared by default when a notice of appeal is filed. 367 For it to be prepared, the appellant must request it. 368 This request should be sent via letter to the reporter and also filed with the trial court clerk. 369 The request must be made at or before or time for perfecting appeal (although the reporter must not refuse to prepare the reporter’s record simply because it was not timely requested). 370 As with the clerk’s record, other parties may designate additions to the reporter’s record, 371 and any party, the trial court or the appellate court may direct the reporter to supplement the reporter’s record if anything relevant is omitted. 372

Once prepared, the reporter will file the reporter’s record with the court of appeals. 373 Today, most Texas appellate courts prefer—and many require—that the reporter’s record be filed in electronic format. The reporter’s deadlines for filing are the same as the deadlines for filing the clerk’s record, discussed above.

365 Tex. R. App. P. 35.3(b).
366 Tex. R. App. P. 34.6(a)(1).
367 See Tex. R. App. P. 34.6(b).
368 See Tex. R. App. P. 34.6(b).
369 See Tex. R. App. P. 34.6(b).
370 See Tex. R. App. P. 34.6(b).
371 See Tex. R. App. P. 34.6(c)(2).
372 See Tex. R. App. P. 34.6(d).
373 See Tex. R. App. P. 35.3(b).
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Although a reporter’s record is not prepared by default for every appeal, the appellant should almost always request preparation of the reporter’s record. An appellant who chooses to appeal without a reporter's record is typically at a significant disadvantage, as the court of appeals will indulge all presumptions in favor of the jury verdict, the trial court’s findings and the judgment.374 Further, certain issues cannot be appealed at all without a reporter's record, including sufficiency of the evidence,375 or challenges to errors in the jury charge.376 The appellant should always request a reporter’s record in a case where evidence was presented to a fact finder.

**PRACTICE POINTER:**
If the court reporter does not timely file the record, it may be helpful for the party seeking to appeal to make inquiries to the court reporter in writing and copy the clerk of the relevant court of appeals so that there will be a record that the party was attempting to file the record.

### 18-9:5 Suspending the Judgment

Generally, execution of a final judgment can be suspended pending appeal.377 Appealable interlocutory orders may also be suspended at the discretion of the trial court.378 The trial court’s denial of suspension of an interlocutory order is reviewed for abuse of discretion.379 The specific methods for suspending execution of a judgment or appealable order are discussed in detail below.

#### 18-9:5.1 Agreement to Suspend Judgment

The judgment debtor (appellant) may agree with the judgment creditor (appellee) to suspend enforcement of the judgment

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374. See *Favaloro v. Comm’n for Lawyer Discipline*, 994 S.W.2d 815, 820 (Tex. App.—Dallas 1999, no pet.).
376. See *T.A. Manning & Sons, Inc. v. Ken-Tex Oil Corp.*, 418 S.W.2d 324, 327 (Tex. App.—Austin 1967, writ ref’d n.r.e.).

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pending appeal. This agreement should be in writing and filed with the trial court.

18-9:5.2 Superseding the Judgment Via Appellate Security

If the parties cannot agree (or do not wish to agree) on suspension of the judgment, the judgment debtor may suspend the judgment by posting the appropriate appellate security with the trial court. The purpose of this security is to ensure that the judgment creditor will be able to collect the judgment if the case is affirmed.

Under the appellate rules, appellate security can take three forms: (1) a “good and sufficient bond” filed with the trial court clerk; (2) a deposit in lieu of a bond filed with the trial court clerk; or (3) alternate security ordered by the court. The security must be in the amount set by Rule 24.2 and section 52.006 of the Civil Practice and Remedies Code. This amount varies depending on the nature of the judgment:

1. For money judgments, the security must equal the sum of compensatory damages plus costs, but must not exceed the lesser of: (1) 50 percent of the judgment debtor’s current net worth, or (2) $25 million.

2. For judgments affecting the recovery of property, the trial court will determine the type and amount of security. For real property, the amount must be at least the value of the property’s interest rent or revenue. For personal property, it must be at least the value of the property interest on the date the court rendered judgment.

3. For judgments not for money or an interest in property (e.g., judgments for declaratory or

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injunctive relief), the trial court must set the type and amount of security. The security “must adequately protect the judgment creditor against loss or damage that the appeal might cause.”

4. For judgments affecting conservatorship or custody, the judgment ordinarily will not be suspended. But the trial court may order suspension, with or without security.

In addition, if the trial court finds after notice to all parties and a hearing that posting a bond, deposit or security in the amount prescribed by the rules above “is likely to cause the judgment debtor substantial economic harm,” the trial court must lower the amount of security required to an amount that will not cause this harm.

Each judgment debtor who wishes to suspend the judgment must file its own appellate security; the judgment debtor cannot rely on security filed by another party. The judgment debtor should file the appellate security before the prevailing party is able to execute the judgment.

Once the trial court sets the security, a party may move in the trial court to modify the required security. The trial court’s jurisdiction to consider this issue continues even during the appeal. The trial court’s ruling may be reviewed by the appellate court.

18-9.3 Suspension of Judgment by Governmental Entities

Unlike most judgment debtors, governmental entities may supersede a judgment—thereby suspending its enforcement—simply by filing a notice of appeal. These entities do not need
to file an appellate security to supersede the judgment.\textsuperscript{399} For attorneys in private practice, these rules are important in cases where the client obtains a favorable trial court judgment against a governmental entity, as the government will typically be able to supersede that judgment very easily.

The government’s ability to supersede simply by filing a notice of appeal creates some tension in the context of judgments awarding something other than money or property. On the one hand, the rule is that the filing of a notice of appeal by a governmental entity—without anything more—supersedes the judgment. But the appellate rules also expressly provide that the trial court has discretion to set the amount and type of security in cases involving judgments that do not involve money or property.\textsuperscript{400} Thus, several courts of appeals have addressed the question of how these two rules interact: does the trial court have discretion to deny supersedeas from a judgment awarding something other than money or property, even where the government has filed a notice of appeal? Courts have come down on both sides of this issue.\textsuperscript{401}

\section*{18-9:5.4 Suspending Execution by Injunction}

The trial court may grant a stay to suspend enforcement of a judgment.\textsuperscript{402} If the trial court still has jurisdiction over the case, a party may seek this relief in a motion.\textsuperscript{403} But if the trial court has lost jurisdiction, the party must file a new suit asking for an injunction in the same court that rendered the judgment.

The court of appeals may also suspend enforcement in certain circumstances. In appeals from interlocutory orders, the court of appeals may enter a temporary order if necessary to preserve the parties’ rights until disposition of the appeal, and if the appellant’s

\textsuperscript{399} Ammex Warehouse Co. v. Archer, 381 S.W.2d 478, 485 (Tex. 1964).

\textsuperscript{400} See § 18-9:5.2 (citing Tex. R. App. P. 24.2(a)(3)).

\textsuperscript{401} Compare Cascos v. Cameron County Attorney, 319 S.W.3d 205, 215-18 (Tex. App.—Corpus Christi 2010, no pet.) (siding with government), and City of Fort Worth v. Johnson, 71 S.W.3d 470, 473 (Tex. App.—Waco 2002, no pet.), with State v. Schless, 815 S.W.2d 373, 375-76 (Tex. App.—Austin 1991, orig. proceeding) (holding that trial court has discretion to refuse to suspend a judgment against a governmental entity if the judgment creditor files an adequate bond).


rights would not be “adequately protected by supersedeas or another order made under Rule 24.”

Also, in rare cases, the court of appeals may potentially issue a writ of injunction to suspend execution of a judgment. This remedy is not easy to obtain and should not be relied upon as an alternative to the standard supersedeas procedures outlined above.

18-9:6 Challenges to Legal and Factual Sufficiency of the Evidence

The trial court’s judgment can be attacked on grounds that inadequate evidence supports one or more factual findings that are essential to the judgment. In a legal sufficiency challenge (also called a “no evidence” challenge), the appellant asserts that the evidence is “legally insufficient”—i.e., that there is “no evidence”—to support a finding of fact that is essential to the trial court’s judgment.

If sustained, a legal sufficiency challenge warrants rendition of judgment for the appellant. Under a factual sufficiency review, the trial court’s factual findings “may be overturned only if they are so against the great weight and preponderance of the evidence as to be clearly wrong and unjust.” If sustained, a factual sufficiency challenge will result in a new trial. These standards of review apply in appeals from jury trials and bench trials alike.

18-9:7 Briefs

18-9:7.1 Appellant’s Brief

In a regular appeal, the appellant must file its brief 30 days after the clerk’s record or the reporter’s record is filed, whichever is later. In an accelerated appeal, this deadline is shortened to 30 days after the record is filed.

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405. See Tex. Gov’t Code § 22.221(a) (conferring courts of appeals with power to issue any writ “necessary to enforce the jurisdiction of the court); see also Holloway v. Fifth Court of Appeals, 767 S.W.2d 680, 684 (Tex. 1989).
408. Anderson v. City of Seven Points, 806 S.W.2d 791, 794 (Tex. 1991) (stating that, in an appeal of a judgment rendered following a bench trial, “[t]he trial court’s findings of fact are reviewable for legal (and factual) sufficiency of the evidence by the same standards as applied in reviewing the legal (and factual) sufficiency of the evidence supporting a jury’s finding”).
409. Tex. App. P. 38.6(a).

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20 days. If the appellant needs additional time, it may file a motion for extension of time “before or after” the brief is due. If the appellant does not timely file its brief or request an extension, then the court can dismiss the appeal for want of prosecution, affirm without examining the record or retain the appeal and give further instructions to the parties.

If produced on a computer, the appellant’s brief must not exceed 15,000 words, excluding sections enumerated in Tex. R. App. P. 9.4(i). If not produced on a computer, it must not exceed 50 pages. Importantly, if the appellant’s brief—or any other brief—is produced on a computer, it must contain a certificate of compliance stating the number of words in the brief. This certificate should come after the signature page at the end of the brief.

There are several other formalistic requirements for the appellant’s brief. The cover must contain the case style and number, the title of the document and the name of the party filing the brief. The front cover must also contain the name, state bar number and contact information for the lead counsel of the party filing the brief. Further—and crucially—if the party wants oral argument, that request must be indicated on the front cover of the first brief filed by that party (typically in the bottom left corner). Failure to include this request on the front cover waives the party’s right to oral argument.

