

WE LOST, NOW WHAT: PERFECTING THE APPEAL

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I. INTRODUCTION

This article seeks to educate the trial lawyer on the basics of perfecting an appeal – from initiating the appeal at the trial court level through the conclusion of the appellate process – with particular emphasis on family law appeals and procedure. The article also briefly examines trial court issues including preservation of error and post-judgment motions.

II. WHAT IS AN APPEAL?

The Nolo online legal dictionary defines an appeal as follows:

“A written request to a higher court to modify or reverse the judgment of a trial court or intermediate level appellate court.”

(<http://www.nolo.com/lawcenter/dictionary/results.cfm>)

The party seeking the appeal is called the appellant. The party defending the appeal is called the appellee. Generally, the appellate court takes the evidence presented at the trial court to be true and considers only whether the judge made mistakes in understanding and applying the law.

Sometimes an appeal is called a “direct appeal”, distinguishing it from a mandamus proceeding, or other type of proceeding. A direct appeal seeks review of a trial court’s final judgment. A judgment is final for the purposes of appeal if it purports to dispose of all claims and parties. In contrast to a direct appeal, other appellate proceedings, such as mandamus or habeas corpus, ask the appellate court to make an initial decision on an issue.

III. DEADLINES

Deadlines are extremely important in an appeal, as a client could lose very important rights if a deadline passes without action. Most often, unlike the trial court, there is no grace or leave of court granted when a deadline passes.

The important deadlines are as are listed in the tables attached as Appendix A to this paper.

IV. CONSIDERATIONS FOR AN APPEAL AT TRIAL COURT LEVEL

Preparation for an appeal really begins at the trial court level. In order to prevail on an appeal, the proper foundation must be laid at the trial court level.

A. Preservation of Error Generally

As a prerequisite for presenting a complaint for appellate review, a complaint must be preserved in accordance with Rule 33.1 of the Texas Rules of Appellate Procedure. In order to preserve a complaint for appeal, trial lawyers should follow these steps:

1. State the specific grounds for the complaint.

Specific grounds for the objection must be stated or must be apparent from the context of the objection. The complaint raised on appeal must be the same as that presented to the trial court. Global objections, profuse objections, or overly general objections preserve no error for review.

2. Assert the objection timely.

Timing is everything. An objection too early is premature and does not preserve error. An objection too late does not preserve error. However, with legal arguments, never assume it is too late. Legal arguments raised post-verdict are timely because they do not involve jury issues.

3. Secure a Ruling

An objection must be overruled in order to preserve error for review. However, the trial court’s ruling may be express or implicit. If the trial court refuses to rule, the objection is still preserved so long as the complaining party objects to the refusal.

4. Make a record

The trial attorney must always bear in mind that the record is the appellate court’s “window” into the trial court. The party complaining on appeal must see that a sufficient record is presented to the appellate court to show error requiring reversal. Without a written motion, response, or order, or a statement of facts containing oral argument or objection, the appellate court must presume that the trial court’s judgment or ruling was correct and that it was

We Lost Now What: Perfecting the Appeal Chapter

supported by the omitted portions of the record. If an attorney fails to ensure that an objection, a ruling, or an offer of proof is on the record, it is as if it never happened.

5. Avoid Waiver

The biggest threat to an appeal is the waiver doctrine. When error is not preserved, it is waived. An unpreserved complaint cannot be reviewed on appeal. Be particularly mindful of the waiver doctrine in preparing and delivering opening and closing arguments. Further, error in admission of evidence is waived if the complaining party introduces the same evidence. Where a party challenges the admissibility of evidence outside the presence of the jury, then states “no objection” when it is offered to the jury, the party waives the complaint. Objections to a pleadings defect are waived if not special exceptions are lodged.

B. Trial Court Pleadings

A party must have pleadings on file requesting all of the relief contained in the trial court’s judgment or it could be reversed on appeal. Further, certain legal remedies are only available to a client if it has been requested in a pleading, including:

- Confirmation of Separate Property,
- Common Law Reimbursement Claims,
- Claims for Economic Contribution,
- Common Law Marriage,
- Marital Agreements,
- Tort Causes of Action,
- Verified Denials, pursuant to Texas Rules of Civil Procedure 93, and
- Affirmative Defenses, pursuant to Texas Rule of Civil Procedure 94.

The requirement of mandatory pleading for the issues listed above can be waived for appeal if the opposing party fails to object, thereby trying the issue by consent.

C. Admission of and Objections to Evidence

At trial, there must be evidence admitted to support each element of a party’s claim, or it could be reversed on appeal. To preserve error in offering evidence, the trial lawyer must do three things. First, she must meet the particular predicate for entry of evidence. Second, she must obtain a ruling. Third, if the evidence is not admitted, she must preserve a copy of the evidence in the record by making an offer of proof if the substance of the evidence is not apparent

from the context of the record.

In order to preserve an objection to evidence on appeal, the party opposing admission must make a timely objection and pursue it until obtaining an adverse ruling. An objection must be overruled to preserve error for appeal. If evidence is admitted over the objection, the objecting attorney must insure the Court’s decision to overrule it is on the record.

The admission or exclusion of evidence is only error where a substantial right of a party is affected.

D. Findings of Fact

1. Requesting Findings of Fact

A party can request that the trial court make findings of fact in support of the judgment after a nonjury trial. Tex. R. Civ. P. 296. Most requests for findings of fact in a family law case, including characterization, valuation, or division of property, fall under the civil rules. Tex. Fam. Code §6.711. Generally, findings of fact must be requested within twenty days after the date the final judgment is signed. Tex. R. Civ. P. 296.

However, some of the specific findings have shorter deadlines and failure to comply with these deadlines may result in difficulty presenting error to the court of appeals on these issues.

Requests for findings regarding a child support order must be made either orally in open court during the hearing, or by written request within ten days of the date of the hearing. Tex. Fam. Code §154.130(a). If the trial court deviates from the child support guidelines, then the trial court must make findings, regardless of whether a party requests them. *Id.* The required child support findings are set out in section 154.130(a) of the Texas Family Code.

