

# PRACTICE BEFORE THE SUPREME COURT OF TEXAS

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## PRACTICE BEFORE THE SUPREME COURT OF TEXAS

This paper provides a comprehensive overview of petition for review and merits briefing practice before the Supreme Court of Texas. In addition to describing the rules and internal operating procedures governing petition and merits practice, the paper offers practical recommendations. Many of the recommendations are drawn straight from the appellate rules themselves. Others are based on several rounds of discussions that the authors had with the Justices at the Supreme Court, various Staff Attorneys for the Justices, the Clerk and Chief Deputy Clerk for the Court, and the Court's Administrative Assistant. Finally, the authors provide recommendations from a number of papers on petition practice.

### I. DOCKET STATISTICS

Before delving into the minutiae of petition and merits practice before the Court, examining its docket statistics can provide some useful global insight for appellate practitioners and litigants alike. Below are some statistical metrics that may inform practice before the Court.

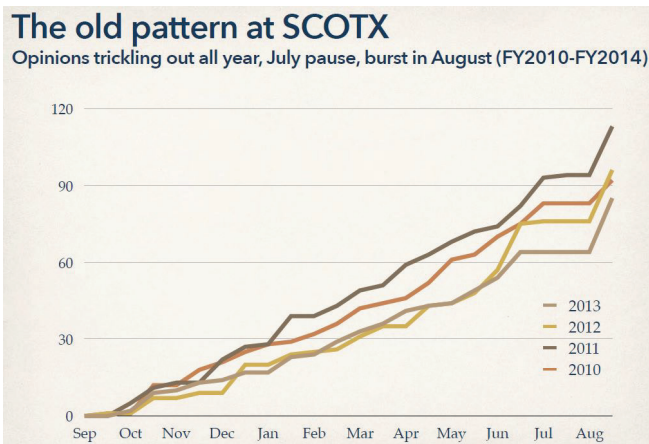
#### A. Court Turnover

In examining these trends, it is important to keep in mind the rate of turnover at the Court during a given time period, and how it may have impacted the Court's ability to timely process its docket.

During the 1990s, the Court's complement changed approximately every ten years.<sup>1</sup> But from 2001 to 2004, the Court averaged a new Justice every 159 days (or every 5.3 months).<sup>2</sup> Predictably, the average number of opinions the Court issued from 2001 to 2004

(about 138 a year) decreased by nearly 50 from the previous five-year period from 1996 to 2000 (roughly 185 a year).<sup>3</sup>

Conversely, the Court enjoyed a nearly unparalleled period of stability from October 2013 to January 2018.<sup>4</sup> For the first time, beginning during its 2015 term, the Court began to issue an opinion in every argued case.<sup>5</sup> To accomplish this unprecedented feat, the Court cut in half the time it traditionally allowed Justices to circulate a majority opinion—down to two months from four.<sup>6</sup> These timelines grow even shorter as the summer approaches, so that the Court is able issue opinions in all argued causes from the term by the end of July.<sup>7</sup> This increase in the pace of opinion issuance has resulted in a changed temporal distribution of cause disposition. Below are two charts prepared by Court specialist Don Cruse and former Court Justice Don Willett, comparing the old (FY 2010–14) versus the new (FY 2014–16) timing of opinion issuance at the Court throughout the calendar year:



**Fig. 1** – Old pattern of Court opinion distribution throughout the calendar year from FY 2010–14.<sup>8</sup>

<sup>1</sup> Hon. Don R. Willett and Don Cruse, *In the Supreme Court of Texas: Lessons from the Longest-Serving Set of Nine Justices in Texas History*, Civil Appellate Section, Austin Bar Association, (Mar. 4, 2010) [hereinafter *Longest Serving*].

<sup>2</sup> *Id.*

<sup>3</sup> See Appendix A, SCOTX Cause and Petition Stats: FY 1996–2017, *infra* (the data in Appendix A are compiled from the Office of Court Administration (“OCA”)’s annual statistical reports from FY 1996–17 analyzing Supreme Court activity—TEXAS OFFICE OF COURT ADMINISTRATION, ANNUAL STATISTICAL REPORTS, <https://bit.ly/2Og9Efl> (last visited Aug. 3, 2018) [hereinafter OCA ANNUAL REPORTS]).

<sup>4</sup> From October 2013 to January 2018, the Court’s membership remained unchanged (Justice Jimmy Blacklock was appointed to the Court in January 2018 to succeed now-Fifth Circuit Judge Don Willett, and Justice Jeff Brown was appointed to the Court in October 2013 to succeed Chief Justice Nathan Hecht in Place 6). See TEXAS SUPREME COURT, JUSTICE JIMMY BLACKLOCK, <https://bit.ly/2vtvyVN>

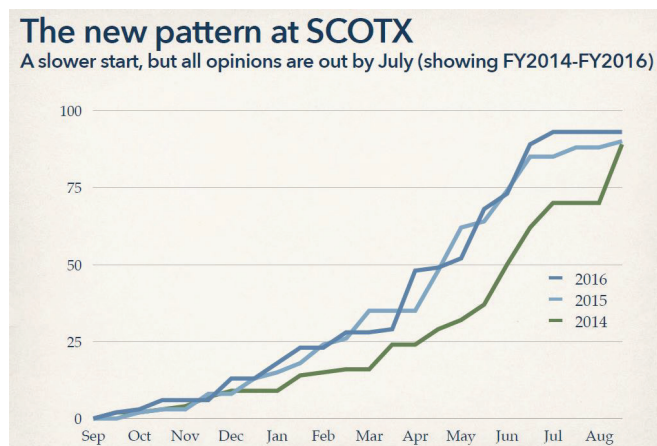
(last visited Aug. 5, 2018); TEXAS SUPREME COURT, JUSTICES, PLACE 6, <https://bit.ly/2neWOCB> (last visited Aug. 5, 2018). This period matched the next longest-serving set of Justices from Fall 2005 to October 2009. Compare *Longest Serving*, with TEXAS SUPREME COURT, JUSTICES, PLACE 9, <https://bit.ly/2vIFWrM> (last visited Aug. 5, 2018).

<sup>5</sup> See Hon. Don R. Willett and Don Cruse, *Supreme Scuttlebutt*, Judiciary Committee, Dallas Bar Association (Oct. 6, 2016), available at <https://bit.ly/2OL3yER> (last visited Aug. 6, 2018) [hereinafter *Supreme Scuttlebutt*] (citing Chuck Lindell, *Texas Supreme Court Hits Milestone: All Opinions Issued*, AUSTIN AM.-STATESMAN, at July 9, 2015 [hereinafter *Court Hits Milestone*]).

<sup>6</sup> *Supreme Scuttlebutt* (citing *Court Hits Milestone*).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*



**Fig 2** – New pattern of Court opinion distribution throughout the calendar year from FY 2014–16.<sup>9</sup>

Due to these concerted efforts, the Court has been able to maintain its record pace of issuing opinions in all argued cases every term since 2015.

### B. Odds of a Given Outcome

Although the statistics vary some from year to year, it is possible to provide some approximations of the odds of the Court taking various actions on petitions for review.<sup>10</sup> The following chart details the likelihood of a given outcome at the Court:

Approximate Likelihood of Court Action		
Court Action	Relative Odds	
Request Petition response if not voluntarily filed:	1/3	
Request merits briefing:	1/4	(25–29%)
Request merits briefing after Response waived:	(5%)	
Request merits briefing after Response voluntarily filed:	(55%)	
Request merits briefing after petition amicus briefing	(82%)	
Grant Petition:	1/10	(11.82%) <sup>11</sup>
Grant Petition after response:	1/5–1/4	(22–25%)
Grant Petition if Brief on the Merits requested:	1/2	(42–49%)
Grant after Petition pending for > 1 year:	(60+%)	
Grant motion for rehearing of Petition denial:	1/25	(3.54%)
Grant motion for rehearing of cause:	1/33	(3.46%)

**Fig. 3** – Approximate likelihood of a given Court action.<sup>12</sup>

Most notable in these statistics is the dramatic change of statistical position a petitioner experiences from her odds of an initial grant (roughly 12% or 1 in 10) to her likelihood of a grant after a response is filed (22% or roughly 1 in 5), to her chances of a grant after merits briefing is requested (42–46% or 1 in 2). In other words, a petitioner's odds of a grant **roughly double** after a response is filed and **quadruple to quintuple** after

<sup>9</sup> *Id.*

<sup>10</sup> The statistics in this Part I(B) are not based on any independent study conducted by the authors. Rather, they were derived from a compilation of statistics drawn from a variety of sources, principally the following: Warren W. Harris, Yvonne Y. Ho, *Strategies in Preparing Petitioner's Brief on the Merits*, TexasBarCLE, Practice Before the Texas Supreme Court Course, ch. 8 at 1 (2017) [hereinafter *Merits Brief Strategies*]; Pamela Stanton Baron, *Texas Supreme Court Docket Update*, TexasBarCLE, 30th Annual Advanced Civil Appellate Practice Course, ch. 15 at 5 (2016) [hereinafter *Docket Update*]; Pamela Stanton Baron, *Annual Review: The Texas Supreme Court*, TexasBarCLE, 27th Annual Advanced Civil Appellate Practice Course, ch. 21 (2014); Melissa Davis and Brantley Starr, *The What, When, Where, How, and Why of Amicus Briefing in the Supreme Court of Texas*, TexasBarCLE, 26th Annual Suing & Defending Governmental Entities Course, ch. 8 at 2 (2014) [hereinafter *Supreme Court Amicus*]; Pamela Stanton Baron, *Ten Things Your Client Needs to Know About Taking a Case to the Texas Supreme Court*, UTCLE, 22d Annual Conference on State and Federal Appeals, at 2 (2012) [hereinafter *Ten Things*]; Pamela Stanton Baron, *Texas Supreme Court Docket Analysis* July 1, 2008, TexasBarCLE, Advanced Personal Injury Law Course, ch. 2 at 2 (2008) [hereinafter *Docket Analysis*]; Pamela Stanton

Baron, *The Chair's Report*, APP. ADVOC., Summer 2005, at 2–4; Pamela Stanton Baron & Stacy R. Obenhaus, *The Texas Supreme Court by the Numbers: A Statistical Survey*, UTCLE, 11th Annual Conference on State and Federal Appeals, ch. 18 (2001); Hon. Thomas R. Phillips, *Thinking Inside the Box: A Review of the Supreme Court's Caseload Statistics and What Those Numbers Mean in Real Life*, TexasBarCLE, Practice Before the Supreme Court of Texas Course, ch. 1 (2002); Hon. David Keltner et al., *Respondent's Strategies in the Supreme Court*, TexasBarCLE, Practice Before the Texas Supreme Court Course, ch. 8 (2009); OCA ANNUAL REPORTS.

<sup>11</sup> This is the average grant rate over the past two decades from FY 1996–2017. See Appendix A, SCOTX Cause and Petition Stats: FY 1996–2017, *infra*.

<sup>12</sup> See, e.g., Douglas W. Alexander and Lori Mason, *Petition for Review Practice Before the Supreme Court of Texas*, TexasBarCLE, Practice Before the Texas Supreme Court Course, ch. 6.1 at 4 (2017) [hereinafter *Supreme Court Practice*]; *Merits Brief Strategies*, at 1; *Docket Update*, at 5; *Supreme Court Amicus*, at 2; *Ten Things*, at 2; *Docket Analysis*, at 2; see also Appendix D, SCOTX Rehearing Statistics, FY 2012–17, *infra* (the data in Appendix D are compiled from the OCA's annual statistical reports from FY 2012–17 analyzing Supreme Court activity—OCA ANNUAL REPORTS).

merits briefing is ordered. Yet another way to understand these odds is that the likelihood of a grant doubles after a response is filed, and *doubles again* after merits briefing is requested.

### C. Grant and Reversal Rates

#### 1. Grant Rates by Court of Appeals

Grant rates for a given court of appeals fluctuate annually, but examining these percentages over time provides some valuable data.<sup>13</sup> Below are the average grant rates for each court of appeals for the past thirteen years, from FY 2005–12:

Average Grant Rates by Court of Appeals, FY 2005–17	
Court of Appeals	Grant Rate
1st – Houston:	10.2%
2d – Fort Worth:	11.9%
3d – Austin:	12.9%
4th – San Antonio:	12.0%
5th – Dallas:	9.2%
6th – Texarkana:	9.0%
7th – Amarillo:	11.7%
8th – El Paso:	14.8%
9th – Beaumont:	8.8%
10th – Waco:	12.2%
11th – Eastland:	6.4%
12th – Tyler:	13.3%
13th – Corpus Christi:	19.4%
14th – Houston:	11.7%

**Fig. 4** – Average grant rates from FY 2005–17 for each court of appeals.<sup>14</sup>

During this period, the Thirteenth Court of Appeals experienced the highest average grant rate (nearly 20%), and the Eastland Court of Appeals possessed the lowest (under 7%). Of the major metro courts of appeals (Austin, Dallas, Fort Worth, Houston, and San Antonio), the Dallas Court of Appeals had the lowest grant rate (just over 9%) and the Austin Court of Appeals had the highest (just under 13%).

Over the past two decades (FY 1996–2017), the Court’s average grant rate has hovered around 12%.<sup>15</sup>

<sup>13</sup> The statistics in this Part I(C) are compiled from the annual statistics published by the Office of Court Administration, from FY 2005–17. See Appendix B, SCOTX Grant Rate by Court of Appeals, FY 2005–17, *infra* (the data in Appendix B are also compiled from the OCA’s annual statistical reports from FY 2005–17 analyzing Supreme Court activity—OCA ANNUAL REPORTS). Where they are not, the source is noted.

