TOP TEN COMPARISONS AND CONTRASTS BETWEEN FEDERAL AND STATE APPEALS

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CHAPTER 12

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Outside the courtroom, Andrew pairs thought leadership with service to the community. He is the publisher of *1910 & Beyond*, a Substack that explores the evolving landscape of appellate litigation in Houston and across the state and country. He is an editor of a leading Texas legal treatise, Bearings' *Texas Civil Litigation*, and is a frequent CLE speaker. He serves the legal community as Immediate Past President of the Federal Bar Association's Southern District of Texas Chapter, Secretary of the Garland R. Walker American Inn of Court, and member of the Texas Bar Foundation's Houston Nominating Committee. A supporter of Houston's fine arts, Andrew is on the Board of Trustees for the Houston Symphony.

Before joining Hicks Johnson, Andrew founded and led the appellate practice at a nationally recognized plaintiffs' firm. Prior to that, he was an award-winning federal appellate prosecutor in the U.S. Attorney's Office for the Southern District of Texas and practiced complex commercial litigation in Washington, D.C. He began his legal career as a law clerk to Judge Raymond M. Kethledge of the U.S. Court of Appeals for the Sixth Circuit and Judge Lee H. Rosenthal of the U.S. District Court for the Southern District of Texas.

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INTRODUCTION

Several years ago, I accepted an offer to create an appellate practice within a leading Texas plaintiffs' firm. A confession: At the time, I knew very little about Texas civil-appellate practice.[2] I was a seasoned *federal* appellate lawyer, having spent the past decade in the federal courts of appeals—and, continuing the candor, mostly litigating criminal appeals in the U.S. Court of Appeals for the Fifth Circuit. But *civil* appeals in Texas *state* court? Well, that was uncharted territory.

My journey into Texas civil-appellate practice began right where you are today: at the Civil Appellate Practice 101 Course. I badly needed a crash course—something to help me understand how the federal and Texas appellate systems compare, and where they diverge. The 101 Course delivered, and then some. I left with the building blocks I needed to translate my federal criminal appellate experience into a civil appellate practice in both Texas state and federal courts.

My goal is to share some of those building blocks with you—but in a slightly different manner. Prior articles, like last year's *Compare and Contrast* article by Tyler Talbert,[3] have offered detailed comparisons of the two systems. What follows is my own "Top Ten List"[4]—with apologies to David Letterman—of what I consider to be the most notable comparisons and contrasts between federal and state appeals.

This (decidedly unfunny) Top Ten List focuses specifically on civil appeals in the Fifth Circuit and the Texas courts of appeals. It does not cover criminal appeals or appeals in the U.S. and Texas Supreme Courts—both topics worthy of their own treatment. With that scope in mind—and with the typical lawyerly caveat that the following discussion is offered at a high level of generality—let's get to it.

And now, drum roll . . .

#10: FINALITY OF JUDGMENT

a. Final Judgment.

When a judgment in trial court is "final," it sounds like it should be straightforward. But like most things in the law, it often is nuanced.

Federal. Dating back to the Judiciary Act of 1789, "the First Congress established the principle that only '*final* judgments and decrees' of the federal district courts" are appealable.[5] That principle remains embedded in 28 U.S.C. § 1291, which "provides that federal courts of appeals 'have jurisdiction of appeals from all *final* decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.'"[6]

As the emphasis shows, the key word is *final*. But what is a "final" decision? As the Fifth Circuit has explained, "[a] final decision is one that 'ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment.'"[7] If a decision "does not end the litigation between" the parties, it is not final.[8]

The Federal Rules of Civil Procedure help identify what constitutes a final decision by requiring federal district courts to enter "[e]very judgment and amended judgment . . . in a separate document" (with certain delineated exceptions).[9] In the typical case, a district court[10] will enter a standalone document—often expressly labeled as a "Final Judgment"—that triggers the notice-of-appeal deadline.

But what happens when a federal district court fails to enter a separate document when one is required? For example, imagine a single-plaintiff/single-defendant case in which a district court enters an opinion granting summary

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1 Many thanks to Vanderbilt University Law School for providing research support for this article.

2 Yes, I did disclose this fact to my future employer before accepting the position.

3 Tyler Talbert, *Spot the Difference: State and Federal Appeals*, STATE BAR OF TEXAS: CIVIL APPELLATE PRACTICE 101 (Sept. 4, 2024).

4 Late Show *Top Ten List*, WIKIPEDIA, available at https://bit.ly/4eZW9OM (last visited Aug. 20, 2025).

5 *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989) (emphasis added).

6 *Id.* (quoting 28 U.S.C. § 1291) (emphasis added).

7 *Vantage Health Plan, Inc. v. Willis-Knighton Med. Ctr.*, 913 F.3d 443, 448 (5th Cir. 2019) (quoting *Dig. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994)).

8 *In re Deepwater Horizon*, 669 F. App'x 704, 705 (5th Cir. 2016) (per curiam).

9 Fed. R. Civ. P. 58(a). Under the exception, standalone documents aren't required for orders disposing of motions "(1) for judgment under Rule 50(b); (2) to amend or make additional findings under Rule 52(b); (3) for attorney's fees under Rule 54; (4) for a new trial, or to alter or amend the judgment, under Rule 59; or (5) for relief under Rule 60." *Id.*

10 Technically, the Clerk of Court enters the judgment (*see* Fed. R. Civ. P. 58(b)), but often the district court itself simply enters the order.

judgment to the defendant on all claims—but fails to enter a separate final judgment as required under Rule 58. Under Rule 58(c)(2), once "150 days have run from the entry" of the order—*i.e.*, the order that should have been followed by a separate document serving as the final judgment—the judgment is deemed final on that date.[11] Federal practitioners thus must be cautious when determining finality, even without the requisite standalone document, because of the jurisdictional deadlines tied to notices of appeals.[12]

State. Texas follows the "final-judgment rule[.]"[13] As in federal courts, "[a] judgment is final for purposes of appeal if it disposes of all pending parties and claims in the record, except as necessary to carry out the decree."[14]

Critically, the Texas Rules of Civil Procedure have no equivalent to Federal Rule 58's requirement that judgments be entered on a separate document. Returning to the prior example, if a Texas trial court grants summary judgment on all claims in a single-plaintiff/single-defendant case, that order itself serves as the final, appealable judgment.

Perhaps because there is no bright-line requirement for a standalone final judgment, Texas law recognizes two ways in which "a judgment issued without a conventional trial is final for purposes of appeal[.]"[15] *First*, does the order "actually dispose[] of all claims and parties then before the court[?]"[16] "Under [this] first method, the appellate court must review the record and determine whether the order in fact disposes of all then-pending claims and parties."[17] If so, "the judgment is final, regardless of its language."[18]

Second, does the order "state[] with unmistakable clarity that it is a final judgment as to all claims and all parties[?]"[19] Under this second method, "the trial court's intent to finally disposes of the case must be unequivocally expressed in the words of the order itself."[20] Although no "magic language" is required, the Texas Supreme Court has provided guidance.[21] For example, "an order stating 'This judgment finally disposes of all parties and all claims and is appealable' would leave no doubt about the court's intention" to enter a final judgment.[22] So, too, is an order stating "'This judgment is final, disposes of all claims and all parties, and is appealable. All relief not granted herein is denied,' even though the order actually left lots of relief not granted."[23] But "an order does not clearly and unequivocally express an intent to enter a final judgment disposing of all claims and parties when it contains only one of these types of statements"—such as "a 'Mother Hubbard clause' stating that 'all relief not granted is denied,'" or a standalone statement that the order is "final" or "appealable."[24]

Moral of the story: Even more than in federal court, Texas appellate practitioners must be especially vigilant in determining whether a final judgment exists. Without the safe harbors of a required standalone judgment or a 150-day grace period, Texas practice leaves less room for error.[25]

b. Partial Final Judgment and Severance.