Where the possession times by each parent are contested, and the court’s order varies from the standard possession schedule set out by the Texas Family Code, findings must be requested orally in open court or no later than ten days from the date of the hearing.

If findings are timely requested but not filed by the court within twenty days after the request, the requesting party must file a reminder of the duty to file findings. Tex. R. Civ. P. 297. Otherwise, the right to complain on appeal about the lack of findings is waived.

If findings are given, but they do not address all issues important to the requesting party, the

We Lost Now What: Perfecting the Appeal Chapter

requesting party can, within ten days of the filing of the findings, file a request for amended or additional findings. Failure to request additional findings waives the right to complain about the failure to find a certain matter.

If findings of fact and conclusions of law are neither filed nor requested, all necessary findings in support of the judgment will be implied.

2. Drafting Findings of Fact

It is the responsibility of the prevailing party to draft findings of fact and conclusions of law upon request of the Court.

Drafting findings of fact that support each element of a cause of action are important to hold up a case on appeal. Sample findings of fact and conclusions of law are attached as Appendix B to this paper.

The findings of fact must include the characterization of each party's assets, liabilities, claims, and offsets on which disputed evidence was presented and the value of the community estate's assets, liabilities, claims, and offsets on which disputed evidence was presented. Tex. Fam. Code §6.711. The findings of fact and conclusions of law must support each element of the cause of action and state the legal determinations arrived at by the trial court, including decisions regarding the best interest of the child.

If the trial court deviates from the standard possession schedule or the child support guidelines set out by the Texas Family Code, the findings must provide specific support for the trial court's decision.

E. Post-Judgment Motions in the Trial Court

Before the Appeal is perfected and the trial court loses jurisdiction of the judgment, certain post-judgment motions can be used to attempt to challenge, modify, and/or reverse the judgment at the trial court level.

1. Motion for Judgment

A motion for judgment asks the trial court to render judgment on the jury's verdict. Tex. R. Civ. P. 300. Such a motion adopts all findings of the jury. A party who obtained judgment in its favor should be wary of moving for judgment based on a verdict if there are any contrary or ambiguous findings in order to avoid waiver of objection to those findings on appeal. In such instance, the motion for judgment should clearly reserve any points to be challenged and

disclaim adoption of any part of the verdict or findings that are unfavorable or objectionable.

2. Motion for Judgment Notwithstanding the Verdict (JNOV)

A motion for JNOV raises legal sufficiency, no evidence or matter of law arguments and preserves the right to request the trial and appellate courts to render judgment. Tex. R. Civ. P. 301.

A motion for JNOV may be filed before judgment or no later than 30 days after the signing of the judgment.

3. Motion to Disregard Jury Findings

A motion to disregard jury findings challenges specific findings, not the entire verdict, and preserves the right to request the trial and appellate courts to render judgment. Tex. R. Civ. P. 301. Specifically, it raises the points that there is no evidence or legally insufficient evidence to support the finding; the finding is immaterial; or the opposite finding is established as a matter of law.

A motion to disregard may be filed before the judgment or no later than 30 days after the signing of the judgment.

4. Motion for New Trial

A motion for new trial raises factual insufficiency and against the great weight of the evidence arguments, and preserves the right to request the trial and appellate courts to order a new trial. Tex. R. Civ. P. 324, 329b. A motion for new trial raises complaints on jury misconduct, newly discovered evidence, failure to set aside default judgment. It also raises a complaint of factual insufficiency of the evidence to support a jury finding, or a complaint that a jury finding is against the overwhelming weight of the evidence. A complaint regarding inadequacy or excessiveness of damages found by a jury can be raised via motion for new trial.

Failure to assert these grounds in a motion for new trial waives them. Other grounds not proper in another type of post-trial motion can be included in a motion for new trial to preserve error.

A motion for new trial must be filed within 30 days after the signing of the judgment. A new motion for new trial may be filed within 30 days after the signing of a corrected or modified judgment.

5. Motion to Modify, Correct or Reform

We Lost Now What: Perfecting the Appeal **Chapter**
Judgment

A motion to modify, correct or reform judgment challenges errors in the judgment but does not seek to vacate the verdict or findings. Tex. R. Civ. P. 329b.

A motion to modify, correct or reform must be filed within 30 days after the signing of the judgment. A new motion may be filed within 30 days after the signing of a corrected or modified judgment.

F. Statement of Points of Appeal in Termination Cases Involving Texas Department of Family and Protective Services

In termination cases involving the Texas Department of Family and Protective Services (TFDPS), a party intending to appeal the termination order must file a statement of points on which the party intends to appeal with the trial court no later than the fifteenth day after the date the final order is signed by the trial judge. Tex. Fam. Code 263.205(b). Effective for appeals of final termination orders filed on or after September 1, 2005, appellate courts may not consider any issue that was not specifically presented to the trial court in a timely filed statement of points on which the party intends to appeal or in a statement combined with a motion for new trial. Tex. Fam. Code 263.205(I).

Parents appealing final orders in termination cases not involving TDFPS are not subject to the deadlines and additional requirements of Texas Family Code 263.405, and are instead subject to the normal appellate deadlines.

V. STARTING AN APPEAL

A. Notice of Appeal

An appeal begins with the filing of the Notice of Appeal. This document is filed in the *trial court*, but a copy is filed in the appropriate court of appeals. The following documents must be filed with the notice of appeal:

- filing fee in the correct amount
- docketing statement for the particular court of appeals
- designation of the clerk's record
- designation of the reporter's record

Each court of appeals has their own form of docketing statement. These are generally available on the courts' individual websites. See Appendix C for a list of the appellate courts and their websites.

B. Designation of Clerk's Record and Reporter's Record

The designation of the clerk's record contains the instructions to the court clerk of what documents need to be forwarded from the trial court's physical file to the appellate court. As a general rule, the designation should have a list of documents and the approximate file dates so the clerk can easily locate the documents. Always request the clerk to include the court's docket sheet in the record. Pleadings, the final judgment and any motion for new trial are probably necessary for any appeal. Memorandums of law are not appropriate to be included in a clerk's record. Unless the appeal involves a specific issue pertaining to discovery, it is unnecessary to include discovery items. Most clerks can provide a computer print out of the documents in the court's file, which can be used to draft the designation.

