Helpful Hints for a Trial Attorney's Appellate Practice

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Kirsten M. Castañeda
Locke Liddell & Sapp LLP – Appellate Section
kcastaneda@lockeliddell.com

Every trial lawyer faces appellate issues in everyday practice. Here are some of those issues and potential pitfalls to avoid.

Juries

1. Selecting a Jury, Part I – The Jury Shuffle. After a venirepanel is assigned to the trial court and prior to *voir dire* examination by any party or attorney, a party may demand a jury shuffle. TEX. R. CIV. P. 223. The shuffle requires that the names of the panelmembers be placed in a receptacle, shuffled, drawn, and transcribed on the jury list in the order drawn. *Id.* Only one shuffle is allowed in each case. *Id.*

"Prior to voir dire examination" means before any question – whether written in a questionnaire or oral – is asked of the panel and reviewed by counsel. *Carr v. Smith*, 22 S.W.3d 128, 133-34 (Tex. App.—Fort Worth 2000, pet. denied). Standard juror form cards are distinct from case-specific questionnaires; a shuffle may be requested after the standard form cards are filled out. *Id.* at 134. However, the shuffle must be requested *before* a case-specific questionnaire is distributed to the panel because "[a]fter the venire panel has been sworn and once substantive inquiry begins and responses have been observed or made available to the parties or their counsel, whether verbally or in writing, voir dire has begun." *Id.* Although this principle leaves a possible loophole for a request between the time the questionnaire is distributed to the panel and the time the attorneys or parties are provided with the responses, the safer course of action is to request a shuffle (or to make the decision not to request one) before any case-specific questionnaire is distributed to the panel.

2. Selecting a Jury, Part Deux – Rehabilitation. For many years, the standard applied to veniremembers' statements indicating bias or prejudice was that the member had to be dismissed, regardless of rehabilitation attempts. *E.g.*, *State v. Dick*, 69 S.W.3d 612, 620 (Tex. App.—Tyler 2001, no pet.), *disapproved by Cortez v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87 (Tex. 2005); *White v. Dennison*, 752 S.W.2d 714, 718 (Tex. App.—Dallas 1998, pet. denied), *disapproved by Cortez v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87 (Tex. 2005). Even when such a member was "rehabilitated" through questions and stated that he/she would decide the case based on the evidence and could be fair to both sides, the court was required to excuse the member. *White*, 752 S.W.2d at 718; *see also Dick*, 69 S.W.3d at 620.

In March 2005, the standard changed radically. *See Cortez v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87, 92-94 (Tex. 2005). Rehabilitation of veniremembers who express bias or prejudice is now possible. *Id.* It remains true that, "if the record, taken as a whole, clearly shows that a veniremember was materially biased, his or her ultimate recantation of that bias at the prodding of counsel will normally be insufficient to prevent the veniremember's disqualification." *Cortez*, 159 S.W.3d at 92-93. However, further questioning after a statement of partiality is permitted. *Id.* "[T]he relevant inquiry is not where jurors *start* but where they are likely to *end*. An initial 'leaning' is not disqualifying if it represents skepticism rather than an unshakeable conviction." *Id.* at 94 (emphasis original).

"Statements of partiality may be the result of inappropriate leading questions, confusion, misunderstanding, ignorance of the law, or merely 'loose words spoken in warm debate.'" *Id.* at 92. "If a veniremember expresses what appears to be bias, we see no reason to categorically

prohibit further questioning that might show just the opposite or at least clarify the statement." *Id.* at 93. "If the initial apparent bias is genuine, further questioning should only reinforce that perception; if it is not, further questioning may prevent an impartial veniremember from being disqualified by mistake." *Id.*

The *Cortez* veniremember had been an insurance adjuster and, after listening to a preview of the expected evidence, stated that the defendants 'would be starting out ahead' of the other party before he even got into the jury box. However, in response to further questions, he also said he was willing to listen to all the evidence and to withhold judgment until the entire case had been presented. He never indicated any inability to find for Cortez, if Cortez proved his case. He said he was "willing to try" to make his decision based on the evidence and the law. For these reasons, the Court found he was not biased to the point of being disqualified. *See Cortez*, 159 S.W.3d at 93-94.

