BRIEFING OUTSIDE THE RULES: SURREPLY BRIEFS, PRE-SUBMISSION BRIEFS, AND POST-SUBMISSION BRIEFS

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BIOGRAPHICAL INFORMATION

EDUCATION

Rice University: BA 1976

University of Texas School of Law: JD 1979

PROFESSIONAL ACTIVITIES

Alexander Dubose & Jefferson (and related predecessor firms): Partner, 2003-present

Houston Bar Association Appellate Section: Chair 1991-92

State Bar of Texas Appellate Section: Chair 1995-96

Texas Center for Legal Ethics Board of Directors: Current Chair-Elect

American Academy of Appellate Lawyers Board of Directors: Current Treasurer

PUBLICATIONS, ACADEMIC APPOINTMENTS & HONORS

Oral Argument, Texas Appellate Practice Manual, Chapter 16 (2d ed. 1993)
Writing a Persuasive Supreme Court Brief, Texas Supreme Court Practice Manual 2005, Chapter 6 (2005)
Preserving Issues for Appeal, Practitioner's Guide to Civil Appeals in Texas, Chapter 1 (2014)
Appellate Ethics, Practitioner's Guide to Civil Appeals In Texas, Chapter 17 (2014)
The Power of Professionalism: *Civility as a Strategy for Effective Advocacy*, 79 Tex. Bar J. 432 (2016)
Standards of Appellate Conduct: Insight into Their Creation and Purpose, 62 Tex. Bar J. 558 (1999)

University of Houston Law Center: Director of Legal Research & Writing (1987-91); Director of Appellate Advocacy (1990-94); Adjunct Professor of Legal Writing (1982-83, 8687), and Appellate Advocacy (2005-10)

Chief Justice Jack Pope Professionalism Award 2012

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EDUCATION:

University of Houston Law Center, J.D., 1988 (Associate Editor, Houston Law Review)

University of Texas at Austin, B.A. in Government, 1982

PROFESSIONAL:

Terry Jennings – ADR (Independent Arbitrator, Mediator, Appellate Consultant): January 1, 2019 – present

Senior Judge, State of Texas: January 1, 2019 - present

Justice, First Court of Appeals, Texas (Ret.): 2001- 2018

Harris County Assistant District Attorney (Houston): 1990 – 2000

Board Certified in Civil Appellate Law, Texas Board of Legal Specialization, 2009

American Arbitration Association, Panel Member, Rosters of Commercial and Consumer Arbitrators

Certificate in Advanced Arbitration Skills, Commercial Arbitration (International and Domestic), A.A. White Dispute Resolution Center, University of Houston Law Center, 2018

Texas Bar Association (ADR and Appellate Sections); Houston Bar Association (ADR and Appellate Sections); Texas Association of Civil Trial and Appellate Specialists; Life Fellow, Texas Bar Foundation

HONORS:

Appellate Judge of the Year, Texas Association of Civil Trial and Appellate Specialists (all members Board Certified in Civil Trial or Civil Appellate Law), 2009 and 2017

Public Sector Achievement Award, University of Houston Law Alumni Association, 2016

Texas Supreme Court Advisory Committee, “served with distinction” 2003 to 2014 (Texas Rules of Evidence and Texas Rules of Appellate Procedure Subcommittees)

“Houston's Best Appellate Judge,” Houston Press, 2011

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PROFESSIONAL ACTIVITIES

The First Court of Appeals of Texas, Senior Staff Attorney, 2013 – present

Bracewell LLP, Associate, 2010 – 2013

The Supreme Court of Texas, Judicial Law Clerk for the Honorable Wallace B. Jefferson, 2009 – 2010

Houston Bar Association (Appellate Section); Houston Young Lawyers Foundation; Houston Young Lawyers Association (Leadership Academy); Texas Supreme Court Historical Society

PUBLICATIONS, ACADEMIC APPOINTMENTS & HONORS

Warren W. Harris & Lauren N. Eddy, *Appellate Law*, 74 Texas Bar Journal 19, Jan. 2011

Warren W. Harris & Lauren N. Eddy, *Constructing a Petitioner's Brief*, Practice Before the Texas Supreme Court (TexasBarCLE), Apr. 2011

J. Brett Busby, Yvonne Y. Ho & Lauren N. Eddy, *Texas Supreme Court Update*, State Bar of Texas 5th Annual Bill of Rights Course, May 2011

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BRIEFING OUTSIDE THE RULES

I. INTRODUCTION

This paper addresses three categories of briefs that, although not uncommon in Texas appellate practice, are not mentioned anywhere in the Texas Rules of Appellate Procedure. Practitioners differ in assessing the meaning of this omission. Some say that any brief not expressly permitted by the Rules should be strongly discouraged, and filed only with leave of court, upon a showing of good cause and extraordinary circumstances. Others say that any brief that is not expressly prohibited is impliedly permitted, and is an acceptable part of the advocate's arsenal that should be employed to advance the interests of the client. Unfortunately, the Rules provide no explicit guidance about which approach should be followed. Perhaps they should.