<sup>14</sup> See *id.*

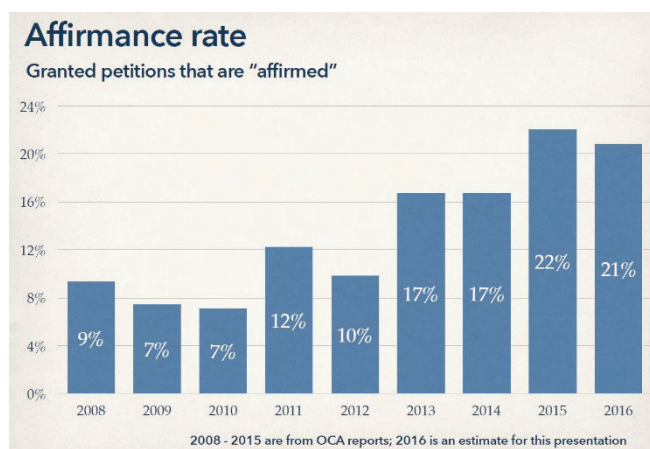
<sup>15</sup> See Appendix A, SCOTX Cause and Petition Stats: FY 1996–2017, *infra*.

<sup>16</sup> TEXAS OFFICE OF COURT ADMINISTRATION, ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY,

During this same time, the Court examined an average of 888 petitions per year. Overall, the number of petitions for review filed at the Court has increased by 17% over the past five years.<sup>16</sup> Typically, mandamus petitions are subject to a grant rate around 6%.<sup>17</sup>

#### 2. Reversal and Affirmance Rates

One of the most common questions from clients before the Court is, “What are my odds” of prevailing? While a precise answer to this question is difficult if not impossible to provide, there are some general, empirical odds that inform this inquiry. Overall, a cause has about a **10%** chance of being affirmed once granted. Conversely, a cause has an **82–92%** chance of being reversed once granted.<sup>18</sup> In recent years, however, affirmance rates have been climbing—from somewhere consistently below 10% to roughly double that at around 20%.<sup>19</sup>



**Fig. 5** – Court affirmance rate from 2008–16.<sup>20</sup>

### D. Time to Disposition

Next to the odds of success at the Court, one of the next most common questions from litigants is, “How long is this going to take?”

Reviewing the past thirteen years of data published by the Office of Court Administration (“OCA”),<sup>21</sup> the following average times to disposition emerge:

FISCAL YEAR 2017, 48, available at <https://bit.ly/2OckiE3> (last visited Aug. 8, 2018) [hereinafter 2017 OCA REPORT].

<sup>17</sup> *Id.* at 49; *Docket Update*, at 2.

<sup>18</sup> *Supreme Court Practice*, at 4; *Docket Update*, at 5–6; *Ten Things*, at 2.

<sup>19</sup> *Supreme Scuttlebutt*; see *Docket Update*, at 5–6.

<sup>20</sup> *Supreme Scuttlebutt*.

<sup>21</sup> The statistics in this Section I(D) are compiled from the annual statistics published by the OCA, from FY 2005–17. See Appendix C, SCOTX Processing Time (in Days), FY 2005–17, *infra* (the data in Appendix C are compiled from the OCA’s annual statistical reports from

Average Court Processing Time, FY 2005–17	
Court Action	Average Time
From Petition to Disposition	145 days (4.8 mos.)
From Petition to Per Curiam	478 days (15.9 mos.)
From Petition Grant to Oral Argument	98 days (3.3 mos.)
From Oral Argument to Disposition	282 days (9.4 mos.)

Fig. 6 – Average Court processing time from FY 2005–17.<sup>22</sup>

So, over the past 13 years, it has typically taken nearly 16 months for the Court to issue a per curiam decision from the date of filing. But it only took only about a month and half more (17.5 months) for the Court to dispose of an argued case.

Pam Baron is renowned for her tireless and invaluable quantification of Court statistics. In 2016, she published a six-year study of disposition times in argued cases.<sup>23</sup>

Average Time to Court Disposition in Argued Causes, 2012–16			
Court Term	Filing to Submission	Submission to Issuance	Filing to Issuance
2012	15 mos.	7 mos.	22 mos.
2013	15 mos.	7 mos.	22 mos.
2014	14 mos.	8 mos.	22 mos.
2015	17 mos.	5.5 mos.	22.5 mos.
2016	15 mos.	5 mos.	20 mos.
<b>Average</b>	<b>15.2 mos.</b>	<b>6.5 mos.</b>	<b>21.7 mos.</b>

Fig. 7 – Average time to Court disposition in argued causes from 2012–16.<sup>24</sup>

While her findings differ somewhat from OCA's, the trends shown by each are the same. Baron's examination shows that the time between submission to issuance has dropped substantially since 2014—by some **3 months** (8 months in 2014 to 5 months in 2016). Similarly, OCA's statistics also show a significant decrease in the time between submission to issuance—by **4.7 months** (from 8.3 months in FY 2014 to 3.7 months in FY 2017).<sup>25</sup> Overall, from filing to issuance, the Court's processing time in argued causes has dropped from 16.8 months in FY 2013 to just 11.2 months in FY 2017—a decrease of nearly **half a year**.<sup>26</sup> From its height a decade ago in FY 2008 (just shy of 2 years), the Court's time to dispose of an argued case has dropped by **over a year** (12.7 months).

FY 2005–17 analyzing Supreme Court activity—OCA ANNUAL REPORTS).

<sup>22</sup> See *id.*

<sup>23</sup> *Docket Update*, at 3.

<sup>24</sup> *Id.*

<sup>25</sup> See Appendix C, SCOTX Processing Time (in Days), FY 2005–17, *infra*.

In turn, the time to disposition in cases submitted without argument during the same time period was as follows:

Average Time to Court Disposition in Nonargued Causes, 2012–16	
Court Term	Filing to Issuance
2012	18 mos.
2013	17 mos.
2014	22 mos.
2015	16 mos.
2016	19 mos.
<b>Average</b>	<b>18.4 mos.</b>

Fig. 8 – Average time to Court disposition in nonargued causes from 2012–16.<sup>27</sup>

Since FY 2015, the average time between a petition grant and oral argument was just over 90 days.<sup>28</sup> But it can be as short as 21 days.<sup>29</sup>

The timing of petition grants has also changed in recent years. Below is the distribution of petition grants throughout the calendar year (excluding per curiam opinions) during 2010–13, as compared to 2014–16):

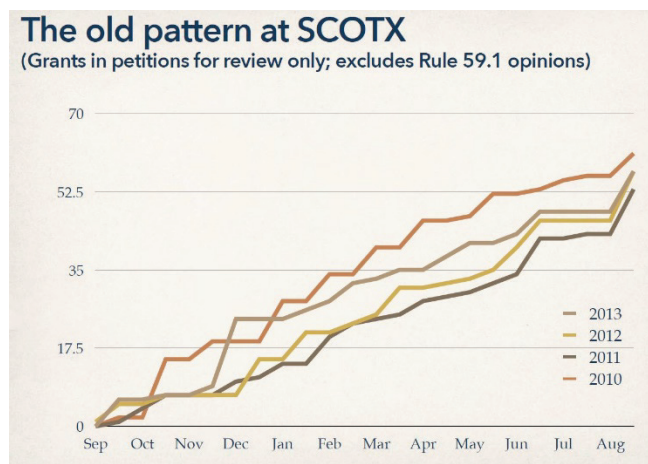


Fig. 9 – Excluding per curiam opinions, the old pattern of petition grant distribution throughout the calendar year from 2010–13.<sup>30</sup>

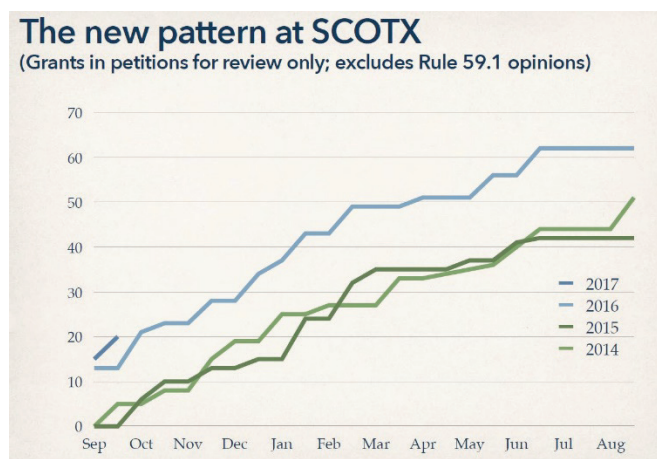
<sup>26</sup> *Id.*

<sup>27</sup> *Docket Update*, at 4.

<sup>28</sup> See Appendix C, SCOTX Processing Time (in Days), FY 2005–17, *infra*.

<sup>29</sup> *Supreme Scuttlebutt*.

<sup>30</sup> *Id.*



**Fig. 10** – Excluding per curiam opinions, the new pattern of petition grant distribution throughout the calendar year from 2014–17.<sup>31</sup>

Regardless of the calendar timing of grants, however, the Court nearly always asks for full merits briefing before granting a petition.<sup>32</sup>

### E. Voting Affinity

One of the most interesting and perhaps useful Court statistics are those that track voting affinity among the Justices. Once again, Don Cruse and former Justice Don Willett have done the most recent work in this area, documenting the following voting patterns over the Court’s 2014–16 terms:<sup>33</sup>

**Vote Patterns (over three terms)**  
Opinions issued in 2014, 2015, and 2016 terms

How often did each pair of Justices agree about the judgment, in those cases that drew at least one dissent?

	Hecht	Green	Johnson	Willett	Guzman	Lehrmann	Boyd	Devine	Brown
Hecht		94.2	40.0	62.7	67.3	54.9	31.4	65.4	74.0
Green	94.2		41.2	59.6	60.4	57.7	32.7	62.3	76.0
Johnson	40.0	41.2		56.0	39.2	44.0	60.0	41.2	41.7
Willett	62.7	59.6	56.0		61.5	66.7	49.0	57.7	57.1
Guzman	67.3	60.4	39.2	61.5		57.7	42.3	60.4	76.0
Lehrmann	54.9	57.7	44.0	66.7	57.7		60.8	71.2	57.1
Boyd	31.4	32.7	60.0	49.0	42.3	60.8		57.7	30.6
Devine	65.4	62.3	41.2	57.7	60.4	71.2	57.7		54.0
Brown	74.0	76.0	41.7	57.1	76.0	57.1	30.6	54.0	

**Fig. 11** – Voting patterns in causes that drew at least one dissent, from 2014–16.<sup>34</sup>

These statistics reveal that, over the three terms examined, Chief Justice Nathan Hecht and Justice Paul Green were generally most likely to agree in the Court’s judgment where at least one other Justice dissented from it. Conversely, Justices Jeff Boyd and Jeff Brown were

least likely to agree in similar circumstances. Now that Justice Blacklock has succeeded Judge Willett, these voting patterns will necessarily change.

## II. INTERNAL PROCEDURES

The following is an overview of the Court’s internal operating procedures.<sup>35</sup> The Court’s transition to electronic filing has substantially changed the manner in which the Court handles filings and transacts its business, including voting on various matters. However, the Court’s internal operating procedures remain largely the same as they were before these technological developments. Because it is easier to understand the process by thinking of paper rather than data being moved, the discussion of the Court’s procedures below remains focused on the paper flow.

### A. Routing of Petitions

The Clerk of the Supreme Court holds each petition for review for 30 days before being forwarded to the Justices, unless a response or response waiver is filed before the expiration of 30 days. The first of these to occur makes the petition ripe for review.

Once a petition is ripe, the file will be forwarded to the Justices electronically the next Tuesday morning. In order to trigger the forwarding of a petition to the Justices on any given Tuesday, the response or waiver should be filed by around 4:00 p.m. the preceding Monday.

A deputy clerk is responsible for assembling the package for each matter ripe for review. The package includes the petition for review with appendix, the response or response waiver (if filed), letters, and amicus submissions. The package also includes a pink vote sheet for the case. *See* Part II(C)(1), *infra*.

In addition to the package for each matter, the Administrative Assistant distributes to each member of the Court a “purple vote sheet,” which lists all matters being forwarded to the Court that week, including petitions for review, original proceedings, and other matters requiring action by the entire Court. *See* Part II(C)(2), *infra*.

The collective volume of materials delivered to the chambers each Tuesday morning is daunting—the delivery includes, on average, 15 petition for review packages,<sup>36</sup> plus mandamus petitions, habeas filings, motions for rehearing, etc.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> For a more exhaustive discussion of the Court’s internal procedures, *see* Blake A. Hawthorne, *Supreme Court of Texas Internal Operating Procedures*, TexasBarCLE,

101 Civil Appellate Practice Course, ch. 1 (2017) [hereinafter *Internal Operating Procedures*]. This paper borrows liberally from that one.

<sup>36</sup> *See, e.g.*, 2017 OCA REPORT, at 48, 105 (documenting 910 petition for review filings during FY 2017, which was a 12% increase from the previous year).

## B. Action on Petitions—The “Conveyor Belt” System

The Court employs a “conveyor-belt” system in acting on petitions for review. 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, 31 days 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. 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 for the first Conference after the expiration of 30 days from the date the response is filed. For a more detailed explanation of the conduct and calendaring of the Court’s Conference, please see Chief Justice Hecht’s thorough discussion from a couple years ago.<sup>37</sup>



Fig. 12 – The Court’s conference room.<sup>38</sup>

With the advent of mandatory electronic filing (see Part V(B), *infra*), most of the Justices obtain and read electronic copies of petitions on a personal computer or tablet. In addition, with courts of appeals opinions being available online, Justices are often aware of matters that may come before the Court before a petition is filed.