The designation of the reporter's record advises the court reporter of the hearing dates which need to be transcribed. Obviously the final trial should be transcribed, but it is not always necessary to include transcripts of every motion hearing that was held unless there is a specific issue for the appeal that involves that hearing.

C. Motions in the Court of Appeals

There are some occasions when it is necessary to file a motion requesting interim relief from the appellate court prior to filing the brief. The most common of these motions is the motion for extension of time to file brief.

The courts of appeals charge a filing fee for every motion that you file. If you do not pay the fee with the filing of the motion, your motion will not be docketed for a response.

A certificate of conference is required on *every* motion filed in the appellate court. The opposing side will be given 10 days to respond to any motion unless the certificate of conference shows agreement.

The court of appeals will prepare its own order ruling on the motion, so it is inappropriate to provide a drafted order with your motion in the appellate court.

The appellate courts also require parties to file the original plus multiple copies of any motion – usually the original plus three copies. It is a good idea to call the clerk of the court and ask how many copies are required before filing it. If the right number of copies are not provided, the court will not file the motion.

We Lost Now What: Perfecting the Appeal Chapter

Mediation is becoming increasingly common at the appellate level. There is a place in most of the courts' docketing statements to indicate whether mediation could assist in resolving the conflict. Whether the parties attended mediation at the trial court level is also a factor in whether the court of appeals will order mediation.

VI. BRIEFING & ARGUMENT

A. Deadlines

The appellant's brief presents to the court of appeals the reasons for reversing the trial court's judgment. It is generally due 30 days after the date the filing of the clerk's record *and* the reporter's record. If additional time is needed to complete the brief, a motion to extend can be filed. However, such a motion to extend must have specific facts plead about the reason why the brief could not be completed by the deadline. It should contain very specific information, such as the cause number and court information where the attorney was in trials or hearings during the time period.

The penalty for failing to file the appellant's brief by the deadline can be dismissal of the appeal.

B. Formatting

There are very specific formatting requirements for the appellant's brief:

- Paper type and size: The paper must be white, 8 ½ x 11 inches.
- Margins: Papers must have at least one-inch margins on all sides and top and bottom.
- Spacing: Text must be double-spaced, but footnotes, block quotes, short lists, and issues or points of error may be single spaced.
- Typeface: Text must be printed in 10-character-per-inc nonproportionally spaced Courier typeface (with a typewriter) or in *13-point* or larger proportionally spaced typeface. Footnotes may be printed in typeface no smaller than 10-point proportionally spaced typeface.
- Binding and covering: A document must be bound so as to ensure that it will not lose its cover or fall apart in regular use. A document should be stapled once in the top

left-hand corner or be bound so that it will lie flat when open. A petition or brief should have durable front and back covers which must not be plastic or be red, black, or dark blue. Some courts specify the colors for the briefs, so check the local rules of the court.

- Content cover: A document's front cover must contain the case style, the cause number, the title of the document, the name of the party filing the document, and the identity of the attorney for the filing party. The request for oral argument, if any, must appear on the front cover of the first brief.
- Appendix: The briefs must contain an appendix, which may be bound with the brief or separately. The appendix should be tabbed and indexed.

Texas Rule of Appellate Procedure 9.4 provides the above stated requirements. Failure to comply with these requirements will cause the party's brief to be stricken and returned to the filing party.

C. Length

The appellant's brief must not exceed 50 pages, excluding the pages containing the list of parties and counsel, table of contents, index of authorities, statement of the case, issues presented, the signature, certificate of service and appendix.

Appellee's brief must comply with the same length and formatting requirements as the appellant's brief.

The appellant's reply brief must be no longer than 25 pages, exclusive of the items states above. The court, on proper motion, may extend the length requirements.

D. Content

An appellant's or appellee's brief should have the following contents:

- Cover page
- List of parties and counsel
- Table of contents
- Index of authorities
- Statement of the case
- Issues presented (or Reply Issues Presented)
- Statement of facts
- Summary of the argument
- Argument (by issues or reply point)

- ↪ Prayer
- ↪ Certificate of Service
- ↪ Appendix

1. Cover Page

The cover page must include the case style and court of appeal's cause number, the title of the document, the name of the party filing the brief, the lead counsel's information, any request for oral argument.

2. List of Parties and Counsel

The list of the parties and counsel gives the justices information about the parties and all of the attorneys that have represented those parties through the trial and appeal so that the justices can identify potential grounds for conflicts.

3. Table of Contents

The table of contents must list the major sections of the brief, the subject matter of each issue, and the specific page references.

4. Index of Authorities

The index of authorities is an alphabetized list of all case law, statutes, and other authorities cited in the brief. The index must contain specific page references. The order for listing authorities is as follows:

1. Cases (without pinpoint page citations)
2. Trial rules, appellate rules and rules of evidence
3. Constitutions
4. Statutes
5. Other authorities, such as legal treatises

5. Statement of the Case

The appellant's brief must contain a section called "statement of the case" where the appellant presents a short procedural history of the case. Generally this section is no longer than half a page. The statement should include a short description of the nature of the case, the course of the proceedings, and the trial court's disposition of the case. The statement should be supported by record references and should not discuss the facts.

6. Issues Presented

The issues presented for review identifies the specific trial errors making up the appellant's complaint. It is a one sentence statement that summarizes the legal significance of the complaint.

7. Statement of the Facts

The statement of facts is one of the most important parts of the brief. This is where each party gets to tell the story of the case and the trial. The statement should draw together the evidence, pleadings, motions, objections, and trial court's rulings. It should

be light on argument and focus on the factual history. Each sentence containing a factual assertion should contain a reference to the record where support for the statement can be found.

8. Summary of the Argument

The summary of the argument is a concise synopsis of the legal arguments. It should not merely repeat the issues presented, but present the main ideas for the argument.

9. Argument

The argument is the heart of the brief. It should first restate each issue, followed by the legal and factual authority supporting the issue. This is where the party tries to convince the appellate court to reverse the judgment of the trial court. The argument must contain references to the record to support factual assertions and references to legal authority to support legal assertions.

