

Initial Civil Appeals: Texas

AMY L. RUDD AND LINDSEY B. COHAN, DECHERT LLP, WITH PRACTICAL LAW LITIGATION

A Q&A guide to appealing from a trial court of general jurisdiction in Texas. This Q&A addresses starting an appeal (as of right or by permission), obtaining a stay pending appeal, completing preliminary requirements (like mediation), submitting a factual record or appendix, briefing the appeal, arguing the appeal and requesting rehearing.

OVERVIEW OF STATE APPEALS

1. What types of rulings can a party appeal as of right (for example, final judgments, preliminary injunctions, interlocutory orders)?

In Texas, a party may generally take an appeal as of right only from a final judgment or order. An order or judgment is final if it disposes of all pending claims at issue in the litigation. (*Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001).)

A party may take an interlocutory appeal as of right under certain statutory exceptions.

For example, a party may appeal from an interlocutory order deciding whether or not a plaintiff independently established proper venue (*Tex. Civ. Prac. & Rem. Code Ann. § 15.003(b)*); see also *Nalle Plastics Family Ltd. P'ship v. Porter, Rogers, Dahlman & Gordon, P.C.*, 406 S.W.3d 186, 195 n.7 (Tex. App. 2013).

Also, a party may appeal as of right from an interlocutory order that:

- Appoints a receiver or trustee.
- Overrules a motion to vacate an order that appoints a receiver or trustee.
- Certifies or refuses to certify a class.
- Grants or refuses a temporary injunction, or grants or overrules a motion to dissolve a temporary injunction.

- Denies a motion for summary judgment based on an assertion of governmental immunity.
- Denies a motion for summary judgment relating to media conduct and the free speech provisions of the US Constitution, the Texas Constitution or the Texas libel statute.
- Grants or denies the special appearance of a defendant, except in a suit brought under the Family Code.
- Grants or denies a plea to the jurisdiction by a governmental unit.
- Denies all or part of the relief sought by a motion under the expert report medical liability law, Section 74.351(b) of the Texas Civil Practice and Remedies Code Annotated, except that an appeal may not be taken from an order granting an extension under the expert report law.
- Grants relief sought by a motion under the adequacy of a medical expert report statute, Section 74.351(l) of the Texas Civil Practice and Remedies Code Annotated.
- Denies a motion to dismiss filed under the motion to dismiss section of the asbestos and silica law, Section 90.007 of the Texas Civil Practice and Remedies Code Annotated.
- Denies a motion for summary judgment filed by an electric utility regarding liability in a suit subject to the limited liability of electric utilities law, Section 75.0022 of the Texas Civil Practice and Remedies Code Annotated.
- Denies a motion to dismiss filed under the motion to dismiss section of the free speech, right to petition or right of association law, Section 27.003 of the Texas Civil Practice and Remedies Code Annotated. (*Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)*.)

2. What types of rulings, if any, can a party appeal by permission (for example, interlocutory orders)?

In Texas, a party may appeal to the Court of Appeals, by permission, an order that is not appealable as of right if:

- The order involves a controlling question of law as to which there is a substantial ground for difference of opinion.



- An immediate appeal from the order may materially advance the ultimate termination of the litigation.

(*Tex. Civ. Prac. & Rem. Code Ann. § 51.014(d)*.)

These grounds for permissive appeal do not apply to appeals brought under the Texas Family Code (*Tex. Civ. Prac. & Rem. Code Ann. § 15.014(d-1)*).

Also, a party may appeal directly to the Texas Supreme Court from an order of the trial court that, on the ground of the constitutionality of a state statute, grants or denies either:

- An interlocutory injunction.
- A permanent injunction.

(*Tex. Gov't Code § 22.001(c)*.)

Direct appeals from the trial court to the Texas Supreme Court are governed by a different procedural rule than other appeals to the courts of appeals or the Texas Supreme Court, set out in Texas Rule of Civil Procedure 57.

3. Are there any restrictions on the types of issues the appellate court can consider (for example, only questions of law)?

The Texas courts of appeals may review both issues of fact and issues of law properly raised on appeal (*Tex. Gov't Code Ann. § 22.225(a), (b)*; *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 794 (*Tex.* 2002)).

