

# Anatomy of an Appeal

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**TABLE OF CONTENTS**

**Page (s)**

I.	ANATOMY OF AN APPEAL IN STATE COURTS OF TEXAS .....	1
A.	Perfecting an Appeal .....	1
1.	What is perfection of an appeal? .....	1
2.	Is the Judgment or Order Appealable? .....	1
3.	The Notice of Appeal .....	1
a.	What Must be Filed? .....	1
b.	Where is Notice of Appeal Filed? .....	1
c.	Notice of Appeal Does Not – By Itself – Suspend Enforcement of Final Judgment .....	2
d.	Who Should File a Notice of Appeal? .....	2
e.	What Must a Notice of Appeal Contain? .....	2
4.	The Docketing Statement .....	2
5.	Deadlines for Filing Notice of Appeal .....	2
B.	The Record on Appeal .....	3
1.	Trial Court Clerk and Trial Court Reporter Responsible for Preparing, Certifying, and Filing (With Court of Appeals) the Record on Appeal – Consisting of “Clerk’s Record” and “Reporter’s Record” .....	3
2.	Parties Should Ensure Contents of the Record on Appeal Are Complete .....	4
C.	The Briefs .....	4
1.	Deadlines for Filing Briefs .....	4
2.	Required Content and Form of Briefs .....	4
D.	Submission and Oral Argument .....	5
E.	Opinion and Judgment of the Court of Appeals .....	6
F.	Motion for Rehearing & Petition for Review .....	6
G.	Mandate .....	7

**TABLE OF AUTHORITY**

**Page(s)**

*Foster v. Williams*,  
74 S.W.3d 200 (Tex. App.—Texarkana 2002, pet. denied)..... 1

*Lehmann v. Har-Con Corp.*,  
39 S.W.3d 191 (Tex. 2001)..... 1

*S&A Restaurant Corp. v. Leal*,  
892 S.W.2d 855 (Tex. 1995)..... 2

*Songer v. Archer*,  
23 S.W.3d 139 (Tex. App.—Texarkana 2000, no pet.) ..... 2

*Texas Parks & Wildlife Dept. v. Dearing*,  
240 S.W.3d 330 (Tex. App.—Austin 2007, pet. denied)..... 7

*Utley v. Marathon Oil Co.*,  
958 S.W.2d 960 (Tex. App.—Waco 1998, no writ) ..... 3

*Wells v. Breton Mills Apts.*,  
85 S.W.3d 824 (Tex. App.—Amarillo 2001, no pet.)..... 1

**Statutes**

TEX. CIV. PRAC. & REM. CODE § 6.001..... 2

TEX. CIV. PRAC. & REM. CODE § 51.014..... 1

TEX. R. APP. P. 9.4(i) ..... 5

18.1..... 7

18.4..... 7

20.1(a) ..... 2

24..... 2, 3

25.1(a) ..... 1, 2

25.1(b) ..... 1, 2

25.1(c) ..... 2

25.1(e) ..... 2

25.1(d)(1-5) ..... 2

26.1..... 2

26.1(a) ..... 2

26.1(b) ..... 2

26.1(c) ..... 2

26.3..... 3

28.1(b) ..... 2

32.1..... 2

32.4..... 2

34.1..... 3

34.5..... 3, 4

34.6..... 3, 4

34.6(b) ..... 4

34.6(c) ..... 4

34.6(d) ..... 4

35.1..... 2, 3

35.1(a) ..... 3

35.1(b) ..... 4

TEX. R. APP. P. 35.3.....	3
38.....	5
38.1(e).....	2
38.2.....	2
38.4.....	5
38.6(a).....	4
38.6(b).....	4
38.6(c).....	4
38.6(d).....	4
38.8.....	4
38.9(a).....	5
39.1.....	5
41.1.....	5, 6
42.3(c).....	2
43.1.....	6
43.2(a).....	6
43.4.....	6
43.5.....	6
47.2(a).....	6
47.4.....	6
49.1.....	6
49.9.....	6
49.10.....	6
53.....	1
53.7.....	7
TEX. R. CIV. P. 306a (1) 329b(a).....	2, 3

## I. ANATOMY OF AN APPEAL IN STATE COURTS OF TEXAS<sup>1</sup>

### A. Perfecting an Appeal

#### 1. What is perfection of an appeal?

It is the process of invoking the jurisdiction of the appellate court over the parties to the trial court's case. TEX. R. APP. P. 25.1(b).<sup>2</sup> An appeal becomes "perfected" when the party appealing – the "appellant" – files a timely and proper notice of appeal. TEX. R. APP. P. 25.1(a). The filing of a notice of appeal by any party to the case invokes the appellate court's jurisdiction over all parties to the trial court's judgment or order from which the appeal is being taken. TEX. R. APP. P. 25.1(b). The "appellee" is the party responding to the appeal.