10. Prayer

The prayer is the short conclusion which clearly states the type of relief the appellant is asking for. The types of relief available are as follows:

- ↪ reverse the judgment and render a new judgment
- ↪ reverse the judgment and remand the case for a new trial
- ↪ modify the judgment
- ↪ affirm the judgment
- ↪ vacate the judgment and dismiss the case
- ↪ dismiss the appeal

The court can do a combination of the above types of relief, such as reverse part of the judgment and affirm the remainder.

11. Appendix

The appendix is mandatory and must contain at least the following documents:

- ↪ the trial court's judgment or other appealable order from which relief is sought
- ↪ the jury charge and verdict or the findings of fact and conclusions of law
- ↪ text of any rule, regulation, ordinance, statute, constitutional provision, or other law on which the argument is based
- ↪ text of any contract or other document essential to the argument

The appendix may also contain any other item pertinent to the issues presented for review, including copies or excerpts of relevant court opinions, statutes, constitutional provisions, documents upon which the suit was based, pleadings, excerpts from the reporter's record, and similar material. However, arguments cannot be moved from the brief to the appendix to

avoid the page limit rules.

12. **Appellee’s Brief**

The appellee’s brief should contain most of the same sections as the appellant’s brief. However, if the appellant’s brief contains a correct statement, then it is not necessary to repeat it. For example, if the appellant’s brief contains a correct list of the parties and counsel, the appellee need not repeat that section.

The appellee’s brief should contain reply points where the appellee replies to the issues presented by the appellant. The appellee’s brief need not include an appendix if all necessary and relevant documents were included in appellant’s appendix.

E. Argument

Oral argument is to emphasize and clarify the written arguments in the briefs. The purpose of oral argument is not to read the briefs to the justices. A party can expect that the justices hearing the argument will have reviewed the briefs and legal authority prior to the argument.

Argument begins with, “May it please the Court and opposing counsel...” The attorney should introduce herself and her client, then state in one sentence the relief being sought. Next, give a short statement of the case and identify the issues. Provide a summary of pertinent facts for the Court. The next step is to proceed with the meat of the argument and discussion of the cases. Proceed with the strongest argument first. At the end of the argument, the attorney should present a short summary of the argument and relief requested.

Each court has different rules about the length of argument, so check the local rules before attending the argument.

The attorney should be prepared to answer questions from the justices about the case and authorities. If a justice starts to ask a question, the attorney should immediately stop talking, listen to the question, then answer it directly. If another question is not asked, the attorney should continue with the argument.

Note that a party is not entitled to have an oral argument. Argument is conducted at the pleasure of the court. If the parties request argument and the justices assigned to the case do not wish to hear it, the court will notify the parties that the case will be submitted without argument.

VII. DECISION

A case is submitted for decision after all the briefing is completed. Following the submission and argument, if any, the justices will consider the case. There is no time restriction on how long the justices can consider a case before making a decision.

Once decided, the court will issue its opinion

and judgment. These are separate documents. The opinion of the court of appeals is the document that contains the reasoning that supports the court’s judgment. The judgment is the pronouncement of the court’s disposition.

Sometimes the justices disagree on the decision, which may result in one or more justices writing a separate dissenting or concurring opinion.

There are three types of opinions – a signed opinion, a memorandum opinion and a per curiam opinion. The signed opinion is one which the justices sign, and which will be published in the case law books. A memorandum opinion is a brief opinion that is no longer than necessary to advise the parties of the decision and the basic reasons for it. It usually does not contain a lengthy recitation of the factual history. An opinion must be designated as a memorandum opinion unless it meets one of the following criteria:

- establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation that is likely to recur in future cases;
- the opinion involves a constitutional or other legal issue important to Texas jurisprudence;
- the opinion criticizes existing law; or,
- the opinion resolves an apparent conflict of authority.

A per curiam opinion is an opinion that is unsigned by the justices and does not identify the author of the opinion. It is usually short and deals with one or two legal issues based on settled principles.

VIII. WHAT COMES AFTER THE DECISION?

A. Motions in the Court of Appeals

After the court of appeals issues its opinion and judgment, either party may file a motion for rehearing with the court of appeals. A motion for rehearing must be filed within 15 days after the date the court of appeals issued the judgment. A motion for extension can be requested. The purpose of the motion for rehearing is to request the court of appeals to change its decision.

A party may also file a motion for en banc review. This motions asks the court of appeals to have the entire court review the case, in place of the three-judge panel that initially review it. This motion is discretionary with the court of appeals and must be filed while the court still has plenary power.

B. Petition for Review in the Texas Supreme Court

A party who is dissatisfied with the court of appeals opinion may seek redress with the Texas Supreme Court. However, before filing a petition for review with the Texas Supreme Court, the party should reevaluate the merits of the appeal, as the Texas

Supreme Court frequently awards damages for frivolous appeals. The purpose of a petition for review is to present the Supreme Court with reasons why the court should exercise jurisdiction to decide the petitioner's arguments.

The petition for review is filed in the Supreme Court. The petitioner must file the petition for review within 45 days after either the court of appeals rendered judgment or the date the court of appeals last ruling on all timely filed motions for rehearing. Any other party may file a petition according to the same deadlines or within 30 days after any preceding petition is filed.

After the petitioner files a petition for review, the respondent may file a response. It is not required for a respondent to file a response, and the Supreme Court will invite the respondent to file a response if the Supreme Court is considering granting the petition. If a respondent is "invited" to file a response, it is strongly suggested they do so.

The petition for review may not exceed 15 pages, excluding the list of parties and counsel, table of contents, index of authorities, statement of the case, statement of jurisdiction, issues presented, signature, certificate of service and appendix.

The petitioner must file the original plus 12 copies of the petition for review with the Supreme Court.

The Texas Supreme Court is not required to hear all cases that seek relief from it. There are certain reasons why they will accept jurisdiction to hear a case:

- ↪ the case involves and issue of importance to the jurisprudence of the state;
- ↪ the court of appeals justices disagree on the question of law material to the case;
- ↪ the court of appeals' decision conflicts with a decision by the Supreme Court or another court of appeals;
- ↪ the case involves the construction or validity of a statute necessary to the determination of the case;
- ↪ the case involves state revenue; or,
- ↪ the Texas Railroad Commission is a party to the case.

