

STATE BAR OF TEXAS JUVENILE LAW SECTION
AND THE TEXAS JUVENILE PROBATION COMMISSION'S
NUTS AND BOLTS OF JUVENILE LAW
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JUVENILE APPEALS

A PRESENTATION BY
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Juvenile Appeals

1. Overview.

The purpose of this paper is to discuss the logistics of appealing a juvenile case. It is my hope that this paper will provide the juvenile practitioner with the background necessary to successfully prosecute and appeal. The Rules of Appellate Procedure referred to in the paper are available on the web at the Supreme Court web site and can be downloaded in PDF to your desktop for easy reference.

2. I Tried, I Fought and I Lost. What Do I Do Now?

Ethical Duties of the Attorney.

The first thought that comes to mind after losing the trial of a case is whether to consider appeal of the case. Obviously, the attorney owes an ethical duty to the client to advise the client of his right to appeal. Even though there is no longer a right to a direct appeal of a certification hearing, it is this author's opinion that there is an ethical duty to advise the client of his right to appeal, as part of the adult appellate process, the issues in the certification hearing. All other matters in the juvenile court still retain the right of direct appeal, including delinquency proceedings, determinate sentencing proceedings and modifications of disposition proceedings.

The attorney owes the client not just the duty of explaining the right to appeal but also the duty of explaining any error the attorney believes that the Court might have committed which might result in reversal. The converse is also true. In the event that the client desires to appeal, the attorney owes the client a duty to advise the client if, in the attorney's considered opinion, there is no reversible error. Ultimately, however, the decision to appeal is the client's.

When does the attorney's ethical responsibility of representation of the client terminate? This depends on several factors. First, if the client is a retained client, the Employment Contract may stipulate when the attorney's duties and responsibilities terminate. In the event that the contract is silent, the attorney's responsibility may well continue after the trial. If the attorney is appointed, the attorney's responsibility may be dictated by the court that the case is tried in. Some courts require the appointed attorney to follow through with the preliminary post-trial filings to insure that the client's right to appeal is protected. Other courts relieve the attorney of all responsibility after the trial. It is essential that the attorney determine what the court's policy is before abrogating responsibility for the client's appeal. When in doubt, continue to act as though you are responsible for the appeal. This will avoid the expiration of deadlines which could result in the denial of the client's right to appeal.

Now That the Judgment is Signed, What Do I File?

3. Motion for New Trial, Request for Findings of Fact and Conclusions of Law and Notice of Appeal

The document you file once the judgment is signed depends on whether the case was tried to the Court or to a jury. If the case is tried to a jury you must file a Motion for New Trial to preserve a no evidence or legal or factual insufficient evidence point of error. In a court trial there is no necessity to file a Motion for New Trial to preserve these points for appellate review. **Rule 33, Rules of Appellate Procedure.** You may file a Notice of Appeal as soon as the judgment is signed if there are no reasons for requiring additional time or genuine issues for a Motion for New Trial.

There is another reason why this author believes that you should always file a Motion for New Trial. It automatically extends the deadline for the filing of the Notice of Appeal to 90 days after the Judgment is signed by the Court. **Rule 26, Rules of Appellate Procedure.** This may also be accomplished after a court trial by filing a Request for Findings of Fact and Conclusions of Law. **Rule 26, Rules of Appellate Procedure.** One additional reason for filing a Motion for New Trial is that the additional time will allow the attorney to secure the Pauper's Oaths in the event the client is indigent and wishes to appeal. Another reason for filing of a Motion for New Trial is that the Court Reporter may need more than 60 days to prepare the statement of facts. Ultimately, the call as to what is filed will depend on the circumstances of each case.

Regardless of which document you decide to file, the most important document is the Notice of Appeal. The appeal is perfected when a written notice of appeal is filed with the trial court clerk. **Rule 25(a), Rules of Appellate Procedure.** The contents of the notice must identify the trial court, the trial court number and style, the date of the judgment being appealed from, state that the party desires to appeal, state the court to which the appeal is taken (unless to the 1st or 14th, in which case state that it is taken to either of the courts), state the name of each party filing the notice, state whether any post judgment motions for new trial or other motions have been filed, and other requirements. **Rule 25(d), Rules of Appellate Procedure.**

In the event that, as this author has, you have a defect in your Notice of Appeal, the rules provide that any defect may be corrected by the filing of an Amended Notice of Appeal at any time before the Appellant's brief is due. **Rule 25(f), Rules of Appellate Procedure.**

The timetable for the filing of the Notice of Appeal, as referred to above, is within 30 days after the judgment is signed, unless a Motion for New Trial, Request for Findings of Fact and Conclusions of Law, or other enumerated pleadings are filed, in which case the Notice of Appeal must be filed within 90 days after the date the judgment is signed. **Rule 26.1, Rules of Appellate Procedure.**

4. My Client and His Family Are Broke. How Do They Appeal?

As is the case in most juvenile appeals, the client and his family are indigent. The procedure for proceeding in the juvenile courts is still antiquated and behind the times because the appellate courts and the legislature still consider the juvenile appellate process to be a civil appeal.

