SUPREME COURT OF TEXAS
INTERNAL OPERATING PROCEDURES

ANDREW WEBER
Supreme Court of Texas
201 W. 14th Street
Austin, Texas 78701
(512) 463-1312

GINGER RODD
Supreme Court of Texas
201 W. 14th Street
Austin, Texas 78701
(512) 463-1317

BLAKE HAWTHORNE
Supreme Court of Texas
201 W. 14th Street
Austin, Texas 78701
(512) 463-1317

DOUG ALEXANDER
ALEXANDER DUBOSE
JONES & TOWNSEND LLP
515 Congress Ave., Suite 1720
Austin, Texas 78701
Telephone: (512) 482-9301
Facsimile: (512) 482-9303
dalexander@adjtlaw.com

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About the Authors

Andrew Weber

Andrew Weber is the Clerk of the Supreme Court of Texas. Following a career in the construction and real estate industry and raising a family in Austin, Andrew attended Baylor Law School. Andrew then served as Justice Greg Abbott's briefing attorney before moving to Dallas to practice at Carrington, Coleman, Sloman & Blumenthal. In 1999, he returned to the Court as Staff Attorney for Justice Priscilla Owen of the Texas Supreme Court. In July 2002, the Court appointed Andrew Clerk of the Court.

Ginger Rodd

Ginger Rodd is a Staff Attorney for Supreme Court Justice Harriet O'Neill. After graduating from the University of Texas School of Law, she served as a Briefing Attorney for former Texas Supreme Court Chief Justice John Hill. She practiced law in Austin for several years, and then returned to the Court as Staff Attorney for former Justice Rose Spector. She is board certified in Civil Appellate Law by the Texas Board of Legal Specialization.

Blake Hawthorne

Blake Hawthorne is the Staff Attorney for Original Proceedings for the Supreme Court of Texas. After graduating from the University of Texas School of Law in 1996, Blake worked as an associate for Jackson Walker in Fort Worth. He then moved to Washington, D.C. where he was an associate for Wiley, Rein & Fielding. Blake then moved back to Austin in 1999 and began working as an Assistant Attorney General for the State of Texas. The Supreme Court hired him as the Staff Attorney for Original Proceedings in 2005.

Doug Alexander

Doug Alexander is a partner with the Austin office of the appellate firm Alexander Dubose Jones & Townsend LLP. He has a statewide appellate practice, with particular expertise before the Supreme Court of Texas. A graduate of the University of Houston Law Center, Doug has served as an Adjunct Professor of Appellate Advocacy at the University of Texas School of Law, a member of the Civil Appellate Law Examination Commission of the Texas Board of Legal Specialization, and a law clerk to the Honorable John R. Brown, former Chief Judge of the United States Court of Appeals for the Fifth Circuit. He is Vice-Chair of the Appellate Section Council of the State Bar of Texas and is board certified in Civil Appellate Law by the Texas Board of Legal Specialization.

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INTERNAL OPERATING PROCEDURES OF THE SUPREME COURT OF TEXAS

The purpose of this paper is to provide an in-depth examination of the internal operating procedures of the Supreme Court of Texas. While some of the observations in this paper come directly from the Texas Rules of Appellate Procedure, most are based on the authors' varied experiences as Clerk of the Supreme Court of Texas (Andrew Weber), a self-described "antediluvian" Staff Attorney for the Supreme Court (Ginger Rodd), the Supreme Court's Mandamus Staff Attorney (Blake Hawthorne), and a Supreme Court practitioner (Doug Alexander).

Many of the Court's IOPs apply broadly to the full range of filings. Others are narrowly applicable to particular types of filings. This paper is intended to cover the waterfront, but to do so in a manner that is readily useable by the practitioner. For ease of reference, bold print is employed to flag those situations where particularized IOPs are applicable. This paper does not attempt to discuss or provide insight into drafting substantively effective filings with the Court. Rather, the focus is to provide the practitioner with a comprehensive picture of what happens behind the scenes to better equip the practitioner in developing strategies and making the most effective presentations to the Court.

I. Intake and Delivery to Justices

A. Receipt of Initial Filing and Logging of Information into Computer

1. Information Logged In

When the initial filing in a new case is received by the Clerk's office, the following information is logged into the computer by one of the deputy clerks:

- Style of the case
- Counsel information (State Bar number, firm name, address, telephone number, and fax number; trial court cause number; court of appeals' cause number; trial judge and Regional Presiding Judge contact information)
- Interested parties (*e.g.*, amici)
- Fee information
- Author of court of appeals' opinion
- Citation to court of appeals' opinion

When a responsive filing or an amicus submission in a case is received by the Court, the above information is updated.

2. Clerk-friendly Filings

Counsel can make the life of the Clerk's office easier by providing pertinent information in readily accessible fashion. The cover letter should identify how many copies of the petition are being filed (original plus eleven—TEX. R. APP. P. 9.3(b)) and whether an extra copy is included for file-stamp purposes. The cover letter should also specify any fees included in the package. In the Identity of Parties and Counsel, care should be taken to make clear which counsel are associated with which party. TEX. R. APP. P. 53.2 (a). Care should also be taken to identify not only counsel involved on appeal, but also

counsel who were involved in the trial court and, in the case of **administrative appeals**, in the proceeding before the administrative agency.

Counsel's State Bar number and name on the filing should be the same as in the State Bar records, not some interesting nickname. The name is cross-checked against the State Bar database and the Clerk's office will investigate name variations. Counsel should also make sure that all address information is correct. Where out-of-state attorneys are included on the petition, prudent practice dictates filing pro hac vice motions prior to or contemporaneously with the filing of the petition.

In **mandamus** or **habeas corpus** proceedings, the Court should be furnished the name and contact information not only of counsel, but also of the respondent, which will usually be either the judge of the trial court that rendered the order complained of, or, in certain cases, the court of appeals that rendered an adverse decision. In a **habeas corpus** case, counsel should also provide the identity and complete contact information—including phone number—for the sheriff or whoever else is responsible for holding the petitioner. In both **mandamus** and **habeas** cases, the Clerk's office appreciates as much contact information for counsel as possible—office phone, cell phone, and e-mail—so that counsel can be readily contacted as needed.

3. Filing by Mail

Pursuant to the mailbox rule, counsel can send the petition or other initial filing to the Clerk's office on or before the date it is due, by United States Postal Service first class, express, registered, or certified mail. TEX. R. APP. P. 9.2(b)(1). If the filing is mailed, the Clerk's office logs in as the filing date the date the document was received, not the date it was mailed. It remains up to opposing counsel or the Court to make the date a jurisdictional issue and determine whether the mailbox rule saves the document from being untimely filed. If counsel relies on the mailbox rule for timely filing, counsel should obtain a receipt or certificate of mailing from the post office showing the date the document was mailed. TEX. R. APP. P. 9.2(b)(2)(B), (C). Because the document must be received by the Clerk's office within ten days after the filing deadline to satisfy the mailbox rule, counsel also should tickle the calendar to ensure that the document was received within the ten days. If it was not received, counsel should file a motion for extension of time. TEX. R. APP. P. 10.5 (b)(1), (3).

4. Special Rules Regarding Mandamus and Motions for Emergency Relief

Mandamus petitions are treated differently than, for example, petitions for review. When a mandamus petition is filed, it is initially routed to the Staff Attorney for Original Proceedings, usually referred to as the Mandamus Attorney ("MA") for screening. The MA determines whether emergency relief is sought and, if so, the degree of the emergency. Counsel should assist the MA with that screening process. If emergency relief is not required, that should be made clear at the very outset of the mandamus petition. If emergency relief is required, counsel should take a number of concrete steps, outlined below.

First, before the mandamus petition is even filed, counsel should phone the Clerk of the Supreme Court to inform him of the intended filing and to advise him that emergency relief is needed. If the Clerk is not available, counsel should leave a voice message stating counsel's name, phone numbers, and the date by which emergency relief is required.

