HOW TO HANDLE CROSS-APPEALS

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CHAPTER 24

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Smith is a regular author and speaker on appellate-related topics and teaches at Solo Practice University, an online resource for law students and lawyers looking to start their own firms. He is the creator and publisher of the *Texas Appellate Law Blog*, the first website of its kind to focus on Texas appellate practice, and was among the first Texas lawyers to use social media as a business development tool.

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I. INTRODUCTION

As part of the 1997 rules rewrite, the Texas Supreme Court adopted Texas Rule of Appellate Procedure 25.1, which provides that any party "who seeks to alter the trial court's judgment or other appealable order must file a notice of appeal." TRAP 25.1(c).[1] Although it seems benign enough, TRAP 25.1(c) creates some unique issues in practice. This paper will discuss those issues, as well as some potential ways to address them, and will offer some practical tips on handling cross-appeals in the intermediate appellate courts.

II. THE DECISION TO CROSS-APPEAL

A. Does Appellee Seek to Alter the Judgment?

Since the 1997 rule change, a "cross-point" in an appellee's brief remains a valid way of presenting additional, independent grounds for affirmance when the appellee is satisfied with the relief granted by the trial court.[2] *Dean v. Lafayette Place (Section One) Council of Co-Owners, Inc.*, 999 S.W.2d 814, 818 (Tex. App.—Houston [1st Dist.] 1999, no pet.). But a cross-point alone is no longer sufficient to assert complaints that would alter the judgment or increase the appellee's relief on appeal. *See Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 171 (Tex. 2004); *Metro. Christian Methodist Episcopal Church v. Vann*, No. 01-12-00332-CV, 2013 WL 1932171, at *8 (Tex. App.—Houston [1st Dist.] May 9, 2013, no pet.) (mem. op.); *New York Party Shuttle, LLC v. Bilello*, ___ S.W.3d ___, No. 01-11-01034-CV, 2013 WL 634718, at *9 (Tex. App.—Houston [1st Dist.] Feb. 21, 2013, pet. filed). Some decisions have treated the failure to perfect a cross-appeal as a waiver issue, while others have held it to be a jurisdictional defect. *Compare LaCroix v. Simpson*, 148 S.W.3d 731, 735 (Tex. App.—Dallas 2004, no pet.) *and EZ Auto, L.L.C. v. H.M. Jr. Auto Sales*, No. 04-01-00820-CV, 2002 WL 1758315, at 5 (Tex. App.—San Antonio July 31, 2002, no pet.), *with Daftary v. Prestonwood Mkt. Square, Ltd.*, 399 S.W.3d 708, 713 (Tex. App.—Dallas 2013, no pet.) *and Frontier Logistics, L.P. v. Nat'l Prop. Holdings, L.P.*, No. 14-11-00357-CV, 2013 WL 1683603, at *6 (Tex. App.—Houston [14th Dist.] Apr. 18, 2013, no pet.) (mem. op.). Regardless, an appellate court cannot grant a non-appealing party relief greater than what the trial court awarded, unless the appellee shows "just cause." TRAP 25.1(c). And arguing just cause—while beyond the scope of this paper—is not a position anyone wants to be in.

In theory, TRAP 25.1(c) is not difficult to apply. If the outcome in the trial court was anything less than a complete victory, counsel should have engaged in a post-judgment recap to determine the need for error-preserving motions or a request for findings of fact and conclusions of law and therefore should already have a good idea whether any colorable appellate points exist. The decision whether to pursue those points in an effort to change the outcome can turn on any number of factors. *See* Amanda G. Taylor & D. Todd Smith, *Your Trial is Over—Now What? Guidance on Perfecting and Pursuing a State Civil Appeal*, TexasBarCLE Webcast, at 18 (Feb. 5, 2013) (discussing need for objective analysis of (1) whether an appeal should be taken at all, (2) if an appeal should be taken, which issues should be raised on appeal, (3) the applicable standard of review for each issue, (4) what the chances of success are on those issues, (5) what risks the client faces pending and post-appeal depending on the various possible outcomes, (6) what the anticipated costs of appeal will be, including the costs of the record, filing fees, and attorney fees and what, if any, chances the client has to recover those costs from the opponent, (7) the temperament and prior opinions of the particular justices to whom you will be appealing, and (8) the anticipated timing of the appeal).

Assume for our purposes that the opposition has gone ahead and filed a notice of appeal. At or before that point, ask yourself whether the issues considered during the "post-judgment recap" could have been asserted in a stand-alone appeal. If so, or if the answer is in doubt, the best practice would be to go ahead and file a notice of cross-appeal to preserve your client's rights. Sample language to be used in a cross-notice appears in Appendix A.

For comparison, courts have held that appellees asserting the following should have filed their own notice of appeal:

- Error in the trial court's judgment providing that "the bylaws may only be amended by the members," despite statutes seemingly providing otherwise. *Brooks*, 141 S.W.3d at 171.
- Error in applying a four-year statute of limitations for unjust enrichment, rather than a two-year statute, even though the intermediate appellate courts were split and the Texas Supreme Court determined that a two-year statute applied while the appeal was pending. *Wagner & Brown, Ltd. v. Horwood*, 58 S.W.3d 732, 737 (Tex. 2001).
- Failure to render judgment against one of two insurers found liable in the jury's verdict. *State Farm Mut. Auto. Ins. Co. v. Bowen*, ___

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[1] For brevity, this paper refers to the Texas Rules of Appellate Procedure as "TRAP" and the Federal Rules of Appellate Procedure as "FRAP."

[2] When the trial court renders a judgment notwithstanding the verdict, the appellee *must* bring forward by cross-point any issue or point that would have vitiated the verdict or that would have prevented an affirmance of the judgment if the trial court had rendered judgment on the verdict. TRAP 38.2(b)(1).