If the Supreme Court grants a petition for review, it request the parties to brief their arguments and will set deadlines for the filing of the briefs. The Supreme Court will also decide whether argument would benefit their consideration of the case.

The Supreme Court will render an opinion about the legal outcome of the case and issue its judgment. The Supreme Court may either affirm, modify and render judgment, reverse and render judgment, reverse and remand, vacate the judgments of the lower courts, or direct the lower court to correct the error.

A party may file a motion for rehearing in the Supreme Court within 15 days of the date the Supreme Court renders judgment. However, the Supreme Court

may deny a party the right to file a motion for rehearing where justice requires.

C. Mandate

A mandate is a judicial order issued by a higher court to a lower court directing the lower court to take a certain action or to make a certain disposition of a case, such as setting the case for a new trial on the issues remanded. Once the deadlines for filing for additional rehearings and review have passed, the clerk of the court of appeals will issue the mandate, which makes the court's judgment enforceable. When the result of an appeal is remand to the trial court, the mandate is the procedural document that returns jurisdiction to the trial court.

IX. CONCLUSION

Knowledge of the appellate process is valuable and has broad applications, from the moment a prospective client walks into your office for an initial consultation. One of the steps in advising a client of his or her options prior to trial is to explore the remedies available both at trial and after the trial is over. Considerations such as the likelihood of success at trial, what issues are available for appeal, and what are the chances of success on appeal all factor in the risk analysis of evaluating pretrial settlement offers and possible trial outcomes.

The client's best chance of getting close to what he or she wants is in settlement prior to trial. If settlement is not an option, then trial is the best option. Once the decision is rendered from the trial, whether by jury or judge, the chances of success decrease dramatically.

Consider these statistics compiled from the 12-month period ending August 31, 2002:

- ↪ The statewide reversal rate in civil cases is approximately one in three.
- ↪ In appeals from judgments entered on jury verdicts, the reversal rate was 25%.
- ↪ In appeals following bench trials, the reversal rate was 22%.
- ↪ In appeals from summary judgments, the reversal rate was 33%.
- ↪ When the courts of appeals reversed judgments on jury verdicts, they most often did so on the basis that the evidence was legally insufficient to support the verdict or because one party was entitled to judgment as a matter of law. These reasons accounted for 60% of the reversals.
- ↪ Charge error accounted for 14% of the reversals from jury verdicts.
- ↪ Factual insufficiency points accounted for just 4% of the reversals from jury verdicts.
- ↪ Rulings concerning the erroneous admission or exclusion of evidence accounted for less than 1% of reversals from jury verdicts.
- ↪ Appeals from no-answer default judgments had

We Lost Now What: Perfecting the Appeal **Chapter**

- one of the highest rates of reversal at 79%.
- ↪ The reversal rate was 48% for post-answer default judgments.
- ↪ The most common reason for reversal following a bench trial was that the evidence was legally insufficient to support the judgment or one party was entitled to judgment as a matter of law. These grounds accounted for 72% of the reversals.
- ↪ 14% of the reversals following bench trials were based on determinations that the trial court's findings were supported by factually insufficient evidence or were against the great weight and preponderance of the evidence.
- ↪ Family law cases formed the largest group of appeals following bench trials.
- ↪ In family cases, the reversal rate was 32%.
- ↪ In divorce cases, including actions to enforce or modify existing decrees, the reversal rate was 24%.
- ↪ In suits affecting the parent-child relationship, the reversal rate was 34%.
- ↪ In child support cases, including actions to collect or modify support, the reversal rate was 42%.

Lynn Liberato & Kent Rutter, *Reasons for Reversal in the Texas Courts of Appeals*, 44 S. Tex. L. Rev. 431 (2003).

Appendix A: Timetables Showing Appellate Deadlines

Appendix B: Sample Findings of Fact and Conclusions of Law

Appendix C: Courts of Appeals Websites and Information

APPENDIX A

ACTION	COURT	DEADLINE	RULE OF PROCEDURE
Final Judgment ¹	Trial Court		
Request for Findings of Fact (Child Support) Request for Findings of Fact (Variance from Standard Possession Order)	Trial Court	<u>Orally</u> : in open court during the hearing <u>Written</u> : within ten days of the date of the <i>hearing</i>	Tex. Fam. Code §154.130(a)
Request for Findings of Fact (General)	Trial Court	20 days from date final judgment is signed.	Tex. R. Civ. P. 296
Notice of Past Due Findings of Fact	Trial Court	20 days after original request for findings of fact was filed	Tex. R. Civ. P. 297
Request for Additional Findings of Fact	Trial Court	10 days after court files FOF	Tex. R. Civ. P. 298
Motion for JNOV Motion to Disregard Jury Findings	Trial Court	30 days from date final judgment is signed.	Tex. R. Civ. P. 301
Motion for New Trial	Trial Court	30 days of date judgment is signed. A new motion for new trial may be filed within 30 days after the signing of a corrected or modified judgment.	Tex. R. Civ. P. 324, 329b
Motion to Modify, Correct, or Reform the Judgment	Trial Court	30 days after the signing of the judgment. A new motion may be filed within 30 days after signing of a corrected or modified judgment	Tex. R. Civ. P. 329b
Notice of Appeal	Trial Court (copy filed with Court of Appeals)	<u>If no MNT or Request for FOF</u> : 30 days of date judgment is signed. <u>If MNT or Request for FOF filed</u> : 90 days of date judgment is signed.	Tex. Rule App. P. 25.1, Tex. Rule App. P. 26.1(a)
Docketing Statement	Court of Appeals	Same as Notice of Appeal.	Tex. Rule App. P. 32.1
Appellant's Brief	Court of Appeals	30 days after date of filing of clerk's record <i>and</i> reporter's record.	Tex. Rule App. P. 9.3(a)(1)(C), 38.4, 38.6(a), 39.7
Appellee's Brief	Court of Appeals	30 days after Appellant's brief is filed	Tex. Rule App. P. 9.3(a)(1)(C), 38.4, 38.6(a), 39.7
Appellant's Reply Brief	Court of Appeals	20 days after Appellee files brief	Tex. Rule App. P. 9.3(a)(1)(C), 38.4, 38.6(a), 39.7
Motion for Rehearing	Court of Appeals	15 days after the date the court of appeals issued the judgment.	Tex. Rule App. P. 9.3(a)(1)(B), 10.5(b), 38.6(d)
Petition for Review	Supreme Court	<u>Petitioner</u> : 45 days after either the court of appeals rendered judgment or the date of the court of appeals last ruling on all timely filed motions for rehearing. <u>Any other party</u> : same deadlines as petitioner or within 30 days after any preceding petition is filed.	Tex. Rule App. P. 9.3(b), 53.2, 53.6, 53.7
Motion for Rehearing (Supreme Court)	Supreme Court	15 days of Supreme Court denial of petition for review or judgment.	Tex. Rule App. P. 9.3(b), 10.5, 64.5