Second, to make clear that emergency relief is sought, counsel is advised to file a separate motion for emergency relief. The motion should state with precision at the outset the date by which emergency relief must issue and state why emergency relief is required.

Third, even if the matter is still stuck in the court of appeals (because, for example, an order has not yet been signed), counsel should consider filing a motion for emergency relief. The motion should state at the outset "we understand that this motion is premature," and then explain the nature of the anticipated emergency. By placing the MA on notice, the Court will not be surprised and will be prepared to act quickly once the emergency actually presents itself.

After the initial screening, the MA will route the emergency motion to whichever Justices are available. To assist with this process, counsel is advised to e-mail a set of the papers to the Supreme Court Clerk, so that the papers can be readily forwarded by e-mail to the MA and the available Justices. The papers should be forwarded in Word or Word Perfect format (the Court staff and Justices have both) rather than (or in addition to) PDF format, so that whoever is working with the filings can readily cut and paste, or otherwise manipulate them. Some of the Justices rely on BlackBerries to receive e-mail when they are away from the office. In emergencies it is easier to communicate with them if the briefs are in Word or WordPerfect format.

Under the Texas Constitution, the vote of only one Justice is required to grant emergency relief. However, members of the Court prefer that 5 Justices vote in favor of granting relief. Thus, any steps that can be taken to facilitate the prompt review of the motion for emergency relief will be appreciated.

If emergency relief is not sought, or if the "emergency" is not immediate, the MA will generally recommend consideration of the mandamus petition by the Court in the regular course.

5. Special Considerations for Direct Appeals

The initial filing in a **direct appeal** contains the record and a short jurisdictional statement. TEX. R. APP. P. 57.3. Unless inconsistent with a statute or Rule 57, "the rules governing appeals to the courts of appeals also apply to direct appeals to the Supreme Court." TEX. R. APP. P. 57.1. Accordingly, the record must be filed within 60 days after the trial court signs the judgment (with certain express exceptions). TEX. R. APP. P. 57.3, 35.1. If the Court notes probable jurisdiction, it will determine a briefing schedule and, usually, set a date for oral argument.

6. Special Considerations for Certified Questions

Because **certified question** cases are submitted by the federal circuit court, the only oddity is that the filing fee usually does not accompany the filing. The clerk's office will send a fee request letter, assessing one half of the $125 fee to appellant(s) and one half to appellee(s). If the Court accepts the question(s), appellant's brief is due to the Court within 30 days after the Court's notice of acceptance. TEX. R. APP. P. 58.7(a).

7. Lead Counsel

The person who signs the petition is designated lead counsel. TEX. R. APP. P. 6.1(b). That counsel alone will receive notices from the

Clerk's office until someone else is designated as lead counsel.

8. Information Placed on Website

All of the information logged into the computer, except any internal remarks, is placed under the filing's case number on the Court's website: http//:www.supreme.courts.state.tx.us/. The information first appears on the website the morning after the filing. Thereafter, any critical event information in the case is also placed on the website.

9. Case Mail

Once a number is assigned to a petition or other initial filing, counsel should register to receive case mail from the Court. The Court's automated information system will send registrants e-mails regarding any filings or other activity, including calendar settings, on the Court's docket sheet for that matter. Of course, counsel should not rely exclusively on this service and should always double-check any due dates and calendar those dates independently of this system. The system can also provide notices of new opinions. The Court's website contains information on registering to receive case mail: http://www.supreme.courts.state.tex.us (see the case mail link on the left). Once registered with a user name and password, counsel may sign up to receive opinion notices in any appellate court in Texas (except the Fifth Court in Dallas), and counsel may elect to receive an e-mail notice for all events and calendars in any case in those courts. Though counsel may view a list of all watched cases from one webpage, and may delete any watched case from that page, counsel must initially go to a particular case in order to elect to receive case mail on that case.

B. Response or Response Waiver

The respondent in a **petition for review** proceeding has the option to (1) file a response; (2) file a waiver of response; or (3) do nothing—the petition will not be granted without a response being filed or requested by the Court. TEX. R. APP. P. 53.3. If the respondent elects not to file a response, it is recommended that to expedite the matter being forwarded to the Justices, counsel file a response waiver rather than do nothing. *See* section I.D.1., *infra.*

The respondent in a **mandamus** or **habeas corpus** proceeding likewise has the option to respond or not to respond—the petition will not be granted without a response being filed or requested by the Court. TEX. R. APP. P. 52.4. Unlike in a petition for review proceeding, however, there is no need to file a response waiver. The matter will be forwarded to the Justices without awaiting the filing of a response or a response waiver. *See* section I.D.1., *infra*.

If the respondent in a **mandamus** or **habeas corpus** proceeding elects to file a response to a motion requesting emergency relief, counsel should inform the Clerk in advance, specifying when the response will be filed. This will enable the MA to alert the Justices that a response is on its way, and to keep an eye out for the response once it is filed.

The response time for a petition for writ of **mandamus** varies depending on the circumstances of the case. When emergency or temporary relief is sought, the typical response time is ten days. But the response time may be shortened depending upon the situation presented. The Court has in the past requested a response in less than twenty-four hours due to exigent circumstances.

Where emergency or temporary relief is not sought, the response time for a petition for writ of **mandamus** is typically thirty days.

In a **direct appeal**, the response to the jurisdictional statement is due within 10 days after the statement is filed. TEX. R. APP. P. 57.3. Similarly, if the Court dismisses the appeal for want of jurisdiction, appellant has only 10 days to perfect any other appeal. Appellee's brief is due within 20 days after appellant's brief is filed, TEX. R. APP. P. 38.6, unless the Court prescribes otherwise. In a **certified question**, the timing for the response brief is the same as that for the response brief in a direct appeal. TEX. R. APP. P. 58.7(a).

C. Reply to Response

The petitioner is entitled to file a reply to the response to the **petition for review**, **mandamus** or **habeas corpus**. TEX. R. APP. P. 52.5, 53.7(e). In the case of the **petition for review**, the reply is due within 15 days of the filing of the response. *Id.* However, there is no guarantee that the Justices will actually review the reply before voting. This is because it is the filing of the response, not the reply, that triggers the petition package being forwarded to the Justices for their consideration.

Requesting an extension of the 15-day deadline to file the reply is essentially a pointless act. The Court almost invariably responds with a form letter stating that the time for filing the reply is not jurisdictional, that the reply can be filed at any time, and that it will be filed and considered by the Court if received before the case has been disposed of. Translated into practical reality, this means that the reply may, or may not, be considered by the Justices if it is filed after the deadline—the Justices will not await the filing of the reply to act on the case. Accordingly, counsel for the petitioner is advised to clear the decks once the response is filed, and to file the reply as quickly as reasonably possible to maximize the odds of it actually being considered by the Justices before casting their votes.

D. Component Parts and Form of Filed Documents—Striking and Redrafting

When a petition, brief or other document is filed, one of the deputy clerks checks it to ensure that it complies with the appellate rules. If it does not comply, it is subject to being struck. In that event, the Court will inform the petitioner why the filing is being struck and order it redrawn, usually within two weeks or less. The Court retains the original and a copy, and returns the remaining copies to the filing party. The screening deputy clerk also cuts out the postmark and tapes it to the original of the filing. The list of items checked by the deputy clerk is set forth below; it can be used by counsel as a checklist in preparing the filing.

1. Cover Color and Materials

The filing should have durable front and back covers, which must not be plastic. TEX. R. APP. P. 9.4(f). Counsel can select any color for the cover of the filing, except red, black, or dark blue. *Id.* It is useful for opposing parties to pick different colors and stick with those colors throughout the proceeding.

2. Cover Contents

The required cover contents are the case style; the case number (which will be blank if no case number has yet been assigned); the title of the document being filed; and the name, mailing address, telephone number, fax number, if any, and state bar number of the lead counsel for the filing party. TEX.

