PERFECTING THE APPEAL -- STATE AND FEDERAL

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APPELLATE BOOT CAMP
State Bar of Texas
Advanced Civil Appellate Practice Seminar
September 10, 2003
Austin, Texas

Chapter 1

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INTRODUCTION

Perfection of an appeal is the jurisdictional requirement for prosecuting an appeal to a state or federal court of appeals. Amendments to both the state and federal Rules of Appellate Procedure have made this process somewhat less hyper-technical; however, the process remains one that requires strict adherence to the rules that specifically delineate a procedure for ensuring that your case will be reviewed by an appellate court.

This paper is intended to provide a practical guide to the process of perfecting an appeal, while offering some guidance for avoiding the traps and pitfalls that lurk in the vague gray areas of this rule-based process. Because the paper is aimed largely at those who are not appellate specialists, this paper is constructed to provide a checklist-like framework for ensuring the necessary steps are taken, in the correct order where necessary, to ensure that any appeal is perfected in a proper fashion.

I. PERFECTING AN APPEAL IN TEXAS STATE COURT

A. WHAT IS PERFECTION?

"Perfecting" an appeal is the process of invoking the jurisdiction of the appellate court over the parties to the trial court's action. TEX. R. APP. P. 25.1(b). However, perfecting the appeal does not impact the subject matter jurisdiction of the appellate court, which defines the types of cases such courts may entertain.[1]

An appeal is "perfected" upon the filing of a timely and proper notice of appeal. TEX. R. APP. P. 25.1(a). As such, Rule 25.1(b)[2] conditions the personal jurisdiction of the appellate court upon the filing of the notice of appeal:

> The filing of a notice of appeal by any party invokes the appellate court's jurisdiction over all parties to the trial court's judgment or order appealed from.

TEX. R. APP. P. 25.1(b). In a sense, then, perfection is a one-step process, satisfied by the act of filing a timely notice of appeal. *Id.* There are, however, numerous other matters which fall generally within the purview of the procedure for perfecting the appeal, which have some impact on the way a case is presented to the court of appeals. Those important matters are discussed more thoroughly below.

B. IS THIS JUDGMENT OR ORDER APPEALABLE?

Before filing a notice of appeal, you need to ascertain whether the judgment or order from which the appeal will be taken is actually appealable. Generally, only final orders and judgments can be appealed. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001). However, certain interlocutory orders are appealable. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (Vernon Supp. 2003)[3]; *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992)(orig. proceeding).[4] If

[1] The "subject matter jurisdiction" of the appellate courts is broad but has some limitations. TEX. CONST., art. V, § 6 (court of appeals has jurisdiction over appeals from county and district courts, or as provided by law). The limitations include the requirement that the amount in controversy exceed $100.00. TEX. GOV'T CODE ANN. § 22.220(a) (Vernon 1988); TEX. CIV. PRAC. & REM. CODE ANN. § 51.012 (Vernon 1997). There are also specific statutory provisions that vest courts other than the court of appeals with appellate jurisdiction over particular matters. *See, e.g.*, TEX. GOV'T CODE ANN. § 22.001(c)(2) (Vernon 1988)(providing for direct appeal to supreme court from order granting or denying a temporary or permanent injunction based on the constitutionality of a state statute). It warrants mentioning, though, that the rules for perfecting an appeal in the court of appeals apply with equal force to the filing of a direct appeal in the Texas Supreme Court. *See* TEX. R. APP. P. 57.1.

[2] Reference in section II of this paper is to the Texas Rules of Appellate Procedure unless otherwise noted.

[3] Hereinafter short cited as TCPRC.

[4] It warrants noting that jurisdiction over interlocutory appeals is generally final in the courts of appeals, absent an express constitutional or legislative grant. *See Coastal Corp. v. Garza*, 979 S.W.2d 318, 319 (Tex. 1998). The Texas Supreme Court has generally limited its review of interlocutory orders to those instances in which: (1) the judgment of the court of appeals conflicts with either a judgment of the supreme court or the judgment of another court of appeals, *id.* (citing TEX. GOV'T CODE ANN. § 22.001(a)(2) (Vernon 1988)); (2) when the court of appeals concludes that it lacks jurisdiction over an interlocutory appeal, *McAllen Med. Ctr. v Cortez*, 66

the order or judgment is not final, and if there is no provision permitting an interlocutory appeal, the court of appeals cannot review the matter, whether an appeal is properly perfected or not.

1. Appealable interlocutory orders. An interlocutory order is, basically, any order that does not dispose of all parties or all issues in a particular case. *Vansteen Marine Supply, Inc. v. Twin City Fire Ins. Co.*, 93 S.W.3d 516, 518 (Tex.App.--Houston [14th Dist.] 2002, pet. denied). In other words, if the court's order leaves something further to be determined, that order is interlocutory. *See Kaplan v. Tiffany Dev. Corp.*, 69 S.W.3d 212, 217 (Tex.App.--Corpus Christi 2001, no pet.)(citing *Bobbitt v. Cantu*, 992 S.W.2d 709, 711 (Tex.App.--Austin 1999, no pet.); *Taliaferro v. Tex. Commerce Bank*, 660 S.W.2d 151, 152 (Tex.App.--Fort Worth 1983, no writ)). Appellate review in an interlocutory appeal is limited to complaints related to whatever appealable interlocutory orders exist. *See Urso v. Lyon Fin. Serv.*, 93 S.W.3d 276, 278 (Tex.App.--Houston [14th Dist.] 2002, no pet.)(citing *Gorham v. Gates*, 82 S.W.3d 359, 363 (Tex.App.--Austin 2002, pet. denied); *Bynog v. Prater*, 60 S.W.3d 310, 314 (Tex.App.--Eastland 2001, pet. denied); *see also Diana Rivera & Assocs., P.C. v. Calvillo*, 986 S.W.2d 795, 797 (Tex.App.--Corpus Christi 1999, pet. denied)(attack on interlocutory order is limited to issues related to that order; party cannot attack an allegedly void judgment in interlocutory appeal). All interlocutory appeals are accelerated appeals. *See* TEX. R. APP. P. 28.1.

The authority for appealing a particular interlocutory order is, generally speaking, statutory, and can be specifically found in the Civil Practice and Remedies Code. *See* TCPRC § 51.014. The interlocutory appeal statute is strictly construed. If the order from which an appeal is sought is not among the types of interlocutory orders specified in the statute, that order cannot be challenged until a final judgment has been rendered. *See Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 355 (Tex. 2001).

• **Red Flag**: Note that this limitation works "in both directions," so to speak: it limits interlocutory appeals to specific groups of orders, but the mere fact that an order falls within one of those groups does not necessarily mean the appeal should be interlocutory -- if the order meets the technical requirements of the statute, but actually disposes of all claims and parties, the order is final and the interlocutory appeal provisions do not apply. *See Wilkins v. State Farm Mut. Auto Ins. Co.*, 58 S.W.3d 176, 179 (Tex.App.--Houston [14th Dist.] 2001, no pet.)(turnover order was final, and no interlocutory appeal was available, even though order appointed a receiver); *Revier v. Spragins*, 810 S.W.2d 298, 300 (Tex.App.--Fort Worth 1991, no writ)(concluding that order appointing receiver was not a final order).

a. Civil Practice and Remedies Code Section 51.014.

i. Specific appealable orders. TCPRC § 51.014(a) categorically makes certain interlocutory orders appealable. These categories are:

(1) **orders appointing receivers or trustees**. TCPRC § 51.014(a)(1); *see Bayoud v. North Central Inv. Corp.*, 751 S.W.2d 525, 526-27 (Tex.App.--Dallas 1988, writ denied); *but see Waite v. Waite*, 76 S.W.3d 222, 223 (Tex.App.--Houston [14th Dist.] 2002, no pet.)(no appeal from order **dissolving** receivership);

(2) **orders overruling a motion to vacate an order that appoints a receiver or trustee**. TCPRC § 51.014(a)(2); *see Sclafani v. Sclafani*, 870 S.W.2d 608, 613 (Tex.App.--Houston [1st Dist.] 1993, writ denied)(Mirabal, J., dissenting);

(3) **orders certifying or refusing to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure**. TCPRC § 51.014(a)(3); *see, e.g., National Western Life Ins. Co. v. Rowe*, 86 S.W.3d 285, 292-93 (Tex.App.--Austin 2002, pet. filed)(order certifying class). This provision also extends to: (a) orders decertifying classes, *Wood v. Victoria Bank & Trust Co., N.A.*, 69 S.W.3d 235, 238 (Tex.App.--Corpus Christi 2001, no pet.); *Grant v. Austin Bridge Constr. Co.*, 725 S.W.2d 366, 368 (Tex.App.--Houston [14th Dist.] 1987, no writ); and (b) orders changing the characterization of a class,

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S.W.3d 227, 231 (Tex. 2001); and (3) certain "unique and compelling circumstances," *see Republican Party v. Dietz*, 940 S.W.2d 86, 93-94 (Tex. 1997)(unique and compelling circumstances existed); *contra Gonzalez v. Avalos*, 907 S.W.2d 443, 444 (Tex. 1995)(Supreme Court review strictly limited, with no allowance for special circumstances).

De Los Santos v. Occidental Chem. Corp., 933 S.W.2d 493, 495 (Tex. 1996)(per curiam).

• **Red Flag**: This section does not apply, however, to orders that (a) refuse to decertify a class, *Bally's Total Fitness*, 53 S.W.3d at 356; or (b) make insubstantial modifications to an order certifying a class, *Koch Gathering Sys., Inc. v. Harms*, 946 S.W.2d 453, 456 (Tex.App.--Corpus Christi 1997, writ denied); *Pierce Mortuary Colleges, Inc. v. Bjerke*, 841 S.W.2d 878, 880 (Tex.App.--Dallas 1992, writ denied).

• **Red Flag**: The recent tort reform legislation now permits a party to file a petition for review in the Texas Supreme Court to review the disposition of interlocutory appeals taken under section 51.014(a)(3). *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, §1.02, 2003 TEX. SESS. LAW SERV. 1, 5 (Vernon)(to be codified as an amendment to TEX. GOV'T CODE ANN. § 22.225(d)).[5]

(4) **orders granting or refusing to grant a temporary injunction or granting or overruling a motion to dissolve a temporary injunction pursuant to TCPRC Chapter 65**. TCPRC § 51.014(a)(4); *see Qwest Comm. Corp. v. AT&T Corp.*, 24 S.W.3d 334, 336-38 (Tex. 2000). Whether an order is appealable based on this provision depends on the character and function of the order regardless of the order's title. *Id.*;

(5) **orders denying motions for summary judgment based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state**. TCPRC § 51.014(a)(5); *see Ware v. Miller*, 82 S.W.3d 795, 800 (Tex.App.--Amarillo 2002, pet. denied); *Hays County v. Hays County Water Planning P'ship*, 69 S.W.3d 253, 260-61 (Tex.App.--Austin 2002, no pet.). This applies to assertions of sovereign immunity, official immunity, and qualified immunity, so long as those defenses are raised by an officer or employee of the state or a political subdivision of the state. *See Brazos Transit Dist. v. Lozano*, 72 S.W.3d 442, 444-45 (Tex.App.--Beaumont 2002, no pet.);

(6) **orders denying motions for summary judgment based on the free speech or free press rights of a member of the electronic or print media.** TCPRC § 51.014(a)(6); *Delta Air Lines, Inc. v. Norris*, 949 S.W.2d 422, 428 (Tex.App.--Waco 1997, writ denied). On appeal, the appellate court may consider any claim raised in the media defendant's motion and denied by the trial court, so long as the motion was based at least in part on free-speech grounds. *Id.* at 429.

(7) **orders granting or denying the special appearance of a defendant under Texas Rule of Civil Procedure 120a (unless the suit is brought under the Family Code)**. TCPRC § 51.014(a)(7); *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 793 (Tex. 2002).