APPENDIX B

CAUSE NO. 999-99999-99

IN THE MATTER OF § IN THE DISTRICT COURT

¹A judgment is final if it purports to dispose of all parties and all claims in the lawsuit. *Lehman v. Har-Con Corp.*, 39 S.W.3d 191, 200 (Tex. 2001).

THE MARRIAGE OF §

§

**JANE DOE §
AND § OF TARRANT COUNTY
JOHN DOE §**

§

**AND IN THE INTEREST OF §
JUNIOR DOE, §
MINOR CHILD § 999TH JUDICIAL DISTRICT**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In response to the request of JOHN DOE, the Court makes and files the following as original Findings of Fact and Conclusions of Law in accordance with rules 296 and 297 of the Texas Rules of Civil Procedure and sections 6.711, 153.258, and 154.130 of the Texas Family Code.

Marriage

1. JANE DOE, Petitioner, and JOHN DOE, Respondent, were married on November 22, 1980.
2. At the time of the filing of this suit, JANE DOE had been a domiciliary of Texas for six months and a resident of Tarrant County for ninety days.
3. The marriage of JANE DOE and JOHN DOE has become insupportable because of discord or conflict of personalities that destroys the legitimate ends of the marital relationship and prevents any reasonable expectation of reconciliation.
4. JOHN DOE had a long-standing extramarital affair during the course of the marriage, which contributed to the break-up of the marriage.
5. JOHN DOE conceded that he committed adultery by engaging in an extramarital sexual relationship unbeknownst to JANE DOE.
6. JOHN DOE committed acts of cruelty against JANE DOE during the marriage.

Child

7. At the time of divorce, JANE DOE and JOHN DOE were the parents of the following child under the age of eighteen years: Junior Doe, Male, born February 15, 1995.
8. It is in the best interest of the child that JANE DOE and JOHN DOE be appointed joint managing conservators of the child and that JANE DOE have the right to determine the child's primary residence within County, Texas and contiguous counties;
9. It is in the best interest of the child that the Texas Guaranteed Tuition Plan held by the parties for the child should be placed under the joint control of JANE DOE and JOHN DOE;
10. The periods of possession comply with the Standard Possession Order.

Child Support

11. The amount of child support ordered by the Court is in accordance with the percentage guidelines.
12. The amount of net resources available to JOHN DOE per month is \$26,360.33.
13. JOHN DOE earned \$694,306 in gross income in 2003, and \$316,324.00 in net income in 2003.
14. The amount of net resources available to JANE DOE per month is \$4,000.00.

15. JANE DOE earned \$80,000 in gross income in 2003.

16. The amount of child support payments per month that is computed if the percentage guidelines of the Texas Family Code are applied to the first \$6,000 of JOHN DOE's net resources is \$1,200.00.

17. The percentage applied to the first \$6,000 of JOHN DOE's net resources for child support by the actual order rendered by the Court is 20%.

Division of Marital Estate

18. During the marriage JANE DOE and JOHN DOE acquired the following property other than by gift or inheritance with the values shown:

Asset	Value
Real Property:	
9999 Collin Drive, Plano	\$225,500
3 Acres in County, Colorado	\$90,000
Automobiles:	
2003 Toyota	\$24,000
2001 Saturn	\$8,000
1986 Pontiac	\$12,000
Retirement Accounts:	
Vanguard Funds ##### & ##### (John Doe)	\$234,286
401k ##### (Jane Doe)	\$292,277
Brokerage/Mutual Fund Accounts:	
Quick & Reilly #####	\$239,773
Wachovia Securities #####	\$79,511
Cash Accounts:	
Compass Bank # (Jane Doe)	\$97,664
Legacy Bank # (Jane Doe)	\$177,190

Asset	Value
Public Traded Stocks, Bonds, Other Securities:	
Suretrade.com	\$56
Motorola, Inc.	\$455
Life Insurance Policies:	
Great Western Life Term Policy (John Doe)	\$0
Great Western Life Term Policy (Jane Doe)	\$0
Custodial Accounts:	
Edward Jones Custodial Account for child	\$33,795
Texas Tomorrow Fund for child	\$9,814
Personalty of Husband:	\$32,322
Personalty of Wife:	\$43,063
Business Interests:	
Business	\$100,000
Airline Miles:	
American Advantage Miles	\$0

19. Before the marriage of the parties, JANE DOE owned the following property: rocker, antique dining table and 4 chairs, antique oval lamp table, antique chair striped, antique chair blue fabric, antique mahogany music cabinet, small round table, Duncan Fife bridge table, antique chest, sewing machine, antique mirror, 2 bookshelves painted white, antique flowered china, antique sterling silver flatware, 2 paintings in guest room, miscellaneous necklaces, stamp collection, baby chest, miscellaneous kitchen small appliances and cookware, antique bowls, cutglass, dessert stemware and pink pitcher.

20. Before the marriage of the parties, JOHN DOE owned the following property: antique roll top desk, Dali print, Troybilt rototiller, Sears Craftsman jointer, Black and Decker drill corded and bits, socket wrench set, Skill electric orbital sander, Model 490, 1/5 hp, Micronta 18 range multi tester.