## C. “Pink,” “Purple,” and “Yellow” Vote Sheets

The Court employs vote sheets to note the Justices’ preferences about actions on petitions. The Court uses three different vote sheets, which serve three different functions. Under the Court’s increasing use of technology, virtually all of the Justices have moved to marking their votes electronically. Thus, the sheets are

mainly reflections of their electronic votes, although yellow sheets are always printed with the Justices’ votes before Conference as a guide while Justices discuss petitions. However, for purposes of understanding how the process works, it remains useful to refer to “pink,” “purple,” and “yellow” vote sheets, even as at least some of those physical sheets are being rendered obsolete by the ever-developing use of technology at the Court. The Court’s Administrative Assistant has also provided guidance for better understanding the pink, purple, and yellow vote sheets.<sup>39</sup>

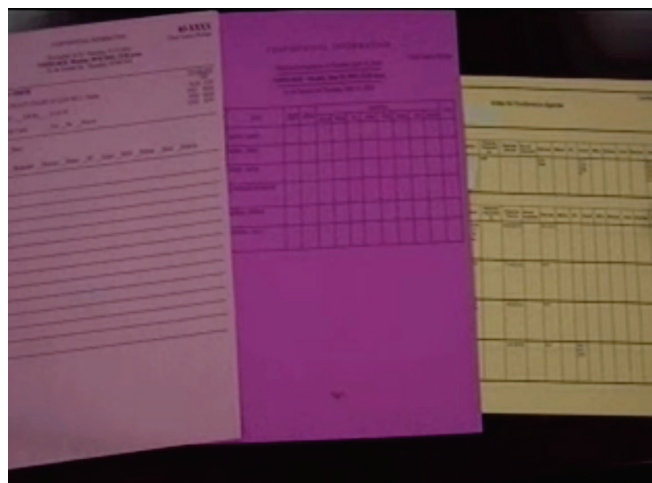


Fig. 13 – Picture of the old pink, purple, and yellow vote sheets.<sup>40</sup>

### 1. Pink Vote Sheet

A pink vote sheet is placed in each petition and rehearing package and is the vote sheet for that particular case. The sheet is intended to be used by each of the Justices reviewing the petition. 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 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

<sup>37</sup> Blake Hawthorne, *Conference at the Supreme Court of Texas with Chief Justice Hecht*, YOUTUBE (May 7, 2015), <https://youtu.be/tvU3m9zSnrQ>.

<sup>38</sup> *Id.*

<sup>39</sup> Interview with Nadine Schneider, Administrative Assistant to the Supreme Court of Texas, available at <https://bit.ly/2MjDqmg> (last visited Aug. 6, 2018).

<sup>40</sup> *Id.*

law clerk is provided the pink vote sheets or electronically recorded notes of each of the Justices to assist the clerk in preparing the study memo. Each Justice's remarks may inform the law clerk as to which particular issues the Justices are interested.

## 2. Purple Vote Sheet

Each Tuesday, each Justice also receives a purple vote sheet on all matters forwarded to chambers that week. 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.

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.

As previously noted, virtually all of the Justices now cast their votes electronically. This has had an impact on the Court's deliberative process. As one of the Justices has described this, with the use of a computerized system to record votes—votes which all of the Justices can see—it is now possible for a Justice to look over the shoulders of his or her colleagues to see how the voting is going on a particular matter. As the deadline for voting approaches, this Justice explained to us, if a particular matter has attracted the interest of several Justices, that may cause the reviewing Justice to take a harder look at the petition package. If, on the other hand, no one has expressed interest in the case or there are a large number of votes for "deny," that may cause the reviewing Justice to either review that petition in only cursory fashion or not at all.

The practical implications for counsel for petitioner are that even greater effort must be made today to craft a petition designed to attract the interest of the Justices. If the initial group of Justices to review the petition and cast votes is not interested, the herd effect may reduce the odds of the remaining Justices developing interest.

### APPENDIX 2

#### CONFIDENTIAL INFORMATION

Petitions forwarded as of: Tuesday, July 09, 2002  
 VOTES DUE : Monday, August 05, 2002, 12:00 noon  
 To Be Denied On: Thursday, August 08, 2002

Petition #	Style	Response Requested	Record Requested	Conference								Hold	Deny
				Discuss	Memo	Brief	P.C.	Grant	WOT	Refuse			
Pet for Review 02-0194	ARNOLD v. WAL-MART DEPT												
02-0263	INTERCAPITAL LODGE LTD V. ALLEN												
02-0340	CHU v. GRACE P. CHEW												
02-0378	HOPKINS v. NETTERVILLE												
02-0405	BENUE, M.D. v. JOCOBO												
02-0427	WEST ORANGE COVE v. ALANIS												
02-0440	YARI v. LIGIA REVUELTA GILES												
02-0483	EL PASO REFERRING v. SCUTLOCK PERMAN												

**Fig. 14** – Copy of an actual purple vote sheet from the Court's 2002 term.<sup>41</sup>

## 3. Yellow Vote Sheet

The yellow vote sheet assists the Court's disposition of petitions and rehearing of denials of 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.

Petitions and rehearing motions that failed to make the initial cut—due to lack of a vote for anything other than "deny" on the purple vote sheets—will not be included on the yellow vote sheet. 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 from the date the response is filed, with two exceptions. If a reply is filed before that 30 days expires, the matter may be scheduled for the next Conference after the reply has been on file for as few as five days. If the petitioner obtains an extension of time to file the reply, the matter will be scheduled for the first Conference following the filing of the reply. If the Justices mark their purple vote sheets with anything other than "deny," that will place the petition on the Conference agenda.

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

<sup>41</sup> Douglas W. Alexander, Lori E. Ploeger, and Amy Warr, *The Ultimate Petition for Review*, TexasBarCLE, Appellate Boot Camp Course, ch. 12 at App'x 2 (2006).

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 study memos that are to be discussed, the Administrative Assistant lists the initial votes that were cast 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. A new cumulative yellow vote sheet is then prepared, reflecting the updated votes, which is then used to guide the Court through the Conference. Counsel should note that achieving a consensus by the Justices that a petition should be denied is the quickest and easiest disposition for the Court.

#### **D. "Study Memo" Procedure and Request for Full Briefing on the Merits**

The practices of the Justices vary with respect to their initially reviewing petitions. Not all of the Justices will read all the petitions each time. Some use their court staff to summarize petitions and flag those deemed worthy of review, others share the review function by informally pooling their efforts, and some read all the petitions each time. Regardless of how they review petitions, however, all find the workload to be huge. The still-evolving internal procedures are calculated, in large measure, to address that heavy workload.

When at least three Justices agree that a petition merits further internal study, the Court requests full briefing on the merits. Once briefs are requested, the petition is assigned in rotation to one of the Chambers for preparation of a study memo, which is almost invariably prepared by one of the law clerks. The law clerk assigned to prepare the study memo is charged by the Court to study the case and prepare a memorandum addressing the pertinent law and facts. The study memo generally must be prepared within 30 days of the filing of the respondent's brief on the merits. However, the grant of briefing extensions for any of the briefs will also delay the internal circulation of the study memo. The study memo will not be circulated until the filing of the reply brief, waiver of reply, or passage of the deadline for filing the reply.

Because the study memo plays such a central role in the Court's decision whether to grant or deny review,

counsel for both petitioner and respondent should be mindful of what the law clerk includes in it.

The study memo's cover identifies the parties and counsel, lower courts, and issues in the case. The law clerk is charged with laying out the issue and the arguments on each side, and writing their own analysis as to how each argument contributes to their own recommended disposition. To begin with, the law clerk must collect the pink sheets or electronically recorded notes from each chambers for the relevant petition. The law clerk will be able to glean from them, and discussion at Conference, which particular issues the Court is interested in, and what the law clerk should focus on in the study memo. If jurisdiction is lacking or questionable, if a particular issue is dispositive and the result is clear, or if an argument has been waived so that the Court is effectively precluded from reaching the issue, the author is instructed to flag that for the Court.

Although the author will typically frame the issues as presented by the parties, the author has freedom to consolidate or reframe the issues so they are presented in a concise manner, especially when numerous cross-issues or unbriefed issues are raised. Law clerks will typically frame the issues with single sentences, so an attorney who wants a law clerk to mimic their own framing of the issues may want to go with the single-sentence style of issue framing rather than the Bryan Garner style of "deep issues."<sup>42</sup> In addition, a law clerk will be more willing to borrow from a non-argumentative recitation of the facts rather than one laced with argument, although the law clerk will check the record on controverted facts and often include citations to the record within the study memo.

The law clerks are also asked to recommend a disposition, generally either granting or denying the petition. Additionally, if the law appears to solidly support a more specific disposition, such as reversal by per curiam opinion, the law clerks are encouraged to provide that recommendation. Often, the law clerk may even draft the per curiam opinion and attach it to the study memo for discussion at Conference. If six Justices vote for a per curiam disposition, or to at least consider one, the per curiam opinion is typically assigned to the chambers that drafted the study memo.

A law clerk may also recommend that the petition be held until another petition or cause with the same issue(s) before the Court is disposed of. When petitions become "linked" in this manner, a law clerk will often address the lead case in a full study memo, with shorter study memos for the linked petitions. However, when petitions arise from the same facts, or similar facts, one study memo may address several petitions with the same

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<sup>42</sup> See McKay Cunningham, *Study Memos and Their Impact*, TexasBarCLE, Practice Before the Texas Supreme Court Course, ch. 5 at 3 (2009).

issue. Bringing to the Court's attention any pending causes with similar issues will assist in this process.

The recommendations by the study memo's author are not rigidly adhered to—it is not uncommon for a Justice to note disagreement with the disposition recommended in a study memo emanating from his or her own chambers. A law clerk will typically attend the Conference(s) during which his/her study memo is discussed, and answer any questions the Justices may have regarding the issues or record in the case.

The Court requests a study memo and, hence, full briefing on the merits, in about 1 in 4 cases, and grants the petition in slightly fewer than half of the cases in which it requests full briefing.<sup>43</sup>

### E. Votes Required for Specific Actions

The votes required for the Supreme Court to take specific actions on petitions for review are listed below:

Court Vote Matrix	
Court Action	Votes Required
Request Response:	1
Request Record:	1
Discuss at Conference:	1
Request Briefs on the Merits/Study Memo:	3
Grant Petition for Review:	4
Grant Rehearing of Denial of Petition:	4
Dismiss Petition WOJ:	5
Grant Writ of Mandamus:	5
Grant Writ of Habeas Corpus:	5
Grant Temporary Relief:	5
Issue Majority Opinion:	5
Refuse Petition:	6
Hold Petition:	6
Deny Petition as Improvidently Granted:	6
Issue Per Curiam Opinion:	6
Grant Rehearing of Cause:	6
Deny Petition:	Automatic unless at least 1 vote for something other than "deny"

Fig. 15 – Requisite votes for a given Court action.<sup>44</sup>

<sup>43</sup> See Pamela Stanton Baron, *Annual Review: The Texas Supreme Court*, TexasBarCLE, 27th Annual Advanced Civil Appellate Practice Course, ch. 21 at 9 (2014) (showing that in 2013, the Court granted review in 43% of the cases in which it requested full briefing).

<sup>44</sup> *Internal Operating Procedures*, at 16; *Supreme Court Practice*, at 3–4.

<sup>45</sup> Hon. Craig T. Enoch & Michael S. Truesdale, *Issues and Petitions: The Impact on Supreme Court Practice*,

### F. CaseMail

Once a number is assigned to the petition, counsel should register to receive CaseMail from the Court. The Court's miscellaneous order regarding electronic filing requires lead counsel for each party to register for CaseMail. The Court's automated information system will send registrants e-mails regarding any filings or other activity on the Court's docket sheet for that matter. The CaseMail system has a number of additional useful features, including notice when the Court calendars a due date and a "tickler" one week in advance of a calendared due date. Of course, counsel should not rely exclusively on this service and should always double-check any due dates and calendar those due dates independently of this system. The system can also provide notices of new filings and opinions. The Court's website contains information on registering to receive CaseMail.

## III. GOAL OF THE PETITION

Petitioner's ultimate goal at the petition for review stage is straightforward: getting through the door. Persuading the Supreme Court that the client should prevail on the merits is a secondary consideration at this stage. The petitioner must persuade at least four Justices that the case is worthy of review.

### A. Demonstrating Substantial Importance

Unless the petitioner is angling for a per curiam opinion to correct error on a narrow legal point, getting through the door requires persuading the Court that the case involves a legal issue of substantial importance to the jurisprudence of the state. The task is complicated by the fact that the sheer volume of petitions the Justices must review each week means, in all likelihood, that very little time will be devoted by the Justices to any given petition. One former Justice has observed that due to the volume of petitions, "the review is necessarily cursory."<sup>45</sup> The current Chief Justice has remarked that in reviewing a petition, "the judge can look at it in **90 seconds** and realize that there is not a chance in the world that anybody on this Court is going to be interested in granting this case."<sup>46</sup> 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, response (if any), and any amicus submissions. Some

31 ST. MARY'S L.J. 565, 588 (2000) [hereinafter *Issues and Petitions*].

<sup>46</sup> Remarks of then-Justice Hecht to the Supreme Court Advisory Committee, Transcript of May 10, 1994, at 4763–64 (quoted in Pamela Stanton Baron, *Drafting Issues in the Texas Supreme Court*, TexasBarCLE, 15th Annual Advanced Civil Appellate Practice Course, ch. 6 at 2 (2001) (emphasis added) [hereinafter *Drafting Issues*]).