Federal. Federal practitioners need not always await a final judgment to seek immediate appellate review of an otherwise interlocutory order. Federal Rule of Civil Procedure 54(b) "permits district courts to authorize immediate appeal of dispositive rulings on separate claims in a civil action raising multiple claims": a partial final judgment.[26] The rule "was adopted" "specifically 'to avoid the possible injustice' of 'delaying judgment on a distinctly separate claim pending adjudication of the entire case.'"[27]

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11 Fed. R. Civ. P. 58(c)(2)(B); *see also Ueckert v. Guerra*, 38 F.4th 446, 453 (5th Cir. 2022) ("Rule 4 [of the Federal Rules of Appellate Procedure] says that even if the judgment is not entered on a separate document, judgment is deemed entered 150 days after the 'entry of the judgment or order in the civil docket.'").

12 *See Ueckert*, 38 F.4th at 453.

13 *Industrial Specialists, LLC v. Blanchard Ref'g Co.*, 652 S.W.3d 11, 13 (Tex. 2022) (plurality op.)

14 *Lehmann v Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001).

15 *Interest of C.K.M.*, 709 S.W.3d 613, 616 (Tex. 2025) (per curiam) (quotation marks omitted).

16 *Id.* (quotation marks omitted).

17 *Id.* at 616–17 (quotation marks omitted).

18 *Id.* at 617 (quotation marks omitted).

19 *Id.* at 616 (quotation marks omitted).

20 *Id.* at 617 (quotation marks omitted).

21 *Id.* (quotation marks and alteration omitted).

22 *Id.* at 618 (some quotation marks omitted).

23 *Id.* (some quotation marks omitted).

24 *Id.*

25 *Compare* Fed. R. Civ. P. 58.

26 *Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 410 (2015).

27 *Id.* (quoting Report of Advisory Committee on Proposed Amendments to Rules of Civil Procedure 70 (1946)) (alterations omitted).

There are three requirements for partial final judgment under Rule 54(b) *First*, "either multiple claims for relief or multiple parties must be involved."[28] *Second*, "at least one claim or the rights and liabilities of at least one party must be *finally* decided."[29] If a court's opinion resolves only part of a claim, partial final judgment is inappropriate.[30] And *third*, the district court must certify "that there is no just reason for delay."[31]

As *Wright & Miller* note, "There is no specific procedure for obtaining the certification prescribed in Rule 54(b)."[32] Most often, a party moves for partial final judgment under Rule 54(b), "requesting the court to make the determinations required by the rule."[33] Occasionally, the court will enter the certification sua sponte.[34] In either case, the court's "intention to issue a partial final judgment under Rule 54(b) must be unmistakable."[35] Though obvious, the best way is through a separate document expressly setting forth the partial final judgment.

Federal district courts have broad discretion in granting (or denying) partial final judgment under Rule 54(b); their weighing of the relevant factors "merits substantial deference on review."[36] Still, the U.S. Supreme Court has cautioned that "sound judicial administration does not require that Rule 54(b) requests be granted routinely."[37]

State. Texas Rule of Civil Procedure 41 is the state counterpart, authorizing "trial courts to sever '[a]ny claim against a party."[38] A trial court may grant severance when three requirements are met:

> (1) the controversy involves more than one cause of action, (2) the severed claim is one that would be the proper subject of an independently asserted lawsuit, and (3) the severed claim is not so interwoven with the remaining action that the actions involve the same facts and issues.[39]

"[A]voiding prejudice, doing justice, and increasing convenience are the controlling reasons to allow a severance."[40] Texas trial courts "have broad discretion to sever claims."[41]

The Texas Supreme Court has warned that "severance should not be granted for the purpose of enabling the litigants to obtain an early appellate ruling on the trial court's determination of one phase of the case."[42] And "severance of two or more causes of action involving the same facts and issues is improper."[43]

Even so, Texas trial courts tend to be more liberal in granting severances than federal district courts in granting Rule 54(b) judgments—particularly when presented with an agreed or unopposed motion for severance. Severance is sometimes granted even when the third "interwoven" factor is debatable. The Texas Supreme Court has recently suggested that, "[i]n cases where severance would be procedurally improper, courts should encourage parties to use the permissive appeal option provided by the Legislature" through Section 51.014(d) of the Civil Practice and Remedies Code.[44] If applied faithfully, cases such as *Sealy Emergency Room* may curb questionable severances, even when agreed.

#9: DEADLINE TO FILE NOTICE OF APPEAL

Now that you have an appealable judgment, what is your deadline to file the notice of appeal?

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28 Mary Kay Kane & Adam N. Steinman, 10A FEDERAL PRACTICE & PROCEDURE (WRIGHT & MILLER) § 2660 (4th ed. updated July 2025).

29 *Id.* (emphasis added).

30 *Id.*

31 Fed. R. Civ. P. 54(b). That said, the Fifth Circuit has somewhat relaxed this third requirement: "If the language in the order appealed from, either independently or together with related portions of the record referred to in the order, reflects the district court's unmistakable intent to enter a partial final judgment under Rule 54(b), nothing else is required to make the order appealable. We do not require the judge to mechanically recite the words 'no just reason for delay.'" *Kelly v. Lee's Old Fashioned Hamburgers, Inc.*, 908 F.2d 1218, 1220 (5th Cir. 1990) (en banc).

32 Kane & Steinman, 10A Federal Practice & Procedure § 2660.

33 *Id.*

34 *Id.*

35 *CBX Res., LLC v. ACE Am. Ins. Co.*, 959 F.3d 175, 177 (5th Cir. 2020).

36 *Curtiss-Wright Corp. v. Gen. Elec. Corp.*, 446 U.S. 1, 12 (1980).

37 *Id.* at 11.

38 *Sealy Emergency Room, LLC v. Free Standing Emergency Room Mgrs. of Am., LLC*, 685 S.W.3d 816, 822 (Tex. 2024) (quoting Tex. R. Civ. P. 41).

39 *Id.* (quotation marks omitted).

40 *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 693 (Tex. 2007).

41 *State v. Morello*, 547 S.W.3d 881, 889 (Tex. 2018).

42 *Sealy Emergency Room*, 685 S.W.3d at 823 (quotation marks omitted).

43 *Id.*

44 *State*, 547 S.W.3d at 824.

a. Ordinary Rules.

Federal. In federal court, a notice of appeal generally must be filed in the district court within 30 days after entry of judgment.[45] The exception is when one of the parties is the United States, a federal agency, or a federal officer or employee. In that case, the notice must be filed within 60 days.[46] If another party wishes to appeal (*e.g.*, a cross-appeal), that party "may file a notice of appeal within 14 days after the date when the first notice was [timely] filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later."[47]

The U.S. Supreme Court "has long held that the taking of an appeal within the prescribed time is mandatory and jurisdictional."[48] As a result, a party's failure to file a notice of appeal within the prescribed deadline cannot be "waived or excused unless a provision of law extend[s] the period during which [it] could file the notice."[49]

State. Texas deadlines differ and depend on the type of appeal. Generally, a notice of appeal must be filed in the trial court within 30 days after the judgment is signed.[50] In accelerated appeals—such as statutorily authorized appeals from interlocutory orders[51]—the notice must be filed within 20 days after the judgment is signed.[52] For restricted appeals (where the party did not participate in the hearing resulting in the judgment and did not timely file a postjudgment motion, among other things[53]), the notice must be filed within six months after the judgment is signed.[54] As in federal court, if another party wishes to appeal, that party "may file a notice of appeal within the applicable period [under Rule 26.1] or 14 days after the first filed notice of appeal, whichever is later."[55]

As in federal court, Texas courts treat these deadlines as jurisdictional.[56] They cannot be waived.[57]

b. Post-Judgment Motions.