21. During the marriage JANE DOE received the following property as gifts: wedding and engagement rings, pearl necklace, diamond earrings, sapphire earrings and necklace, mattcutter, LandsEnd luggage, binoculars, Motebancane racing bike, tree of life vessel, irregular vessel blue, burgundy and black, Nortaki colorwave dishware and accessories, large crystal vase, turquoise swirl vessel, pink glass heart perfume vial, Lennox vase, silver plated coffee service, kitchen knives, color printer, garden pruners, personal clothing.

22. During the marriage JOHN DOE received the following property as gifts: personal clothing, gas logs in den, wood artistic clock, antique clock study, brass desk lamp, black leather desk chair, 8-10 collectible knives, artistic glass kaleidoscope, drill press, chisels and wood lathe carving tools, luggage LandsEnd, roto zip saw, digital camera, custom golf clubs, Bosch corner sander, fishing rod and accessories, Sears Craftsman 12-1/2" thickness planer, bowl gouge, Fred Super Dado blades.

23. The following are liabilities of the community estate:

Creditor:	Account Balance:
MasterCard ##### (Jane Doe)	-\$1,000
Foley's ##### (John Doe)	-\$250
MasterCard (John Doe)	-\$300
Mortgage Debt on 9999 Collin Drive	-\$161,003

24. JOHN DOE has significantly greater future earning capacity and/or power than JANE DOE.

25. JOHN DOE has earned gross income as follows for the past three years, as compared to JANE DOE:

Year	JOHN DOE Gross Income	JANE DOE Gross Income
2007	\$694,306	\$80,000
2006	\$615,475	\$78,000
2005	\$605,118	\$75,000

26. Any finding of fact that is a conclusion of law shall be deemed a conclusion of law.

Conclusions of Law—Divorce

1. The *Original Petition for Divorce* filed by JANE DOE and the counterclaim for divorce filed by JOHN DOE are in due form and contain all the allegations required by law.

2. This Court has jurisdiction of the parties and of the subject matter of this case.

3. All legal prerequisites to granting a divorce have been met.

4. The divorce is granted on the ground of insupportability.

5. All the property belongs to the community estate except for the following, which belongs to the

parties' separate estates: rocker, antique dining table and 4 chairs, antique oval lamp table, antique chair striped, antique chair blue fabric, antique mahogany music cabinet, small round table, Duncan Fife bridge table, antique chest, sewing machine, antique mirror, 2 bookshelves painted white, antique flowered china, antique sterling silver flatware, 2 paintings in guest room, miscellaneous necklaces, stamp collection, baby chest, miscellaneous kitchen small appliances and cookware, antique bowls, cutglass, dessert stemware and pink pitcher, antique roll top desk, Dali print, Troybilt rototiller, Sears Craftsman jointer, Black and Decker drill corded and bits, socket wrench set, Skill electric orbital sander, Model 490, 1/5 hp, Micronta 18 range multi tester, wedding and engagement rings, pearl necklace, diamond earrings, sapphire earrings and necklace, mattcutter, landsend luggage, binoculars, Motebancane racing bike, tree of life vessel, irregular vessel blue, burgundy and black, Nortaki colorwave dishware and accessories, large crystal vase, turquoise swirl vessel, pink glass heart perfume vial, Lennox vase, silver plated coffee service, kitchen knives, color printer, garden pruners, personal clothing, personal clothing, gas logs in den, wood artistic clock, antique clock study, brass desk lamp, black leather desk chair, 8-10 collectible knives, artistic glass kaleidoscope, drill press, chisels and wood lathe carving tools, luggage LandsEnd, roto zip saw, digital camera, custom golf clubs, Bosch corner sander, fishing rod and accessories, Sears Craftsman 12-1/2" thickness planer, bowl gouge, Fred Super Dado blades.

6. The following constitutes a just and right division of the community estate:

ASSET/LIABILITY	WIFE	HUSBAND
9999 Collin Drive, Plano	\$225,500	
3 Acres in County, Colorado		\$90,000
Vanguard Funds ##### & ##### (John Doe)	\$234,286	
401k ##### (Jane Doe)	\$292,277	
Compass Bank ##### (Jane Doe)		\$97,664
Legacy Bank ##### (Jane Doe)	\$177,190	
Great Western Life Term Policy (John Doe)		\$0
Great Western Life Term Policy (Jane Doe)	\$0	
Personalty of Husband:		\$32,322
Personalty of Wife:	\$43,063	
2003 Toyota	\$24,000	
2001 Saturn	\$8,000	
1986 Pontiac		\$12,000
ASSET/LIABILITY	WIFE	HUSBAND
Suretrade.com		\$56
Motorola, Inc.	\$455	
Business		\$100,000

American Advantage Miles	\$0.00	
MasterCard ##### (Jane Doe)	-\$1,000	
Foley's ##### (John Doe)		-\$250
MasterCard (John Doe)		-\$300
Mortgage Debt on 9999 Collin Drive	-\$161,003	

7. The division of the property of JANE DOE and JOHN DOE effected by the final judgment is just and right, having due regard for the rights of each party and the child of the marriage, irrespective of the characterization of any item of property as either community or separate.

8. JANE DOE and JOHN DOE should be named joint managing conservators of the child with the rights and duties stated in the judgment, and JANE DOE should be named as the conservator with the right to determine the child's primary residence.

9. JANE DOE shall have the exclusive right to receive child support.

10. The permanent injunction is consistent with the best interest of the child in order to assure that the child will have frequent and continuing contact with both JANE DOE and JOHN DOE, to provide a safe, stable and nonviolent environment for the child, and to encourage both JANE DOE and JOHN DOE to share in the rights and duties of raising the child after the dissolution of the marriage.

11. The permanent injunction is necessary to promote the emotional and physical needs of the child now and in the future, to protect the child from emotional and physical danger now and in the future, to promote the stability of the child's environment with each parent, and to promote the moral welfare of the child.

12. It is in the best interest of the child's emotional development that the permanent injunction be entered restricting the parties' right to have unrelated overnight guests of the opposite sex in the presence of the child.

13. JOHN DOE should pay child support in the amount of \$1,200.00 per month and provide medical support.

14. Any conclusion of law that is a finding of fact shall be deemed a finding of fact.

SIGNED on _____.

