

RULE 9. PAPERS GENERALLY

Rule 9.2. FILING

- (c) **Electronic Filing.** ~~A court of appeals may by local rule permit documents to be filed, signed, or verified by electronic means that are consistent with technological standards, if any, that the Supreme Court establishes.~~ Documents may be permitted or required to be filed, signed, or verified by electronic means by order of the Supreme Court or the Court of Criminal Appeals, or by local rule of a court of appeals. A technical failure that precludes a party's compliance with electronic-filing procedures cannot be a basis for disposing of any case.

[\(David A. Schulman\)](#) As some of you know, I have personally been in favor of eFiling for a number of years, so I am enthusiastic, to say the least. I would like, in fact, to see our courts go to a nearly complete “e” system, with even notices from the courts being sent by eMail. The CCA has doing that for some months now, at their system works great. However, what bothers me a little is that this rule doesn’t say anything other than we’re going to have eFiling at some point, and, as of today, only the 1st, 3rd, 5th and 14th Courts of Appeals have optional eFiling. What bothers me a lot is that, absent some extraordinary control from the TXSC and CCA, there is a possibility that we could end up with fourteen different sets of eFiling rules, and that would not be good. Finally, having already eFiled 10 different pleadings, the system the State has opted to use is very cumbersome. Although it is sad to say, I am of the opinion that the federal eFiling system is simpler and easier to use ... and it's free. Our eFiling system costs us about \$10 every time we file something.

[\(Alan Curry\)](#) I could not agree more. There has to be uniform rules. I am not certain how cost-effective it is going to be because we are required to pay an e-filing fee, and many courts still require the filing of some paper originals or copies with the electronic filing. The First Court of Appeals still requires paper copies, even when you e-file. It is not cost effective. I see no reason why we should not implement the federal system. I am unfamiliar with the reasoning behind requiring a for-profit middle man. We have not switched to e-filing, although I very much want to. I am very ready to get on board this, but the courts are not making it easy to do so.

[\(Angela Moore\)](#) The 4th Court of Appeals local rule requires their copy of the record to be filed on disk or electronically. However, the copy for opposing counsel is not required to be on disk. We still are goofing with the paper copies.

(Kevin Yeary) Our District Clerk's office is beginning to favor providing electronic copies of the record for purposes of appeal. One problem I have encountered is that when they send me a record electronically, they send it piecemeal, with each volume of the record attached to a separate email. It is a difficult transition for me. I'm used to the paper. But I know the age of the electronic record is upon us. I now have an ipad, and but I have not had much luck with getting electronic records onto the ipad so that I can take the records with me. I believe that once the technical barriers have been knocked down, the age of electronic appellate records will be exiting!

Ed Note: Although not part of any comments, several of the writers have lamented the fact the eFiling rules have not specifically provided for service by eMail or other electronic means. While this is true, it is reported that the platform which must be used for eFiling, regardless of which for-profit system/provider you select, permits the filer to serve other parties electronically . . . for an additional fee, of course.



Rule 9.3. **NUMBER OF COPIES**

- (b) **Supreme Court and Court of Criminal Appeals.** ~~A party must file the original and 11 copies of any document addressed to either the Supreme Court or the Court of Criminal Appeals, except that in the Supreme Court, only an original and two copies must be filed of a motion for extension of time or a response to the motion, and in the Court of Criminal Appeals, only the original must be filed of a motion for extension of time or a response to the motion, or a pleading under Code of Criminal Procedure article 11.07.~~
- (1) **Paper Copies of Document Filed in Paper Form.** A party must file the original and 11 copies of any document addressed to either the Supreme Court or the Court of Criminal Appeals, except that in the Supreme Court, only an original and one copy must be filed of any motion, response to the motion, and reply in support of the motion, and in the Court of Criminal Appeals, only the original must be filed of a motion for extension of time or a response to the motion, or a pleading under Code of Criminal Procedure article 11.07.
 - (2) **Electronic Copies of Document Filed in Paper Form.** An electronic copy of a document filed in paper form may be required by order of the Supreme Court or the Court of Criminal Appeals.

- (3) Paper Copies of Electronically Filed Document. Two paper copies of each document that is electronically filed with the Supreme Court or the Court of Criminal Appeals must be mailed or hand-delivered to the Supreme Court or the Court of Criminal Appeals, as appropriate, within one business day after the document is electronically filed.