R. APP. P. 9.4(g). The case number should appear in 48-point font.

Although the rule technically requires only that identifying information for lead counsel appear on the cover, the cover may also contain other counsel of record. The State Bar number of each listed attorney should be included immediately beneath his or her name, unless space is a constraint—in that event, only the State Bar number of the lead counsel need be provided.

Although also not required, some Justices prefer that the cover reflect the name of the court of appeals whose decision is being reviewed—*e.g.*, "On Petition for Review from the [number] of Court of Appeals at [City], Texas." The Clerk's office prefers this information to be included as it expedites logging the required information into the computer.

3. Binding

Although the rules permit stapling petitions or briefs in the top left-hand corner, counsel should decline that option. Instead, counsel should spiral bind the document so that it will lie flat when open. TEX. R. APP. P. 9.4(f).

4. Margins

The document must have at least one-inch margins (top, bottom, and sides). TEX. R. APP. P. 9.4(c).

5. Spacing

Although the text of the document must be double-spaced, block-quotations, short lists, and issues or points of error may be single-spaced. TEX. R. APP. P. 9.4(d). However, counsel are cautioned that a filing may be stricken for overdoing single-spacing.

6. Font Size

If the document is prepared using Courier or some other non-proportionally spaced type face, the font must be printed in standard 10–character-per-inch font. Proportionally spaced typeface, such as Times New Roman, must be in 13-point or larger. TEX. R. APP. P. 9.4(e). Use 13-point font; 10-point non-proportional spacing is for those using manual typewriters. Footnotes may be printed as small as 10-point, using proportionately spaced typeface. However, because 10-point font is so difficult to read, counsel are advised to use 12-point font.

7. Number of Pages

A **petition for review, mandamus or habeas corpus** cannot exceed 15 pages, excluding the identity of parties and counsel, table of contents, index of authorities, statement of the case, statement of jurisdiction, issues presented, signature, certificate of service, and appendix. TEX. R. APP. P. 52.6, 53.6.

E. Holding and Forwarding of Documents to Justices

1. Length of Time Held

A **petition for review** is held in the Clerk's office for 30 days before being forwarded upstairs to the Justices, unless a response or response waiver is filed before the expiration of 30 days. The first of these to occur will trigger the petition being forwarded.

A **mandamus petition**, **habeas petition**, **parental termination** case, or **rehearing motion** is not held in the Clerk's office, but rather is forwarded

without awaiting the filing of a response. A **mandamus petition, habeas petition**, or **parental termination** case is forwarded directly to the MA to review. As a general rule, the MA treats all **habeas petitions** and **parental termination** cases as emergencies and will bring them to the Court's attention as soon as practicable. The same is true of **mandamus petitions** when emergency relief is sought.

2. Tracking

The Clerk's office runs a calendar report that indicates which proceedings are ripe to be sent upstairs.

3. Forwarding

Once a proceeding is ripe for review, the file will be sent upstairs to the Justices the next Tuesday morning between about 10:00 a.m. and noon. In order to trigger the forwarding of a **petition for review** to the Justices on any given Tuesday, the response or response waiver must arrive in the Clerk's office by around 4:00 p.m. the preceding Monday. This allows time for the receipt of the response or response waiver to be logged into the computer and for the calendar in that case to be revised to reflect that forwarding to the Justices is due. The calendar report is generated each Tuesday morning.

4. Package

A deputy clerk is responsible for assembling the package for each matter ripe for review. The Court's Administrative Assistant is responsible for distributing the packages to each of the Justices' chambers. The package for each matter is placed in a redrope, which includes the petition or motion, the appendix, the response or response waiver (if filed), letters, and amicus submissions. The package also includes a pink vote sheet for the case. *See* § II.A.2, *infra.* Most redropes are relatively thin unless a large appendix is included or there are multiple amicus submissions. The collective volume of the matters delivered to the chambers each Tuesday morning, however, is daunting—the delivery includes petition for review packages (on average, 16-17 per week), plus mandamus petitions, habeas filings, motions for rehearing, etc.

F. Subsequent Petitions for Review

A special set of rules applies to cases in which more than one **petition for review** may be filed complaining of the court of appeals' decision.

1. Time for Filing

Any other party required to file a petition or review may do so within 30 days after any preceding petition is filed or within 45 days after the last timely filed motion for rehearing in the court of appeals is overruled, whichever date is later. TEX. R. APP. P. 53.7(c). There is no need to inform the Clerk's office of a party's intent to file a subsequent petition.

2. Effect on Disposition of Initial Petition

In the event that a motion for extension of time is filed on a subsequent petition, the first petition, even though forwarded to the Justices from the Clerk's office, should not be disposed of until either (1) the subsequent petition has been circulated or (2) a determination is made that the subsequent petition has not been and can no longer be submitted timely. The Justices are not actually told of the filing of a motion for extension of time for the subsequent petition. But the Court's Administrative Assistant strikes the initial petition from the purple vote sheet, *see* § II.A.3., *infra*, and reschedules the petition for

consideration for a date driven by when the subsequent petition is due or actually arrives. Once it does arrive, the subsequent petition is forwarded immediately to the Justices, unless the initial petition has not yet been forwarded. If the initial petition has not been forwarded, the subsequent petition is held as well until the entire package is ripe for forwarding. This same procedure applies to a response or response waiver to the subsequent petition.

G. Amicus Submissions at Petition Stage

1. Submission

Under the appellate rules, an amicus brief is not technically "filed" with the Supreme Court, it is merely "received." TEX. R. APP. P. 11 ("An appellate clerk may receive, but not file, an amicus curiae brief."). Thus, an amicus correctly states not that it is "filing" the brief with the Court but rather that it is "submitting" the brief.

2. Forwarding to Justices

Notwithstanding that an amicus brief is merely "received" by the Court, if it is submitted before the **petition for review, mandamus** or **habeas corpus** has been forwarded to the Justices, *see* § I.C.3., *supra*, it will be held in the file and included in the redrope along with the petition. If an amicus brief is received after the petition has been forwarded, it will be forwarded immediately to the Justices. To be assured that the Justices will actually consider the amicus brief when marking their vote sheets for the case, if reasonably possible the brief should be submitted to the Court before the petition is actually forwarded to the Justices. That way, from the outset the amicus brief will be included in the redrope along with the petition. Counsel is cautioned that the submission of an amicus brief may impact a Justice's decision whether to participate in the case.

II. Judicial Determination at Petition Stage

A. Overview of Action on Petitions for Review, Mandamus and Habeas Corpus

1. "Conveyor Belt" System

The Court employs a "conveyor-belt" system in acting on petitions for review and **non-emergency mandamus petitions** Once a petition is placed in the hands of the Justices on a given Tuesday, it begins moving along the conveyor belt. Unless it is affirmatively removed from the belt by one or more of the Justices, the petition is automatically denied on the Court's Friday orders, 31days after the Justices first received it. One or more of the Justices can remove a petition from the conveyor belt by voting to take some action other than denying it. The Court employs vote sheets to note their preferences.

2. Pink Vote Sheet

The Court uses three different vote sheets, which serve three different functions. A pink vote sheet is placed in each petition and rehearing package and is the vote sheet for that particular case. An exemplar is attached as Appendix 1. The pink vote sheet is intended to be used by each of the Justices reviewing the petition. It lists the Supreme Court style and case number, identifies the trial court and court of appeals, and indicates whether a response or response waiver was received by the Clerk. It provides blanks for the reviewing Justice to indicate the action deemed appropriate: deny; request response; request record; discuss at conference; request study memo; issue *per curiam* opinion; grant; dismiss for want of jurisdiction; refuse petition; hold; dismiss petition on motion of party. The pink vote

sheet also provides space for "remarks" by the reviewing Justice— essentially space for notes that the Justice can use to refresh recollections about the case when the petition proceeds to conference. If briefs on the merits are requested in a particular case, the assigned law clerk is provided the pink vote sheets of the Justices to assist the clerk in preparing the study memo.