#### 2. Is the Judgment or Order Appealable?

As a general rule, only final orders or judgments can be appealed. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001). An order or judgment is "final for purposes of an appeal [if it] actually disposes of every pending claim and party or [] clearly and unequivocally states that it finally disposes of all claims and all parties." *Id.* at 205.

<sup>1</sup> This paper discusses an appeal from trial courts in Texas to Texas's intermediate courts of appeals, of which there are fourteen. While appeals from *federal* trial courts to the United States Courts of Appeals follow generally the appellate process in Texas state courts, there are important differences that are beyond the purview of this paper. Additionally, this paper does not discuss original proceedings (mandamus) or, in much detail, the process of appeal from intermediate courts of appeals to the Supreme Court of Texas, which involves petition for discretionary review to the supreme court. See TEX. R. APP. P. 53.

<sup>2</sup> Generally speaking, the "Texas Rules of Civil Procedure" (TEX. R. CIV. P.) apply to proceedings before trial courts in Texas, while the "Texas Rules of Appellate Procedure" (TEX. R. APP. P.) apply to matters before the appellate courts in Texas.

That general rule is subject, however, to exceptions for certain appealable interlocutory orders that the Texas Legislature has seen fit to make appealable. See, e.g., TEX. CIV. PRAC. & REM. CODE § 51.014 (making certain interlocutory orders appealable, including orders: (a) appointing a receiver or trustee, (b) certifying or refusing to certify a class in a class action suit, (c) granting or refusing to grant a temporary injunction, (d) denying a plea of immunity by an officer or employee of the government, (e) the denial of a motion for summary judgment based on the defense of the constitutional right of free speech or free press, (f) the grant or denial of the special appearance of a defendant, (g) the grant or denial of a plea to the jurisdiction by a governmental unit, (h) the denial of a motion to dismiss by a physician or other health care provider based on the failure of a claimant to satisfy the expert report requirement in medical malpractice cases, and (i) where the trial court has certified the order as having "a controlling question of law as to which there is substantial ground for difference of opinion . . . that may materially advance the ultimate termination of the litigation" (this was just amended by the Texas Legislature to dispense with the requirement that the parties agree to the order, bringing the State law in line with a similar federal provision).

#### 3. The Notice of Appeal

##### a. **What Must be Filed?**

All appeals in Texas courts are perfected by the filing of a written notice of appeal. TEX. R. APP. P. 25.1(a); *Wells v. Breton Mills Apts.*, 85 S.W.3d 824, 832 (Tex. App.—Amarillo 2001, no pet.). Filing of the notice of appeal invokes the appellate court's jurisdiction over all parties to the trial court's judgment from which the appeal was taken. TEX. R. APP. P. 25.1(b).

##### b. **Where is Notice of Appeal Filed?**

The notice of appeal is filed with the trial court clerk. TEX. R. APP. P. 25.1(a); *Foster v. Williams*, 74 S.W.3d 200, 202 (Tex. App.—Texarkana 2002, pet. denied). But if it's mistakenly filed with the court of appeals, it will

be “deemed” filed with the trial court clerk. *Id.* Also, the notice of appeal must be served on all parties to the trial court’s order or judgment and filed with the clerk of the court of appeals, too. TEX. R. APP. P. 25.1(e).

**c. Notice of Appeal Does Not – By Itself – Suspend Enforcement of Final Judgment**

The filing of a notice of appeal does not, by itself, suspend enforcement of a final judgment – the judgment remains enforceable unless it is superseded pursuant to Rule 24 of the Texas Rules of Civil Procedure. TEX. R. APP. P. 24.

**d. Who Should File a Notice of Appeal?**

Any party who wants to alter the trial court’s judgment or order should file a timely notice of appeal, including an appellee. TEX. R. APP. P. 25.1(c).

**e. What Must a Notice of Appeal Contain?**

The notice of appeal must (1) identify the trial court and state the case’s trial court number and style, (2) state the date the judgment or order appealed from was signed by the judge, (3) state the name of the party who desires to appeal, and (4) state the name of each party filing the notice of appeal. TEX. R. APP. P. 25.1(d)(1-5). As a general rule, the notice of appeal does not have to state or specify the grounds for the appeal. *Songer v. Archer*, 23 S.W.3d 139, 143 (Tex. App.—Texarkana 2000, no pet.). The party who is making the appeal need not state the issue for its appeal until its first brief is filed with the court of appeals. TEX. R. APP. P. 38.1(e).