3. Selecting a Jury, Part C – Preserving "For Cause" Challenge Error. In the same case (*Cortez*), the Texas Supreme Court clarified the procedure necessary to preserve any error in a trial court's denial of challenges for cause:

A. Use a peremptory challenge against the veniremember(s) you challenged for cause.

B. Exhaust your remaining peremptory challenges.

C. Notify the court on the record:

i. which veniremember(s) you used a peremptory challenge to strike, that he/she/they should have been stricken for cause, and on what basis each should have been stricken for cause; and

ii. which specific objectionable veniremember(s) will remain on the jury list as a result..

Cortez, 159 S.W.3d at 90-91. The Court stated that error is not waived by failing to state why the remaining member is objectionable because peremptory challenges generally do not require a reason. *Id.* at 91.

This procedure is in place because, when a court denies a challenge for cause, the error can be corrected by striking the veniremember peremptorily. *Id.* at 90. Thus, the error is harmful only if the used peremptory challenge would have been used on another objectionable veniremember. *Id.* Using the procedure ensures that the court is informed of the problem while there is still time for it to consider whether the party was, in fact, forced to take objectionable jurors." *Id.* at 91.

Judgments

4. I'm OK, Dual Summary Judgment Motions Are OK. A few years ago, there was considerable debate among the courts of appeals as to whether a party could safely file a single motion that urged summary judgment grounds under both the traditional and "no evidence"

standards. *Compare Torres v. City of Waco*, 51 S.W.3d 814 (Tex. App.—Waco 2001) (resurrecting principle that dual motion attaching evidence would be treated solely as traditional motion), *disapproved in part by Binur v. Jacobo*, 135 S.W.3d 646 (Tex. 2004); *with Alashmawi v. IBP, Inc.*, 65 S.W.3d 162, 170-71 & n.7 (Tex. App.—Amarillo 2001, pet. denied) (noting better practice is to file separate motions); *and Jennings v. City of Dallas*, 138 S.W.3d 366, 370 n.3 (Tex. App.—Dallas 2001) (noting that dual motions are confusing and disfavored), *rev'd on other grounds*, 142 S.W.3d 310 (Tex. 2004). The Texas Supreme Court has resolved the issue. In *Binur v. Jacobo*, 135 S.W.3d 646 (Tex. 2004), the Court determined that appellate courts cannot disregard "no evidence" grounds on the basis that evidence is attached to a dual motion. 135 S.W.3d at 651. The Court did advise that:

> [U]sing headings to clearly delineate the basis for summary judgment under subsection (a) or (b) from the basis for summary judgment under subsection (i) would be helpful to the bench and bar, but the rule does not require it.

Id. Accordingly, so long as a motion clearly sets forth its grounds and otherwise meets Rule 166a's requirements, it is sufficient. *Id.*

5. <u>When You're Between a Rock and Hard Place – Proposed Orders and Judgments.</u> As rare as they are, there are times when we actually lose in the trial court. Generally speaking, either by default or pursuant to the court's express request, the prevailing party will draft and submit the proposed order or judgment. However, there are times when the non-prevailing party – a/k/a the loser (again, usually not us) – would find it useful to submit its own proposed order or judgment. Other times, the court demands that both parties submit competing forms.

However, the invited error doctrine gets in the way. This principle prohibits a party from complaining about error that he or she invited. *Morse v. Delgado*, 975 S.W.2d 378, 381 (Tex. App.—Waco 1998, no pet.); *Texas Indus., Inc. v. Vaughan*, 919 S.W.2d 798, 804 (Tex. App.—Houston [14th Dist.] 1996, writ denied). For example, a party cannot urge the trial court to enter a judgment on the jury's verdict and then complain about the jury's verdict on appeal. *Litton Indus. Prods., Inc. v. Gammage*, 668 S.W.2d 319, 321-22 (Tex. 1984).

How, if at all, can a non-prevailing party submit a proposed order in conformity with the trial court's oral adverse ruling? The Texas Supreme Court has stated that "[t]here must be a method by which a party who desires to initiate the appellate process may move the trial court to render judgment without being bound by its terms." *First Nat'l Bank v. Fotjik*, 775 S.W.2d 632, 633 (Tex. 1989). This method is to solidly reserve the right to complain. *Id.* There are two recognized methods: (1) make an express statement on the record when submitting your proposed order/judgment; or (2) sign the proposed order/judgment as "Agreed as to form only." *See id.*; *Morse*, 975 S.W.2d at 381.