Inside the brief, the appellant must include several required sections. The sections should appear in the order below and with the following titles:

* A section called “Identity of Parties and Counsel,” which lists the information about the parties and counsel on both sides of the appeal.

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410 Tex. R. App. P. 38.6(a).
411 Tex. R. App. P. 38.6(d).
412 Tex. R. App. P. 38.8(a).
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* A “Table of Contents,” which lists the major sections of the brief and the subject matter of each issue or group of issues.\textsuperscript{420}

* An “Index of Authorities,” which provides an alphabetized listing of all the authorities cited in the brief, including the specific page number(s) on which the authority appears.\textsuperscript{421}

* A “Statement of the Case,” which contains the nature of the case, the trial court’s disposition and the course of the proceedings.\textsuperscript{422} The Statement should be supported by record references, should seldom exceed one-half page and should not discuss facts or make arguments.\textsuperscript{423}

\begin{tcolorbox}
\textbf{PRACTICE POINTER:} \\
Many practitioners present the statement of the case in a tabular format, although the rules do not require a tabular format to be used.
\end{tcolorbox}

* (Optional) A “Statement Regarding Oral Argument,” in which the appellant explains why oral argument is necessary.\textsuperscript{424} This section is not necessary to preserve a party’s right to oral argument and does not supplant the requirement that the party include its request for oral argument on the brief’s front cover.

* An “Issues Presented” section, which states all points raised on appeal.\textsuperscript{425} A statement of an issue or point will be treated as covering every subsidiary question that is fairly included.\textsuperscript{426} Crucially, an issue not included in a party’s opening brief is

\begin{footnotes}
\textsuperscript{420} Tex. R. App. P. 38.1(b).
\textsuperscript{421} Tex. R. App. P. 38.1(c).
\textsuperscript{422} Tex. R. App. P. 38.1(d).
\textsuperscript{423} Tex. R. App. P. 38.1(d).
\textsuperscript{424} Tex. R. App. P. 38.1(e).
\textsuperscript{425} Tex. R. App. P. 38.1(f).
\textsuperscript{426} Tex. R. App. P. 38.1(f).
\end{footnotes}
typically considered waived; a party cannot raise an issue for the first time in a reply brief.427

* A “Statement of Facts,” which must provide the facts—supported by citations to the record—pertinent to the issues presented.428 The court will accepted the facts as true unless another party contradicts them.429

* A “Summary of the Argument,” which presents a succinct, clear and accurate statement of the arguments made in the body of the brief.430

* An “Argument,” section, which is the heart of the brief and is where the appellant must cite the record and applicable legal authorities to convince the court to reverse or otherwise change the trial court’s judgment.431

* A “Prayer,” which is a short conclusion stating the nature of the relief sought.432 The prayer may ask for alternative relief—e.g., reverse and render, or in the alternative, reverse and remand—but that request should be supported by argument in the body of the brief and by the issues presented.

**PRACTICE POINTER:**
The prayer customarily ends with a statement that the party also seeks all other relief to which it is entitled, but such a statement is not required under the rules.

* A signature block in which the party or his attorney signs the brief.433

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* A “Certificate of Compliance” stating the number of words in the document, if the document was prepared on a computer.\(^{434}\)

* Proof of service, usually in the form of a “Certificate of Service” identifying the persons on whom copies of the brief were served, their addresses and the date and manner of service.\(^{435}\)

* An “Appendix” containing copies of the critical documents in the record that allows the court to examine those documents. In a civil case, it must include: the trial court’s judgment or other appealable order; the jury charge and verdict, if any; the trial court’s findings of fact and conclusions of law, if any; and the text of any provision or law on which the argument is based, or the text of any contract or other document central to the case.\(^{436}\) The appendix may also include other documents pertinent to the issues presented, like copies or excerpts of relevant court opinions, statutes or constitutional provisions.\(^{437}\)

#### PRACTICE POINTER:

Most courts of appeals have adopted local rules allowing electronic filing of briefs; per a Texas Supreme Court order, e-filing will be mandatory in all courts of appeals for any party represented by an attorney beginning on January 1, 2014. Some courts of appeals require that courtesy paper copies be provided after e-filing; some do not. If papers copies are required, they should have durable front and back covers that cannot be plastic, red, black, or dark blue.\(^{438}\)

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\(^{434}\) Tex. R. App. 9.4(i)(3).

\(^{435}\) Tex. R. App. P. 9.5(e).

\(^{436}\) Tex. R. App. P. 38.1(k).

\(^{437}\) Tex. R. App. P. 38.1(k)(2).

18-9:7.2 Appellee’s Brief
In a regular appeal, the appellee’s brief is due 30 days after the appellant files its brief. In an accelerated appeal, the deadline is 20 days.

Generally speaking, the appellee must follow all the rules applicable to the appellant’s brief, including the 15,000 word limit or 50-page restriction. However, the appellee may elect not to include certain sections if he is satisfied with those portions of the appellant’s brief: the Identity of Parties & Counsel, the Statement of the Case, the Statement of Facts, and the Appendix.

If an appellee wishes to assert cross-points on appeal, he may do so by listing those points in the “Issues Presented” section of the brief. The appellee need not file a separate notice of appeal to bring cross-points, although the appellee must file a separate notice of appeal if he seeks relief greater than what he won in the trial court or if he seeks to challenge a remittitur. Further, the appellee must bring a cross-point in certain situations involving judgments notwithstanding the verdict, and if the appellee wants a hearing on remand in the event that the court of appeals sustains one of the appellant’s issues.

18-9:7.3 Appellant’s Reply Brief
The appellant may—but need not—file a reply brief. If a reply brief is filed, it is due 20 days after the appellee’s brief is filed. A reply brief is limited to 7,500 words if computer generated or 25 pages if not.

The reply brief should follow the same rules as the brief of appellant, but it need not contain all the same formal parts. It should include—at a minimum—a Table of Contents, an Index of Authorities, an Argument, and a Prayer. The reply brief should

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439. Tex. R. App. P. 38.6(b).
440. Tex. R. App. P. 38.6(b).
444. See Tex. R. App. P. 46.2; see also Tex. R. App. P. 25.1(c).
446. Tex. R. App. P. 38.6(c).
address only those matters raised in the appellee’s brief. It cannot raise any new issues not articulated in the appellant’s brief.

18-9:8  Motion Practice

The appellate rules allow a party to seek an order or other relief by filing a motion. As a general rule, a motion must: (1) contain or be accompanied by any matter specifically required by a rule governing the motion; (2) state with particularity the basis for the motion; (3) set forth the order or relief sought; and (4) be served and filed with any brief, affidavit or other paper filed in support of the motion. In addition, a motion should always contain a caption that briefly describes what the party is seeking from the court (e.g., “Motion for Extension of Time to File Brief of Appellant”). A motion should be styled the same as the case in which it is filed and contain the same case number. For motions filed after an appeal is perfected but before the appeal is docketed, the motion will be docketed and assigned a docket number and that same docket number will be assigned to the appeal once it is eventually filed.

In civil cases, motions must also comply with an additional requirement. Except for a motion for rehearing or a motion for reconsideration en banc, any motion must include a certificate stating that the filing party conferred—or made a reasonable attempt to confer—with all other parties about the merits of the motion. The certificate must also state whether the other parties oppose the motion.

As a general rule, a motion need not be verified. However, a motion must be verified and supported by an affidavit (or other satisfactory evidence) if it depends on facts that are (1) outside the

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454. See § 18-9:11.
record, (2) not within the court’s knowledge in its official capacity, and (3) not within the personal knowledge of the attorney signing the motion.\textsuperscript{458}

A response to a motion is optional.\textsuperscript{459} A party may file a response at any point in time until the court decides the motion (unless the court sets a deadline for a response).\textsuperscript{460} The court need not wait for a response to decide a motion.\textsuperscript{461}

For most motions, the court must wait at least 10 days before hearing or deciding the motion.\textsuperscript{462} There are three exceptions to this rule: (1) motions to extend time to file a brief, a petition for review or a petition for discretionary review; (2) motions stating that the parties have conferred and that no party opposes the motion; and (3) motions for emergency relief.\textsuperscript{463} Many motions may be decided by a single appellate judge or justice.\textsuperscript{464} But an appellate court may provide, by order or rule, that the panel or the entire court must consider a particular motion or class of motions.\textsuperscript{465}

\textbf{18-9:8.1 Particular Motions}

The appellate rules impose specific requirements for certain types of motions. These rules apply in addition to the general requirements above for all motions:

Motions to Extend Appellate Timetables: Any motion to extend time—except a motion to extend the time for filing a notice of appeal—must state: (1) the deadline for filing the item in question; (2) the length of the extension sought; (3) the facts relied on reasonably to explain the need for an extension; and (4) the number of previous extensions granted regarding the item in question.\textsuperscript{466} A motion to extend the time for filing a notice of appeal must comply with the first and third of those four requirements; it must also identify the trial court, state the date of the trial court’s

\textsuperscript{458} Tex. R. App. P. 10.2.
\textsuperscript{459} See Tex. R. App. P. 10.1(b).
\textsuperscript{460} See Tex. R. App. P. 10.1(b).
\textsuperscript{461} See Tex. R. App. P. 10.1(b).
\textsuperscript{462} Tex. R. App. P. 10.3(a).
\textsuperscript{463} Tex. R. App. P. 10.3(a).
\textsuperscript{464} Tex. R. App. 10.4(a).
\textsuperscript{465} Tex. R. App. P. 10.4(b).
\textsuperscript{466} Tex. R. App. P. 10.5(b)(1).
judgment (or appealable interlocutory order) and state the case and style of the number in the trial court. Further, a motion to postpone argument must be supported by “sufficient cause,” unless all parties agree about postponement or unless sufficient cause is apparent to the court.

Motions Relating to Informalities in the Record: Any motion relating to informalities in the manner of bringing the case into the appellate court must be filed within 30 days after the record is filed with the court of appeals. If such a motion is not filed in that time frame, the objection is waived (if it is waivable).