Federal. Certain timely post-judgment motions extend the notice-of-appeal deadline in federal court. These include motions:

- For judgment under Federal Rule of Civil Procedure 50(b).[58]
- To amend or make additional factual findings under Rule 62(b).[59]
- For attorney's fees under Rule 54 (if the court extends the time to appeal under Rule 58).[60]
- To alter or amend the judgment under Rule 59.[61]
- For a new trial under Rule 59.[62]
- For relief under Rule 60 (if filed within the Rule 59 timeframe).[63]

If such a motion is timely filed, the notice of appeal is due 30 days (or 60 days in cases involving a federal party) from the entry of the order disposing of the motion.[64]

State. In Texas courts, only certain timely post-judgment motions extend the notice-of-appeal deadline:

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45 Fed. R. App. P. 4(a)(1)(A).
46 Fed. R. App. P. 4(a)(1)(B).
47 Fed. R. App. P. 4(a)(3).
48 *Bowles v. Russell*, 551 U.S. 205, 209 (2007) (quotation marks omitted).
49 *Parrish v. United States*, 605 U.S. –, 145 S. Ct. 1664, 1675 (2025) (Jackson, J., concurring in the judgment).
50 Tex. R. App. P. 26.1(a).
51 Tex. R. App. P. 28.1(a).
52 Tex. R. App. P. 26.1(b).
53 Tex. R. App. P. 30.
54 Tex. R. App. P. 26.1(c).
55 Tex. R. App. P. 26.1(d).
56 *Mitschke v. Borromeo*, 645 S.W.3d 251, 260 (Tex. 2022).
57 *Hamilton v. Bell*, No. 03-13-00190-CV, 2013 WL 6805663, at *1 (Tex. App.—Austin Dec. 20, 2013, pet. denied) (mem. op.).
58 Fed. R. App. P. 4(a)(4)(A)(i).
59 Fed. R. App. P. 4(a)(4)(A)(ii).
60 Fed. R. App. P. 4(a)(4)(A)(iii).
61 Fed. R. App. P. 4(a)(4)(A)(iv).
62 Fed. R. App. P. 4(a)(4)(A)(v).
63 Fed. R. App. P. 4(a)(4)(A)(vi).
64 Fed. R. App. P. 4(a)(4)(A).

- A motion for new trial.[65]
- A motion to modify the judgment.[66]
- A motion to reinstate under Texas Rule of Civil Procedure 165a.[67]
- Requests for findings of fact and conclusions of law, if either required by the Texas Rules of Civil Procedure or permissible for appellate consideration.[68]

Unlike in federal court, the extended deadline in Texas runs from the date the judgment is signed—not from the trial court's ruling on the motion.[69] A timely qualifying motion extends the deadline to 90 days after the judgment's signing.[70]

c. Extensions of Time.

Federal. If no notice of appeal is filed by the deadline, the Federal Rules of Appellate Procedure provide a limited avenue for a short extension of time.[71] Under Rule 4(a)(5), a district court may grant a motion to extend the time to file a notice of appeal if: (1) the motion is filed no later than 30 days after the deadline's expiration; and (2) the movant "shows excusable neglect or good cause."[72]

The U.S. Supreme Court has described excusable neglect as "at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission."[73] Those factors include "the danger of prejudice, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith."[74] Notably, the Fifth Circuit considers it "the rare case" in which "misinterpretations of the federal rules"—especially those that are "unambiguous"—"qualify as excusable neglect."[75]

Ultimately, a federal district court's excusable-neglect determination is reviewed for abuse of discretion.[76] But appellate courts accord even more deference to that determination when the district court grants the extension motion.[77]

State. Texas Rule of Appellate Procedure 26.3 provides a similar mechanism but with notable differences. For starters, the deadline for filing a motion to extend the time to file a notice of appeal is 15 days (not 30) after the deadline's expiration.[78]

Next, the movant must file both the notice of appeal in the trial court, as well as a motion complying with Texas Rule of Appellate Procedure 10.5(b)—setting forth the required contents for an extension motion, including the reasons for the extension request[79]—in the appellate court.[80] Even so, the Texas Supreme Court has held that a notice of appeal filed in the trial court within the 15-day extended period implies the requisite motion for extension of time in the appellate court.[81]

Finally, the appellate court—not the trial court—determines whether to grant the extension motion.[82]

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65 Tex. R. App. P. 26.1(a)(1).
66 Tex. R. App. P. 26.1(a)(2).
67 Tex. R. App. P. 26.1(a)(3).
68 Tex. R. App. P. 26.1(a)(4).
69 Indeed, timely filed motions for new trial or to modify, correct, or reform a judgment are automatically overruled by operation by law if they are not ruled upon by written order 75 days after the signing of judgment. Tex. R. Civ. P. 329b(c).
70 Tex. R. App. P. 26.1(a).
71 *See* Fed. R. App. P. 4(a)(5)(C) ("No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.").
72 Fed. R. App. P. 4(a)(5)(A)(i)–(ii).
73 *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993); *see also Halicki v. La. Casino Cruises, Inc.* 151 F.3d 465, 469 (5th Cir. 1998) (extending *Pioneer* to Rule 4(a)(5)).
74 *Stotter v. Univ. of Tex. at San Antonio*, 508 F.3d 812, 820 (5th Cir. 2007) (quoting *Pioneer*, 507 U.S. at 395) (alteration omitted).
75 *Halicki*, 151 F.3d at 470; *but cf. United States ex rel. King v. Univ. of Texas Health Sci. Ctr.-Houston*, 544 F. App'x 490, 493–94 (5th Cir. 2013) (declining to read *Halicki* as holding "that misinterpretation of the rules could never constitute excusable neglect").
76 *Stotter*, 508 F.3d at 820.
77 *Id.*
78 Tex. R. App. P. 26.3.
79 Tex. R. App. P. 10.5(b)(1)–(2).
80 Tex. R. App. P. 26.3.
81 *In Interest of J.Z.P.*, 484 S.W.3d 924, 925 (Tex. 2016) (per curiam).
82 Tex. R. App. P. 26.3.

More so than federal courts, Texas appellate courts liberally grant extension motions.[83] As long as the movant provides "a reasonable explanation" behind the motion, the appellate court must grant it.[84] "In this context, a reasonable explanation includes any plausible statement of circumstances indicating that failure to file within the sixty-day period was not deliberate or intentional, but was the result of inadvertence, mistake or mischance."[85] Misunderstanding the rules, including deadlines, qualifies.[86] This approach reflects the Texas Supreme Court's bedrock principle that "appellate courts should reach the merits of an appeal whenever possible."[87]

#8: WORD LIMITS

Now, to far more straightforward topics—starting with word limits. How long can your briefs and motions be?

a. Briefs.

Federal. In the Fifth Circuit, an appellant's and appellee's principal (*i.e.*, opening and response) briefs are each limited to 13,000 words.[88] An appellant's reply brief is limited to 6,500 words—half the length of a principal brief.[89]

The rules are different if the parties are cross-appealing. Cross-appeals follow a four-step briefing sequence:

- Appellant's Opening Brief: 13,000 words.[90]
- Appellee's Response Brief and Cross-Appellant's Opening Brief: 15,300 words.[91]
- Appellant's Reply Brief and Cross-Appellee's Response Brief: 13,000 words.[92]
- Cross-Appellant's Reply Brief: 6,500 words.[93]

To exceed these limits, the Fifth Circuit requires parties to file a motion for leave no later than 10 days before the brief's deadline.[94]

State. Everything is bigger in Texas, and that includes our briefs! Appellants and appellees each get 15,000 words for their principal briefs,[95] and appellants get 7,500 words for their replies.[96]

Unlike the Federal Rules of Appellate Procedure, the Texas Rules of Appellate Procedure contain no framework for cross-appeals. Instead, parties typically file dueling sets of briefs, subject only to an aggregate briefing limit of 27,000 words per party.[97] I've previously criticized this practice in my *1910 & Beyond* Substack as inefficient and duplicative.[98] At least one court seems to agree: the Fifth Court of Appeals in Dallas has adopted a local rule modeled on Federal Rule 28.1(e), providing for a four-step sequence:

- Appellant's Opening Brief: 15,000 words.[99]
- Appellee's Response Brief and Cross-Appellant's Opening Brief: 30,000 words.[100]
- Appellant's Reply Brief and Cross-Appellee's Response Brief: 22,500 words.[101]
- Cross-Appellant's Reply Brief: 7,500 words.[102]