3. Purple Vote Sheet

Each Tuesday, each Justice also receives a purple vote sheet on all matters forwarded to chambers that week. An exemplar is attached as Appendix 2. The sheet lists for action not only petitions for review, mandamus, and habeas corpus, but also rehearing motions, and other matters requiring action by the full Court. The purple vote sheet includes the same blanks as the pink vote sheet for the Justices to record their preferred disposition. Justices may also cast their votes electronically. The deadline for the purple vote sheet to be returned to the Court's Administrative Assistant is noon Tuesday, four weeks after the petition is first forwarded to the Justices. If any Justice votes to take any action other than denying a petition, the petition is removed from the conveyor belt. A Justice's failure to mark a vote on a petition is treated as a vote to deny it.

4. Yellow Vote Sheet

The agenda for the Court's conference is composed of "preliminary items" requiring the immediate attention of the court, post-submission discussion of prior oral arguments, draft opinions in causes, draft *per curiam* opinions, motions for rehearings of causes and denials of petitions, and pending petitions. The yellow vote sheet assists the Court's disposition of the last two categories of agenda items—rehearings of denials of petitions (but not rehearings of causes) and pending petitions. It is used to allow the Justices, in advance of conference, to see how the other Justices voted on matters previously recorded on purple vote sheets, and to record votes on circulated study memos due to be discussed at conference. The votes of the Justices may change after circulation of study memos.

At the time the conference agenda is prepared, generally one week in advance of the scheduled conference, the Court's Administrative Assistant prepares a preliminary yellow vote sheet. That vote sheet will not include any petitions or rehearing of denial of petition motions that have failed to make the "initial cut" due to lack of a vote for anything other than "deny" on the purple vote sheets marked by the Justices. As for those petitions and rehearing motions that do make the "initial cut," how the Justices marked their purple vote sheets determines which conference the matter goes to. If any of the Justices requests a response to a petition or rehearing motion, the matter is scheduled for the conference following the expiration of 30 days after the response is filed. In those rare occasions when a Justice requests the record without full briefing on the merits having been called for, the matter is scheduled for conference following the expiration of 30 days after the record is received. If the Justices mark their purple vote sheets for something other than "response requested," "record requested," or "deny," the matter goes directly to the next scheduled conference. Thus, the yellow vote sheet could include matters from several different purple vote sheets.

Those petitions and rehearing of denial of petition motions that make the "initial cut" and are "ripe" for discussion at the next scheduled conference are listed on the yellow vote sheet for that conference, along with any study memos that will be discussed at that conference. The Court's

Administrative Assistant, by consulting the purple vote sheets, records on the yellow vote sheet how each Justice voted on each petition and rehearing motion listed. With respect to the study memos that are to be discussed, the Administrative Assistant lists the initial votes that were case before the study memo was prepared. The yellow vote sheet is then circulated to all of the Justices. The Justices, once they have had a chance to see how other Justices have voted, and review any study memos that have been circulated, are then at liberty to change their vote on a petition or rehearing of denial of petition motion. The Justices record their votes on all petitions, rehearings of petitions, and study memos scheduled for discussion, and on the morning of the conference, each Justice hands the Administrative Assistant their completed vote sheet. All new votes and vote changes are copied to a new cumulative yellow vote sheet, which is then circulated to all the Justices. With the votes thus compiled, the Court can move more efficiently through the discussion of these matters. The Chief Justice is able to quickly identify which matters are candidates for an outright grant, which are clear candidates for a study memo, and which Justices have an interest in a particular matter that may require more protracted discussion. Achieving a consensus by the Justices that a petition be denied is the quickest and easiest disposition for the Court.

5. Request for Response

If any of the Justices requests that a response be filed, that is sufficient to pull the case from the "conveyor belt." The case is placed on a "status report" list until the response is received or the deadline for filing the response has passed. At that point the case is placed on the Court's conference agenda, after allowing ample time for a reply to be filed (assuming a response was filed) as well as time for the Justices to review the response and any reply.

B. Review of Petitions

1. Amount of Review

The practices of the Justices vary with respect to their initially reviewing petitions for review, mandamus and habeas corpus in order to mark the purple vote sheets. Not all the Justices will read all the petitions each time. Some use their court staff to summarize petitions and flag those deemed worthy of further study, and some read all the petitions each time. Although it may vary somewhat, most Justices say they spend a maximum of 15 minutes per petition package, which includes reviewing the petition, court of appeals opinion, and response (if any).

2. Manner of Review

The order in which the matters in the petition package are reviewed by the Justices also varies. Some start with the court of appeals' opinion, since the Court is reviewing the opinion for error. Some start with the issue statements and then look at the court of appeals' opinion. Some start with the summary of the argument and then read only those portions of the court of appeals opinion relevant to the issues presented.

3. Timing of Review

The practice varies with respect to the timing of review as well. Some Justices read the petitions soon after they are forwarded; others read them the week before the purple vote sheet is due. One or two may not read them in time to mark their votes on the purple vote sheet, but may read them later and pull from orders a petition set to be denied so it can be

discussed at the next conference. Those Justices who read petitions earlier may alert the other Justices to an upcoming petition that involves an issue similar to one being discussed, and the Court may then decide to hold the petition to consider them together.

4. Role of Court Staff in Review

Some Justices have or have had staff attorneys or law clerks help screen petitions and recommend votes. This practice has ranged from having staff generally screen petitions for particular issues (*e.g.*, family law issues, constitutional law issues), to having them summarize all petitions and recommend their disposition.

C. Conference at Petition Stage

1. Conference Calendar

The Court sets a fall and spring conference calendar. These calendars are discussed at administrative conference prior to the coming season, *e.g.,* at the June administrative conference the Court sets the fall conference calendar. Generally, the Court holds conference once a month on a Monday at 10:00 a.m. If the Court is unable to complete its business in a single day, the conference carries over to Tuesday, starting at 9:00 a.m. Holidays, judicial conferences outside of Austin, and swearing-in ceremonies will determine whether a scheduled conference is cancelled, rescheduled, or starts late. At the end of the Court's session, as summer approaches, the Court generally schedules several conferences each month, as the Court works on wrapping up opinions. In June, the Court usually conferences weekly.

2. Length of Conference

Typically, conference will start at 9:00 a.m. and end between 4:00 and 6:00 p.m. At the beginning of the term, in mid-August, the first conference will last two days and the second will last one and one-half days.

3. Attendance at Conference

The persons required to attend conference for its duration are the Justices, the Court's Administrative Assistant, and the Conference Monitor for that week (a duty assigned to a law clerk in a particular chambers on a rotating basis by seniority). Staff attorneys also usually attend conference for its duration, although this depends on the particular Justice. Law clerks are allowed to attend conference for its duration, again depending on the particular Justice. Interns may participate at conference only to the extent of discussing opinions, rehearing of petitions, and petitions on which they have actually worked

4. Agenda for Conference

The conference agenda is prepared by the Court's Administrative Assistant with input from each chambers. Items included on the agenda include filings that require immediate attention by the Court ("preliminary items"), post-submission discussion of prior oral arguments, draft opinions in causes, draft *per curiam* opinions, motions for rehearing of causes and petitions, and pending petitions.

5. Disposition of Petition Without Discussion at Conference

If no Justice has either requested a response to a petition or indicated a preferred disposition of the petition other than "deny," the petition will not be placed for discussion on the Court's conference

agenda. Instead, the petition will be automatically denied on the Court's Friday orders, 31 days after the petition package was forwarded to the Justices.