What sort of express statement on the record will do? In *Fotjik*, the Texas Supreme Court determined that the right to complain had been preserved when the non-prevailing party filed a motion for judgment that stated:

> While 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 the 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 result.

775 S.W.2d at 633.

6. Judgment Interest.

a. *How to figure out the rate.* Section 304 of the Texas Finance Code is your guide to judgment interest. If a money judgment is based on a contract providing for interest, section 304.002 tells you what to do (*i.e.*, the lesser of the rate specified in the contract and 18% per year). If the money judgment is not based on a contract providing for interest, then section 304.003 tells you what to do. Generally, under section 304.003(c), post-judgment interest is assessed at: (1) the prime rate as published by the Federal Reserve Bank of New York on the date of computation; (2) five percent a year if the prime rate as published by the Federal Reserve Bank of New York described by Subdivision (1) is less than five percent; or (3) 15 percent a year if the prime rate as published by the Federal Reserve Bank of New York described by Subdivision (1) is more than 15 percent.

b. *Huh? (or, how to find the non-contractual rate without a calculator).* Section 304.003(b) provides a little help in figuring out which non-contractual post-judgment rate applies at any given time. "On the 15th day of each month, the consumer credit commissioner shall determine the postjudgment interest rate to be applied to a money judgment rendered during the succeeding calendar month." TEX. FIN. CODE § 304.003(b). The rate is available online at the Texas Office of Consumer Credit Commissioner site (http://www.occc.state.tx.us/). Click on the "Interest Rates" button on the left side, and check out the list of "Current Rates," which includes the "Judgment Rate" for the current month (http://www.occc.state.tx.us/pages/int_rates/Index.html). Past month's rates also can be viewed in the "Judgment Rate Summary."

c. *How to calculate it.* Post-judgment interest is compounded annually. TEX. FIN. CODE § 304.007.

d. *How much to use for supersedeas bonds.* Eighteen months is a generally accepted period for bonding post-judgment interest. Less or more may be appropriate depending on the circumstances of the case. Under Texas Rule of Appellate Procedure 24.3, the trial court has continuing jurisdiction, even after its plenary power expires, to modify the amount of type of security if circumstances change.

d. *Prejudgment interest.* Prejudgment interest is addressed in sections 304.101 through 304.107 and section 304.201. The rate for prejudgment interest, where applicable, is the same as the rate for post-judgment interest at the time of the judgment. TEX. FIN. CODE § 304.103. However, prejudgment interest is simple and not compound. *Id.* at § 304.104.

Supersedeas

7. Supersedeas Bonds and Post-Judgment Discovery. Attorneys and clients generally expect that, once a supersedeas bond is filed, all efforts to collect on the judgment – including all post-judgment discovery – must cease. However, it is possible for post-judgment discovery to continue even after a bond is posted. *See In re Emeritus Corp.*, 179 S.W.3d 112, 115 (Tex. App.—San Antonio 2005, mand. dism'd[1]). Texas Rule of Civil Procedure 621a authorizes post-judgment discovery for two purposes: (1) to obtain information to aid in enforcing a judgment; and (2) to obtain information relevant to a motion under Texas Rule of Appellate Procedure 24 (formerly rules 47 and 49). *Id.* at 116-17; TEX. R. CIV. P. 621a. Rule 621a expressly states that the first type of post-judgment discovery may be used "so long as said judgment has not been suspended by a supersedeas bond . . . ." This statement is not used in conjunction with the second type. *See* TEX. R. CIV. P. 621a.

The San Antonio Court of Appeals concluded that the absence of the phrase meant that the Texas Supreme Court intended for supersedeas to halt one type of discovery but not the other. *Emeritus*, 179 S.W.3d at 115. The second type of discovery may be pursued even after a supersedeas bond is filed. *Id.* This type includes discovery relating to: (a) a motion about the type and sufficiency of the bond; or (b) a motion to enjoin a judgment debtor from dissipating or transferring its assets to avoid satisfaction of a judgment. *Id.*; TEX. R. CIV.. P. 621a; TEX. R. APP. P. 24.

