AFTER THE VERDICT: WHAT DO I DO NOW?

Kimberly S. Keller
KELLER STOLARCZYK PLLC
www.kellsto.com

234 W. Bandera #120
Boerne, Texas 78006
Phone: 830-981-5000
kim@kellsto.com

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KIMBERLY S. KELLER, APPELLATE ATTORNEY, PERSONAL HIGHLIGHTS

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  - Admitted in Supreme Court of United States, Multiple Circuit Courts of Appeals (Fifth, Eighth, Eleventh), and all Federal District Courts in Texas and Arkansas

- TRIAL EXPERIENCE:
  - Appellate advisor to trial lawyers complex litigation nationwide, including multi-district/class action litigation; providing assistance during pretrial (pleadings, dispositive motions) & trial stages (evidentiary issues, error preservation, jury charge, post-verdict motions) in state & federal court

- APPELLATE EXPERIENCE:
  - Lead appellate counsel on over 300 direct appeals, interlocutory appeals, mandamus proceeding
  - *Supreme Court of the United States*
    -Counsel of Record on several cases, including two Petitions for Writ of Certiorari granted by the Court (successful outcomes for client in both cases)
  - *Supreme Court of Texas*
    -Lead appellate counsel on petitions for review & for writ of mandamus, merits briefing, & oral argument
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- APPELLATE COURT BRIEFING ATTORNEY EXPERIENCE:
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- SCHOLARLY & PUBLIC ACHIEVEMENTS
  - Author of nine law review articles, some of which have been cited by Texas Supreme Court, Texas Court of Criminal Appeals, & appellate courts of Colorado, Minnesota, New Mexico, Tennessee, as well as over 40 legal scholars in peer-reviewed publications; author of numerous continuing legal education papers.
  - Former Professor of Pre-Law, *University of Texas at San Antonio* (*Phi Alpha Delta* Professor of the Year)
  - Former Adjunct Professor of Appellate Advocacy, *St. Mary's University School of Law*
  - Regularly listed as a "Super Lawyer" by publications
  - Interviewed by international press organizations & requested by Texas Senate to present research at committee hearings

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I. PREJUDGMENT MATTERS

A. Entering the Judgment.

There are several rules that address the process for entering judgment. For example, Texas Rule of Civil Procedure 301 addresses the trial court's duty to enter judgment. It provides "[t]he judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity." TRCP 301. Texas Rules of Civil Procedure 304, 305, and 306 address what should go into a judgment, where it should be entered, and describe the process for submitting a proposed judgment to the court. TRCP 304, 305, 306.

A judgment should include opening recitals, decretal portions (merits), pre-judgment interest, post-judgment interest, attorneys' fees, costs, language of finality, and a signature line.

i) When to File?

There is no specific rule governing motions for entry of judgment or the exact process to follow to obtain judgment in your client's favor.

ii) What Is the Effect of Filing?

There are a couple of things to remember about a motion for entry of judgment. First, the filing of such motion will not extend the trial court's plenary power or the appellate time tables. *Brazos Elec. Power Co-op, Inc. v. Callejo*, 734 S.W.2d 126, 128 (Tex. App.—Dallas 1987, no writ); *see* TRCP 329b (listing motions that extend the trial court's plenary power); *see also* TRAP 26.1(a) (describing motions and other actions taken in the trial court that extend the appellate deadlines). Second, this motion will not operate to preserve error. *Emerson v. Tunnel*, 793 S.W.2d 947 (Tex. 1990). Third, the filing of a motion to enter judgment by a "prevailing party" could be prejudicial to the case. If your client prevails on all of his or her theories at trial, requesting a judgment is simple — ask for judgment on all your claims and/or defenses. When your client has prevailed on some, but not all of his or her claims and/or defenses, be careful what you ask for in a motion for entry of judgment. Your request could be construed as a waiver of error as to complaints you may want to raise in the future on appeal (or cross-appeal). For example, the Texas Supreme Court has concluded a motion for judgment on the verdict is an affirmation of the jury's verdict and waives any subsequent complaint that the verdict is not supported by evidence. *Litton Indus. Prods., Inc. v. Gammage*, 668 S.W.2d 319, 322 (Tex. 1984); *Cruz v. Furniture Technicians of Houston, Inc.*, 949 S.W.2d 34, 35 (Tex. App—San Antonio 1997, pet denied).

[1]The author wishes to acknowledge the many appellate law journal, law review, and CLE articles that were consulted during the preparation of this Article and give credit to those articles for raising many of the pre-judgment, post-judgment, and appellate issues discussed, collected, and updated in this Article. This Article was last updated in August 2017.

Courts of appeals are split as to the extent of the waiver caused by a motion for judgment based on the fact finder's verdict. Several courts hold that only challenges to the sufficiency of the evidence are waived. *Stewart & Stevenson Servs., Inc. v. Enserve, Inc.*, 719 S.W.2d 337 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.)(ruling that sufficiency challenges are waived, but error in jury charge was not); *Harry v. Univ. of Tex. Sys.*, 878 S.W.2d 342 (Tex. App.—El Paso 1994, no writ) (accord). Other courts, however, adhere to a stricter rule that an unqualified motion for entry of judgment preserves nothing for further review. *Casu v. Marathon Ref. Co.*, 896 S.W.2d 388, 389-91 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

There are several exceptions to the aforementioned waiver rule: (1) when the jury's findings are ambiguous; (2) when the issues on appeal are not inconsistent with the motion for entry of judgment; or (3) when the movant expressly reserves the right to complain about certain findings while seeking entry of judgment on other favorable findings. *Miner-Dederick Constr. Corp. v. Mid-Cnty. Rental Serv.*, Inc., 603 S.W.2d 193, 197-99 (Tex. 1980) (holding party did not waive complaint about jury findings where findings were ambiguous); *Litton Indus. Prods.*, 668 S.W.2d at 322 (holding party did not waive complaint about jury finding where complaint on appeal was consistent with motion for entry of judgment); *F. Nat'l Bank of Beeville v. Fotjik*, 775 S.W.2d 632, 633 (Tex. 1989) (holding party did not waive complaint about findings where party expressly reserved the right to challenge the trial court's judgment on appeal).

Practitioners should expressly identify the findings and/or rulings that the client disagrees with and then state that, by tendering the proposed judgment, your client agrees with the form of the judgment, but does not agree with the substance of the judgment and expressly reserves the right to challenge the identified findings and/or rulings by either post-trial motion or appeal. Before filing a motion for entry of judgment, however, review *First National Bank of Beeville v. Fotjik*, 775 S.W.2d 632, 633 (Tex. 1989) (holding that party did not waive complaint about jury findings where party stated in its motion for judgment, "[w]hile plaintiffs disagree with the findings of the jury and feel there is a fatal defect which will support a new trial, in the event the Court is not inclined to grant a new trial prior to entry of judgment, plaintiffs pray the court enter the following judgment. Plaintiffs agree only as to the form of the judgment but disagree and should not be construed as concurring with the content and the result.").

B. Judgment Notwithstanding the Verdict

A motion for judgment *non obstante veredicto*, or motion for JNOV, is expressly authorized by Texas Rule of Civil Procedure 301. Rule 301 requires "[t]he judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity." TRCP 301. The rule expressly authorizes the court, upon motion and reasonable notice, to enter judgment notwithstanding the verdict if a directed verdict would have been proper.

See id.; *Fort Bend Co. Drainage Dist. v. Sbrusch*, 818 S.W.2d 392, 394 (Tex. 1991).

There are several reasons for seeking a motion for JNOV: (1) there is no evidence to support a jury finding, *Tiller v. McLure*, 121 S.W.3d 709, 713 (Tex. 2003); (2) a factual issue was established as a matter of law which is contrary to a jury finding, *John Masek Corp. v. Davis*, 848 S.W.2d 170, 173-74 (Tex. App.—Houston [1st Dist.] 1992, writ denied); (3) a legal principle prevents a party from prevailing on its claim or defense regardless of whether the plaintiff proves all the allegations in its pleadings, *id.* at 173; and (4) a jury finding is immaterial. *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 752 (Tex. 1995).

i) When to File?