6. Postponement of Discussion of Petition

Sometimes the Justice or Justices who have marked a petition for discussion (or something other than "deny") is not present at conference. On other occasions, a Justice will ask for additional time to study the petition. In these instances, the petition will be placed for discussion on the next conference agenda, or the petition may be denied if the Justice reviews it and declines to vote for any action other than deny. On still other occasions, there may be some votes for a certain action (*e.g.*, assigning a study memo), but the votes are insufficient. In this instance, the Court may hold the petition over for Justices to further study it or for an absent Justice to vote. Or the Court may vote to deny the petition on orders subject to the absent Justice's prerogative to "pull" the petition from orders before they issue. The Court's Administrative Assistant is responsible for monitoring petitions and ensuring that they are placed back on the conference agenda at the appropriate time.

7. Discussion of Petition at Conference

Because of the extensive list of matters typically included on the conference agenda, even when a petition survives automatic denial and makes it to conference, the amount of time devoted to discussion of the petition is generally limited—usually 1 to 15 minutes, with 15 minutes being considered an extraordinarily lengthy discussion. All petitions on the conference agenda are called to the table by the Chief Justice in numeric order, oldest cases first. A petition is discussed at conference according to the votes reflected on the yellow vote sheet. Generally, the Chief Justice controls the discussion by calling on Justices who have either voted to discuss the petition or recommended specific disposition, such as request study memo, grant, dismiss WOJ, or hold. These Justices then present their concerns to the Court. Other Justices may jump into the discussion, including those who have voted to deny the petition (with their reasons for denial). Justices who have not yet voted may vote at this point. Justices may also change their votes based on the conference discussion. If no consensus is apparent from the discussion, the Chief Justice will call for a vote. At this point, the most common resolutions are to deny the petition, request a study memo, or dismiss the petition for want of jurisdiction.

D. Votes Required for Particular Dispositions

The timing and disposition of each petition turns on the Justices' votes. Those votes are initially reflected on the purple vote sheets, which are distributed to the Justices with the petition package on a Tuesday and are due to be returned to the Court's Administrative Assistant by noon Monday four weeks later. *See* § II.A.3., *supra.* The Justices may, however, change their votes, or place their votes for the first time on a petition, if the case survives automatic denial and is placed on the conference agenda. Because conferences are held on Mondays and the Court's orders issue on Fridays, this allows time for one or more of the Justices to "pull" the matter from orders for further study or for some other reason. The various dispositions and required votes are set forth below.

1. Deny

If all of the votes on the purple vote sheets are to deny the matter, even if fewer than 9 votes are cast, the petition is automatically denied without any discussion at conference on the following Friday's

set of weekly orders, 31 days after the petition package was initially forwarded to the Justices.

2. Request Response

If any Justice votes to request a response to the petition, the Clerk's office requests by letter that the response be filed within 30 days. If the response is timely filed, the petition is placed on the calendar for the first conference following the expiration of an additional 30 days. If the response is not timely received and no motion for extension of time is filed and granted, the petition is ultimately placed on a conference agenda with a notation that the response was never received. The Court may then dispose of the petition or instruct the Clerk's office to either request a status report on the response or make other inquiry.

3. Request Record

If any Justice votes to request the record, the court of appeals will be directed to send the appellate record to the Clerk of the Supreme Court. It is relatively rare for a Justice to request the record absent a request for full briefing on the merits.

4. Discuss

If any Justice votes to discuss a petition, the petition is discussed in the earliest scheduled Monday conference. If no other interest is shown in the petition, it is denied on the following Friday's orders.

5. Dismiss WOJ

Similarly, if any Justice votes to dismiss a petition for want of jurisdiction, the petition is discussed in the earliest scheduled Monday conference. If 5 or more Justices vote to DWOJ the petition, it is dismissed WOJ on the following Friday's orders. If not DWOJ'ed, the petition is denied or otherwise disposed of according to the votes in conference.

6. Request Full Briefing and Memo

If 3 or more Justices vote to do so, the Clerk's office will request full briefing on the merits and a study memo will be assigned. The request letter will indicate when petitioner's and respondent's briefs on the merits are due, and when petitioner's reply brief on the merits is due. The request for full briefing is invariably accompanied by a request that the court of appeals send the appellate record to the Clerk of the Supreme Court.

7. Grant Petition for Review

If 4 or more Justices vote to do so, a petition for review is granted. The rules preclude the Court from granting a petition without first receiving a response. TEX. R. APP. P. 52.4, 53.3. Nothing in the rules, however, precludes the Court from granting the petition before requesting a study memo or full briefing on the merits. As a practical matter, however, the Court tries to avoid this and it rarely occurs.

8. Grant Petition for Writ of Mandamus or Habeas Corpus

It takes a vote of 5 or more Justices to grant a petition for writ of mandamus or habeas corpus.

9. Hold

If 6 or more Justices vote to do so, the Court may hold off on taking action on a petition. This may be so that the petition can be disposed of with a pending cause, or so that further study can be done.

10. *Per Curiam*

If 6 or more Justices vote to do so, the Court may, without hearing oral argument, grant the petition and issue a *per curiam* opinion in the matter. TEX. R. APP. P. 59.1. In that event, the Chief Justice will assign a Justice to draft a *per curiam* opinion, usually the same Justice whose chambers prepared the study memo. Following further deliberations, either the opinion will issue on 5 or more votes, or the matter will be otherwise disposed of. In other words, at least 6 Justices must vote to issue a PC without oral argument, but only 5 Justices need join in the PC.

11. Refuse

If 6 or more Justices agree, the court of appeals' opinion may be refused. In practice, the Court will generally only consider refusal after a study memo has been prepared, the memo endorses the court of appeals' opinion, and the Court has jurisdiction over all issues. It is the Court's policy that a petition will only be refused after the court of appeals' opinion has been reviewed by a Staff Attorney.

12. Improvident Grant

The Court may decide after initially granting review, but before issuing a decision, that review never should have been granted in the first place. In that event, the Court issues an "Improvident Grant" notice to the parties. It takes the votes of 6 or more Justices to IG a case.

13. Summary of Required Votes

In sum, the following votes are required for the corresponding action or disposition of a **petition for review**, **mandamus** or **habeas corpus**:

Request Response	1
Request Record	1
Discuss	1
Dismiss WOJ	5
Request Briefs/Memo	3
Grant Petition for Review	4
Grant Mandamus/Habeas	5
Hold	6
Per Curiam	6 issue; 5 join
Refuse	6
Improvident Grant	5
Deny	Automatic unless at least 1 vote for something other than "deny"

III. Briefs on the Merits and Study Memo

A. Request for Briefs on the Merits

1. Practical Significance of Request

The Court requests the parties to file full briefing on the merits in only about 1 in 4 cases. The request for full briefing increases the odds of a grant or *per curiam* opinion from about 1 in 10 to 1 in 3.

2. Relationship to Assignment of Study Memo and Request for Record

When briefing on the merits is requested, the Clerk's office simultaneously requests the clerk of the court of appeals to forward the record to the Supreme Court. Full briefing is almost always requested when a study memo is assigned. Occasionally, a study memo will be assigned without full briefing (*e.g.*, on jurisdiction only), and then the

time frame for the study memo is shorter (*i.e.*, it is due to the Court sooner than if the Court had to wait for full briefing on the merits). Sometimes petitions are held while the opinion in a cause or a *per curiam* opinion is being drafted, so that the Court can be ready to dispose of the petition when the cause or PC is close to completion. In such a case, the Court may request full briefing without an official study memo ever being prepared; the chambers with the PC or cause studies the petition, the record, and the briefing, and makes a recommendation to the Court on how to dispose of the petition in light of the PC or cause opinion.