(8) **orders granting or denying a plea to the jurisdiction by a governmental unit**. TCPRC § 51.014(a)(8); *Guadalupe-Blanco River Auth. v. Pitonyak*, 84 S.W.3d 326, 333 (Tex.App.--Corpus Christi 2002, no pet.); *Eastland County Co-op Dispatch v. Poyner*, 64 S.W.3d 182, 187 (Tex.App.--Eastland 2001, pet. denied).

ii. <u>Section 51.014(d)</u>. The Legislature recently added a catch-all provision that, in the abstract, permits appeal of *any* interlocutory order. TCPRC § 51.014(d). This rule permits an interlocutory appeal if the parties obtain an order from the trial court, so long as the order demonstrates that: (1) the parties agree the order involves a controlling question of law as to which there is a substantial ground for difference of opinion; (2) an immediate appeal may materially advance the ultimate termination of the litigation; and (3) the parties agree to the order allowing interlocutory appeal. *Id.*

• **Red Flag**: The parties must apply to the court of appeals to take the case within 10 days of the date of the trial court's order. *Id.*; *see Smith v. Adair*, 96 S.W.3d 700, 703-04 (Tex.App.--Texarkana 2003, pet. filed); *In re D.B.*, 80 S.W.3d 698, 701-02 (Tex.App.--Dallas 2002, no pet.).

At this point in time, there is very little law, other than the Legislature's expression in the statute

[5] Note that this applies to decisions on interlocutory appeals taken under section 51.014(a)(6) as well. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, §1.02, 2003 TEX. SESS. LAW SERV. 1, 5 (Vernon)(to be codified as an amendment to TEX. GOV'T CODE ANN. §22.225(d)).

itself, to guide those who seek interlocutory review based upon section 51.014(d). However, if the parties fail to abide by the procedure specified in the statute, the court of appeals will not have jurisdiction to consider the appeal. *In re D.B.*, 80 S.W.3d at 702.

b. Other statutory avenues for seeking interlocutory review.

i. Texas Arbitration Act. The Texas Arbitration Act provides for interlocutory appeal of an order denying a motion to compel arbitration under the TAA. *See* TCPRC § 171.098(a)(1); *Certain Underwriters at Lloyd's of London v. Celebrity, Inc.*, 988 S.W.2d 731, 732 (Tex. 1998).

• **Red Flag**: Note, however, that an order denying a motion to compel arbitration under the Federal Arbitration Act is subject to mandamus review and will not give rise to an interlocutory appeal. *See In re Valero Energy Corp.*, 968 S.W.2d 916, 916-17 (Tex. 1998)(orig. proceeding); *In re Turner Bros. Trucking Co.*, 8 S.W.3d 370, 375 (Tex.App.--Texarkana 1999, orig. proceeding).

ii. New interlocutory appeals pursuant to Texas House Bill 4. With the recent passage and enactment of its most recent round of tort reforms, the Legislature has amended section 51.014(a) to include two new categories of interlocutory appeals. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, §1.03, 2003 TEX. SESS. LAW SERV. 1, 7 (Vernon)(to be codified as an amendment to TCPRC § 51.014(a)). First, the statute provides interlocutory review of a trial court's denial of relief to certain medical malpractice defendants who move for sanctions pursuant to a new provision to be codified at section 74.351(b) of the TCPRC. *Id.* In addition, the statute appears to provide for an interlocutory appeal from an order awarding sanctions pursuant to TCPRC § 74.351(b)(1). *Id.*

Likewise, an amendment to section 15.003 of the Civil Practice and Remedies Code will permit an interlocutory appeal of the trial court's determination (in a case involving multiple plaintiffs) as to whether an individual plaintiff did or did not independently establish proper venue, or that such a plaintiff did or did not establish an exception to the requirement that each such plaintiff independently establish proper venue. *See id.* at § 3.03, 21-22.

2. Final orders and judgments.

a. What makes a decree "final"? Other than the handful of instances in which an interlocutory order may be appealed, a court of appeals has jurisdiction only to hear appeals from final judgments. *See generally* TCPRC § 51.012. "[A]n order or judgment is not final for purposes of appeal unless it actually disposes of every pending claim and party or unless it clearly and unequivocally states that it finally disposes of all claims and all parties." *Lehmann,* 39 S.W.3d at 205. While this would seem to be a straightforward rule in theory, in application, practitioners and courts have struggled mightily with determining whether particular judgments are final or not.[6]

b. Compare the judgment with the record. Determining whether an order or judgment is final is largely a matter of comparison. *See Lehmann*, 39 S.W.3d at 195. The Texas Supreme Court has explained that "[b]ecause the law does not require that a final judgment be in any particular form, whether a judicial decree is a final judgment must be determined from its language and the record in the case." *Id.*

c. Mother Hubbard clause no longer satisfactory to demonstrate finality. For a period of time, Texas courts held that the inclusion of a Mother Hubbard clause -- a statement that "all relief not granted is denied" -- was sufficient to make final an otherwise interlocutory decree. *See id.* at 202-03. But with the supreme court's holding in

[6] While a full discussion of judgment finality is beyond the scope of this paper, there are a number of excellent seminar papers and articles devoted to the specifics of judgment finality. *See* Elaine Carlson & Karlene Dunn, *Navigating Procedural Minefields: Nuances in Determining Finality of Judgments, Plenary Power, and Appealability*, 41 S. TEX. L. REV. 953 (2000); *see also* David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 54 BAYLOR. L. REV. 1 (2002); William J. Boyce, *Finality Plus,* in UNIV. TEX. 12TH ANNUAL CONFERENCE ON STATE AND FEDERAL APPEALS 3 (2002); William J. Boyce, *Is Lehmann the Final Word on Summary Judgment Finality?,* XIV THE APP. ADVOC. 4 (Summer 2001).

Lehmann, this rule is no longer iron-clad: the use of Mother Hubbard language will generally be dispositive on the issue of finality if there has been a full trial on the merits to either the bench or a jury, but a Mother Hubbard clause has no such effect as to judgments rendered without a conventional trial (such as summary judgments). *Id.* at 204.

d. <u>Presumption of finality after full trial on the merits</u>. As *Lehmann* demonstrates, there is a presumption that all parties and claims have been disposed of if a case goes to a jury verdict or completed bench trial. *See also North East Indep. Sch. Dist. v. Aldridge*, 400 S.W.2d 893, 897-98 (Tex. 1966).

e. <u>Summary judgment finality problems</u>.

i. <u>Full summary judgments</u>. The same presumption, however, does not apply to judgments rendered before trial. On judgments that purport to grant summary judgment as to all claims and parties, the decree will be final only if it actually disposes of all claims and parties. *Lehmann*, 39 S.W.3d at 205. To this end, in *Lehmann*, the Texas Supreme Court encouraged parties to include specific, express language in the decree indicating that the "judgment finally disposes of all parties and all claims and is appealable." *Id.* at 206. With very few exceptions, when the movant actually seeks summary judgment as to all claims against all parties, such language will make the decree final. *Id.*

ii. <u>Partial summary judgments</u>. The issue becomes far less clear when the basis for the decree is the grant of a motion for partial summary judgment. As a general rule, a summary judgment that, on its face, amounts to only a partial disposition as to the parties or the claims, is not appealable unless, by its subject matter, it falls within one of the categories of appealable interlocutory orders.

A partial summary judgment can become final, however, in two circumstances. First, when the trial court signs a final judgment that actually disposes of all claims and parties, the partial summary judgment is merged into the judgment and becomes a final judgment. *See Stephens v. Dallas Area Rapid Transit*, 50 S.W.3d 621, 625 n.1 (Tex.App.--Dallas 2001, pet. denied). Second, the partial summary judgment order becomes final if the trial court severs the parties and claims involved in the partial summary judgment, and there are no unresolved claims against the parties to the severed cause. *See Harris County Flood Cont. Dist. v. Adam*, 66 S.W.3d 265, 266 (Tex. 2001)(per curiam). Thus, the mere fact that the applicable motion is one for partial summary judgment does not, *per se*, preclude the possibility that an order disposing of the motion is final; but, obviously, achieving finality in such situations requires more than just obtaining a signed decree. In dealing with orders granting partial summary judgments, practitioners should never assume the court granted all relief that was requested by the successful movant.

3. <u>Conclusion</u>. In the appellate process, the name of the game is having an appealable order. Without an appealable order, the court of appeals lacks subject matter jurisdiction and can do nothing to remedy any errors the trial court might have made, even if those errors are egregious. But as importantly, the determination that a judgment or order is final is of paramount importance in ascertaining what rules apply to perfecting your appeal and determining when the timelines for perfecting an appeal commence.

C. METHOD OF PERFECTING THE APPEAL

Regardless of the type of order from which you are appealing, the appeal is perfected by filing a notice of appeal. In short, the type of order from which the appeal is taken determines the *deadline* for perfecting the appeal, but has no bearing on the *method* for perfecting the appeal.

• **Red Flag**: With all issues regarding perfection of the appeal, it is important to ensure that you have not only complied with the Texas Rules of Appellate Procedure, but also with the local rules for the particular court of appeals with jurisdiction over your appeal. Virtually every available rule book has reprinted copies of the local rules for each court of appeals. Should you be unable to locate the applicable local rules in any printed volume, you can also obtain copies of the local rules on the website for the Texas Judiciary (www.courts.state.tx.us).

• **Red Flag**: Be certain to pay any applicable fees for filing any documents or pleadings related to perfecting the appeal. The consequences for failing to do so can be dire. *See Marathon Corp. v. Pitzner*, 55 S.W.3d 114, 124-25 (Tex.App.--Corpus Christi 2001)(by failure to timely pay $15 fee for filing motion for new trial, appellant waived complaints regarding factual sufficiency of the evidence to support the judgment), *rev'd on other grounds*, 106 S.W.3d 724 (Tex. 2003). For the most part, the applicable fee schedules can be found in the Texas Government Code. *See* TEX. GOV'T CODE ANN. § 51.005 (Vernon 1998) (fees and costs in Texas Supreme Court) & § 51.207 (Vernon Supp. 2003) (fees and costs in courts of appeals).

1. Notice of Appeal

a. What must be filed? By rule, all appeals in state court are perfected by the filing of a written notice of appeal. TEX. R. APP. P. 25.1(a); *see Wells v. Breton Mill Apartments*, 85 S.W.3d 823, 824 (Tex.App.--Amarillo 2001, no pet.)("it is clear that perfecting an appeal merely entails the filing of a timely notice of appeal."). Filing of the notice of appeal invokes the appellate court's jurisdiction over all parties to the trial court's judgment or order from which the appeal is taken. TEX. R. APP. P. 25.1(b); *Wells*, 85 S.W.3d at 824.

In the unfortunate event a notice of appeal was not filed, note that there is some authority to suggest that a party might satisfy the notice of appeal requirement by filing the docketing statement required by Rule 32. *See Foster v. Williams*, 74 S.W.3d 200, 203 (Tex.App.--Texarkana 2002, pet. denied).

Texas law used to require that a party provide security for costs as a prerequisite to invoking the appellate court's jurisdiction. *In re Arroyo*, 988 S.W.2d 737, 738 (Tex. 1998)(orig. proceeding). Rule 25.1 abolishes this requirement in all appeals. TEX. R. APP. P. 25.1.

• **Red Flag**: The filing of the notice of appeal does not suspend a party's ability to enforce the judgment. The judgment remains enforceable unless the judgment is superseded pursuant to Rule 24, or the appellant is entitled to supersede the judgment without security by filing a notice of appeal.

b. Where is the notice of appeal filed and how is it served? The notice of appeal should be filed with the trial court clerk. TEX. R. APP. P. 25.1(a); *see Foster*, 74 S.W.3d at 202. The rule does make an allowance for those who file the notice of appeal with the appellate court, however, providing that a notice filed in the appellate court is "deemed to have been filed the same day with the trial court clerk, and the appellate clerk must immediately send the trial court clerk a copy of the notice." *Id*.

The notice of appeal must be served on all parties to the trial court's final judgment; or, in an interlocutory appeal, on all parties to the trial court's proceeding. TEX. R. APP. P. 25.1(e).

c. Who files the notice of appeal? Any party who seeks to alter the trial court's judgment or appealable order must file a timely notice of appeal. TEX. R. APP. P. 25.1(c). A party's failure to file a timely notice of appeal deprives it of any right to complain of the trial court's judgment, and the appellate court may not grant such a party any "more favorable relief than did the trial court except for just cause." *Id.*; *see also Lubbock County, Texas v. Trammel's Lubbock Bail Bonds*, 80 S.W.3d 580, 584 (Tex. 2002); *Twenty-Nine Gambling Devices v. State*, 2003 WL 1961121, at *3 (Tex.App.--Amarillo 2003, no pet. h.). Parties whose interests are aligned are permitted to file a joint notice of appeal. TEX. R. APP. P. 25.1(c).