S.W.3d ___, No. 11-11-00082-CV, 2013 WL 1087796, at *3 (Tex. App.—Eastland Mar. 14, 2013, no pet.).

- Error in failing to render judgment rescinding a one-fifth mineral interest conveyed in a general deed, although the judgment voided a separate mineral deed. *Dwairy v. Lopez*, 243 S.W.3d 710, 714 (Tex. App.—San Antonio 2007, no pet.).
- Error in denying a motion to dismiss and failing to award attorney's fees. *Cavazos v. Cintron*, No. 13-04-00529-CV, 2006 WL 1766189, at *2 (Tex. App.—Corpus Christi June 29, 2006, no pet.) (mem. op.).
- That the jury's failure to award past and future lost earnings was against the great weight and preponderance of the evidence. *Tesmec USA, Inc. v. Whittington*, No. 10-04-00301-CV, 2006 WL 827849, at *10 (Tex. App.—Waco Jan. 18, 2006, pet. denied) (mem. op.).
- Failure to disqualify a law firm representing another party in the case. *Boulle v. Boulle*, 160 S.W.3d 167, 176 (Tex. App.—Dallas 2005, pet. denied).
- Failure to award pre-judgment interest. *Marks v. Martin*, No. 09-02-088CV, 2003 WL 1989429, at *1 (Tex. App.—Beaumont May 1, 2003, pet. denied) (mem. op.).
- Failure to grant a judgment notwithstanding the verdict finding the appellant's employee negligent as a matter of law. *Wal-Mart Stores, Inc. v. Garza*, 27 S.W.3d 64, 67 (Tex. App.—San Antonio 2000, pet. denied).

By contrast, no separate notice of appeal was required for the appellee to raise the following issues:

- Entitlement to a remand for the trial court to consider a claim for attorney fees under Chapter 10 of the Civil Practice and Remedies Code when the relief requested was the same as what the trial court awarded in the reversed judgment. *Epps v. Fowler*, 351 S.W.3d 862, 871 (Tex. 2011).
- Whether appellee's suit was a health care liability claim when the order on appeal was the denial of the appellant hospital's motion to dismiss. *McAllen Hosps., L.P. v. Ontiveros*, No. 13-11-00512-CV, 2012 WL 3761981, at *2 (Tex. App.—Corpus Christi Aug. 30, 2012, pet. denied).
- The merits of a ground for summary judgment that the trial court had expressly denied. *City of Brownsville ex rel. Pub. Utilities Bd. v. AEP Tex. Cent. Co.*, 348 S.W.3d 348, 358 (Tex. App.—Dallas 2011, pet. denied); *Bosque Asset Corp. v. Greenberg*, 19 S.W.3d 514, 520 (Tex. App.—Eastland 2000, pet. denied).

Most often, determining whether a separate notice of appeal is required will not be a close call. But if in doubt, counsel should file a cross-notice to avoid any potential waiver issues.

B. Pursuing a Cross-Appeal Conditionally

Appellees occasionally employ a strategy of pursuing their cross-appeal conditionally. In this situation, an appellee is generally satisfied with the relief it obtained in the trial court, but has identified one or more rulings that did not go its way that should be preserved for review. Already faced with defending an appeal, a conditional cross-appeal theoretically allows the appellee to present its own complaints to the appellate court, but to pursue them only if the court were to grant appellant any relief in the original appeal. This process begins with the filing of a notice of conditional cross-appeal, sample language for which is included in Appendix A.

This approach is not without risk. One line of cases holds that "an appellee's attempt to condition consideration of a cross-point on 'the event that (the appellate court) reverses the judgment of the trial court on appeal' is ineffective to limit or condition the appeal." *See Moseley v. Omega OB-GYN Assocs. of S. Arlington*, No. 02-06-00291-CV, 2008 WL 2510638, at *3 & n.18 (Tex. App.—Fort Worth June 19, 2008, pet. denied) (mem. op.); *Unitarian Universalist Serv. v. Lebrecht*, 670 S.W.2d 402, 403 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.); *see also* 6 McDonald & Carlson, TEX. CIV. PRAC. 2d, *Issues or Points in Response* § 38:9 n. 38 (2012) (citing *Unitarian Universalist Serv*. and concluding that "[c]onditional cross-points are not allowed in the court of appeals"). These cases hold that, once a cross-point is presented to an appellate court, it is before the court for all purposes. *Moseley*, 2008 WL 2510638, at *3 & n.18; *Unitarian Universalist Serv.*, 670 S.W.2d at 403; *Payne v. Lucas*, 517 S.W.2d 602, 608 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.). Most pre-date the 1997 rule change.

Theoretically, a court following these authorities might reverse a trial court's judgment based on an error asserted in a conditional cross-appeal, without regard for the condition. *See* John Hill Cayce, et al., *Civil Appeals in Texas: Practicing Under the New Rules of Appellate Procedure*, 49 BAYLOR L. REV. 867, 964-65 & n.627 (1997) (hereinafter "Cayce, *Civil Appeals in Texas*). Such a result could be disastrous, such as when the trial court's judgment was generally favorable to the appellee, but the conditional cross-point "successfully" results in a remand instead of affirmance.