STARTING AN APPEAL

4. When must a party start an appeal?

In Texas, a party must generally file a notice of appeal within 30 days after the judgment is signed (*Tex. R. App. P. 26.1*). However:

- The notice of appeal must be filed within 90 days after the judgment is signed, if any party timely files:
 - a motion for new trial;
 - a motion to modify the judgment;
 - a motion to reinstate under Texas Rule of Civil Procedure 165a(3); or
 - a request for findings of fact and conclusions of law if findings and conclusions either are required by the Texas Rules of Civil Procedure or, if not required, could properly be considered by the appellate court.
- In an accelerated appeal, the notice of appeal must be filed within 20 days after the judgment or order is signed. Accelerated appeals have quicker deadlines and faster dispositions than normal appeals (*Foster v. Zavala*, 214 S.W.3d 106, 117 (*Tex. App.* 2006)).
- In a restricted appeal, the notice of appeal must be filed within six months after the judgment or order is signed. A restricted appeal is a direct attack on the trial court's judgment by a party to the suit who did not participate in the actual trial or proceeding, where the error complained of is apparent on the face of the record (*Norman Commc'ns v. Tex. Eastman Co.*, 955 S.W.2d 269, 270 (*Tex.* 1997); *Gen. Elec. Co. v. Falcon Ridge Apartments, J.V.*, 811 S.W.2d 942, 943 (*Tex.* 1991)).
- If any party timely files a notice of appeal, another party may file a notice of appeal within the applicable period in the bulleted items above or 14 days after the first filed notice of appeal, whichever is later.

(*Tex. R. App. P. 26.1(a)-(d)*.)

Where the appeal is a direct appeal from the trial court to the Texas Supreme Court, relating to a temporary or permanent injunction, the appeal is governed by the rules for accelerated appeals (*Tex. R. App. P. 57.1*; see *Question 2*). The appellant must file the petition for review no more than 20 days after the trial court signs the order for injunctive or declaratory relief (*Tex. R. App. P. 26.1(b)*; *Narmah v. Waller Indep. Sch. Dist.*, 257 S.W.3d 267, 272 (*Tex. App.* 2008)).

5. How, if at all, can a party extend the time to start an appeal?

In Texas, an appellate court may grant a party an extension of time to take an appeal if, within 15 days after the deadline for filing the notice of appeal, the appellant:

- Files in the trial court a notice of appeal.
- Files in the appellate court a motion to extend time complying with Texas Rule of Appellate Procedure 10.5(b).

(*Tex. R. App. P. 26.3(d)*.)

A motion to extend time to file a notice of appeal must state facts reasonably explaining the need for an extension (*Tex. R. App. P. 10.5(b)*).

6. How does a party start an appeal as of right (for example, notice of appeal, petition)?

In Texas, a party starts an appeal as of right by filing a written notice of appeal with the trial court clerk (*Tex. R. App. P. 25.1(a)-(c)*).

The notice of appeal must:

- Identify the trial court and state the case's trial court number and style.
- State the date of the judgment or order appealed from.
- State that the party desires to appeal.
- State the court to which the appeal is taken unless the appeal is to either the First or Fourteenth Court of Appeals, in which case the notice must state that the appeal is to either of those courts.
- State the name of each party filing the notice.
- In an accelerated appeal, state that the appeal is accelerated.
- In a restricted appeal (see *Question 4*):
 - state that the appellant is a party affected by the trial court's judgment but did not participate in the hearing that resulted in the appealed judgment;
 - state that the appellant did not timely file a post-judgment motion, a request for findings of fact and conclusions of law or a notice of appeal; and
 - be verified by the appellant if the appellant does not have counsel.

(*Tex. R. App. P. 25.1(d)*.)

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

7. How does a party start an appeal by permission (for example, motion to the appellate court, motion to the trial court)?

A party wishing to appeal an interlocutory order for which there is no right of appeal must first file a motion with the trial court for permission to appeal (*Tex. Civ. Prac. & Rem. Code § 51.014(d)*; see *Question 2*).