As a result Rule 20 applies to juvenile appeals. A party who cannot pay the costs in an appellate court may proceed without advance payment of costs if: (1) the party (in the juvenile appellate process this means not only the child but his parent(s)) files an affidavit of indigence in compliance with this rule; (2) the claim is not contested, or, if contested, the contest is not sustained by written order; and (3) the party timely files a notice of appeal. **Rule 20.1(a), Rules of Appellate Procedure.**

The contents of the affidavit must identify the party filing the affidavit and must state what costs, if any the party can pay and must contain information about the affiant's employment, income, spouse's income, real and personal property, cash, bank accounts, other assets, dependents, indebtedness, monthly expenses, ability to obtain a loan for court costs, whether an attorney is providing free legal services without a contingent fee and whether the attorney has agreed to pay or advance court costs. **Rule 20.1(b), Rules of Appellate Procedure.** The affidavit of indigency must be filed with the trial court clerk. The clerk, court reporter, or any other party may challenge the affidavit by filing a contest to the affidavit within 10 days after the date the affidavit is filed. If the contest is filed late or not filed at all, then the affidavit is deemed true and the appeal will proceed without costs to the appellant. **Rule 20.1(d)(e), Rules of Appellate Procedure.** You should always file an Order reciting the fact that the appellant can proceed as a pauper. In the event that a contest is filed, it is your burden to prove your client and his family indigent. **Rule 20.1(g), Rules of Appellate Procedure.**

5. My Client Is No Longer Broke, or I am Retained on the Case. What Do I File Next?

Now that you have either the funds to proceed or the Order finding your client and his family indigent, you must request the record be prepared to forward to the appellate court.

The first thing that you should request is the Statement of Facts from the Court Reporter. Once you are sure that you are going to appeal make this request immediately. All the court reporters will thank you and you will usually get your record filed on time. The request for the preparation of the statement of facts must be made in writing at or before the time for perfecting the appeal. The request must designate the exhibits to be included and the portions of the testimony to be included, and a copy must be filed with the trial court clerk. **Rule 34.6(b), Rules of Appellate Procedure.**

The Transcript (clerk's record) is governed by Rule 34 of the Rules of Appellate Procedure. You may designate those items you want included in the record any time before the clerk's record is prepared. **Rule 34(b), Rules of Appellate Procedure.**

All of the provisions of supplementation of the record are included in Rule 34. A careful reading of this section will prepare the practitioner for the pitfalls that can occur between the attorney's office, clerk's office, reporter's office, and the appellate clerk's office.

The clerk's record is due within 30 days after the filing of the Notice of Appeal and is the responsibility of the clerk if the proper notices have been filed. **Rule 35.1, 35.3(a), Rules of Appellate Procedure.** The filing of the reporter's record is the responsibility of the court reporter if the proper notices have been filed. **Rule 35.1, 35.3(b), Rules of Appellate Procedure.**

6. I Received The Notice, The Record's Been Filed. No What Do I Do?

Let us assume that you have done everything properly to this point. The next thing that you will receive is a notice from the Court of Appeals that the record has been filed on (date) and that the appellants's brief is due 30 days from that date. The Court of Appeals may also tell you that the filing fees are due in that same notice.

You should have already received a copy of the statement of facts from the court reporter. You may now go to the Court of Appeals, if you are appointed, or, if retained and you did not order an additional copy of the transcript, and check out the transcript and take it with you to assist in the preparation of the brief. The appellant's brief is due 30 day after the record is filed. The appellee's brief is due 30 days after the appellant's brief is filed. **Rule 38.6, Rules of Appellate Procedure.**

The requirements for the contents of the brief are set out in Rule 38 of the Rules of Appellate Procedure and include identity of the parties and counsel, table of contents, index of authorities, statement of the case, issues presented, statement of facts, summary of the argument, argument, prayer and certificate of service. **Rule 38.1, Rules of Appellate Procedure.** The rules governing the appellee's brief are set out in Rule 38.2 of the Rules of Appellate Procedure. The appellant's brief must be no longer than 50 pages and the reply brief no longer than 25 pages. **Rule 38.4, Rules of Appellate Procedure.**

Pleadings filed in the appellate court had to be at least 13 point or larger type and have a rigid front and back cover. **Rule 9.4, Rules of Appellate Procedure.** I guess that the appellate judges are tired of reading book size print. I now know that every brief I file will be in 14 point type.

When you begin to prepare the brief remember that the appellate courts utilize briefing clerks to “screen” the briefs and issues. Therefore, attempt to frame the issues in the most concise and interesting means possible. I have had the opportunity to speak with Justice Eric Andell and Justice Murray Cohen, both of whom have sat on the First Court of Appeals in Houston. According to both Justice Andell and Justice Cohen, the general consensus on the appellate courts is that brevity and specificity are desirable in appellate briefs.

7. What Do I Do Now That The Appellate Court Has Set Me For Oral Argument?

The most important thing to do to prepare for oral argument is to follow up on the case law cited in your brief by researching to see if the law has changed to your benefit, or detriment. Update the case law, check the State Juvenile Law Web Cite (www.juvenilelaw.org) and research the state’s cases to see if the law has changed from their perspective.