Although Rule 301 authorizes a party to file a motion for JNOV, the rule does not set forth a procedure for doing so. Some courts hold that a motion for JNOV is timely filed if it is filed any time after judgment is announced so long as the trial court has plenary power to grant the motion. *Spiller v. Lyons*, 737 S.W.2d 29, 29 (Tex. App.—Houston [14th Dist.] 1987, no writ); *Cleaver v. Dresser Indus.*, 570 S.W.2d 479, 483 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.). Other courts, however, hold that the motion must be filed within thirty days after the judgment is signed. *Commonwealth Lloyd's Ins. Co. v. Thomas*, 825 S.W.2d 135, 141 (Tex. App.—Dallas 1992), judgment vacated by agr., 843 S.W.2d 486, (Tex. 1993) (reasoning that a motion for JNOV is the equivalent of a motion to modify, correct or reform the judgment and must therefore be filed within the time deadlines set forth in Rule 329b of the Texas Rules of Civil Procedure). Given the split of appellate courts, it is advisable to file a motion for JNOV within thirty days of when the judgment is signed.

If no motion for new trial is filed, then a motion for JNOV must be filed and ruled upon within thirty days of when the court signs its judgment. *Walker v. S&T Truck Lines, Inc.*, 409 S.W.2d 942, 943 (Tex. Civ. App.—Corpus Christi 1966, writ ref'd); *see also* TRCP 306a; 329b. Although some courts equate motions for JNOV with motions to correct, modify, or reform a judgment, it is a mistake for the practitioner to assume that all courts will do this because you risk not having your motion heard and ruled upon in a timely manner. If a motion for new trial is filed (and plenary power extended), then the motion for JNOV should be ruled upon before the motion for new trial is overruled either by written order or by operation of law. *Spiller*, 737 S.W.2d at 29; *Commercial Standard Ins. Co. v. S. Farm Bureau Cas. Ins. Co.*, 509 S.W.2d 387, 392 (Tex. Civ. App.— Corpus Christi 1974, writ ref'd n.r.e.).

ii) What Is the Effect of Filing?

Texas Rule of Appellate Procedure 26 governs when an appeal must be perfected. *See* TRAP 26.1 (setting forth deadlines for filing notice of appeal in civil cases). Because Rule 26 does not refer to motions for JNOV, such motions may not extend the deadline for filing a notice of appeal. This position is the traditional position maintained by some appellate courts. *Walker*, 409 S.W.2d at 943; *F. Freeport Nat'l Bank v. Brazoswood Nat'l Bank*, 712 S.W.2d 168, 170 (Tex. App.—Houston [14th Dist.] 1986, no writ). The continued validity of this traditional position, however, has been called into doubt. *Kirschberg v. Lowe*, 974 S.W.2d

844, 847-48 (Tex. App.—San Antonio 1998, no pet.) (treating motion for JNOV as motion to modify, correct, and reform, and holding that timely filed motion for JNOV extended appellate timetable); *see Lane Bank Equip. Co. v. Smith S. Equip., Inc.*, 10 S.W.3d 308, 312 (Tex. 1999); *Gomez v. Tex. Dep't of Criminal Justice*, 896 S.W.2d 176, 177 (Tex. 1995). Accordingly, the best practice is to assume that a motion for JNOV will not extend the deadline for filing a notice of appeal.

Texas Rule of Civil Procedure 329b provides that a trial court's plenary power is extended if a motion for new trial or motion to modify, correct, or reform the judgment is filed within thirty days after the judgment is signed. TRCP 329b. The amount of time that a trial court's plenary power is extended depends upon whether the motion for new trial or to modify, correct, or reform is overruled by written order or by operation of law. *Id*. If the motion is overruled by operation of law, then the court's plenary power lasts for 105 days after the judgment is signed. *Id*.

Rule 329b makes no mention of motions for JNOV. Texas courts have thus traditionally held that a motion for JNOV, by itself, does not extend the court's plenary power over its judgment. *Walker*, 409 S.W.2d at 943; *see also* TRCP 306a; 329b. Although some courts equate motions for JNOV with motions to correct, modify, or reform a judgment, you should not assume that all courts will. Practitioners should thus follow the plain language of Rule 329b and not assume that a motion for JNOV extends the trial court's plenary power.

iii) Will It Preserve Error?

Motions for JNOV are one of the recognized ways to preserve a legal sufficiency challenge. *Aero Energy, Inc. v. Circle C Drilling Co.*, 699 S.W.2d 821, 822-23 (Tex. 1985) (holding legal sufficiency challenge is preserved by: (1) objecting to the charge; (2) filing a motion for directed verdict; (3) filing a motion for JNOV; (4) filing a motion to disregard; and (5) filing a motion for new trial). Listed below are several appellate complaints preserved by a motion for JNOV:

- the evidence is legally insufficient to support the verdict of the jury. TRCP 301; *Tiller v. McLure*, 121 S.W.3d 709, 713 (Tex. 2003); *Aero Energy Corp.,* 699 S.W.2d at 822. A motion for JNOV, however, will not preserve a factual sufficiency challenge, which must be preserved in a motion for new trial. TRCP 324(b)(2)-(3).

- a jury finding must be disregarded because the evidence conclusively establishes as a matter of law the opposite factual proposition found by the jury. *John Masek*, 848 S.W.2d at 173-74.

- a legal rule bars recovery even though all elements of a cause of action have been established. *Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 94-95 (Tex. 1999).

- a jury finding is immaterial. *City of Brownsville*, 897 S.W.2d at 752.

iv) Specificity

Be aware of the detail required in the motion. For example, the Texas Supreme Court has held that "[g]enerally, a no-evidence objection

directed to a single jury issue is sufficient to preserve error without further detail." *Akroma Basin Exploration Co. v. FMF Assocs. 1990-A Ltd.*, 249 S.W.3d 380, 387 (Tex. 2008). A stock objection to the jury's answer to a broad form negligence question may also preserve error for challenges to more than one distinct element of negligence. *Majeed v. Hussain*, No. 03-08-00679-CV, 2010 WL 5575954 (Tex. App.—Austin Dec. 22, 2010, no pet).

v) Appellate Review

When a motion for JNOV addresses the sufficiency of the evidence to support one or more essential elements of a claim or defense, an appellate court reviews the grant or denial of the motion under a legal sufficiency standard of review. *Garza v. Alviar*, 395 S.W.2d 821, 823-24 (Tex. 1965). Under a legal sufficiency standard, the court asks whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). The reviewing court credits favorable evidence if reasonable jurors could do so and disregards contrary evidence unless reasonable jurors could not. *Id.*

When the JNOV motion raises a non-evidentiary claim, including a legal proposition that would determine the case, the appellate court determines whether, as a matter of law, the proposition advanced in the motion entitles the movant to judgment notwithstanding the jury's findings. *ARCO v. Misty Prods., Inc.*, 820 S.W.2d 414, 420-21 (Tex. App.—Houston [14th Dist.] 1991, writ denied). If the motion for JNOV concerns an immaterial jury finding, the appellate court will determine whether the finding is immaterial and, if so, whether the movant is entitled to judgment when the finding is disregarded. *Spencer v. Eagle Star Ins. Co.*, 876 S.W.2d 154, 157 (Tex. 1994). When the JNOV motion raises several grounds, and the trial court's order sustaining the motion does not specify the grounds upon which the motion was granted, the party seeking to overturn the JNOV on appeal must show that the JNOV cannot be sustained on any of the grounds stated in the motion. *Fort Bend Co. Drainage Dist. v. Sbrusch*, 818 S.W.2d 392, 394 (Tex. 1991).

Grounds not raised in the JNOV may also provide a basis for the prevailing party to argue that the grant of the JNOV should be affirmed. *Ingram v. Deere*, 288 S.W.3d 886, 893 (Tex. 2009)

To protect against rendition on the jury's verdict if the JNOV is reversed on appeal, a practitioner should consider raising cross-issues. Such cross-issues include factual insufficiency challenges and any other challenges that would vitiate the jury's verdict or prevent the entry of judgment on the jury's verdict. TRCP 324(c); *Winograd v. Clear Lake Water Auth.*, 811 S.W.2d 147, 159 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

C. Disregarding the Jury's Findings

A motion to disregard jury findings asks the court to disregard certain findings and enter judgment on the remaining findings. *Kish v. Van Note*, 692 S.W.2d 463, 466-67 (Tex. 1985); *Dewberry v. McBride*, 634 S.W.2d 53, 55 (Tex. App.—Beaumont 1982, no writ). Reasons for disregarding a jury finding, include: (1) there is no evidence to support the finding. *Tiller v. McLure*, 121 S.W.3d 709,

713 (Tex. 2003); (2) a factual issue was established as a matter of law which is contrary to the finding. *John Masek*, 848 S.W.2d at 173-74; and (3) the finding is immaterial. *City of Brownsville*, 897 S.W.2d at 752.