If the trial court grants permission to appeal from an interlocutory order, the party seeking to appeal must then petition the Court of Appeals for permission to appeal (*Tex. R. App. P. 28.3(a)*). The petition must be filed with the clerk of the particular Court of Appeals having appellate jurisdiction over the action within 15 days after the order to be appealed is signed (*Tex. R. App. P. 28.3(b)-(c)*).

The 15-day time limit for the petition in the Court of Appeals applies regardless of the timing of the trial court's order granting permission to appeal. A party can, however, apply for an extension of time to petition the Court of Appeals under Texas Rule of Appellate Procedure 10.5(b).

When filing the petition, the petitioner also must file a docketing statement that conforms with the requirements of Texas Rule of Appellate Procedure 32.1 (*Tex. R. App. P. 28(i)*; see *Question 9*).

If any party timely files a petition for permission to appeal with the Court of Appeals, any other party may file a response or cross-petition within ten days after the initial petition is filed. A party may then file a response to any cross-petition within ten days after the cross petition is filed. A petitioner or cross-petitioner also has a right of reply, which must be filed within seven days of the date of response. (*Tex. R. App. P. 28.3(f)*.)

If the Court of Appeals grants permission to appeal, the successful petitioner must file a copy of the order granting the petition with the trial court clerk (*Tex. R. App. P. 28.3(k)*).

STAYS PENDING APPEAL

8. How, if at all, can a party stay the lower court's ruling pending appeal (for example, posting a bond, making a motion, automatically by appealing)?

AUTOMATIC STAYS

An appeal of any of the interlocutory orders listed in *Question 1*, with the exception of a temporary injunction order, automatically stays the commencement of a trial in the trial court pending resolution of the appeal (*Tex. Civ. Prac. & Rem. Code § 51.014(b)*).

Also, an appeal of any of the following interlocutory orders automatically stays trial and all other proceedings in the trial court:

- Certifying or refusing to certify a class in a suit brought under the class action law, Texas Rule of Civil Procedure 42.
- Denying a motion for summary judgment based on an individual's assertion of governmental immunity.
- Granting or denying a plea to the jurisdiction by a governmental unit.
- Denying a motion for summary judgment filed by an electric utility regarding liability in a suit subject to the limited liability of electric utilities law, Section 75.0022 of the Texas Civil Practice and Remedies Code.

(*Tex. Civ. Prac. & Rem. Code § 51.014(b)*.)

The denial of a motion for summary judgment, special appearance or plea to the jurisdiction under Section 51.014 of the Texas Civil Practice and Remedies Code does not result in an automatic stay unless the motion, special appearance or plea to the jurisdiction at issue is filed and submitted for hearing to the trial court no later than the later of:

- A date set by the trial court in a scheduling order entered under the Texas Rules of Civil Procedure.

- The 180th day after the date the defendant files:
 - its original answer;
 - its first other responsive pleading to the plaintiff's petition; or
 - if the plaintiff files an amended pleading alleging a new cause of action against the defendant that enables the defendant to assert a new defense under Texas Civil Practice and Remedies Code § 51.014(a)(5), (7) or (8), the responsive pleading that raises that defense.

(*Tex. Civ. Prac. & Rem. Code § 51.014(c)*.)

JUDGMENT DEBTOR STAYS

When an appeal of a final order is pending, a judgment debtor may supersede the judgment, with the effect of staying its enforcement, by either:

- Filing with the trial court clerk a written agreement with the judgment creditor to suspend enforcement of the judgment.
- Filing with the trial court clerk a good and sufficient bond.
- Making a deposit with the trial court clerk instead of a bond.
- Providing alternate security ordered by the court.

(*Tex. R. App. P. 24.1(a)-(c)*.)

If a judgment debtor takes any of the above steps, the judgment is considered superseded and must be suspended (*Tex. R. App. P. 24.1(f)*).

PERMISSIVE STAYS

In general, permissive interlocutory appeals do not stay proceedings in the trial court, unless either:

- The parties agree to a stay.
- The trial or appellate court orders a stay of the proceedings pending appeal.

(*Tex. Civ. Prac. & Rem. Code § 51.014(e)*.)

A Texas Court of Appeals may issue any temporary orders necessary to preserve the parties' rights until disposition of the appeal, including issuing a stay. The appellate court may require the petitioner to give appropriate security for any temporary order requested. The appellate court may not, however, suspend the trial court's order if the appellant's rights would be adequately protected by a supersedeas bond or other order made under Texas Rule of Appellate Procedure 24. (*Tex. R. App. P. 29.3*.)