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83 *See generally Hone v. Hanafin*, 104 S.W.3d 884, 888 (Tex. 2003) (per curiam) (discussing "the liberal standard established by this Court for considering untimely appeals").
84 *Interest of S.V.*, 697 S.W.3d 659, 661 (Tex. 2024).
85 *Id.* (quotation marks omitted).
86 *Id.* at 662.
87 *Id.* (quotation marks omitted).
88 Fed. R. App. P. 32(a)(7)(B)(i).
89 Fed. R. App. P. 32(a)(7)(B)(ii).
90 Fed. R. App. P. 28.1(e)(2)(A)(i).
91 Fed. R. App. P. 28.1(e)(2)(B)(i).
92 Fed. R. App. P. 28.1(e)(2)(A)(i).
93 Fed. R. App. P. 28.1(e)(2)(C).
94 5th Cir. R. 32.4.
95 Tex. R. App. P. 9.4(i)(2)(B).
96 Tex. R. App. P. 9.4(i)(2)(C).
97 Tex. R. App. P. 9.4(i)(2)(B).
98 Andrew Gould, *25-03: Apparently Not the Revenue Stream*, 1910 & BEYOND (June 24, 2025), *available at* https://bit.ly/3Hod413 (last visited Aug. 20, 2025).
99 5COA R. 5(b)(1).
100 5COA R. 5(b)(2).
101 5COA R. 5(b)(3).
102 5COA L.R. 5(b)(4).

I'd welcome a similar amendment to the Texas Rules of Appellate Procedure. Until then, plan for dueling sets of briefs unless you're in the Fifth Court.

Finally, unlike the Fifth Circuit's local rules, the Texas Rules of Appellate Procedure have no deadline for moving to exceed the word limits.[103] In theory, you could file an overlength brief and the corresponding motion for leave at the same time.

b. Motions.

Federal. The Federal Rules of Appellate Procedure limit motions to 5,200 words.[104] Responses have the same 5,200-word limit,[105] while replies are capped at 2,600 words.[106]

State. Also unlike the federal rules, the Texas Rules of Appellate Procedure impose no word limits for motions filed in the appellate courts.[107] Even so, I try to keep my motions (like my briefs) as concise as possible.

#7: SUPPLEMENTAL BRIEFS

After the parties have filed their opening, response, and reply briefs, what if one party wants to file additional briefing—such as a surreply brief?

Federal. The Federal Rules of Appellate Procedure do not permit supplemental briefs without leave of court.[108] In practice, the Fifth Circuit is reluctant to allow them unless truly necessary. Instead, as the Fifth Circuit's local rules explain, "there are some occasions, particularly after a case is orally argued or submitted on the summary calendar, where the court will call for supplemental briefs on particular issues."[109]

But the federal rules do provide a streamlined way to cite "intervening decisions or new developments" after briefing is complete: a Rule 28(j) letter.[110] Under Federal Rule of Appellate Procedure 28(j), "[i]f pertinent and significant authorities come to a party's attention after the party's brief has been filed—or after oral argument but before decision—a party may promptly advise the circuit court by letter[.]"[111] This letter, limited to 350 words, "must state the reasons for the supplemental citations, referring either to the page of the brief or to the point argued orally."[112]

The opposing party may file a responsive letter, also limited to 350 words.[113] There is no deadline for this response, other than that it should be filed "promptly[.]"[114] Rule 28(j) does not provide for a reply letter (which, again, the Fifth Circuit doesn't want).[115]

State. Texas practice is less rigid. Texas Rule of Appellate Procedure 38.7 states that "a brief may be amended *or supplemented* whenever justice requires, on whatever reasonable terms the court may prescribe."[116] This rule thus seemingly covers supplemental briefs—*i.e.*, the briefs beyond those regular ones prescribed by rule. And caselaw supports the view that a party seeking to file a supplemental brief (including a surreply brief[117]) must first seek leave of court.[118]

But is this actually a rule? I find that questionable. In practice, parties in Texas appellate courts often file supplemental briefs without seeking leave—and the courts rarely object.[119] So what is a litigant to do if it wants to file

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103 *See* Tex. R. App. P. 9.4(i)(4) (permitting motions to exceed but not setting deadline).

104 Fed. R. App. P. 27(d)(2)(A).

105 *Id.*

106 Fed. R. App. P. 27(d)(2)(C).

107 *See generally* Tex. R. App. P. 9.4(i), 10.

108 5th Cir. R. 28.4.

109 *Id.*

110 *Id.*

111 Fed. R. App. P. 28(j).

112 *Id.*

113 *Id.*

114 *Id.*

115 *See id.*

116 Tex. R. App. P. 38.7 (emphasis added).

117 *In re Jordan Foster Constr., LLC*, No. 08-22-00201-CV, 2023 WL 2366610, at *7 (Tex. App.—El Paso Mar. 6, 2023, orig. proceeding); *In re KFC USA, Inc.*, No. 05-98-01116-CV, 1998 WL 427284, at *1 (Tex. App.—Dallas July 30, 1998, orig. proceeding) (not designated for publication).

118 *E.g.*, *Standard Fruit & Vegetable Co. v. Johnson*, 985 S.W.2d 62, 65 (Tex. 1998); *Khan v. Chaudhry*, No. 09-14-00479-CV, 2016 WL 1158734, at *2 (Tex. App.—Beaumont Mar. 24, 2016, pet. denied) (mem. op.).

119 In fact, I remember one appeal where the opposing party filed a surreply brief without seeking leave of court. I moved to strike the brief, noting that the Texas Rules of Appellate Procedure didn't allow for surreply briefs and that the brief seemed nothing more than an attempt to gain the last word. The court summarily denied the motion, thus allowing the surreply brief.

a supplemental brief? The safest course is to request leave under Rule 38.7. But some practitioners simply file the supplemental brief and address any challenge only if it arises.

#6: AMICUS BRIEFS

The rules governing amicus briefs differ sharply between the federal and Texas systems.

Federal. As Justice Evan Young recently noted, federal appellate courts "rigidly limit amicus briefing."[120] Unless the amicus is the United States (or a federal agency or officer) or a State, it must either obtain the consent of all parties or secure leave of court to file.[121] A motion for leave must state the amicus's interest, explain why the "amicus brief is desirable[,]" and show how "the matters asserted are relevant" to the case's resolution.[122] The proposed brief must also accompany the motion.[123] Although federal appellate courts generally grant leave, they may prohibit or strike the brief if it would cause "a judge's disqualification."[124]

Absent leave of court, the amicus brief must be filed within seven days after the principal brief of the party being supported—or, if supporting neither party, within seven days after the appellant's brief.[125] An amicus brief is limited to half the length of the supported party's principal brief (usually 6,500 words).[126] The rules also specify required contents, including a financial disclosure.[127] And there are still further rules governing amicus briefs on rehearing, including the deadline and length.[128]

State. By contrast, Texas Rule of Appellate Procedure 11 imposes few requirements for amicus briefs.[129] As Justice Young summarizes:

> Amicus briefs require no motion and have and have no deadlines. They are welcome any time . . . . An amicus may submit additional briefing as the case proceeds. Briefs may be as lengthy as those the parties file or as short as a postcard, reflecting how flexibly we view the requirement that an amicus brief "comply with the briefing rules for parties." Tex. R. App. P. 11(a). The only other formal requirements relate to disclosure and service. *Id.* R. 11(b)–(d).[130]

In short, while federal courts tightly regulate amicus filings—requiring careful coordination to meet deadlines—Texas courts are "exceedingly generous about hearing from amici."[131]

#5: TYPES OF OPINIONS

Appellate practitioners often use the terms "published" and "unpublished" opinions. But what do they actually mean in federal and Texas appellate courts?

Federal. Federal appellate courts distinguish between published and unpublished opinions, which determine their precedential value. All opinions issued before January 1, 1996—published or unpublished—are precedential.[132] After that date, only published opinions have precedential value.[133] Unpublished opinions may be cited "as persuasive authority[,]" but they are not binding.[134]

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120 *Perez v. City of San Antonio*, 711 S.W.3d 204, 205 (Tex. 2024) (Young, J., respecting denial of motion for participation at oral argument).