Nevertheless, in more recent decisions, appellate courts have honored the condition without questioning their authority to do so or the propriety of presenting conditional cross-points for review. *See, e.g.*, *Ware v. United Fire Lloyds*, No. 09-12-00061-CV, 2013 WL 1932812, at *4 & n.1 (Tex. App.—Beaumont May 9, 2013, no pet.) (declining to reach conditional cross-appeal issues after overruling appellant's issues, resulting in affirmance of trial court's judgment); *Tex Star Motors, Inc. v. Regal Fin. Co., Ltd.*, 401 S.W.3d 190, 204 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (declining to address conditional cross-appeal seeking reinstatement of fiduciary duty claims against two individual defendants in event of remand for new trial because court did not remand entire case for new trial); *Whitmire v. Nat'l Cutting Horse Ass'n*, No. 02-11-00170-CV, 2012 WL 4815413, at *16 (Tex. App.—Fort Worth Oct. 11, 2012, no pet.) (overruling conditional cross-appeal points and affirming trial court's judgment as modified).

Conditional cross-appeals—like cross-appeals generally—require strategic purpose and caution on the practitioner's part. That said, although no rule expressly authorizes conditional cross-appeals, the Texas Supreme Court has permitted conditional cross-petitions for review (and, before that, conditional cross-applications for writ of error) without an express rule. *See* 6 McDonald & Carlson, TEX. CIV. PRAC. 2d, *Cross-Petitions* § 22:6 (2012) (recognizing that "the winner in the court of appeals may file a conditional cross-petition requesting that the Supreme Court grant the conditional cross-petition only in the event that the other party's petition for review is granted" and that "[t]he complaints in the conditional cross-petition need only be addressed if the Supreme Court resolves to grant the other party's petition for review"). Given the absence of any articulated basis for differentiating between conditional cross-appeals and conditional cross-petitions for review, it seems likely that appellate courts will honor conditional cross-issues that need not be reached if the appellant's original issues are overruled and the trial court's judgment can be affirmed.

C. Timing

If any party has timely filed a notice of appeal, another party may file a notice of cross-appeal at any time within the ordinary deadlines or within 14 days of the first notice of appeal, whichever is later. TRAP 26.1(d). This rule may allow the winning party to wait and see whether the loser will appeal before deciding whether to pursue a cross-appeal, conditional or otherwise. However, if the appellant files a late notice of appeal, the appellee does not have 14 days from the untimely filing to file its own notice of appeal. Rather, the appellee must either perfect its cross-appeal within the TRAP 26.1 deadlines or seek an extension of time.

III. COMPLICATIONS IN HANDLING CROSS-APPEALS

Applied to cross-appeals, TRAP 25.1(c) creates a situation in which each party is both an appellee and an appellant in the same case. *See* Cayce, *Civil Appeals in Texas*, at 962-63. This creates some complications in handling cross-appeals that counsel should keep in mind from the outset and address as necessary throughout the case.

A. Docketing Statement and Filing Fee

Promptly" upon perfecting appeal, "the appellant" must file a docketing statement in the appellate court. TRAP 32.1. The docketing statement as an administrative tool the clerk's office uses to verify jurisdiction over the appeal and to obtain information about the parties and the proceeding for entry into the court's docket management system.

Read literally, TRAP 32.1 would seem to require a cross-appellant to file its own docketing statement, even though much of the information provided would duplicate any docketing statement the appellant filed. While this may seem unnecessary, filing a separate docketing statement will ensure that the court recognizes your cross-appeal, updates the case style, and so forth, saving you any hassle over these issues later.

An appellant must ordinarily pay a $175 filing fee for an appeal from a district or county court. *See* TEX. GOV'T CODE § 51.207(b), (c); *see also* TRAP 5; TRAP Appendix, "Order Regarding Fees Charged in Civil Cases." The relevant statute states that a fee must be paid "for cases appealed to and filed in the court of appeals…." TEX. GOV'T CODE § 51.207(b). This language does not clearly impose a separate filing fee for cross-appeals, but the appellate courts will generally expect you to pay the fee as if you were the original appellant.

B. The Record

In ordinary practice, the appellant requests that the trial court clerk prepare, certify and file the "clerk's record" and, if necessary, that the court reporter(s) prepare, certify, and file any transcripts of proceedings on which the appeal is based. TRAP 34.5(b), 34.6(b).[3] Together, these comprise the "appellate record."

As the appellee, you should carefully review the appellant's record request(s) as soon as they are filed. If you believe additional contents are necessary, you

[3] Technically, no request for the clerk's record is necessary. *See* TRAP 35.3(a). In most cases, however, the better practice is to designate the matters to be included in the clerk's record.

should promptly request that they be included in the record. TRAP 34.5(b)(1); 34.6(c)(2). However, the rules are silent regarding whether a cross-appellant must pay any portion of the original costs incurred to prepare the record.[4]

The absence of a specific provision apportioning record costs in cross-appeals invites some gamesmanship between counsel, particularly when the record costs will be significant. The appellant may believe that the cross-appellant should help bear the costs of the appellate record or should pay for anything it adds to the record. Depending on timing, however, a cross-appellant may wait until the appellant has paid for the record before filing its notice of cross-appeal, thus effectively avoiding the expense of paying for the record, even if it intended to appeal all along.

Up-front resolution of any issues regarding payment for the appellate record is preferred, but that possibility will depend largely on the circumstances. If the parties cannot agree on how to allocate responsibility to pay for the record, the original appellant may have to swallow hard and write the check. Even then, this issue might be addressed after the appeal is decided by filing a motion to apportion costs stating good cause. *See* TRAP 43.4.

C. Briefs

1. Parallel Briefing Tracks

The most significant complication arising from the adoption of TRAP 25.1(c) is the effective increase in the number of briefs that must be filed when a party cross-appeals. Commentators, including current and former appellate judges, recognized this problem immediately:

> [A] leading commentator has suggested that, in light of the provision in Rule 38.6(a) requiring an appellant to file a brief[,] each party who files a notice of appeal must file an appellant's brief. Each party who responds to the brief would then file a brief in response as an appellee, to which each appellee/appellant may file a reply brief.
>
> At a minimum, this parallel briefing scheme doubles the number of briefs filed by the parties in a case. In a simple two-party appeal in which a cross-point is asserted, the rules require the court to process a minimum of four separate briefs from each party. This problem is obviously exacerbated when multiple parties are involved.