Justices also rely on summaries of petitions written by law clerks.

### B. Grabbing the Court's Attention—the “Hook”

With so little time being devoted by the Justices to actually reviewing any given petition, the petitioner's initial goal must be to grab the Court's attention. This challenge is exacerbated by the fact that there is no guarantee that all of the Justices will actually read every section of the petition or will read front to back. 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. Some rely on summaries of petitions prepared by law clerks. This practical reality calls for a fundamental shift in strategy from briefing to the court of appeals, where there is an assurance that the case will be heard and that the entire brief will be read by at least one of the Justices and, in all probability, by all three.

An effective technique for grabbing the attention of the Court in the petition is to employ a “hook.” Developing a hook requires boiling down the principal argument to a simple statement, ideally a single sentence, which not only captures the argument but also reveals its importance. The hook is then incorporated into various sections of the petition, so that no matter which section a particular Justice actually looks to, the chances are enhanced of the hook being set.

This technique will not appeal to those writers who rely on a thesaurus to avoid repeating themselves. It is nonetheless an effective technique for those writers whose practical goal is simply to grab the attention of Justices who may give the petition no more than a “cursory” review.

## IV. BREVITY IS THE SOUL OF AN EFFECTIVE PETITION

Above all, the petition should be short. The body of the petition for review (statement of facts, summary of the argument, argument, and prayer) may contain no more than 4,500 words. TEX. R. APP. P. 9.4(i)(2)(D). Because many required sections of the petition do not fall within that limit, the temptation to use the preliminary sections to circumvent that page limitation may be strong. **Resist that temptation.** On average, the

Justices will have about three petitions to review each weekday, 52 weeks a year, to keep up with the inflow of petitions. Their time is valuable, and an effective petition will reflect respect for that fact. Attaching briefing in the appendix to circumvent the page limitations will ensure the appendix getting struck.

Moreover, since a given petition is likely to receive no more than a cursory review, it is ultimately counterproductive to file a bloated instrument. A streamlined, tightly focused petition is much more likely to grab the attention of the Justices. A former Chief Justice of the Supreme Court has emphasized that the length limit “is a maximum, **not a recommendation or suggestion.**”<sup>47</sup> He has even gone Biblical in driving home this point:

My own view is that writing to the page limits does not increase your chances for review or send any indication to the judges as to the seriousness of your case. To paraphrase St. Luke, ‘What profiteth a writer to use all his pages, but to lose his audience.’<sup>48</sup>

The Chief Justice's view is shared by the other Justices: “I rarely heard from other members of the court that the petition was **too short.**”<sup>49</sup>

Technically, on motion, the Court may permit a longer petition, response, or reply. *See* TEX. R. APP. P. 9.4(i)(4). As a practical matter, however, the Court routinely denies such motions. Accordingly, counsel should comply with the word limitations on the initial filing since, virtually without exception, these limitations will ultimately be enforced.

## V. BASIC REQUIREMENTS

### A. Formatting

The Court routinely rejects and requires the resubmission of petitions that do not comply with the appellate rules. Following are the basic formatting requirements, which apply equally to all briefs filed under the petition system.

#### 1. Margins

The petition must have at least 1-inch margins (top, bottom, and sides). TEX. R. APP. P. 9.4(c). But margins may be more narrow than 1 inch, and at least one influential typographical expert has recommended using margins between 1.5 and 2 inches.<sup>50</sup>

<sup>47</sup> Hon. Thomas R. Phillips, *Thinking Inside the Box: A Review of the Supreme Court's Caseload Statistics and What Those Numbers Mean in Real Life*, TexasBarCLE, Practice Before the Supreme Court of Texas Course, ch. 1 at 5 (2002) (emphasis added).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* (emphasis added).

<sup>50</sup> Matthew Butterick, *Typography for Lawyers*, TexasBarCLE, Legal Writing to Win Course, ch. 6 at 35 (2015); Matthew Butterick, *Typography for Lawyers: Designing Superior Legal Documents*, TexasBarCLE, Exceptional Legal Writing Course, ch. 2 at 3 (2013) (providing recommendations on “How to Read TRAP 9.4”); *see* MATTHEW BUTTERICK, *TYPOGRAPHY FOR LAWYERS* 141 (2d ed. 2015); PAGE MARGINS, BUTTERICK'S PRACTICAL TYPOGRAPHY, <https://bit.ly/2ANiq2M> (last visited Aug. 6,

## 2. Spacing

Although the text of the petition 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).

## 3. Font

If the petition is prepared using courier or some other nonproportionally 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 14-point or larger. TEX. R. APP. P. 9.4(e). Go with 14-point font. As the Clerk’s office explained to us, the rule allowing 10-point, non-proportional spacing is for a virtually extinct breed—those using manual typewriters. According to the Court’s Clerk, Times New Roman and New Century Schoolbook are acceptable fonts.<sup>51</sup> The Georgia font is designed for reading on a screen and may be a good choice for electronic briefs.<sup>52</sup> The Court’s Clerk also recommends perusing Matthew Butterick’s discussion of font choice in his seminal book on legal typography, aptly entitled *Typography for Lawyers*.<sup>53</sup>

## 4. Record Citations

The petition rules swept away the traditional “transcript” and “statement of facts” in favor of the more straightforward “clerk’s record” and “reporter’s record.” TEX. R. APP. P. 34.5–.6. The abbreviations “CR” for clerk’s record and “RR” for reporter’s record are now familiar to the Court. Volume and page number citations to the reporter’s record are usually sufficient, e.g., “RR 3:181–82,” or “3 RR 181–82.” If the record is

complicated (for example, if there are supplemental volumes of clerk’s record), consider including an explanatory sentence or two at the beginning of the petition, perhaps even under a separate heading entitled, “Record References” or something similar.

## 5. Footnotes

Avoid using footnotes; most of the Justices we spoke to agreed that footnotes are distracting and, given the limited time that the Justices have to review each petition, are generally not read. Indeed, the tide of opinion now appears to be turning against the citational footnote,<sup>54</sup> in no small part due to the advent of e-briefing. Now, the vast majority of Justices are reading e-briefs on mobile devices like laptops or tablets.<sup>55</sup> Particularly on these smaller screens, scrolling back and forth between body and footnote text is jarring and annoying, as several Justices have publically confirmed at numerous bar presentations.<sup>56</sup>

If footnotes are absolutely necessary, they may be single-spaced. TEX. R. APP. P. 9.4(d). We recommend using 13-point font, although the rules allow the use of 12-point font in footnotes. Reserve footnotes for such matters as listing out-of-state authorities, where appropriate.

Most of the Justices do not like the use of string cites. But if they must be used, it is appropriate to place them in footnotes. Be judicious in the use of parentheticals when citing authorities. While some Justices find them helpful, others find them cumbersome.

2018); *see also Internal Operating Procedures*, at 6 (recommending *Typography for Lawyers*).

<sup>51</sup> *Internal Operating Procedures*, at 6.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*; *see* MATTHEW BUTTERICK, *TYPOGRAPHY FOR LAWYERS* 112, 118–19 (2d ed. 2015). Butterick, a former professional typographer himself turned attorney, recommends that practitioners “do better” than choosing to use Times New Roman simply due to its “ubiquity” as an MS Word default system font. Leaving no doubt, Butterick opines that Times New Roman:

[C]onnotes apathy. It says, “I submitted to the **font of least resistance**.” Times New Roman is not a font choice so much as the absence of a font choice, like the blackness of deep space is not a color. **To look at Times New Roman is to gaze into the void.**

*Id.* at 118–19 (emphasis added).

<sup>54</sup> Compare Bryan A. Garner, *Numerical Pollution: Textual Citations Make Legal Writing Onerous, for Lawyers and Nonlawyers Alike*, 100 A.B.A. J. 22 (Feb. 2014) (advocating for the expanded use of citational footnotes), with Wayne Schiess & Elana Einhorn, *Bouncing and E-Bouncing:*

*The End of the Citational Footnote*, 26 APP. ADVOC. 409 (Spring 2014) [hereinafter *Bouncing*]; *see* Raymond Ward, *The Never Ending Debate Over Citational Footnotes*, THE (NEW) LEGAL WRITER, (Feb. 7, 2014), <http://j.mp/1z6lcVV> [hereinafter *Never Ending Debate*]; Roger D. Townsend, A Functional Approach to Footnotes in Briefs and Opinions, <http://j.mp/1zr1ipL> (last visited Aug. 6, 2018); Jason Steed, *Rejecting the Guru’s Advice*, LEGAL SOLUTIONS BLOG (Jan. 29, 2014), <http://j.mp/1wd725A>; Rich Phillips, *The Great Footnote Debate (A Response to Bryan Garner)*, TEXAS APPELLATE WATCH (Jan. 28, 2014), <http://j.mp/1vBEkq3> [hereinafter *Great Debate*].

<sup>55</sup> *See* Michael A. Cruz, *Substance and Style: E-Brief Formatting Tips*, TexasBarCLE, Practice Before the Supreme Court of Texas Course, ch. 5 at 3 (2017); *Bouncing*, 26 APP. ADVOC. at 411–12; *Never Ending Debate*; *Great Debate*.

<sup>56</sup> *See Bouncing*, 26 APP. ADVOC. at 411; *Never Ending Debate*; *Great Debate*. Indeed, a survey of Texas appellate justices in 2015 showed a staggering 93% preferred in-text citations rather than footnoted ones. @rbphillipsjr, TWITTER (Aug. 30, 2016, 5:14 PM), <https://bit.ly/2Mm5MsF>; @rbphillipsjr, TWITTER (Aug. 30, 2016, 4:52 PM), <https://bit.ly/2vocMPw>.

## 6. Word Limitations

All briefs filed under the petition for review system exclude the following sections from the page limitations: 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. Exclusive of such sections, the word limitations are as follows:

- a. Petition for Review:  
4,500 words. TEX. R. APP. P. 9.4(i)(2)(D).
- b. Response to Petition:  
4,500 words. TEX. R. APP. P. 9.4(i)(2)(D).
- c. Reply to Response:  
2,400 words. TEX. R. APP. P. 9.4(i)(2)(E).
- d. Petitioner's Brief on the Merits:  
15,000 words. TEX. R. APP. P. 9.4(i)(2)(B).
- e. Respondent's Brief on the Merits:  
15,000 words. TEX. R. APP. P. 9.4(i)(2)(B).
- f. Reply Brief on the Merits:  
7,500 words. TEX. R. APP. P. 9.4(i)(2)(C).
- g. Motion for Rehearing and Response:  
4,500 words. TEX. R. APP. P. 9.4(i)(2)(D).

## B. Filing

### 1. Preparing an Electronic Brief

Attorneys must e-file documents with the Court through eFileTexas.gov, the e-filing portal provided by the Office of Court Administration. TEX. R. APP. P. 9.2(c)(2). Mandatory e-filing is broad in scope: every document that an attorney files with the Court must be filed electronically, except documents that are filed

under seal, that are subject to a pending motion to seal, or to which access is otherwise restricted by law or court order. *Id.* 9.2(c)(1), (3).

An electronically filed document must be in a text-searchable portable document format (PDF) file. *Id.* 9.4(j)(1). If the document is created with a word processing program, then the e-filed document may not be a scan of the original but must instead be converted directly into PDF format from the electronic version of the document. *Id.* 9.4(j)(1). The Justices have expressed their appreciation of electronic briefs containing hyperlinks to **key cases, statutes,** and material in the appendix.<sup>57</sup>

The Clerk of the Court has authored an excellent step-by-step guide for creating electronic briefs,<sup>58</sup> as has one of his former deputy clerks.<sup>59</sup> The Court also provides a video tutorial explaining in detail how to create electronic briefs.<sup>60</sup> Chief Justice Hecht and Justice Boyd have also both recorded and posted interviews regarding their favored e-briefing and e-formatting practices.<sup>61</sup> Both have expressed their strong preference for printing cases included in the appendix in single- rather than double-column format to facilitate reading on mobile devices.<sup>62</sup> Indeed, there are four publically available, hour-and-a-half panel discussions with the full Court that date back to 2010, wherein the Justices discuss general briefing and e-briefing best practices the authors commend for your review.<sup>63</sup>

### 2. Electronic Filing

To e-file, a person must first register with an Electronic Filing Service Provider (EFSP), an approved list of which is on the eFileTexas.gov website. The e-filer must then log in to the website of the selected EFSP and follow the instructions for filing an electronic brief.

A document is considered timely filed if it is electronically filed at any time before midnight (in the Court's time zone) on the filing deadline. TEX. R. APP.

<sup>57</sup> *Internal Operating Procedures*, at 9; *Never Ending Debate* ("readers of hyperlinked text want the hyperlinks as close as possible to the material supported by the hyperlink").

<sup>58</sup> Blake A. Hawthorne, *Guide to Creating Electronic Appellate Briefs*, available at <https://bit.ly/2vGRA6I> (Jan. 1, 2014).

<sup>59</sup> *See Substance and Style*.

<sup>60</sup> SUPREME COURT OF TEXAS, E-BRIEFS GUIDE, available at <https://my.adobeconnect.com/p72935018/> (last visited Aug. 6, 2018).

<sup>61</sup> Interview by Michael A. Cruz with Hon. Nathan L. Hecht, available at <https://bit.ly/2LTG8zk> (last visited Aug. 6, 2018) [hereinafter Hecht Interview]; Interview by Michael A. Cruz with Hon. Jeff S. Boyd, available at <https://bit.ly/2nfTelv> (last visited Aug. 6, 2018).