• **Red Flag**: Note that the rule applies to "a party who seeks to alter" the decree. TEX. R. APP. P. 25 (1)(c).. This requirement extends even to an appellee. The appellee cannot rely on asserting a cross-point to seek an alteration of the trial court's judgment; rather, he must independently perfect an appeal by filing his own timely notice of appeal.

d. What is in the notice of appeal? The notice of appeal must: (1) identify the trial court and state the case's trial court number and style; (2) state the date of signing of the judgment or order appealed from; (3) state that the party desires to appeal; (4) state the court to which the appeal is taken -- if the appeal is to either of the Houston courts, the party cannot specify the court to which the appeal is taken,

so the notice of appeal must state that the appeal is to either of the courts; and (5) state the name of each party filing the notice. TEX. R. APP. P. 25.1(d)(1)-(5).

The notice of appeal need not specify the grounds upon which the appeal is to be taken. *Songer v. Archer*, 23 S.W.3d 139, 143 (Tex.App.--Texarkana 2000, no pet.). Likewise, Rule 25 does not require a party to state whether the appeal is limited. *Id.* The appealing party need not set forth the appellate issues until the appellate brief is filed. *See* TEX. R. APP. P. 38.1(e).

• **Red Flag**: If you are filing a notice of appeal to perfect an appeal in the Waco Court of Appeals, be aware that the court has expressed its belief that multiple notices of appeal may be necessary because "the better practice would be to file a separate notice of appeal for each separate order from which a party desires to appeal." *Chase Manhattan Bank v. Bowles*, 52 S.W.3d 871, 871 (Tex.App.--Waco 2001, no pet.). While there is no requirement of such in Rule 25.1(d), it is best to follow that guideline if you are perfecting an appeal to that court.

• **Red Flag**: Note that in several counties, a party has a choice between two courts of appeals in deciding where to pursue the appeal. *See* TEX. GOV'T CODE ANN. § 22.001 (Vernon 1988). The general rule is that in the small number of instances in which a particular county is within the territorial jurisdiction of multiple courts of appeals, the first party to file a notice of appeal elects the court to which the appeal is taken.

Here is a list of the courts of appeals that share concurrent jurisdiction over appeals from the same counties:

- Fifth (Dallas) and Sixth (Texarkana) Courts of Appeals have concurrent jurisdiction over appeals from Hunt County;
- Fifth (Dallas) and Twelfth (Tyler) Courts of Appeals have concurrent jurisdiction over appeals from Kaufman and Van Zandt Counties;
- Sixth (Texarkana) and Twelfth (Tyler) Courts of Appeals have concurrent jurisdiction over appeals from the following counties: Gregg, Hopkins, Panola, Rusk, Upshur, and Wood.

Note that the general rule **does not** apply to cases filed in either of the Houston Courts of Appeals. *See* TEX. R. APP. P. 25.1(d)(4). A party may not specify to which of the Houston courts the appeal is taken. *Id.* In noticing an appeal from any of the counties within the territorial jurisdiction of the Houston courts, the appellant should file the notice of appeal in the trial court, and should "state that the appeal is to either of those courts." *Id.*

- First (Houston) and Fourteenth (Houston) Courts of Appeals have concurrent jurisdiction over appeals from the following counties: Austin, Brazoria, Brazos, Burleson, Chambers, Colorado, Fort Bend, Galveston, Grimes, Harris, Trinity, Walker, Waller, and Washington;

In the affected counties, each trial court clerk randomly determines whether the case will be assigned to the First or Fourteenth Court of Appeals. *See* TEX. GOV'T CODE ANN. § 22.202(h) (Vernon 1988); § 22.215(e) (Vernon 1988).

e. <u>Amending the notice of appeal</u>. A party may file an amended notice of appeal to correct a defect or omission in an earlier-filed notice, and may do so at any time before the appellant's brief is filed. TEX. R. APP. P. 25.1(f). Though amendment is allowed, an amendment may be challenged and can be struck for cause on the motion of any party affected by the amended notice. *Id.* Once the appellant's brief is filed, amendment is allowed only upon receiving leave of the appellate court and only on such terms as the court determines to be appropriate. *Id.*

Note that Rule 25.1(f) dovetails with Rule 37.1, which requires the appellate clerk to notify the parties of any defect in a notice of appeal so that the defect can be remedied, if possible. *Compare* TEX. R. APP. P. 25.1(f) *with* TEX. R. APP. P. 37.1.

2. <u>The docketing statement</u>. Though not required to perfect the appeal, Rule 32 requires the appellant

to file a "docketing statement" in the appellate court. TEX. R. APP. P. 32.1. Unlike the notice of appeal, which is filed in the trial court, the docketing statement is filed in the court of appeals. *Id.*

The docketing statement is an administrative tool. TEX. R. APP. P. 32.4. The docketing statement does not affect the appellate court's jurisdiction, but the failure to file the docketing statement could result in the court of appeals' dismissing the appeal. TEX. R. APP. P. 42.3(c)(permitting involuntary dismissal when "the appellant has failed to comply with a requirement of [the Texas Rules of Appellate Procedure] . . . .").

• **Red Flag**: Most of the courts of appeals have developed unique docketing statements that are available online (www.courts.state.tx.us). If the court has developed its own docketing statement, you should simply fill out the form and file it with the court of appeals. If, however, such a form is not available, Rule 32 specifies what information should be included in the docketing statement. TEX. R. APP. P. 32.1(a). Any party may supplement or amend the docketing statement. TEX. R. APP. P. 32.3.

D. TIME TO PERFECT THE APPEAL

While the type of decree that forms the basis for the appeal has no bearing on *how* the appeal is perfected, it has a significant impact upon calculating the deadlines that determine *when* the appeal must be perfected. *See* TEX. R. APP. P. 26.1.

1. Measuring the appellate deadlines. In Texas state court, all appellate deadlines begin running from the date that the trial court signs an appealable order. *See* TEX. R. CIV. P. 306a(1), 329b(a); TEX. R. APP. P. 26.1, 35.1. Note that the rules specifically tie the deadlines to the **signing** of an appealable order, and not the rendition or entry of such an order.[7] Thus, the appellate deadlines are calculated from the signing of the order or judgment. *See, e.g., Farmer v. Ben E. Keith Co.*, 907 S.W.2d 495, 496 (Tex. 1995)(per curiam).

a. General rule in appeals from final judgments is 30 days. Rule 26.1 provides that the notice of appeal "must be filed within 30 days after the judgment is signed." TEX. R. APP. P. 26.1. There are, however, several exceptions to this general rule.

b. Post-judgment motions extend the deadline to 90 days. Upon filing a motion for new trial, a motion to modify the judgment, a motion to reinstate (pursuant to TRCP 165a), or a proper 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). As discussed below, this enlargement of time does not apply to accelerated appeals. TEX. R. APP. P. 26.1(b).

i. Motion for new trial. A motion for new trial is a matter of right and extends the appellate timetable regardless of whether there is any sound or reasonable basis for the motion. *See Old Republic Ins. v. Scott*, 846 S.W.2d 832, 833 (Tex. 1993). A motion for new trial extends the appellate deadlines for all parties, regardless of which party files the motion. A document that is not entitled "motion for new trial," may nevertheless be treated as a motion for new trial and extend the deadline. *See Padilla v. LaFrance*, 907 S.W.2d 454, 458 (Tex. 1995)("motion for reconsideration"); *Gomez v. Texas Dep't of Criminal Justice*, 896

[7] Also note that "signed," "rendered" and "entered" are non-synonymous terms that denote specific actions by the trial court. A judge "renders" a judgment; a clerk "enters" a judgment.

Specifically, "rendition" of a judgment or order is the judicial act by which the court settles and declares the decision of law on the matters at issue. *See* Dana Livingston Cobb & Warren W. Harris, *Perfecting the Appeal in State Court*, in APPELLATE PRACTICE: A PRACTICAL SKILLS COURSE FOR NEW AND TRANSITIONAL ATTORNEYS, Chpt. K, n. 1 (1998) (citing *Knox v. Long*, 152 Tex. 291, 295, 257 S.W.2d 289, 291 (1953)). Thus, judgment is "rendered" when the decision is officially announced -- this may be done orally in open court or by memorandum filed with the clerk. *Id.* (citing *S&A Rest. Corp. v. Leal*, 892 S.W.2d 855, 857 (Tex. 1995)(per curiam). A judgment is not "rendered" until the judge undertakes specific acts to do so -- the judge's intention to "render" judgment is insignificant without an actual declaration that a decision has been made. *Id.*

By contrast, "entry" of the judgment is a "ministerial act of the clerk by which enduring evidence of the judicial act of rendering judgment is afforded." *Id.* (citing *Knox*, 152 Tex. at 295, 257 S.W.2d at 291).

S.W.2d 176-77 (Tex. 1995)("bill of review"). Regardless, it remains the better practice to accurately entitle your pleadings.

ii. <u>Motion to modify judgment</u>. A motion to modify, correct, or reform the judgment extends the deadlines for perfection in the same fashion that a motion for new trial does. Unlike the extension resulting from the filing of a motion for new trial, the filing of a motion to modify extends the deadlines only if the motion seeks a substantive change in the judgment. *See Lane Bank Equip. Co. v. Smith Southern Equip., Inc.*, 10 S.W.3d 308, 313 (Tex. 2000).

> • **Red Flag**: Note that the San Antonio Court of Appeals has held that a **post-verdict** motion for judgment n.o.v., as opposed to a **post-judgment** motion for judgment n.o.v., does nothing to extend the deadlines because such a motion does not seek a substantive change in the judgment. *See, e.g., Miller Brewing Co. v. Villarreal*, 822 S.W.2d 177, 179-80 (Tex.App.--San Antonio 1991), *rev'd on other grounds*, 829 S.W.2d 770 (Tex. 1992).

iii. <u>Motion to reinstate pursuant to Texas Rule of Civil Procedure 165a</u>. A timely motion to reinstate a case dismissed for want of prosecution extends the time for perfecting the appeal. *See Butts v. Capitol City Nursing Home, Inc.*, 705 S.W.2d 696, 697 (Tex. 1986). But the motion to reinstate must be verified; an unverified motion will not extend the deadline.

iv. <u>Request for findings of fact and conclusions of law</u>. A timely-filed request for findings of fact and conclusions of law extends the deadline for perfection if the findings and conclusions are required by Rule 296, or if such findings and conclusions could be considered by the appellate court. TEX. R. APP. P. 26.1. If a party seeks findings of fact and conclusions of law in an instance where they are not proper, the deadline will not be extended. *See* TEX. R. APP. P. 26.1(a)(4).

> • **Red Flag**: Requests for findings of fact and conclusions of law will not extend the appellate timetables for appealing matters such as: (1) summary judgment orders; (2) judgment after directed verdict; (3) judgment n.o.v.; (4) default judgment awarding liquidated damage; (5) dismissal for want of prosecution action without an evidentiary hearing; (6) dismissal based on the pleadings or special exceptions; and (7) any judgment rendered without an evidentiary hearing. *See generally Ford v. City of Lubbock*, 76 S.W.3d 795, 796 (Tex.App.--Amarillo 2002, no pet.); *Foster*, 74 S.W.3d at 204.

v. <u>Effect of premature motion on time for perfecting appeal</u>. The Austin Court of Appeals has recently noted that "[i]f prematurely filed, a motion for new trial or a request for findings of fact and conclusions of law [still] extends the time for perfection of an appeal from a subsequently corrected judgment." *Whacep, Inc. v. Congress Fin. Corp.*, 2003 WL 21087997, at *13-14 (Tex.App.--Austin, May 15, 2003, no pet.)(memorandum opinion); *see also* TEX. R. CIV. P. 306c; TEX. R. APP. P. 27.1(a), 27.2, 27.3; *Fredonia State Bank v. Gen. Am. Life Ins. Co.*, 881 S.W.2d 279, 282 (Tex.1994); *Maddox v. Cosper*, 25 S.W.3d 767, 770-71 n.3 (Tex.App.--Waco 2000, no pet.) (holding motion to modify filed before corrected judgment extended time for perfection as long as substance of motion could be properly raised in connection with corrected judgment)); *Johnson v. Tom Thumb Stores, Inc.,* 771 S.W.2d 582, 585-86 (Tex.App.--Dallas 1989, writ denied) (no rebuttal of presumption that premature motion for new trial is deemed filed on the date of, but subsequent to, the signing of the judgment when there is only one written judgment).

c. <u>Deadline for interlocutory appeals</u>.

i. <u>Interlocutory appeals based on section 51.014(a)</u>. Rule 26.1(b) provides that, in accelerated appeals, the notice of appeal must be filed within 20 days of the signing of the interlocutory order. TEX. R. APP. P. 26.1(b); *Iron Mountain Bison Ranch, Inc. v. Easley Trailer Mfg., Inc.*, 964 S.W.2d 762, 763 (Tex.App.--Amarillo 1998, no pet.). Motions for new trial do not extend the time to file an interlocutory appeal. TEX. R. APP. P. 28.1; *Denton County v. Huther*, 43 S.W.3d 665, 666-67 (Tex.App.--Fort Worth 2001, no pet.); *Dayco Prods., Inc. v. Ebrahim*, 10 S.W.3d 80, 83 (Tex.App.--Tyler 1999, no pet.). There is no language in Rule 26 to suggest that the types of motions designated in Rule 26.1(a) will extend the time to file a notice of appeal in an interlocutory appeal. *But see Hone v. Hanafin*, 104 S.W.3d 884,

888 (Tex. 2003)(reversing dismissal of interlocutory appeal when party "could have plausibly assumed" that its request for findings of fact and conclusions of law would extend the time for filing a notice of appeal).

ii. Interlocutory appeals based on section 51.014(d). If a party is pursuing an "agreed" interlocutory appeal based on section 51.014(d), an "application" for permission to appeal must be filed in the trial court within 10 days of the trial court's order. *See* TCPRC § 51.014(f).