PRELIMINARY MATTERS

9. What, if any, preliminary matters are required before the parties brief the appeal (for example, filing informational forms, participating in mediation or settlement conferences)?

In Texas, a party must perfect an appeal by filing a written notice of appeal with the trial court clerk (*Tex. R. App. P. 25.1(a)*).

The appellant must also promptly file in the Court of Appeals a docketing statement that includes the following information:

- If the appellant is represented by counsel, the name of the appellant and the name, address, telephone, fax number and State Bar of Texas identification number of the petitioner's lead counsel.
- If the appellant is not represented by counsel, the appellant's name, address, telephone number and fax number, if any.

- The date the notice of appeal was filed in the court and, if mailed to the trial court clerk, the date of the mailing.
- The trial court's name and county, the name of the judge who tried the case and the date the judgment or order appealed from was signed.
- The date of filing of any motion for new trial, motion to modify the judgment or order, requests for findings of fact, motion to reinstate or other filing that affects the time for perfecting the appeal.
- The names of all other parties to the trial court's judgment or the order appealed from.
- The general nature of the case (for example, breach of contract).
- Whether the proposed appeal should be given priority or treated as an accelerated appeal, and whether the appeal is a parental termination or child protection case as defined in Texas Rule of Appellate Procedure 28.4.
- Whether the appellant has requested or will request a reporter's record on appeal, and whether any trial was electronically recorded.
- The name of the court reporter in any proceeding in the trial court.
- Whether the appellant intends to seek temporary or ancillary relief while the appeal is pending.
- The date of filing of any affidavit of indigence, of any contest, of any order on the contest and whether the contest was sustained or overruled.
- Whether the appellant has filed or will file a supersedeas bond.
- Any other information the appellate court requires.

(*Tex. R. App. P. 28.3(i), 32.1*)

Although the Texas Rules of Appellate Procedure do not require the appellate courts to order the parties to mediation or alternative dispute resolution (ADR) before filing their briefs on appeal, some of the appellate courts have local rules permitting the courts to refer a case to ADR (see, for example, *Tex. Loc. R. 10th Ct. App. 9*).

COURT SUBMISSIONS

10. What factual materials are submitted to the court (for example, the trial court record, excerpts of the record, an appendix)? When and by whom?

FULL RECORD ON APPEAL

In general, the record on appeal in Texas consists of the clerk's record, and if necessary to the appeal, the reporter's record (*Tex. R. App. P. 34.1*). The parties may, however, agree on the contents of the appellate record by written stipulation filed with the trial court clerk (*Tex. R. App. P. 34.2*).

Absent a stipulation by the parties, the clerk's record must include:

- All pleadings on which the trial was held.
 - The court's docket sheet.
 - The court's charge and the jury's verdict, or the court's findings of fact and conclusions of law.
 - The court's judgment or order that is being appealed.
 - Any request for findings of fact and conclusions of law, any post-judgment motion and the court's order on the motion.
 - The notice of appeal.
- Any formal bill of exception.
 - Any request for a reporter's record.
 - Any request for preparation of the clerk's record.
 - A certified bill of costs.
 - Any filing that a party designates for inclusion in the record.

(*Tex. R. App. P. 34.5(a)*.)

The reporter's record includes either:

- If the proceedings were stenographically recorded, the reporter's stenographic transcription of the proceedings and of the exhibits that the parties to the appeal designate.
- If the proceedings were electronically recorded, certified copies of all tapes or other audio-storage devices on which the proceedings were recorded, any exhibits that the parties to the appeal designate, and certified copies of the logs prepared by the court recorder under Texas Rule of Appellate Procedure 13.2.

(*Tex. R. App. P. 34.6(a)*.)

Instead of a reporter's record, the parties may agree on a brief statement of the case, which must be filed with the trial court clerk and included in the appellate record (*Tex. R. App. P. 34.3*).

Most of the appellate courts in Texas have detailed rules and procedures regarding the compilation and filing of the clerk's record and reporter's record. A party should always check the local rules and procedures of the appellate court in which the appeal is pending.