3. Deadlines

The ordinary rules for filing briefs on the merits are set out in the appellate rules. The petitioner's opening brief is due 30 days after the notice requesting full briefing, the respondent's brief is due 20 days after the petitioner's brief, and petitioner's reply brief is due 15 days after that. TEX. R. APP. P. 55.7. On motion complying with Rule 10.5(b), the Court may extend the time for filing these briefs. *Id.* In rare cases, the Court may decide to expedite full briefing. More often, the deadlines are extended through motions for extension of time. Such motions are generally handled by the Clerk; the chambers which has been assigned the study memo is then informed of the extension. If the Clerk is absent, the extension motions are forwarded for action to the chambers assigned the study memo.

B. Assignment and Preparation of Study Memo

1. Manner in Which Assignments Made

In most cases where it requests full briefing on the merits, the Court also assigns the case to the chambers of one of the Justices for preparation of a study memo. As the Court makes its assignments, each successive one is assigned in turn to a Justice in a rotation order that begins with the Chief Justice, proceeds down by seniority, and then starts again with the Chief Justice. Whichever chambers was next in line for assignment on the rotation at the end of a given conference is first in line at the next conference. The Justice's vote on the petition does not affect the assignment (*i.e.*, even if a Justice votes to deny a petition, the memo may nonetheless be assigned to that Justice's chambers). If, however, the Justice is recused on the petition, the memo will not be assigned to that Justice's chambers. In **mandamus** or **habeas corpus** proceedings, the Court may assign the case to the MA for preparation of the study memo, rather than to the chambers of one of the Justices.

After conference, the Court's Administrative Assistant circulates a list of all the study memo assignments and due dates. Each chambers then assigns study memos according to their internal system (which may involve alternating memos between law clerks, except where law clerk recusal issues arise, or it may depend on law clerk workloads).

2. Focus on Particular Issues

Sometimes at conference, the Court will instruct the law clerk to focus on particular issues raised by the petition, or specific issues raised by the Court (such as jurisdiction). The law clerks are also

instructed generally to focus on dispositive issues—if the law clerk can resolve the petition based on one issue, the clerk has the discretion not to address the others unless the Court disagrees with the resolution and sends it back for the clerk to address the other issues. It is the responsibility of the law clerk to identify those issues that are not addressed in the study memo.

3. Reliance on Parties' Briefs vs. Independent Research

Law clerks are generally instructed to use the briefs only as a starting point. Clerks are instructed to double check the information (facts and legal authority) presented in the briefs, and then to do independent research for authority, preservation of error, and other dispositive issues that the parties may have missed. The clerks are specifically charged to address error preservation in their study memo.

4. Study Memo Guidelines

Law clerks are provided with the Court's study memo policy. They are also given a study memo orientation, usually by one of the more senior Staff Attorneys. The orientation includes review of the study memo policy, preservation of error principles, and when to recommend a grant as opposed to other action. The law clerks may not exceed the Court's 10-page (single-space) limit for the study memo without the Chief Justice's permission. Further guidelines may be provided within each chambers. Although the Justices are generally not involved in the preparation of the memos, the Staff Attorneys generally read, edit, and discuss the memos with the law clerks, at least at the beginning of the term. In preparing the study memo, the law clerk is charged to summarize each side's arguments and authorities and to provide an objective analysis of each issue. The clerk is not required to state or frame the issues the same way the parties have, or even in the same order.

5. Law Clerk's Recommended Disposition

Law clerks are asked to make a recommendation of disposition to the Court—grant, PC, deny, refuse, dismiss WOJ, or hold. The law clerk leaves that question "open" if the clerk is unable to decide on a specific recommended disposition. If the law clerk concludes that the Court should grant a petition, the clerk may simply recommend a "grant" or the clerk may recommend a "grant" along with a proposed resolution of the issue. Also if the clerk recommends "refuse," the Court's new policy is to have the matter assigned to a Staff Attorney (presumably from the same chambers) for review to determine if refusal is in fact appropriate.

6. Deadline for Memo

The study memo is due for circulation to the Justices 30 days after the response brief on the merits is filed. This allows sufficient time for the law clerk to receive and consider the petitioner's reply brief, which is due 15 days after the response brief. TEX. R. APP. P. 55.7. In the relatively rare event that the Court grants an extension motion for filing the reply brief (a decision that is made by the chambers assigned the study memo) that will correspondingly extend the time for the law clerk to complete the study memo—the memo will not be circulated until the extended reply date.

In most instances, rather than grant or deny the extension motion, the Clerk will send a letter indicating that the deadline for filing the reply is not jurisdictional, that the reply can be filed at any time, and that it will be filed and considered by the Court if received before the case has been disposed of. If

the reply is filed after the due date for the memorandum, the law clerk will supplement the memo if a new argument is raised. Because extensions of time for filing the reply brief are so rarely granted, counsel for petitioner is advised to get the reply on file by the deadline to ensure that it will actually be considered by the law clerk in preparing the study memo.

C. Amicus Submissions at Briefs on the Merits Stage

1. Forwarding to Justices

Once a case reaches the briefs on the merits stage, any amicus briefs that are submitted are forwarded immediately to the Justices.

2. Review by Justices

While the practice varies, most Justices will not review an amicus brief at the time it is submitted, unless the Justice is closely monitoring that particular case. Instead, the Justices typically will review the amicus brief for the first time—if at all—shortly before the conference at which the study memo for that case is scheduled to be discussed. Some Justices do not actually review the amicus briefs, but rely instead on the study memo's discussion of any amicus briefs.

3. Treatment in Study Memo

The law clerks are instructed to list on the first page of the study memo the names of any amici. The study memo will note which side—petitioner or respondent—the amicus supports. If the arguments in the amicus brief are essentially the same as those in the supported party's brief on the merits, the study memo will merely note that. If, however, the amicus brief includes independent analysis that is different from that appearing in the supported party's brief, the study memo will generally contain a more detailed discussion of that independent analysis.

It is conventional wisdom at the Court that the fact amici briefs are filed in a case is usually more important that what they say. However, amici briefs can be very helpful to the Justices by identifying the practical impact of the case—*e.g.*, describing in concrete terms how a particular outcome will adversely affect the amicus and others similarly situated. In order to have an impact on the substantive discussion appearing in the study memo, counsel for an amicus should submit the brief no later than the date the respondent's brief is filed or very shortly thereafter. As a general matter, it is better to line up amicus support at the petition stage rather than wait until the merits stage.

D. Circulation of Study Memo

1. General Policy Regarding Circulation

The law clerk circulates one copy of the study memo to each of the Justices as well as one to the Court's Administrative Assistant. The conference agendas are prepared on Monday, one week in advance of the next conference. The agenda includes any study memos that have been filed or are due since the last conference. This allows the Justices at least a week to review the memo before the conference in which the memo is to be discussed, depending on which day of the week the memo is actually circulated.

2. No Screening by Justices Before Circulation

Although each study memo is assigned to a particular chambers for preparation, most Justices do not screen the memo before it is circulated—one

Justice does so fairly consistently and another couple of Justices do so occasionally.

3. Justices' Review of Study Memo vs. Parties' Briefs

In making their decision to grant or deny review at this juncture, the practices of the Justices vary. Some may only read the study memo, while some may read the study memo and briefing. Most Justices typically review the study memos in a batch before conference.

E. Conference at Briefs on the Merits Stage

1. Nature of Discussion

The law clerk who prepared the study memo is present in the room during conference, but does not actually make a formal presentation of the study memo. Instead, the law clerk is available as a resource in case any of the Justices have questions. The Chief Justice generally calls on those Justices who have indicated some vote on the yellow vote sheet other than "deny" to allow them the opportunity to present their views or question the law clerk who prepared the study memo. If 4 or more Justices have already indicated an interest in granting the case, the discussion will typically be very short if there is any discussion at all. If the decision to grant or deny is a close one, however, the discussion may be more protracted—up to 30 minutes in an unusual case.

