

Post-Judgment Appellate Issues in State Court Civil Cases

LUCY FORBES

Board Certified in Civil Appellate Law
by the Texas Board of Legal Specialization

THE FORBES FIRM
Houston

Brazoria County Bar Association
March 13, 2020 | Angleton

Brazoria County
Courthouse, 1897



Bench Trial or Jury Trial

**Appellate
deadlines are
triggered from
the date the
Trial Court
signs the
Judgment**



BRAZORIA COUNTY COURT HOUSE, ANGLETON, TEXAS.



- ❑ First Deadline is within **20 days** of the date the court signed the judgment
- ❑ If your client did not prevail, file a **Request for Findings of Fact and Conclusions of Law**
- ❑ Court's **Findings of Fact** are due within **20 days** of the date you filed your Request
- ❑ **Notice of Past Due Finding of Fact** is due within **30 days** of the date you filed your Request
- ❑ Note: you cannot prematurely file the Notice of Past Due Finding of Fact

Bench Trial
TEX. R. CIV. P. 296-299a



Bench Trial

- ❑ The court's **Findings of Fact** are then due **within 40 days of the date you filed your Request**
- ❑ The court can file its Finding of Fact at any time
- ❑ The prevailing party usually drafts them
- ❑ Once the court signs and files the Finding of Fact, **you have 10 days to file a Request for Additional or Amended Findings of Fact and Conclusions of Law**
- ❑ This Request for Additional Finding of Fact must be **specific** as to what Additional or Amended Finding of Fact you want.



Bench Trial

- ✓ Judgment Signed: March 13, 2020, Friday
- ✓ File your Request for Finding of Fact by the 20th day, Thursday, April 2 (20 days)
- ✓ Court's Finding of Fact are due Wednesday, April 22 (20 days)
- ✓ Notice of Past Due Finding of Fact is due on May 2 (Saturday), so Monday, May 4 (30 days), remember, you cannot prematurely file this



Bench Trial

- ✓ This means, you must file the Notice of Past Due Findings between April 23 and May 4
- ✓ Court's Finding of Fact are due on due on Tuesday, May 12 (40 days)
- ✓ Court files its Finding of Fact on Wednesday, May 13
- ✓ Request for Additional or Amended Finding of Fact is due by May 23 (Saturday), so Monday, May 25 (10 days)



Jury Trial



Motion for New Trial

Motion for New Trial

- ❑ Due within **30 days of the date the trial court signs the Judgment** TEX. R. CIV. P. 329b(a)
- ❑ This is a hard deadline
- ❑ A timely filed Motion for New Trial extends the trial court's plenary power TEX. R. CIV. P. 329b(c), (e)
- ❑ It is required to preserve the points detailed in TEX. R. CIV. P. 324(b) for jury trials
- ❑ Can extend the deadline by which the court's clerk can issue a writ to execute on the judgment TEX. R. CIV. P. 627, 628
- ❑ Extends appellate deadline for filing the notice of appeal from 30 days to 90 days TEX. R. APP. P. 26.1(a)(1)
- ❑ It can be filed solely for the purpose of extending the appellate deadlines in a bench or jury trial



**Motion to Modify,
Correct, or Reform
the Judgment**

Motion to Modify, Correct, or Reform the Judgment

- Due within **30 days** of the date the trial court signs the Judgment TEX. R. CIV. P. 329b(g)
- This is a hard deadline
- A timely filed Motion to Modify that seeks a substantive change extends court's plenary power TEX. R. CIV. P. 329b(g)
- Extends appellate deadline for filing the notice of appeal from 30 days to 90 days TEX. R. APP. P. 26.1(a)(2)
- Raise your legal sufficiency points in this motion so you can request a rendition of judgment on appeal
- It can be filed in a bench or jury trial



Texas Center for
LEGAL ETHICS
Professionalism in Practice™

Lawyer A represents Client Z in a difficult, contentious divorce case. When the case settles, Lawyer A closes the file.