APPENDIX

The appellant also must submit an appendix to the appellate court. The appendix must contain a copy of:

- The trial court judgment or other appealable order from which relief is sought.
- The jury charge and verdict or findings of fact and conclusions of law, if any.
- The text of any rule, regulation, ordinance, statute, constitutional provision or other law (excluding case law), on which the argument is based, and the text of any contract or other document that is central to the argument.

(*Tex. R. App. P. 38.1(k)(1)*.)

The appendix may contain any other materials relevant to the issues presented for appellate review, including relevant court opinions, laws, pleadings, excerpts from the reporter's record or other similar material (*Tex. R. App. P. 38.1(k)(2)*).

TIME FOR FILING

The appellant must file the appellate record in the appellate court within 60 days after the challenged judgment is signed, except that:

- If any party has filed a motion for new trial, motion to modify the judgment, motion to reinstate, or request for findings of fact and conclusions of law, within 120 days after the judgment is signed.
- If the appeal is an accelerated appeal, within ten days after the notice of appeal is filed.
- If the appeal is a restricted appeal, within 30 days after the notice of appeal is filed.

(*Tex. R. App. P. 35.1, 26.1(a)-(c)*.)

If the proceedings were electronically recorded, the appendix must be filed at or before the time a party's brief is due, and it must contain a transcription of all portions of the recording that the party considers relevant to the appeal (*Tex. R. App. P. 38.5(a)(1)*).

RESPONSIBLE FOR FILING

The appellant is responsible for ordering the clerk's record (*Tex. R. App. P. 35.3(a)(2)*). The trial court clerk must prepare, certify and timely file the clerk's record when:

- A notice of appeal has been filed.
- The party responsible for paying the clerk's record preparation fee has paid the fee, made satisfactory arrangements with the clerk to pay the fee or is entitled to appeal without paying the fee.

(*Tex. R. App. P. 35.3(a)*.)

The appellant is responsible for ordering the reporter's record (*Tex. R. App. P. 35.3(b)(2)*). The official or deputy reporter must prepare, certify and timely file the reporter's record when:

- A notice of appeal has been filed.
- The appellant has asked for the reporter's record to be prepared.

(*Tex. R. App. P. 35.3(b)*.)

The trial and appellate courts are jointly responsible for ensuring that the appellate record is timely filed (*Tex. R. App. P. 35.3(c)*).

By request of the clerk or reporter, an appellate court may extend the deadline for filing the appellate record. Any extension, however, may not exceed:

- 30 days in an ordinary or restricted appeal.
- Ten days in an accelerated appeal.

(*Tex. R. App. P. 35.3(c)*.)

If the clerk or reporter fails to file a timely record, the appellate court nevertheless must permit late filing if the delay is not the appellant's fault and the court has discretion to permit late filing even if the delay is the appellant's fault. The appellate court may enter any order necessary to ensure the timely filing of the appellate record. (*Tex. R. App. P. 35.3(c)*.)

11. What briefs are filed and when? Does this change when there is a cross-appeal?

In Texas, there are usually three appellate briefs:

- The appellant's opening brief.
- The appellee's responsive brief.
- The appellant's optional reply brief.

(*Tex. R. App. P. 38.1 to 38.3*.)

The Texas Rules of Appellate Procedure do not specify whether additional briefing is permitted when there is a cross-appeal. Many of the Texas courts of appeals, however, have set out local rules regarding briefing in cross-appeals (see, for example, *Tex. Loc. R. 5th Ct. App. 10*). Parties should check the local rules of the court where the appeal is pending to determine the requirements for briefing in a cross-appeal.

FILING BRIEFS

An appellant must file an opening brief within 30 days after the later of the date when:

- The clerk's record was filed.
- The reporter's record was filed.

(*Tex. R. App. P. 38.6(a)*.)

In an accelerated appeal, the appellant must file an opening brief within 20 days after the later of those two events (*Tex. R. App. P. 38.6(a)*).

If an appellant fails to timely file a brief, the appellate court may:

- Dismiss the appeal, unless the appellant reasonably explains the failure and the appellee is not significantly injured by the appellant's failure to timely file a brief.
- Decline to dismiss the appeal and exercise its discretion to consider the appeal.
- If the appellee files a brief, regard that brief as correctly presenting the case and affirm the trial court's judgment based on that brief without examining the record.