• **Red Flag**: There are few cases construing this recent provision, but the Dallas Court of Appeals has concluded that this deadline cannot be extended. *See In re D.B.*, 80 S.W.3d at 702-03 (holding that 10-day deadline in section 51.014(f) controlled and not the 20-day deadline found in Rule 26.1(b), and that 10-day deadline cannot be extended pursuant to Rule 26.3).

While the statute specifies the filing of an application, at least one commentator believes that "it may also be necessary to file a notice of appeal" to perfect an agreed appeal of an interlocutory order. *See* Russell S. Post, *Interlocutory Appeals in the 21st Century*, in STATE BAR OF TEXAS ADVANCED CIVIL APPELLATE PRACTICE COURSE, Chpt. 18 at 10 (2002).

d. Restricted Appeals. Rule 30 permits an 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 judgment's signing. TEX. R. APP. P. 30. Such appeals 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). Extension of time allowed by Rule 4.2(a)(2) does not apply in restricted appeals. *See Maldonado v. Maldonado*, 100 S.W.3d 345, 346 (Tex.App.--San Antonio 2002, no pet.)

• **Red Flag**: Note that this deadline runs from the date the judgment or order is signed, and not the date the absent party receives notice of that decree. *See, e.g., Cotton v. Cotton*, 57 S.W.3d 506, 509 (Tex.App.--Waco 2001, no pet.).

2. Extension of time to file notice of appeal. As distinguished from an extension of the deadline to file a notice of appeal, an extension of time permits a party to have additional time to file its notice, even after the deadline has expired. TEX. R. APP. P. 26.3. The court of appeals may grant an extension for the late filing of a notice of appeal if: (1) the notice of appeal is filed with the trial court clerk not later than 15 days after the deadline for filing the notice of appeal; and (2) a motion for extension of time complying with Rule 10.5(b)[8] is filed in the court of appeals within the 15-day period, reasonably explaining the need for the extension. *See* TEX. R. APP. P. 26.3; *Williams v. Flores*, 88 S.W.3d 631, 632 (Tex. 2002)(per curiam).

a. Formal requisites of motion. As a general rule, the motion for extension need not be verified; however, if the motion depends on facts not in the record, not within the court's knowledge in its official capacity, or not within the personal knowledge of the attorney signing the motion, it may be necessary to supply affidavits or other evidence. TEX. R. APP. P. 10.2. Also note that the local rules of some courts may require that motions be verified.

b. Determination on motion. Texas courts liberally construe the rules of procedure related to the acquisition of appellate jurisdiction. *See Verburgt v. Dorner*, 959 S.W.2d 615, 616-17 (Tex. 1997). The party whose notice is late must provide the court with a reasonable explanation for the delay in filing. *See Jones v. City of Houston*, 976 S.W.2d 676, 677 (Tex. 1998).

Satisfaction of this requirement generally requires some statement indicating that the failure to

[8] Rule 10.5(b) requires that the motion to extend the time to file the notice of appeal must: (1) state the deadline for filing the item in question and the length of the extension sought; (2) identify the trial court; (3) state the date of the trial court's judgment or appealable order; and (4) state the case number and style of the case in the trial court. TEX. R. APP. P. 10.5(b). In addition, as with all other appellate motions, the motion to extend time to file the notice of appeal must contain or be accompanied by a certificate that certifies that the filing party has conferred, or made a reasonable effort to confer, with all other parties about the substance of the motion and to determine if the other parties oppose the motion. TEX. R. APP. P. 10.1(a)(5).

file was not deliberate or intentional. *See Garcia v. Kastner Farms*, 774 S.W.2d 668, 669-70 (Tex. 1989). As the supreme court put it: "any plausible statement of circumstances indicating that the failure to file within the [required] period was not deliberate or intentional, but was the result of inadvertence, mistake, or mischance . . . even if that conduct can also be characterized as professional negligence" will suffice as a reasonable explanation for the late filing of the document. *See id.; but see Kidd v. Paxton*, 1 S.W.3d 309, 310-11 (Tex.App.--Amarillo 1999, pet. denied)("too busy," without showing that busy schedule contributed to the missed deadline is not sufficient excuse); *Inman's Corp. v. TransAmerica Comm. Fin. Corp.*, 825 S.W.2d 473, 482 (Tex.App.--Dallas 1991, no writ)(involvement in settlement negotiations not sufficient reason to miss deadline).

3. Premature notice of appeal. On occasion, such as when an order believed to be final is discovered to be an unappealable interlocutory order, a party may have prematurely filed its notice of appeal. *See Espalin v. Children's Med. Ctr. of Dallas*, 27 S.W.3d 675, 681 (Tex.App.--Dallas 2000, no pet.). Rule 27.1 accounts for this possibility, and provides that "a prematurely filed notice of appeal is effective and deemed filed on the day of, but after, the event that begins the period for perfecting the appeal." TEX. R. APP. P. 27.1; *see Sheppard v. Thomas*, 101 S.W.3d 577, 581 (Tex.App.--Houston [1st Dist.] 2003, pet. denied). Thus, once the notice of appeal is on file with the trial court, an appeal will be perfected (assuming the notice of appeal satisfies all requirements) upon the signing of an appealable judgment or order. *See Kelly v. Demoss Owners Ass'n*, 71 S.W.3d 419, 422 n.3 (Tex.App.--Amarillo 2002, no pet.).

E. RECORD ON APPEAL

Having filed a timely notice of appeal and a docketing statement, the next step is to properly request the appellate record. The record on appeal will always include the clerk's record, which consists of the pleadings and other documents filed with the trial court clerk. TEX. R. APP. P. 34.1, 34.5. The record on appeal also includes the reporter's record, which is a transcription of the proceedings (testimony of witnesses and arguments of counsel) and the exhibits that the parties introduced. TEX. R. APP. P. 34.1, 34.6. Even when more than one notice of appeal has been filed, there should only be one appellate record. TEX. R. APP. P. 34.1. However, a reporter's record is not always necessary to the disposition of an appeal as, for example, when the appeal is from a summary judgment, *see El Chico Corp. v. Poole*, 732 S.W.2d 306, 308 (Tex. 1987), or involves an issue that is purely a question of law, *see Segrest v. Segrest*, 649 S.W.2d 610, 611 (Tex.), *cert. denied,* 464 U.S. 894 (1983).

1. Obtaining the record. The parties to the appeal bear no responsibility for the actual filing of the record on appeal. *See* TEX. R. APP. P. 35.3. The trial court clerk "is responsible for preparing, certifying, and timely filing the clerk's record," upon the satisfaction of certain conditions. TEX. R. APP. P. 35.3(a). Likewise, 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).

2. Time for filing the record. The deadlines for filing the record are similar to the deadlines for filing the notice of appeal. As a general rule, the appellate record must be filed in the appellate court within 60 days after the *judgment is signed*. TEX. R. APP. P. 35.1. As with the deadline for the notice of appeal, the deadline for filing the record is extended to 120 days after the judgment is signed if any party files a motion for new trial, a motion to modify the judgment, a motion to reinstate pursuant to TRCP 165a, or a proper request for findings of fact and conclusions of law. TEX. R. APP. P. 35.1(a). In an accelerated appeal, the deadline is shorter, and the record must be filed within 10 days after the notice of appeal is filed. TEX. R. APP. P. 35.1(b). Finally, if the appeal is a restricted appeal, the record must be filed within 30 days after the notice of appeal is filed. TEX. R. APP. P. 35.1(c).

3. Invoking the duty to file. The duty to file the record does not attach automatically upon the filing of a notice of appeal. With both the clerk's record and the reporter's record, invoking the duty to

file the record is a multi-step process. *See* TEX. R. APP. P. 35.3.

a. <u>Clerk's record</u>. The clerk has a duty to prepare, certify, and timely file the clerk's record once (1) a notice of appeal has been filed and (2) the party responsible for paying for the preparation of the clerk's record: (a) has paid the clerk's fee, (b) has made satisfactory arrangements with the clerk to pay the fee, or (c) is entitled to appeal without paying the fee. TEX. R. APP. P. 35.3(a).[9] The duty to pay for preparation of the clerk's record (or to make satisfactory arrangements to pay the fee) falls on the appellant. *See Utley*, 958 S.W.2d at 961.

b. <u>Reporter's record</u>. The official or deputy court reporter's duty to prepare, certify, and file the record arises upon the satisfaction of three conditions. If a reporter's record is sought, the party seeking to obtain the record must make a written request to the court reporter. The request should designate the portions of the proceedings to be transcribed and must designate the exhibits to be included in the record. TEX. R. APP. P. 34.6(b)(1). A copy of this request must be filed with the trial court clerk, too. TEX. R. APP. P. 34.6(b)(2). The rule provides that the request must be filed "at or before the time" for filing the notice of appeal, but further provides that "an appellate court must not refuse to file a reporter's record . . . because of a failure to timely request it." TEX. R. APP. P. 34.6(b)(3).

Additionally, the party responsible for paying for the preparation of the reporter's record must (a) pay the reporter's fee, (b) make satisfactory arrangements with the reporter to pay the fee, or (c) be entitled to appeal without paying the fee. TEX. R. APP. P. 35.3(b)(3); *see infra* note 9.

At least one court has held that where an appellant and the reporter are embroiled in a dispute as to whether satisfactory payment arrangements were made, the deadline for filing the record should be abated to permit an evidentiary hearing to resolve the dispute. *see Mills v. Haggard*, 17 S.W.3d 462, 463 (Tex.App.--Waco 2000, no pet.)(per curiam).

4. <u>Contents of the record</u>.

a. <u>Mandatory contents of clerk's record</u>. To an extent, the rule determining the contents of the clerk's record is self-effectuating. Rule 34.5 specifies certain pleadings that must be in the record (unless the parties stipulate to the record's contents

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[9] This exception accounts for indigent parties. To establish indigence, an appellant claiming indigence must file an affidavit of indigence "in the trial court with or before the notice of appeal." TEX. R. APP. P. 20.1(c)(1). If the appellee is claiming indigence and seeks relief from the requirement to pay part of the cost for preparing the record, the affidavit must be filed in the trial court within 15 days of the date when the appellee becomes responsible for paying that cost. *Id.* The appellate court can extend the period of time for filing the affidavit, if the party files an appropriate motion within 15 days after the deadline for filing the affidavit. TEX. R. APP. P. 20.1(c)(3); TEX. R. APP. P. 10.5(b).