Texas Rule of Civil Procedure 301 authorizes the trial court to disregard any jury finding on a question that has no support in the evidence. TRCP 301. Although the rule uses the term "no evidence," a motion to disregard may be used to address jury issues that should not have been addressed in the first place or that have been rendered immaterial by other findings. *Cecil v. Smith*, 804 S.W.2d 509, 510-11 (Tex. 1991); *Spencer v. Eagle Star Ins. Co.*, 876 S.W.2d 154, 157 (Tex. 1994).

i) When to File?

Texas Rules of Civil Procedure 301 does not set forth a procedure for filing a motion to disregard jury findings. Some appellate courts have held that a motion to disregard jury findings is timely filed if it is filed any time after judgment is announced so long as the trial court has plenary power to grant the motion. *Eddings v. Black*, 602 S.W.2d 353, 356-57 (Tex. Civ. App.—El Paso 1980, writ ref'd n.r.e.). Other courts, however, have begun to construe motions for JNOV as motions to modify, correct, and reform under Rule 329b, and broadly hold that any motion assailing the trial court's judgment must be filed within thirty days after the judgment is signed. *Commonwealth Lloyd's Ins. Co.*, 825 S.W.2d at 141. Consequently, practitioners should file a motion to disregard jury findings within thirty days after the judgment is signed.

If no motion for new trial is filed, then a motion to disregard jury findings must be filed and ruled upon within thirty days of when the courts signs the judgment. *Eddings v. Black*, 602 S.W.2d 353, 356- 57 (Tex. Civ. App.—El Paso 1980, writ ref'd n.r.e.) (discussing motions to disregard jury findings). Although some courts have begun to equate motions for JNOV with motions to correct, modify, or reform a judgment, practitioners cannot assume all courts will follow suit, or even go a step further and assume that a motion to disregard jury findings will constitute a motion to modify, correct, or reform. Practitioners should thus follow the plain language reading of Rule 329b and not assume a motion to disregard jury findings will extend the court's plenary power to rule.

If a motion for new trial is filed (and plenary power is extended), then a motion to disregard jury findings should be ruled upon before the motion for new trial is overruled, either by written order or operation of law. TRCP 329b; *Cf., Spiller v. Lyons*, 737 S.W.2d 29, 29 (Tex. App.—Houston [14th Dist.] 1987, no writ) (discussing motions for JNOV); *Commercial Standard Ins. Co.*, 509 S.W.2d at 392.

ii) What Is the Effect of Filing?

Texas Rule of Appellate Procedure 26 governs when an appeal must be perfected. TRAP 26.1 Because Rule 26 does not refer to motions to disregard jury findings, such motions likely do not extend the deadline for filing a notice of appeal. *See Walker*, 409 S.W.2d at 943) (discussing motions for JNOV); *F. Freeport Nat'l Bank*, 712 S.W.2d at 170 (accord). Until the Supreme Court resolves the issue, the best practice is assume that a motion to disregard jury

findings will not extend the deadline for filing a notice of appeal.

Rule 329b makes no mention of motions to disregard jury findings. *See* TRCP 329b. The plain language of Rule 329b thus does not embrace the idea that a motion to disregard jury findings will extend the court's plenary power over its judgment.

Although some courts equate motions for JNOV or motions to disregard with motions to correct, modify, or reform a judgment, you should not assume that all courts will. Practitioners should therefore follow the plain language of Rule 329b and not assume that a motion to disregard jury findings will extend the trial court's plenary power.

iii) Will It Preserve Error?

A motion to disregard jury findings preserves a contention that the evidence is legally insufficient to support the jury's verdict. TRCP 301; *Cecil v. Smith*, 804 S.W.2d 509, 510-11 (Tex. 1991). It also preserves a contention that a jury finding has been rendered immaterial by the jury's answers to other questions. *Spencer*, 876 S.W.2d at 157. A motion to disregard jury findings will not preserve a factual sufficiency complaint. TRCP 324(b)(2)-(3).

iv) Appellate Review

When a motion to disregard addresses the sufficiency of the evidence to support one or more essential elements of a claim or defense, the appellate court reviews the grant or denial of the motion under a legal sufficiency standard of review. *Garza*, 395 S.W.2d at 823-24. If the motion addresses an immaterial jury finding, the appellate court determines whether the finding is immaterial and, if so, whether the movant is entitled to judgment when the finding is disregarded. *Spencer*, 876 S.W.2d at 157.

D. Final Judgments

A final judgment or appealable order must be signed by the trial court before an appeal may be perfected. *E.g. Rehab 2112, L.L.C. v. Audio Images Int'l Inc.*, 168 S.W.3d 308, 311 (Tex. App.—Dallas 2005, no pet.). In *Unifund CCR Partners v. Villa*, 299 S.W.3d 92 (Tex. 2009), the court held that, in a case where a motion for sanctions had been filed, the order of dismissal was not final because it was silent on sanctions. The subsequent order of sanctions was final for purposes of appeal. *Id.* A trial court order whose effectiveness is conditioned on the happening of a future even is not considered final. *Hegwood v. Am. Habilitation Servs., Inc.,* 294 S.W.3d 603, 605-06 (Tex. App.—Houston [1st Dist.] 2009, no pet.).

Since September 2011, in addition to the list of statutory interlocutory appeals, an interlocutory appeal may be taken if the trial court certifies that an immediate appeal will materially advance the ultimate termination of the litigation and the appellate court permits the appeal. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (d).

Be aware that a trial court does not have the power to amend a judgment or order after it loses plenary power. *See In re Daredia*, 317 S.W.3d 247, 248-249 (Tex. 2010) (holding that the trial court did not have the jurisdiction to enter a nuc pro tunc order that a judgment was "interlocutory" because the judgment itself had provided clearly and

unequivocally that the judgment was "final").

There are three stages associated with judgments: rendition; reduction to writing; and entry. *Oak Creek Homes, Inc. v. Jones*, 758 S.W.2d 288, 290 (Tex. App.—Waco 1988, no writ). Rendition occurs when the judge, either orally in open court or by written memorandum filed with the clerk, announces a decision on the law as to the matters at issue. *Garza v. Tex. Alcoholic Beverage Comm'n*, 89 S.W.3d 1, 6 (Tex. 2002); *Formby's KOA v. BHP Water Supply Corp.*, 730 S.W.2d 428, 429–30 (Tex. App.—Dallas 1987, no writ). The subsequent reduction of the pronouncement to writing, signed and dated by the court, is a ministerial act, *Oak Creek Homes*, 758 S.W.2d at 290, and does not change the date of a prior rendition to the date of the signing of the written draft. *Knox v. Long*, 257 S.W.2d 289, 292 (Tex. 1953), *overruled in part on other grounds by Jackson v. Hernandez*, 285 S.W.2d 184, 191 (Tex. 1955). A judgment is "entered" by a purely ministerial act of the clerk of the court. *Burrell v. Cornelius*, 570 S.W.2d 382, 384 (Tex. 1978). The trial court's rendering of its order is fully effective for all purposes, except for calculating the time to perfect an appeal. TRAP 26.1; *see Galbraith v. Galbraith*, 619 S.W.2d 238, 240 (Tex. Civ. App.—Texarkana 1981, no writ). The trial court's order is valid from that time forward until vacated or set aside. *Ex parte Cole*, 778 S.W.2d 599, 600 (Tex. App.—Houston [14th Dist.] 1989, no writ).

Specific words of rendition are not required. *Golodetz Trading Corp. v. Curland*, 886 S.W.2d 503, 505 (Tex. App.—Houston [1st Dist.] 1994, no writ). "Oral rendition is proper under the present rules, but orderly administration requires that form of rendition to be in and by spoken words, not in mere cognition, and to have effect only insofar as those words state the pronouncement to be a present rendition of judgment." *Reese v. Piperi*, 534 S.W.2d 329, 330 (Tex. 1976). The words used by the trial court must clearly indicate the court's intent to render judgment at the time the words are expressed. *Id.* Docket sheet entries are insufficient to constitute a judgment or decree of the court. *Bailey-Mason v. Mason*, 122 S.W.3d 894, 897 (Tex. App.—Dallas 2003, pet. denied).