18-9:8.2 Deadlines for Motions to Extend Time

Certain motions to extend time must be filed within 15 days after the original deadline of the item in question. The motions that must comply with this absolute deadline are: (1) motions to extend time to file an affidavit of indigence; (2) motions to extend time to file a notice of appeal; (3) motions to extend time to file a formal bill of exception; (4) motions to extend time to file a motion for rehearing or reconsideration en banc in the court of appeals; (5) motions to extend time to file a petition for review in the Texas Supreme Court; and (6) motions for extension of time to file a motion for rehearing in the Texas Supreme Court. Other motions for extension of time do not carry an absolute deadline and may be filed more than 15 days after the original deadline for the item. For instance, a motion to extend time to file a brief in the court of appeals may be filed “before or after” the briefing deadline and the rules do not impose any limitation on how long after. Of course, as a practical matter, it is wise to file a motion for extension of time as soon as possible, even for those

476. Tex. R. App. P. 64.5.
477. Tex. R. App. P. 38.6(d).
motions that do not have an absolute deadline. If a party waits too long to file a motion for extension, the issue may become moot if the court issues a ruling in the case; also, the court may deny the motion for extension, particularly if the party cannot articulate a compelling reason for waiting to ask for an extension.

**PRACTICE POINTER:**
The rules require a statement of good cause for an extension of time. A list of other briefs or arguments that are already set is a good basis for the good cause. Texas courts of appeals and the Texas Supreme Court will customarily grant one motion for extension of time, whether it is opposed or unopposed.

18-9:9 Oral Argument and Submission

A party who has filed a brief may request an opportunity to present oral argument.\(^\text{478}\) A party who wants oral argument should indicate that request on the front cover of that party’s first brief.\(^\text{479}\) The failure to request argument on the front cover of the brief waives the party’s right to argue.\(^\text{480}\) That said, even when one or both parties request argument, the court need not grant it.\(^\text{481}\) The court may determine that oral argument is unnecessary if (1) the appeal is frivolous; (2) the dispositive issue or issues have been authoritatively decided; (3) the facts or legal arguments are adequately presented in the briefs and the record; or (4) the decisional process would not be significantly aided by oral argument.\(^\text{482}\)

Unlike a party, an amicus curiae does not have the right to argue and generally is not permitted to argue.\(^\text{483}\) The exception is when one of the parties consents to share time with the attorney for amicus curiae, and the court grants leave in advance of oral argument.\(^\text{484}\)

\(^{484}\) See Tex. R. App. P. 39.5; see also Anheuser-Busch Cos. v. Summitt Coffee Co., 934 S.W.2d 705, 706 n.3 (Tex. App.—Dallas 1996, writ dism’d).
Chapter 18 Preservation of Error – Appeal Tactics

At least 21 days before a case is set for submission, the clerk of the appellate court must send the parties a notice. That notice must include the date of the submission, whether the submission will be with oral argument or on the briefs alone and the names of the justices who will sit on the panel. If the case will be submitted after argument, the notice must also state the amount of time allotted to each side. Importantly, however, a party’s failure to receive the clerk’s notice does not prevent a case from being argued or submitted on the scheduled date.

PRACTICE POINTER:
Generally, only one attorney should argue the case for each side. The maximum number of attorneys to argue for each side is two, unless the court grants leave in advance of oral argument for more than two attorneys to argue. Only one attorney may argue in rebuttal. The appellant opens the argument and must be permitted to be the final speaker.

18-9:10 Opinion and Judgment
Typically, the courts of appeals issue a written opinion and a judgment concurrently. The opinion is the document that contains the reasoning supporting the court’s decision. The judgment is a short document that tells the trial court and the parties the outcome of the appeal and assesses costs on appeal to the appropriate parties.

The appellate rules allow six possible dispositions in the appellate judgment: (1) affirm the trial court’s judgment or order in whole or in part; (2) modify the judgment and affirm as modified; (3) reverse in whole or in part and render the judgment the trial court should have rendered; (4) reverse and remand

494. See Tex. R. App. 43.2, 43.4.
the case to the trial court for further proceedings; (5) vacate the judgment and dismiss the case; or (6) dismiss the appeal.495 No other dispositions are permitted.

A court of appeals must designate each of its opinions as either an “opinion” or a “memorandum opinion.”496 This determination—as well as the determination whether the opinion will be signed by a justice or issued per curiam—must be made by a majority of the justices participating in the decision.497

By default, an opinion should be a memorandum opinion that is “no longer than necessary to advise the parties of the court’s decision and the basic reasons for it.”500 An opinion must be designated a memorandum opinion unless it does one of the following: (1) establishes a new rule of law, alters or modifies an existing rule or applies an existing rule to a novel fact situation likely to recur in future cases; (2) involves issues of constitutional law or other legal issues important to the jurisprudence of Texas; (3) criticizes existing law; or (4) resolves an apparent conflict of authority.501 But an opinion cannot be designated a memorandum opinion if the author of a concurrence or dissent opposes that designation.502

A court of appeals’ opinion must address every issue necessary to the final disposition of the appeal.503 The court need not

\[\text{\begin{align*}
\text{\textit{Practice Pointer:}} \\
\text{The distinction between opinions and memorandum opinions has less significance today than it did before January 1, 2003; before that date, a memorandum opinion was also designated “do not publish” and did not carry precedential weight.} \\
\text{Since that date, however, all opinions and memorandum opinions carry precedential value.}
\end{align*}}\]

\[\text{495. See Tex. R. App. 43.2.} \\
\text{496. Tex R. App. 47.2(a).} \\
\text{497. Tex R. App. 47.2(a).} \\
\text{498. See Tex. R. App. 47.2(c), 47.7.} \\
\text{499. See Tex. R. App. P. 47.7 & cmt.} \\
\text{500. Tex R. App. P. 47.4.} \\
\text{501. Tex. R. App. P. 47.4.} \\
\text{502. Tex. R. App. P. 47.4.} \\
\text{503. Tex. R. App. P. 47.1.} \]
consider issues that are not necessary to the final disposition—e.g., if the court affirms on the first ground offered by appellee, it need not address the alternative second and third grounds offered by appellee. That said, the court cannot summarily dispose of issues necessary to resolving an appeal; it must provide the reasons for its decision in a written opinion.

18-9:11 Motions for Rehearing and En Banc Reconsideration

18-9:11.1 Motion for Rehearing

A motion for rehearing asks the court of appeals panel that decided the case to change its judgment and opinion. It must be filed within 15 days after the court issues its judgment, although a party may seek an extension within 15 days after the motion for rehearing was initially due.

A motion for rehearing is limited to 4,500 words if produced on a computer; otherwise, it must not exceed 15 pages. Generally, it should contain the same cover as the party’s original brief, with the appropriate title. Although not strictly required, the motion should typically contain a section called “Issues Presented for Review” or “Points Presented for Review.” It should also contain a section entitled “Argument,” and a prayer for relief. It need not contain the other sections required in an appellate brief. The motion should contain a certificate of compliance stating the number of words in the motion, but it need not include a certificate of conference.

A response to a motion for rehearing is not required. The court will not grant rehearing without first requesting a response. If a

response is filed, it should conform to the same rules applicable to the motion.

**PRACTICE POINTER:**
A motion for rehearing *is not* a jurisdictional prerequisite to seeking review in the Texas Supreme Court, nor is it required to preserve error.\(^{514}\)

### 18-9:11.2 Motion for En Banc Reconsideration

After the court issues its judgment, a party may move for en banc reconsideration.\(^{515}\) The en banc court consists of all members of the court who are not disqualified or recused and—if the case was originally argued before or decided by a panel—any members of the panel who are not members of the court but remain eligible for assignment to the court.\(^{516}\) En banc review is “disfavored” and will generally not be ordered unless necessary to secure or maintain uniformity of the court’s decisions, or unless extraordinary circumstances require en banc consideration.\(^{517}\) If a majority of the court decides to grant en banc reconsideration, the panel’s judgment will not become final.\(^{518}\) The case will be resubmitted to the entire court for review and disposition, though the case is usually not rebriefed or reargued. In contrast, if en banc reconsideration is denied, the panel’s judgment will become final.\(^{519}\)

The procedural and formal requirements for a motion for en banc reconsideration are the same as those for a motion for rehearing.\(^{520}\) As with motions for rehearing, a motion for reconsideration en banc is not a jurisdictional prerequisite to filing a petition for review in the Texas Supreme Court and is not required to preserve error.

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\(^{514}\) Tex. R. App. P. 49.9.
\(^{515}\) See Tex. R. App. P. 41.2(c), 49.7.
\(^{516}\) Tex. R. App. P. 41.2(a).
\(^{517}\) Tex. R. App. P. 41.2(c).
\(^{518}\) Tex. R. App. P. 49.7.
\(^{519}\) See Tex. R. App. P. 49.7.
\(^{520}\) See § 18-9:11.1.
PRACTICE POINTER:
Make sure the issue is worthy of review by the *en banc* court before filing this motion.

18-9:12 Mandate

The mandate is the document directing the trial court to enforce the court of appeals’ judgment. The court of appeals’ judgment does not become enforceable until the mandate issues. The court of appeals clerk will distribute the mandate to the trial court and to all parties.

The timing of the mandate depends on what happened after the court of appeals issued its opinion and judgment. If no petition for review is filed in the Texas Supreme Court, the mandate will issue 10 days after the time expires to file a motion for extension of time to file a petition for review. The filing of a motion for rehearing or en banc reconsideration extends the deadline for filing a petition for review. Thus, the filing of those motions effectively pushes back the date that the mandate will issue. The interaction of these various deadlines is complex and means that the timing of the mandate can vary significantly from case to case, depending on what is filed after the court of appeals’ judgment. As a general rule of thumb, the earliest the mandate will issue—when nothing is filed after the court of appeals’ judgment—is 70 days after the judgment.

If a party seeks review in the Texas Supreme Court and that review is denied, the mandate will issue 10 days after the time expires to file a motion to extend time for a motion for rehearing of a denial, refusal or dismissal of the petition for review.

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524 See Tex. R. App. P. 53.7(a); see also § 18-9:13.
525 See Tex. R. App. P. 53.7(a) (45 days from judgment to file petition for review); Tex. R. App. P. 53.7(f) (15 days from due date of petition for review to file motion for extension of time to file petition); Tex. R. App. P. 18.1(a) (ten additional days before mandate issues).
On motion or agreement of the parties, the court of appeals may issue the mandate early.\textsuperscript{527} A petitioner may also move to stay the mandate pending disposition of a petition for a writ of certiorari to the U.S. Supreme Court.\textsuperscript{528}

18-9.13 Appellate Timetable

The tables below contain the deadlines pertinent to regular appeals and accelerated appeals, respectively. Please note that these tables include only those deadlines that are part of the appeal itself; deadlines for other matters bearing on the appeal but not directly part of the appeal (e.g., deadlines for filing posttrial motions) are covered in other chapters of this book.