**4. The Docketing Statement**

Though it’s not required to perfect an appeal, the rules of appellate procedure require the appellant to file a docketing statement in the court of appeals (unlike the notice of appeal, which is filed in the trial court). TEX. R. APP. P. 32.4. A docketing statement is an administrative tool which, if not filed, could result in dismissal of an appeal. TEX. R. APP. P. 42.3(c). It is required to contain information about the parties and their attorneys, the court reporter, a

statement about the general nature of the case, whether the trial record’s been requested, whether the appellant is indigent,<sup>3</sup> whether a supersedeas bond will be filed, and any other information required by the court of appeals. TEX. R. APP. P. 32.1.

**5. Deadlines for Filing Notice of Appeal**

Generally speaking, with final judgments or other appealable orders, the clock starts ticking for appellate deadlines the day the trial court signs the final judgment or order. TEX. R. CIV. P. 306a(1), 329b(a); TEX. R. APP. P. 26.1, 35.1. The rules tie the deadlines to the signing of the judgment or order and not to the “rendition.”<sup>4</sup> If no post-judgment motions have been filed, the notice of appeal “must be filed within 30 days after the judgment is signed.” TEX. R. APP. P. 26.1. But there are exceptions to this general rule.

If a timely post-judgment motion is filed, which includes a motion for new trial, motion to modify the judgment, motion to reinstate a case dismissed for want of prosecution, or a request for findings of fact and conclusions of law, a party has up to 90 days after the judgment is signed to file its notice of appeal. TEX. R. APP. P. 26.1(a). This enlargement of time does not apply to accelerated appeals, however. TEX. R. APP. P. 28.1(b).

<sup>3</sup> The filing fee is currently \$175 for an appeal to Texas’s intermediate courts of appeals, and \$125 for the filing of a petition for review with the Texas Supreme Court (plus \$75 additional fee if the petition is granted). Appellants who can establish their indigence are not required to pay filing fees in advance, and most governmental entities are not required to pay these filing fees in advance. TEX. R. APP. P. 20.1(a); TEX. CIV. PRAC. & REM. CODE § 6.001 *et seq.*

<sup>4</sup> As distinguished from when a judge actually signs the judgment or order, a judge “renders” a judgment when the judge first declares the decision of law and officially announces it—which may be done orally in open court or by memorandum filed with the clerk. *S&A Restaurant Corp. v. Leal*, 892 S.W.2d 855, 857 (Tex. 1995) (per curiam).

For accelerated or interlocutory appeals, the notice of appeal is required to be filed within 20 days of the signing of the interlocutory order. TEX. R. APP. P. 26.1(b).

The rules of appellate procedure allow a “restricted appeal” for parties that: (1) did not participate in person or by counsel in the hearing that resulted in the judgment complained of; (2) did not file a timely post-judgment motion or request for findings of fact and conclusions of law; and (3) did not file a notice of appeal within 30 days of the signing of the judgment. TEX. R. APP. P. 30. These restricted appeals – asserting there is error “on the face of the record” – must be perfected by filing a notice of appeal within 6 months after the judgment or order is signed. TEX. R. APP. P. 26.1(c).

A party may move for an extension of time to file a notice of appeal, even after the deadline for doing so has expired. TEX. R. APP. P. 26.3. The court of appeals can grant such a request for an extension of time if: (a) the notice of appeal is filed with the trial court clerk within 15 days of the deadline for filing a notice of appeal; and (b) a motion for an extension of time is filed in the court of appeals within the same 15-day period, reasonably explaining the need for an extension of time. TEX. R. APP. P. 26.3.

Additionally, the deadlines can be extended where a party did not receive notice or acquire actual knowledge of the judgment within 20 days after it was signed – under a process set forth in Rule 306a. TEX. R. CIV. P. 306a.

## **B. The Record on Appeal**

After an appeal has been timely perfected by filing a notice of appeal, the record must be properly requested so the appellate court will have the documents and evidence it needs to decide the appeal. The record on appeal will always include the trial court clerk’s record, including the pleadings, motions, orders, and other documents filed with the clerk. TEX. R. APP. P. 34.1, 34.5. In addition to the trial court clerk’s record, the record on appeal also includes the reporter’s record transcripts of the hearings, trial, or other proceedings at the trial court

(along with exhibits that were introduced), which would include transcribed recordings of arguments of counsel, testimony of witnesses, statements made by the trial judge, etc. TEX. R. APP. P. 34.1, 34.6.