Cayce, *Civil Appeals in Texas*, at 963 (footnotes omitted).

In its current form, TRAP 25(c) breeds inefficiency and increases the resources necessary to see cross-appeals through to conclusion. Possible solutions to this problem are proposed below.

2. Word Count

The Texas Supreme Court instituted mandatory word-count limits for all computer-generated briefs effective December 1, 2012. Each appellant's brief is now limited to 15,000 words, and reply briefs are limited to 7,500 words. TRAP 9.4(i)(B). In civil cases, the aggregate of all briefs filed by one party must not exceed 27,000 words. *Id*.

The aggregate word count allows for cross-appeals to some extent. If a party must pursue parallel briefing tracks, however, the pre-aggregate limit would be 45,000 words. Therefore, in a cross-appeal situation, the aggregate limit shortens the total amount of available briefing space by 18,000 words.

The aggregate word-count limit may be insufficient in complex cases involving multiple parties and issues. Possible solutions to this problem are suggested below.

D. Oral Argument

A final area of concern regarding cross-appeals under the current rules is how the parties are designated at oral argument and the amount of time each party will receive for their respective presentations.

Although these matters are generally governed by local practices, the TRAPs provide that "[t]he appellant must be allowed to conclude the argument." TRAP 39.3. If treated as an appellee for argument purposes, however, a cross-appellant would not receive rebuttal time at oral argument. This may not have a significant impact in a conditional cross-appeal situation, but parties who are actively pursuing a cross-appeal to correct perceived trial-court errors should be concerned about whether they will receive the last word on their points as cross-appellant.

IV. POTENTIAL SOLUTIONS

A. Motion Practice

Most of the concerns raised in this paper could be addressed by filing an appropriate motion in the court of appeals. Motions would be most effective in dealing

[4] The appellate court may tax the costs of requesting unnecessary items against you, even if you prevail on appeal. TRAP 34.5(b)(3).

with the briefing and oral argument issues. Anyone contemplating this option should check local rules first.

With respect to briefing, the author has found opposing counsel and several appellate courts amenable to a motion asking the court for leave to assert cross-appeal points in the appellee's brief.[5] The motion—which is typically filed jointly and signed by all parties—also asks the court to adopt a briefing schedule cutting the total number of briefs from six to four. Reducing the number of briefs increases efficiency and lowers the client's net cost of pursuing a cross-appeal, and it likewise benefits the appellant and the court. A sample of this motion is attached as Appendix B.

With respect to argument time and rebuttal, the appellate rules expressly provide for motions to increase argument time and to align the parties when the matter is pending in the Texas Supreme Court. *See* TRAP 59.4. There is no equivalent provision in the rules governing practice in the courts of appeals. *See generally* TRAP 39. Nevertheless, courts should be amenable to motions that fairly allocate argument time, including any appropriate rebuttal time, particularly if the parties reach agreement on those issues and the motions can be filed jointly.

B. TRAP Amendment

In the long run, the most efficient course for addressing the concerns raised in this paper would be to amend the relevant TRAPs. The briefing and word-count issues are the most pervasive among those identified. These concerns are ripe, and the Texas Supreme Court should consider and implement corrective revisions.[6]

What would the revisions look like? The Supreme Court should look first to Federal Rule of Appellate Procedure 28.1, which has long addressed both the number of briefs and word counts in cross-appeals. As noted in the 1997 Cayce article:

> The Federal Rules of Appellate [Procedure] designate the first filing party as the "appellant" for briefing purposes. Thus, there is only one appellant and only one appellant's brief. The wisdom of this rule is in the limiting effect it has on the number of briefs that can be filed by a party, preventing confusion and inconvenience occasioned by multiple briefing tracks when the same parties file briefs as both appellant and appellee. There is no similar provision in the Texas rules.

Cayce, *Civil Appeals in Texas*, at 963 (citing FRAP 28.1) (footnotes omitted).

The federal rule expressly limits the number of briefs in cross-appeals to four, unless otherwise permitted, delineating them as (1) appellant's principal brief, (2) appellee's principal and response brief, (3) appellant's response and reply brief, and (4) appellee's reply brief. *See* FRAP 28.1(c)(1)-(5) (Appendix C). The federal rule further sets type-volume (word count) limitations for each. FRAP 28.1(e)(2).

The Supreme Court should also look to a local rule the Fifth Court of Appeals adopted to deal the number and length of briefs to be filed in cross-appeals. *See* 5TH TEX. APP. (DALLAS) LOC. R. 10) (Appendix D). Like FRAP 28.1, the Fifth Court's rule identifies four briefs to be filed by the parties: (1) the appellant's brief, (2) a combined appellee's and cross-appellant's brief, (3) a combined appellant's reply and cross-appellee's brief, and (4) the cross-appellant's reply brief. The Fifth Court's rule has not yet been revised to factor in word counts.

At the time of this writing, the Fourteenth Court of Appeals is considering a local rule similar to the Fifth Court's. The fact that the intermediate appellate courts are resorting to these measures confirms the significance of briefing issues in cross-appeals and underscores the need for a long-term, statewide resolution.