JUDGE PRESIDING

APPENDIX C

Appellate Courts Websites and Information

Supreme Court of Texas

Mailing address:

P. O. Box 12248

Austin, Texas 78711-2248

Delivery address:

201 W. 14th Street, Room 104

Austin, Texas 78701

Tel: (512) 463-1312

Fax: (512) 463-1365

(Fax filing not accepted)

www.supreme.courts.state.tx.us

Tel: (214) 712-3450

Fax: (214) 745-1083

www.5thcoa.courts.state.tx.us

Sixth Court of Appeals

Bi-State Justice Building

100 North State Line Ave., Suite 20

Texarkana, Texas 75501

Tel: (903) 798-3046

Fax: (903) 798-3034

www.6thcoa.courts.state.tx.us

First Court of Appeals

1307 San Jacinto Street

10th Floor

Houston, Texas 77002

Tel: (713) 655-2700

Fax: (713) 752-2304

www.1stcoa.courts.state.tx.us

Seventh Court of Appeals

Mailing address:

P. O. Box 9540

Amarillo, Texas 79105-9540

Delivery address:

501 S. Fillmore, Suite 2-A

Amarillo, Texas 79101-2449

Tel: (806) 342-2650

Fax: (806) 342-2675

www.7thcoa.courts.state.tx.us

Second Court of Appeals

Tarrant County Justice Center

401 W. Belknap, Suite 9000

Fort Worth, Texas 76196

Tel: (817) 884-1900

Fax: (817) 884-1932

www.2ndcoa.courts.state.tx.us*

Eighth Court of Appeals

El Paso County Courthouse

500 East San Antonio, Suite 1203

El Paso, Texas 79901

Tel: (915) 546-2240

Fax: (915) 546-2252

www.8thcoa.courts.state.tx.us

Third Court of Appeals

Mailing address:

P. O. Box 12547

Austin, Texas 78711-2547

Delivery address:

Price Daniel, Sr. Building

209 W. 14th Street, Room 101

Austin, Texas 78701

Tel: (512) 463-1733

Fax: (512) 463-1685

www.3rdcoa.courts.state.tx.us

Ninth Court of Appeals

1001 Pearl Street, Suite 330

Beaumont, Texas 77701

Tel: (409) 835-8402

Fax: (409) 835-8497

www.9thcoa.courts.state.tx.us

Fourth Court of Appeals

Bexar County Justice Center

300 Dolorosa, Suite 3200

San Antonio, Texas 78205-3037

Tel: (210) 335-2635

Fax: (210) 335-2762

www.4thcoa.courts.state.tx.us

Tenth Court of Appeals

Mailing address:

P. O. Box 1606

Waco, Texas 76703-1606

Delivery address:

501 Washington Avenue, Room 415

Waco, Texas 76701

www.10thcoa.courts.state.tx.us

Fifth Court of Appeals

600 Commerce Street, 2nd Floor

Dallas, Texas 75202

Eleventh Court of Appeals

Mailing address:
P. O. Box 271
Eastland, Texas 76448-0271
Delivery address:
County Courthouse
100 West Main Street, 5th Floor
Eastland, Texas 76448
Tel: (254) 629-2638
Fax: (254) 629-2191
www.11thcoa.courts.state.tx.us

Twelfth Court of Appeals

West Front Street, Suite 354
Tyler, Texas 75701
Tel: (903) 593-8471
Fax: (903) 593-2193
www.12thcoa.courts.state.tx.us

Thirteenth Court of Appeals

Corpus Christi Office:
County Courthouse
901 Leopard Street, 10th Floor
Corpus Christi, Texas 78401
Tel: (361) 888-0416
Fax: (361) 888-0794
Edinburg Office:
100 E. Cano, 5th Floor
Edinburg, Texas 78539
Tel: (956) 318-2405
Fax: (956) 318-2403
www.13thcoa.courts.state.tx.us

Fourteenth Court of Appeals

1307 San Jacinto, 11th Floor
Houston, Texas 77002
Tel: (713) 655-2800
Fax: (713) 650-8550
www.14thcoa.courts.state.tx.us

Subscribing to Receive Automatic Email Updates Regarding Your Case

All of the Texas Court of Appeals allow you to register to receive automatic updates of your case via email. The system is the same for all of the Courts, except for the Fifth Court of Appeals which uses a slightly different system. Signing up for these automatic updates is a free and easy way to keep yourself informed about important events in your case.

Case Mail

The First, Second, Third, Forth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, and Fourteenth Courts of Appeals allow you to sign up to receive automatic updates regarding your case via email through a system called "Case Mail".

You can register to receive Case Mail updates on the websites for the Courts of Appeals listed above. To register, click on the "register" link found under the heading "Case Mail" which should appear towards the bottom right of the each Court of Appeals homepage. Upon entering the registration page, you will be prompted to enter a username, the email address, and a password. Case Mail updates will be sent to the email you provide on the registration page.

Once you have completed the registration process, you will use your username and password to login to your Case Mail Account. You can search for cases that you would like to receive Case Mail updates on by using the "Case Search" option on the Courts of Appeals websites. This option allows you to search for cases by cause number or by style. When you identify a case you would like to receive Case Mail updates on, click on the CaseMail link at the upper right corner of the page.

The Case Search Option allows you to view Appellate case information, trial court information, case events, and a calendar of important dates in your case.

vNotices! (Fifth Court of Appeals)

The Dallas Court of Appeals uses a slightly different email update system. The system used by the Dallas Court of Appeals is called "vNotices!".

As with Case Mail in the other courts, you can register to receive vNotice! updates about your case on the Fifth Court of Appeals website. The link to register for vNotices! appears towards the center of the Fifth Court of Appeals homepage. After clicking on the "register" option you will be requested to provide your email address, name, bar card number, address, and telephone and fax numbers. You will also be required to select which types of Fifth Court of Appeals opinions and Supreme Court opinions you would like to receive via email.

When your registration is complete, vNotices! will automatically send you email notices of events occurring in all cases linked to your bar number. Like the Case Mail Updates, this is a valuable way to keep track of important events and information in your Dallas Court of Appeals case.