Agreed judgments are treated as a contract between the parties, and their interpretation is governed by the laws relating to contracts. *McCray v. McCray*, 584 S.W.2d 279, 281 (Tex. 1979). Although rules relating to contract interpretation apply, an agreed judgment is accorded the same degree of finality and binding force as a final judgment rendered at the conclusion of an adversarial proceeding. *Id.*; *Treadway v. Shanks*, 110 S.W.3d 1, 7 (Tex. App.—Dallas 2000), *aff'd, Shanks v. Treadway*, 110 S.W.3d 444 (Tex. 2003). Courts must look to the intent of the parties, *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983), and are bound by the express intent of the parties as reflected within the four corners of the instrument itself. *Nat'l Union Fire Ins. Co. v. CBI Indus.*, 907 S.W.2d 517, 520 (Tex. 1995) (per curiam).

If a judgment contains language such as a Mother Hubbard clause that purports to deny all relief not expressly granted and disposes of all claims and parties, regardless of the intent of the parties or the trial court, that judgment is final as to all claims and all parties. *In re J.G.W.*, 54 S.W.3d 826, 831 (Tex. App.—Texarkana 2001, no pet.).

II. POST JUDGMENT MATTERS

A. Motions for New Trial.

Motions for new trial give the trial court an opportunity to correct any mistakes, preserve error, and extend appellate deadlines. The trial court may grant a new trial and set aside the judgment for good cause on the motion of any party or on the court's own motion. When it appears to the court that a new trial should be granted on an issue affecting only a part of the matter in controversy, and such part is clearly separable without unfairness to the parties, the trial court may grant a new trial as to that part only. TRCP 320.

A motion for new trial must be in writing and signed by the attorney or the party. TRCP 320. Each point relied on in a motion for new trial or in arrest of judgment shall briefly refer to that part of the ruling of the court, charge given the jury or charge refused, admission or rejection of evidence, or other proceedings that are designated to be complained of, in such a way that the objection can be clearly identified and understood by the court. TRCP 321. Grounds of objection couched in general terms shall not be considered by the court. TRCP 322. The motion must specifically request a new trial. *Mercer v. Band*, 454 S.W.2d 833, 836 (Tex. App.—Houston [14th Dist.] 1970, no writ).

i) Will It Preserve Error?

A motion for new trial is not necessary to preserve error (in either a jury or a nonjury case) except under very limited circumstances. TRCP 324(a); *Office of Atty. Gen. of Tex. v. Burton*, 369 S.W.3d 173, 174 (Tex. 2012) (explaining that a motion for new trial is not required to preserve error as to the legal sufficiency of the evidence). A motion for new trial is a prerequisite to the following complaints on appeal: (1) a complaint on which evidence must be heard, such as one of jury misconduct or newly discovered evidence or failure to set aside a default judgment; (2) a complaint of factual insufficiency of the evidence to support a jury finding; (3) a complaint that a jury finding is against the overwhelming weight of the evidence; (4) a complaint of inadequacy or excessiveness of the damages found by the jury; and (5) incurable jury argument if not otherwise ruled on by the trial court. TRCP 324(b). The motion for new trial, however, does not negate the need for the party to have objected at trial to preserve error for an appeal.

An argument that the jury finding is against the overwhelming weight of the evidence is used if the party filing the motion had the burden of proof on that issue. *Id.*; *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001). An argument that the evidence is factually insufficient to support the jury finding is used if the party filing the motion did not have the burden of proof on that issue. TRCP 324(b); *Wayne v. A.V.A. Vending, Inc.*, 52 S.W.3d 412, 419 (Tex. App.—Corpus Christi 2001, pet. denied).

If a legal sufficiency point is presented in a motion rather than a JNOV, the appellate court may only remand for a new trial rather than reverse and render on that point. *J. Weingarten Inc. v. Razey*, 426 S.W.2d 538, 540-41 (Tex. 1968).

A party who has its motion for judgment on the verdict of a jury denied

may forgo the filing of a motion for new trial and predicate its appellate issues on matters included in such motion. The party following this route may only complain on appeal about the denial of the motion for judgment. *Abbott v. Earl Hayes Chevrolet Co.*, 384 S.W.2d 782, 784 (Tex. Civ. App.— Tyler 1964, no writ).

ii) When to File?

A party must file a motion for new within thirty days after the judgment or other order complained of is signed. TRCP 329b(a). Within that same thirty-day period, a party may file one or more amended motions for new trial without leave of court as long as the trial court has not already overruled an earlier motion for new trial. TRCP 329b(b). Given leave of court, a party may file an amended or supplemental motion for new trial within thirty days of the signing of the judgment even if the court has overruled an earlier motion for new trial. *See id.*; *Equinox Enters., Inc. v. Associated Media, Inc.*, 730 S.W.2d 872, 875 (Tex. App.—Dallas 1987, no writ); *Lind v. Gresham*, 672 S.W.2d 20, 22 (Tex. App.—Houston [14th Dist.] 1984, no writ). A trial court is prohibited from lengthening the period for taking any action under the Texas Rules of Civil Procedure relating to new trials except as stated in the rules. TRCP 5.

Motions for new trial (original, amended, or supplemental) filed after this thirty-day period are a nullity. *Equinox*, 730 S.W.2d at 875. Although a motion for new trial filed more than thirty days after the trial court's judgment is untimely, the trial court may nevertheless consider the grounds raised in an untimely motion and grant a new trial under its inherent authority before it loses plenary power. *Moritz v. Priess*, 121 S.W.3d 715, 720 (Tex. 2003). Prematurely filed motions for new trial are deemed filed on the date of, and subsequent to, the time that the court signs the judgment. TRCP 306c.

Be cautious in filing premature motions for new trial. In *Linan v. Padron*, No. 13-10-00070, 2010 WL 3180278, at *1 (Tex. App.—Corpus Christi Aug 12, 2010, no pet.), the court of appeals held that a prematurely filed motion for new trial was deemed filed immediately after the judgment, and was also deemed overruled on the same day the judgment was entered. Because the premature motion was deemed overruled on the same date the judgment was entered, the trial court lost plenary power 30 days after the entry of judgment. A second timely motion for new trial filed by the defendant had no effect on the trial court's plenary power. However, in *Ryland Enter., Inc. v. Weatherspoon*, 355 S.W.3d 664, (Tex. 2011) (also discussed below), the court held that a pre-judgment motion for JNOV filed after verdict extends the appellate timetable to ninety days and the court of appeals erred in dismissing the appeal for want of jurisdiction. According to the court, the premature filing rules in Texas Rule of Civil Procedure 306 and Texas Rule of Appellate Procedure 27.2 apply equally to motions for new trial or to modify the judgment.

Exceptions to the general rule requiring filing of the motion within 30 days of the signing of the judgment apply when a party receives a late notice of judgment, *see* TRCP 306a, when the trial court signs a judgment rendered after citation by publication, *see* TRCP 329(a), or when a party files an original petition in a Texas court to enforce a foreign

judgment. *See* TEX. CIV. PRAC. & REM. CODE § 35.003(b)-(c).

iii) The New Trial Order

An order granting a motion for new trial must be written and signed prior to the trial court losing plenary power. *Faulkner v. Culver*, 851 S.W.2d 187, 188 (Tex. 1993). A docket entry is not an order and may not be considered as part of the record. *Jauregui Partners, Ltd. v. Grubb & Ellis Commercial Real Estate Servs.*, 960 S.W.2d 334, 336 (Tex. App.—Corpus Christi 1997, writ denied). The trial court's order must clearly state that the court has granted the motion for new trial. *In re Nguyen*, 155 S.W.3d 191, 194 (Tex. App.—Tyler 2003, orig. proceeding) An order granting a new trial after a jury trial must identify the reasons for granting the new trial as it is no longer sufficient for a trial court to grant a new trial "in the interest of justice." *In re Columbia Med. Ctr. of Las Colinas*, 290 S.W.3d 204, 213 (Tex. 2009, orig. proceeding); *In re C.R.S.*, No. 04-09-00814-CV., 2010 WL 454965, *1 (Tex. App.—San Antonio, Feb. 10, 2010, orig. proceeding). In setting forth the specific reasons, the trial court may not use "and/or" prior to each stated reason because it creates ambiguity. *In re United Scaffolding, Inc.*, 377 S.W.3d 685, 688-89 (Tex. 2012) (orig. proceeding). The court also explained in *United Scaffolding* that the trial court's order granting a new trial should reference the evidence adduced at trial and how the jury's answers are contrary to the great weight and preponderance of the evidence.