Lawyer A later discovers that Client Z has posted the following on a review website:

“Lawyer A is awful and I cannot recommend her. She told me my ex would not get visitation rights but my terrible ex (who everyone knows should not be around children) still gets the kids every other weekend. She forced me to settle my case even though she previously told me we would win at trial. She did so because she knew I was running out of money. Lawyer A doesn’t care about her clients or their children; she just wants to make money off the misery of others.”



Texas Center for
LEGAL ETHICS
Professionalism in Practice™

Lawyer A considers posting one of the following responses:

1. “I am sorry that you are unhappy with the outcome of your case, but I am more than willing to discuss any issues you have with my representation privately.”
2. “Because our ethics rules prevent me from revealing any client confidences publicly, I am not comfortable discussing these matters in this forum. But for the record, I do not believe that your post presents a fair and accurate picture of the events you describe.”
3. “I never said that your ex would not get visitation rights, or that we would win at trial. Under the circumstances, I got you the best possible outcome you could have expected. You told me you chose to settle because you were worried about the cost of going to trial. You are now dealing with the consequences of your own choice, not any poor performance by me.”
4. “Everything you said here is false. You were uncooperative throughout and changed your story and your mind frequently. You complained about my bills constantly, and even though I got a great result for you, you attack me online hoping that you won’t have to pay me the money you still owe me. Well, it won’t work.”



Which of these is most accurate?

- A. None of the responses above is permitted; lawyers should not discuss anything about their clients' cases or even acknowledge online comments and criticisms.
- B. Option 1 is acceptable, but the rest are not.
- C. Options 1 and 2 are acceptable because the lawyer didn't reveal any confidential information in the responses.
- D. Options 1, 2 and 3 are acceptable because the attorney limited her online discussion to items the client raised first.
- E. All are acceptable because the ethics rules permit lawyers to disclose client confidences when defending themselves against a client's accusations of wrongdoing.



ANSWER: C

The advent of online reviews has created a particularly thorny ethical dilemma for attorneys who want to preserve their reputations in the face of public criticism. The internet allows anyone to broadcast negative messages to the world with no filters and little or no recourse for an attorney who wishes to stay within the boundaries of the ethics rules.

The primary consideration here is [Rule 1.05](#) of the Texas Disciplinary Rules of Professional Conduct



Which of these is most accurate?