In *Emeritus*, the judgment creditors filed a motion to enjoin Emeritus from dissipating or transferring its assets to avoid satisfaction of the judgment. 179 S.W.3d at 117. After the injunction was granted, the creditor sought post-judgment discovery to obtain information about Emeritus's ongoing compliance with the injunction. *Id.* The court of appeals determined that this discovery was permissible because it "related to a motion allowed by Rule of Appellate Procedure 24 and [was] for a relevant purpose." *Id.* Although the court did not opine on discovery filed in advance of a Rule 24 motion, there is nothing in the opinion or the rules indicating that such discovery would not be allowed under the same rationale. *See id.* at 115-17. However, the court of appeals' statement that the discovery was permissible both because it related to a motion *and was for a relevant purpose* indicates that the discovery standard should be objective (*e.g.*, to obtain information either relevant or reasonably calculated to lead to the discovery of admissible evidence), not subjective (*e.g.*, the judgment creditor related the request to a Rule 24 motion).

8. Supersedeas Bonds for Privately Held Companies and Individuals.[2] The general requirements by sureties for supersedeas bonds vary depending on whether the judgment debtor is a public company, a privately held company, or an individual. It is advisable to check with an agency or particular surety to determine the applicable requirements. As of the date of this presentation:

[1] After briefing was requested and filed, the parties filed a joint motion to dismiss. Thus, there is briefing available online (http://www.supreme.courts.state.tx.us/ebriefs/FILES/20050726.HTM), but the Texas Supreme Court, in the end, did not issue an opinion on the merits of the mandamus.

[2] Many thanks to Kate Werner (504-581-4277) and Darlene Borndt (504-581-4272) of International Sureties, Inc. (203 Carondelet Street, Suite 500, New Orleans, Louisiana 70130) for their invaluable assistance with this section.

- for publicly traded companies, the financial information needed to decide whether the bond can be issued without collateral generally can be accessed by the agency and surety online. The annual premium ranges from 1%-2% of the amount of the bond, and advance payment requirements vary. Premium rates differ depending upon whether or not collateral is involved, the type of collateral utilized, on whose behalf the bond is required, and the size bond needed.

- for privately held companies, a surety generally will want to review the most current year-end audited financials, plus any interim statements that may be available, to determine if collateral will be required. Often, privately held companies are hesitant to release the information or simply do not have it. Additionally, it is important to note that providing financials does not guarantee that no collateral will be required. Even after the surety reviews adequate financials, it is not unusual for the surety to require collateral valued at 100% of the bond amount. Much depends upon the bond size in relation to the company's financials. Certainly, if no financial information is provided, then 100% collateral likely will be required.

- for individuals, a surety generally requires collateral valued at 100% of the bonded amount to secure the bond. The preferred form of collateral is a letter of credit from a bank approved by the surety, using the surety's required letter of credit form. Providing the insurance/surety agent (or the surety itself) with the name and address of the bank (from which the client proposes to obtain the letter of credit) allows the agent to try and get pre-approval from potential sureties. Because it may take a bank several days to perfect a letter of credit, the bank's turnaround time – as well as the time to obtain a surety – should be factored into the lead time you need to make supersedeas arrangements. The annual premium for individuals generally is 2% of the bond amount, and the surety most likely will require 2 years' advance payment.

Another important factor in determining supersedeas requirements is whether or not a case is insured. If insurance is involved, that may change the surety's underwriting requirements.

Mandamus

9. Mandamus time limits. There is no official deadline for filing a petition for writ of mandamus. *See* TEX. R. APP. P. 52. However, some courts have dispensed with the prejudice prong and look solely at whether any delay was justified. *See, e.g.*, *In re Lexington Ins. Co.*, 2004 WL 210576 (Tex. App.—Houston [14th Dist.] Feb. 2, 2004, mand. denied) (not designated for publication); *In re Wise*, 20 S.W.3d 897 (Tex. App.—Waco 2000, orig. proceeding); *Quanto Int'l Co., Inc. v. Lloyd*, 897 S.W.2d 482 (Tex. App.—Houston [1st Dist.] 1995, orig. proceeding); *International Awards, Inc. v. Medina*, 900 S.W.2d 934 (Tex. App.—Amarillo 1995, orig. proceeding).[3] One court effectively imposes a standard for laches based solely on delay (*i.e.*, the passage of time), without regard for justification or prejudice. *See, e.g.*, *In re Harbrook*, 181 S.W.3d 551 (Tex. App.—El Paso 2005, mand. denied).