Be aware that you risk waiver of objections to the new trial order if you fail to request that the trial court clarify the reasons for granting the motion. *In re Salinas*, No. 13-09-00599-CV, 2010 WL 196887 (Tex. App.—Corpus Christi Jan. 20, 2010, no pet.).

iv) What Is the Effect of Filing?

A motion for new trial extends the trial court's plenary power to grant a new trial until 30 days after such motion has been overruled, either by a written and signed order or by operation of law, whichever occurs first. TRCP 324b(e). The filing of a motion the motion also extends the time to file the notice of appeal from 30 days after the judgment is signed to 90 days. TRAP 26.1(a)(1). The deadline is extended even if the filing fee paid, but failure to pay the fee may waive factual sufficiency points presented in the motion. *Garza v. Garcia*, 137 S.W.3d 36, 37-39 (Tex. 2004).

v) If a New Trial Is Granted

If the trial court grants the other party's motion for new trial, a practitioner should file a motion for reconsideration and try to get the trial court to "ungrant" the motion for new trial. *See In re Baylor Med. Ctr. at Garland*, 280 S.W.3d 227, 232 (Tex. 2008) ("'There is no sound reason why the court may not reconsider its ruling [granting] a new trial' at any time."). The party opposing the grant of a new trial may also consider filing a mandamus to obtain judicial review of the trial court's order. *See In re Columbia Med. Ctr. of Las Colinas*, 290 S.W.3d 204, 213 (Tex. 2009, orig. proceeding).

vi) Effect of Untimely Motion

An untimely motion does not extend the court's plenary power. *In re Brookshire*, 250 S.W.3d 66, 70 (Tex. 2008). If an amended motion for new trial is filed

more than 30 days after the trial court's judgment or after a first motion for new trial is denied, it is considered untimely. *Id.*; *Moritz v. Preiss*, 121 S.W.3d 715, 720 (Tex. 2003). Nevertheless, the trial court has inherent discretion to grant relief based on an untimely motion for new trial. *Id.*

B. Modifying, Correcting, or Reforming the Judgment

A motion to modify, correct, or reform the judgment requests the trial court to change its judgment. *See* TRCP 324b(g). A practitioner should file this type of motion to correct any error in the judgment, such as when the trial court does not award attorney's fees or does not award the correct amount of attorney's fees, *see Tex. Educ. Agency v. Maxwell*, 937 S.W.2d 621, 623 (Tex. App.—Eastland 1997, writ denied), or when the judgment does not award costs or awards an incorrect amount. *Portland S&L Ass'n v. Bernstein*, 716 S.W.2d 532, 541 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).

The motion must be in writing and signed by the party or his attorney and must specify what aspects of the judgment should be modified, corrected, or reformed. TRCP 324b(g). The filing of this motion has the effect of extending the trial court's plenary power to grant a new trial until 30 days after such motion has been overruled, either by a written and signed order or by operation of law, whichever occurs first. TRCP 324b(e). It also extends the time to file the notice of appeal from 30 days after the court signs the judgment to 90 days. TRAP 26.1(a)(2). The motion to modify, correct, or reform the judgment must be filed within 30 days of the date the trial court signs the judgment. TRCP 324b(g). A party may file a motion to modify, correct, or reform the judgment even if the court has already overruled a motion for new trial as long as it is filed while the court retains plenary power. *L.M. Healthcare, Inc. v. Childs*, 929 S.W.2d 442, 443 (Tex. 1996).

Note that in *Ryland Enter. v. Weatherspoon*, 355 S.W.2d 664, 665-66 (Tex. 2011), the Texas Supreme Court held that motion for new trial and motions to modify the judgment will extend the appellate timetable even if the motion is filed before the judgment is signed.

C. Findings of Fact and Conclusions of Law

A trial court's findings of fact serve the same purpose as a jury's findings in a non-jury trial, *i.e.*, they resolve the factual disputes in the case whereas conclusions of law serve as the court's statement of the legal bases it applied to resolve the case. Filing a request for findings of fact, if required under rule 296 of the Texas Rules of Civil Procedure, (or, if not required, could properly be considered by the appellate court) extends the time to file the notice of appeal from 30 days after the court signs its judgment to 90 days. TRAP 26.1(a)(4).

i) When Are They Necessary?

Findings of fact are necessary in the following circumstances:

a. in any case tried without a jury, TRCP 296;

b. in a nonjury case, which is resolved by a judgment after the petitioner rests, *Qantel Bus. Sys., Inc. v. Custom*

Controls Co., 761 S.W.2d 302, 304 (1988);

c. when the jury omits elements of an issue, *see* TRCP 296; and

d. when part of the case is tried to a jury and another part is tried to the court, findings of fact should be requested on the issues decided by the court. *Roberts v. Roberts*, 999 S.W.2d 424, 433-34 (Tex. App.—El Paso 1999, no pet.).

Findings of fact are considered helpful in the following situations:

a. when the court rules on jurisdictional challenges after an evidentiary hearing, *see Goodenbour v. Goodenbour*, 64 S.W.3d 69, 76 (Tex. App.— Austin 2000, pet. denied);

b. after the court holds a hearing on a motion to transfer venue, *see Coke v. Coke*, 802 S.W.2d 270, 278 (Tex. App.—Dallas 1990, writ denied); and

c. after an evidentiary hearing on a motion for new trial. *See Higginbotham v. Gen. Life & Accident Ins. Co.*, 796 S.W.2d 695, 695 (Tex. 1990).

Findings of fact are inappropriate (and thus not extend the time within which to perfect the appeal) in the following instances:

a. when issues are tried to a jury, *IKB Indus, Ltd. v. Pro-Line Corp.*, 938 S.W.2d 440, 443 (Tex. 1997);
b. when the court renders summary judgment, *IKB*, 938 S.W.2d at 443;
c. when the court grants a directed verdict in a jury trial, *id.*; and
d. when the court grants a JNOV. *Id.*

ii) <u>Who Should Request & When?</u>

Findings of fact governed by Rule 296 of the Texas Rules of Civil Procedure should be requested by the party who loses; otherwise, facts are deemed in favor of the judgment. *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990). The first request for findings of fact must be filed within 20 days of the date that the court signs the judgment. TRCP 296. The trial court should file FOF within 20 days of receiving the request. TRCP 297. A trial court's recitation of facts in the judgment does not fulfill the requirements of rules 296-268 of the Texas Rules of Civil Procedure. TRCP 299a; *Frommer v. Frommer*, 981 S.W.2d 811, 814 (Tex. App.—Houston [1st Dist.] 1998, pet. dism'd).

When the trial court fails to file findings of fact and conclusions of law within 20 days after the first request, the requesting party has 30 days from the date of the original request to file a "Notice of Past Due Findings of Fact and Conclusions of Law." TRCP 297. Failing to file a "Notice of Past Due Findings of Fact and Conclusions of Law" waives the right to complain about the court's failure to file findings of fact and conclusions of law. *Curtis v. Comm'n for Lawyer Discipline*, 20 S.W.3d 227, 231-32 (Tex. App.—Houston [14th Dist.] 2000, no pet.). If a party files a Notice of Past Due Findings of Fact and Conclusions of Law, the trial court has 40 days from the date of filing of the party's first request to file findings and conclusions. TRCP 297.

Once the trial court files its findings of fact and conclusions of law, either party has 10 days to request additional or

amended findings. TRCP 298. If the court omits a finding on a material fact, the requesting party must submit a specific proposed finding. *Alvarez v. Espinoza*, 844 S.W.2d 238, 241-42 (Tex. App.—San Antonio 1992, writ dism'd).

If a party properly files a request for findings of fact, the trial court is required to file findings of fact and an appellate court will presume harm when a reporter's record is made part of the appellate record. *Cherne Indus., Inc. v. Magallanes*, 763 S.W.2d 768, 772 (Tex. 1989). This presumption, however, is rebuttable. *Sheldon Pollack Corp. v. Pioneer Concrete of Tex., Inc*., 765 S.W.2d 843, 845 (Tex. App.—Dallas 1989, writ denied).