Deadlines for accelerated appeals—where different from those for regular appeals—are indicated in \textit{italics}.

<table>
<thead>
<tr>
<th>Action(s)</th>
<th>Deadline(s)</th>
<th>Rule(s)</th>
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<tbody>
<tr>
<td>File notice of appeal in trial court</td>
<td>30 days after judgment is signed (if no posttrial motion extending deadline was filed)</td>
<td>Tex. R. App. P. 26.1, 25.1(f)</td>
</tr>
<tr>
<td>Serve copies of notice of appeal on all parties to final judgment or appealable order</td>
<td>90 days after judgment is signed if a motion for new trial, a motion to modify the judgment, a motion to reinstate, or a motion for findings of fact and conclusions of law was filed</td>
<td>\textit{Tex R. App. P. 26.1(b), 25.1(f)}</td>
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<td>20 days after judgment is signed in accelerated appeals</td>
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<tr>
<th>Action(s)</th>
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<tr>
<td>File docketing statement in court of appeals</td>
<td>“Promptly” after notice of appeal is filed</td>
<td>Tex. R. App. P. 32.1</td>
</tr>
<tr>
<td>(Optional) File notice by additional party once first notice of appeal is filed</td>
<td>Deadlines above for first notice of appeal or 14 days after first notice of appeal is filed (whichever is later)</td>
<td>Tex. R. App. P. 26.1(d)</td>
</tr>
<tr>
<td>(Optional) File motion to stay execution of judgment in trial court, along with either: (1) a written agreement with the judgment creditor; (2) a supersedeas bond; (3) security deposit; or (4) alternate security</td>
<td>Before execution of judgment</td>
<td>Tex. R. App. P. 24.1–.2</td>
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<tr>
<td>Pay for or arrange to pay fees for preparation, clerk’s record</td>
<td>Before clerk’s record is prepared</td>
<td>Tex. R. App. P. 35.3(a)(2)</td>
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<tr>
<td>(Optional) File request with trial court clerk for additional items to be included in clerk’s record</td>
<td>Before clerk’s record is prepared</td>
<td>Tex. R. App. P. 34.5(b)</td>
</tr>
<tr>
<td>(Optional but recommended) Send written request to court reporter requesting</td>
<td>When notice of appeal is filed</td>
<td>Tex. R. App. P. 34.6(b)</td>
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<td>Action(s)</td>
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<tr>
<td>preparation of reporter’s record and designating items and exhibits to be included in reporter’s record</td>
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<td>Tex. R. App. P. 35.3(b)(3)</td>
</tr>
<tr>
<td>File copy of request to trial court clerk</td>
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<tr>
<td>Pay for or arrange to pay fees for preparation of reporter’s record</td>
<td>Before reporter’s record is prepared</td>
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<tr>
<td>(Deadline for trial court clerk) File clerk’s record in court of appeals</td>
<td>60 days after judgment is signed if no motion for new trial or other motion extending deadline to perfect appeal was filed</td>
<td>Tex. R. App. P. 35.1, 35.3(a)</td>
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<td>120 days after judgment is signed if motion for new trial or other motion extending deadline to perfect appeal was filed</td>
<td>Tex. R. App. P. 35.1(b)</td>
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<td>10 days after judgment is signed in an accelerate appeal</td>
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<tr>
<td>(Deadline for court reporter) File reporter’s record in court of appeals</td>
<td>Same deadlines as for filing of clerk’s record</td>
<td>See above</td>
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### Chapter 18

#### Preservation of Error – Appeal Tactics

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<tr>
<th>Action(s)</th>
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<th>Rule(s)</th>
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</table>
| Appellant files brief  
Include request for oral argument (if desired) on front cover of brief | 30 days after clerk’s record or reporter’s record is filed, whichever is later  
20 days after clerk’s record or reporter’s record is filed, whichever is later, in an accelerated appeal | Tex. R. App. P. 38.6(a), 39.7  
Tex. R. App. P. 38.6(a) |
| Appellee files brief  
Include request for oral argument (if desired) on front cover of brief | 30 days after appellant’s brief is filed (or would have been due, if not filed)  
20 days after appellant’s brief is filed (or would have been due, if not filed), in an accelerated appeal | Tex. R. App. P. 38.6(b), 39.7  
Tex. R. App. P. 38.6(b) |
<p>| (Optional) Appellant files reply brief | 20 days after appellee’s brief is filed | Tex. R. App. P. 38.6(c) |
| (Deadline for court of appeals) Court of appeals clerk sends notice of oral argument to parties, if requested | At least 21 days before argument | Tex. R. App. P. 39.8 |
| Case is argued and submitted, or submitted on the briefs | Set by court of appeals | Tex. R. App. P. 39.1, 39.8(b) |</p>
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<th>Action(s)</th>
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<tbody>
<tr>
<td>Court of appeals renders judgment and issues opinion</td>
<td>Tex. R. App. P. 43.1, 47.1</td>
<td></td>
</tr>
<tr>
<td>(Optional) Party files motion for rehearing</td>
<td>15 days after judgment is issued</td>
<td>Tex. R. App. P. 49.1</td>
</tr>
<tr>
<td>(Optional) Party files motion for reconsideration en banc</td>
<td>15 days after judgment is issued, or, when permitted, 15 days after court denies last timely filed motion for rehearing or motion for reconsideration en banc</td>
<td>Tex. R. App. P. 49.7</td>
</tr>
<tr>
<td>(Deadline for court of appeals) Court of appeals clerk issues mandate</td>
<td>10 days after deadline to file motion for extension of time to file petition for review (if no motion for rehearing, motion for reconsideration en banc or petition for review is pending)</td>
<td>Tex. R. App. P. 18.1(a)(1), Tex. R. App. P. 18.6</td>
</tr>
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Concurrent with judgment or whenever appeal is “finally disposed of,” in an accelerated appeal (court of appeals’ discretion)
Many of the rules applicable to appeals in the intermediate courts of appeals (explained above) also apply to proceedings in the Texas Supreme Court. This chapter covers some of the rules applicable specifically to practice in the Supreme Court.

18-10:1 Jurisdiction
The Texas Supreme Court has jurisdiction over civil cases only.529 And the Supreme Court’s jurisdiction is discretionary—the Court is not obligated to take every case brought before it. The Texas Supreme Court has jurisdiction only over those cases meeting at least one of the following requirements:

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.530

In many ways, the Supreme Court’s jurisdiction is more limited than the jurisdiction of the courts of appeals. The Supreme Court

529 Tex. Gov’t Code 22.001(a).
530 Tex. Gov’t Code 22.001(a).
cannot review factual issues, including the factual sufficiency of the evidence.531 The Government Code also enumerates several very specific types of cases in which the court of appeals’ judgment is final on both the facts and the law.532 Importantly, though, the Supreme Court retains jurisdiction over those specific types of cases if “the justices of the courts of appeals disagree on a question of law material to the decision” or if “one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court, as provided by Subdivisions (1) and (2) of Section 22.001(a).”533

After enumerating the specific cases in which the Court lacks jurisdiction, Section 22.225 also contains a catch-all providing that the court of appeals’ judgment is final on the law and the facts “[in] all other cases except the cases where appellate jurisdiction is given to the supreme court and is not made final in the courts of appeals.”534 Thus, for a petitioner in the Supreme Court, it is crucial to establish jurisdiction under one of the bases listed above. Otherwise, the Court cannot hear the case and the court of appeals’ judgment is final.

The Court also has jurisdiction to hear a direct appeal from a trial court order granting or denying an interlocutory or permanent injunction on the ground of the constitutionality of a Texas statute.535 This direct appeal mechanism is discussed below.

18-10:2 Petitions for Review

18-10:2.1 Purpose

The petition for review is the primary vehicle for seeking review in the Supreme Court. As noted above, the Supreme Court’s review is discretionary. Thus, the primary purpose of the petition for review is to set forth the reasons why the Court should exercise its jurisdiction and take the case.536

533. Tex. Gov’t Code § 22.225(c).
535. Tex. Gov’t Code § 22.001(c); see also Tex. R. App. P. 57.
Broadly speaking, most petitions for review should attempt to accomplish two goals (though not necessarily in this order). First, the petition should explain why the court of appeals' judgment is incorrect. Second, the petition should give the Supreme Court a reason or reasons why the case is important enough that the Court should step in to correct the court of appeals' erroneous decision. The first of these two considerations is analogous to the goal of an appellant's brief in the court of appeals (i.e., convincing the court of appeals that the trial court's judgment was wrong). The second consideration, meanwhile, is unique to the Supreme Court and derives from the Court's discretionary review. Because review is discretionary, it is not enough simply to convince the Supreme Court that the court of appeals got it wrong. Rather, the petitioner must also convince the Supreme Court that there is a compelling reason to step in and correct the error.

With that in mind, the appellate rules prescribe several factors the Supreme Court will consider in determining whether to grant review:

1. whether the justices of the court of appeals disagree on an important point of law;
2. whether there is a conflict between the courts of appeals on an important point of law;
3. whether a case involves the construction or validity of a statute;
4. whether a case involves constitutional issues;
5. whether the court of appeals appears to have committed an error of law of such importance to the state's jurisprudence that it should be corrected; and
6. whether the court of appeals has decided an important question of state law that should be, but has not been, resolved by the Supreme Court.  

A good petition for review will usually touch on at least one of these points, if not several.

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PRACTICE POINTER:
The “importance to the jurisprudence” criterion may be satisfied in a variety of ways, including the breadth of impact of the court of appeals’ decision. Amicus briefs may bring home to the Supreme Court the significance of the case to meet this criterion. What makes an issue important?

* Effects on an industry (oil & gas, banking, insurance, medical).
* Positions of amici (why your amici think the case is important).
* National trends in jurisprudence (issues with attention nationwide, academic discussion, differing views).
* Conflicts among Texas courts (also a basis for jurisdiction).
* Hot topics in Texas jurisprudence (immunity, limitations, tort reform).
* Public policy (detrimental effects of opinion on the judicial system, perverse incentives).

18-10:2.2 Requirements of Procedure and Form

The petition for review is due 45 days after either (1) the date the court of appeals rendered judgment (if no timely motion for rehearing or en banc reconsideration was filed), or (2) the date of the court of appeals’ last ruling on all timely filed motions for rehearing or en banc reconsideration. If one petition for review has been filed, any other party who wishes to file a petition for review may do so within that same deadline, or within 30 days after the first petition was filed, whichever is later. The time to file a petition for review can be extended upon motion, but the motion must be filed within 15 days after the date on which the petition for review was due. This deadline for a motion to extend time is absolute.