[3] *But see In re Hinterlong*, 109 S.W.3d 611 (Tex. App.—Fort Worth 2003, mand. denied) (requiring both unjustified delay and prejudice); *In re Hamel*, 180 S.W.3d 226 (Tex. App.—San Antonio 2003, orig. proceeding); *Sanchez v. Hester*, 911 S.W.2d 173 (Tex. App.—Corpus Christi 1995, mand. overr.).

These cases reflect a misinterpretation of *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366 (Tex. 1993). In *Rivercenter*, the Court focused only on part of the laches standard – unjustified delay – and quoted part of a sentence from an earlier opinion ("'Equity aids the diligent and not those who slumber on their rights'"). 858 S.W.2d at 367. However, in the earlier opinion, the Court made clear that equitable laches applies in full to mandamus proceedings. *Callahan v. Giles*, 137 Tex. 571, 575-76, 155 S.W.2d 793, 795-96 (1941). The Court reasoned, "The maxim that 'Equity aids the diligent and not those who slumber on their rights' is a fundamental principle of equity jurisprudence, resulting in a rule of practice which has made the defense of laches just as complete a bar to the assertion of an equitable right as the defense of limitation is a bar to the assertion of a legal right."

Some courts of appeals have read the partial quote in *Rivercenter* as reflecting an intent to dispense with prejudice and require only unjustified delay. The misinterpretation has led to differing laches standards in different courts of appeals. In addition, it has led to differing laches standards for different types of mandamus. In mandamus proceedings regarding motions to compel arbitration, courts that interpret *Rivercenter* to dispense with the prejudice requirement have nevertheless created a special "arbitration mandamus" laches standard that requires a showing of prejudice. *AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190, 202 (Tex. App.—Houston [14th Dist.] 2003, no pet.); *see also In re Delta Homes, Inc.*, 5 S.W.3d 237, 240 (Tex. App.—Tyler 1999, orig. proceeding) (using same standard).

Until the Texas Supreme Court resolves the issue, unjustified delay (and in El Paso, any delay) remains a possible obstacle to mandamus, regardless of whether prejudice exists.

10. Mandamusable rulings. In the past, mandamus was not an option without a written order. However, it is possible to mandamus an oral ruling if the court's ruling is a clear, specific, and enforceable order that is adequately shown by the record. *In re Bledsoe*, 41 S.W.3d 807, 811 (Tex. App.—Fort Worth 2001, orig. proceeding). The Fort Worth Court of Appeals examined changes to the mandamus rule of procedure and noted that, although the former version expressly required a "certified or sworn copy of the order complained of," the current version allows either "a certified or sworn copy of any order complained of, *or any other document showing the matter complained of*." *Id.* (emphasis original); *compare also* TEX. R. APP. P. 52.3(j)(1)(A); *with* TEX. R. APP. P. 121(a)(2)(C). Although the court did "not encourage parties to file mandamus actions based upon a court's oral pronouncements," the court allowed that mandamus is not precluded if the oral ruling is "clear, specific, and enforceable" and "adequately shown by the record." *Bledsoe*, 41 S.W.3d at 811.

Miscellaneous Issues

11. Odds and ends.

a. Changes to the Federal Rules of Appellate Procedure. Changes to the Federal Rules of Appellate Procedure became effective December 1, 2005. Rules 4, 26, 27, 28, 32, 34, 35, and 45 were changed, and Rule 28.1 was added.

b. Changes to the 5th Circuit's address. Effective April 24, 2006, the 5th Circuit clerk's office mailing address changed to: 600 S. Maestri Place, New Orleans, LA 70130.

c. E-briefs. A requirement that parties submit e-briefs in addition to hard copies is becoming more and more common. Specific standards vary. For example, in the Fifth Circuit, the e-brief must be the only file contained on a diskette, labeled with the case name, docket number, brief title (*i.e.*, Appellant's Brief), and the word processing software and version used to prepare the brief. 5TH CIR. R. 31.1; *see also Guide to Writing a Brief Under Fed. R. App. R. 32; Electronic Filing and Serving of Briefs, etc.*, available at http://www.ca5.uscourts.gov/clerk/docs/guide32.pdf. Moreover, the e-brief must be in searchable PDF form – a document printed and scanned into PDF is not acceptable. 5TH CIR. R. 31.1.