The affidavit must identify the filing party and state the amount of costs that party can pay, if any. TEX. R. APP. P. 20.1(b). The affidavit must also include: (1) the nature and amount of the party's income; (2) the income of the party's spouse and the availability of such income to the party; (3) real and personal property owned by the party; (4) cash the party holds and amounts on deposit that can be withdrawn; (5) the party's other assets; (6) the number and relationship of the party's dependents; (7) the nature and amount of the party's debts; (8) the nature and amount of the party's monthly expenses; (9) the party's ability to obtain a loan for court costs; (10) whether the party is receiving *pro bono* legal assistance without a contingency fee; and (11) whether an attorney has agreed to pay or advance court costs. *Id*.

The affidavit must be sent to the appropriate court reporter upon its filing. TEX. R. APP. P. 20.1(d). The affidavit may be challenged by the clerk, the court reporter, or any party. TEX. R. APP. P. 20.1(e). When the contest must be filed depends on where the affidavit was filed. If the affidavit was filed in the appellate court, the contest must be filed on or before the date set by the clerk of the appellate court. *Id.* If the affidavit was filed in the trial court, the contest must be filed within 10 days after the date when the affidavit was filed. *Id.* If there is a contest, the party claiming indigence must obtain a written order showing that the contest to the affidavit was overruled. TEX. R. APP. P. 20.1(a)(2). If no contest is filed, the affidavit's allegations are deemed true. TEX. R. APP. P. 20.1(f).

Once the party's indigence has been established (that is, if the allegations in the affidavit are shown or deemed to be true), the court reporter and trial court clerk have a duty to prepare the appellate record without prepayment. TEX. R. APP. P. 20.1(j).

pursuant to Rule 34.2). These pleadings include: (1) all pleadings on which the trial was held; (2) the court's docket sheet; (3) the court's charge and the jury verdict (or the court's findings of fact and conclusions of law); (4) the court's judgment or any order that is being appealed; (5) any request for findings of fact and conclusions of law; (6) any post-judgment motion (and the court's order on that motion); (7) the notice of appeal; (8) any formal bill of exception; (9) any request for a reporter's record (including an agreed statement made pursuant to Rule 34.3); (10) any request for preparation of the clerk's record; and (11) a certified bill of costs (including the cost of preparing the clerk's record). TEX. R. APP. P. 34.5(a)

b. Requested contents of clerk's record. Rule 34.5 also permits parties "at any time before the clerk's record is prepared," to "file with the trial court clerk a written designation specifying items to be included in the record." TEX. R. APP. P. 34.5(b)(1). Such requests must specifically describe the item in a manner that allows the clerk to readily identify the requested document -- the clerk may disregard any general designations such as "all papers filed in this case." TEX. R. APP. P. 34.5(b)(2). Be cautious, though, about making overbroad requests -- the rule expressly provides that if a party requests the inclusion of unnecessary items in the clerk's record, the court of appeals may require that party to pay the costs for preparation of the unnecessary portion. TEX. R. APP. P. 34.5(b)(3). In addition, if it is discovered that a relevant item has been omitted from the clerk's record, the trial court, the appellate court, or any party may direct the trial court clerk to prepare, certify, and file a supplemental clerk's record in the court of appeals. TEX. R. APP. P. 34.5(c)(1). Such a request should be made by letter to the trial court clerk. *Id.* Any supplemental record automatically becomes part of the appellate record. TEX. R. APP. P. 34.5(c)(3).

c. Reporter's record. Because the reporter's record may or may not be necessary, there are no mandatory contents specified in Rule 34.6.[10] Upon a proper request, the parties may seek a full record of all recorded proceedings, or transcriptions of some part of those proceedings. *See* TEX. R. APP. P. 34.6(b)&(c). Any other party may designate additional exhibits or portions of the testimony to be included in the reporter's record. *Id.* If the appellant requests only part of the reporter's record, the request sent to the reporter and the trial court clerk must "include . . . a statement of the points or issues to be presented on appeal and will then be limited to those points or issues." TEX. R. APP. P. 34.6(c)(1). Note, however, that the failure to timely file a compliant statement will not result in waiver if the failure does no harm to the appellee. *See Bennett v. Cochran*, 96 S.W.3d 227, 229 (Tex. 2002).

If anything relevant is omitted from the reporter's record, the trial court, the appellate court, or any party may, by letter, direct the court reporter to prepare, certify, and file a supplemental record containing the omitted items in the appellate court. TEX. R. APP. P. 34.6(d). A supplemental reporter's record is part of the appellate record. *Id.*

5. What if no record is filed?

a. Notice of late record. Note that Rule 37.3 prescribes the consequences when the record is late. TEX. R. APP. P. 37.3. The rule requires the appellate court clerk, upon discovering that any part of the record is late, to send notice to whomever was responsible for filing that part of the record. TEX. R. APP. P. 37.3(a)(1). Generally, this notice will provide that the person responsible for filing the record has additional time to do so (30 days from the date of the notice in an ordinary or restricted appeal; 10 days in an accelerated appeal). The notice will also provide that the matter will be referred to the appellate court if the clerk does not receive the record within the stated time period. *Id.*

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[10] The Supreme Court has recently noted that some of the courts of appeals "require 'strict compliance' with all of Rule 34.6's provisions to preserve appellate review." *Bennett v. Cochran*, 96 S.W.3d 227, 229 (Tex. 2002)(citing *Brown v. McGuyer Homebuilders, Inc.*, 58 S.W.3d 172, 175 (Tex.App.--Houston [14th Dist.] 2001, pet. denied) (appellant's failure to file statement of points in compliance with Rule 34.6 required appellate court to presume record's omitted portions supported trial court's judgment); *In re R.C.*, 45 S.W.3d 146, 149 (Tex.App.--Fort Worth 2000, no pet.) (appellate court permitted to review only those issues properly designated in appellant's statement of points); *Hilton v. Hillman Distrib. Co.*, 12 S.W.3d 846, 847 (Tex.App.--Texarkana 2000, no pet.) (requiring both request for partial record and statement of points to be timely filed).

b. Appellant's failure to invoke duty. As for the parties, the rule broadly suggests that if the appellant has complied with all of its responsibilities with regard to the record, the court of appeals must permit the record to be filed late. In fact, the courts have generally exercised broad discretion to permit late filing even when the tardiness is partially or totally the appellant's fault. *See generally Wu v. Star Houston, Inc.*, 2002 WL 830733, at *1 (Tex.App.--Waco 2002, no pet.)(per curiam)(late record because of appellant's failure to notify the court of substituted counsel and claimed belief that notice of late clerk's record was actually notice of late reporter's record did not warrant dismissal of appeal); *but see Gordon v. James*, 95 S.W.3d 734, 736 (Tex.App.--Houston [1st Dist.] 2003, no pet.)(receipt of empty envelope from court of appeals rather than notice that appeal would be dismissed for failure to pay for clerk's record was sufficient to put appellant on notice that he should inquire about and remedy the defect).

i. No request for reporter's record. The consequence for the failure to file a reporter's record will result in dismissal of the appeal unless there are "issues or points that do not require a reporter's record for a decision." TEX. R. APP. P. 37.3(c).

• **Red Flag**: Where a reporter's record is needed for review, but is not requested by the appellant, the court of appeals has authority to presume that the omitted portion of the reporter's record supports the trial court's judgment. *See In re Marriage of Spiegel*, 6 S.W.3d 643, 646 (Tex.App.--Amarillo 1999, no pet.)(citing *Bryant v. United Shortline, Inc.*, 972 S.W.2d 26, 31 (Tex. 1998)); *see also Brown v. McGuyer Homebuilders, Inc.*, 58 S.W.3d 172, 175 (Tex.App.--Houston [14th Dist.] 2001, pet. denied).

ii. No request to include relevant items in clerk's record. The same wiggle room does not exist with respect to the clerk's record. Rule 37.3(b) explicitly vests the court of appeals with discretion to dismiss the appeal if no clerk's record has been filed due to the appellant's failure to pay or make arrangements to pay for that record. TEX. R. APP. P. 37.3(b); *see Gordon*, 95 S.W.3d at 736; *see also In re R.M.M.*, 2002 WL 199733 (Tex.App.--Tyler 2002, no pet.)(per curiam)(dismissing appeal for want of prosecution where appellant failed to make adequate arrangements to pay for clerk's record within one month after receiving order requiring him to do so).

6. Potential traps for the unwary.

a. Clerk's record. There are several issues to be wary of in seeing the clerk's record through to filing.

i. Non-mandatory contents. There are numerous examples of pleadings or other documents that are not mandatorily made a part of the clerk's record, but which are often essential (if not dispositive) of the issues on appeal. For example, the rule does not provide for the mandatory inclusion of objections to the court's charge or tendered jury questions and/or instructions. But issues that require such documents are frequently raised on appeal. An appellant who wishes to raise charge error has the burden of designating any written objections or tendered jury questions for inclusion in the clerk's record.

Similarly, you should be cautious to ensure that all live pleadings become a part of the record. The rule provides only that the record should include the pleadings on which trial was held, but note that in a complex case, or in a case that has been rife with amended and supplemental pleadings, the identification of those pleadings may be difficult, particularly for the clerk who has not been part of the case. Thus, the prudent move is to specifically include in your designation, any instruments that contain counterclaims, cross-claims, pleas in intervention, or other similar pleadings.

Finally, note that the rule provides only for the mandatory inclusion of post-judgment motions and orders. But this category will not catch pleadings like motions for judgment n.o.v., motions for summary judgment, or motions to transfer venue. *See Davis v. Medical Evaluation Specialists, Inc.*, 31 S.W.3d 788, 795 (Tex.App.--Houston [1st Dist.] 2000, pet. denied)(failure to include summary judgment motion in record precluded appellate court from reviewing merits of attack on summary judgment); *Elite Towing, Inc. v. LSI Fin. Group*, 985 S.W.2d 635, 645 (Tex.App.--Austin 1999, no pet.)(challenge to venue not reviewable where

neither motion to transfer venue nor order ruling on that motion was included in record).

ii. Lost or destroyed contents. Where pleadings or other items designated for inclusion in the clerk's record have been lost or destroyed, if the parties can reach a written stipulation, they may deliver a copy of that item to the trial court clerk for inclusion in the record. TEX. R. APP. P. 34.5(e). If there is no agreement amongst the parties with respect to the replacement, the trial court must make a determination as to what constitutes an accurate copy of the missing item. *Id.* This determination can be made on the motion of any party, or at the request of the appellate court. *Id.*

b. Lost or destroyed reporter's record. At one time, an appellant was entitled to a new trial if part or all of the reporter's record was missing. That is no longer true. TEX. R. APP. P. 34.6(f). Rule 34.6(f) provides that an appellant is entitled to a new trial only if: (1) the appellant has timely requested the reporter's record; (2) without the appellant's fault, a significant exhibit or a significant portion of the court reporter's notes and records has been lost or destroyed (or if the recording of the proceeding has been lost or destroyed, or is inaudible); (3) the lost, destroyed, or inaudible portion of the reporter's record (or the lost or destroyed exhibit) is necessary to the appeal's resolution; and (4) the parties cannot agree on a complete reporter's record. *Id.*

Note that even this has its limitations, though. For example, a court reporter is permitted to destroy records after three years have expired. *See* TEX. GOV'T CODE ANN. § 52.046(a)(4) (Vernon 1998); *see also Piotrowski v. Minns*, 873 S.W.2d 368, 370 (Tex.1993). In some instances, there is the possibility -- albeit an attenuated possibility -- that more than three years will expire between the signing of a non-appealable interlocutory order and the signing of a final judgment. If your case fits that category, it is of paramount importance to request a transcription of any hearings that lead to the signing of the interlocutory order if that order might be at issue in your appeal. *See Ganesan v. Vallabhaneni*, 96 S.W.3d 345, 349 (Tex.App.--Austin 2002, pet. denied); *see also Minns*, 873 S.W.2d at 370.