Petitions for review produced on a computer are limited to 4,500 words, excluding the sections enumerated in Texas Rule of Appellate Procedure 9.4(i). As with filings in the courts of appeals (explained above), and as with any other word-limited filing in the Supreme Court, the motion must be filed within 45 days of the judgment, or within 30 days after the filing of the first petition for review, whichever is later. The time to file a motion to extend time is absolute.

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539. Tex. R. App. P. 53.7(c).

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Court, a petition for review must contain a certificate of compliance stating the number of words in the petition.542 A petition for review that is not produced on a computer must not exceed 15 pages.543 The petition must be typed in “conventional” typeface no smaller than 14-point font, with footnotes no smaller than 12-point font.544 Margins must be at least one inch on all four sides.545

Petitions for review—and any other document filed in the Supreme Court not under seal—must be filed electronically if the party is represented by an attorney.546 The attorney must file through one of the preapproved electronic filing service providers (EFSPs) listed on the Supreme Court’s website. That EFSP will then transmit the filing to the Supreme Court clerk. Once the Supreme Court clerk has reviewed the document for compliance with the filing requirements, it will file the document and send back an electronic copy bearing the clerk’s file-stamp on the front cover. If a petition for review is mistakenly filed with the court of appeals, it is deemed to have been filed that same day with the Supreme Court, and the court of appeals clerk will immediately send it to the Supreme Court clerk.547

Once a petition for review is e-filed, the petitioner must send two paper copies to the Supreme Court clerk.548 These paper copies should have a durable front and back cover that is not clear, red, black, or dark blue. It must be a printout of the electronically file-stamped document that was e-filed and returned by the clerk’s office.549 The appendix to the petition550 should be tabbed in the hard copy sent to the Court.

18-10:2.3 Contents

The cover of a petition for review must contain the following: (1) the case style and cause number;551 (2) a statement addressing...

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547 Tex. R. App. P. 53.7(g).
550 See § 18-10:2.3.
the petition to “The Supreme Court of Texas;”\textsuperscript{552} (3) the title of the document (“Petition for Review”);\textsuperscript{553} (4) the name of the party filing the petition,\textsuperscript{554} and (5) the lead attorney’s name, contact information, state bar number and email address.\textsuperscript{555} Unlike in the court of appeals, the cover of a petition for review should not state that the party is requesting oral argument. Further, the cause number can be left blank (“No. ____”) if the case has not yet been assigned a cause number in the Supreme Court.

As with briefs in the court of appeals, the rules prescribe several required sections for a petition for review.\textsuperscript{556} These sections should appear in the following order and with the following titles:

\begin{itemize}
  \item A section called “Identity of Parties and Counsel,” which lists the information about the parties and counsel on both sides of the appeal.\textsuperscript{557}
  \item A “Table of Contents,” which lists the major sections of the petition and the subject matter of each issue or group of issues.\textsuperscript{558}
  \item An “Index of Authorities,” which provides an alphabetized listing of all the authorities cited in the brief, including the specific page number on which the authority appears.\textsuperscript{559}
  \item A “Statement of the Case,” which contains: a concise description of the nature of the case; the trial court’s disposition; the designation of the trial court and the name of the trial judge the parties in the court of appeals; the district of the court of the appeals; the names of the justices who participated in the court of appeals’ decision; the author of that court’s opinion, and the author of any separate opinion; the citation for the court of
\end{itemize}

\begin{itemize}
  \item Text R. App. P. 53.1.
  \item Tex. R. App. P. 9.4(g).
  \item Tex. R. App. P. 9.4(g).
  \item Tex. R. App. P. 9.4(g).
  \item See Tex. R. App. 53.2.
  \item Tex. R. App. P. 53.2(a).
  \item Tex. R. App. P. 53.2(b).
  \item Tex. R. App. P. 53.2(c).
\end{itemize}
appeals’ opinion; and the disposition of the case by the court of appeals, including any disposition of postjudgment motions. The Statement should be supported by record references, should seldom exceed one page and should not discuss facts or make arguments.

**PRACTICE POINTER:**

Many practitioners present the statement of the case in a tabular format, although the rules do not require a tabular format to be used.

* A “Statement of Jurisdiction,” in which the petitioner explains the basis for the Supreme Court’s jurisdiction. The Statement should cite at least one of the statutory bases for the Court’s jurisdiction enumerated in Texas Government Code section 22.001.

* An “Issues Presented” section, which states all points raised for the Court’s review. An issue not presented in the petition for review is waived. A statement of an issue or point will be treated as covering every subsidiary question that is fairly included. If the error originated in the trial court, the complaint must have been preserved for appellate review and raised in the court of appeals. If the petitioner wants the Supreme Court to consider issues that were briefed in, but not decided by, the court of appeals, or if the petitioner wants the court to remand those issues

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563. See § 18-10:1.
for consideration in the first instance by the court of appeals, the petitioner can make this request in the petition, the reply, in any brief on the merits, or in a motion for rehearing. If the petitioner wishes to raise an issue but does not want to substantively discuss it in the petition for review—i.e., because of space constraints or because the petitioner wishes to save the argument for briefing on the merits—the petitioner may list the issue in the Issues Presented section as an “unbiefed” issue and omit substantive discussion of the issue from the Argument section (discussed below).

* A “Statement of Facts,” which must provide the facts—supported by citations to the record—pertinent to the issues presented. Rule 52.2(g) requires that the statement of facts “affirm that the court of appeals correctly stated the nature of the case, except in any particulars pointed out.” To comply with this requirement, many attorneys begin the statement of the facts section with an express statement that “the court of appeals correctly stated the nature of the case,” or “the court of appeals correctly stated the nature of the case, except for the particulars identified below.”

* A “Summary of the Argument,” which presents a succinct, clear and accurate statement of the arguments made in the body of the petition.

* An “Argument,” section, which is the heart of the petition and is where the petitioner must cite the record and applicable legal authorities to convince the Court to grant review. The petitioner may reserve arguments for briefing on the merits.

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570. Tex. R. App. P. 53.2(g).
571. Tex. R. App. P. 53.2(g).
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(although the petitioner risks the court denying review without ever seeing those arguments if briefing on the merits is not requested).\textsuperscript{574} The Argument should state the reasons why the Supreme Court should grant review with specific reference to the factors listed in Texas Rule of Appellate Procedure 56.1(a).\textsuperscript{575}

* A “Prayer,” which is a short conclusion stating the nature of the relief sought.\textsuperscript{576} The prayer may ask for alternative relief—e.g., reverse and render, or in the alternative, reverse and remand—but that request should be supported by argument in the body of the brief and by the issues presented.

\begin{quote}
**PRACTICE POINTER:**
The prayer customarily ends with a statement that the party also seeks all other relief to which it is entitled, but such a statement is not required under the rules.
\end{quote}

* A signature block in which the party or his attorney signs the brief.\textsuperscript{577} This signature block should include the same information as the information provided about the attorney on the front cover.

* A “Certificate of Compliance” stating the number of words in the document, if the document was prepared on a computer.\textsuperscript{578}

* Proof of service, usually in the form of a “Certificate of Service” identifying the persons on whom copies of the brief were served, their addresses, and the date and manner of service.\textsuperscript{579}

\begin{footnotes}
\textsuperscript{574} Tex. R. App. P. 53.2(i).
\textsuperscript{575} See § 18-10:2.1 (listing factors).
\textsuperscript{576} Tex. R. App. P. 53.2(j).
\textsuperscript{578} Tex. R. App. P. 9.4(i)(3).
\textsuperscript{579} Tex. R. App. P. 9.5(d), (e).
\end{footnotes}
An “Appendix” contains copies of the critical documents in the record and allows the court to examine those documents. The petition appendix must (unless voluminous or impracticable) include: (1) the judgment or other appealable order of the trial court from which relief in the court of appeals was sought; (2) the jury charge and verdict, if any, or the trial court’s findings of fact and conclusions of law, if any; (3) the opinion and judgment of the court of appeals; and (4) the text of any rule, regulation, ordinance, statute, constitutional provision, or other law on which the argument is based (excluding case law), and the text of any contract or other document that is central to the argument. The appendix may also include other documents pertinent to the issues presented. In compiling the appendix, it is important to determine whether the court of appeals issued a judgment that is separate from the court of appeals’ slip opinion and, if so, to include both the slip opinion and the separate judgment in the appendix.

18-10.2.4 Response to Petition for Review
A response to a petition for review is not required. The respondent may wish to file a response, particularly if there is a very strong argument why the Supreme Court lacks jurisdiction or otherwise should not grant review (e.g., the issues presented in the petition have been waived).

The response, if any, is due 30 days after the petition for review is filed. If the respondent decides not to file a response, there are two options. First, the respondent can simply do nothing and let the time expire to file a response. Second, the respondent can file a letter with the Supreme Court indicating that the respondent

582. Tex. R. App. P. 53.7(d).
waives its opportunity to file a response unless the Court requests one.\textsuperscript{584} The latter option will cause the case to be forwarded to the justices for consideration immediately, whereas the former option means that the justices will not consider the case until the time to file a response has expired.

\begin{center}
\textbf{PRACTICE POINTER:}
\end{center}

The Supreme Court will \textit{never} grant a petition for review unless a response has been filed or requested by the Court.\textsuperscript{585} This means the respondent \textit{does not} lose its right to respond by doing nothing or by filing an initial response waiver.\textsuperscript{586} If at least one justice votes to request a response after the case has been forwarded to chambers, the respondent will have 30 days to file it (although the respondent may seek an extension of time). If no justice requests a response or votes to take any other action, the petition will be denied.

