

# **Tips for Practice Before The Third Court**

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Disclaimer:

Although the paper draws on input and comments from the justices, clerks, and attorneys of the Third Court, the opinions expressed are the current opinions of these particular attorneys. They are not intended to and do not represent the opinions of the justices of the Third Court of Appeals, other staff attorneys, or members of the Clerk's Office. Indeed, the remaining author reserves the right to change her opinion of these opinions at any time and for any reason. Any attempts to rely on this paper as an accurate or complete statement of the law or Court policy or to rely on it as a predictor of future Court opinions would be ill-advised and should and may be met with hoots of derision. This paper was written many moons ago for a general audience and does not focus solely on administrative issues, but we hope you find it useful just the same. David isn't really responsible for its ongoing use anymore, but AZ wanted to be sure he got creditblame just the same. Please note that the paper's case cites haven't necessarily been updated. I've tried to update changes in rules or the law, of course, but please send me a note if you find errors or omissions that need to be addressed ([alessandra.ziek@txcourts.gov](mailto:alessandra.ziek@txcourts.gov)).

Thanks:

Thanks to the justices, our fellow staff attorneys, and the Clerk's Office for your input and suggestions and for discussing in great depth such important issues as font size, citations in footnotes yay or nay (**NAY**<sup>1</sup>), the importance of headings, and other such matters.

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<sup>1</sup> Seriously. NAY.

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## **Practice Tips from the Third Court of Appeals a/k/a Help Us Help You**

### **Starting Off Right**

The Third Court tends to err on the side of allowing a party to appeal, but some other courts aren't so generous. The size of the Court's docket, plus accelerated appeals and tight deadlines being imposed, has increased pressure for us to consider dismissal for noncompliance with timetables and other rules. However, the Court still prefers to address the merits of an appeal, so a motion to dismiss complaining that the appellant's brief was filed two days late generally is futile and may paint the filing party and/or attorney in a not-great light.

### ***E-Filing***

Please don't make us explain e-filing again. We will if you need us to, but would really rather not. Any civil party represented by counsel has to e-file, and that does not mean filing via e-mail. *See* Tex. R. App. P. 9.2(c). Most attorneys in criminal cases do, too. *See id.*

### ***When to file notice of appeal***

We may not exercise jurisdiction over a case in which the notice of appeal was not timely filed. *Wilkins v. Methodist Health Care Sys.*, 160 S.W.3d 559, 564 (Tex. 2005); *see Olivo v. State*, 918 S.W.2d 519, 522 (Tex. Crim. App. 1996) (discussing jurisdiction in criminal context). Know what extends your appellate deadline and, more important, what doesn't. Certain post-judgment motions extend the deadline for filing a notice of appeal from most final judgments. *See* Tex. R. App. P. 26.1(a). Such motions and requests do not, however, extend the appellate deadline in accelerated cases. *In re K.A.F.*, 160 S.W.3d 923, 925-27 (Tex. 2005); *Rainbow Grp., Ltd. v. Wagoner*, 219 S.W.3d 485, 493 (Tex. App.—Austin 2007, no pet.). And, a request for findings of fact and conclusions of law will not extend the deadline if the findings and conclusions would not be useful, such as in a summary judgment proceeding. *See* Tex. R. App. P. 26.1(a)(4); *IKB Indus. (Nigeria) Ltd. v. Pro-Line Corp.*, 938 S.W.2d 440, 443 (Tex. 1997) (request for findings/conclusions does not extend deadline if they have no purpose, such as summary judgment, directed verdict, JNOV, default judgment awarding liquidated damages, dismissal on pleadings or special exceptions, or DWOP, DWOJ, or other judgment rendered without evidentiary hearing).

If you're late but filing your notice of appeal within 15 days after the appellate deadline has run, you're not dead yet. *See* Tex. R. App. P. 26.3. If you are within that window, file the notice of appeal and a motion to extend time—the notice of appeal should be filed in the trial court, and the motion to extend should be filed in the appellate court. *Id.* If you do not file a motion to extend time, the notice of appeal acts as an implied motion to extend, *Verburgt v. Dorner*, 959 S.W.2d 615, 617 (Tex. 1997), but you still need to follow up with a reasonable explanation of why you require an extension of the deadline. Note, however, that in a criminal case, you **must** file the motion to extend time within the 15-day window. *Olivo*, 918 S.W.2d at 526.

### ***Where to file the notice of appeal***

The rules require the NOA be filed in the trial court, but our Court appreciates it when you also file a courtesy copy with us, along with your filing fees. Without a courtesy copy, we don't know about the appeal until the trial court clerk's office sends us a clerk's record, and sometimes that takes a surprisingly long time. Once you give us a courtesy copy, we can get the case set up and docket its deadlines, send late-record notifications, etc.

### ***Things to include in the notice of appeal***

The name of the judge who signed the judgment or order challenged on appeal is helpful. Some judges have TERRIBLE handwriting, court numbers aren't helpful in counties with a central docket, and sometimes a visiting judge wanders through.

Please, please list the names of all the parties to the trial court's judgment or order, not simply one party's name and "et al." *See* Tex. R. App. P. 25.1(d)(5). And, if you do not intend for all of those people and/or entities to be parties to the appeal, please give us a clear explanation of who is and is not a party on appeal. In our judgment, we have to specifically name every party who should be bound by our decision, and your using "et al." requires us to sift through every petition, order, judgment, and notice of nonsuit in an attempt to track who is a party at what point. That takes a lot of time and increases the risk that we'll mess it up. (Please include the same information on the docketing statement and consider adding to your brief a page listing all the parties below and on appeal.)

Similarly, in your NOA certificate of service, instead of merely saying it was sent to "all attorneys of record," please name the individual attorneys who were served and the parties they represent. *See id.* R. 9.5(e), 25.1(e).

### ***File a docketing statement***

It's required, we use them, and we'll just keep hounding you until you do. *See id.* R. 32.1 (civil), 32.2 (criminal). The form (and other hopefully helpful forms, information, and tips) is available at the Court's website.

### ***Fees and statements of inability to afford costs***

For the Court, getting filing fees paid is a little easier now that we have e-filing. Unless your client is excused from payment for some reason, you pretty much have to pay your fees (initial filing fees and later motion-related fees) at the time a document is e-filed. If your client is indigent, please note that the TRAPs and TRCPs addressing indigence have changed. Most issues related to whether a party can pay court costs, including getting a free record on appeal, are left to the trial courts. *See* Tex. R. Civ. P. 145. Please note that the TRAP provision related to indigence only applies to appellate-court filing fees. *See* Tex. R. App. P. 20.1.

To be excused from paying for the clerk's and reporter's records, an appellant asserting indigence should file a Statement of Inability to Afford Payment of Court Costs in the trial court. Tex. R. Civ. P. 145 (form available on [txcourts.gov](http://txcourts.gov), under Rule & Forms,

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First appeared as part of the conference materials for the  
12<sup>th</sup> Annual Advanced Texas Administrative Law Seminar session  
"Behind the Scenes at the Third Court of Appeals"