(*Tex. R. App. P. 38.8(a)*.)

An appellee must file its responsive brief within 30 days after the appellant's brief was filed or within 20 days in an accelerated appeal. If the appellant did not timely file a brief as required, an appellee may file a brief within 30 days (or within 20 days in an accelerated appeal) after the date the appellant's brief was due. (*Tex. R. App. P. 38.6(b)*.)

In all appeals, any reply brief must be filed within 20 days after the date the appellee's brief was filed (*Tex. R. App. P. 38.6(c)*).

Any party may seek to amend or supplement a brief whenever justice requires, on reasonable terms prescribed by the court (*Tex. R. App. P. 38.7*). Texas courts have permitted amending and supplementing briefs on this ground (see *Lopez-Juarez v. Kelly*, 348 S.W.3d 10, 15 (*Tex. App. 2011*); *MEMC Elec. Materials, Inc. v. Albemarle Corp.*, 241 S.W.3d 67, 69 n.2 (*Tex. App. 2007*)).

12. How, if at all, can a party extend the time to file a brief (for example, stipulation, so-ordered stipulation, motion)?

In Texas, a party can seek an extension of time to file a brief by filing a motion to extend time under Texas Rule of Appellate Procedure 10.5(b).

A motion to extend time may be filed before or after the date a brief is due (*Tex. R. App. P. 38.6*). A motion to extend the time to file a brief must state:

- The deadline for filing the brief.
- The length of the extension sought.
- Facts reasonably explaining the party's need for an extension.
- The number of previous extensions granted for filing the brief.

(*Tex. R. App. P. 10.5(b)*.)

13. Are there word or page limits for briefs? If so, please indicate:

- The word or page limit for each type of brief (for example, appellant's brief, appellee's brief, reply brief).
- How, if at all, a party can obtain permission to exceed the usual limit (for example, stipulation, so-ordered stipulation, motion).

WORD OR PAGE LIMITS

In Texas, an appellant's opening brief and the appellee's responsive brief must not exceed either:

- 15,000 words if computer-generated.
- 50 pages if not computer-generated.

(*Tex. R. App. P. 9.4(i)(2)(B).*)

A reply brief must not exceed either:

- 7,500 words if computer-generated.
- 25 pages if not computer-generated.

(*Tex. R. App. P. 9.4(i)(2)(C).*)

A party's briefs in the aggregate must not exceed either:

- 27,000 words if computer-generated.
- 90 pages if not computer-generated.

(*Tex. R. App. P. 9.4(i)(2)(B).*)

In calculating the length of a brief, every word and every part of the document, including headings, footnotes and quotations, must be counted, except for the:

- Caption.
- Identity of parties and counsel.
- Statement regarding oral argument.
- Table of contents.
- Index of authorities.
- Statement of the case.
- Statement of issues presented.
- Statement of jurisdiction.
- Statement of procedural history.
- Signature.
- Proof of service.
- Certification.
- Certificate of compliance.
- Appendix.

(*Tex. R. App. P. 9.4(i)(1).*)

OVERSIZED BRIEFS

A party may file a motion with the Court of Appeals to exceed the page limit (*Tex. R. App. P. 9.4(i)(4).*)

Although there is no specific rule governing how a party may seek to file an oversized brief, the Texas Rules of Appellate Procedure provide a general procedure for any party to follow when applying for an order or other relief in the Court of Appeals.

If a party plans to submit a brief exceeding the word or page limits, the party should file a motion with the appellate court for permission to submit a longer brief. Texas Rule of Appellate Procedure 10.1(a) sets out the general requirements for making a motion.

ORAL ARGUMENTS**14. Is oral argument available? If so, please indicate:**

- Any restrictions on what types of cases may be argued.
- Whether the parties can request oral argument or submission on the papers.
- How much time each party or side typically receives for argument.

TYPES OF CASES THAT MAY BE ARGUED

Generally, in Texas, a party that has submitted a brief and timely requested oral argument is entitled to oral argument in any civil case.