### 1. Trial Court Clerk and Trial Court Reporter Responsible for Preparing, Certifying, and Filing (With Court of Appeals) the Record on Appeal – Consisting of “Clerk’s Record” and “Reporter’s Record”

The parties to the appeal do not have the responsibility for actually filing the trial court clerk’s record and the reporter’s record transcripts. The trial court clerk is responsible for “preparing, certifying, and timely filing the clerk’s record,” upon satisfaction of certain conditions, including that the appellant has paid or arranged to pay for preparation of the clerk’s record. TEX. R. APP. P. 35.3. Similarly, if a reporter’s record is necessary and is properly requested, “the official or deputy reporter is responsible for preparing, certifying, and timely filing the reporter’s record.” TEX. R. APP. P. 35.3(b); *Utley v. Marathon Oil Co.*, 958 S.W.2d 960, 961 (Tex. App.—Waco 1998, no writ). The reporter only has a duty to file the reporter’s record if requested to do so, in writing, by the party who wants the record, specifically designating which portions of the record are to be transcribed and exhibits to be included, a copy of which must be filed with the trial court clerk, and that written request must be filed “at or before the time” for filing the notice of appeal. TEX. R. APP. P. 34.6.

As with the filing of the notice of appeal, the deadline for the filing of the record on appeal runs from the signing of the appealable judgment or order. Generally, the record on appeal is required to be filed within 60 days of the signing of the judgment. TEX. R. APP. P. 35.1. As with the notice of appeal, the deadline for filing the record is extended -- to 120 days if any party files with the trial court a motion for new trial, a motion to modify the judgment, a motion to reinstate, or a proper request for findings of fact and conclusions of law. TEX. R. APP. P. 35.1(a). In an accelerated appeal, the record must be filed within 10 days after the

notice of appeal is filed. TEX. R. APP. P. 35.1(b).

## 2. Parties Should Ensure Contents of the Record on Appeal Are Complete

While the rules require certain mandatory items to be included in the trial court clerk's record (e.g., all pleadings, trial court's docket sheet, trial court's charge to the jury and verdict, judgment or order appealed from, post-judgment motions and requests for findings of fact and conclusions of law, the notice of appeal, requests for reporter's record and clerk's record, certified bill of costs), parties are permitted – and should – make sure the clerk's record includes all items necessary for the court of appeals to consider and decide the appeal.<sup>5</sup> TEX. R. APP. P. 34.5. A supplemental clerk's record may be requested and filed if any necessary items are omitted. *Id.*

Because reporter's record transcripts of proceedings in the trial court may not be necessary on appeal, there are no mandatory contents for the reporter's record specified in the rules. TEX. R. APP. P. 34.6. Upon a proper, written request by one of the party's to an appeal and payment or payment arrangements made, the trial court reporter will prepare designated portions or the whole of the proceedings before the trial court and file the transcribed reporter's record with the court of appeals. TEX. R. APP. P. 34.6(b), (c). If anything necessary or relevant is omitted, the parties, the trial court, or the appellate court can ask the court reporter to supplement the reporter's record accordingly. TEX. R. APP. P. 34.6(d).

## C. The Briefs

The biggest opportunity and most important tool for persuading the appellate court is the

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<sup>5</sup> Certain items, while not mandatory for the trial court clerk to include, should be requested where they are necessary for the appellate court to decide the issues presented. For example, the rules don't require inclusion of the proposed jury charge and instructions requested by the parties, but those items are necessary where the one of the parties to an appeals desires to complain about the charge and instructions the trial court submitted to the jury.

brief. The appellant's brief provides the appellate judges with a written summary of the relevant events in the trial court, it states the issues being raised in the appeal and the errors made in the trial court that need correction, and then discusses each point with the applicable law and facts to persuade the court of appeals to change the result of what occurred in the trial court. Generally, the appellee's brief responds to the issues raised in the appellant's brief and tells the court of appeals why the trial court committed no error, and why the trial court's judgment ought to be affirmed.