The response must conform to the requirements for a petition for review (explained above), except that the response need not include the following:

- The list of parties and counsel, unless necessary to supplement or correct the list contained in the petition.\textsuperscript{587}
- The Statement of the Case and the Statement of Facts, unless the respondent is dissatisfied with those portions of the petition.\textsuperscript{588} (Note: In most cases, the respondent will want to include a Statement of Facts, as the petitioner’s presentation of the facts will be slanted in the petitioner’s favor.)
- The Statement of Issues, unless either (1) the respondent is dissatisfied with that portion of the petition; (2) the respondent is asserting

\textsuperscript{584} See Tex. R. App. P. 53.3.
\textsuperscript{585} Tex. R. App. P. 53.3.
\textsuperscript{586} See Tex. R. App. P. 53.3.
\textsuperscript{587} Tex. R. App. P. 53.3(a).
\textsuperscript{588} Tex. R. App. P. 53.3(b).
independent grounds for affirming the court of appeals’ judgment; or (3) the respondent is asserting grounds that establish the respondent’s right to a judgment that is less favorable to the respondent than the judgment rendered by the court of appeals but more favorable to the respondent than the judgment that might be awarded to the petitioner (e.g., a remand for a new trial rather than a rendition of judgment in favor of the petitioner).589 Notably, however, when the respondent seeks affirmance on a ground briefed in, but not decided by, the court of appeals, or when the respondent wants those issues remanded to the court of appeals or considered by the Supreme Court, the respondent need not include those issues in the response.590 The respondent may include them in the response, but can also include them for the first time in any brief on the merits, or in a motion for rehearing.591

* The Statement of Jurisdiction, unless the petition fails to assert valid grounds for jurisdiction, in which case the reasons why the Supreme Court lacks jurisdiction must be concisely stated.592

* An Appendix, except to the extent that the respondent wishes to include items not already contained in the petitioner’s appendix.593 The respondent may—but need not—include items already included in the petitioner’s appendix.594

Lastly, the response is limited to the issues raised by the petition for review plus any additional issues raised in the response’s Statement of Issues.595

589. Tex. R. App. P. 53.3(c).
595. Tex. R. App. P. 53.3(c).
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18-10:2.5 Reply to Response to Petition for Review

After a response is filed, the petitioner may (but need not) submit a reply. The Court may consider and decide the case before a reply is filed. If the petitioner elects to file a reply, it is due within 15 days after a response is filed. The petitioner may seek an extension of time “before or after” the reply is due, but should generally do so as soon as possible. The reply should have the same type of cover as the petition, and the paper copies filed with the court should be of the same color. Organizationally, the reply need not contain the introductory sections required in the petition and the response. At a minimum, the reply should typically contain an “Argument” section and a prayer for relief. It should also contain a signature block, a certificate of compliance and proof of service.

18-10:3 Direct Appeals

In addition to acquiring jurisdiction through a petition for review from a court of appeals’ judgment, the Supreme Court also has jurisdiction to hear direct appeals from district and county courts in limited circumstances. In particular, the Court has jurisdiction over a direct appeal when either: (1) the trial court’s order is one granting or denying temporary or permanent injunctive relief based on grounds of a state statute’s constitutionality; or (2) the order relates to the validity of public bonds or utility financing orders. Direct appeals are limited strictly to questions of law, not fact. Except when inconsistent with a statute or Rule 57, the procedures and rules governing appeals to the courts of appeals apply to direct appeals in the Supreme Court.

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598. Tex. R. App. P. 53.7(e).
599. See Tex. R. App. P. 53.7(f).
600. See §§ 18-10:2.3 to 18-10:2.4.
602. See § 18-10:2.3.
603. See Tex. Const. art. 5, § 3-b; Tex. Gov’t Code § 22.001(c); Tex. R. App. P. 57.2.
604. See Tex. Const. art. 5, § 3-b; Tex. Gov’t Code § 22.001(c); Tex. R. App. P. 57.2.
A direct appeal is not mandatory—that is, a party may appeal the issues enumerated above to the court of appeals, as in any other case. However, a party cannot pursue a direct appeal to the Supreme Court and a regular appeal at the same time. If the party pursues a direct appeal to the Supreme Court and the Court dismisses it, the party may file a normal appeal in the court of appeals. The notice of appeal must be filed within 10 days after the Supreme Court dismisses the direct appeal.

When a party wants to pursue a direct appeal, it must file a “Statement of Jurisdiction”—concurrently with the record—setting forth the bases for the Supreme Court’s direct appeal jurisdiction. The appellee then has 10 days to file a response. If the Supreme Court determines that it has probable jurisdiction over the case, the parties must file briefs as in any regular appeal to the intermediate courts of appeals. Even if the Court has probable jurisdiction, it may decline to accept the direct appeal if the case lacks importance, the record is inadequately developed or any opinion issued by the Court would be advisory.

18-10:4 Briefs on the Merits

Briefs on the merits are filed only if the Supreme Court requests them. The Court may ask for briefing on the merits with or without granting the petition for review. As a matter of practice, however, the Court today very rarely (if ever) grants a petition for review before first requesting and receiving briefing on the merits. Conversely, a request for briefing on the merits does not indicate that the Court has granted review. In fact, the Court grants review only in about one-third of the cases in which it requests briefing on

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the merits. Note that the practice of the Texas Supreme Court—in which the Court requests briefing on the merits before the Court decides whether to grant review—differs from practice of the U.S. Supreme Court, in which briefs on the merits are filed only after the Court has granted a petition for writ of certiorari.

Briefs on the merits are longer and allow for more detailed factual recitations and arguments than the petition-stage filings. But because briefing on the merits takes place before review has been granted, just as with the petition-stage briefing, the petitioner should focus not only on demonstrating that its position is correct but also on convincing the Court to use its discretionary jurisdiction to grant review. Likewise, the respondent should use its merits brief to convince the Court that it should not grant review or, if it does grant review, that it should grant relief favorable to the respondent.

When the Court requests briefing on the merits, the notice issued by the clerk will typically contain the schedule for the petitioner’s brief, the respondent’s brief and the petitioner’s reply brief. If the clerk’s notice does not contain this schedule, the following default schedule applies: petitioner’s opening merits brief is due 30 days after the date of the notice (not the date petitioner received the notice); respondent’s brief is due 20 days after receiving petitioner’s brief; and petitioner’s reply brief is due 15 days after receiving the respondent’s brief. On motion complying with Rule 10.5(b)—which may be filed “before or after” the brief is due—the Court may extend the time to file a brief.

The procedural and formal requirements for briefs on the merits are mostly the same as those for the petition for review, response and reply. However, there are a few differences. First, as noted above, briefs on the merits may be longer. If produced on a computer, the petitioner’s brief and the respondent’s brief may not exceed 15,000 words (excluding the portions enumerated in Rule 9.4(i));
otherwise, they must not exceed 50 pages. Each brief must contain a certificate of compliance stating the number of words in the document. Also, instead of sending two file-stamped paper copies to the Court after e-filing, the attorney must send four paper copies within three days after the brief is e-filed.

The cover and required contents of briefs on the merits are essentially identical to those for the corresponding petition-stage documents (e.g., the petitioner’s brief on the merits has the same required contents as the petition for review; the respondent’s brief on the merits has the same required contents as the response to the petition for review). As a notable exception, however, substantive arguments on an issue can no longer be “reserved” in briefing on the merits, as they can at the petition stage. Also, the petitioner’s argument must be confined to the issues raised in the petition for review—the petitioner cannot raise new issues in its brief that were not included in the petition. Correspondingly, the respondent’s argument is confined to the points raised in the petitioner’s brief and to any issues asserted in the respondent’s statement of issues.

**PRACTICE POINTER:**
The Court normally requests briefs on the merits before the Court decides to grant review. Thus, the brief on the merits should be written with the dual aim of (1) convincing the Court to grant or deny review, and (2) convincing the Court of the merits of your client’s position.

**18-10:5 Appellate Record**
The Supreme Court reviews cases using the same appellate record that was presented to the court of appeals. The record is not sent automatically to the Supreme Court when a petition for review is

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627 Compare Tex. R. App. P. 53.2(i) (petition for review), with 55.2(i) (briefing on the merits).
628 Tex. R. App. P. 55.2.
629 Tex. R. App. P. 55.3(e).
filed; instead, the Court must request it. This request can occur any time before or after review is granted, but usually, the record is not requested until the Court requests briefing on the merits. It is the court of appeals clerk’s responsibility to transmit the record to the Supreme Court. The petitioner must pay for the cost of mailing or shipping the record. Upon receiving the record, the Supreme Court clerk must file it and enter the filing on the docket.

In direct appeals to the Supreme Court, the preparation and filing of the record should be handled per the rules for normal appeals to the courts of appeals.

**18-10:6 Oral Argument and Submission**

If the Supreme Court grants a petition for review, it will either set the case for oral argument or submit the case without argument. If the Court wants oral argument, it will issue a notice setting the date and time of argument and the time allotted to each side. Typically, each side is allowed 20 minutes to argue. The purpose of oral argument is to “emphasize and clarify the written arguments in the briefs;” counsel should assume that all Justices have read the briefs and should be prepared to respond to the Justices’ questions.

Generally, only one counsel for each side should argue. Except with leave of court, no more than two attorneys from any side may argue, and only one attorney may argue rebuttal. An amicus curiae generally does not have the right to argue, unless a party

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635. Tex. R. App. P. 54.3.
637. See § 18-9-4.
consents to share its argument time with the amicus curiae and obtains leave of Court to share the time.\textsuperscript{643}

\textbf{18-10:7 Opinion and Judgment}

Typically, the Supreme Court issues a written opinion and a judgment concurrently. The opinion is the document that contains the reasoning supporting the Court’s decision.\textsuperscript{644} The judgment is a short document that pronounces the disposition of the case and informs the trial court, the court of appeals and the parties of that disposition.\textsuperscript{645}

All Supreme Court opinions are published and have precedential value.\textsuperscript{646} There are two types of Supreme Court opinions: signed opinions and per curiam opinions. A signed opinion will contain the name of the Justice who authored it and a list of the other participating Justices. A per curiam opinion is issued without the signature of the authoring Justice, but contains the names of all participating Justices. Typically (though not always), per curiam opinions are issued in cases submitted without oral argument,\textsuperscript{647} whereas signed opinions are issued in argued cases.\textsuperscript{648}

There are six possible judgments the Supreme Court may enter on the merits:

\begin{enumerate}
\item affirm the lower court’s judgment in whole or in part;
\item modify the lower court’s judgment and affirm it as modified;
\item reverse the lower court’s judgment in whole or in part and render the judgment that the lower court should have rendered;
\item reverse the lower court’s judgment and remand the case for further proceedings;
\end{enumerate}

\begin{footnotes}
\textsuperscript{643} Tex. R. App. P. 59.5.  \\
\textsuperscript{644} See Tex. R. App. P. 63.  \\
\textsuperscript{645} See Tex. R. App. P. 60.2.  \\
\textsuperscript{646} See Tex. R. App. P. 63.  \\
\textsuperscript{647} See Tex. R. App. P. 59.1.  \\
\textsuperscript{648} See Tex. R. App. P. 59.2.  \\
\end{footnotes}
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(e) vacate the judgments of the lower courts and dismiss the case; or
(f) vacate the lower court’s judgment and remand the case for further proceedings in light of changes in the law.  