121 Fed. R. App. P. 29(a)(2).

122 Fed. R. App. P. 29(a)(3).

123 *Id.*

124 Fed. R. App. P. 29(a)(2).

125 Fed. R. App. P. 29(a)(6).

126 Fed. R. App. P. 29(a)(5).

127 Fed. R. App. P. 29(a)(4).

128 Fed. R. App. P. 29(b).

129 Tex. R. App. P. 11.

130 *Perez*, 711 S.W.3d at 205.

131 *Id.*

132 5th Cir. R. 47.5.

133 *See id.*

134 *Rex Real Estate I, LP v. Rex Real Estate Exch., Inc.*, 80 F.4th 607, 616 n.1 (5th Cir. 2023). In my experience, federal district courts within the Fifth Circuit are likelier to give extra weight to unpublished opinions—understandable, since those opinions express the views of three Fifth Circuit judges. But the Fifth Circuit itself won't hesitate to disregard unpublished opinions it otherwise disagrees with. *E.g.*, *Cascabel Cattle Co., L.L.C. v. United States*, 955 F.3d 445, 450 (5th Cir. 2020).

Fifth Circuit Rule 47.5.1 sets out the criteria for the publication determination. An opinion that "merely decide[s] particular cases on the basis of well-settled principles of law" is typically unpublished.[135] By contrast, an opinion should be published, for example, if it:

- "[a]pplies an established rule of law to facts significantly different from those in previous published opinions applying the rule";[136]
- "[c]reates or resolves" an intra-circuit or inter-circuit conflict;[137] *or*
- "[c]oncerns or discusses a factual or legal issue of significant public interest[.]"[138]

All panel members must agree to designate an opinion as unpublished.[139] But any party may move for publication of an unpublished opinion—and any Fifth Circuit judge may make a similar request.[140] The opinion will be published if all three panel members agree.[141]

State. Although the Texas Rules of Appellate Procedure differentiate between opinions and memorandum opinions,[142] they no longer allow "unpublished opinions" in civil cases.[143] Instead, "[a]ll opinions and memorandum opinions issued in civil cases from 2003 onward have precedential value."[144]

Civil opinions issued before January 1, 2003 designated as "unpublished" may still be cited. But as in federal courts, they serve only as persuasive—not binding—authority.[145]

#4: PANEL AND EN BANC PANEL REHEARING

The panel has issued its opinion, and you disagree with the result. Both federal and Texas appellate courts allow rehearing requests, whether by the panel or the full en banc court.

Federal. Federal Rule of Appellate Procedure 40 allows parties to seek rehearing through a petition for panel rehearing, petition for en banc rehearing, or both.[146] "Unless a local rule provides otherwise," both requests must be combined into a single petition.[147] The Fifth Circuit is an exception: Under Rule 40, a party seeking both both panel and en banc must file separate petitions.[148]

"A petition for [panel] rehearing"—which is presented solely to the panel members—"is intended to bring to the attention of the panel claimed errors of fact or law in the opinion."[149] It is not a vehicle "for reargument of the issue previously presented or to attack the court's well-settled summary calendar procedures."[150]

A petition for rehearing en banc "is an extraordinary procedure"—and, in the Fifth Circuit's words, "the most abused prerogative of appellate advocates in the Fifth Circuit."[151] It "is intended to bring to the attention of the entire court an error of exceptional public importance or an opinion that directly conflicts with Supreme Court, Fifth Circuit,

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135 5th Cir. R. 47.5.1.
136 5th Cir. R. 47.5.1(b).
137 5th Cir. R. 47.5.1(d).
138 5th Cir. R. 47.5.1(e).
139 5th Cir. R. 47.5.2.
140 *Id.*
141 *Id.*
142 Tex. R. App. P. 47.2(a), 47.4. The criteria for designating an opinion as a "memorandum opinion" are similar to the federal criteria for designating an opinion as published. *Compare* Tex. R. App. P. 47.4, *with* 5th Cir. R. 47.5.1.
143 Tex. R. App. P. 47.2(c), 47.7(b).
144 *Cherian v. Berkley Court Condo. Owners Ass'n, Inc.*, No. 14-23-00697-CV, 2025 WL 454222, at *3 n.3 (Tex. App.—Houston [14th Dist.] Feb. 11, 2025, no pet. h.) (mem. op.) (citing Tex. R. App. P. 47.7(b); Tex. R. App. P. 47.7 cmt.). Despite the long-changed rule, some appellate courts continue to mistakenly cling to the prior distinction. *E.g.*, *Vela v. Salas*, No. 13-20-00424-CV, 2022 WL 2976444, at *4 (Tex. App.—Corpus Christi–Edinburg July 28, 2022, pet. denied) (mem. op.).
145 *Bandas Law Firm, P.C. v. Modjarrad & Associates, P.C.,* No. 05-23-01115-CV, 2025 WL 1208686, at *6 (Tex. App.—Dallas Apr. 25, 2025, no pet. h.) (mem. op.); *Baleares Link Exp., S.L. v. GE Engine Services-Dallas, LP*, 335 S.W.3d 833, 838 (Tex. App.—Dallas 2011, no pet.).
146 Fed. R. App. P. 40(a).
147 *Id.* (emphases added).
148 5th Cir. R. 40.1.
149 5th Cir. R. 40.1.2.
150 *Id.* (emphasis in original).
151 5th Cir. I.O.P. 40.

or state law precedent[.]"[152] Alleged factual errors or routine misapplications of settled law to facts "are generally matters for panel rehearing but not for rehearing en banc."[153]

The Fifth Circuit Internal Operating Procedures outline the en banc process within the court.[154] The first step is the petition's submission to the panel itself. The panel has initial "control" of the petition: It may treat the petition as one for panel rehearing, and issue a new opinion granting or denying rehearing.[155]

Rehearing petitions—whether panel or en banc—are generally due 14 days after the opinion's issuance (45 days if a federal party is involved).[156] They are limited to 3,900 words.[157] No response may be filed unless ordered by the court.[158]

State. Texas practice is similar. A petition for panel rehearing is called a "motion for rehearing,"[159] and an en banc petition is called a "motion for en banc reconsideration."[160] Though the Texas Rules of Appellate Procedure do not contain any explanation of the differences between the two motions, the functional distinctions are the same: Rehearing motions address panel-level errors, while en banc motions address exceptional errors warranting full court review. As in the Fifth Circuit, the two motions must be filed separately, not in a combined motion.[161]

Also as in the Fifth Circuit, "[e]n banc consideration of a case is not favored[.]"[162] It will only be ordered when "necessary to secure or maintain uniformity of the court's decisions or [when] extraordinary circumstances require en banc consideration."[163] Some courts of appeals—including the First and Fourteenth Courts of Appeals in Houston—follow the Fifth Circuit practice of circulating en banc motions first to the panel, which may treat the motion as one for rehearing.[164]

As a practical matter, en banc motions are most viable in courts with a large bench—for example, the First, Fifth, and Fourteenth Courts. But they make less sense (at least as compared to a simple motion for rehearing) in courts with a smaller bench—especially those with only three or four Justices (the Sixth through Twelfth Courts, and the current Fifteenth Court).

Rehearing or en banc motions are due within 15 days of the opinion's issuance.[165] They are limited to 4,500 words.[166] And as in federal court, no response may be filed unless requested by the court.[167]

#3: INTERLOCUTORY APPEALS AS OF RIGHT

This paper began with the general rule for appealability: the final-judgment rule. But certain interlocutory orders are immediately appealable as of right.