There are two potential problems with the lack of guidance regarding these briefs:

- **These briefs can prevent the party with the burden of proof from going first and last.** Our legal system generally gives the party with the burden of proof the right to be heard first and last. *See* TEX. R. CIV. P. 265, 269; TEX. R. APP. P. 38, 53, 55. These outside-the-rules briefs create the possibility of the party without the burden of proof getting the last word, and all the advantages of persuasion that come with that.
- **Disparity of practices regarding these briefs can result in unfair advantage.** Because these briefs are not covered in the rules, practitioners have different perceptions about whether they are appropriate, and, if so, the limits on their use. Advocates who are inclined to push and stretch the limits of the rules will use these briefs aggressively. Courts are reluctant to strike briefs for reasons not clearly specified in the Rules, so they are likely to accept and read these briefs. That gives advocates who make robust use of these briefs an unfair advantage over advocates who attempt to rigorously play by the rules. Thus, this ambiguity seems to reward and punish the wrong kind of conduct.

If the Rules addressed these briefs and established uniform practices for their use, the system would be more transparent, more even-handed, and more fair.

II. APPLICABLE RULES

A. Court of Appeals Briefs

Briefing in the court of appeals is governed by Rule 38. That Rule describes only three briefs.

Rule 38.1 describes the Appellant's Brief.

Rule 38.2 describes the Appellee's Brief, which "should respond to the appellant's issues or points," and can also raise cross-points. TEX. R. APP. P. 38.2.

Rule 38.3 describes the Reply Brief. It provides that an appellant "may file a reply brief," and limits the reply brief to "addressing any matter in the appellee's brief." TEX. R. APP. P. 38.3. If this Rule is followed, there should be no new issues raised in the reply brief. *See McAlester Fuel Co. v. Smith Int'l, Inc.*, 257 S.W.3d 732, 737 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (issue raised for first time in reply brief waived and need not be considered by appellate court). This Rule also provides that "the appellate court may decide the case before a reply brief is filed." TEX. R. APP. P. 38.3. This suggests that the court's consideration of a reply brief is not a matter of right, and further suggests that, if considered, the reply brief should be the end of the briefing process.

B. Petitions for Review in the Supreme Court

Petitions for Review are governed by Rule 53. That Rule describes only three briefs.

Rule 53.2 describes the Petition for Review.

Rule 53.3 describes the Response to Petition for Review, and provides that "the respondent's arguments must be confined to the issues or points presented in the petition or asserted by the respondent in the respondent's statement of issues." TEX. R. APP. P. 53.3(e).

Rule 53.5 describes Petitioner's Reply to Response. It provides that an appellant "may file a reply," and limits the reply to "addressing any matter in the response." TEX. R. APP. P. 53.5. If this Rule is followed, there should be no new issues raised in the reply brief. This Rule also provides that "the Court may consider and decide the case before

a reply brief is filed." *Id.* This suggests that the court's consideration of a reply is not a matter of right, and further suggests that, if considered, the reply should be the end of the briefing process.

C. Briefs on the Merits in the Supreme Court

Briefs on the merits are governed by Rule 55. That Rule describes only three briefs.

Rule 55.2 describes the Petitioner's Brief on the Merits. It provides that "the brief may not raise additional issues or points or change the substance of the issues or points raised in the petition." TEX. R. APP. P. 55.2(f).

Rule 55.3 describes the Respondent's Brief, and provides that "the respondent's arguments must be confined to the issues or points presented in the petition or asserted by the respondent in the respondent's statement of issues." TEX. R. APP. P. 53.3(e).

Rule 55.4 describes Petitioner's Reply to Response. It provides that an appellant "may file a reply brief," and limits the reply brief to "addressing any matter in the brief in response." TEX. R. APP. P. 55.4. If this Rule is followed, there should be no new issues raised in the reply brief. This Rule also provides that "the Court may consider and decide the case before a reply brief is filed." *Id.* This suggests that the court's consideration of a reply is not a matter of right, and further suggests that, if considered, the reply should be the end of the briefing process.