### 1. Deadlines for Filing Briefs

The appellate rules require the appellant to file its brief first and the appellant is required to file its brief within 30 days – 20 days in an accelerated appeal – after the later of (a) the date the clerk's record was filed; or (b) the date the reporter's record was filed. TEX. R. APP. P. 38.6(a). The appellee's brief follows, and is required to be filed within 30 days – 20 days in an accelerated appeal – after the date the appellant's brief was filed. TEX. R. APP. P. 38.6(b). The appellant gets the last word, so to speak, and is required to file its "reply brief" within 20 days after the date the appellant's brief was filed. TEX. R. APP. P. 38.6(c). Extensions of time may be granted for filing briefs with the filing of the proper motion for an extension, explaining the basis for the request. TEX. R. APP. P. 38.6(d).

If an appellant fails to timely file a brief, the court of appeals may dismiss the appeal for want of prosecution, decline to dismiss the appeal but "give further direction to the case as it considers proper," or, if an appellee's brief is filed, the court may regard that brief as correctly presenting the case and may affirm the trial court's judgment upon that brief without examining the record. TEX. R. APP. P. 38.8.

### 2. Required Content and Form of Briefs

The parties to an appeal should make every effort to present their arguments in a clear and concise form. If a brief is submitted but it is not in compliance with the rules, the court, either on



its own motion or on a party's motion, may require re-briefing to correct the defects. TEX. R. APP. P. 9.4(i), 38.9(a). The appellant's principal brief and the appellee's brief cannot exceed 50 pages each (excluding certain items like the list of the parties and counsel, any statement about oral argument, table of contents, index of authorities, statement of the case, issues presented, etc.). TEX. R. APP. P. 38.4.

The appellant's principal brief must have durable front and back covers, the style of the case and title of the document, the name of the party and identity of the lawyers and their contact information, table of contents, index of legal authorities, a statement of the case, a statement about oral argument (why it should or should not be permitted), issues presented, a statement of the relevant facts (each sentence of which is required to be supported by a specific reference to the record on appeal), a summary of the argument, and the main body of the brief – which is the argument section. TEX. R. APP. P. 38. The argument must be supported by proper citations to the record on appeal and to pertinent legal authority. *Id.* Finally, the appellant's brief should contain a "prayer," which is a short conclusion clearly stating the type of relief requested from the court of appeals. *Id.* For instance, the prayer could ask the appeals court to reverse the trial court judgment and render judgment or, in the alternative, to reverse the trial court judgment and remand the case for a new trial.

The appellee's brief does not need to include certain items, like the identity of parties and counsel, a restatement of the issues, a statement on oral argument, but it should contain those items to the extent the appellee is dissatisfied with the way they were stated by the appellant or to correct any inaccuracies in the appellant's brief. Similarly, the appellee's brief should contain a section called "statement of facts" if the appellant's statement of facts is inadequate or misrepresents the facts. TEX. R. APP. P. 38.2. The appellee's brief must contain a summary of the argument, the argument, and a prayer for relief. For example, the appellee may ask in the prayer that the court of appeals affirm

the trial court's judgment or modify the judgment and affirm it. *Id.*

After the appellee files its brief, the appellant gets the final written word by filing its reply brief. A reply brief should do more than simply restate the arguments presented in the appellant's principal brief, and should respond to the arguments made by the appellee to the extent they were not addressed in the appellant's principal brief. No new arguments or issues can be presented in the reply brief, for the first time. While an appellant is not required to file a reply brief, if one is filed, it cannot exceed 25 pages. TEX. R. APP. P. 38.4.

#### **D. Submission and Oral Argument**

After the briefing is complete, the parties will receive a "notice of submission" from the clerk of the court of appeals. Once the appeal is "submitted," the court of appeals can move forward and decide the case. The clerk of the court of appeals' notice of submission to the parties informs them of when the case will be submitted to the court, whether the case will be submitted with oral argument or on the briefs alone, the composition of the panel of 3 justices of the court of appeals that will decide the case and, if oral argument is allowed, how much time each side will have to argue. TEX. R. APP. P. 41.1. If the case is submitted with oral argument, the submission date will be the date oral argument is held.

A party's request for oral argument does not mean oral argument will be granted. The court of appeals has discretion to decide a case without oral argument if, after examining the briefs, it determines oral argument is unnecessary. TEX. R. APP. P. 39.1. The court of appeals may decide oral argument is unnecessary if it believes (a) the appeal is frivolous, (b) the main issue has been decided already by the Texas Supreme Court, (c) the briefs and record adequately present the facts and arguments, or (d) oral argument would not significantly aid the court of appeals in its decision. *Id.*

If oral argument is granted, generally only one attorney for each side will present oral argument. Strict time constraints are imposed and generally each side will have 15-20 minutes with the appellant going first, appellee second, and appellant having a short amount of time for rebuttal argument. While most attorneys have their remarks prepared and outlined in advance, more often than not they spend most of their time responding to specific questions from the court of appeals justices during oral argument. It is common wisdom that it is more important for attorneys to answer the justices' questions than to make their own points at oral argument.