When you appear for oral argument be prepared. Know the case law. Be prepared for questions from the judges. Highlight the strongest points of error if you have many that you have raged. In the event that the Court addresses an issue that you did not brief or did not brief sufficiently, request an opportunity to file a supplemental brief to address those issues.

Do not be anxious or nervous. My experience has been both at the court of appeals level, and before the Supreme Court, that the justices know little, if anything, about juvenile law. Most likely you will be presenting the justices with the equivalent of CLE in juvenile law.

8. I Argued Masterfully. What Next?

The next step is to wait. Some appellate courts are faster than others. The average length of time from argument to opinion varies in Houston from six weeks to two years. Go figure.

9. The Opinion Is In. I Won. Now What Do I Do?

The opinion is in and you won. Congratulations. It is not over. In the event that your client is in TYC, you need to have him or her bench warranted to the Court that you got reversed because, unless the Court of Appeals ordered the case dismissed, the proceeding begins anew as though your client was never adjudicated. Even if your client was placed on probation the entire proceeding begins from ground zero. You will have to prepare an Order Vacating the Prior Order and have that Order entered.

10. The Opinion Is In. I lost. What Now?

The battle is not over. It is now time to review the opinion and determine if there are grounds for a Motion for Rehearing. If you believe that a Motion for Rehearing is prudent it must be filed within 15 days after the court of appeals judgment or order is rendered. **Rule 49.1, Rules of Appellate Procedure.** A Motion for Rehearing is not a prerequisite to the filing of a petition for review in the Supreme Court. **Rule 49.9, Rules of Appellate Procedure.**

The requirements for the petition for review in the Supreme Court are set out in Rule 53 of the rules of Appellate Procedure. Rules 54, 55 and 56 provide the guidelines for the proceedings in the Supreme Court.

11. All Else Failed. What About Habeas Corpus?

The remedy of Habeas Corpus is always available to the juvenile respondent where the assertion can be made that the juvenile is being unlawfully held or detained. The original Writ of Habeas Corpus is filed in the trial court where the juvenile was originally adjudicated and disposition orders were entered. After hearing in the Writ, if the result is unfavorable, then the Order may be appealed to the court of appeals. Rule 31 of the Rules of Appellate Procedure control the procedure for appeal of a denial of a Writ of Habeas Corpus.

12. Now the Good Part: How do I Pass the Board Certification Exam

There were two essay questions on the exam I took back in the dark ages before color television was developed that dealt with appellate issues, in my opinion. The first essay question was an outright appellate question. It set out a fact situation, gave the Trial Court ruling and then asked you to address the appellate issues and rule as though you were the Appellate Justice. The suggested approach is to address each issue as you discern it and to make an outline in the test booklet of each issue as it comes up and to continue thru the fact situation until you have determined each of the issues upon which you wish to write.

In appellate briefs these issues are called points of error. On the last exam I found 14 points of error to write on. When you set out a point of error, outline it precisely. For instance, "Point of Error Number One: The Trial Court erred in denying the Respondent's Motion to Suppress because the evidence was obtained without a search warrant and without probable cause for the stop. The next step in dealing with the Point of Error is to address the facts and set out the applicable law. After you have explained how the Trial Court erred in light of the law then rule on the Point of Error by either sustaining the point of error (overruling the Trial Court) or overruling the point of error (affirming the Trial Court). Then move on to the next point of error.

The second question on the exam I took was a little bit more tricky. That issue involved a detention hearing and set out in the middle of the fact situation was an issue of appeal of the referee's ruling and habeas corpus issues. The questions raised involved the right to petition the appellate court for habeas corpus relief vs. The Juvenile Court Judge. Be wary of such appellate issues being woven into other essay questions. My best advice is that if you see an appellate issue, write on it. Sometimes it is better to overkill than be killed.

13. I Can't Make Heads or Tails of the Timetables.

Here is the timetable in plain Greek:

1. Judgment Signed;
2. Request for Findings of Fact and Conclusions of Law due 15 days after Judgment is signed;
3. If no Findings of Fact and Conclusions of Law are filed by the Court within 20 days after filing initial request then within 30 days after Judgment is signed file Notice of Past Due Findings of Fact and Conclusions of Law;
4. Motion for New Trial due within 30 days;
5. If no Motion for New Trial filed Pauper's Oath and Notice of Appeal due in 30 days;
6. If Motion for New Trial filed pauper's Oath and Notice of Appeal due in 90 days after Judgment signed;
7. Request for Transcript and Statement of Facts due 30 days after Judgment signed unless Motion for New Trial filed;
8. Request for Transcript and Statement of Facts due 90 days after Judgment signed if Motion for New Trial filed;

9. Appellant's Brief due 30 days after the later of the filing of Transcript or Statement of Facts.

Conclusion

It is my sincere hope that with the information contained in this paper and the rules cited that you will be prepared for the certification examination. My best advice is, as Clayton Williams once said, "just sit back and enjoy it". As always, if prior to the exam you have any questions please feel free to e-mail me at bjflaw@hotmail.com and I will be glad to answer any and all I can.