III. APPELLATE MATTERS[2]

A. The Notice of Appeal

A party desiring to file an ordinary appeal must file a notice of appeal within 30 days after the judgment is **signed**. TRAP 26.1. Warning: the date of the judgment's *signing* may be different than the date the judgment is filed. If a party files an appropriate request for findings of fact and conclusions of law or one of the motions identified in the Rules of Appellate Procedure, the time period for filing an appeal is extended to 90 days. TRAP 26.1(a). If a party needs additional time to file a notice of appeal, the party must file an extension motion. TRAP 26.3. However, a notice of appeal extension motion is very different than an extension motion for a briefing deadline. Special care should be used in drafting this extension motion. *See* III.D of this paper.

When a party does not receive notice that the judgment or appealable order was signed within 20 days (but no more than 90 days after the order was signed), then the order is considered to be "signed" for regular appeal deadlines on the date that the party receives notice or actual knowledge of the order's signing. TRAP 4.2(a)(1). In this situation, the party should file a motion pursuant to Texas Rule of Civil Procedure 306a.5 and present evidence at a hearing in the trial court. TRAP 26.1(b-c).

A party perfects an appeal by filing a written notice of appeal with the trial court clerk. The filing of a notice of appeal invokes the jurisdiction of the appellate court. If the party mistakenly files the notice of appeal with the appellate court, the notice is deemed filed with the trial court clerk on that same day, and the appellate clerk must immediately send the trial court clerk a copy of the notice. TRAP 25.1(a)–(c). The appellant must serve the notice of appeal on all parties to the trial court's final judgment and file a copy with the appellate court clerk. TRAP 25.1(e).

A notice of appeal should: (1) identify the trial court and the cause number and style of the case; (2) state the date of judgment or order from which the party is appealing; (3) state that the party desires

[2]CaseMail and the Attorney Portal on the websites of the varying Texas courts of appeals and Supreme court of Texas. Every appellate court's website has links to register and access to information through CaseMail and via the Attorney Portal. Through CaseMail, a practitioner can register to receive email notifications of any activity taken on her case (or of any case of interest). The Attorney Portal is limited to attorneys of record and allows the attorneys of record on a case to access all documents in the court's file, including the record.

to appeal; (4) designate 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; and (5) state the name of each party filing the notice. TRAP 25.1(d)(1)–(5). In an accelerated appeal, the notice of appeal must also state that the appeal is accelerated. TRAP 25.1(d)(6). The notice of appeal must also state whether the accelerated appeal is a parental-termination case or child-protection case. TRAP 25.1(d)(6). If the appellate is deemed indigent, this must also be set forth in the notice of appeal. TRAP 25.1(d)(8). For a restricted appeal, the notice of appeal must also: (a) state that the appellant is a party affected by the judgment but that he did not participate in the hearing resulting in the judgment; (b) state that the appellant did not file a timely postjudgment motion, request for findings of fact and conclusions of law, or notice of appeal; and (c) be verified by the appellant if the appeal is pro se. TRAP 25.1(d)(7).

The appellate court may consider a defective notice of appeal sufficient to perfect the appeal as long as the defective notice is a bona fide attempt to invoke the court's jurisdiction. *Sweed v. Nye*, 323 S.W.3d 873, 874-75 (Tex. 2010); *accord Warwick Towers Council of Co-owners v. Park Warwick, L.P.*, 244 S.W.3d 838, 839-40 (Tex. 2008).

i) What Is the Effect of Filing?

The filing of the notice of appeal does not suspend enforcement of the judgment, and enforcement of the judgment may proceed unless the judgment is superseded in accordance with rule 24 of the Texas Rules of Appellate Procedure. TRAP 25.1(h)(1). While parties have an absolute right to supersede a money judgment pending appeal, the right to supersede a judgment based on real property is more limited. TRAP 24.1; *Ex parte Kimbrough*, 146 S.W.2d 371, 372 (Tex. 1941, orig. proceeding). A judgment creditor may supersede the judgment by: (1) filing with the trial court clerk a written agreement with the judgment creditor for suspending the enforcement of the judgment; (2) filing with the trial court clerk a good and sufficient bond; (3) making a deposit with the trial court clerk in lieu of a bond; or (4) providing alternate security ordered by the court. TRAP 24.1(a). If a judgment is superseded, enforcement of a judgment is suspended and, if already begun, must cease. When execution has been issued, the clerk will promptly issue a writ of supersedeas. TRAP 24.1(f).

If an appellee is satisfied by the judgment and does not want to alter it but wants to present additional grounds for affirming the judgment, the appellee does not need to file a notice of appeal. *Epps v. Fowler*, 351 S.W.3d 862, 871-72 (Tex. 2011).

B. Interlocutory & Accelerated Appeals

An interlocutory appeal is filed during the course of the trial proceedings. Section 51.014 of the Texas Civil Practice and Remedies Code describes the orders from which a party may file an interlocutory appeal. TEX. CIV. PRAC. & REM. CODE § 51.014. If the parties agree, a court may allow an interlocutory appeal not otherwise permitted. TEX. CIV. PRAC. & REM. CODE § 51.014(d); TEX R. APP. P. 28.3. The Texas Supreme Court also now has the authority to review a permissive

appeal of an interlocutory order taken under section 51.014(d). Specific requirements pertain to such agreed interlocutory appeals. *See* TRAP 28.2. An appeal from an interlocutory order is accelerated. TRAP 28.1(a). Accelerated appeals are given preference over other appeals and are fast tracked in the appellate court. TRAP 26.1. An appeal from an interlocutory order is accelerated. TEX. R. APP. 28.1.

Special rules governing appeals in termination cases, which are considered accelerated, are found in TRAP 28.4, including guidelines for preparing the appellate record and when a new trial must begin if the appellate court reverses and remands.

If an appeal is taken from an interlocutory order, and the trial court later issues a final judgment disposing of all parties and claims, the appellate court cannot dismiss the appeal as moot, but instead must treat the appeal as having been filed taken from the final judgment. *Roccaforte v. Jefferson Cnty.*, 341 S.W.3d 919, 924 (Tex. 2011).

C. Mandamus

Another possible appellate remedy in certain cases is mandamus. For civil cases, Texas courts of appeals have mandamus power as set forth in Section 22.221 of the Texas Government Code:

> (a) Each court of appeals or a justice of a court of appeals may issue a writ of mandamus and all other writs necessary to enforce the jurisdiction of the court.
>
> (b) Each court of appeals for a court of appeals district may issue all writs of mandamus, agreeable to the principles of law regulating those writs, against a:
>
> (1) judge of a district or county court in the court of appeals district[.]

TEX. GOV'T CODE ANN. § 22.221; *accord* TRAP 52.1 *et seq.* (governing original proceedings in the appellate courts).

The standard governing mandamus proceedings is well-established. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding). Mandamus is considered an "extraordinary" remedy. *In re Sw. Bell Tel. Co., L.P.*, 235 S.W.3d 619, 623 (Tex. 2007) (orig. proceeding). Mandamus relief is available where (1) the trial judge has committed a clear abuse of discretion; and (2) there is no adequate remedy on appeal. *In re Odyssey Healthcare, Inc.*, 310 S.W.3d 419, 422 (Tex. 2010) (per curiam) (orig. proceeding). A "clear abuse of discretion" occurs when the challenged ruling is "so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." *In re CSX Corp.*, 124 S.W.3d 149, 151 (Tex. 2003) (per curiam) (orig. proceeding); *see Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding). "[T]he adequacy of an appellate remedy must be determined by balancing the benefits of mandamus review against the detriments." *In re Team Rocket, L.P., 2*56 S.W.3d 257, 262 (Tex. 2008) (orig. proceeding). An appellate remedy is only adequate if the detriments to issuing mandamus relief outweigh the benefits; but if the detriments are outweighed by the benefits, "courts must consider whether

the appellate remedy is adequate." *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding).

Mandamus relief has been held available in a variety of circumstances. For example, the Texas Supreme Court has held that mandamus relief is available if the trial court abuses its discretion in granting a new trial. *E.g., In re Toyota Motor Sales, U.S.A., Inc.*, No. 10-0933, 2013 WL 4608381, *9 (Tex. Aug. 30, 2013); *In re Columbia Med. Ctr. of Las Colinas*, 290 S.W.3d 204 (Tex. 2009). In *In re Toyota Motor Sales, U.S.A., Inc.*, the court recently held that appellate courts may "conduct a merits-based review of new trial orders" in mandamus proceedings. *In re Toyota Motor Sales, U.S.A., Inc.*, No. 10-0933, 2013 WL 4608381, *9 (Tex. Aug. 30, 2013).