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[5] The author can take no credit for this approach, which was suggested in the Cayce law review article and was successfully implemented earlier by Ben Taylor of Norton Rose Fulbright. As stated in the Cayce article and quoted in the form motion:

> To relieve the courts of appeals of the potential burden (and confusion) created by parallel briefing, and as a convenience and cost saving measure for the parties, it is suggested that, depending upon the nature and complexity of the issues raised, when an appellee wishes to assert a cross-point, the appellee first file a motion requesting leave to assert the cross-point in the appellee's brief rather than filing a separate appellant's brief. The appellant should then be entitled to reply to the cross-point in the appellant's reply brief. Most courts of appeals should look upon such a motion favorably.

Cayce, *Civil Appeals in Texas*, at 963-64 (1997) (footnotes omitted).

[6] According to the outgoing Texas Supreme Court rules attorney, no plans for adopting a cross-appeal rule are currently in the works.

V. CONCLUSION

Many of the issues discussed in this paper can be resolved through open communications and agreements between counsel. Otherwise, the parties may generally seek relief from the appellate court. Nevertheless, ready examples of how to deal with briefing and word-count limits in cross-appeals are available for the Supreme Court's consideration. Rule changes should be adopted that minimize the burden cross-appeals impose on both litigants and appellate courts.

APPENDIX A

[PARTY'S] NOTICE OF CROSS-APPEAL

On or about _____, 20___, [Appellant] filed a notice of appeal. [Appellee] also desires to appeal from the final judgment signed on _____, 20___ by the Honorable _____, Judge of the ___st District Court of _____ County, Texas, in Cause No. _____, styled _____. This appeal is taken to the _____ Court of Appeals at _____, Texas.

* * *

[PARTY'S] NOTICE OF CONDITIONAL CROSS-APPEAL

On or about _____, 20___, [Appellant] filed a notice of appeal. [Appellee] hereby files this conditional notice to preserve its rights against [Appellant]. [Appellee] also desires to appeal from the final judgment signed on _____, 20___ by the Honorable _____, Judge of the ___st District Court of _____ County, Texas, in Cause No. _____, styled _____ but only in the event the Court of Appeals or the Texas Supreme Court were to grant [Appellant] any relief in its appeal. This conditional cross-appeal is taken to the _____ Court of Appeals at _____, Texas.

APPENDIX B

AGREED, JOINT MOTION TO ADOPT BRIEFING SCHEDULE AND FOR LEAVE TO ASSERT CROSS-POINTS IN APPELLEE'S BRIEF

The parties to this appeal, [Appellant/Cross-Appellee] and [Appellee/Cross-Appellant], request that the Court adopt a specific briefing schedule and that [Appellee/Cross-Appellant] be granted leave to assert its cross-points in a single brief as appellee/cross-appellant.

I.

On _____ 20__, the trial court signed a judgment disposing of all claims and issues in this case.

II.

Under the Texas Rules of Appellate Procedure, any party "who seeks to alter the trial court's judgment or other appealable order must file a notice of appeal." TEX. R. APP. P. 25.1(c).

III.

[Appellant/Cross-Appellee] filed a notice of appeal on _____ 20__. [Appellee/Cross Appellant] a notice of cross-appeal on _____ 20__.

IV.

The reporter's record was filed on _____ 20__. The clerk's record was filed on _____ 20__. Accordingly, the deadline for filing both sides' briefs as appellants is _____ 20__.

V.

In a thoughtful law review article, the authors noted a potential problem created by the current appellate rules when more than one party has appealed:

> A question that the new rules leave unclear is whether the appellee asserting a cross-point is required to file a separate appellant's brief, or whether the cross-point may be raised in the appellee's brief as under the former practice. The Federal Rules of Appellate [Procedure] designate the first filing party as the "appellant" for briefing purposes. Thus, there is only one appellant and only one appellant's brief. The wisdom of this rule is in the limiting effect it has on the number of briefs that can be filed by a party, preventing confusion and inconvenience occasioned by multiple briefing tracks when the same parties file briefs as both appellant and appellee. There is no similar provision in the Texas rules. In the absence of such a provision, one leading commentator has suggested that, in light of the provision in Rule 38.6(a) requiring an appellant to file a brief[,] each party who files a notice of appeal must file an appellant's brief. Each party who responds to the brief would then file a brief in response as an appellee, to which each appellee/appellant may file a reply brief.
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> At a minimum, this parallel briefing scheme doubles the number of briefs filed by the parties in a case. In a simple two-party appeal in which a cross-point is asserted, the rules require the court to process a minimum of four separate briefs from each party. This problem is obviously exacerbated when multiple parties are involved.
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> To relieve the courts of appeals of the potential burden (and confusion) created by parallel briefing, and as a convenience and cost saving measure for the parties, it is suggested that, depending upon the nature and complexity of the issues raised, when an appellee wishes to assert a cross-point, the appellee first file a motion requesting leave to assert the cross-point in the appellee's brief rather than filing a separate appellant's brief. The appellant should then be entitled to reply to the cross-point in the appellant's

> reply brief. Most courts of appeals should look upon such a motion favorably.

John Hill Cayce, Anne Gardner, and Felicia Harris Kyle, *Civil Appeals in Texas: Practicing Under the New Rules of Appellate Procedure*, 49 BAYLOR L. REV. 867, 963-64 (1997) (footnotes omitted).

VI.

At least one Texas intermediate appellate court has adopted a local rule to address this problem. *See* 5TH TEX. APP. (DALLAS) LOC. R. 10. The Dallas Court's rule brings cross-appeal practice in line with the Fifth Circuit and other federal appellate courts, which by rule provide for a briefing schedule that avoids the filing of redundant briefs. *See* FED. R. APP. P. 28.1. [*Note: Consider attaching both rules to motion.*]

VII.