2. Supplemental Study Memo

Occasionally, the Court will table the discussion of a study memo and request the preparation of a supplemental study memo. This task is almost always assigned to the same chambers that prepared the original study memo. The supplemental memo may be assigned to a different chambers if, for example, the issue targeted for supplementation is one that is being addressed in another chambers as part of its preparation of a majority opinion in a cause. Consequently, in preparing merits briefing, counsel is advised to let the Court know if similar issues are involved in other matters pending before the Court.

Factors that may trigger a supplemental memo include a request by the Court for clarification of a particular point in the record. Additionally, the Court may disagree with a law clerk's assessment that a particular issue is dispositive and renders unnecessary the discussion of other issues; the Court may request a supplemental study memo to discuss the unaddressed issues.

3. Protracted Inactivity

In some cases, many months may go by after the parties have submitted all their briefing on the merits. This does not mean that the Court has "forgotten" about the case; there is usually an explanation that the parties will not be informed of and the Clerk's office is not privileged to convey if asked. The explanation may be that the Court has voted to prepare a *per curiam* opinion and a protracted period of time is required for that opinion to ultimately issue. Or it could be that the Court has decided to "hold" the case until either a *per curiam* opinion issues or a cause has been decided in some other case involving a similar issue that is dispositive. It could also mean that a Justice interested in the case has not been able to secure enough votes for a grant and is attempting to persuade other Justices to go the *per curiam* route. If the case is hung up for a protracted period of time, counsel should consider filing supplemental briefing to tip the balance.

F. Voting on Disposition at Briefs on the Merits Stage

1. Dispositions Available

Once the case has been fully briefed on the merits, by far the most common dispositions are to "grant," "deny" or "*per curiam*." Less common at this stage is a decision to dismiss the case for want of jurisdiction. Even more rare is a decision to "refuse" the petition. The Court may also vote to "hold" the petition pending issuance of a *per curiam* opinion or the decision of a cause.

2. Impact of Study Memo on Disposition

The law clerks are asked to recommend a disposition when they prepare a study memo. However, it is frequently the case that the Justices decline to follow the recommended disposition. Generally speaking, law clerks tend to focus more on whether there was error than on whether the issue involved is important to the development of the state's jurisprudence. Thus, a law clerk may recommend "deny" because, in the clerk's opinion, the court of appeals committed no error, when, in the view of the Justices, the core issue is of sufficient jurisprudential importance to warrant review regardless of the merits. Thus, notwithstanding the law clerk's recommended disposition, the Justices independently scrutinize whether to exercise their discretionary jurisdiction in a particular case. Nonetheless, the study memo plays a pivotal role in the decision whether to grant or deny a petition, since it is to the memo that the Justices will typically first turn in this decision making process.

IV. Motions (other than Rehearing Motions)

A. Motions to Extend Time ("METs")

The Court has assigned METs to the Clerk for disposition. The Court developed a set of procedures to ensure consistent disposition of such motions. Motions must either have a certificate of conference (which is preferred) or make clear in the body of the motion whether the motion is opposed or unopposed. TEX. R. APP. P. 10.1(a)(5). Additionally, each MET must provide, among other things, the critical disposition dates in the court of appeals. TEX. R. APP. P. 10.5(b)(2), (3)(B). The following general rules apply to Unopposed METs for Petitions for Review. If a MET is opposed, the Clerk's office will inquire whether opposing counsel intends to file any opposition. If it is not clear from the certificate of conference whether the MET is opposed, the Clerk's office will call the movant and, if necessary, the nonmovant. If no certificate is present, the Clerk requests a certificate before disposing of the motion. Finally, no MET to file a petition for review is ever denied without the Court's approval.

1. Unopposed MET for Petition for Review

As a general rule, the first MET will be granted for up to 30 days. A second will also be granted for up to 30 days, but the grant letter will include "standard" language informing the movant that further requests for extensions will be disfavored. **Parental termination** cases represent the exception to the general rule—all standard times for extensions are halved.

2. Unopposed MET for Response to Petition

If the response was requested by the Court, the requesting Justice(s) will be asked if they want to grant the extension. If so, it will be granted. If the

response was not requested by the Court, the MET will be granted for up to 30 days; the grant letter will include the standard language about further requests being disfavored.

3. Unopposed MET for Reply to Response to Petition

These motions prompt a letter from the Clerk's office neither granting nor denying the requested extension. Instead, the movant is informed that a reply is not jurisdictional; if the reply arrives before the petition is disposed of, it will be considered.

4. Unopposed MET for Petitioner's and Respondent's Briefs on the Merits

These METs are granted for up to 30 days and the standard language about further requests being disfavored is included.

5. Unopposed MET for Petitioner's Reply Brief on the Merits

Unless the chambers to which the study memo has been assigned informs the clerk that it wants to grant the MET, the movant is informed that if the brief arrives prior to disposition, it will be considered.

6. Unopposed MET for Motion for Rehearing

a. Of a Cause or *Per Curiam* Decision

The chambers that authored the majority opinion or the *per curiam* opinion will decide whether to grant the MET.

b. Of a Denied Petition

The Clerk's office processes these METs. The first MET is granted for up to 30 days; the letter includes the standard language about further requests being disfavored.

B. Motions to Abate

Motions to abate, whether for bankruptcy or settlement purposes, are presented to the Court for action. The motion is usually accompanied by a short memo. The memo is prepared by the motions attorney for the week in which the motion is filed, unless the case has already been assigned to a particular chambers for preparation of a study memo or an opinion, in which case that chambers will prepare the memo. The attorney authoring the memo will usually recommend a particular disposition to be effected at a certain time unless the Justice hears otherwise before that time.

C. Motions to Dismiss Pursuant to Settlement

Parties may jointly move to dismiss if a case is settled. TEX. R. APP. P. 56.3. Depending on the particulars of the motion, the Court will dismiss the petition, vacate the judgments of the lower courts, and remand the cause to the trial court for rendition of judgment pursuant to the settlement or other requested disposition. *Id.* If the dismissal requires granting the petition in order to act on the lower court(s)' judgments, the Court will issue a judgment and a mandate. Settlements may not be conditioned upon the Court's vacating the court of appeals' opinion. *Id.*

D. Other Motions

Other motions are forwarded to the motions attorney for the week in which the motion is filed—with two exceptions. First, if additional motions are filed in a matter, the attorney who processed the first motion will process all additional motions in that matter. Second, if a matter has been assigned to a chambers for preparation of a study memo or writing an opinion, that Justice will dispose of all motions in that matter. The motions attorney assignment rotates weekly in seniority order.

V. Submission With and Without Oral Argument

A. Submission Without Oral Argument

l. Votes Required

By vote of 6 of the 9 Justices, a **petition for review**, **mandamus** or **habeas corpus** may be granted and the case decided without oral argument. TEX. R. APP. P. 59.1.

2. Manner of Disposition without Oral Argument

Cases decided without oral argument are typically, but not invariably, disposed of by *per curiam* opinion. A *per curiam* opinion becomes a signed opinion in the event of a dissent or concurrence.

3. Reasons for Deciding Case Without Oral Argument

Summary disposition without oral argument provides a means for the Court to engage in error correction in cases not involving issues of substantial jurisprudential importance. It also provides a means for the Court to resolve cases involving the application of well-developed legal principles. The Court may also elect to issue a signed opinion without oral argument in special circumstances, such as where the case is time sensitive or where relief is being granted to a *pro se* petitioner.

4. Assignment of Opinion

If the Court votes to issue a *per curiam* opinion, the Court may agree to assign the case to a Justice with special familiarity with the issues, *e.g.*, the Justice in the chambers that prepared the study memo. If that Justice is opposed to the disposition favored by the 6 or more Justices who voted in favor of issuing a *per curiam* opinion, the Justice will nonetheless generally agree to accept the assignment of preparing the opinion. In the rare case where the Justice feels strongly enough to decline that assignment, the Chief Justice will assign the task of preparing the *per curiam* opinion to another Justice based on the amount of interest shown by and the amount of time available to that Justice.