D. Appellate Deadlines

In general, a notice of appeal must be filed within thirty days after the judgment is signed. An appellant may file its notice of appeal within ninety days after the judgment is signed if a party timely files a motion for new trial, a motion to modify the judgment, a motion to reinstate after a dismissal for want of prosecution, or a request for findings of fact and conclusions of law. TRAP 26.1(a). "In a civil case, a prematurely filed notice of appeal is effective and deemed filed on the day of, but after, the event that begins the period for perfecting the appeal." TRAP 27.1(a). When a party timely files a notice of appeal, any other party may file a notice of appeal within the applicable period provided in rule 26.1(a)–(c) or fourteen days after the first filed notice of appeal, whichever is later. TRAP 26.1(d).

The notice of appeal in an accelerated appeal must be filed within ***twenty days*** after the judgment or order is signed. TRAP 26.1(b). An accelerated appeal is perfected by filing a notice of appeal within the time allowed by rule 26.1(b) or as extended by rule 26.3. TRAP 28.1(b). The filing of a motion for new trial, request for findings of fact, or other post-trial motion will not extend the time to perfect an accelerated appeal. TRAP 28.1(b).

Appellate courts may extend the time to file a notice of appeal if, within fifteen days after the deadline for filing the notice of appeal, the appellant files the notice of appeal in the trial court and a motion for extension of time to file notice of appeal in the appellate court. TRAP 26.3. If appellant files the notice of appeal within fifteen days of the date that it was due, it implies a motion requesting an extension of time. However, the appellant bears the burden of providing a reasonable explanation for the late filing. *Verburgt v. Dorner*, 959 S.W.2d 615, 617 (Tex. 1997). A reasonable explanation is considered any plausible statement of circumstances indicating that the failure to file within the required time period was not deliberate or intentional, but was the result of inadvertence, mistake, or mischance. *Garcia v. Kastner Farms, Inc.*, 774 S.W.2d 668, 669 (Tex. 1989). Any conduct short of deliberate or intentional noncompliance, even if the conduct can be characterized as professional negligence, qualifies as inadvertence, mistake, or mischance and would be accepted as a reasonable explanation. *Id.* at 670. Generally, counsel's allegations of workload, standing alone, may not constitute good cause for filing an extension of time to file the notice of appeal. *See Pool v. Tex. Dept. of Family &*

Protective Servs., 227 S.W.3d 212 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

E. The Record on Appeal

i) The Clerk's Record

The trial court clerk is responsible for preparing, certifying, and timely filing the clerk's record if a notice of appeal has been filed and the appellant is entitled to appeal without paying the clerk's fee or has paid the clerk's fee or made satisfactory arrangements to pay the fee. TRAP 35.3(a).[3] The appellate court has authority to dismiss an appeal for want of prosecution if the appellant fails to pay or make arrangements to pay the clerk's fee for preparing the record. TRAP 37.3(b). The clerk's record must include the following: (1) all pleadings on which the trial was held; (2) the court's docket sheet; (3) the jury charge and verdict or the court's findings of fact and conclusions of law; (4) the court's judgment or other order being appealed; (5) any request for findings of fact and conclusions of law, any postjudgment motion, and the court's order on the motion; (6) the notice of appeal; (7) any formal bill of exception; (8) any request for a reporter's record; (9) any request for preparation of the clerk's record; and (10) a certified bill of costs, including the cost of preparing the clerk's record, showing credit for payments made. TRAP 34.5. Before the clerk's record is prepared, any party may file with the clerk a written designation of the specific items to be included in the clerk's record. TRAP 34.5(b), (c). No formal request is required for the preparation of this record, but the clerk may consult with the parties concerning the contents of the record. *See* TRAP 34.5(h).

A party may move to supplement the record if it is incomplete. TRAP 34.5(c). The appellate court's refusal to allow the supplementation may constitute error. *See In re K.C.B.,* 251 S.W.3d 514, 517 (Tex. 2008) (per curiam) (parental termination case; error in refusal to allow supplementation especially given the constitutional dimension of the proceedings). According to the court, "justice is not served when a case like this, ripe for determination on the merits, is decided on a procedural technicality that can easily be corrected." *Id.* (internal citation and quotation marks omitted).

TRAP 35.3(c) allows the appellate court to extend the deadline to file the record if requested by the clerk or court reporter (*see* Reporter's Record, below).

ii) The Reporter's Record

When the proceedings are stenographically recorded, the reporter's record consists of the court reporter's transcription of the proceedings and any that the parties designate. TRAP 34.6(a)(1). At or before the time for perfecting the appeal, the appellant must do as follows: (1) request in writing that the official reporter prepare the reporter's

[3]Tex. R. App. 20.1 and TRCP 125 were recently amended to change the procedure for a party claiming an inability to afford court costs. Instead of an affidavit of indigence, a party must now file a Statement of Inability to Afford Payment of Court Costs. Generally, if a party filed this at the trial court level, she is not required to pay costs in the appellate court unless the trial court overruled the party's claim under TRCP 145(f). If the claim was overruled, the appellate court may permit the party to proceed without payment of costs if she can show a material change in her financial circumstances since the trial court overruled her claim.

record; (2) designate the exhibits to be included, and (3) designate the portions of the proceedings to be included. TRAP 34.6(b)(1). Effective March 1, 2012, the trial court clerk is required to immediately send a copy of the notice of appeal to the appellate court clerk as well as the court reporter(s) responsible for preparing the reporter's record. TRAP 25.1(f).

A party may request a partial reporter's record. If an appellant requests a partial reporter's record, the appellant must include in the request a statement of the points or issues to be presented on appeal. TRAP 34.6(c)(1). The appellant will be limited to the points or issues designated.

When a partial reporter's record is properly designated, "[t]he appellate court must presume that the partial reporter's record designated by the parties constitutes the entire record for purposes of reviewing the stated points or issues. This presumption applies even if the statement includes a point or issue complaining of the legal or factual sufficiency of the evidence to support a specific factual finding identified in that point or issue." TRAP 34.6(c)(1). If the reporter's record is not properly requested by filing and serving a request for a partial reporter's record which states the points of error or issues to be presented on appeal, the presumption that the partial reporter's record constitutes the entire record for purposes of reviewing the stated points or issues does not apply. *Jaramillo v. Atchison, Topeka & Santa Fe Ry. Co.*, 986 S.W.2d 701, 702 (Tex. App.—Eastland 1998, no pet.); *Richards v. Schion,* 969 S.W.2d 131, 133 (Tex. App.—Houston [1st Dist.] 1998, no pet.) ("When an appellant appeals with a partial reporter's record but does not provide the list of points as required by rule 34.6(c)(1), it creates the presumption that the omitted portions support the trial court's findings."); *CMM Grain Co., Inc. v. Ozgunduz*, 991 S.W.2d 437, 439 (Tex. App.—Fort Worth 1999, no pet.); *Greco v. Greco*, No. 04-07- 00748-CV, 2008 WL 4056328, at *1 (Tex. App.—San Antonio 2008, no pet.).

Under the Texas Rules of Appellate Procedure, the Supreme Court continues to authorize electronic reporting on a court-by-court basis, through Supreme Court order. However, numerous rule changes have been made to protect the integrity of the process of electronic reporting. These are set out in TRAP 13.2.

Texas Rule of Appellate Procedure 34.6 (a) (2) requires a reporter's record that is recorded electronically to include: (1) certified copies of all tapes or other audio-storage devices on which the proceedings were recorded; (2) any exhibits that the parties designate; and (3) certified copies of the original logs prepared by the court recorder pursuant to Rule 13.2. Each party in an appeal using an electronically-recorded reporter's record must file one copy of an appendix containing a transcription of all portions of the recording that the party considers relevant. A copy of relevant exhibits must be included. TRAP 38.5.

iii) Inaccurate or Lost Records

On receiving the record, the appellate court clerk should check the reporter's record for compliance with the Supreme Court's and Court of Criminal Appeals' order on preparation of the record. If not in compliance, the clerk of the appellate

court is to contact the court reporter to bring the reporter's record into compliance. TRAP 37.2. Inaccuracies in the reporter's record can be corrected by agreement of the parties without recertification by the court reporter. When a dispute arises concerning the accuracy of the reporter's record, the trial judge, after notice and hearing, can settle the dispute. TRAP 34.6(e)(2). Where the dispute arises after the record is filed with the appellate court, the court of appeals can submit the matter to the trial court. TRAP 34.6(e)(3).