By this motion, the parties ask the Court to adopt a similar solution for this case. As cross-appellant, [Appellee/Cross-Appellant] intends to raise relatively straightforward issues pertaining to the trial court's failure to award attorney fees. Parallel briefing tracks would provide no benefit, but instead would unnecessarily increase the time and resources expended by the parties and the Court. Justice and efficiency would best be served by allowing [Appellee/Cross-Appellant] to raise and argue its appellate complaints by way

of cross-points in its appellee's brief, thus reducing the total number of briefs to be filed in this matter from six to four.

VIII.

The parties ask the Court to adopt the following briefing schedule and word-count limits, subject to the exclusions outlined in Texas Rule of Appellate Procedure 9.4(i)(1) and possible extensions upon further motion by a party:

a. [Appellant/Cross-Appellee's] opening brief as appellant shall be due on _____ 20__ (_____-word limit);

b. [Appellee/Cross-Appellant's] brief as appellee/cross-appellant shall be due 30 days after [Appellant/Cross-Appellee's] opening brief is filed (_____-word limit, _____ for the appellee's portion and _____ for the cross-appellant's portion);

c. [Appellant/Cross-Appellee's] combined reply brief as appellant/response to [Appellant/Cross-Appellee's] cross-appeal shall be due 30 days after [Appellant/Cross-Appellee's] opening brief is filed (_____-word limit, _____ for the reply brief and _____ for the cross-appellee's brief); and

d. [Appellee/Cross-Appellant's] reply brief as cross-appellant shall be due 20 days after [Appellant/Cross-Appellee's] combined reply brief as appellant/response to [Appellee/Cross-Appellant's] cross-appeal is filed (_____-word limit).

IX.

This case has not been set for submission. Therefore, no unnecessary delay will result from the granting of this motion.

CONCLUSION AND PRAYER

For these reasons, the parties respectfully request that the Court grant this agreed, joint motion and issue an order expressly allowing [Appellee/Cross-Appellant] to raise and argue its appellate complaints in its appellee's brief. The parties further ask the Court, upon granting this motion, to adopt the briefing schedule set out in Part VIII above.

APPENDIX C

United States Code Annotated
Federal Rules of Appellate Procedure (Refs & Annos)
Title VII. General Provisions

Federal Rules of Appellate Procedure Rule 28.1, 28 U.S.C.A.

Rule 28.1. Cross-Appeals

Currentness

(a) Applicability. This rule applies to a case in which a cross-appeal is filed. Rules 28(a)-(c), 31(a)(1), 32(a)(2), and 32(a)(7)(A)-(B) do not apply to such a case, except as otherwise provided in this rule.

(b) Designation of Appellant. The party who files a notice of appeal first is the appellant for the purposes of this rule and Rules 30 and 34. If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by the parties' agreement or by court order.

<[Text of subsection (c) effective until December 1, 2013,
absent contrary Congressional action.]>

(c) Briefs. In a case involving a cross-appeal:

(1) Appellant's Principal Brief. The appellant must file a principal brief in the appeal. That brief must comply with Rule 28(a).

(2) Appellee's Principal and Response Brief. The appellee must file a principal brief in the cross-appeal and must, in the same brief, respond to the principal brief in the appeal. That appellee's brief must comply with Rule 28(a), except that the brief need not include a statement of the case or a statement of the facts unless the appellee is dissatisfied with the appellant's statement.

(3) Appellant's Response and Reply Brief. The appellant must file a brief that responds to the principal brief in the cross-appeal and may, in the same brief, reply to the response in the appeal. That brief must comply with Rule 28(a)(2)-(9) and (11), except that none of the following need appear unless the appellant is dissatisfied with the appellee's statement in the cross-appeal:

(A) the jurisdictional statement;

(B) the statement of the issues;

(C) the statement of the case;

(D) the statement of the facts; and

(E) the statement of the standard of review.

(4) Appellee's Reply Brief. The appellee may file a brief in reply to the response in the cross-appeal. That brief must comply with Rule 28(a)(2)-(3) and (11) and must be limited to the issues presented by the cross-appeal.

(5) No Further Briefs. Unless the court permits, no further briefs may be filed in a case involving a cross-appeal.

<[Text of subsection (c) effective December 1, 2013,
absent contrary Congressional action.]>

(c) Briefs. In a case involving a cross-appeal:

(1) Appellant's Principal Brief. The appellant must file a principal brief in the appeal. That brief must comply with Rule 28(a).

(2) Appellee's Principal and Response Brief. The appellee must file a principal brief in the cross-appeal and must, in the same brief, respond to the principal brief in the appeal. That appellee's brief must comply with Rule 28(a), except that the brief need not include a statement of the case unless the appellee is dissatisfied with the appellant's statement.

(3) Appellant's Response and Reply Brief. The appellant must file a brief that responds to the principal brief in the cross-appeal and may, in the same brief, reply to the response in the appeal. That brief must comply with Rule 28(a)(2)-(8) and (10), except that none of the following need appear unless the appellant is dissatisfied with the appellee's statement in the cross-appeal:

(A) the jurisdictional statement;

(B) the statement of the issues;

(C) the statement of the case; and

(D) the statement of the standard of review.

(4) Appellee's Reply Brief. The appellee may file a brief in reply to the response in the cross-appeal. That brief must comply with Rule 28(a)(2)-(3) and (10) and must be limited to the issues presented by the cross-appeal.

(5) No Further Briefs. Unless the court permits, no further briefs may be filed in a case involving a cross-appeal.

(d) Cover. Except for filings by unrepresented parties, the cover of the appellant's principal brief must be blue; the appellee's principal and response brief, red; the appellant's response and reply brief, yellow; the appellee's reply brief, gray; an intervenor's or amicus curiae's brief, green; and any supplemental brief, tan. The front cover of a brief must contain the information required by Rule 32(a)(2).