B. Submission With Oral Argument

1. Votes Required

By vote of four of the nine Justices in the case of **petition for review**, or the vote of five Justices in the case of **mandamus** or **habeas corpus**, the Court may grant review, set the case for oral argument, and notify the parties of the submission date. TEX. R. APP. P. 59.2.

2. Drawing of Opinion

When the Court has granted 9 or more petitions that are to be scheduled for oral argument (which, after granting, become "causes"), each Justice, in reverse seniority order, will draw a case

out of the "hat." The Justice who draws the case will ultimately end up writing the majority, a concurring or dissenting opinion, depending on the various Justices' views of the case following oral argument.

3. Preparation for Oral Argument

The practices of the Justices in preparing for oral argument vary. Some will look to the study memo, others to the briefs on the merits, some to both, and still others will have their chambers prepare bench memos. The Justice who has drawn the case will typically devote especial effort to preparation, since he or she will have the first opportunity to try to fashion a majority opinion. There is no formal pre-submission conference—by this stage, most of the Justices have a fairly good sense of their colleagues' views of the case based on discussions at one or more conferences in which the Court considered whether to grant the petition.

4. Post-submission Conference

The Court's first formal post-argument discussion of the case occurs in the first scheduled conference following the argument. Because the Court generally schedules conferences only approximately once per month, this means that the Court could discuss up to nine arguments at a regularly scheduled conference. Assuming that the Justice who has drawn the case is in the majority after the post-submission conference, he or she will draft a majority opinion for the Court's review. If it is clear at the post-submission conference that a dissent is likely, the Chief Justice may request that a Justice begin drafting the dissent.

5. Post-submission Briefing

The appellate rules say nothing about post-submission briefing and the Court has no formal policy on the subject. The Court's informal practice is to accept any post-submission briefing that is filed. The Justices prefer brevity at this stage. Post-submission briefs that merely rehash arguments already made are not welcome. Such a brief may be struck if objected to by opposing counsel. Briefs that provide the Court with pertinent new authorities are welcome. Briefs that more fully or accurately respond to specific questions asked at oral argument can also be viewed as useful. Most of the Justices will read post-submission briefs.

VI. Circulation of Draft Opinions and Disposition of Case

A. Opinions Issued Without Oral Argument

1. *Per Curiam* Opinions

When the Court votes to issue a *per curiam* opinion, a draft opinion is usually circulated within 60 to 120 days. Because the *per curiam* opinion is almost invariably assigned to the same chambers that prepared the study memo, this expedites drafting of the opinion. On some occasions, contrary views appear after circulation of the draft *per curiam* opinion so that the case is ultimately set for oral argument or becomes a signed opinion.

2. Signed Opinions Without Oral Argument

On rare occasions, a dissent or concurrence may appear after circulation of a draft *per curiam* opinion, but the decision is made not to set the case for oral argument. In such a case, the draft *per curiam* opinion is converted into a signed opinion without oral argument, accompanied by the separate opinion. On other rare occasions, the Court has issued signed opinions without oral argument and without a dissenting opinion.

B. Opinions Issued After Oral Argument

1. Circulation of Draft Opinions

A draft opinion of the Court in a cause is generally circulated within 4 to 6 months after oral argument. The opinion is placed on the agenda for discussion at the first conference following circulation of the opinion. The Chief Justice calls on the author of the opinion to explain why the opinion should be embraced by a majority of the Court. Then others around the table are given an opportunity to express their views. Following the conference, any concurring or dissenting opinions are circulated within 60 days. These opinions are scheduled and discussed at conference in similar fashion. At conference, on some occasions, the Justices may flip-flop so that what was going to be the majority opinion no longer attracts a majority of the Justices and, thus, the opinion must be transformed into a dissent and vice versa. This protracts the ultimate disposition of the case. When any draft opinion is circulated to the Justices, it is frequently the case that various Justices at conference suggest changes that are changes ultimately made by the author. A Justice may pull an opinion for further study if that Justice is unsure whether to join the opinion or to suggest changes.

2. Disposition

After the majority writing garners 5 or more votes, and the majority supporters believe that any separate writings have been adequately addressed, the Court will determine that the opinion should be issued. The opinion and judgment will issue on the next regularly scheduled Friday's orders.

VII. Motions for Rehearing

A. Of Denial of a Petition

1. Distribution

A motion for rehearing of a denial of a petition for review is sent directly to the chambers of all the Justices once it is filed and placed on the next Tuesday's vote sheet.

2. Disposition Without Conference

The Tuesday following its distribution to all the Justices, the motion is listed on the "purple vote sheet" along with all other matters requiring disposition by the entire Court. Like petitions, a motion for rehearing is thereby placed on a "conveyor belt"—if no Justice takes an interest, the motion will be summarily denied in the orders issued by the Court 31 days following its initially being placed on the conveyor belt.

3. Disposition With Conference and Required Votes

It takes the vote of only one Justice to pull a motion for rehearing off the conveyor belt. If the motion proceeds to conference, it takes 4 votes to grant a motion for rehearing of a denial of a **petition for review**, and 5 votes to grant rehearing of a denial of a **mandamus** or **habeas corpus** petition. A study memo could be assigned at this point if 3 Justices vote for it. This would be most likely to happen if no study memo was prepared the first time around. But even if a study memo was previously prepared, the Court could assign a second study memo, although this rarely occurs. If the motion fails to garner the 3 votes required for a study memo or the 4 votes required for a grant, some other affirmative action by the Court is required to save the motion

from being denied—absent an order granting the motion, the rehearing motion will be overruled by operation of law 180 days after filing.

B. Of a Cause or *Per Curiam* Decision

1. Distribution and Initial Processing

Like a motion for rehearing of a denial of a petition, a motion for rehearing of a cause or *per curiam* decision is distributed to all members of the Court once it is filed. A motion for rehearing of a cause or PC, however, is accorded additional special treatment. Such a motion is initially processed by the chambers that drafted the majority opinion in the case. The staff prepares a brief memo to the Court summarizing and analyzing the arguments on rehearing. The deadline for preparing the rehearing memo is 30 days after filing of the motion for rehearing. This deadline is not affected by the filing or non-filing of a response. The memo writer usually makes a recommendation to grant or deny the motion. Once completed, the rehearing memo is circulated and the matter is placed on the agenda for discussion at the next scheduled conference. If the rehearing motion raises matters that the Court believes merit a response—such as factual matters that were not fully addressed in the Court's opinion—the Court will request a response. In no event will the Court grant rehearing without requesting a response if one has not already been filed. TEX. R. APP. P 64.3. The current practice is that only the chambers responsible for preparing the rehearing memo can request a response.

2. Participation by New Justices in Rehearing

The former practice was that Justices who were not sitting on the Court at the time the initial opinion and judgment were issued, could not participate in the decision to grant or deny rehearing. That practice has changed. New Justices are now permitted to decide rehearing motions, regardless whether they participated in the initial decision.

3. Disposition and Required Votes

Motions for rehearing of causes or PCs are infrequently granted. The Court may re-issue the opinion with changes to address issues raised by the motion for rehearing, but unless the Court changes the judgment, it will generally deny the motion for rehearing. Only rarely will a rehearing motion result in the judgment being altered. It takes 5 votes to grant a motion for rehearing of a cause or PC.

C. No Successive Motions

If the Court denies a motion for rehearing, the Court will not consider a second motion for rehearing. TEX. R. APP. P. 64.4. The Court will consider an additional motion for rehearing if the Court issues a new opinion with substantive changes (even if it denies the motion for rehearing). In such a case, the "second" motion for rehearing should be limited to the changes made in the re-issued opinion.

CONCLUSION

Since the switch to petition for review practice in 1997, the Court's internal operating procedures continue to evolve as the Court responds to the increased workload that the system necessarily entails. The effective Supreme Court practitioner will keep abreast of this evolution as it ultimately influences successful advocacy before the Court.