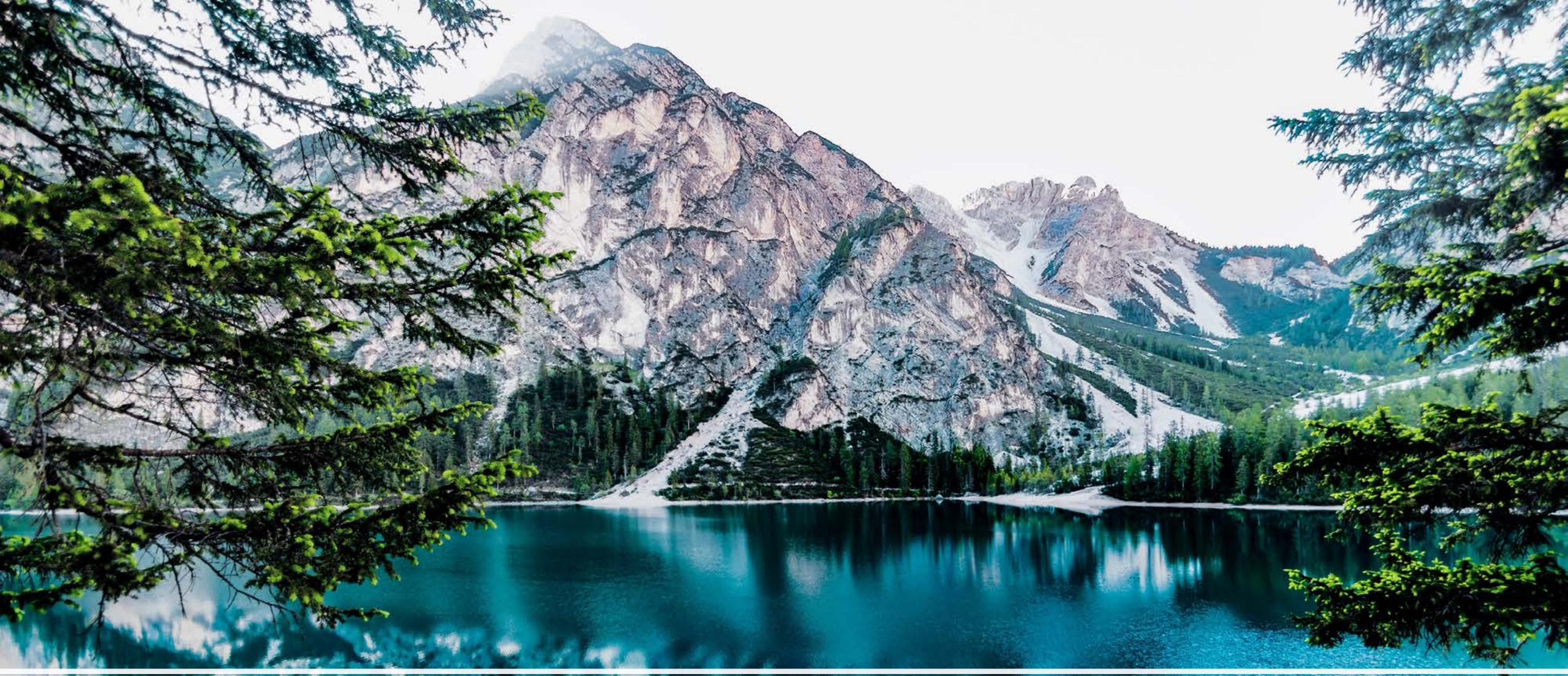
- A. None of the responses above is permitted; lawyers should not discuss anything about their clients' cases or even acknowledge online comments and criticisms.
- B. Option 1 is acceptable, but the rest are not.
- C. Options 1 and 2 are acceptable because the lawyer didn't reveal any confidential information in the responses.**
- D. Options 1, 2 and 3 are acceptable because the attorney limited her online discussion to items the client raised first.
- E. All are acceptable because the ethics rules permit lawyers to disclose client confidences when defending themselves against a client's accusations of wrongdoing.



Texas Center for
LEGAL ETHICS
Professionalism in Practice™

Lawyer A considers posting one of the following responses:

- 1. “I am sorry that you are unhappy with the outcome of your case, but I am more than willing to discuss any issues you have with my representation privately.”**
- 2. “Because our ethics rules prevent me from revealing any client confidences publicly, I am not comfortable discussing these matters in this forum. But for the record, I do not believe that your post presents a fair and accurate picture of the events you describe.”**
3. “I never said that your ex would not get visitation rights, or that we would win at trial. Under the circumstances, I got you the best possible outcome you could have expected. You told me you chose to settle because you were worried about the cost of going to trial. You are now dealing with the consequences of your own choice, not any poor performance by me.”
4. “Everything you said here is false. You were uncooperative throughout and changed your story and your mind frequently. You complained about my bills constantly, and even though I got a great result for you, you attack me online hoping that you won’t have to pay me the money you still owe me. Well, it won’t work.”



Other Legal Sufficiency Motions

Other Legal Sufficiency Motions

- Best practice, file within 30 days of the date the trial court signs the Judgment TEX. R. CIV. P. 329(b)(a), (g)
- Enables you to request a rendition on appeal
- File these only following a jury trial
- Judgment Notwithstanding the Verdict** TEX. R. CIV. P. 324(c)
- Judgment to Disregard Jury Findings**



Texas Center for
LEGAL ETHICS
Professionalism in Practice™

Lawyer A represents Client B in a partnership dispute against Partner C. After extensive discovery, the court orders the parties to mediation two months before the trial setting.