### **E. Opinion and Judgment of the Court of Appeals**

A majority of the 3-judge panel must agree on the judgment of the court of appeals. TEX. R. APP. P. 41.1. The judgment of the court of appeals is the document that informs the trial court and the parties of the decision reached by the appellate court in its opinion. The opinion is the document that sets forth the legal rationale and principles applied to the facts of the case and the conclusion reached by the court. On occasion, the panel issues more than one opinion, *e.g.*, the 2-justice majority opinion and an opinion authored by the dissenting justice. A "concurring opinion" is one issued by a justice who agrees in the judgment and result of the majority opinion, but disagrees about how that result should be reached.

The court of appeals must designate each of its opinions as either an "opinion" or a "memorandum opinion." TEX. R. APP. P. 47.2(a). A majority of the justices who participated in the decision will decide whether a particular justice will sign the decision or whether the court will issue the opinion *per curiam*. *Id.* A *per curiam* opinion is one that not signed by any justice. A *per curiam* opinion lists the names of the justices who participated but it does not indicate which one authored the opinion. Most *per curiam* opinions are short and deal with only one or two legal principles of settled law that are dispositive of the appeal. A memorandum opinion is also short – no longer than necessary to advise the parties of the

appeals court's decision and the basic reasons for it. TEX. R. APP. P. 47.4.

The "judgment" of the appeals court is the final decree of the court. It acts on the trial court's judgment or order by affirming, reversing, vacating, or modifying that judgment or order, or by directing the trial court to take whatever action is necessary. TEX. R. APP. P. 43.2. The judgment is short and gives the result of the appeals court's decision without the rationale for it. The judgment also assesses the costs of the appeal against the proper parties. TEX. R. APP. P. 43.4, 43.5. The court of appeals should render its judgment "promptly" after the case has been submitted – which usually is a few months, on average. TEX. R. APP. P. 43.1.

### **F. Motion for Rehearing & Petition for Review**

A motion for rehearing asks the court to change its decision and it generally should not be submitted unless there are clear mistakes in court of appeals' opinion. A party must file a motion for rehearing within 15 days of the issuance of the court of appeals' judgment. TEX. R. APP. P. 49.1. If a motion for rehearing is warranted, its tone should never be insulting or harsh. It is limited to 15 pages. TEX. R. APP. P. 49.10. The filing of a motion for rehearing is not a prerequisite to filing a petition for review to the Texas Supreme Court. TEX. R. APP. P. 49.9.

A petition for review is filed with the Texas Supreme Court and challenges the decision reached by the court of appeals. Unlike the 14 intermediate courts of appeals in Texas – which are obliged to consider and decide the merits of every appeal over which they have jurisdiction – the Texas Supreme Court has the discretion to decide which appeals warrant the exercise of its jurisdiction. The Texas Supreme Court grants review of petitions for review – on average – in only 10% of cases filed, so parties should carefully evaluate their case before filing a petition for review. A petition for review must be filed within 45 days after (1) the court of appeals renders judgment, if no motion for rehearing is timely filed, or (2) the date of the

court of appeals' last ruling only all timely filed motions for rehearing. TEX. R. APP. P. 53.7.

### **G. Mandate**

Finally, the mandate is the document issued by the court of appeals to the trial court, directing it to carry out the court of appeals' judgment. Once the deadlines for appealing to the Texas Supreme Court have expired, the clerk of the court of appeals will issue the court of appeal's mandate. TEX. R. APP. P. 18.1. If a timely petition for review is filed with the Texas Supreme Court, the clerk of the court of appeals will not issue the mandate until after a petition for review is denied, refused, or dismissed by the Texas Supreme Court. *Id.*

Once the mandate is received by the trial court, the trial court's clerk files it with the papers of the case and notes the mandate on the court's docket sheet. TEX. R. APP. P. 18.4. The trial court has the ministerial duty to comply with the mandate – it has no discretion to review or interpret the mandate. *See, e.g., Texas Parks & Wildlife Dept. v. Dearing*, 240 S.W.3d 330, 347 (Tex. App.—Austin 2007, pet. denied).