Federal. Federal courts recognize "rare statutory exception[s]" to the final-judgment rule.[168] The most familiar is 28 U.S.C. § 1292(a)(1), which authorizes immediate appeals from orders granting, continuing, modifying, refusing, or dissolving injunctions (or refusing to dissolve or modify them).[169] Another common exception is 9 U.S.C. § 16(a) of the Federal Arbitration Act, which allows immediate appeal from the denial of a motion to compel arbitration.[170] Other statutory exceptions cover orders involving receiverships[171] and admiralty cases.[172]

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152 *Id.*
153 *Id.*
154 *Id.*
155 *Id.*; *see also, e.g.*, *Missouri v. Biden*, No. 24-30252, 2025 WL 342855, at *1 (5th Cir. Jan. 30, 2025) (per curiam); *Edwards v. 4JLJ, L.L.C.*, 976 F.3d 463, 464 (5th Cir. 2020).
156 Fed. R. App. P. 40(d)(1).
157 Fed. R. App. P. 40(d)(3).
158 Fed. R. App. P. 40(d)(4).
159 Tex. R. App. P. 49.1.
160 Tex. R. App. P. 49.5.
161 *Id.* In my experience, this requirement is unevenly enforced.
162 Tex. R. App. P. 41.2(c).
163 *Id.*
164 General Operating Procedures of the Court of Appeals for the First District of Texas (Mar. 21, 2023), *available at* https://bit.ly/4fHYLRu (last visited Aug. 20, 2025); Internal Operating Procedures of the Fourteenth Court of Appeals (Feb. 1, 2023), *available at* https://bit.ly/4fIV3ad (last visited Aug. 20, 2025).
165 Tex. R. App. P. 49.1, 49.5.
166 Tex. R. App. P. 9.4(i)(2)(D).
167 Tex. R. App. P. 49.2, 49.5.
168 *Coinbase, Inc. v. Bielski*, 599 U.S. 736, 740 (2023).
169 28 U.S.C. § 1291(a)(1).
170 *Coinbase*, 599 U.S. at 740.
171 28 U.S.C. § 1292(a)(2).
172 *Id.* § 1292(a)(3).

Another "common" exception—criticized by one Fifth Circuit judge as "atextual"[173]—is the collateral-order doctrine. "This exception considers as final judgments, even though they do not end the litigation on the merits, decisions which finally determine claims of right separate from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate jurisdiction be deferred until the whole case is adjudicated."[174] "To fall within the limited class of final collateral orders, an order must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment."[175]

A narrow category of cases meets this test—most often denials of qualified or official immunity.[176] These orders are immediately appealable as of right.

State. Unlike federal courts, "[l]imiting appeals to final judgments can no longer be said to be the general rule" in Texas.[177] Historically, statutory exceptions to the final-judgment rule were rare.[178] But today, Section 51.014 of the Civil Practice and Remedies Code allows interlocutory appeals as of right from 17 categories of orders:

- Appointing or refusing to vacate a receiver or trustee.[179]
- Overruling a motion to vacate an order that appoints a receiver or trustee.[180]
- Certifying or refusing to certify a class in a suit under Texas Rule of Civil Procedure 42.[181]
- Granting or refusing a temporary injunction, or granting or overruling a motion to dissolve a temporary injunction.[182]
- Denying a summary-judgment motion based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state.[183]
- Denying a motion for summary judgment based in whole or in part on a claim against or defense by a member of the electronic or print media, acting in such capacity, or a person whose communication appears in or is published by the electronic or print media, arising under the Free Speech or Free Press Clause of the U.S. Constitution's First Amendment; Article I, Section 8 of the Texas Constitution; or Chapter 73.[184]
- Granting or denying a defendant's special appearance under Texas Rule of Civil Procedure 120a, except in a suit brought under the Family Code.[185]
- Granting or denying a plea to the jurisdiction by a governmental unit.[186]
- Denying all or part of the relief sought by a motion under Section 74.351(b) of the Texas Medical Liability Act, except that an appeal may not be taken from an order granting an extension under Section 74.351.[187]
- Granting relief sought by a motion under Section 74.351(1) of the Texas Medical Liability Act.[188]
- Denying a motion to dismiss under Section 90.007 (involving claims arising from asbestos- or silica-related injuries).[189]
- Denying a motion to dismiss under Section 27.003 of the Texas Citizens Participation Act.[190]
- Denying a summary-judgment motion filed by an electric utility regarding liability in a suit subject to Section 75.0022.[191]

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173 *Heidi Grp., Inc v. Tex. Health & Human Servs. Com'n*, 138 F.4th 920, 928 n.5 (5th Cir. 2025) (Oldham, J.).
174 *Midland Asphalt Corp.*, 489 U.S. at 798 (quotation marks omitted).
175 *Id.* at 799 (quotation marks omitted).
176 *See, e.g.*, *Heidi Grp.*, 138 F.4th at 928 & n.5; *In re Deepwater Horizon*, 793 F.3d 479, 484–85 (5th Cir. 2015); *see also generally* Edward H. Cooper, 15A FEDERAL PRACTICE & PROCEDURE (WRIGHT & MILLER) § 3911 (3d ed. updated 2025) ("Collateral Orders").
177 *Dallas Symphony Ass'n, Inc. v. Reyes*, 571 S.W.3d 753, 759 (Tex. 2019).
178 *Id.* at 758.
179 Tex. Civ. Prac. & Rem. Code § 51.014(a)(1)–(2).
180 *Id.* § 51.014(a)(2).
181 *Id.* § 51.014(a)(3).
182 *Id.* § 51.014(a)(4).
183 *Id.* § 51.014(a)(5).
184 *Id.* § 51.014(a)(6).
185 *Id.* § 51.014(a)(7).
186 *Id.* § 51.014(a)(8).
187 *Id.* § 51.014(a)(9).
188 *Id.* § 51.014(a)(10).
189 *Id.* § 51.014(a)(11).
190 *Id.* § 51.014(a)(12).
191 *Id.* § 51.014(a)(13).

- Denying a motion filed by a municipality in a population of 500,00 or more in an action filed under Local Government Code Sections 54.012(6) or 214.0012.[192]
- Making a preliminary determination on a claim under Section 74.353 of the Texas Medical Liability Act.[193]
- Overruling an objection filed under Section 148.003(d) of the Pandemic Liability Protection Act, or denies all or part of the relief sought by a motion under Section 148.003(f).[194]
- Granting or denying a summary-judgment motion filed by a highway or road contractor under Section 97.002.[195]

Like the Federal Arbitration Act, Section 171.098 of the Texas Arbitration Act authorizes immediate appeals from certain arbitration-related orders, including the denials of motions to compel arbitration.[196]

But although Texas law is more generous in allowing interlocutory appeals, it has not recognized the collateral-order doctrine.[197] As the Texas Supreme Court explained in *In re Academy, Ltd.*, the collateral-order is "a creature of *federal* procedural law that allows immediate appeal of nonfinal orders in very narrow circumstances[.]"[198] The doctrine thus does not provide an "exception to the requirement that only a final judgment is appealable" absent statutory authorization.[199] Even so, as cases like *Academy* show, even when statutory appeal is unavailable, a mandamus petition may offer a path to immediate review.[200]

#2: PERMISSIVE INTERLOCUTORY APPEALS

But before jumping to mandamus petitions, there's one more option—and often overlooked—for immediate appellate review: a permissive appeal.

Federal. Congress enacted the Interlocutory Appeals Act of 1958 "to meet the recognized need for prompt review of certain nonfinal orders."[201] Under 28 U.S.C. § 1292(b), there is a three-step process.[202]

District-court certification. The district court must certify that the order "[1] involves a controlling question of law as to which there is a substantial ground for difference of opinion and [3] that an immediate appeal from the order may materially advance the ultimate termination of the litigation[.]"[203] Certification may be granted on motion[204] or sua sponte.[205]

"A controlling question must be one of law—not fact—and its resolution must materially affect the outcome of litigation in the district court."[206] Typical examples include "whether a claim exists as a matter of law, whether a defense that will defeat the claim is available, and questions as to subject-matter jurisdiction, proper venue, personal jurisdiction, and standing to maintain the action."[207] By contrast, "a question is not controlling just because its answer would complicate a litigant's ability to make its case" or "because our answer could save the parties from a post-judgment appeal."[208]

Petition to the court of appeals. Once the district court issues a Section 1292(b) order, the would-be appellant has ten days to petition the federal circuit court to allow the appeal.[209] The petitioner "has the burden of persuading the court of appeals that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment."[210]