At the mediation session, Partner C makes a credible settlement offer to Client B. Lawyer A recommends that Client B accept that offer. Client B refuses and demands to go to trial unless Partner C makes a substantially higher offer.



Texas Center for
LEGAL ETHICS
Professionalism in Practice™

Lawyer A is concerned that Partner C came across much better in his deposition than Client B, and the documents seem to support Partner C's position. Lawyer A thinks there is a good chance that Partner C will prevail at trial, or, even if Client B prevails, his damage model is weak, and the jury is very likely to award damages significantly less than Partner C's current settlement offer. Of course, a modest recovery by Client B means a modest contingent fee for Lawyer A. Accordingly, Lawyer A tells Client B that he will withdraw his representation unless Client B accepts the settlement offer.

Lawyer A tells Client B that he can hire a new lawyer and take this case to trial if he wishes. He also tells the client that the court will grant a continuance of the current trial setting because this is only the second trial setting. The likely continuance should provide Client B plenty of time to hire new counsel.



Texas Center for
LEGAL ETHICS
Professionalism in Practice™

Which statement most accurately addresses whether Lawyer A can withdraw?

- A. Lawyer A can withdraw, but only after he secures a continuance of the current trial setting.
- B. Lawyer A can withdraw unconditionally because his client is making the representation unreasonably difficult by not accepting a recommended settlement offer.
- C. Lawyer A cannot withdraw because, under these circumstances, withdrawal would have a materially adverse effect on the client.
- D. Lawyer A cannot withdraw because he cannot guarantee that he will be able to persuade the court to grant a continuance.
- E. We don't have enough facts to know whether Lawyer A can withdraw.



Texas Center for
LEGAL ETHICS
Professionalism in Practice™

ANSWER: C

DISCUSSION:

Rule 1.15(b) of the Texas Disciplinary Rules of Professional Conduct governs the conditions under which a lawyer is permitted to withdraw:

- (b) Except as required by paragraph (a), a lawyer shall not withdraw from representing a client unless:
- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
 - (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes may be criminal or fraudulent;
 - (3) the client has used the lawyer's services to perpetrate a crime or fraud;
 - (4) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent or with which the lawyer has fundamental disagreement;
 - (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services, including an obligation to pay the lawyer's fee as agreed, and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
 - (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
 - (7) other good cause for withdrawal exists.



Texas Center for
LEGAL ETHICS
Professionalism in Practice™

Which statement most accurately addresses whether Lawyer A can withdraw?

- A. Lawyer A can withdraw, but only after he secures a continuance of the current trial setting.
- B. Lawyer A can withdraw unconditionally because his client is making the representation unreasonably difficult by not accepting a recommended settlement offer.
- C. Lawyer A cannot withdraw because, under these circumstances, withdrawal would have a materially adverse effect on the client.**
- D. Lawyer A cannot withdraw because he cannot guarantee that he will be able to persuade the court to grant a continuance.
- E. We don't have enough facts to know whether Lawyer A can withdraw.

Finality of Judgment

- ❑ Generally, an appellate court has jurisdiction only over final judgments
- ❑ A judgment following a trial on the merits is *presumed* to be final. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 200 (Tex. 2001).
- ❑ There is no such presumption of finality where judgment is signed without a trial. *Id.*



Finality of Judgment when is it not *final*

- ❑ A judgment rendered without a trial is not final **merely because it is labeled “final” or because it contains a “Mother Hubbard” clause indicating that all relief not granted has been denied.** *Lehmann*, 39 S.W.3d at at 205-06.
- ❑ “Mother Hubbard” language—“a recitation that all relief not expressly granted is denied,” is not conclusive as to finality. *Id.* at 206-07.
- ❑ “A judgment issued without a conventional trial is **final** for purposes of appeal if and only **if either it actually disposes of all claims and parties then before the court, regardless of its language, or it states with unmistakable clarity that it is a final judgment as to all claims and all parties.**” *Id.* at 192-93.