In *Ganesan*, the trial court signed an interlocutory judgment that the parties were married at common law. *Id.* The court reporter transcribed the proceedings that led to that interlocutory judgment, but the appellant did not request the transcription of those proceedings. *Id.* More than three years after the court signed the interlocutory judgment, it signed a final divorce decree. *Id.* During that time, the reporter permissibly destroyed the record. On appeal, appellant claimed he was entitled to a new trial because the reporter's record of the proceedings had been destroyed. The Austin Court of Appeals disagreed, concluding that the appellant was at fault for the destruction of the record due to his failure to request the record during the three year interim. *Id.*

III. PERFECTING THE FEDERAL APPEAL

A federal appeal "as of right" from a final district court judgment is perfected by filing a notice of appeal. FED. R. APP. P. 3(a)(1); *Smith v. Barry*, 502 U.S. 244, 247-48 (1992). The Federal Rules of Procedure make a distinction between appeals "as of right" (FED. R. APP. P. 3(a)(1)) and appeals by permission under 28 U.S.C.A. § 1292(b) (West 1993) (FED. R. APP. P. 3(a)(4) and FED. R. APP. P. 5) or appeals from bankruptcy cases (FED. R. APP. P. 6). In addition, there are appeals from other interlocutory orders provided by specific statutes. Appeals as of right from a district court final judgment are discussed in sections III.A and III.B. Not intended to be an exhaustive treatment, but rather a general overview with guidance as to what rule or statute governs the perfecting of an appeal in that particular instance, section III.C. summarily lists these other categories of appeals not encompassed by Rule 3(a)(1).[11]

Because most practitioners attending this seminar will most likely be filing an appeal to the Fifth Circuit, section III focuses on the Fifth Circuit's view of the rules governing perfecting an appeal. For a guide to the Fifth Circuit's clerk's office or the internal operating procedures of the Fifth Circuit, go to the court's web site at **www.ca5.uscourts.gov/clerk.htm**.

[11] Reference in section III of this paper is to the Federal Rules of Appellate Procedure unless otherwise noted.

A. REQUISITES OF NOTICE OF APPEAL -- DISTRICT COURT FINAL JUDGMENT

1. <u>Appeal must be from a final judgment</u>. Under 28 U.S.C.A. § 1291 (West 1993), a court of appeals has jurisdiction over final, appealable orders of a district court. In order for a judgment to be final, it must conclusively determine the rights of the parties to the litigation and leave nothing for the court to do but execute the order or resolve collateral issues. The judgment must dispose of all the claims of all the parties, thereby effectively ending the litigation. *See, e.g.*, *Ludgood v. Apex Marine Corp. Ship Mgt.*, 311 F.3d 364, 368 (5th Cir. 2002); *Transit Mgmt. of S.E. La., Inc. v. Group Ins. Admin., Inc.*, 226 F.3d 376, 381-82 (5th Cir. 2000); *Lauderdale County Sch. Dist. v. Enterprise Consol. Sch. Dist.*, 24 F.3d 671, 680 (5th Cir.), *cert. denied,* 513 U.S. 988 (1994); *see also FirsTier Mortgage Co. v. Investors Mortgage Ins. Co.*, 498 U.S. 269, 273-74, 276 (1991)("For a ruling to be final, it must end the litigation on the merits, and the judge must clearly declare his intention in this respect."); *Catlin v. United States*, 324 U.S. 229, 233 (1945)("a 'final decision generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment").

Federal Rule of Civil Procedure 54(b) provides in part that:

> ... any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

However, unlike state practice, a judgment in federal court is final for appellate purposes even if the issue of attorneys' fees or costs is still pending -- because those are considered "collateral" to the decision on the merits. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200-02 (1988) (attorney's fees); *Buchanan v. Stanships, Inc.*, 485 U.S. 265, 266-69 (1988)(costs); *see also Samaad v. City of Dallas*, 922 F.2d 216, 218 (5th Cir. 1991)(attorney fees and costs are "collateral matters for purposes of finality"); *Treuter v. Kaufman County*, 864 F.2d 1139, 1143 (5th Cir. 1989)(order dismissing claim and awarding attorney fees as sanctions was final even though amount of fees was not yet determined). *But see Deus v. Allstate Ins. Co.*, 15 F.3d 506, 520-22 (5th Cir.)(where attorneys fees are sought as substantive relief or a part of damages, then they are not "collateral" and the judgment is not final for appeal purposes until the fees are determined), *cert. denied,* 513 U.S. 1014 (1994).

2. <u>Perfect appeal by filing notice of appeal with district court</u>. In order to perfect an appeal as of right from a district court judgment, a notice of appeal must be filed with the district court within the time allowed by Rule 4. FED. R. APP. P. 3(a); *Houston v. Lack,* 487 U.S. 266, 273 (1988)(receipt by district clerk of notice of appeal constitutes "filing"); *In re Lacey*, 114 F.3d 556, 557 (5th Cir. 1997)(timely notice of appeal is mandatory and jurisdictional). Note that this same procedure is applicable to an appeal from a judgment by a magistrate judge. FED. R. APP. P. 3(a)(3). However, if the notice is erroneously filed with the appellate court, the clerk of the court of appeals will note the date and forward it to the clerk of the district court. The notice is deemed filed in the district court as of the date of receipt noted by the appellate court clerk. FED. R. APP. P. 4(d).

3. <u>Service of notice of appeal</u>. Under Rule 3(d), the district clerk must serve notice of the filing of a notice of appeal by mailing a copy to each party's counsel of record, except the appellant. Thus, when filing the notice, counsel should include enough copies to perfect that service. However, because Rule 3(d) does not relieve the party filing the notice from its requirement to serve opposing parties, counsel should also serve opposing parties.

4. <u>Contents of notice of appeal</u>. "Rule 3's dictates are jurisdictional in nature, and their satisfaction is a prerequisite to appellate review." *Smith v. Barry*, 502 U.S. at 248. Note that there is a form notice of appeal immediately following the Federal Rules of Appellate Procedure. FED. R. APP. P. Appendix of Forms, Form 1.

a. Must specify party appealing. Prior to the 1993 amendment of Rule 3(c), a notice of appeal naming only one party and then adding an *et al.* to cover any other appellants was insufficient to perfect an appeal except on behalf of the named party. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 315-19 (1988). The 1993 amendments sought to remedy that trap and prevent the loss of appellate rights by a party who intended to appeal, but was not named specifically in the notice of appeal. *Garcia v. Wash*, 20 F.3d 608, 609 (5th Cir. 1994).

The amendments changed the requirement from "shall specify the party" to "must specify the party" and provided for some limited generic descriptions of appellants, such as "all plaintiffs," "the defendants," "the plaintiffs A, B, *et al.*" or "all defendants except X." Fed. R. App. P. 3(c). Note that these amendments have been held to be retroactive. *Garcia v. Wash*, 20 F.3d at 609. However, the amended rule still provides that "a notice of appeal must specify the party or parties taking the appeal." *But see Longmire v. Guste*, 921 F.2d 620, 622-23 (5th Cir. 1991)(Rule 3(c) does not require that notice name all *appellees* so long as receive notice). According to the Advisory Committee Notes to FRAP 3, the test is "whether it is objectively clear that a party intended to appeal." *Garcia v. Wash*, 20 F.3d at 610. Thus, some ambiguity remains with regard to the extent terms like "*et al.*" or "*e.g.*" can be used; consequently, the careful practitioner should continue to list in the body of the notice of appeal all parties by name who intend to file an appeal, but be aware that if some names are inadvertently omitted, his right to appeal may be saved by the Rule 3(c) amendment.

b. Must designate order or judgment being appealed and court to which appeal is taken. The notice of appeal must also designate the judgment, order, or part thereof from which an appeal is being taken. Fed. R. App. P. 3(c); *Warfield v. Fidelity and Deposit Co.*, 904 F.2d 322, 325 (5th Cir. 1990)(no jurisdiction over order not specified in notice of appeal); *F.T.C. v. Hughes*, 891 F.2d 589 (5th Cir. 1990)(no jurisdiction where notice failed to specify order denying Rule 59 motion). However, the Fifth Circuit has at times relaxed that requirement, holding that Rule 3(c)'s requirement of identifying the order should be "construed broadly." *Osterberger v. Relocation Realty Serv. Corp.*, 921 F.2d 72, 74 (5th Cir. 1991); *see also United States v. O'Keefe*, 128 F.3d 885, 889 7 n.4 (5th Cir. 1997)(notice of appeal designating order denying reconsideration of order granting new trial was viewed as including order granting new trial), *cert. denied,* 523 U.S. 1078 (1998); *Friou v. Phillips Petroleum Co.*, 948 F.2d 972 (5th Cir. 1991)(notice of appeal which did not refer to summary judgment order adequate where both sides briefed summary judgment issues).

5. Filing fee. A $105 fee -- $5 filing fee and $100 docketing fee -- must be paid to the district court clerk upon filing of the notice of appeal. FED. R. APP. P. 3(e); 5TH CIR. R. 3; *see also* 28 U.S.C.A. § 1913 (West 1994) & § 1917 (West 1994) (establishing fee). Failure to pay the fee will not keep the appeal from being docketed; however, such is grounds for dismissal of the appeal under FED. R. APP. P. 3(a)(2); 5TH CIR. R. 42.

6. Joint or consolidated appeals. When two or more parties are entitled to appeal from a judgment and their interests make joinder practicable, they may file a joint notice of appeal. FED. R. APP. P. 3(b)(1). Even if the parties have filed separate timely notices of appeal, the court of appeals can consolidate those appeals. FED. R. APP. P. 3(b)(2); *Lauderdale County*, 24 F.3d at 682.

7. Separate notice of appeal required if seek any modification of judgment. If any party other than the one filing the first notice of appeal desires to alter, modify, reverse, or remand the judgment or enlarge his rights under the judgment, then he must file a separate notice of appeal. *United States v. Coscarelli*, 149 F.3d 342, 343 (5th Cir. 1998)(en banc); *see also Marts v. Hines*, 117 F.3d 1504, 1506-15 (5th Cir. 1997)(en banc)(Garwood, J., dissenting) (detailing history of requirement of notice of cross appeal, based on inveterate rule that appellate court has no power to enlarge rights absent a cross appeal), *cert. denied,* 522 U.S. 1058 (1998); *Crist v. Dickson Welding, Inc.*, 957 F.2d 1281, 1289-90 (5th Cir.)(appeal dismissed because party failed to file notice of appeal as to part of judgment adverse to it), *cert. denied,* 506 U.S. 864 (1992). This notice of cross appeal must be filed within the original time period for notices of appeal or within 14 days after the filing of first notice of appeal, whichever is later.

FED. R. APP. P. 4(a)(3); *Maiz v. Virani*, 311 F.3d 334, 339 (5th Cir. 2002). Even a notice filed by a person later determined to have improperly intervened in the case has been held to afford the other parties the extended 14 days in which to file their notices of appeal. *Lauderdale County*, 24 F.3d at 681 & n.13; *see also Thurman v. FDIC*, 889 F.2d 1441, 1448 (5th Cir. 1989). The 14-day period runs from the filing of the first notice of appeal. *Cyrak v. Lemon*, 919 F.2d 320, 323-24 (5th Cir. 1990).

8. <u>Representation statement must be filed with court of appeals</u>. FRAP 12(b) requires that 10 days after filing a notice of appeal, the attorney who filed the notice shall file with the clerk of the court of appeals a statement naming each party represented by that attorney. FED. R. APP. P. 12(b). Under 5th Cir. R. 12, the FRAP 12 requirement is met by completing the Fifth Circuit's form for appearance of counsel and returning it to the clerk within 30 days of filing the notice of appeal. 5TH CIR. R. 12. This form is sent to counsel after the appeal is docketed in the Fifth Circuit.

B. TIMELINES FOR FILING NOTICE OF APPEAL

1. <u>30 days from entry of judgment if no post-trial motion</u>. A notice of appeal must be filed within 30 days after entry of judgment -- or 60 days by **any** party if the United States or an officer or agency thereof is a party. FED. R. APP. P. 4(a)(1); *United States ex rel. Russell v. Epic Healthcare Mgt. Group*, 193 F.3d 304, 306-07 (5th Cir. 1999). "Entry of judgment" occurs when the judgment is set forth on a separate document under FRCP 58 and entered by the clerk on the civil docket as provided in Rule 79(a). FED. R. APP. P. 4(a)(7); *Transit Mgmt.*, 226 F.3d at 381-82; *see also Tijerina v. Plentl*, 984 F.2d 148 (5th Cir. 1993)("entry" of judgment distinguished from signing or filing judgment). The "separate document" requirement means a document distinct from the district court's opinion or memorandum. FED. R. CIV. P. 58 advisory committee note; *Ludgood*, 311 F.3d at 368.

> • **Red Flag**: In the event a district court should issue a document entitled "final judgment" which meets the requisites of a final judgment before it issues its memorandum or opinion, the triggering date for calculating the deadline for the filing of a notice of appeal remains the "entry" of judgment, not the later opinion. *See Ludgood*, 311 F.3d at 368-69 (appeal dismissed because notice filed within 30 days of date of memorandum rather than judgment was untimely).