[\(David A. Schulman\)](#) This seems to be a compromise between those who want to go to eFiling and those who are afraid of it. Unless and until section (b)(2) is adopted and mandatory, we will not have accomplished much. Additionally, as to section (b)(3), why not cut out the postal/delivery services and print shops, and charge a small fee for eFiling anything. My most recent PDR ran about \$7.50 per copy. The Courts could charge a fee designed to cover the cost of printing out the two copies required by section (b)(3). No printing, no mailing and nothing gets lost, and I would be much happier.

[\(Angela Moore\)](#) I agree with David's comments completely. We had the occasion to have our COA suspend the mail box rule.



~~RULE 50. RECONSIDERATION ON PETITION FOR DISCRETIONARY REVIEW~~

~~Within 30 days after a petition for discretionary review has been filed with the clerk of the court of appeals that delivered the decision, a majority of the justices who participated in the decision may summarily reconsider and correct or modify the court's opinion or judgment. If the court's opinion or judgment is corrected or modified, the original opinion or judgment must be withdrawn and the modified or corrected opinion or judgment must be substituted as the opinion or judgment of the court. The original petition for discretionary review is dismissed by operation of law. Any party may then file with the court of appeals a petition for discretionary review seeking review of the corrected or modified opinion or judgment under Rule 68.2.~~

Official Comment: Rule 50 is abolished. Motions for rehearing serve the same purpose.

[\(Angela Moore\)](#) I like this. The Fourth Court almost never in my memory has changed an opinion on filing of PDR. Years ago, opinions were withdrawn and changed language or case citations in support based on PDR's, but not usually the result.

[\(David A. Schulman\)](#) I have never liked the idea that, after it had denied me relief and not granted my motion for rehearing, a Court of Appeals could wait until I had worked up my PDR, then issue a new opinion which (a) probably knocks the pins out of my PDR, and costs me \$100 and a lot of time to file a new PDR. This is a smart change. I like it.

[\(Kevin Yeary\)](#) I will miss Rule 50. Unlike some, I did once have a case that I might not have won without it. I also had cases where it proved to be completely useless, a burden, and a huge time waster. Still, I believe it served a good purpose. Remember, most petitions for discretionary review are refused. Most decisions of the Courts of Appeals are final at the Court of Appeals level. I believe there have been times when the Courts of Appeals have made mistakes that they did not recognize until after the time for rehearing was past. In those cases, if a petition for discretionary review was filed, Rule 50 was there to give the Courts of Appeals the opportunity to cure those mistakes without the necessity of intervention by a higher court. In those cases, the Rule permitted justice to be reached where it might not have been otherwise. All that said, it is true that the Rule was not often utilized and that the cases in which it made a significant difference were rare. In the long run, the abolition of Rule 50 is bound to improve judicial economy.



RULE 68. DISCRETIONARY REVIEW WITH PETITION

Rule 68.2 Time to File Petition.

(a) First petition. The petition must be filed within 30 days after either the day the court of appeals' judgment was rendered or the day the last timely motion for rehearing **or timely motion for en banc reconsideration** was overruled by the court of appeals.

Official Comment: The amendment to Rule 68.2(a) resolves timely filing questions concerning motions for en banc reconsideration by including those motions in calculating time to file.

[\(David A. Schulman\)](#) Another good and common sense based change. The (soon to be) former practice of having a motion for rehearing en banc not affect the timing was what recent opinions have referred to as hypertechnical. I would say unnecessary, counter-productive and hypertechnical.



Rule 68.3 Where to File Petition.

(a) The petition and all copies of the petition must be filed with the clerk of the Court of Criminal Appeals, but if the State's Prosecuting Attorney files a petition, the State's Prosecuting Attorney may file the copies of the petition, but not the original, with the clerk of the Court of Criminal Appeals instead of with the court of appeals clerk.

(b) **Petition Filed in Court of Appeals.** If a petition is mistakenly filed in the court of appeals, the petition is deemed to have been filed the same day with the clerk of the Court of Criminal Appeals instead of with, and the court of appeals clerk must immediately send the petition to the Clerk of the Court of Criminal Appeals.

Official Comment: Rule 68.3 is changed to require petitions for discretionary review to be filed in the Court of Criminal Appeals rather than in the court of appeals. With the deletion of Rule 50, there is no reason to file petitions in the court of appeals. Rule 68.3(b) is added to address and prevent the untimely filing of petitions for discretionary review that are incorrectly filed in the court of appeals rather than in the Court of Criminal Appeals.

Ed Note: When I started this particular project earlier this summer, the TIBA writers were pretty much in agreement that doing away with Rule 50 was a good idea, but that it would be a better idea to file directly with the Court of Criminal Appeals. Sometime after May 15th, the Court changed the rule so that now, effective on the 1st, the PDR will be filed with the CCA. It would appear that the CCA heard what we were saying.