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192 *Id.* § 51.014(a)(14).
193 *Id.* § 51.014(a)(15).
194 *Id.* § 51.014(a)(16).
195 *Id.* § 51.014(a)(17).
196 *Id.* § 171.098(a).
197 *Permian Corp. v. Davis*, 610 S.W.2d 236, 238 (Tex. App.—El Paso 1980, writ ref'd).
198 625 S.W.3d 19, 34 (Tex. 2021) (orig. proceeding) (emphasis added).
199 *Permian Corp.*, 610 S.W.2d at 238.
200 *See, e.g.*, 625 S.W.3d at 36 (granting mandamus petition for challenge to denial of motion for summary judgment).
201 *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 474 (1978).
202 Though beyond the scope of this paper, Federal Rule of Civil Procedure 23(f) provides a similar (but also different) mechanism for obtaining immediate appealability of an order granting or denying class-action certification.
203 28 U.S.C. § 1292(b).
204 *Silverthorne Seismic LLC v. Sterling Seismic Servs., Ltd.*, 125 F.4th 593, 597 (5th Cir. 2025).
205 *Swales v. KLLM Transport Servs., LLC*, 985 F.3d 430, 439 (5th Cir. 2021).
206 *Silverthorne Seismic*, 125 F.4th at 598 (quotation marks omitted).
207 *Id.* at 598–99 (quotation marks omitted).
208 *Id.* at 599 (quotation marks omitted).
209 28 U.S.C. § 1292(b).
210 *Coopers & Lybrand*, 437 U.S. at 475 (quotation marks omitted).

Under Federal Rule of Appellate Procedure 5, the petition is limited to 5,200 words.[211] The opposing party may file an answer in opposition (or a cross-petition)—also limited to 5,200 words[212]—within ten days of the petition.[213] There is no provision for a reply.[214]

Court of appeals' determination. Upon reviewing the petition and answer, the federal circuit court has "unfettered discretion" to determine whether to grant or deny the petition.[215] If the petition is granted, the interlocutory appeal proceeds.[216]

Even when the petition is granted, "[t]he merits panel that ultimately reviews the appeal has an independent obligation to ensure that jurisdiction exists"[217]—hence the dismissal of the appeal in *Silverthorne Seismic*.[218] But when jurisdiction exists, the appeal "is not limited to the certified controlling question[.]"[219] That is because "[u]nder § 1292(b), it is the order, not the question, that is appealable."[220] The federal circuit court thus "may address any issue fairly included in the certified order[.]"[221]

State. Section 51.014(d) of the Civil Practice and Remedies Code is the state counterpart to Section 1292(b). It allows a trial court—on motion or sua sponte—to permit an appeal from a nonfinal order if: "(1) the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion; and (2) an immediate appeal may materially advance the ultimate termination of the litigation."[222]

Like federal appellate courts, Texas appellate courts "strictly construe" Section 51.014(d).[223] Even so, the Texas Supreme Court has "encourage[d]" the use of permissive appeals: "In cases where severance would be procedurally improper, courts should encourage parties to use the permissive appeal option provided by the Legislature."[224]

The process for obtaining a permissive appeal follows a similar three-step sequence:

Trial court certification. Whether on motion or its own initiative, the trial court issues a Section 51.014(d) order. The Dallas Court of Appeals has cautioned that "broad and conclusory language" in this order "is insufficient" to meet the statute's requirements.[225]

Application to court of appeals. Within 15 days of the order, the would-be appellant must file in the appellate court "an application for interlocutory appeal explaining why an appeal is warranted under Subsection (d)."[226] Texas Rule of Appellate Procedure 28.3(e) provides what must be in the application—chief among them a "clear[] and concise" argument why the order meets the Section 51.014(d) requirements.[227] Here again, "broad and conclusory language . . . is insufficient[.]"[228] The petition is limited to 4,500 words.[229]

The opposing party may then file a response (or cross-petition)—also limited to 4,500 words[230]—within ten days of the petition.[231] Unlike Federal Rule of Appellate Procedure 5, the petitioner may file a reply—limited to 2,400 words—within seven days of the response.[232]

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211 Fed. R. App. P. 5(c)(1).
212 *Id.*
213 Fed. R. App. P. 5(b)(2).
214 *See* Fed. R. App. P. 5.
215 *Microsoft Corp. v. Baker*, 582 U.S. 23, 31 (2017).
216 *See* Fed. R. App. P. 5(d).
217 *Jackson v. City of Houston*, 143 F.4th 640, 644 (5th Cir. 2025).
218 *Silverthorne Seismic*, 125 F.4th at 598.
219 *Jackson*, 143 F.4th at 644.
220 *Id.* quotation marks omitted).
221 *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996).
222 Tex. Civ. Prac. & Rem. Code § 51.014(d).
223 *State v. LBJ/Brookhaven Inv'rs, L.P.*, No. 05-25-00525-CV, 2025 WL 1594380, at *3 (Tex. App.—Dallas June 5, 2025, no pet. h.) (mem. op.).
224 *Sealy Emergency Room*, 685 S.W.3d at 824.
225 *State*, 2025 WL 1594380, at *3.
226 Tex. Civ. Prac. & Rem. Code § 51.014(f); Tex. R. App. P. 28.3(c).
227 Tex. R. App. P. 28.3(e)(4).
228 *State*, 2025 WL 1594380, at *3.
229 Tex. R. App. P. 28.3(g).
230 *Id.*
231 Tex. R. App. P. 28.3(f)–(g).
232 *Id.*

Court of appeals' determination. Finally, the appellate court must exercise its discretion to determine whether to grant or deny the application. Even when the Section 51.014(d) "requirements are met, the appellate court must still agree to hear the appeal."[233] If the application is granted, the interlocutory appeal proceeds as an accelerated appeal.[234]

But "[i]f a court of appeals does not accept an appeal, it must state the specific reason for finding that the appeal is not warranted under the statute."[235] The Texas Supreme Court reviews denials de novo, "direct[ing] the court of appeals to accept the appeal" if it concludes that the Section 51.014(d) requirements "are satisfied[.]"[236]

#1: MANDAMUS

Finally, my number-one difference between federal and state appeals: petitions for writs of mandamus.

Federal. The Fifth Circuit has described mandamus as "a drastic and extraordinary remedy reserved for really extraordinary cases."[237] To obtain mandamus relief, a petitioner must meet three conditions.[238]

First, the petitioner must "have no other adequate means to attain the relief he desires[.]"[239] The inquiry here is whether "there is no other avenue for petitioners to seek recourse for the erroneous [ ] decision."[240] This condition is "designed to ensure that the writ will not be used as a substitute for the regular appeals process[.]"[241]

Second, the petitioner must show a "clear and indisputable" right to issuance of the writ.[242] "Satisfying this condition requires more than showing that the district court misinterpreted the law, misapplied it to the facts, or otherwise engaged in an abuse of discretion."[243] "The petitioner must show not only that the district court erred but that it *clearly and indisputably erred*."[244]

Accordingly, "even when the district court erred[,]" an appellate court "may deny the writ as a matter of prudence[.]"[245] "Such prudential denials involve a district court's mistaken resolution of a novel or thorny question of law."[246] "These types of mistakes, made under difficult circumstances," do not necessarily constitute *clear and indisputable* error.[247]

And *third*, "the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances."[248] Given their "supervisory [] nature[,]" writs of mandamus "are particularly appropriate when the issues also have an importance beyond the immediate case."[249] That is often the case when the decision at issue is "rarely reviewed" and, in turn, has led to inconsistent results in the district courts.[250]

Given these strict requirements, mandamus relief in federal appellate courts is "reserved for really extraordinary cases."[251] Recent examples include cases involving venue transfers,[252] forum non conveniens,[253] apex depositions,[254] compelled production of privileged documents,[255] and undue delay in ruling on motions.[256] Beyond these categories of cases, mandamus relief is rare.

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233 *Helena Chem. Co. v. Bales*, No. 08-25-00003-CV, 2025 WL 1803385, at *1 (Tex. App.—El Paso June 30, 2025, no pet. h.) (mem. op.) (citing Tex. Civ. Prac. & Rem. Code § 51.014(f); *Indus. Specialists, LLC v. Blanchard Ref. Co.*, 652 S.W.3d 11, 16 (Tex. 2022)).