(e) Length.

(1) Page Limitation. Unless it complies with Rule 28.1(e)(2) and (3), the appellant's principal brief must not exceed 30 pages; the appellee's principal and response brief, 35 pages; the appellant's response and reply brief, 30 pages; and the appellee's reply brief, 15 pages.

(2) Type-Volume Limitation.

(A) The appellant's principal brief or the appellant's response and reply brief is acceptable if:

(i) it contains no more than 14,000 words; or

(ii) it uses a monospaced face and contains no more than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if:

(i) it contains no more than 16,500 words; or

(ii) it uses a monospaced face and contains no more than 1,500 lines of text.

(C) The appellee's reply brief is acceptable if it contains no more than half of the type volume specified in Rule 28.1(e)(2)(A).

(3) Certificate of Compliance. A brief submitted under Rule 28.1(e)(2) must comply with Rule 32(a)(7)(C).

(f) Time to Serve and File a Brief. Briefs must be served and filed as follows:

(1) the appellant's principal brief, within 40 days after the record is filed;

(2) the appellee's principal and response brief, within 30 days after the appellant's principal brief is served;

(3) the appellant's response and reply brief, within 30 days after the appellee's principal and response brief is served; and

(4) the appellee's reply brief, within 14 days after the appellant's response and reply brief is served, but at least 7 days before argument unless the court, for good cause, allows a later filing.

CREDIT(S)

(As added April 25, 2005, eff. Dec. 1, 2005; amended Mar. 26, 2009, eff. Dec. 1, 2009; Apr. 16, 2013, eff. Dec. 1, 2013, absent contrary Congressional action.)

ADVISORY COMMITTEE NOTES

2005 Adoption

The Federal Rules of Appellate Procedure have said very little about briefing in cases involving cross-appeals. This vacuum has frustrated judges, attorneys, and parties who have sought guidance in the rules. More importantly, this vacuum has been filled by conflicting local rules regarding such matters as the number and length of briefs, the colors of the covers of briefs, and the deadlines for serving and filing briefs. These local rules have created a hardship for attorneys who practice in more than one circuit.

New Rule 28.1 provides a comprehensive set of rules governing briefing in cases involving cross-appeals. The few existing provisions regarding briefing in such cases have been moved into new Rule 28.1, and several new provisions have been added to fill the gaps in the existing rules. The new provisions reflect the practices of the large majority of circuits and, to a significant extent, the new provisions have been patterned after the requirements imposed by Rules 28, 31, and 32 on briefs filed in cases that do not involve cross-appeals.

Subdivision (a). Subdivision (a) makes clear that, in a case involving a cross-appeal, briefing is governed by new Rule 28.1, and not by Rules 28(a), 28(b), 28(c), 31(a)(1), 32(a)(2), 32(a)(7)(A), and 32(a)(7)(B), except to the extent that Rule 28.1 specifically incorporates those rules by reference.

Subdivision (b). Subdivision (b) defines who is the "appellant" and who is the "appellee" in a case involving a cross-appeal. Subdivision (b) is taken directly from former Rule 28(h), except that subdivision (b) refers to a party being designated as an appellant "for the purposes of this rule and Rules 30 and 34," whereas former Rule 28(h) also referred to Rule 31. Because the matter addressed by Rule 31(a)(1)--the time to serve and file briefs--is now addressed directly in new Rule 28.1(f), the cross-reference to Rule 31 is no longer necessary. In Rule 31 and in all rules other than Rules 28.1, 30, and 34, references to an "appellant" refer both to the appellant in an appeal and to the cross-appellant in a cross-appeal, and references to an "appellee" refer both to the appellee in an appeal and to the cross-appellee in a cross-appeal. Cf. Rule 31(c).

Subdivision (c). Subdivision (c) provides for the filing of four briefs in a case involving a cross-appeal. This reflects the practice of every circuit except the Seventh. *See* 7th Cir. R. 28(d)(1)(a).

The first brief is the "appellant's principal brief." That brief--like the appellant's principal brief in a case that does not involve a cross-appeal--must comply with Rule 28(a).

The second brief is the "appellee's principal and response brief." Because this brief serves as the appellee's principal brief on the merits of the cross-appeal, as well as the appellee's response brief on the merits of the appeal, it must also comply with Rule 28(a), with the limited exceptions noted in the text of the rule.

The third brief is the "appellant's response and reply brief." Like a response brief in a case that does not involve a cross-appeal--that is, a response brief that does not also serve as a principal brief on the merits of a cross-appeal--the appellant's response and reply brief must comply with Rule 28(a)(2)-(9) and (11), with the exceptions noted in the text of the rule. *See* Rule 28(b). The one difference between the appellant's response and reply brief, on the one hand, and a response brief filed in a case that does

not involve a cross-appeal, on the other, is that the latter must include a corporate disclosure statement. *See* Rule 28(a)(1) and (b). An appellant filing a response and reply brief in a case involving a cross-appeal has already filed a corporate disclosure statement with its principal brief on the merits of the appeal.

The fourth brief is the "appellee's reply brief." Like a reply brief in a case that does not involve a cross-appeal, it must comply with Rule 28(c), which essentially restates the requirements of Rule 28(a)(2)-(3) and (11). (Rather than restating the requirements of Rule 28(a)(2)-(3) and (11), as Rule 28(c) does, Rule 28.1(c)(4) includes a direct cross-reference.) The appellee's reply brief must also be limited to the issues presented by the cross-appeal.

Subdivision (d). Subdivision (d) specifies the colors of the covers on briefs filed in a case involving a cross-appeal. It is patterned after Rule 32(a)(2), which does not specifically refer to cross-appeals.