E-briefs are available online for Texas Supreme Court cases where full briefing on the merits is requested. The e-brief library (http://www.supreme.courts.state.tx.us/ebriefs/) can be accessed from the Court's home page. Either click on "Case Information" at the left side of the page, and then click on "Electronic Briefing" on the pull-down menu, or just go directly to the bottom of the page and click on "Electronic Briefing" in the list down there. Cases are stored by docket number, so you will need to know that in order to search the e-brief library. If you don't know the number offhand, you first should do a Case Search on the site. (Either click on "Case Information" at the left side of the page, and then click on "Case Search" on the pull-down menu, or just go directly to the bottom of the page and click on "Case Search" in the list down there.) You can search by party name, court of appeals number (which is available in the caption of any opinion that was issued), or range of dates.

At least one Texas court of appeals – Waco – requests that e-briefs be submitted along with hard copies. 10th DIST. L. R. 12(g). The e-brief may be submitted on CD-ROM or by e-mailing to ebrief@10thcoa@courts.state.tx.us. The court prefers searchable PDF format. The local rule expressly states that electronic filings are not considered in determining whether a brief is timely filed. Not in the local rule are the additional format and certification requirements for your e-brief. For those, go to http://www.10thcoa.courts.state.tx.us/ebriefs/index.asp. This page contains the formatting and labeling requirements, in addition to a link to the form of compliance certificate required.

d. Electronic access to court records. Justice Hecht stated recently at the recent UT Conference on State and Federal Appeals that state rules regarding electronic access to court records are in the works. The Rules Advisory Committee is considering provisions that will balance the interest in open courts with the interests against providing electronic access to Social Security numbers, bank account information, detailed information regarding children, or other data that could assist wrongdoers in criminal activity.

e. Proof of mailing. In state appellate court, a document may be filed by mail if: (1) it is sent to the proper clerk by United States Postal Service first-class, express, registered, or certified mail; (2) it is placed in an envelope or wrapper properly addressed and stamped; (3) it is deposited in the mail on or before the last day for filing; and (4) it is received by the court within ten days after the filing deadline. TEX. R. APP. P. 9.2(b)(1). Though other proof of mailing might be considered, the following are conclusive proof of the date of mailing: (1) a legible postmark affixed by the United States Postal Service; (2) a receipt for registered or certified mail if the receipt is endorsed by the United States Postal Service; or (C) a certificate of

mailing by the United States Postal Service. TEX. R. APP. P. 9.2(b)(2). Although proof is not required to be submitted concurrently with your filing, at least one court of appeals (Tyler) sometimes refuses to file briefs without receiving proof of filing. The court will mark the brief "received" and request that you provide proof of mailing within a certain time period. If proof is provided, it will mark the brief filed and deem it filed timely. The best course of action, therefore, is to have the postmark on the brief affixed by the U.S. Postal Service, not your own mailroom or meter. The U.S. Postal Service postmark is conclusive proof of the date of mailing (TEX. R. APP. P. 9.2(b)(2)(A)), and the court receives it concurrently with your filing.

f. Extensions of time. The Texas Legislature has recently tied budget decisions about the courts of appeals to performance statistics. The standard is to dispose of an appeal within 24 months of its filing. As a result, some courts of appeals, including Dallas, are becoming stricter with regard to extensions of time to file briefs. In a recent appeal, a thirty-day extension of time to file the appellants' brief was requested and received. The extended deadline made the appellee's brief due on December 14. Opposing counsel sought a forty-eight day extension of time to file the appellee's brief, based on counsel's upcoming aneurysm surgery and the holidays. The Dallas Court of Appeals granted the extension, but *sua sponte* reduced it thirty days. So, be aware that a thirty-day extension still is generally acceptable, but that may be it.

g. Oral argument. For the same reasons, some courts of appeals, including Dallas, are becoming stricter with regard to oral argument. Many (though certainly not all) summary judgment appeals are not getting oral argument, even if the issues are complex. However, there are no hard or official rules on what cases will be afforded argument. It may be worthwhile to include in your brief a statement providing the reasons that oral argument would aid the court in your particular case.