The time limits for filing a notice of appeal are mandatory and jurisdictional and cannot be enlarged by the appellate court. *Ramsey v. Colonial Life Ins. Co. of America*, 12 F.3d 472, 476 (5th Cir. 1994). Given that "[a] timely notice of appeal is necessary to the exercise of appellate jurisdiction," an appellate court cannot review the merits of an appeal absent a timely notice of appeal. *United States v. Truesdale*, 211 F.3d 898, 902 (5th Cir. 2000). However, as discussed at section III.B.4, under Rule 4(a)(5), the district court, upon a showing of excusable neglect or good cause may extend the time for filing a notice of appeal if a motion is filed within 30 days after the time prescribed by Rule 4(a).

2. <u>30 days from entry of order disposing of certain post-trial motions</u>. If any party timely files one of the following motions, the timetable for filing a notice of appeal is extended as to **all** parties and the 30 days begins to run from the entry of an order disposing of the last outstanding motion:

(1) motion for judgment under Rule 50(b)
(2) motion to amend or make additional findings of fact under Rule 52(b) whether or not granting the motion would alter the judgment
(3) motion to alter or amend the judgment under Rule 59
(4) motion for attorneys' fees under Rule 54 if district court under Rule 58 extends the time for appeal
(5) motion for a new trial under Rule 59
(6) motion for relief under Rule 60 if the motion is served within 10 days after the entry of judgment.

FED. R. APP. P. 4(a)(4); *see also Simmons v. Reliance Standard Life Ins. Co. of Tex.*, 310 F.3d 865, 867-68 (5th Cir. 2002)(timely FRCP 59(3) motion renders underlying judgment nonfinal until district court disposes of the motion); *Richardson v. Oldham*, 12 F.3d 1373, 1377 (5th Cir. 1994) (timely filed Rule 59 motion tolled 30-day appeals clock as to all other defendants whose liability was

determined in the judgment which the motion sought to amend).

A "timely filed" motion is an extremely important component of this timeline. The Fifth Circuit has held that where a Rule 59 motion was not timely filed, it did not extend the time for filing a notice of appeal. *Vincent v. Consol. Operating Co.*, 17 F.3d 782, 785 (5th Cir. 1994); *see also Midwest Employers Cas. Co. v. Williams*, 161 F.3d 877, 878 (5th Cir. 1998); *F.T.C. v. Hughes*, 891 F.2d 589, 591 (5th Cir. 1990).

• **Red Flag**: Subsequent motions for rehearing or reconsideration after a district court has ruled on a post-judgment motion like FRCP 59(e) will not extend the time for filing the notice of appeal because Rule 4(a)(4) is clear that the time runs from the overruling of one of the designated post-judgment motions. *Anderson v. Pasadena Indep. Sch. Dist.*, 184 F.3d 439, 446-47 (5th Cir. 1999); *Hamilton Plaintiffs v. Williams Plaintiffs*, 147 F.3d 367, 371 (5th Cir. 1998).

3. Extensions for filing notice of appeal.

a. Timeline for filing motion for extension. An extension of the deadline for filing a notice of appeal may be had by motion filed within 30 days after the due date, which shows excusable neglect or good cause for the late filing of the notice. FED. R. APP. P. 4(a)(5); *Dunn v. Cockrell*, 302 F.3d 491, 492-93 (5th Cir. 2002)(party cannot use FRCP 60(b) to vacate and re-enter judgment as a substitute for a timely notice of appeal because such "squarely collides with Rule 4(a)(5)"), *cert. denied,* 123 S.Ct. 1208 (2003); *Wilkens v. Johnson*, 238 F.3d 328, 330-31 (5th Cir.)(appeal dismissed because motion for extension was filed more than 60 days after entry of judgment), *cert. denied,* 533 U.S. 956 (2001). However, a court may, under Rule 4(a)(5), extend the time for filing a notice of appeal no more than 30 days after the original due date or 10 days after entry of order granting extension, whichever is longer. This 30-day time period is jurisdictional. *United States v. Doyle*, 854 F.2d 771, 773 (5th Cir. 1988).

? **Red Flag**: Note that an extension granted to one appellant will not extend the deadline for filing a notice of appeal for other appellants who did not seek an extension. *Cyrak*, 919 F.2d at 324.

b. Motion for extension must be filed with district clerk. Any motion for extension must be filed with the district clerk, not the court of appeals, because the appellate court cannot extend the time for filing a notice of appeal. *In re Lacey*, 114 F.3d 556, 557 (5th Cir. 1997).

c. Standard for obtaining extension. The "good cause" standard in Rule 4(a)(5) applies only to requests made before the expiration of the original 30-day time period in which to file the notice of appeal. If the extension is requested after the due date of the notice but within the 30-day extension period allowed by Rule 4(a)(5), the standard is "excusable neglect." *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199, 1202 n.6 (5th Cir. 1993).

The Fifth Circuit has traditionally construed the "excusable neglect" requirement narrowly. *See, e.g., Latham*, 987 F.2d at 1201-02 (counsel received judgment late, but within appeal time); *Campbell v. Bowlin*, 724 F.2d 484, 488 (5th Cir. 1984)(counsel failed to read federal rules); (client had economic difficulties). However, *Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. P'ship*, has caused the court to be somewhat more flexible in its interpretation. 507 U.S. 380, 388 (1993)(holding that "excusable neglect" can include mere inadvertence and carelessness in certain circumstances, including a consideration of a party's good faith, prejudice to other parties, impact on the litigation, and cause of the delay).

In *United States v. Clark*, the Fifth Circuit acknowledged that "*Pioneer* does allow somewhat more room for judgment in determining whether mistakes of law are excusable than does the strict standard for excusable neglect espoused by some of our prior decisions." 51 F.3d 42, 44 (5th Cir. 1995)(in light of new standard, remanding to district court for reconsideration of counsel's mistaken use of wrong time-computation rule for filing notice of appeal; but noting that opinion did not hold that such was as a matter of law excusable neglect). Accordingly, to the extent that any prior opinions "strenuously construing 'excusable neglect'" conflicted with *Pioneer*, the Fifth Circuit disapproved them. *Halicki v. La. Casino Cruises, Inc.*, 151 F.3d 465, 468 (5th Cir. 1998), *cert. denied*, 526 U.S. 1005 (1999).

- **Red Flag**: However, counsel is cautioned against assuming motions for extension to file notices of appeal will be granted based on *Pioneer.* Since the *Pioneer* decision, the Fifth Circuit has twice held that the excusable neglect standard had not been met. *Midwest Employers Cas. Co. v. Williams*, 161 F.3d 877, 879 (5th Cir. 1998)(it is the "rare case" where a misinterpretation of the federal rules will qualify as excusable neglect); *Halicki*, 151 F.3d at 467-70 (counsel's erroneously applying 3-day mail service extension rule to judgment served by mail to calculate deadline for filing motion for new trial is not excusable neglect); *see also Pioneer*, 507 U.S. at 392 ("[I]gnorance of the rules [and] mistakes construing the rules do not usually constitute 'excusable' neglect.").

4. <u>Timeline extended if no notice of judgment</u>. If no notice of judgment is received within 21 days after entry of judgment, as required by FRCP 77(d), the district court may reopen the time for appeal for a 14-day period if the following conditions are met: (1) a motion to reopen the time to file an appeal is filed within the **earlier** of (a) 180 days after entry of judgment or (b) within 7 days of receipt of notice; (2) the court finds a party was entitled to notice of the judgment, but did not receive such; and (3) the court finds that no party would be prejudiced. FED. R. APP. P. 4(a)(6); *Wilkens*, 238 F.3d at 331-32 (appeal dismissed because failed to file motion within 7 days of district court's faxing judgment to appellant even though 180-day period had not yet expired); *Latham*, 987 F.2d at 1202 (motion must be filed within 7 days of receiving notice).

5. <u>Prematurely filed notice of appeal</u>. Under current Rule 4(a)(2), if a notice of appeal is prematurely filed before the entry of the judgment, such notice is deemed to have been filed immediately after entry of the judgment. *Long v. Simmons*, 77 F.3d 878, 879 n.5 (5th Cir. 1996); *Lauderdale County*, 24 F.3d at 681. Rule 4(a)(2) also permits a notice of appeal from a nonfinal decision to operate as a notice of appeal from the final judgment when a district court announces a decision that would be appealable if immediately followed by the entry of judgment. *FirsTier Mortgage*, 498 U.S. at 276; *Cousin v. Small*, 325 F.3d 627, 631 (5th Cir. 2003), *petition for cert. filed,* 72 U.S.L.W. 3007 (U.S. June 23, 2003)(No. 02-1862); *Brown v. Miss. Valley State Univ.*, 311 F.3d 328, 332 (5th Cir. 2002); *Barrett v. Atlantic Richfield Co.*, 95 F.3d 375 (5th Cir. 1996); *see also Swope v. Columbian Chemicals Co.*, 281 F.3d 185, 191 (5th Cir. 2002)("premature notice of appeal effective if Rule 54(b) certification is subsequently granted"). *But see United States v. Cooper*, 135 F.3d 960, 963 (5th Cir. 1998)(in a non-Rule 54(b) case, premature notice of appeal was not effective as to a nonfinal order); *Jones v. Johnson*, 134 F.3d 309, 311-12 (5th Cir. 1998)(certificate of probable cause issued by a magistrate judge is ineffective to confer appellate jurisdiction).

In addition, Rule 4 provides that if a party files a notice of appeal after judgment is announced, but before the post-judgment motions are ruled upon, the notice is deemed effective when an order disposing of the last such motion is entered. FED. R. APP. P. 4(a)(4)(B)(i).

C. REQUISITES OF PERFECTING THE APPEAL--OTHER THAN "AS OF RIGHT"

1. <u>Appeal by permission (28 U.S.C.A. § 1292(b); Rule 5)</u>. In order to take a permissive appeal of a non-final order under section 1292(b), the district court must state in writing that: (1) the order involves a controlling question of law as to which there is substantial ground for difference of opinion; and (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation. 28 U.S.C.A. § 1292(b) (West 1993); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 474-77 (1978)(discussing general procedure and purpose of appeals under section 1292(b)).

A party must also comply with the requirements of Rule 5 and petition the court of appeals for permission to appeal. *Chevron USA, Inc. v. Sch. Bd. Vermilion Parish*, 294 F.3d 716, 720 (5th Cir. 2002); *Aucoin v. Matador Serv., Inc.*, 749 F.2d 1180, 1181 (5th Cir. 1985). No notice of appeal is necessary, but within 10 days of an order granting permission to appeal, the appellant must pay the district clerk all required fees and file a cost bond if required. FED. R. APP. P. 5(d). The appellate court's jurisdiction under section 1292(b) is limited to questions that are material to the particular order appealed from. *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 250

(1996); *Adkinson v. Int'l Harvester Co.*, 975 F.2d 208, 211-12 & n.4 (5th Cir. 1992).

2. Appeals in Bankruptcy.[12]

a. From final judgment "as of right" (Rule 6; 28 U.S.C.A. § 158(a)(1), (2); FED. R. BANKR. P. 8001, 8002). An "as of right" appeal in bankruptcy court is perfected exactly the same as in district court -- by filing a notice of appeal with the clerk of the bankruptcy court. FED. R. BANKR. P. 8001(a); *In re Transtexas Gas Corp.*, 303 F.3d 571, 578-59 (5th Cir. 2002) (general rule that filing of notice of appeal confers jurisdiction on court of appeals applies with equal force to bankruptcy cases). However, the timeline is shorter; the notice of appeal must be filed within **10 days** from entry of the judgment, order, or decree appealed from. FED. R. BANKR. P. 8002(a); *In re Arbuckle*, 988 F.2d 29, 31 (5th Cir. 1993)(time for appeal begins to run from the date of the order's entry, not from the date of its service). An extension of the 10-day period may be granted by the bankruptcy judge, but it may not exceed 20 days from the expiration of the time for filing a notice of appeal. FED. R. BANKR. P. 8002(c). The standard for permitting an extension of time is excusable neglect. *In re Moody*, 41 F.3d 1024, 1027 (5th Cir. 1995); *In re Christopher*, 35 F.3d 232, 236 (5th Cir. 1994)(in evaluating "excusable neglect," the court should consider all relevant circumstances, including the danger of prejudice to the debtor, length of the delay, whether delay within control of debtor, and whether debtor acted in good faith).