When the Supreme Court reverses the court of appeals’ judgment, it may “in the interest of justice” remand for further proceedings, even where rendition of judgment would otherwise be appropriate.

In addition, if the Court grants review but later decides that it should not have done so, it may dismiss the petition as improvidently granted. The effect of this decision is the same as if review had never been granted.

18-10:8 Motions for Rehearing

After the Supreme Court issues its judgment or denies a petition for review, a party may file a motion for rehearing. The motion for rehearing asks the Court to reconsider its decision in the case. The motion must specify the points relied upon for rehearing.

Motions for rehearing and responses to those motions must be e-filed if the party is represented by an attorney. They are limited to 4,500 words if produced on a computer (excluding the sections enumerated in Rule 9.4(i)), or 15 pages if not. If produced on a computer, a motion of response must contain a certificate of compliance stating the number of words in the document.

Generally, a motion for rehearing must be filed within 15 days after the judgment or the order disposing of the petition for review. However, in “exceptional” cases, the Court may shorten this time or deny the right to file a motion for rehearing altogether. Also,
a party may file a motion for extension of time to file a motion for rehearing, if that motion complies with Rule 10.5(b) and is filed within 15 days after the motion for rehearing would have been due.\textsuperscript{659}

A response to a motion for rehearing may be filed but is not required unless the Court requests one.\textsuperscript{660} A motion for rehearing will not be granted unless a response has been filed or requested, except in “exceptional cases.”\textsuperscript{661}

After the Court has disposed of a motion for rehearing, it will not accept a second motion for rehearing unless the Court modifies its judgment, vacates its judgment and renders a new one or issues a different opinion.\textsuperscript{662} If the Court modifies only its opinion but not the judgment, it will usually deny a second motion for rehearing unless the new opinion is substantially different from the original.\textsuperscript{663}

\textbf{18-10:9 Mandate}

If the Supreme Court denies review, the court of appeals issues a mandate on its judgment under the timetables discussed above in the Appeals chapter.\textsuperscript{664} If the Supreme Court grants review and issues a judgment, the timing for the Court’s mandate depends on what happens after the judgment. If no motion for rehearing is filed, the Supreme Court clerk will issue the mandate 10 days after the deadline to file for an extension of time to file a motion for rehearing.\textsuperscript{665} This will typically be 40 days after the Court issues its judgment.\textsuperscript{666} If a motion for rehearing was filed, the mandate will issue after the Court overrules the motion if the Court does not change its opinion or judgment.\textsuperscript{667}

\begin{itemize}
  \item \textsuperscript{659} Tex. R. App. P. 64.5.
  \item \textsuperscript{660} Tex. R. App. P. 64.3.
  \item \textsuperscript{661} Tex. R. App. P. 64.3.
  \item \textsuperscript{662} Tex. R. App. P. 64.4.
  \item \textsuperscript{663} Tex. R. App. P. 64.4 cmt.
  \item \textsuperscript{664} See § 18-9:13.
  \item \textsuperscript{665} Tex. R. App. P. 18.1(b).
  \item \textsuperscript{666} See Tex. R. App. P. 64.1 (15 days to file motion for rehearing), Tex. R. App. P. 64.5 (15 days after motion for rehearing was due to file motion for extension), Tex. R. App. P. 18.1(b) (mandate issues after 10 additional days).
  \item \textsuperscript{667} See Tex. R. App. P. 64.4.
\end{itemize}
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If the mandate is not stayed or recalled, the judgment creditor is entitled to prompt execution according to the terms of the Court’s mandate.\textsuperscript{668} If the Supreme Court renders judgment, no further action is required by the lower courts, although the lower courts must enter the mandate on their docket once they receive it.\textsuperscript{669} If the proceedings ultimately continue in the trial court (i.e., on remand), the trial court clerk must enforce the judgment of the Supreme Court as in any other case.\textsuperscript{670}

\textbf{18-10:10  Supreme Court Timetable—Petition for Review}

The table below summarizes the deadlines pertinent to Supreme Court proceedings on a petition for review.

<table>
<thead>
<tr>
<th>Action(s)</th>
<th>Deadline(s)</th>
<th>Rule(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Petitioner files petition for review</td>
<td>45 days after court of appeals rendered judgment, if no timely filed motion for rehearing or en banc reconsideration \textit{or} 45 days after court of appeals ruled on last timely filed motion for rehearing or en banc reconsideration.</td>
<td>Tex. R. App. P. 53.2, 53.7</td>
</tr>
<tr>
<td>(Optional) Petitioner files motion for extension of time to file petition for review</td>
<td>15 days after petition for review would have been due</td>
<td>Tex. R. App. P. 10.5(b), 53.7(f)</td>
</tr>
</tbody>
</table>

\textsuperscript{668} See \textit{Gulf, Colo. & Santa Fe Ry. v. City of Beaumont}, 373 S.W.2d 741, 744 (Tex. 1964).
\textsuperscript{669} Tex. R. App. P. 18.4.
\textsuperscript{670} Tex. R. App. P. 65.2.
<table>
<thead>
<tr>
<th>Action(s)</th>
<th>Deadline(s)</th>
<th>Rule(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Other parties file petitions for review, if any</td>
<td>Same deadline as for the initial petition for review</td>
<td>Tex. R. App. P. 53.2, 53.7(c)</td>
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<td></td>
<td>or</td>
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<tr>
<td></td>
<td>30 days after the first petition for review was filed (if this date is later than original deadline)</td>
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</tr>
<tr>
<td>(Optional) Respondent files response to petition for review or letter waiving initial right to respond</td>
<td>30 days after petition for review was filed</td>
<td>Tex. R. App. P. 53.3, 53.7(d)</td>
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<td>or</td>
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<td></td>
<td>30 days after Court requests a response (if respondent initially did not file response or filed an initial waiver of response)</td>
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</tr>
<tr>
<td>(Optional) Petitioner files reply to response to petition for review</td>
<td>15 days after response was filed</td>
<td>Tex. R. App. P. 53.7(e)</td>
</tr>
<tr>
<td>Petitioner files brief on the merits, if requested by Court</td>
<td>On date specified by Court</td>
<td>Tex. R. App. P. 55.7</td>
</tr>
<tr>
<td></td>
<td>or</td>
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<td>30 days after briefing on the merits is requested, if the Court does not specify a briefing schedule</td>
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(Continued)
## Chapter 18  Preservation of Error – Appeal Tactics

<table>
<thead>
<tr>
<th>Action(s)</th>
<th>Deadline(s)</th>
<th>Rule(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Respondent files brief on the merits</td>
<td>On date specified by Court or 20 days after petitioner’s brief was filed</td>
<td>Tex. R. App. P. 55.7</td>
</tr>
<tr>
<td>(Optional) Petitioner files reply brief on the merits</td>
<td>On date specified by Court or 15 days after respondent’s brief was filed</td>
<td>Tex. R. App. P. 55.7</td>
</tr>
<tr>
<td>Court denies the petition for review</td>
<td>Court’s discretion</td>
<td>Tex. R. App. P. 56.1(b), (c)</td>
</tr>
<tr>
<td>Court grants petition for review and files notice of oral argument, if any</td>
<td>Court’s discretion</td>
<td>Tex. R. App. P. 56.1(a), 59.1, 59.2, 60, 63</td>
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<td></td>
<td>Or</td>
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<tr>
<td></td>
<td>Court grants petition and later issues per curiam opinion without argument</td>
<td></td>
</tr>
<tr>
<td>Case is argued and submitted</td>
<td>On date specified by Court</td>
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</tr>
<tr>
<td>Action(s)</td>
<td>Deadline(s)</td>
<td>Rule(s)</td>
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<tr>
<td>Court issues opinion after argument and judgment</td>
<td>Court’s discretion</td>
<td>Tex. R. App. P. 59</td>
</tr>
<tr>
<td>Party files motion for rehearing</td>
<td>15 days after petition for review is disposed of</td>
<td>Tex. R. App. P. 64.1</td>
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<td>or</td>
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<td></td>
<td>15 days after judgment is issued (if petition for review was granted)</td>
<td></td>
</tr>
<tr>
<td>(Optional) Party files motion for extension of time to file motion for</td>
<td>15 days after motion for rehearing was due</td>
<td>Tex. R. App. P. 10.5(b), 64.5</td>
</tr>
<tr>
<td>rehearing</td>
<td></td>
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</tr>
<tr>
<td>(Optional) Opposing party files response to motion for rehearing</td>
<td>Court’s discretion (unnecessary to file response unless Court requests one—Court will not grant a motion for rehearing without first requesting or receiving a response)</td>
<td>Tex. R. App. P. 64.3</td>
</tr>
<tr>
<td>Court rules on motion for rehearing</td>
<td>Court’s discretion</td>
<td>Tex. R. App. P. 64.3</td>
</tr>
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<td></td>
<td>or</td>
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<tr>
<td></td>
<td>Motion for rehearing overruled by operation of law if Court does not act on it within 180 days after its filing</td>
<td>Tex. Const. art. 5, § 31(d)</td>
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</table>

(Continued)
Chapter 18 Preservation of Error – Appeal Tactics

<table>
<thead>
<tr>
<th>Action(s)</th>
<th>Deadline(s)</th>
<th>Rule(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supreme Court clerk issues mandate</td>
<td>10 days after deadline for motion for extension of time to file motion for rehearing</td>
<td>Tex. R. App. P. 18.1(b)</td>
</tr>
</tbody>
</table>

18-11 ORIGINAL PROCEEDINGS

18-11:1 Overview

Three forms of original proceedings are relevant in business litigation—a writ of mandamus, a writ of prohibition and a writ of injunction. A petition for writ of mandamus is the most commonly used original proceeding in Texas, but writs of injunction and prohibition may be relevant in business litigation.