234 Tex. Civ. Prac. & Rem. Code § 51.014(f).

235 *Helena Chem. Co.*, 2025 WL 1803385, at *1 (citing Tex. Civ. Prac. & Rem. Code § 51.014(g)).

236 Tex. Civ. Prac. & Rem. Code § 51.014(h).

237 *Def. Distributed v. Bruck*, 30 F.4th 414, 426 (5th Cir. 2022) (quotation marks omitted).

238 *Id.*

239 *In re Chamber of Commerce of U.S.A.*, 105 F.4th 297, 311 (5th Cir. 2024) (quotation marks omitted).

240 *In re Clarke*, 94 F.4th 502, 516 (5th Cir. 2024).

241 *Chamber of Commerce*, 105 F.4th at 311 (quotation marks omitted).

242 *Id.* (quotation marks omitted).

243 *In re Sealed Petitioner*, 106 F.4th 397, 402 (5th Cir. 2024) (quotation marks and alteration omitted).

244 *Id.* (quotation marks omitted; emphasis in original).

245 *Id.* (quotation marks omitted).

246 *Id.* (quotation marks omitted).

247 *Id.* (quotation marks omitted).

248 *Chamber of Commerce*, 105 F.4th at 311 (quotation marks omitted).

249 *Id.* at 312 (quotation marks omitted).

250 *Clarke*, 94 F.4th at 516 (quotation marks omitted).

251 *Def. Distributed*, 30 F.4th at 426 (5th Cir. 2022) (quotation marks omitted).

252 *E.g.*, *Chamber of Commerce*, 105 F.4th at 300.

253 *In re Volkswagen AG*, No. 23-40487, 2023 WL 8074229, at *1 (5th Cir. Nov. 21, 2023) (per curiam).

254 *In re Paxton*, 60 F.4th 252, 254 (5th Cir. 2023).

255 *E.g.*, *In re Boeing Co.*, No. 21-40190, 2021 WL 3233504, at *1 (5th Cir. July 29, 2021) (per curiam).

256 *In re Johnson*, 814 F. App'x 881 (5th Cir. 2020) (per curiam).

State. Texas courts similarly characterize mandamus relief as "both an extraordinary remedy and a discretionary one."[257] But in practice, they grant relief far more often than federal courts. If winning mandamus relief in federal court is like hitting the jackpot, Texas practice feels closer to Oprah Winfrey's famous giveaway: "You get a car! You get a car! Everybody gets a car!"[258]

To establish its entitlement to mandamus relief, a relator must meet two prongs.

Clear abuse of discretion. The relator first must show that a clear abuse of discretion.[259] "A trial court has no discretion to determine what the law is, . . . and abuses its discretion when its rulings are arbitrary, unreasonable, or made without reference to guiding legal principles."[260] Unlike federal practice,[261] Texas courts will find a clear abuse of discretion "even when the law is unsettled."[262] Accordingly, a legal error alone meets the first prong of mandamus relief.

No adequate remedy by appeal. Next, the relator must show that it has "no adequate remedy by appeal."[263] Recall that in federal court, the analogous question is whether "there is no other avenue for petitioners to seek recourse for the erroneous [ ] decision."[264] In Texas courts, the determination of "whether an appellate remedy is adequate" turns on a "balance" of "the benefits of mandamus review against the detriments."[265] "This balancing test is necessarily a fact-specific inquiry that resists categorization."[266] Put another way: This second prong presents a squishy standard that allows for a variety of arguments for (and against) mandamus relief.

Even so, the Texas Supreme Court has provided a couple of guideposts. "[T]he most frequent use" the Court has "made of mandamus relief involves cases in which the very act of proceeding to trial—regardless of the outcome—would defeat the substantive right involved."[267] "Sitting on our hands while unnecessary costs mount up contributes to public complaints that the civil justice system is expensive and outmoded."[268] Additionally, if "the order being challenged severely compromise[s] and effectively foreclose[s] the defendant's ability to present a defense[,]" mandamus relief is appropriate.[269]

Given these looser requirements, Texas appellate courts grant mandamus relief in a wide variety of contexts. In the past Term alone, the Texas Supreme Court granted relief from orders:

- Denying a Rule 91a motion to dismiss.[270]
- Granting a new trial.[271]
- Denying forum non conveniens.[272]
- Granting discovery sanctions.[273]
- Striking a responsible-third-party designation.[274]
- Denying motions to abate claims and to quash deposition.[275]
- Compelling production of video.[276]
- Denying leave to withdraw and amend discovery responses.[277]
- Compelling depositions.[278]

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257 *In re Garza*, 544 S.W.3d 836, 840 (Tex. 2018) (orig. proceeding).
258 *Look Back at Oprah's Free-Car Giveaway*, OPRAH.COM, *available at* https://bit.ly/3JH8hs4 (last visited Aug. 20, 2025).
259 *In re State Farm Mut. Auto. Ins. Co.*, 712 S.W.3d 53, 58–59 (Tex. 2025) (orig. proceeding).
260 *Id.*
261 *Sealed Petitioner*, 106 F.4th at 402.
262 *Id.*
263 *State Farm*, 712 S.W.3d at 59.
264 *Clarke*, 94 F.4th at 516.
265 *State Farm*, 712 S.W.3d at 59 (quotation marks omitted).
266 *In re Academy, Ltd.*, 625 S.W.3d 19, 32 (Tex. 2021) (orig. proceeding).
267 *Id.* (quotation marks omitted).
268 *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d
269 *In re Illinois Nat'l Ins. Co.*, 685 S.W.3d 826, 843 (Tex. 2024) (orig. proceeding).
270 *In re Oncor Elec. Delivery Co.*, — S.W.3d —, 2025 WL 1774438, at *1 (Tex. June 27, 2025) (orig. proceeding).
271 *In re Space Exploration Techs. Corp.*, — S.W.3d —, 2025 WL 1774175, at *1 (Tex. June 27, 2025) (orig. proceeding) (per curiam).
272 *In re Greyhound Lines, Inc.*, — S.W.3d —, 2025 WL 1478491, at *1 (Tex. May 23, 2025) (orig. proceeding) (per curiam).
273 *In re Newkirk Logistics, Inc.*, — S.W.3d —, 2025 WL 1415884, at *1 (Tex. May 16, 2025) (orig. proceeding) (per curiam).
274 *In re E. Tex. Med. Ctr. Athens*, 712 S.W.3d 88, 90 (Tex. 2025) (orig. proceeding).
275 *State Farm*, 712 S.W.3d at 56–57.
276 *In re Elhindi*, 704 S.W.3d 425, 425–26 (Tex. 2024) (orig. proceeding) (per curiam).
277 *In re Euless Pizza, LP*, 702 S.W.3d 543, 545 (Tex. 2024) (orig. proceeding) (per curiam).
278 *In re Office of Att'y Gen.*, 702 S.W.3d 360, 362 (Tex. 2024) (orig. proceeding) (per curiam).

- Compelling discovery responses.[279]

The takeaway: In federal court, mandamus petitions should be reserved for the rare case where there is a genuine likelihood of success. In Texas courts, mandamus is a far more common tool for challenging interlocutory orders. If you are filing (or responding to) a mandamus petition, make sure to consult Texas Rule of Appellate Procedure 52, which governs original proceedings.[280]

CONCLUSION

And that's today's Top Ten. I wish I could cue Paul Shaffer and the World's Dangerous Band[281] to play us off, but instead I'll leave you with these ten guideposts to help navigate your next appeal. My hope is that they provide the same kind of practical building blocks I was fortunate to receive at my own Civil Appellate 101 Course, so that when your next federal or Texas appeal comes up, you're ready to handle it like a seasoned pro—minus the late-night laugh track.

279 *In re Peters*, 699 S.W.3d 307, 309 (Tex. 2024) (orig. proceeding) (per curiam).

280 Tex. R. App. P. 52.

281 *Paul Shaffer and the World's Most Dangerous Band*, WIKIPEDIA, *available at* https://bit.ly/4oL4pq1 (last visited Aug. 20, 2025).