

Appeals



Educational Background:

Bachelor of Arts, University of Texas, 1971
Doctor of Jurisprudence, University of Houston Law Center, 1974
Board Certified, Personal Injury Trial Law, 1991
Board Certified, Juvenile Law, 2003
Former Board of Directors, Houston Bar Association Juvenile Law Section

Major Accomplishments

Eagle Scout
Hiked out from the bottom of the Grand Canyon in a snow storm
Took scuba lessons while my wife was in law school and sky dived after she graduated
Married for twenty-five years
Only husband and wife team in Texas both board certified in Juvenile Law

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About this Paper

For purposes of brevity citations from the Texas Family Code are listed by their Section Number (▪) only. In addition citations involving the Texas Rules of Appellate Procedure are listed as TRAP. *.

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Top Ten Reasons For Not Taking An Appeal

1. You like to sleep at night.
2. You ~~are~~ not sure whether a key number refers to a point of law or your hotel room.
3. You don't know whether TRAP refers to a hunting device or something you are likely to fall into.
4. You don't keep time records.
5. You don't have storage space.
6. You ~~are~~ concerned about paying money out of pocket for copying, binding, and postage and then having to wait a year or more for reimbursement.
7. You ~~are~~ concerned about seeing your name in SW3 with the word affirmed either starting or ending the case.
8. You ~~are~~ concerned about being in front of a three judge panel that looks alternately bored or hostile.
9. You ~~are~~ concerned about telling your colleagues that their defense was ineffective.
10. You like to sleep at night.

Civil Proceedings - Criminal Cases

Juvenile Delinquency cases are civil and quasi-criminal in nature. *Matter of M.A.F.* 966 S.W.29448 (1998). Texas Family Code §51.17 (a)The Texas Rules of Civil Procedure govern proceedings under this title.

§56.01 Right to Appeal

An appeal from the trial court is filed in the appropriate Court of Appeals. A subsequent appeal is to the Texas Supreme Court by writ of error, as in civil cases generally.

Types of Appeal:

1. Adjudication and disposition, §56.01 (A) & (B).
2. Modification of a previous juvenile adjudication, §56.01 (C).
3. Commitment of a child to a facility for the mentally ill or mentally retarded §56.01 (D).
4. Transfer of a juvenile from the Texas Youth Commission to the Texas Department of Criminal Justice, institutional division, pursuant to a determinate sentence adjudication, §56.01 (D) (2).
5. Waiver of Jurisdiction & Discretionary Transfer to Criminal Court §54.02 (h).

Practice note: There is no immediate appeal from a certification. The appeal is carried along with the criminal case to be reviewed at its completion and any writ of error is to the Texas Court of Criminal Appeals.

Rights of the Juvenile:

1. Right of appeal, §56.01 (D) (2) (d) (1).
2. Representation of juvenile on appeal §56.01 (D) (2) (d) (2).
3. Appointment of appellate counsel if juvenile is indigent §56.01 (D) (2) (d) (3).

Limited Right of Appeal

If the juvenile enters a stipulation of evidence with an agreed disposition then the juvenile's right to an appeal is only with the court's permission §56.01(n) (1) or is based on matters raised by written motion filed before the entering of the stipulation §56.01 (n) (2).

Limited Right to Appeal by the State

■ **56.03** permits the State a right of appeal in determinate sentencing cases brought under ■ **53.054** for the following reasons:

1. The trial court dismisses a petition or any portion of the petition.
2. The trial court arrests or modifies a judgment.
3. The trial court grants a motion for new trial.
4. The trial court sustains a claim of former jeopardy.
5. The trial court grants a motion to suppress evidence, confession, or an admission.

Continuing Duty of Trial Counsel:

If the juvenile, parent or guardian express a desire to appeal, the trial counsel shall file a notice of appeal with the juvenile trial court and inform the court whether that attorney will handle the appeal, ■ **56.01 (f)**.

Practice note: Find out as soon as practicable whether your client wants and appeal and whether you want to handle it. If you do not want to handle the appeal, notify the trial court so that an appellate attorney is appointed and allow that attorney to file the notice of appeal, otherwise the appellate court will consider you as the appellate attorney of record and will forever send you notices instead of the real appellate attorney.

Appeal Does Not Suspend Disposition:

An appeal does not suspend the order of the juvenile court, nor does it release the juvenile from the custody of that court or any placement by that court.

Practice note: You must tell your client and his parents or guardian that an appeal will have no immediate effect of the disposition and that the juvenile's probation or placement may well be completed before the appellate court has ruled on the appeal.

Appeal Dismissed if Juvenile Escapes Custody

An appeal will be dismissed if the juvenile escapes custody during the pendency of the appeal and does not voluntarily return to the state's custody within ten days of the escape, ■ **56.01 (k)**.

Adverse Trial Court Adjudication - Now What?

The First Thirty Days

The Judgment or Verdict does not become final until thirty days after it is signed. It is therefore extremely important to know the day the trial judge signed the Judgment. The following must be filed within the first thirty day if no motion for new trial is filed:

1. Notice of Indigence, if applicable.
2. Request for Findings of Fact, if court trial.
3. Notice of Appeal.
4. Motion for New Trial.

Notice of Indigence

The elements of the Notice of Indigence are covered by **§56.01 (m)** and **TRAP 20.1**. The trial court must consider assets and income of the juvenile, the juvenile's parent and any other person responsible for the support of the juvenile. It must be filed before or contemporaneously with the Notice of Appeal.