<sup>62</sup> Blake Hawthorne, *Hecht Single Column*, YOUTUBE (Feb. 13, 2017), <https://youtu.be/7bZViUIAab8>; Blake Hawthorne, *Justice Boyd Prefers Single Column*

*pinions in Appendix* (Feb. 13, 2017), <https://youtu.be/ryoajlBzr08>.

<sup>63</sup> STATE BAR OF TEXAS, APPELLATE SECTION AND AUSTIN BAR ASSOCIATION, CIVIL APPELLATE SECTION, AN EVENING WITH THE SUPREME COURT OF TEXAS (Mar. 1, 2018), available at <https://bit.ly/2KIkQiG> (last visited Aug. 8, 2018); STATE BAR OF TEXAS, APPELLATE SECTION AND AUSTIN BAR ASSOCIATION, CIVIL APPELLATE SECTION, AN EVENING WITH THE SUPREME COURT OF TEXAS (Apr. 17, 2014), available at <https://bit.ly/2vQbPyL> (last visited Aug. 8, 2018); STATE BAR OF TEXAS, APPELLATE SECTION AND AUSTIN BAR ASSOCIATION, CIVIL APPELLATE SECTION, AN EVENING WITH THE SUPREME COURT OF TEXAS (Apr. 26, 2012), available at <https://bit.ly/2vrkmZM> (last visited Aug. 8, 2018); STATE BAR OF TEXAS, APPELLATE SECTION AND AUSTIN BAR ASSOCIATION, CIVIL APPELLATE SECTION, AN EVENING WITH THE SUPREME COURT OF TEXAS (Feb. 18, 2010), available at <https://bit.ly/2nlyq2b> (last visited Aug. 8, 2018);

P. 9.2(c)(4). If a document is electronically filed on Saturday, Sunday, or an official holiday, then it will be deemed filed on the next day that is not a Saturday, Sunday, or legal holiday. *Id.* 9.2(c)(4)(A).

### 3. Electronic Service

Service must be accomplished through eFileTexas.gov if the email addresses of the attorneys or parties to be served are on file with eFileTexas.gov. TEX. R. APP. P. 9.5(b)(1). If an email address is not on file, service may be accomplished by email, hand-delivery, mail, commercial delivery, or fax. *Id.* 9.5(b)(1), (2). Texas Rule of Appellate Procedure 9.5 requires service on lead counsel for each party, not every attorney listed on a brief. However, it is customary courtesy to serve all attorneys listed.

### 4. Fees

The following filing fees pertain to petition for review practice:

Court Filing Fees	
Direct appeal	\$205.00
Certified Question from a federal court	\$180.00
Petition for Review	\$155.00
Petition for Mandamus, Habeas Corpus, Prohibition, Injunction, and other original proceedings	\$155.00
Additional fee if Petition for Review is granted	\$75.00
Exhibits tendered for oral argument	\$25.00
Motion for Rehearing	\$15.00
Motion for Extension of Time	\$10.00
Miscellaneous motions	\$10.00
Response brief	\$0.00
Reply brief	\$0.00
Waiver of Response brief	\$0.00

**Fig. 16** – Requisite filing fees at the Court.<sup>64</sup>

Fees for electronically filed documents are paid through the filer's EFSP. EFSPs may accept credit cards for payment of fees for electronic filings. Counsel should consult with an individual EFSP to determine whether that EFSP accepts credit card payments. EFSPs may charge electronic filing fees in addition to the Court's filing fees set forth above.

For filings that are not electronic (e.g., filings under seal), the Court Clerk will accept fees paid in cash, by check, or by money order. Checks and money

orders should be made payable to "Clerk, Supreme Court of Texas." The Court does not accept credit cards for non-electronic filings.

The Clerk's office files and holds (i.e., does not forward to the Court) items received without adequate fees or a proper affidavit of indigence, unless the party is exempt from payment or allowed by law to delay payment. The Clerk's office sends a letter informing the party that the item has been filed but that, if the fee or affidavit is not received within 10 days, the item will be dismissed under Texas Rule of Appellate Procedure 5.

### C. Deadlines

The following deadlines apply to the various filings under petition for review practice unless the Clerk's notice directs otherwise. The Court can shorten the briefing deadlines if it wishes.

#### 1. Petition for Review

45 days from the later of the date of the court of appeals' judgment or its last ruling on a timely filed motion for rehearing or rehearing en banc. TEX. R. APP. P. 53.7(a).

#### 2. Successive Petitions

45 days after the last timely motion for rehearing is overruled or 30 days after any preceding petition is filed, whichever date is later. TEX. R. APP. P. 53.7(c).

#### 3. Response to Petition

30 days after the petition is filed. TEX. R. APP. P. 53.7(e).

#### 4. Reply to Response

15 days after the response is filed. TEX. R. APP. P. 53.7(e).

#### 5. Petitioner's Brief on the Merits

30 days after the date of the Clerk's notice that the Court has requested briefs on the merits. TEX. R. APP. P. 55.7.

#### 6. Respondent's Brief on the Merits

20 days after receiving petitioner's brief. TEX. R. APP. P. 55.7.

#### 7. Reply Brief on the Merits

15 days after receiving respondent's brief. TEX. R. APP. P. 55.7.

#### 8. Motion for Rehearing

15 days from the date when the Court renders judgment or makes an order disposing of a petition for

<sup>64</sup> SUPREME COURT OF TEXAS, FREQUENTLY ASKED QUESTIONS: WHAT IS THE FILING FEE?, *available at* <https://bit.ly/2Mp38m7> (last visited Aug. 6, 2018).

review. TEX. R. APP. P. 64.1.

#### **D. Motions to Extend Time (“METs”)**

The Court has assigned METs to the Clerk for disposition. Motions should have a certificate of conference and make clear in the body of the motion whether the motion is opposed or unopposed. TEX. R. APP. P. 10.1(a)(5). If the motion is unopposed, that should also be noted in the title of the motion to assist the Clerk in expediting it. Also, it is helpful to the Clerk for the first paragraph of the motion to state (1) when the document is due; (2) the length of the extension sought; and (3) the new deadline if the extension is granted. If an MET is opposed, the Clerk’s office will inquire whether opposing counsel intends to file any opposition. No MET to file a petition for review is ever denied without the Court’s approval.

Technically, the rules permit extension motions to be filed even after the expiration of the various deadlines for filing. However, no practitioner should ever voluntarily take advantage of the grace periods because the Clerk’s office and the Court would view that with disfavor. Similarly, while the Court is relatively generous with granting extensions, counsel should avoid taking undue advantage of that generosity. Subject to those caveats, following are deadlines involving petition for review filings, and the Clerk’s general rules applicable to unopposed METs:

##### **1. Petition for Review**

No later than 15 days after the last day for filing the petition. TEX. R. APP. P. 53.7(f). If the MET is unopposed, the first extension will generally 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 extension will be disfavored.

##### **2. Response to Petition**

At any time before or after the response is due. TEX. R. APP. P. 53.7(f). An unopposed MET will be granted for up to 30 days; the grant letter will include the standard language about further requests being disfavored.

##### **3. Reply to Response**

At any time before or after the reply is due. TEX. R. APP. P. 53.7(f). An extension of up to 15 days for filing the reply will routinely be granted. The Court will adjust the date for action on the petition to accommodate the Justice’s consideration of the reply under the extended deadline.

##### **4. Petitioner’s Brief on the Merits**

At any time before or after the brief is due. TEX. R. APP. P. 55.7. Unopposed METs will be granted for up

to 30 days and the standard language about further requests being disfavored is included.

##### **5. Respondent’s Brief on the Merits**

At any time before or after the brief is due. TEX. R. APP. P. 55.7. Unopposed METs will be granted for up to 30 days and the standard language about further requests being disfavored is included.

##### **6. Reply Brief on the Merits**

At any time before or after the brief is due. TEX. R. APP. P. 55.7. The Clerk’s office will inform the chambers to which the study memo is assigned about the MET and will grant an unopposed MET for up to 30 days (although 15 days is preferred), unless instructed not to do so. If granted, the letter will contain the standard language about further requests being disfavored.

##### **7. Motion for Rehearing**

No later than 15 days after the last date for filing a motion for rehearing. TEX. R. APP. P. 64.5. If rehearing is sought of a cause or per curiam decision, the chambers that authored the majority or per curiam opinion will decide whether to grant the MET. If rehearing is sought of the denial of a petition, the Clerk’s office processes the MET. The first unopposed MET is granted for up to 30 days; the letter includes the standard language about further requests being disfavored.

#### **E. Amendment**

On motion showing good cause, the Court may allow a party to amend, on such reasonable terms as the Court may prescribe, the petition for review, response, reply, or any of the briefs on the merits. TEX. R. APP. P. 53.8, 55.8. As with any appellate motion under the rules, the movant must comply with the requirements of Rule 10, including the provision of a certificate of conference.

#### **VI. ANATOMY OF PETITION**

With minor exception, a petition for review must contain the following sections, in the order listed and “under appropriate headings”:

- Identity of Parties and Counsel
- Table of Contents
- Index of Authorities
- Statement of the Case
- Statement of Jurisdiction
- Issues Presented
- **Statement of Facts**
- **Summary of the Argument**

- **Argument**
- **Prayer**
- **Signature**
- **Certificate of Service**
- **Certificate of Compliance**
- **Appendix**

TEX. R. APP. P. 53.2. Only the bolded sections are included in the petition's 4,500-word limit. TEX. R. APP. P. 9.4(i)(1). Each of the key sections required by the rules is addressed below, and an optional section not required by the rules is also discussed.

#### A. **Cover of Petition**

##### **TEX. R. APP. P. 9.4(g). Contents of cover.**

*A document's front cover, if any, must contain the case style, the case number, the title of the document being filed, the name of the party filing the document, and the name, mailing address, telephone number, fax number, if any, email address, and State Bar of Texas identification number of the lead counsel for the filing party. If a party requests oral argument in the court of appeals, the request must appear on the front cover of that party's first brief.*

The cover should be clean and simple. The required cover contents are the case style; the case number; the title of the document being filed (e.g., "Petition for Review"); and the name, mailing address, telephone number, fax number, if any, email address, and State Bar number of the lead counsel for the filing party. TEX. R. APP. P. 9.4(g). Though the rule requires that only the email address of lead counsel be included on the cover, the Clerk's office prefers that the email address of each attorney listed on the cover be included.

Though not required under the rule, the State Bar Number of each listed attorney should be included immediately beneath his or her name. The Clerk's office enters a notation on the computer system next to the name of the first signer to indicate that he or she is lead counsel. Only that attorney will receive official notices from the Clerk's office, although anyone who signs up can receive CaseMail. The name of the attorney should be the bar-card name of the attorney, not some interesting nickname. The name is cross-checked against the State Bar database and the Clerk's office will investigate name variations.

When out-of-state attorneys are included on the cover, prudent practice dictates filing a pro hac vice motion prior to or contemporaneously with the filing of the brief.

Although not required, some Justices prefer that the cover reflect that the matter is "On Petition for

Review from the [number] Court of Appeals at [City], Texas, Cause No. \_\_\_\_\_." The Clerk's office appreciates including this information.

The cover of a petition ***should not*** request oral argument. Only in the court of appeals must a request for oral argument appear on the cover. TEX. R. APP. P. 9.4(g).

Now that e-filing is required in all appellate courts, the rule governing the colors and materials to be used for the cover has effectively been rendered obsolete. TEX. R. APP. P. 9.4(f).

#### B. **Preliminary Sections**

##### 1. Identity of Parties and Counsel

**TEX. R. APP. P. 53.2(a).** *The petition must give a complete list of all parties to the trial court's final judgment, and the names and addresses of all trial and appellate counsel.*

The rule requires a complete list of all parties to the trial court's judgment, and the names and addresses of all trial and appellate counsel. The Clerk's office also prefers inclusion of the email address for each listed attorney. It is not necessary to provide the addresses of the parties to the trial court's final judgment; only the addresses of trial and appellate counsel must be provided. Counsel should also provide the addresses of any pro se litigants.

Although not required, it is helpful to the Court to indicate the parties' procedural posture in the trial court, the court of appeals, and the Supreme Court (e.g., Defendant/Appellee/ Petitioner).

Under the rule governing petitions for review, both trial and appellate counsel must be listed. Clearly designate whether listed attorneys served as trial counsel, appellate counsel, or both.

Those we talked to at the Court unanimously agreed that the identity of parties and counsel page need not contain a stock introductory sentence as suggested by some appellate form books (e.g., This list is being provided pursuant to Rule 53.2(a) so that the members of the Court may determine whether they are recused.).

This section of the petition does not count against the 4,500-word limit. TEX. R. APP. P. 9.4(i)(1).

##### 2. Table of Contents

**TEX. R. APP. P. 53.2(b).** *The petition must have a table of contents with references to the pages of the petition. The table of contents must indicate the subject matter of each issue or point, or group of issues or points.*

Because of the sheer volume of petitions that each Justice reviews, the importance of a well-drafted table of contents assumes greater importance under petition practice. Properly crafted, the table of contents may

serve as an effective overview of the issues presented and the reasons that those issues merit the Court's attention. The table of contents is also an ideal place to incorporate one or more times the “hook” discussed in Part III(B), *supra*.

The table of contents should contain page references for every required section. The primary advantage of providing a thorough table of contents is to aid the Justices to zero in on the section in which they are interested. A secondary benefit is that the table of contents can then serve as a quick cross-check against Rule 53.2 to ensure that the petition includes all required sections in the correct order.