If a significant portion of the reporter's record is lost or destroyed, a new trial may be ordered. TRAP 34.6(f). An appellant is entitled to a new trial under the following circumstances: (1) if the appellant has timely requested a reporter's record; (2) if, without the appellant's fault, a significant exhibit or a significant portion of the court reporter's notes and records has been lost or destroyed or-if the proceedings were electronically recorded-a significant portion of the recording has been lost or destroyed or is inaudible; (3) if the lost, destroyed, or inaudible portion of the reporter's record, or the lost or destroyed exhibit, is necessary to the appeal's resolution; and (4) if the lost, destroyed or inaudible portion of the reporter's record cannot be replaced by agreement of the parties, or the lost or destroyed exhibit cannot be replaced either by agreement of the parties or with a copy determined by the trial court to accurately duplicate with reasonable certainty the original exhibit. TRAP 34.6(f).

F. The Docketing Statement.

The rules governing docketing statements were recently amended to required that upon filing the notice of appeal (rather than upon perfecting the appeal) the appellant must file with the court of appeals a docketing statement. TRAP 32.1. The docketing statement must also state whether the appeal is a parental termination case or child-protection case. The courts of appeals have developed various forms, which can be downloaded from the various court websites, for use by the practitioner in filing a docketing statement. Although the Rules of Appellate Procedure do not provide a specific process for compelling the filing of the docketing statement, the appellant's failure to file the docketing statement could result in dismissal of the appeal or affirmance of the appealed judgment or order. *See* TRAP 42.3.

G. Briefing Rules

The Texas Rules of Appellate Procedure also provide the form the parties' briefs must follow. For example, Rule 38 governs briefs filed in the courts of appeals. TRAP 38. Under Rule 38, the appellant's brief must contain certain sections: (1) identity of parties and counsel, (2) table of contents, (3) index of authorities, (4) statement of the case,[4] (5) statement regarding oral argument (this section is not mandatory), (6) the issues presented, (7) statement of facts, (8) summary of the argument, (9) argument, (10) prayer, and (11) an appendix.

The Statement of the Case:

[4]The Fifth Circuit Court of Appeals amended its rules to eliminate a separate "Statement of the Case." Now, the statement of the case and statement of the facts are combined into one section, which the new rule describes as a "concise statement of the case."

> must state concisely the nature of the case (e.g., whether it is a suit for damages, on a note, or involving a murder prosecution), the course of proceedings, and the trial court's disposition of the case. The statement should be supported by record references, should seldom exceed one-half page, and should not discuss the facts.

TRAP 38.1(d). Moreover, both the Statement of the Facts and the Argument sections of the brief must contain citation to record references from the Record on Appeal.[5] *Id.* 38.1(g),(i). The appendix must contain the order or judgment that is being appealed; the jury charge, jury verdict, and findings of fact and conclusions of law, if any; and, the text of relevant rules, regulations, ordinances, statutes, constitutional provisions, or other law that the party has relied upon in making its argument. *Id.* 38.1(k)(1). The appendix may also contain any other items that are relevant to the court's disposition of the case. *Id.* 38.1(k)(2).

An appellee's brief must also conform to 38.1, although it not required to contain a list of the parties and counsel, a statement of the case, a statement of the facts, or issues presented – unless these portions of the appellant's brief are disputed. TRAP 38.2(a)(1). The appellee's brief also need not contain any item that is already in the appellant's brief appendix. *Id.*

An appellant is permitted, but is not required, to file a reply brief. TRAP 38.3. However, the appellate court may decide a case before the reply brief is filed. *Id.* From a practical standpoint, it is unlikely that a case will be decided before a reply brief is filed in the average appeal since it generally takes a court of appeals around six months after briefing is completed to issue its decision.

The state appellate system transitioned to word count years ago. Now, instead of focusing on the number of pages, practitioners generating briefs on the computer are limited, in the parties' opening briefs on the merits, to no longer than 15,000 words. TRAP 9.4(i)(2)(B). Reply briefs that are computer generated cannot exceed 7,500 words. TRAP 9(i)(2)(C). For the preliminary filings at the Supreme Court of Texas, the petition for review and response to petition for review cannot exceed 4,500 words, while the reply to the petition for review cannot exceed 2,400 words. Moreover, a motion for rehearing cannot exceed 4,500 words.

In calculating the length of the brief, every word and part of the document, including headers, footnotes, and quotations is counted except 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

[5]There is no standard format for citation to the Record on Appeal in Texas. However, the Fifth Circuit recently amended its rules to impose a uniform method of citation for the appellate record. Under Fifth Circuit Rule 28.2, the new form of citation is "ROA.XXXX" where "XXXX" is the page number from the record. If the appeal is a multiple-record appeal, then the uniform citation form is "ROA.NN-NNNNN.XXX" where "NN.NNNNN" is the case number in which the record was filed.

procedural history, signature block, proof of service, and certification (of conference, compliance with brief length limitations, other requirements as imposed on briefs in original proceedings). TRAP 9.4(i)(1).

If a practitioner anticipates the need to file a brief exceeding the limitations, the practitioner may move for leave to do so under TRAP 9.4(i)(4) and 10.1(a).

H. E-Filing

Effective January 1, 2014, e-filing is now mandatory for all civil cases in the Texas Supreme Court and all of the courts of appeals.[6] E-filing applies to the Record on Appeal and/or to the documents submitted by the parties. *See* Misc. Order 12-9208 (Dec. 11, 2012). According to the order, once a court is subject to e-filing, it may not allow any other form of filing "except in the event of an emergency." *Id.* E-filing is performed through eFileTexas.gov. However, the Misc. Order 12-9208 requires that e-filed documents be submitted through a state-wide, uniform system known as TexFile (www.texfile.com).

With the change to mandatory e-filing also comes a change in the deadlines to response to documents that are served. In the past, practitioners at both the trial and appellate level could add three days to any response deadline if documents were served by mail or fax. Effective January 1, 2014, the three-day window has been eliminated for documents served by fax from the Texas Rules of Civil Procedure and the Texas Rules of Appellate Procedure. Specifically, the modification was made to Texas Rules of Civil Procedure 4, 21, 21a, 45, 57, and 502, and Texas Rules of Appellate Procedure 6, 9, and 48. *See* Misc. Order 13-9165 (Dec. 13, 2013).[7]

In addition, with the change to e-filing, the Texas Supreme Court no longer requires paper courtesy copies of documents that are filed electronically. The court announced the change on January 16, 2014.

I. Oral Argument.

Rule 39 of the Texas Rules of Appellate Procedure addresses the specific rules regarding oral argument in an appellate proceeding. An appellate court may decide a case without oral argument "if argument would not significantly aid the court." TRAP 39.8. A party desiring oral argument should note the request on the front cover of the party's brief. A party's failure to request oral argument waives oral argument except if the court directs the party to appear and argue before the court. *See* TRAP 39.7 *see also Green v. Tex. Elec. Wholesalers, Inc.*, 647 S.W.2d 1, 1 (Tex. App.—Houston [1st Dist.] 1982, no writ) (per curiam). The Rules now require practitioners to include a statement

[6] Attached is a letter from the Chair of the State Bar of Texas Appellate Section that provides e-filing tips and recent changes in the Texas Rules of Civil Procedure and Texas Rules of Appellate Procedure impacted by e-filing.

[7] E-filing in trial courts is currently required in several Texas counties, including Bexar, Collin, Dallas, Denton, El Paso, Fort Bend, Harris, Hidalgo, Tarrant, and Travis. However, electronic filing will be mandatory in all Texas counties by 2016.

Pleadings and documents filed in the trial court must also now contain the attorney's email address

regarding oral argument in their brief explaining why oral argument should be permitted by the court. TEX. APP. P. 38.1(e). A party who has been denied oral argument may consider filing a motion for reconsideration with the appellate court after receiving the notice of submission.

The purpose of oral argument is to emphasize and clarify the arguments in the briefs. Practitioners should not refer to matters outside the record. Counsel should assume the court has read the briefs and be ready to respond to questions from the panel. TRAP 39.2. Texas Rule of Appellate Procedure 39.8 mandates the appellate clerk provide the parties twenty-one days notice of submission of the case. The notice must provide: (1) whether oral argument will be permitted; (2) the date of argument or submission; (3) the time allotted for argument, if allowed; and (4) the names of all members of the panel who will decide the case. TRAP 39.8.