

Focus | Appellate Law/Trial Skills

DIY Clerk's Records — How Could this Possibly Work?

BY THAD D. SPALDING AND CLAIRE MOULTON

For appeals filed after January 1, 2024, an appellant may now create its own clerk's record by filing an "appendix." Tex. R. App. P. 34.5a. Despite its label, this new "appendix" is fundamentally different from the "appendix" that Rule 38.1(k) requires with each appellant's brief. Do not confuse one for the other.

The Rule 34.5a "appendix" replaces the clerk's record, and it becomes the appellant's obligation to assemble and file it, removing that burden from the court clerk (along with the corresponding cost for its preparation). In fact, if an appellant opts to make its own record, the court clerk is prohibited from preparing one or charging a fee for doing so.

In concept, the do-it-yourself clerk's record looks a lot like a mandamus record, without any certification requirement. The appendix must be filed separately from the parties' briefs and its pages must be consecutively numbered. Sensitive information (minor's identity and other "sensitive data") must be redacted. Once filed, the "appendix" becomes part of the formal appellate

record. This article provides some advice on how to best utilize this new procedure.

Timing

Acting fast is critical. To use Rule 34.5a, the appellant must file a "notice of election" in the trial court **and** the court of appeals within 10 days of filing the notice of appeal.

When is the "Appendix" Due?

The appendix is due when your brief is due. Electing to use Rule 34.5a could accelerate the due date because the briefing deadline is now tied to the date the notice of election is filed or the date the reporter's record is filed, whichever is later. If your case does not have, or require, a reporter's record (e.g., for a summary judgment motion), your brief could be due as soon as 40 days (30 for accelerated appeals) after your notice of appeal is filed. You can, however, still ask for an extension of that deadline.

A "Joint Appendix"?

Perhaps envisioning the prospect of cross-appeals, the rule allows the parties

to prepare a "joint appendix." It is unclear whether a joint "notice of election" must be filed, or what happens if one appellant elects to prepare its own "appendix" and the other elects to have the clerk handle it. It is also unclear when the joint appendix must be filed, although to be workable, it would make sense to prepare and file it before or with the filing of the parties' opening briefs.

What Must Be in the "Appendix"?

The "appendix" must include all the documents required by Rule 34.5a plus any other items referenced in the appellant's brief. Do not include documents that were not filed with the trial court, unless they are documents issued by the trial court or documents included by mutual agreement of the parties. The documents should be file-stamped "when available." Presumably, this means that if you can find the file-stamped documents on a particular county's website, you should. But the rule's language also could imply that file-stamped copies are not necessarily required, which is oddly contrary to the mandatory language used in the statute that gave rise to Rule 34.5a, specifically Section 51.018(c) of the Civil Practice and Remedies Code ("An appendix ... **must** contain a file-stamped copy of each document required by Rule 34.5a...").

own brief. The court of appeals may also direct the appellant to prepare a supplemental appendix to include additional documents. If the appellant fails to do so, the appeal can be dismissed (if the missing documents impact the court's ability to determine its own jurisdiction) or the court may assume that the missing documents support the trial court's decision. Beware, however, that the burden remains on the appellant to ensure that the necessary documents are before the appellate court. While the court of appeals may direct that missing documents be added, it is not required to and could still find waiver if it feels that the documents necessary to review the case are not before it.

Will It Work?

Whether the new rule will work remains to be seen. Given that the existing procedure for requesting and preparing a clerk's record seemed to be working fine, the goal of the new rule is unclear. In theory, this new procedure could provide a more flexible and less costly approach to the overall appellate process and potentially reduce the administrative burden on court clerks. But it also presents a potential trap for inexperienced attorneys and pro se appellants who may inadvertently omit crucial documents from the "appendix" and not find out until it is too late. Whether in reality the new rule does any of these things will depend largely on the user. **HN**

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What if Something Important Is Left Out?

Any other party involved in the case may file a supplemental appendix with its

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