Subdivision (e). Subdivision (e) sets forth limits on the length of the briefs filed in a case involving a cross-appeal. It is patterned after Rule 32(a)(7), which does not specifically refer to cross-appeals. Subdivision (e) permits the appellee's principal and response brief to be longer than a typical principal brief on the merits because this brief serves not only as the principal brief on the merits of the cross-appeal, but also as the response brief on the merits of the appeal. Likewise, subdivision (e) permits the appellant's response and reply brief to be longer than a typical reply brief because this brief serves not only as the reply brief in the appeal, but also as the response brief in the cross-appeal. For purposes of determining the maximum length of an amicus curiae's brief filed in a case involving a cross-appeal, Rule 29(d)'s reference to "the maximum length authorized by these rules for a party's principal brief" should be understood to refer to subdivision (e)'s limitations on the length of an appellant's principal brief.

Subdivision (f). Subdivision (f) provides deadlines for serving and filing briefs in a cross-appeal. It is patterned after Rule 31(a)(1), which does not specifically refer to cross-appeals.

2009 Amendments

Subdivision (f)(4). Subdivision (f)(4) formerly required that the appellee's reply brief be served "at least 3 days before argument unless the court, for good cause, allows a later filing." Under former Rule 26(a), "3 days" could mean as many as 5 or even 6 days. See the Note to Rule 26. Under revised Rule 26(a), intermediate weekends and holidays are counted. Changing "3 days" to "7 days" alters the period accordingly. Under revised Rule 26(a), when a period ends on a weekend or holiday, one must continue to count in the same direction until the next day that is not a weekend or holiday; the choice of the 7-day period for subdivision (f)(4) will minimize such occurrences.

2013 Amendments

[Effective December 1, 2013,
absent contrary Congressional action.]

Subdivision (c). Subdivision (c) is amended to accord with the amendments to Rule 28(a). Rule 28(a) is amended to consolidate subdivisions (a)(6) and (a)(7) into a new subdivision (a)(6) that provides for one "statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review ..." Rule 28.1(c) is amended to refer to that consolidated "statement of the case," and references to subdivisions of Rule 28(a) are revised to reflect the re-numbering of those subdivisions.

Changes Made After Publication and Comment

No changes were made to the text of the proposed amendment to Rule 28.1 after publication and comment. The Committee revised a quotation in the Committee Note to Rule 28.1(c) to conform to the changes (described above) to the text of proposed Rule 28(a)(6).

Notes of Decisions (1)

F. R. A. P. Rule 28.1, 28 U.S.C.A., FRAP Rule 28.1
Amendments received to 7-15-13

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APPENDIX D

Vernon's Texas Rules Annotated
Local Rules of the Courts of Appeals
Fifth Court of Appeals Local Rules (Dallas) (Refs & Annos)

TX 5th Tex.App. (Dallas) Rule 10
Formerly cited as TX R 5 A CT Rule 11

Rule 10. Briefs in Cross-Appeals

Currentness

1. In a civil appeal in which a cross-appeal has been timely filed, the briefs to be filed by the parties are:

a. The appellant's brief.

b. A combined appellee's and cross-appellant's brief.

c. A combined appellant's reply and cross-appellee's brief.

d. The cross-appellant's reply brief.

2. The aggregate number of pages for all briefs filed by any party may not exceed 125. The pages used to determine page limitations are those contained in appellate rule 38.4. The page limits are those set forth in appellate rule 38.4, except as provided for herein for the combined appellee/cross-appellant and appellant reply/cross-appellant's briefs. The combined appellee/cross-appellant's brief may be 100 pages, 50 pages for the appellee's portion and 50 pages for the cross-appellant's portion. The combined appellant's reply/cross-appellee's brief may be 75 pages, 25 for the reply brief and 50 for the cross-appellee's brief.

3. The deadlines for filing the briefs are:

a. The appellant's brief is due no later than thirty days after the date the record is filed with the Court.

b. The appellee/cross-appellant's brief is due no later than thirty days after the date the appellant's brief is filed.

c. The appellant's reply/cross-appellee's brief is due no later than thirty days after the date the appellee/cross-appellant's brief is filed

d. The cross-appellant's reply brief is due twenty days after the date the cross-appellee's brief is filed.

4. If appellant or cross-appellant's appeal is dismissed and the appeal remains pending on the undismissed notice of appeal, the briefing schedule and page limitations will be as provided for in the rules of appellate procedure.

5. The Court may change the requirements of this rule on its own motion or motion of any party to the appeal.

Credits

Former Rule 11 added with approval by Supreme Court Aug. 17, 2003, and Court of Criminal Appeals Sept. 29, 2004; amended with approval by Supreme Court Nov. 22, 2004. Renumbered Rule 10 and amended with approval by Supreme Court June 13, 2012, eff. July 1, 2012.

<(Cite these rules as 5th Tex.App. (Dallas) Loc.R.)>

Editors' Notes

NOTES AND COMMENTS

Currently, the appeal and cross-appeal have separate but concurrent briefing schedules and requirements (viz. appellant's brief, appellee's brief, appellant's reply brief). This requires the justices and staff to look at six different briefs to see all the issues raised in the appeal. Under this proposal, the parties receive the standard amount of time to file their briefs and the Court can see all the issues raised in one progression of four briefs. The page limitations will be the combined amount (e.g., appellant's reply and cross-appellee's brief will be no longer than 75 pages, a combination of the reply brief limit of 25 pages and appellee's brief limit of 50 pages) so the parties receive the same number of pages they would if the briefs were filed separately.

Court of Appeals Rules, Fifth District, Rule 10, TX R 5 A CT Rule 10
Current with amendments received through April 15, 2013

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