Bankruptcy Rule 8002(b), which adapts Rule 4(a)(4) to bankruptcy appeals, provides that if certain listed post-judgment motions are filed, the time for appeal runs from the entry of the order disposing of the last such motion outstanding. FED. R. BANKR. P. 8002(b); *Transtexas Gas*, 303 F.3d at 579; *see also In re Stangel*, 219 F.3d 498, 500 (5th Cir. 2000)(filing a second round of post-judgment motions is ineffective to extend the time for appeal; therefore, appeal untimely), *cert. denied*, 532 U.S. 910 (2001). Rule 8002(a) makes a similar provision to Rule 4(a)(2) that a prematurely filed notice of appeal is deemed filed as of the time judgment is entered. FED. R. BANKR. P. 8002(a).

The contents of the notice of appeal are set forth in Bankruptcy Rule 8001(a). FED. R. BANKR. P. 8001(a); *see also* FED. R. BANKR. P. OFFICIAL FORMS, Form 35 (West 1984).

b. From interlocutory orders (28 U.S.C.A. § 158(a)(3); FED. R. BANKR. P. 8001(b), 8003). District courts can hear appeals from interlocutory orders entered by the bankruptcy court "with leave of court" under 28 U.S.C.A. § 158(a)(3) (West Supp. 2003); or a party may elect to have a bankruptcy appellate panel instead of the district court, if the federal court authorizes the referral and all parties to the appeal consent. FED. R. BANKR. P. 8001(e) & advisory committee notes; *In re O'Connor*, 258 F.3d 392, 397 (5th Cir. 2001). The Fifth Circuit does not have jurisdiction to hear appeals from bankruptcy interlocutory orders; its jurisdiction is limited to appeals from final orders. *In re Texas Extrusion Corp.*, 844 F.2d 1142, 1156 & n.18 (5th Cir. 1888)(citing 28 U.S.C.A. § 159(d)).

To perfect such an appeal, a party must file a notice of appeal accompanied by a motion for leave to appeal within 10 days of the date of entry of the order being appealed. FED. R. BANKR. P. 8001(b), 8002(a), 8003; U.S.C.A. § 158(c)(2) (West Supp. 2003); *see also O'Connor*, 258 F.3d at 397 (Rule 8002's time limits apply to interlocutory appeals; but can also extend time under Bankruptcy Rule 8002(c)(2)). Bankruptcy Rule 8003 governs the content and filing of a motion for leave to appeal. FED. R. BANKR. P. 8003. Bankruptcy Rule 8008 governs the filing and service of the motion for leave to file. FED. R. BANKR. P. 8008.

3. Appeals from interlocutory orders. Note that as a general proposition, appeals of interlocutory orders are generally disfavored; and, for that reason, statutes allowing such appeals are strictly construed. *In re Complaint of Ingram Towing Co.*, 59 F.3d 513, 515 (5th Cir. 1995).

a. Certification under FED. R. CIV. P. 54(b). Federal Rule of Civil Procedure 54(b) allows for an appeal in a case involving multiple claims or multiple parties where some claims or parties have

[12] For a more in-depth discussion of bankruptcy appeals, see Kimberly M. Robinson, *Appeals from Magistrate & Bankruptcy Decisions*, in STATE BAR OF TEXAS ADVANCED CIVIL PRACTICE COURSE, Chpt. 19 (2001).

not been disposed of. "Upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment" certified by the district court, a party may appeal such an order. *See Brown*, 311 F.3d at 331-32; *Swope*, 281 F.3d at 192-93 However, note that appeals under FRCP 54(b) and section 1292(b) are mutually exclusive, and a party cannot pursue appeal under both. *Chevron*, 294 F.3d at 720.

- **Red Flag**: For purposes of Rule 4, a judgment becomes final on the date of entry of the FRCP 54(b) certification order and not on the date when the partial judgment was entered. *Brown*, 311 F.3d at 332.

b. Injunctions/Receivers/Admiralty (28 U.S.C.A. § 1292(a) (West 1993)). Section 1292(a) provides for an appeal of different types of interlocutory orders, including: (1) granting, continuing, modifying, refusing, or dissolving injunctions (*Ruiz v. United States*, 243 F.3d 941, 945 (5th Cir. 2001); *Sierra Club v. Glickman*, 67 F.3d 90, 93 (5th Cir. 1995)); (2) appointment of and other matters related to receivers (*Resolution Trust Corp. v. Smith*, 53 F.3d 72, 77 (5th Cir. 1995)); and (3) decrees involving the rights and liabilities of parties to an admiralty case in which an appeal from a final decree is allowed (*Austracan (U.S.A.), Inc. v. M/V Lemoncore*, 500 F.2d 237, 240 (5th Cir. 1974)). 28 U.S.C.A. § 1292(a) (1), (2), (3) (West 1993).

c. Class actions (FED. R. CIV. P. 23(f)). A court of appeals may allow an appeal from an order granting or denying class action certification if application is made within 10 days after entry of the order. FED. R. CIV. P. 23(f).

d. Collateral order doctrine. Under a doctrine of appealability arising from *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), certain nonfinal orders are appealable if they: (1) are conclusive; (2) resolve important, but unsettled questions that are completely separate from the merits; and (3) are effectively unreviewable on appeal from the final judgment in the underlying action. *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375 (1987); *United States v. Brown*, 218 F.3d 415, 420 (5th Cir. 2000), *cert. denied,* 531 U.S. 1111 (2001). Examples of such a "*Cohen* order" are: denial of a qualified immunity defense asserted in a summary judgment motion (*Kinney v. Weaver*, 301 F.3d 253 (5th Cir. 2002), *reh. en banc granted 7/9/03*); dismissal on grounds of immunity (*United States v. Moats*, 961 F.2d 1198, 1204 (5th Cir. 1992)); denial of a Eleventh Amendment immunity motion to dismiss (*Hospitality House, Inc. v. Gilbert,* 298 F.3d 424 (5th Cir. 2002)).

e. Arbitration (9 U.S.C.A. § 16). Orders which interfere with arbitration, such as denying a motion to compel arbitration or refusing a stay pending arbitration are appealable (9 U.S.C.A. § 16(a) (West 1999)), but orders compelling or enforcing rights under arbitration are not (*Id*. at § 16(b)). *See American Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 712-13 (5th Cir. 2002)(Dennis, J., concurring), *cert. denied,* 123 S.Ct. 871 (2003).

D. POTENTIAL TRAPS FOR THE UNWARY

1. No "mailbox" rule for notices of appeal. Note that there is no "mailbox" rule whereby the notice of appeal simply must be placed in the mail by the due date; rather, the notice of appeal must be **received** by the district clerk on or before the due date. The notice is effective only on the date it is filed. *Ludgood*, 311 F.3d at 367-68; *In re Arbuckle*, 988 F.2d 29, 31-32 & n.5 (5th Cir. 1993); *Cyrak*, 919 F.2d at 323. Nor is the mailbox rule applicable to a bankruptcy notice of appeal. *Arbuckle*, 988 F.2d at 31 (appeal not timely where clerk received mailed notice of appeal on eleventh day); *see also* FED. R. BANKR. P. 8008(a).

2. Be careful in your computations of deadlines! Always read the rules before computing deadlines -- even if you think you know them by heart. For example, prior to the 2002 amendments, under Rule 26(a) weekends were excluded only if the time allowed for filing was less than 7 days. *United States v. Clark*, 51 F.3d 42, 43 n.3 (5th Cir. 1995)(notice of appeal not timely because mistakenly excluded weekends). However, effective December 1, 2002, Rule 26(a) was amended to conform to FRCP 6 such that weekends are excluded from the calculation if the time allowed for filing is less than **11** days. FED. R. APP. P. 26(a).

Also, the Rule 26(c) additional 3 days allowed if service is by mail applies only to matters served by a party and **does not apply to** filings with the clerk of

matters, such as **notices of appeal** or petitions for rehearing. 5TH CIR. R. 26.1; *see also Ludgood*, 311 F.3d at 367 & n.2.

3. Time for filing notice of appeal begins 150 days after entry on civil docket sheet if judgment has not yet been set forth in a separate document. Prior to the 2002 amendments, the majority of circuits held that there was no "entry" of judgment -- and thus the timeline for perfecting the appeal did not commence -- until the judgment was set forth on a separate document, no matter how long that took. *See Hammack v. Baroid Corp.*, 142 F.3d 266, 268 (5th Cir. 1998)(20-month period expired between district court's announcing a judgment and entry of judgment on a separate document; time period for perfecting an appeal did not begin to run until there was a judgment on a separate document and it was recorded on the civil docket). However, effective December 1, 2002, the amendments to Rule 4(a)(7)(A) and FRCP 58 have set a cap of 150 days on the "separate document" requirement. "Entry" for purposes of starting the timeline for filing a notice of appeal now occurs the earlier of: (1) the judgment being set forth on a separate document; or (2) 150 days having passed since the entry of the judgment on the civil docket sheet. Thus, an appellant now has a maximum of 180 days after the judgment is recorded on the civil docket to file his notice of appeal.

4. File amended notice on denial of post-trial motion or appellate complaint thereon is waived. The 1993 amendments changed the prior rule which provided that the filing of a post-verdict motion voided any notice of appeal on file at that time. *See Offshore Prod. Contractors v. Republic Underwriters Ins. Co.*, 910 F.2d 224, 229 (5th Cir. 1990)(notice filed before disposition of post-trial motion is of no effect). Under amended Rule 4(a)(4), a notice of appeal filed prior to the disposition of all post-judgment motions remains dormant until the last post-trial motion is decided and then it becomes effective. *Burt v. Ware*, 14 F.3d at 258; FED. R. APP. P. 4(a)(4) advisory committee notes.

However, there still remains a potential trap for the unwary under the current rules. Even though the notice of appeal is not voided by the subsequent filing of a post-verdict motion, a party cannot complain of the disposition of that motion unless the notice of appeal is appropriately amended to include the order on the post-verdict motion as one of the orders from which an appeal is taken. *See, e.g., Bann v. Ingram Micro, Inc.*, 108 F.3d 625, 626 (5th Cir. 1997)(appellate review of order denying reinstatement precluded because failed to amend notice of appeal on dismissal order); *Williams v. Chater*, 87 F.3d 702, 705 (5th Cir. 1996)(where Rule 60(b) motion is filed after notice of appeal from underlying judgment, a separate notice of appeal is required in order to preserve denial of the Rule 60(b) motion for appellate review); *Reeves v. Collins*, 27 F.3d 174, 177 (5th Cir. 1994) (holding appeal on issues contained in motion to reconsider not perfected because party failed to amend notice of appeal to cover order denying reconsideration motion); *Quave v. Progress Marine*, 912 F.2d 798, 801 (5th Cir. 1990)(no jurisdiction over fee award made subsequent to judgment because no reference to it in notice of appeal), *cert. denied,* 500 U.S. 916 (1991). But a notice of appeal as to a final judgment will be sufficient to perfect the appeal of all interlocutory rulings. *Trust Co. of La. v. N.N.P., Inc.*, 104 F.3d 1478 (5th Cir. 1997)(an appeal from a final judgment preserves review of all prior orders "intertwined with the final judgment"). Such amendment must be filed within the time prescribed by Rule 4, measured from the entry of the order disposing of the last outstanding post-verdict motion. FED. R. APP. P. 4(a)(4)(B)(ii). There is no additional fee for this amended notice. FED. R. APP. P. 4(a)(4)(B)(iii); *In re Butler, Inc.*, 2 F.3d 154, 157 (5th Cir. 1993).

IV. CONCLUSION

The rules for perfecting an appeal in state or federal court are straightforward, but nonetheless the process has traps for the unwary advocate. The Texas Supreme Court has concluded that the rules of appellate procedure should be interpreted in a manner that furthers the resolution of appeals based on the merits of the issues presented, rather than on technical observance of procedural requirements. *See Bennett*, 96 S.W.3d at 230. However, "litigants should not view our relaxation of rules in a particular case as endorsing noncompliance." *Id.* Clearly, it behooves anyone who prosecutes an appeal either in state or federal court to adhere to the rules because "litigants who ignore [the] rules do so at the risk of forfeiting appellate relief." *Id.*

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