III. APPELLEE'S SUR-REPLY BRIEFS

This discussion primarily is targeted at a brief filed by an Appellee (or Respondent) after the three briefs described in the Rules. Those briefs are often called a "Sur-Reply Brief," but may be called by other names: Appellee's (Respondent's) Reply Brief, Appellee's (Respondent's) Response to Reply Brief, etc. And some cases generate a Sur-Sur-Reply Brief, a Sur-Sur-Sur Reply Brief, etc. as parties go to absurd lengths to get the last word. *See Acadia Healthcare Co. v. Horizon Health Corp.*, 472 S.W.3d 74, 105 (Tex. App.—Fort Worth 2015), *aff'd in part, rev'd in part*, 520 S.W.3d 848 (Tex. 2017) ("We recognize this is a complicated appeal but briefing must end at some point."). This section addresses all of those briefs not included in the first three briefs described in the Rules.

A. Whether to file?

One end of the spectrum*:* Don't file. The Rules carefully describe the briefs that are permitted, and sur-reply briefs are not mentioned. The court must not have intended to receive and read them, or it would have described them in the Rules.

The other end of the spectrum: File. The Rules do not prohibit them, and they were a known practice when the Rules were written. They present another opportunity for advocacy on behalf of the client, and advocates should use every opportunity at their disposal. Plus, the importance of having the last word n the process of persuasion cannot be overstated, so, when possible, why not have the last word?

B. If filed, what to include?

One end of the spectrum*:* Strictly limited to **new** points raised in the Reply Brief that may affect the outcome.

The other end of the spectrum: Respond to everything in the Reply Brief, and add in any new arguments that have occurred to you since the last brief. Everything's fair game.

C. Proposed New Rules

TEX. R. APP. P. 38.4: "Any briefing on the merits after the briefs described in Rules 38.1, 38.2, and 38.3 is strongly discouraged. Additional briefs may be filed only upon leave of court, for good cause shown by the party seeking leave. If leave to file is granted by the court, the additional briefing shall be limited to addressing the point upon which leave to file additional briefing was granted, and not re-argue points previously briefed. These briefs shall not exceed 2,400 words."

TEX. R. APP. P. 53.6: "Any briefing on the merits after the briefs described in Rules 53.2, 53.3, and 53.4 is strongly discouraged. Additional briefs may be filed only upon leave of court, for good cause shown by the party seeking leave. If leave to file is granted by the court, the additional briefing shall be limited to addressing the point upon which leave to file additional briefing was granted, and not re-argue points previously briefed. These briefs shall not exceed 2,400 words."

TEX. R. APP. P. 55.6: "Any briefing on the merits after the briefs described in Rules 55.2, 55.3, and 55.4 is strongly discouraged. Additional briefs may be filed only upon leave of court, for good cause shown by the party seeking leave. If leave to file is granted by the court, the additional briefing shall be limited to addressing the point upon which leave to file additional briefing was granted, and not re-argue points previously briefed. These briefs shall not exceed 2,400 words."

IV. LETTERS OF SUPPLEMENTAL AUTHORITY

This discussion addresses filings that bring to the attention of the court additional relevant authority that has issued, or been discovered, after the close of the briefing and before submission. Sometimes these take the form of a Pre-Submission Brief, or a Supplemental Brief, or more commonly a Letter of Supplemental Authority.

A. Whether to file?

One end of the spectrum: Don't file. The Rules don't mention these afterthought briefs, and the briefing is closed. Advocates can mention newly discovered authorities during oral argument, and if the court wants to it can request a post-submission brief. Trust the court to do its job.

The other end of the spectrum: File whenever the opportunity presents itself. The Rules don't prohibit these important briefs, and it is important that the court get the law right, regardless of when the advocates discovered the controlling authority. To the contrary, the ethical rules require the disclosure of adverse authority. *See Schlafly v. Schlafly*, 33 S.W.3d 863, 873 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (counsel has duty of candor toward court); *see also Ambulatory Infusion Therapy Specialist, Inc. v. N. Am. Adm'rs, Inc.*, 262 S.W.3d 107, 120 n.10 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (by failing to bring to court's attention adverse authority, party knowingly invited court to err). Moreover, if counsel is going to rely on newly discovered authorities in oral argument, it is more fair and efficient for the court and opposing counsel to be apprised of that ahead of time.