Rule 68.7 Court of Appeals Clerk's Duties.

~~(a) On filing of the petition. Upon receiving the petition, the court of appeals clerk must file the original petition and note the filing on the docket.~~

~~(b) Sending petition to~~ **Within 15 days of receiving notice of the filing of a petition for discretionary review from the clerk of the** Court of Criminal Appeals. ~~Unless a petition for discretionary review is dismissed under Rule 50, the clerk of the court of appeals must, within 30 days after the petition is filed, send to the clerk of the Court of Criminal Appeals the petition and any copies furnished by counsel, together with the record, copies of the~~ motions filed in the case, and copies of any judgments, opinions, and orders of the court of appeals. The clerk

need not forward any non-documentary exhibits unless ordered to do so by the Court of Criminal Appeals.

Official Comment: Rule 68.7(a) and (b) are deleted and (c) is amended to reflect changes consistent with filing the petition and reply in the Court of Criminal Appeals rather than in the court of appeals, and to order the record to be sent to the Court of Criminal Appeals. Additionally, Rule 68.7(c) is amended to delete reference to Rule 50, which is abolished.



Rule 68.8 Court of Criminal Appeals Clerk's ~~Duties on Receipt of Petition~~.

~~Upon receipt of the~~ ~~The clerk of the Court of Criminal Appeals will receive a petition for discretionary review, file the petition and the accompanying record from the court of appeals, note the filing of the petition and record on the docket, and notify the parties by U.S. Mail of the filing. The Court may dispense with notice and grant or refuse the petition immediately upon its filing~~ ~~the clerk of the Court of Criminal Appeals will file the record and enter the filing on the docket.~~

Official Comment: Rule 68.8 is amended to reflect changes consistent with filing the petition in the Court of Criminal Appeals.



Rule 68.9 Reply.

The opposing party has 1530 days after the timely filing of the petition in the Court of Criminal Appeals, ~~unless additional time is allowed,~~ to file a reply to the petition with the Clerk of the Court of Criminal Appeals. ~~When a reply is filed or the time for filing a reply has expired, the petition will be treated as submitted to the Court and ready for disposition.~~

Official Comment: This Rule is added so that any reply will be filed in the Court of Criminal Appeals since the petition is also filed in the Court of Criminal Appeals.

([David A. Schulman](#)) I'm not sure that 15 days is sufficient time to reply in every case, so I am hoping the Court will entertain motions for extension in some situations. Besides, whatever delay there is in getting PDRs resolved simply cannot be blamed on the time in which responses to PDRs are or have been being filed.



Rule 68.10 Amendment.

Upon motion, tThe petition or a reply may be amended or supplemented ~~within 30 days after the original petition was filed in the court of appeals or at any time when justice requires. The record may be amended in the Court of Criminal Appeals under the same circumstances and in the same manner as in the court of appeals.~~

Official Comment: This Rule is changed to reflect the filing of the petition and any reply in the Court of Criminal Appeals. Thus. the rule is also changed to require a motion and to delete a time frame because the petition will be filed in the Court of Criminal Appeals.

Rule 68.11 Service on State Prosecuting Attorney.

In addition to the service required by Rule 9.5, service of the petition, the reply, and any amendment or supplementation of a petition or reply must be made on the State Prosecuting Attorney, ~~P.O. Box 12405, Austin, Texas 78711~~.

Official Comment: The address for the State Prosecuting Attorney is deleted because it has changed and may change again.

[\(David A. Schulman\)](#) I guess the SPA got tired of having its mailed misdirected.



RULE 79. REHEARINGS

Rule 79.2 Contents.

(c) A motion for rehearing an order that refuses or dismisses a petition for discretionary review may be grounded only on substantial intervening circumstances **or other significant circumstance** which are specified in the motion. Counsel must certify that the motion is so grounded and that the motion is made in good faith and not for delay.

Official Comment: Rule 79.2(c) is amended so that it applies only to petitions for discretionary review that are refused. Additionally, the certification requirement is changed to encompass a broader basis for rehearing.

[\(David A. Schulman\)](#) This seems like a good idea, as it can do nothing but broaden the circumstances in which motions for rehearing can be filed. Nevertheless, the Court will do what the Court will do.

[\(Kevin Yeary\)](#) It seems to me that the addition of the phrase "or other significant circumstance" has rendered obsolete the alternative ground of "substantial intervening circumstances." I believe that they should just go ahead and delete the phrase: "substantial intervening circumstances" as well as the proposed additional phrase: "or other."