The rules also require that the table of contents “indicate the subject matter of each issue or point, or group of issues or points.” TEX. R. APP. P. 53.2(b).

With electronic filing, parties have the option of linking each entry in the table of contents to the section of the petition/brief to which that entry corresponds. In addition, parties can create a “bookmark” for each section of the brief, and the Justices may use those bookmarks to navigate within an electronic brief. The Justices have commented that they find such links and bookmarks to be helpful.

This section of the petition does not count against the 4,500-word limit. TEX. R. APP. P. 9.4(i)(1).

### 3. Index of Authorities

**TEX. R. APP. P. 53.2(c).** *The petition must have an index of authorities arranged alphabetically and indicating the pages of the petition where the authorities are cited.*

The index of authorities should not be cumbersome. Over-categorization makes it difficult for the reader to find a case by simple alphabetical reference. To avoid this problem, the authorities should be listed alphabetically under the following headings or an appropriate variation thereof: (1) Cases (without grouping by jurisdiction); (2) Constitutional Provisions, Statutes and Rules; and (3) Miscellaneous Authorities.

The better practice is to provide page references for every page in the petition on which the authority is cited. Unless unduly cumbersome, avoid the use of

“*passim*” in lieu of providing page numbers, even for a frequently cited authority. Do not include pinpoint page references within the citations in the index of authorities (although *always* do so for citations in the text).

Follow *Bluebook* and *Greenbook* citation form to the extent practicable. Many Staff Attorneys and Law Clerks are former law review and journal editors to whom citation mistakes may be distracting and even credibility-reducing.<sup>65</sup>

To this end, be particularly mindful of some oft-overlooked idiosyncrasies when citing to Court and intermediate Texas appellate authority:

- Court opinions issued during Reconstruction (dubbed the “Military Court”) from 1867–70 (30 Tex. 375 to 33 Tex. 584) are not precedential because the Court operated without constitutional authority during that time.<sup>66</sup>
- Opinions issued by the so-called “Semicolon Court” that sat from 1870–73 (33 Tex. 585 through 39 Tex.), while technically precedential, are often not accorded jurisprudential respect because of the juridic pall that hung over that Court.<sup>67</sup>
- In order to be able to determine whether the notations, “no pet.” or “no pet. h.” are appropriate, you must investigate whether: (1) a petition for review has been filed; (2) a motion for rehearing or en banc review is still pending; or (3) 45 days have elapsed since the appellate court’s judgment or the court’s ruling on a motion for rehearing or en banc review.<sup>68</sup> It may be necessary to check the website of a given court of appeals or that of the Texas Supreme Court to determine if a motion for rehearing has been filed or a motion to extend time has been filed
- Always be sure to double-check 1997 intermediate appellate court opinions to determine whether they were issued before

<sup>65</sup> Many lawyers, some judges, and most every law clerk “will judge you by your citation form, as inconsequential as it may be.” Wayne Schiess, *Citation form: The Tyranny of the Inconsequential*, LEGIBLE (Aug. 9, 2012), <https://bit.ly/2OmQUjl>. Often, a lawyer’s legal prose may be the only hallmark by which court staff know an attorney, and the sole measure by which a lawyer is judged in the back halls of the courthouse. Bradley B. Clark, *Yes, Judges Really Do Care About That! Lawyers’ Most Common Citation Mistakes*, TexasBarCLE, Consumer and Commercial Law Course, at 3 (2007).

<sup>66</sup> Jim Paulsen & James Hambleton, *Confederates & Carpetbaggers: The Precedential Value of*

*Decisions from the Civil War and Reconstruction Era*, 51 TEX. B.J. 916, 920 (Oct. 1988) [hereinafter *Confederates & Carpetbaggers*]; see *Peck v. City of San Antonio*, 51 Tex. 490, 492 (1879); Dylan O. Drummond, *Citation Writ Large*, 20 APP. ADVOC. 89, 92 (Winter 2007) [hereinafter *Citation Writ Large*].

<sup>67</sup> See *Confederates & Carpetbaggers*, 51 TEX. B.J. at 920; see also *Citation Writ Large*, 20 APP. ADVOC. at 92–93.

<sup>68</sup> TEX. R. APP. P. 53.7(a); THE GREENBOOK: TEXAS RULES OF FORM 127–28, App’x D (Texas Law Review Ass’n ed., 12th ed. 2015) [hereinafter *GREENBOOK*].

or after September 1, 1997: (1) if issued before September 1st, the subsequent history notation should reference the application for “writ” of error, and (2) if issued on or after September 1st, the subsequent history notation should reference the “pet.” for review.<sup>69</sup>

- Because Texas’s intermediate appellate courts had no criminal jurisdiction from 1911 to August 31, 1981, refer to courts from this period in citations as “Tex. Civ. App.” instead of “Tex. App.”<sup>70</sup>
- Any intermediate appellate court opinion issued before January 1, 2003 that was also affirmatively designated, “do not publish,” has no precedential value but may be cited with the parenthetical notation, “(not designated for publication).”<sup>71</sup> It is without precedential effect if a court of appeals mistakenly affixes a “do not publish” designation to a case after January 1, 2003.<sup>72</sup>
- One of the most common citation mistakes that befall practitioners is affixing the proper date of enactment to a session law. The date of enactment of a session law is the “final relevant legislative action on the bill, not the date of executive approval.”<sup>73</sup> Typically, this date is the day upon which the remaining legislative body (House or Senate) approved the final version of the measure. The easiest way to investigate not only pertinent dates of legislative action, but bill text, and a host of other information is by visiting the Texas Legislature Online website, which provides a search feature going back to the 71st Regular Legislative Session in 1989.<sup>74</sup> Notably, however, the Texas Legislative Reference Library maintains its own

website, which provides a legislative search function going back to the 12th Regular Legislative Session in 1871.<sup>75</sup>

- You’ll notice that the Court rarely, if ever uses “Ann.,” “West,” or dates in statute citations within its opinions. This is because the Court’s internal style guide directs judicial staff not to. The explanation given is that Texas law is not proprietary, and therefore providing attribution to a commercial reprinting service in a citation is unnecessary and—dare we say—slightly unseemly. Regarding omitting dates from Texas statute cites, the Court’s style guide instructs that dates should only be included if relevant to the analysis.
- The proper use of signals is paramount in establishing one’s credibility to the reader.<sup>76</sup> Study Bluebook Rule 1.2 to avoid giving your reader the impression that what may have been an inadvertent mistake was, in fact, aimed at recasting the import of cited authority in one’s favor.<sup>77</sup>
- Always denote any procedural information specific to the handling of the case cited ((per curiam),<sup>78</sup> (orig. proceeding),<sup>79</sup> (not designated for publication),<sup>80</sup> (op. on reh’g), (mem. op.),<sup>81</sup> etc.).
- Abbreviations for all the Texas subject-matter codes, some of which are not otherwise abbreviated in the *Bluebook*, may be found in Appendix H.1 of the *Greenbook*.<sup>82</sup>

Be particularly mindful to provide accurate subsequent histories. Failing to correctly note the subsequent history of a Texas case can precedentially neuter the cited material.<sup>83</sup>

<sup>69</sup> GREENBOOK at 26–27 (4.4.1), 124–33 (App’x D).

<sup>70</sup> *Id.* at 22–23 (4.2.1–2).

<sup>71</sup> TEX. R. APP. P. 47.7(b).

<sup>72</sup> TEX. R. APP. P. 7.2(c), 47.7(b).

<sup>73</sup> GREENBOOK at 61–62 (10.3.1).

<sup>74</sup> TEXAS LEGISLATURE ONLINE, <https://capitol.texas.gov/>, (last visited Aug. 7, 2018).

<sup>75</sup> LEGISLATIVE REFERENCE LIBRARY OF TEXAS, DIRECT SEARCH, <https://bit.ly/2AQm4ZK> (last visited Aug. 7, 2018).

<sup>76</sup> Hon. Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 123 (Thomson/West 2008).

<sup>77</sup> THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 58–60, 1.2 (Columbia Law Review Ass’n et al. eds., 20th ed. 1st prtng. 2015) [hereinafter BLUEBOOK].

<sup>78</sup> See TEX. R. APP. P. 47.2(a), 59.1; BLUEBOOK at 108 (10.6.1(b)); GREENBOOK at 18 (4.1.2(a)).

<sup>79</sup> See GREENBOOK at 38–41 (6.1–2.5(b)).

<sup>80</sup> TEX. R. APP. P. 47.7(b); GREENBOOK at 19 (4.1.2(c)).

<sup>81</sup> See TEX. R. APP. P. 47.2(a), 47.4; BLUEBOOK at 108 (10.6.2); GREENBOOK at 18 (4.1.2(a)).

<sup>82</sup> GREENBOOK at 138–39 (App’x H.1).

<sup>83</sup> Dylan O. Drummond, *Texas Citation Writ Large(r): Consequential Necessity or “Tyranny of the Inconsequential”?*, 26 APP. ADVOC. 24, 35 (Fall 2013). For a

This section of the petition does not count against the 4,500-word limit. TEX. R. APP. P. 9.4(i)(1).

#### 4. Statement of the Case

**TEX. R. APP. P. 53.2 (d).** *The petition must contain a statement of the case that should seldom exceed one page and should not discuss the facts. The statement must contain the following:*

- (1) *a concise description of the nature of the case (e.g., whether it is a suit for damages, on a note, or in trespass to try title);*
- (2) *the name of the judge who signed the order or judgment appealed from;*
- (3) *the designation of the trial court and the county in which it is located;*
- (4) *the disposition of the case by the trial court;*
- (5) *the parties in the court of appeals; the district of the court of appeals;*
- (7) *the names of the justices who participated in the decision in the court of appeals, the author of the opinion for the court, and the author of any separate opinion;*
- (8) *the citation for the court of appeals' opinion, if available, or a statement that the opinion was unpublished; and*
- (9) *the disposition of the case by the court of appeals.*

The statement of the case provides one of the greatest invitations for abuse under petition practice. Chief Justice Hecht has explained that the elements of the statement of the case intentionally mirror those found in the Court's study memos prepared by law clerks in each case.<sup>84</sup>

Rule 53.2(d) provides a suggested page limit for the statement of the case (one page) but not a mandatory one. Compounding the risk of abuse is the fact that the statement of the case is excepted from the 4,500-word limit.

Practitioners who follow the format preferred by virtually all of the Justices with whom we spoke, however, will face no such temptation. The Justices almost uniformly prefer that the statement of the case be presented in tabular form. The statement of the case should serve as a simple reference page, to which the Justices can turn for basic information about the case. The suggested tabular format closely resembles the study memo format that the Court's staff is required to use. Employing this format is, therefore, helpful to the chambers assigned to the case and can enhance credibility.

Practitioners may be reluctant to abandon the traditional, narrative statement of the case for fear of losing an opportunity to persuade the Court. The expressed preferences of the Justices and the ease of reference provided by the suggested format, however, outweigh any incremental persuasive value of a narrative statement of the case.

The nine items required by Rule 53.2(d) to be included in the statement of the case in a petition for review can easily be collapsed into five headings: Nature of the Case and Parties; Trial Court; Trial Court's Disposition; Court of Appeals; and, Court of Appeals' Disposition.

##### a. Nature of the Case and Parties:

Rule 53.2(d)(1), (5): The rule gives as examples of the "concise description of the nature of the case": "whether it is a suit for damages, on a note, or in trespass to try title." Being a little more specific, though not more lengthy, may be helpful. For example, "a suit for damages" can take many different forms, such as a product liability suit, a medical malpractice action, or a simple personal injury suit. Provide enough information so that the statement of the nature of the case will distinguish this petition from others.

The rule also requires identifying "the parties in the court of appeals." TEX. R. APP. P. 53.2(d)(5). This information can be included as part of the description of the nature of the case. TEX. R. APP. P. 53.2(d)(1). In a multi-party appeal, of course, this could conceivably be an unmanageably long list. In that event, make reference to the appendix and include the list there. Because the statement of the case is not included in the page limit, this should not be construed as a violation of the rule precluding the inclusion of matters in the appendix in an attempt to avoid the page limits. TEX. R. APP. P. 53.2(k)(2).

##### b. Trial Court

Rule 53.2(d)(2), (3): Provide the full name of the trial judge who signed the order or judgment appealed

more fulsome examination of Texas subsequent history and the precedential weight accorded a given case, see *Citation Writ Large*, 20 APP. ADVOC. at 89–109.

<sup>84</sup> Hecht Interview.

from, as well as the designation of the trial court and the county in which it is located.

c. Trial Court’s Disposition

Rule 53.2(d)(4): A one-line statement of the trial court action suffices.

d. Court of Appeals

Rule 53.2(d)(6), (7), (8): Include here the district of the court of appeals; the names of the justices who participated in the decision of the court of appeals; the author of the opinion for the court, and the author of any separate opinion; and the citation for the court of appeals’ opinion. Although it is best to identify the trial judge by his or her full name, including the first names of court of appeals justices is unnecessary unless there is more than one judge with the same last name on the court. Be sure to indicate if a lower court judge was sitting “by designation.”

e. Court of Appeals’s Disposition

Rule 53.2(d)(9): Simply state what the court of appeals ultimately adjudged. Reserve any details, including when the court of appeals acted on any motion for rehearing that may have been filed, for the statement of facts, which expressly calls for inclusion of the procedural background. TEX. R. APP. P. 53.2(g).

If the practitioner chooses to provide a statement of the case in narrative form, it should be as short as practicable and should rarely exceed one-half page. The purpose of the statement of the case is to provide the Court with orientation. A simple litmus test can be employed to determine whether a statement of the case, provided in narrative form, is appropriate: could the Court include the statement verbatim in its opinion? If not, it is overly argumentative and should be redrafted.