The court, however, after reviewing the briefs may decide that oral argument is unnecessary, because either:

- The appeal is frivolous.
- The dispositive issues have been authoritatively decided.
- The facts and legal arguments are adequately presented in the briefs and record.
- Oral argument would not aid the court's decision.

(*Tex. R. App. P. 39.1.*)

PARTY INVOLVEMENT IN DECISION

Any party desiring oral argument must note their request on the front cover of their brief. A party's failure to do so waives the party's right to argue. The Court of Appeals may nevertheless direct the waiving party to appear and argue. (*Tex. R. App. P. 39.7.*)

If only one party has requested oral argument, the Court of Appeals also may allow only that party to argue (*Tex. R. App. P. 39.6.*)

If the Court of Appeals sets a date for oral argument, the parties may agree to postpone oral argument to another date.

Absent agreement of the parties, a party wishing to postpone oral argument must file a motion to postpone in the Court of Appeals. Unless sufficient cause is apparent to the court, the motion must set forth sufficient cause for the requested postponement. (*Tex. R. App. P. 10.4(c).*)

LENGTH OF ORAL ARGUMENTS

The individual appellate courts have discretion to set the time for oral argument (*Tex. R. App. P. 39.3*). Some appellate courts have local rules setting forth those time limits (see, for example, *Tex. Loc. R. 4th Ct. App. 9.1 and Tex. Loc. R. 5th Ct. App. 3(d)*). Parties should consult the local rules and procedures of the appellate court that has jurisdiction over the appeal.

Counsel need not use all of its allotted time. A party may exceed its allotted time only by permission of the court. The appellant must be allowed to conclude the argument. (*Tex. R. App. P. 39.3.*)

REHEARING FOR STATE APPEALS

15. Is there a mechanism for rehearing (panel or en banc)? If so, please describe:

- The process for requesting rehearing (for example, petition, motion).
- The process for presenting the merits if the court grants rehearing (for example, decision on the existing papers, new argument, new briefing).

A party may file a motion for rehearing within 15 days after the Court of Appeals renders its decision. The motion must clearly set forth the grounds for rehearing. (*Tex. R. App. P. 49.1*).

A party opposing the request for rehearing need not file a response unless asked to do so by the Court of Appeals. The court will not grant any motion for rehearing unless a response has been filed or requested. (*Tex. R. App. P. 49.2*).

A motion for rehearing:

- Can only be granted by a majority of the justices who participated in the decision.
- Must be denied otherwise.

(*Tex. R. App. P. 49.3*).

If rehearing is granted, the court or panel has discretion to dispose of the case with or without re-briefing and oral argument (*Tex. R. App. P. 49.3*).

In an accelerated appeal, the appellate court may either or both:

- Deny the parties the right to file a motion for rehearing.
- Shorten the time to file the motion

(*Tex. R. App. P. 49.4*).

Any party may file a further motion for rehearing, if on rehearing the appellate court:

- Modifies its judgment.
- Vacates its judgment and renders a new judgment.
- Issues a different opinion.

(*Tex. R. App. P. 49.5*).

Any further motion for rehearing may be filed within 15 days of the decision on the initial motion for rehearing (*Tex. R. App. P. 49.5*).

By separate motion, a party may move for *en banc* reconsideration regardless of whether it moved for rehearing. A party moving for *en banc* reconsideration must file its motion within either:

- 15 days after the Court of Appeals renders its decision.
- With the court's permission, within 15 days after the Court of Appeals' denial of the party's last timely filed motion for rehearing or *en banc* reconsideration.

(*Tex. R. App. P. 49.7*).

If the majority orders reconsideration, the panel's judgment does not become final, and the case is resubmitted to the court for *en banc* review and disposition (*Tex. R. App. P. 49.7*).

ABOUT PRACTICAL LAW

Practical Law provides legal know-how that gives lawyers a better starting point. Our expert team of attorney editors creates and maintains thousands of up-to-date, practical resources across all major practice areas. We go beyond primary law and traditional legal research to give you the resources needed to practice more efficiently, improve client service and add more value.

If you are not currently a subscriber, we invite you to take a trial of our online services at practicallaw.com. For more information or to schedule training, call **888.529.6397** or e-mail ustraining@practicallaw.com.