

**Practice Pointers from the Third Court of Appeals**  
**Justice Diane Henson**  
**September 25, 2008**

**How the Court Operates**

*Assignment of Cases*

Responsibility for each appeal is assigned to a single judge from the time of filing until the issuance of the opinion. Upon filing, cases are automatically assigned to one of the six judges in rotation. Generally, the assigned judge is responsible for all routine pre-submission motions filed in that case, reviews all motions to dismiss, to take judicial notice, or to strike, and grants or denies any request for oral argument. Any post-submission motions are reviewed by the panel. The assigned judge drafts the opinion, unless the judge's view does not represent the majority will of the panel. In that case, one of the other two panel members will draft the opinion and the original judge will draft a dissent. The identity of the assigned judge remains confidential until the opinion is released.

The Third Court takes cases from 24 different counties, including Travis County. The Court also handles all administrative law cases in the state of Texas, unless the case is transferred by the supreme court. As part of its docket equalization program, the supreme court transfers cases from the busier courts to those courts that have fewer filings.<sup>1</sup>

As a practical matter, when you file your notice of appeal in the trial court, it's a good idea to get a file-stamped copy and send it to the Third Court as well. This will allow our clerk's office to go ahead and assign a cause number to your appeal, even if we haven't received the notice of appeal from the trial court. The notice of appeal can occasionally get held up at the trial court, so it helps if we receive a file-stamped copy from you. That way our clerk's office can start sending friendly reminders to the trial court clerk to get the notice of appeal and record filed sooner rather than later.

*Panels*

The Chief Justice, Kenneth Law, presides on the morning panel; the senior justice, Justice Jan Patterson, presides on the afternoon panel. The other four justices rotate between the panels semi-annually, usually serving a term from January-June, and another from July-December. The current morning panel is Law, Puryear, and Pemberton. The afternoon panel is Patterson, Waldrop, and Henson. The judges may occasionally shift places due to a conflict, recusal, illness, or unavoidable scheduling conflicts.

---

<sup>1</sup> In fiscal year 2008, 10 cases were transferred from the Third Court to the less busy appellate courts.

### *Circulation of Opinions*

Every proposed draft opinion is circulated to all six justices, not just those on the panel. After circulation there may be additional conferencing, proposed changes to the draft opinion, or proposed concurring or dissenting opinions.

Circulating the drafts to all members of the Court allows those not on the panel to express their concerns or disagreement. Usually these concerns can be responded to by the panel before the opinion is released. This practice greatly reduces the granting of motions for rehearing en banc. Practically speaking, with six judges on the court, there must usually be a dissent on the original panel for a motion for rehearing en banc to garner four votes.

### *Docket Management*

In fiscal year 2008, the Third Court had 782 new cases filed. Of those, 435 (56%) were civil, and 347 (44%) were criminal. The average time between submission and disposition was 3.72 months. As of August 31, 2008, there were 685 cases pending on our docket. Of these 685 cases, 53.4% had been pending for over six months. It is noted that cases pending on the docket for six months have decreased almost 6 % from last year. The Court is trying to reduce the backlog on our docket in 2009.

### **Briefing Tips**

*Filing Fees* - \*\*\*When filing motions, don't forget to pay the filing fee and include a certificate of conference! The Court cannot take action on motions until the filing fee is paid and a proper certificate of conference is filed.

*Citations* - In citing cases that have not been published, keep in mind that the Court uses Lexis-Nexis and does not have access to WestLaw. It is a convenience to the Court to give us the Lexis citation, although we will locate the cite if WestLaw is used instead.

*Record References* - Be sure to include accurate record references in your statement of facts, to help the Court locate the relevant portions of the record more quickly and easily. Also, it is helpful for all parties to use a consistent method of referencing the record, especially if the record is particularly long. Remember, it never helps your case to misrepresent the facts or the state of the record. Candor to the tribunal is always important.

*Appendix* - It can be very helpful to the Court if you include an appendix to your brief that contains the judgment or administrative order being appealed, any findings of fact or conclusions of law, key cases, statutes or rules, and even relevant testimony.

*Acronyms* - We often receive briefs that include extensive lists of acronyms, particularly in administrative cases. The overuse of acronyms can hurt the readability of your brief, so try to limit it to only those acronyms that are truly necessary.

*Standard of Review* - If your brief deals with multiple issues that have varying standards of review, you should consider including the standard of review at the beginning of your discussion of each individual issue, rather than listing all the standards of review at the outset.

*Prioritize Your Arguments* - In an appeal, there are always some issues that are more persuasive than others. Consider whether you're diluting the persuasiveness of your brief by including the weaker arguments.

*Findings of Fact* - If you're challenging a finding of fact, it helps if you include the actual text of the challenged finding in your brief, rather than making a blanket statement, such as, "We challenge Findings of Fact 2, 5, 7, etc."

*Brief Covers* - If you represent an appellee, the Court will find it helpful if you select a color for your brief cover that is very different from the color used by the appellant.

## **Oral Argument**

The Court generally holds oral argument twice a month, although there are occasional exceptions. The decision to grant oral argument rests with the individual judge to whom the case is assigned, and different judges have different philosophies on when oral argument would be helpful and when it would not. If a case is submitted on briefs, any judge on the assigned panel may request oral argument.

If new cases are handed down prior to oral argument that you feel are helpful to your case, it is to your advantage to submit a letter brief prior to the day of your argument that focuses the Court's attention on the new cases, rather than just giving citations during oral argument. This will allow the Court to review the new authorities before oral argument.

It is fine to utilize handouts during oral argument, but we find that handouts are more effective if they are limited to one or two pages, rather than having the panel members flip through 15 or 20 pages of information during oral argument.

Cases that are heard on oral argument have the benefit of being discussed and reviewed more extensively by the entire panel than cases submitted on briefs. All panels conference after oral argument, and some panels also have a pre-argument conference to identify areas of concern and focus questioning during oral argument.

However, parties can also lose ground at oral argument if counsel is unprepared or unfamiliar with the facts of the case. If trial court counsel doesn't serve as appellant counsel, it's a good idea to have trial counsel familiarize appellant counsel with the facts prior to oral argument. Try to avoid having to answer factual questions at oral argument with, "I don't know, I didn't try the case."

On the other hand, try not to spend too much of your allotted time at oral argument reciting the facts of the case. The judges have already read the briefs and familiarized themselves with the record. Make the most of your allotted time by jumping straight into the most important points.

If you get stumped by a legal question on oral argument, feel free to admit you don't know the answer. Offer to answer the question in a post-submission letter brief, so you don't risk conceding a point of law before you've had a chance to fully review the issue.

### **Third Court Website**

Check out our website: <http://www.3rdcoa.courts.state.tx.us>. Under the "Case Information" headline on the home page, you can click on "Case Submissions" to see the list of cases under submission on oral argument and on briefs, along with the date of submission. You can also click on "Released Orders/Opinions" to find a list of recently released orders and opinions with a link to their text. "CaseMail" allows you to sign up to be notified of any filings or developments in submitted cases you wish to follow. You can also ask to be notified by email when opinions are released by the Court.

### **Submission of Electronic Documents**

The Court is now accepting electronic courtesy copies of filings in addition to paper copies. An electronic copy of the clerk's record, reporter's record, and briefs will help facilitate disposition of your appeal. While paper copies are still necessary, you may provide the Court with an electronic copy of your briefs on a CD/DVD. The electronic copies will merely serve as courtesy copies and are not required. For more information on electronic filing, see "Electronic Filing" under the "Practice Before the Court" headline on our website.