5. Statement of Jurisdiction

**TEX. R. APP. P. 53.2 (e).** *The petition must state, without argument, the basis of the Court’s jurisdiction.*

During the 85th legislative session in 2017, the Legislature made a nominally sweeping change to the Court’s jurisdiction, but the modification will likely have little practical impact.<sup>85</sup> H.B. 1761 eliminated the six jurisdictional grounds long contained in Texas Government Code section 22.001(a), including disagreement among the intermediate appellate justices on the panel below and conflict between the courts of appeals.<sup>86</sup> Now, the only remaining jurisdictional touchstone is the one previously housed in

section 22.001(a)(6)—whether the “appeal presents a question of law that is important to the jurisprudence of the state.”<sup>87</sup>

But this change is not as dramatic as it might appear at first blush because, in practice, the Court rarely ever granted a petition unless it presented an issue of statewide import—regardless of what other jurisdictional factors may have been present. Moreover, Rule 56.1(a) governing the considerations the Court weighs when deciding whether to grant review, still contains all six grounds formerly made jurisdictional bases in Texas Government Code section 22.001(a).<sup>88</sup> See Part VI(C)(1), *infra*.

Therefore, a single sentence should nearly always suffice for the statement of jurisdiction. For example: “The Supreme Court has jurisdiction of this suit under Government Code section 22.001(a), because this case presents an important issue of constitutional law of first impression to this Court that is likely to recur in future cases.”

While conflicts among the courts of appeals are no longer strictly jurisdictional, they nevertheless may show that a given issue is one of statewide import. Consequently, if a case presents what would have traditionally been termed, “conflicts jurisdiction,” the jurisdictional statement could include a single sentence stating the point on which the courts of appeals disagree, as well as citations to the conflicting opinions with appropriate signals.

The statement of jurisdiction is specifically excepted from the 4,500-word limit. TEX. R. APP. P. 9.4(i)(1).

Any argument that the practitioner may be tempted to include in the statement of jurisdiction, however, should be avoided. If argument is included in the statement of jurisdiction, at best it will go unread and at worst it will be perceived as an abusive attempt to circumvent the length limit and could result in the petition being struck. See *Daimler-Benz Aktiengesellschaft v. Olson*, 53 S.W.3d 308, 308 (Tex. 2000) (Hecht, J., joined by Owen, J., dissenting from pet. struck) (striking a petition for review because it contained a five-page jurisdictional statement detailing the alleged conflict). Besides, it looks like a rookie move.

Only if jurisdiction truly is an issue in the case—such that the petition might be a legitimate target for a motion to dismiss for want of jurisdiction—should the statement of jurisdiction contain a substantive discussion of the jurisdictional issue.

<sup>85</sup> Tex. H.B. 1761, § 1, 85th Leg., R.S. (2017), codified at TEX. GOV’T CODE § 22.001(a).

<sup>86</sup> *Id.* The bill also made the welcome change to finally remove the Government Code’s outdated reference to “applications for writ of error”—a mechanism that hasn’t

existed since it was replaced by petitions for review in September 1997. See TEX. GOV’T CODE § 22.007.

<sup>87</sup> TEX. GOV’T CODE § 22.001(a).

<sup>88</sup> See TEX. R. APP. P. 56.1(a)(1)–(6).

6. Issues Presented

**TEX. R. APP. P. 53.2 (f).** *The petition must state concisely all issues or points presented for review. The statement of an issue or point will be treated as covering every subsidiary question that is fairly included. If the matter complained of originated in the trial court, it should have been preserved for appellate review in the trial court and assigned as error in the court of appeals.*

The governing rule allows the petitioner to present the Court with either points of error or issues. The Justices prefer the use of issues over points. Moreover, issue practice lends itself much better to seizing the attention of the Court; it is more readily apparent that an issue is of substantial importance to the jurisprudence of the state when it is stated as an issue rather than as a point of error. Some Justices commented that they usually can spot a petition that is not grantworthy from the issues.<sup>89</sup> On the other hand, “an issue presented can also attract judicial attention and encourage a justice to spend more time reviewing the case.”<sup>90</sup>

Because the grant or denial of a petition can be determined by a Justice reviewing nothing more than the issues presented, the importance of carefully selecting and framing the issues cannot be overstated.<sup>91</sup> Much has been written on issue practice.<sup>92</sup> Unfortunately, some of the advice is conflicting. Outlined below is the key advice, including conflicting advice, as well as the authors’ personal views on which path to take where the recommendations cannot be reconciled.

a. Limiting Briefed Issues

All agree that it is a good idea to limit the number of points or issues presented to the Supreme Court for review. The length limitations of the petition make limiting the number of issues even more critical; only one or two issues can be briefed effectively in the

argument portion of the petition. As one former Justice has put it, “the best points, and only the best points, should be in the petition.”<sup>93</sup>

The petitioner should critically evaluate whether to even preserve those issues as to which the available space does not permit meaningful discussion.

b. Preserving Unbriefed Issues in the Petition for Review

The rules do not require the petitioner to address in the argument section of the petition every issue listed in the issues presented. *See* TEX. R. APP. P. 53.2(i). If one or more issues in the petition are not addressed in the argument, to preserve them the petitioner should include in the list of issues presented the bracketed reference “(unbriefed)” immediately following each such issue, or group them under the heading “Unbriefed Issues.”

c. Listing Issues

Simply listing the issues numerically is sufficient. The issues may be single-spaced. *See* TEX. R. APP. P. 9.4(d). The issues should not be typed in all capital letters as that makes them difficult to read.

d. Framing Issues

The issues should be framed in such a way that they present concrete, legal questions for the Court’s resolution, reveal the importance of the question for the Court’s consideration, and place the issue in the context of the actual case before the Court. This is easier said than done: “Preparing an effective issue statement is one of the most important, and difficult, tasks facing the author of an appellate brief.”<sup>94</sup>

(i) Frame to Demonstrate Importance

Pam Baron, an experienced Texas Supreme Court practitioner, has developed a number of thoughtful suggestions for preparing issues. First, she observes that “[t]here are significant differences between the

<sup>89</sup> *Accord Issues and Petitions*, at 588, 590–91 (“Frequently, a justice may decide to deny a petition based solely on a review of the issue presented by a petition .... A justice reviewing a petition may be able to tell immediately, based on review only of the issue presented, that the case is not one warranting supreme court review.”).

<sup>90</sup> *Id.* at 591.

<sup>91</sup> *Id.* at 590 (“[T]he supreme court presumes that a petition for review will be denied, and the denial is automatic absent any action from members of the court. Given that presumption and the sparse amount of time the court can dedicate to reviewing each petition, the importance of the issues presented cannot be overestimated. In fact, one commentator suggests that the issue presented ‘is as important as anything that follows in the petition.’”) (quoting Charles B. Lord, *Understanding the New Petition for Review Process*,

TexasBarCLE, *Practicing Under the New Texas Appellate Rules Course*, ch. I at 4 (1997)).

<sup>92</sup> *See, e.g., Issues and Petitions; Drafting Issues; Bryan A. Garner, Issue-Framing: The Upshot of It All*, TexasBarCLE, 11th Annual Advanced Civil Appellate Practice Course, ch. O (1997) [hereinafter *Upshot of it All*].

<sup>93</sup> *Issues and Petitions*, at 587, 603 (“[G]iven the page constraints of a petition, a party can only adequately brief one or two issues at most.”); Hon. Deborah Hankinson, *Framing Issues Under the New Rules: A View from the Supreme Court*, 5 APP. LAW. 4 (1998–99) (“Realistically, only one or two issues can be briefed effectively in a petition, so you need to focus even more carefully on choosing your strongest and most important issues.”).

<sup>94</sup> *Issues and Petitions*, at 593.

intermediate courts of appeals and the Texas Supreme Court that should be taken into account when drafting issues.”<sup>95</sup> Unlike in the court of appeals, where the court must hear the case, in drafting issues to the Supreme Court the petitioner “must try to incorporate the concept of importance—such as the need for the state’s highest court to decide the case, the widespread effect that resolution of the issue has, or a need to resolve a conflict among courts of appeals.”<sup>96</sup> To highlight importance, “a good issue is framed as broadly as the case will permit—like a good law school question. The broader the question, the broader its applicability, and the more likely the Court will determine the issue is important.”<sup>97</sup> The petitioner should avoid framing the question in a manner that is overly fact-specific. “If the issue is fact-intensive, it suggests that the issue is not important to the jurisprudence of the state but only to resolution of the particular case.”<sup>98</sup>

(ii) Frame Neutrally

Baron recommends that, at the petition stage, the issue should be stated neutrally because the answer does not matter—yet.<sup>99</sup> Again, the goal at this stage is to just get through the door; persuading the Court that the client should prevail on the merits can be accomplished if the Court requests full briefing on the merits, which is what the petitioner should be angling for. “At the petition phase, it is more important to convince the Court that the issue is interesting and in need of resolution by the state’s highest authority. As one article co-authored by a Supreme Court Justice observed, ‘the first review is to determine the cases that obviously have no merit; the review is not designed to resolve any apparent questions.’ An interesting issue very often has more than one possible answer. It may do more to get a grant to state the issue in a neutral way.”<sup>100</sup>

(iii) Frame for Disposition Sought

Baron observes that the way the issue is framed may differ depending on whether the petitioner is seeking disposition after full oral argument or by per curiam opinion.<sup>101</sup> “If the petitioner seeks a short opinion correcting error without argument, obviously the issues will differ significantly from those asking the Court to review a broad issue of statewide importance.”<sup>102</sup>

e. Split of Opinion on Single Versus Multi-Sentence Issues

There is split of opinion among practitioners and commentators as to whether issues should be framed using single sentences or multiple sentences.

The most prominent proponent of the multi-sentence issue is Bryan Garner.<sup>103</sup> Garner is harshly critical of the single-sentence issue, at least as conventionally framed: “The one-sentence version of an issue doesn’t seem to be required anywhere, but it’s a widely followed convention. And it’s ghastly in its usual form because it leads to unreadable issues that are deservedly neglected. They’re either surface issues that are either too abstract, or else they’re meandering, unchronological statements that can’t be understood on fewer than three very close readings.”<sup>104</sup>

Despite Garner’s criticism of the single-sentence approach, the authors remain persuaded that this approach is preferable in seeking review from the Court for several reasons.

First, the single-sentence approach conforms with the format the law clerks employ in preparing the study memo. If that format is used in the petition and, ultimately, in the brief on the merits, the law clerk will be more inclined to adopt the issue as framed by the petitioner. If, on the other hand, the petitioner presents a multi-sentence issue, it falls to the law clerk to synthesize it into a single-sentence—one not crafted by petitioner’s counsel and one with which counsel might not be pleased. In short, counsel who use multi-sentence issues in their briefing to the Court risk losing control of the manner in the issues are ultimately presented to the Justices who will be making the grant/deny decision.

Second, using multi-sentence issues in the petition creates the danger of the Justices not taking the time to digest the issues. According to some of the Staff Attorneys with whom we spoke, when faced with a list of multi-sentence issues the reader is inclined to skip to the Table of Contents to divine what the case is actually about.

Third, the authors are concerned about Garner’s multi-sentence approach to issues because it fails to account for the fundamental distinction between issue-framing in the court of appeals and issue-framing in the Supreme Court. In the authors’ view, the multi-sentence approach lends itself to being too case-specific. This detracts from demonstrating the importance of the issue to the jurisprudence of the state. The lead example of a

<sup>95</sup> *Drafting Issues*, at 1.

<sup>96</sup> *Id.* at 2.

<sup>97</sup> *Id.* at 4.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 7.

<sup>100</sup> *Id.* (quoting *Issues and Petitions*, at 588).

<sup>101</sup> *Id.* at 1.

<sup>102</sup> *Id.* at 3.

<sup>103</sup> *See Upshot of it All*.

<sup>104</sup> *Id.* at 5.

multi-sentence issue in Garner’s paper illustrates the point:

As Hannicut Corp. planned and constructed its headquarters, the general contractor, Lawrence Construction Co., repeatedly recommended a roof membrane and noted that the manufacturer also recommended it. Even so, the roof manufacturer warranted the roof without the membrane. Now that the manufacturer has gone bankrupt and the roof is failing, is Lawrence Construction jointly responsible with the insurer for the cost of reconstructing the roof?<sup>105</sup>

While this approach cleanly frames the issue, it in no way indicates why the issue is jurisprudentially interesting. This syllogistic multi-sentence approach also leads logically to only one answer, which is precisely what Garner advocates: “Write fair but persuasive issues that have *only one answer*.”<sup>106</sup> The authors do not favor this approach at the petition stage. Instead, the authors side with the approach advocated by Baron, discussed above: “At the petition phase, it is more important to convince the Court that the issue is interesting and in need of resolution by the state’s highest authority .... An interesting issue very often has *more than one possible answer*.”<sup>107</sup>

The single-sentence approach does not lead logically to only one answer, although it can be couched so as to nudge the reader toward the desired answer. The first issue in the sample petition illustrates the point—the use of the word “mere” in “*mere* knowledge” is employed in order to *suggest* to the Court that such knowledge is not sufficient for personal jurisdiction to attach. But the issue, as framed, does not logically *compel* that conclusion. The issue is designed primarily to capture the interest of the Court.

### C. Body of Petition

#### 1. Reasons to Grant

The threshold decision before the Court on petition for review is whether to grant review. Accordingly, it may be useful, though not contemplated by the rules, to commence the body of the petition with a stand-alone section that focuses on a concrete question: why should the Court grant review? By including such a section in the bookmarks to the electronic version of the petition, a reviewing Justice can simply click on that section and be transported to a set of enumerated reasons for the Court to take the case.