Practice note: If the trial court finds the juvenile indigent, on all transmittal letters to the court of appeals, remind the court that your client is indigent so that you will not be continuously dunned by the court for fees for filing motions.

Request for Findings of Fact (Court Trial only)

The exception to the thirty day rule is the twenty day rule for requesting findings of fact pursuant to **Rule 296 Texas Rules of Civil Procedure**. The trial court is supposed to file its findings of fact within twenty days after a timely request has been filed. If the trial court does not timely file the findings of fact, the requesting party shall file a Notice of Past Due Findings of Fact within thirty after filing the original request, thereby giving the trial court forty days to prepare the Findings of Fact, **Rule 297 Texas Rules of Civil Procedure**.

Notice of Appeal

An appeal is perfected when a written Notice of Appeal is filed with the trial court clerk **TRAP 25.1 (a)**. The contents of the Notice of Appeal **TRAP 25.1 (b)** include:

1. Identity of the trial court, case number, and style;
2. The date of the judgment or order;
3. The name of the party which desires the appeal;

4. The appellate court to which the appeal is taken unless it is to either the First or Fourteenth Court of Appeals, then to both (Houston, Harris County problem only);
5. The name of each party filing the notice;
6. If an accelerated appeal, a statement that it is an accelerated appeal;
7. If a restricted appeal, include a statement regarding its limitation or restriction.

Motion for New Trial

A Motion for New Trial (MNT) is not mandatory for an appeal, **Rule 324 Texas Rules of Civil Procedure**. However it provides numerous benefits. From a time line standpoint a MNT pushes the date for the filing of the Affidavit of Indigence and Notice of Appeal up to ninety days after the original judgment.

A MNT is mandatory if you want to raise the following issues, rule 324 (b):

1. Jury misconduct or newly discovered evidence;
2. A complaint of factual insufficiency of the evidence;
3. A complaint that a jury finding is against the overwhelming weight of the evidence;
4. A complaint of incurable jury argument if not otherwise ruled on by the trial court.

***Practice note:** A MNT is not necessary to raise a legal insufficiency point (no evidence of a required element of the offense).*

Appellate Record

Both the Clerk's Record and the Reporter's Record are due within thirty days of the filing of the Notice of Appeal.

TRAP 35.1. The Clerk's Record **TRAP 34.5** include all of the written pleadings, motions, orders, court's charge and jury verdict, findings of fact. **Practice note:** Review the entire court file and make a list of all of the contents and include each of them in your request for the Clerk's Record. This may eliminate the necessity of requesting a supplemental clerk's record after you have started your brief and discover that a certain document that you are referring to is not in the Clerk's Record.

Have Read the Record, Now What?

Appellate Brief

The requirements of the brief are set forth in **TRAP 38.2**. They include:

1. The identity of the parties and counsel;
2. Table of contents;
3. Index of authorities;
4. Statement of the case;
5. Issues presented;
6. Summary of the argument;
7. Argument;
8. Prayer;
9. Appendix.

The brief is due within 30 days after the filing of the Appellate Record **TRAP 38.6**. The appellate courts will almost always give you at least one extension to file the brief. **TRAP 38.6 (d)**.

***Practice note:** Please check with your Court of Appeals regarding the style of the brief. Most of the appellate courts have local rules regarding the size of the print as well as the type of font. In a court trial, the appellate court will assume that the judge ignored improperly admitted evidence, so save your time on legal research and briefing these types of evidentiary issues.*

Frivolous Appeals

The Texas Supreme Court has held that the appellate attorney in a juvenile case must follow the law as set forth in *Anders v. California*, 386U.S. 738, 87 S.Ct. 1396 (1967); *In Re DAS* 973 S.W.2d 296. If after a careful reading of the appellate record you cannot find any grounds for an appeal, you are required to file a motion to withdraw and a supporting brief covering each issue as required in DAS. A copy of the motion and supporting brief must be sent to your client.

Writ of Habeas Corpus

If you believe that the juvenile is being detained unlawfully, a writ of habeas corpus must be filed first in the trial court. If the writ is denied then it may be appealed to the appellate court. **TRAP 31.1**.

Oral Argument

The granting of a request for oral argument is in the discretion of the appellate court. The Honorable Eric Andell who was the trial judge of the 315th District Court of Harris County (juvenile court) and later Justice on the First Court of Appeals would always suggest that you request oral argument.

***Practice note:** A very close friend of mine who is board certified in appellate law asserts that a good argument will rarely win a case but that a bad argument can sink one.*

Possible Specialization Questions

1. Without a Motion for New Trial- 30 days to file Notice of Appeal and Affidavit Indigence; 90 days otherwise.
2. Limited right of appeal on negotiated plea.
3. Limited right of appeal by State in determinate sentencing cases.
4. Habeas Corpus filed in trial court.

The Number One Reason For Taking An Appeal

Taking an appeal will make you a better trial lawyer. Researching the law on evidentiary points will help you remember the predicate for the introduction of the evidence. Reading the reporter's record will help you focus on how to ask questions and how to respond to answers that you do not anticipate. Standing in front of a three judge panel will sharpen your skills of answering difficult questions. Remember a TRAP is something that you don't always have to fall into.