18-11:1.1 Writ of Mandamus

A writ of mandamus allows a litigant to seek an order from a court that commands a lower court, tribunal or public officer either to do some act or to refrain from doing some act. Traditionally, the writ of mandamus issued to compel a public official to perform some ministerial, nondiscretionary function as imposed by law. However, the writ of mandamus is now often used as a form of interlocutory appeal (although, strictly speaking, it is not an appeal) when the trial court or court of appeals exceeds its authority or commits a clear abuse of discretion.

Mandamus is a non-equitable remedy issued largely on equitable principles; it is within the discretion of the court and is not issued as a matter of right. It is an extraordinary remedy that is granted “only when the trial court has clearly abused its discretion and the relator [that is, the party seeking relief through the writ.] lacks an adequate appellate remedy.” This is a heavy burden placed on the relator.

671 See generally Tex. R. App. P. 52.
673 Rivercenter Assoc. V. Rivera, 858 S.W.2d 366, 367 (Tex. 1993).
675 Lutheran Social Serv., Inc. v. Meyers, 460 S.W.2d 887, 889 (Tex. 1970).
18-11:1.1a Clear Abuse of Discretion

A relator must first demonstrate that there has been a clear abuse of discretion on the part of the respondent. A clear abuse of discretion is an action “so arbitrary and unreasonable as to amount to a clear and prejudicial error of law.” This test asks whether the respondent “acted without reference to any guiding rules or principles” or “whether the act was arbitrary or unreasonable.” That the respondent (usually the trial court) may have reached an outcome different from the appellate court is not, alone, sufficient to suggest a clear abuse of discretion. However, a respondent has no discretion to misinterpret or misapply the law, and a clear failure to analyze or apply the law correctly—even if the law is unsettled—constitutes an abuse of discretion reversible by a writ of mandamus.

18-11:1.1b No Adequate Remedy by Appeal

The relator must also demonstrate that it does not have any other adequate remedy at law. If a relator has an adequate remedy by appeal, a writ of mandamus will not issue. Whether a potential remedy through appeal is “adequate” depends on whether the mandamus benefits outweigh the detriments; it is a careful balancing of jurisprudential considerations, which implicate public and private interests. It must be stressed, though, that this

676. Johnson v. Fourth Ct. of Appeals, 700 S.W.2d 916, 917 (Tex. 1985).
682. In re Prudential Ins. Co. of Am., 148 S.W.3d 124, 135–36 (Tex. 2004). (“Mandamus review of incidental, interlocutory rulings by the trial courts unduly interferes with trial court proceedings, distracts appellate court attention to issues that are unimportant both to the ultimate disposition of the case at hand and to the uniform development of the law, and adds unproductively to the expense and delay of civil litigation. Mandamus review of significant rulings in exceptional cases may be essential to preserve important substantive and procedural rights from impairment or loss, allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments, and spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.”).
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weighing is not abstract or formulaic; rather, “it is practical and prudential.”

18-11:1.1c  Special Situations Where Mandamus Is Used in Business Litigation

Resisting Overly Broad Orders. Mandamus can be used to seek review of a trial court’s overly broad discovery order. “[A]n order that compels overly broad discovery well outside the bounds of proper discovery is an abuse of discretion for which mandamus is the proper remedy.” Thus, mandamus can be employed to limit discovery requirements of broad, likely irrelevant information.

Protecting Privilege. When a trial court orders discovery that a party thinks requires the disclosure of privileged information (such as trade secrets or attorney-client privileged documents), there will be no adequate remedy on appeal. Once the privileged documents are disclosed, the purpose of the privilege is defeated. Therefore, the party can file a petition for writ of mandamus in order to correct the trial court’s error.

Enforcing Contractual Arbitration, Forum Selection or Jury Waiver Clauses. Mandamus is also a viable tool when the trial court denies a motion to compel arbitration. Appeal is not a viable remedy in that situation; if a party must fully litigate a dispute in order to appeal the denial of the motion to compel arbitration, the whole purpose of arbitration is lost. The same reasoning supports the use of mandamus as a tool to ensure that a forum selection or jury waiver clause is enforced.

684. Dillard Dep’t Stores, Inc. v. Hall, 909 S.W.2d 491, 492 (Tex. 1995) (citation omitted).
685. See, e.g., In re Deere & Co., 299 S.W.3d 819 (Tex. 2009); In re Graco Children’s Prods., Inc., 210 S.W.3d 598 (Tex. 2006); In re CSX Corp., 124 S.W.3d 149 (Tex. 2003).
687. See e.g., In re Labatt Food Serv., L.P., 279 S.W.3d 640 (Tex. 2009); In re Merrill Lunch Trust Co. FSB, 235 S.W.3d 185 (Tex. 2007); In re FirstMerit Bank, N.A., 52 S.W.3d 749 (Tex. 2001).
PRACTICE POINTER:
“Never say never”—never assume that a matter might not be subject to mandamus review. Under In re Prudential Ins. Co. of Am.,689 if the issue is important enough, then the Court might be willing to hold that the mandamus requirement of “no adequate remedy by appeal” has been satisfied.

18-11:1.2 Writ of Prohibition
The second form of original proceeding is a writ of prohibition. As opposed to a writ of mandamus, which commands a lower court to do some act, a writ of prohibition orders the lower court to refrain from doing something.690 The general purpose of the writ is to enable a higher court to protect and enforce its jurisdiction and judgment from intrusion or interference by a lower court.691 A writ of prohibition is not an independent proceeding that grants the appellate court jurisdiction; rather, it requires the appellate court’s jurisdiction to have been invoked on other appropriate grounds.692 Like mandamus, prohibition is not available if the petitioner has another remedy available at law.693

18-11:1.3 Writ of Injunction
The third type of original proceeding is a writ of injunction. A writ of injunction allows an appellate court to protect or enforce its subject matter jurisdiction over an appeal by enjoining or limiting conduct in a court of inferior jurisdiction.694 As with a writ of prohibition, the appellate court must have actual jurisdiction over a proceeding in order to issue a writ of injunction.695 While mandamus, prohibition and injunction all sound similar, there are distinctions between them. A writ of injunction, for

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690 Tilton v. Marshall, 925 S.W.2d 672, 676 n.4 (Tex. 1996).
692 Texas Employers’ Ins. Ass’n v. Kirby, 152 S.W.2d 1073, 1073 (Tex. 1941).
695 In re Wyatt, 110 S.W.3d 511 (Tex. App.—Waco 2003, orig. proceeding).

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instance, prevents a litigant from committing future wrongs, but a writ of mandamus concerns present problems caused by past mistake. Meanwhile, a writ of injunction is issued against a litigant while a writ of prohibition is issued against a lower court. And a writ of prohibition tells a lower court not to do something, whereas a writ of mandamus compels a lower court to do something; they are similar, though, in that both a writ of prohibition and a writ of mandamus may correct an unlawful assumption of jurisdiction by the lower court.

18-11:2 Procedure

18-11:2.1 Parties to an Original Proceeding
The party seeking relief is the “relator.” The person against whom relief is sought—often the trial judge when original proceedings are invoked during litigation—is the “respondent.” And any person who would be directly affected by the sought relief is considered a “real party in interest;” real parties in interest are parties to the case.

18-11:2.2 The Original Proceeding Action
An action for extraordinary relief is commenced by filing a petition with the clerk of the appropriate court, with the case styled “In re [name of relator].” The Texas Rules require the writ petition to include particular information in a particular order. A response to the petition is not mandatory, but any party (respondent or real party in interest) may file one. The response must contain most of the information required by Rule 52.3, with some exceptions. The court cannot grant relief on the petition before a response has been filed or requested by the court. And while the petitioner can file a reply to the response, the court can

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700. See Tex. R. App. P. 52.3.
702. See Tex. R. App. P. 52.4(a)-(e).
grant relief before the reply is filed. The reply cannot address any new issue that the relator failed to include in the petition.

18-11:2.3 Preparation of the Mandamus Record

The Texas Rules of Appellate Procedure require the relator to file a record with a petition for writ of mandamus. The record must include a certified or sworn copy of every document material to the relator’s claim that was filed in the underlying proceeding as well as an authenticated transcript of any relevant testimony from the underlying proceeding (including exhibits) or a statement that no testimony was adduced that is relevant to the matter at issue in the petition. This record can be supplemented by the relator or any other party to the proceeding. Any party filing materials in the record—whether the original record or supplementation—must serve those materials on every party (except materials that have been provided as part of the record in another original appellate proceeding), including an index that lists the materials with a description that identifies them.

18-11:2.4 Temporary Relief

After the relator has filed a petition for an original writ, the relator can also seek emergency relief by filing a motion for temporary relief. A motion for temporary relief allows the appellate court to stay underlying proceedings or provide other relief necessary to maintain the status quo for the dispute raised in the petition. Rule 52.10 requires the relator to “notify or make a diligent effort to notify all parties by expedited means (such as by telephone or fax)” that temporary relief has been sought, and the relator must certify to the court that it has complied with the notification requirements.

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504. Tex. R. App. P. 52.5.
506. Tex. R. App. P. 52.7(a).
507. Tex. R. App. P. 52.7(b).
508. Tex. R. App. P. 52.7(c).
511. Tex. R. App. P. 52.10(a).
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The court can grant any just relief, without notice, either on a party’s motion or the court’s own initiative.712 The court can require a party to put up a bond that protects the party who will be affected by the temporary relief.713 If the court grants temporary relief, the order granting such relief is valid until the case is finally decided, barring an order by the court vacating or modifying the temporary relief.714 At any time, a party can file a motion asking the appellate court to reconsider its grant of temporary relief.715

18-11:2.5 Court’s Ruling on a Petition for Extraordinary Relief

Before the court makes a final ruling, it can order interim action, including requesting a response from the respondent, ordering full briefing (in the Supreme Court) and setting oral argument.716 The court can grant relief without taking any of these steps, though. If the court grants relief, it makes an appropriate order and must hand down an opinion.717 If the court denies the petition, it need not hand down an opinion (but can).718 Any party can move for rehearing within 15 days after the final order is rendered, and that party must state with clarity the points relied on for rehearing.719 No response is required, but the court cannot grant rehearing without receiving a response or requesting one.720

712. Tex. R. App. P. 52.10(b).
713. Tex. R. App. P. 52.10(b).
714. Tex. R. App. P. 52.10(b).
715. Tex. R. App. P. 52.10(c).
716. Tex. R. App. P. 52.8(b).
717. Tex. R. App. P. 52.8(c), (d).
718. Tex. R. App. P. 52.8(d).