B. If filed, what to include?

One end of the spectrum: Limit to significant new authorities issued after the briefing concluded. Provide the citation and, if necessary, a brief mention of which argument the new authority pertains to. But do not include text making an argument based on the new authority, and certainly don't use this brief to reinforce other arguments previously made.

The other end of the spectrum: Anything goes. Include any new authorities, whether decided since the briefing concluded or merely discovered by counsel when preparing for oral argument. Present argument about how the new authority applies to existing argument or creates new arguments. If counsel have an opportunity to be before the court they have a duty to advocate on behalf of their client's position in whatever way possible.

C. When to file?

File as soon as practically possible. Keep in mind that a court may be reviewing a case before the official submission date, especially if a case is being argued.

D. Proposed New Rules

TEX. R. APP. P. 38.45: "Relevant authorities that are issued or discovered after the close of briefing may be brought to the court's attention by way of a brief letter of supplemental authorities. The Letter shall provide the citation of the case, and, if not clearly discernible, the point in previous briefing to which the supplemental authority applies. The letter shall not contain text arguing the merits of the point to which the supplemental authority applies."

TEX. R. APP. P. 53.6: "Relevant authorities that are issued or discovered after the close of briefing may be brought to the court's attention by way of a brief letter of supplemental authorities. The Letter shall provide the citation of the case, and, if not clearly discernible, the point in previous briefing to which the supplemental authority applies. The letter shall not contain text arguing the merits of the point to which the supplemental authority applies."

TEX. R. APP. P. 55.6: "Relevant authorities that are issued or discovered after the close of briefing may be brought to the court's attention by way of a brief letter of supplemental authorities. The Letter shall provide the citation of the case, and, if not clearly discernible, the point in previous briefing to which the supplemental authority applies. The letter shall not contain text arguing the merits of the point to which the supplemental authority applies."

V. POST-SUBMISSION LETTER BRIEFS

This discussion pertains to any briefs filed after oral argument.

A. Whether to file?

One end of the spectrum: Don't file — unless expressly requested by the court. *See, e.g.*, *Fin. Comm'n of Tex. v. Norwood*, 418 S.W.3d 566, 590 (Tex. 2013) (court requested post-submission briefing to address jurisdiction). Counsel had had ample opportunity to make arguments in the briefing allowed by the Rules, and oral argument. Briefing is closed, and the case is submitted. Respect the process.

The other end of the spectrum: File in most cases. After oral argument is the time when most advocates finally have their clearest understanding of the case; why not share that with the court? Plus, most oral arguments provide at least a glimpse of the court's concerns, and this is the advocate's last opportunity to address those.

B. If filed, what to include?

One end of the spectrum: Post-submission briefs should be limited to responding to direct questions presented by the court during oral argument and not covered by prior briefing. *Cf. Black v. Shor*, 443 S.W.3d 170, 174 n.3 (Tex. App.—Corpus Christi 2013, no pet.) (new or additional issues raised in post-submission briefing are untimely and will not be considered by court). Answer questions previously raised as succinctly as possible, and trust the court to do its job.

The other end of the spectrum: Anything goes. Address points raised in oral argument and points that didn't get reached in oral argument, and address them fully. Rephrase arguments previously made with the superior understanding achieved after oral argument. Be an advocate, use the opportunity to do whatever it takes to increase the client's chance of winning.

C. When to file?

File as soon as practically possible. A case is always freshest in everyone's mind immediately after oral argument. *See Standard Fruit & Vegetable Co. v. Johnson*, 985 S.W.2d 62, 65 (Tex. 1998) (party could not wait more than six months and then argue that "justice" required that he be permitted to file post-argument brief (internal quotations omitted)); *see also Shelby Distrib., Inc. v. Reta*, 441 S.W.3d 715, 721 n.3 (Tex. App.—El Paso 2014, no pet.) (permitting post-submission briefing filed "shortly after oral argument").

D. Proposed New Rules

TEX. R. APP. P. 59.7: "(a) Post-submission letter briefs may be requested by the court, either during oral argument or in subsequent written requests. When requested, post-submission briefs should be limited to addressing the matters upon which the court requested additional briefing, as succinctly as possible, and not used as a platform to re-argue the whole case. (b) If not requested by the court, post-submission letter briefs may only be filed upon leave of court, for good cause, to answer specific questions raised by the court during oral argument. The letter shall not be used to address points that did not come up in oral argument, or to re-argue material already addressed in previous briefing or in oral argument. Post-submission letter briefs shall not exceed 2,400 words."