Finality of Judgment when is it *final*, *In re R.R.K.*, a recent supreme court case

- **“A judicial decree is final when it disposes of all issues and all parties in the record. Because a court order need not be in any particular form, ‘whether a judicial decree is a final judgment must be determined from its language and the record in the case.’” *In re R.R.K.*, 509 S.W.3d 535, 538 (Tex. 2019) (quoting *Lehmann*, 39 S.W.3d at 195).**
- **“When an order ‘finally disposes of all claims and all parties’ in ‘clear and unequivocal language,’ it is a final order.” *In re R.R.K.*, 509 S.W.3d at 538 (citing *Elizondo*, 544 S.W.3d 827-28 (Tex. 2018) (per curiam); *Lehmann*, 39 S.W.3d at 205-06).**

Finality of Judgment

- ❑ Where the order does not contain “clear,” “unequivocal,” and “unmistakable” indicia of finality, removing “any doubt” about its effect, the appellate court examines the record to determine the trial court’s intent. *See In re R.R.K.*, 509 S.W.3d at 542, 538.
- ❑ “Clear and unequivocal” language that reflects an intent to dispose of the entire case is given effect, but when there is doubt about finality, the record resolves the issue. *Id.*

Finality of Judgment

- ❑ **“The record reveals that no one—not the trial court and not the parties—intended the earlier memorandum to be the ‘final’ order.”** *In re R.R.K.*, 509 S.W.3d at 544.
- ❑ **“We hold that an order lacking the unmistakable language of finality—that it resolves all claims between and among all parties and is final and appealable—is ambiguous in a suit under the Family Code when the order does not comport with the statute governing final orders and is otherwise inconclusive as to its intent.”** *Id.*

Finality of Judgment

- ❑ **“If a judicial decree’s finality is ambiguous, a reviewing court should examine the record to determine the trial court’s intent. Because the record in this case reveals that the trial court’s later order was the final order, the mother’s appeal was timely filed.”** *In re R.R.K.*, 509 S.W.3d at 544
- ❑ *In re R.R.K.* Lesson: If the order does not contain clear, unequivocal, and unmistakable indicia of finality, removing any doubt as to its intent, the appellate court examines the record to determine the trial court’s intent as to finality.



Notice of Appeal

Notice of Appeal

- ❑ Due within **30 days of the date the trial court signs the Judgment** TEX. R. APP. P. 26.1
- ❑ File it with the **trial court clerk** TEX. R. APP. P. 25.1(a)
- ❑ Who must file? Anyone who wants to alter the underlying judgment or order TEX. R. APP. P. 25.1(c)
- ❑ Contents of Notice of Appeal outlined TEX. R. APP. P. 25.1(d)
- ❑ If opposing party files a Notice of Appeal, **you have 14 days from that date to file your own** TEX. R. APP. P. 26.1(d)
- ❑ File a Motion for New Trial, Motion to Modify Judgment, Request for Findings where required, and **Notice of Appeal is due within 90 days of the date of the judgment** TEX. R. APP. P. 26.1(a)(1)-(4)



Suspend Enforcement of the Judgment



Suspend Enforcement of Judgment

- ❑ Filing a Notice of Appeal **does not suspend enforcement of the judgment** TEX. R. APP. P. 25.1(h)
- ❑ Follow TEX. R. APP. P. 24 and TEX. CIV. PRAC. & REM. CODE § 52.006 to suspend enforcement of judgment
- ❑ Protect your client while the appeal is pending

Thank you, Brazoria
Bar Association
and
State Bar of Texas
Appellate Section
Local Bar Committee

BRAZORIA COUNTY
BAR ASSOCIATIONTM

The End

Have more questions?
Please feel free to contact me:

Lucy Forbes

lucy@forbesfirm.com

(832) 620-3030