The single most common complaint among the Justices has been that many, if not most, petitions “lack focus.” A “Reasons to Grant” section should avoid this complaint by incorporating the “hook” and setting the hook early. *See* Part III(B), *supra*. Such a section will not only provide the focus that the Justices desire at the outset but also force the practitioner to identify and crystallize the reasons that the Court should grant review.

The rules enumerate specific factors the Court should consider in deciding whether to grant a petition for review. TEX. R. APP. P. 56.1. Rule 53.2(h) requires that the petition make specific reference to these factors. The better practice is to incorporate citations to the relevant provisions into the body of the argument rather than give the Court a laundry list of reasons from Rule 56.1 as to why it should exercise jurisdiction. The factors enumerated in Rule 56.1 are:

- whether the justices of the court of appeals disagree on an important point of law;
- whether there is a conflict between the courts of appeals on an important point of law;
- whether a case involves the construction or validity of a statute;
- whether a case involves constitutional issues;
- whether the court of appeals appears to have committed an error of law of such importance to the state’s jurisprudence that it should be corrected; and
- whether the court of appeals has decided an important question of state law that should be, but has not been, resolved by the Supreme Court.

Rule 56.1 is not an exclusive list of factors. Other standards may be looked to in demonstrating that a case is “important” to the state’s jurisprudence.

A paper authored by Ginger Rodd, a former Supreme Court Staff Attorney, provides excellent guidance on this point.<sup>108</sup> She explains that, with the adoption of the study-memo procedure, a training program was developed for new law clerks. In developing that program, the Justices were interviewed to obtain their views on what kinds of cases they consider “grant-worthy.”<sup>109</sup> Although the Court’s composition has changed since those interviews were conducted, the types of cases that will interest Justices

<sup>105</sup> *Id.* at 4.

<sup>106</sup> *Id.* at 7 (emphasis added).

<sup>107</sup> *Drafting Issues*, at 7 (emphasis added).

<sup>108</sup> *See* Elizabeth V. Rodd, *What is Important to the Jurisprudence of the State?*, TexasBarCLE, Practice Before the Supreme Court of Texas Course, ch. 4 (2002).

<sup>109</sup> *Id.*

remain the same. The following are factors identified by the Justices as weighing in favor of a grant:<sup>110</sup>

- The case presents an issue of first impression for the Court, particularly if the issue is likely to recur. Because some Justices prefer that novel issues have the opportunity to “percolate” through the courts of appeals, Rodd suggests that if the issue in question has not previously reached many Texas courts of appeals, the petitioner might try to convince the Court that the issue has been well developed in other jurisdictions.<sup>111</sup>
- The case involves the construction or interpretation of a statute of statewide importance. Statutory interpretation cases have, statistically, been one of the hottest areas for the granting of review.
- The case presents an issue where statewide uniformity is important.
- The court of appeals’ opinion is likely to mislead or confuse other courts of appeals if the petition were denied. Rodd writes that “[a]t least one Justice took the view that a court of appeals’ opinion that is *not* ‘blatantly outlandish’ would be more worthy of a grant than one that is, on the theory that other courts of appeals would be likely to recognize truly egregious analysis.”<sup>112</sup> Petitioners should take note of this observation—while it is somewhat counterintuitive, blasting a court of appeals’ opinion as “egregious” could ultimately prove counterproductive in trying to secure review and detracts from the petition’s credibility. The better approach is to depict the court of appeals’ opinion as reflecting confusion in the law—confusion that, unless corrected, is bound to engender confusion among other courts of appeals as well.
- The case presents a genuine constitutional issue for review. “Uniformly, the Justices consider constitutional issues generally important.”<sup>113</sup>

- The case involves an issue that is emerging nationally, and allows the Court to decide whether Texas will participate in a nationwide trend. Rodd advises that “[a] practitioner who wishes to rely on a nationwide trend to pique the Court’s interest might consider including a tabular compilation describing the other 50 states’ treatment of the issue. The briefing attorney [law clerk] who is ultimately directed to conduct a 50-state search will undoubtedly be grateful for the assistance. Moreover, the Court is generally interested in knowing what, if anything, the relevant Restatement would say about a particular issue.”<sup>114</sup>
- The case allows the Court to clarify one of its own opinions that is being misinterpreted by the trial courts or courts of appeals. Since this is the type of case that would appropriate for a per curiam opinion, Rodd advises that “[a] litigant might improve his or her chances of obtaining relief from an unfavorable court of appeals’ decision by arguing that the case would be appropriate for per curiam disposition.”<sup>115</sup>

Another argument for a “grant” is to point out that there is already a granted petition pending before the Court involving the same controlling issue. Properly crafted so as to flag the attention of the Court to the pending case, a “me too” petition may well be pulled from the conveyor belt and “held” until resolution of that case.

Statistics suggest that many of the Justices believe that the Court has an error-correction responsibility. Per curiam opinions, which are an ideal vehicle for error correction,<sup>116</sup> have comprised a substantial portion of the Court’s decisions in recent years. If counsel for a petitioner is faced with a case calling for error correction, the best practice may be to angle for a per curiam opinion. The recommended approach is to make any such suggestion gingerly or, even better, implicitly, by crafting the petition so that a per curiam opinion could be readily drafted based on the petition.

Angling for a per curiam opinion can be accomplished by focusing the petition on a single issue

<sup>110</sup> See *id.* at 3–4.

<sup>111</sup> See *id.* at 3.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 4.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> See *Citation Writ Large*, 20 APP. ADVOC. at 93–94; Hon. Robert H. Pemberton, *One Year Under the New TRAP: Improvements, Problems and Unresolved Issues in Texas Supreme Court Proceedings*, TexasBarCLE, Advanced Civil Appellate Practice Course, ch. B at B-18 (1998).

and demonstrating that the court of appeals's decision on that point is clearly erroneous and requires reversal, rather than arguing that the issue is worthy of a grant. There could be an unintended downside to directly arguing that the case should be resolved by per curiam opinion—such an opinion requires six votes and, thus, in a close case counsel could be shooting the client in the foot by asking for a disposition that requires more than a simple majority of votes.

## 2. Statement of Facts

**TEX. R. APP. P. 53.2 (g).** *The petition must affirm that the court of appeals correctly stated the nature of the case, except in any particulars pointed out. The petition must state concisely and without argument the facts and procedural background pertinent to the issues or points presented. The statement must be supported by record references.*

The statement of facts is the first required section that counts against the petition's 4,500-word limit. TEX. R. APP. P. 53.2(g), 9.4(i)(1). If a "Reasons to Grant" section is included before the Statement of Facts, it will count against the word-count limit as well.

The rules require that the petitioner either state agreement with the court of appeals' rendition of the facts or specify which facts are contested. But the petition should not rely too heavily on the court of appeals' rendition of the facts.

The petition's statement of facts should be freestanding. Several of the Justices read the petition first and then turn to the court of appeals' opinion only if something in the petition sufficiently attracts their interest to proceed further. For these Justices, a petition is inadequate if it merely refers the Court to the court of appeals' opinion for a recitation of the facts—in effect, the petition provides no factual context for these Justices, and they may be disinclined to accept the invitation to turn elsewhere to find that context.

The statement of facts should include only those facts necessary to frame the issues presented in the petition and demonstrate the importance of those issues to the jurisprudence of the state. The facts should be presented in an uncomplicated fashion but should not be oversimplified. If the facts of the petition lend themselves to it, one Justice suggested the use of bullet points. Each fact stated in the statement of facts should be supported by a record reference.

Although every portion of the petition should be designed to persuade the Court to exercise its discretionary jurisdiction, the statement of facts must not include any argument, TEX. R. APP. P. 53.2(g), and should disclose all key facts, even the important facts favorable to the respondent. Of course, the petitioner should always avoid exaggerating or inaccurately describing any facts. With nine chambers reviewing

each petition, the ever-present danger inherent in misrepresenting the record is magnified. Nothing threatens to torpedo a petition more quickly than misrepresenting the record, and nothing places more at risk the credibility of a practitioner in future proceedings than playing fast and loose with the facts in the present one. The Justices do remember.

The statement of facts must include a brief summary of the relevant procedural history. The practitioner should use the required recitation of the case's procedural history to reassure the Justices that the issues presented to the Court in the petition were preserved for appeal in the courts below, if preservation was necessary. Under the rules, a motion for rehearing in the court of appeals is not required to preserve error. TEX. R. APP. P. 49.9. Nonetheless, if a motion for rehearing was filed, this should be stated in the statement of facts.

## 3. Summary of the Argument

**TEX. R. APP. P. 53.2(h).** *The petition must contain a succinct, clear, and accurate statement of the arguments made in the body of the petition. This summary must not merely repeat the issues or points presented for review.*

A petition for review must include a summary of the argument.

Because of the length limitations for the petition for review, the summary of the argument should not exceed one page. The summary should succinctly explain how the court of appeals and/or trial court got it wrong and why the Supreme Court should care. At this juncture in the proceedings, the facts of the particular case are less important. You should not challenge the court of appeals' decision as being unjust to your client, but rather as constituting an erroneous and unjust application of the law, which will be applied to future litigants.

The summary should not just regurgitate the headings in the argument section—the summary needs to be independently crafted. Because of the constraints on their time, certain Justices may scrutinize this section in particular to determine whether the petition merits being pulled from the conveyor belt.

4. Argument

**TEX. R. APP. P. 53.2(h).** *The petition must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record. The argument need not address every issue or point included in the statement of issues or points. Any issue or point not addressed may be addressed in the brief on the merits if one is requested by the Court. The argument should state the reasons why the Supreme Court should exercise jurisdiction to hear the case with specific reference to the factors listed in Rule 56.1(a). The petition need not quote at length from a matter included in the appendix; a reference to the appendix is sufficient. The Court will consider the court of appeals' opinion along with the petition, so statements in that opinion need not be repeated.*

In the petition the space actually available for the Argument will be 4,500 words, *less* whatever space is consumed by Reasons to Grant, Statement of Facts, Summary of Argument, and Prayer, all of which also count toward the page limitation. TEX. R. APP. P. 9.4(i)(1). Moreover, given that the Justices would prefer to receive even shorter petitions, if possible, the argument should ultimately be even tighter still.

Incorporating charts or tables into a petition for review can help grab a Justice's attention. Incorporating them into full briefing also increases the chances of the law clerk incorporating the relevant chart or table into the study memo.

Rule 53.2(h) states that "[t]he argument should state the reasons why the Supreme Court exercise jurisdiction." Given the importance of showing jurisprudential importance, as described above, it may be useful to include a stand-alone section at the outset of the petition entitled "Reasons to Grant." See Part VI(C)(1), *supra*. That section can be devoted to explaining why the Court should exercise its discretionary jurisdiction.

Rule 53.2(h) states that the petition "must contain a clear and concise argument for the contentions made." If the petition contains a section such as "Reasons to Grant," the Argument section can be devoted to addressing the merits of the case.

For practical reasons, counsel should limit the argument of issues to the best one or two. If an attempt is made to brief more than that in the limited space available, the argument will suffer; it will appear granulated and superficial. Fact specific issues are better

left for the brief on the merits stage because they won't jump out to the Justices as being issues of importance at the petition stage.

In crafting the merits section of the argument, counsel should be particularly mindful of the forest. The goal at the petition stage is not to address all issues fully. Rather, the goal is to capture the attention of the Court and secure an invitation from the Court to provide a full brief on the merits under Rule 55. This does not mean, however, that the argument can afford to touch only lightly on the merits of the case. Counsel must carefully craft both the Reasons to Grant and the Argument on the merits. They are ultimately inextricably related. Collectively, they should be calculated to persuade the Court to hear the case.

5. Prayer

**TEX. R. APP. P. 53.2 (j).** *The petition must contain a short conclusion that clearly states the nature of the relief sought.*

The prayer should be crafted with extraordinary care. The Court's power to grant the petitioner relief is circumscribed by the relief requested.<sup>117</sup> The petitioner must consider carefully what the Court must do to grant the petitioner effective relief and then request just that.

If the Court can render judgment in favor of petitioner, the petitioner should request a rendition. If effective relief requires that all or part of the case be remanded, the petitioner should request that action specifically. In those cases in which various issues give rise to various dispositions, the prayer should include alternative requests for relief. Care should be taken to draft a prayer that does not conflict with the relief suggested by the argument and does not ask for relief that the Court cannot grant.

A prayer for an invitation to file a brief on the merits is not necessary to preserve an opportunity to do so. If it wants full briefing, the Court will request it.

A prayer for general relief is probably not necessary. If the petitioner fails to ask the Court for the necessary relief, a general prayer will not help.

6. Signature

Under petition practice, *who* signs first matters. The rules incorporate the concept of "lead counsel" for purposes of receiving any notice and copies of documents filed in the appellate court. TEX. R. APP. P. 6. In the Supreme Court, unless another attorney is designated, lead counsel for the petitioner is the attorney whose signature first appears on the first document filed in the Supreme Court. TEX. R. APP. P. 6.1. Other attorneys may sign the petition as well, although the

<sup>117</sup> See *Cont'l Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 455 (Tex. 1996).

presence or absence of such signatures has no practical consequences under the rules.

This signature does not count against the 4,500-word limit. TEX. R. APP. P. 9.4(i)(1).

With mandatory electronic filing, few documents require an actual signature. It suffices to type a “/s/” and name typed in the space where the signature would otherwise appear, as follows:

Respectfully submitted,

/s/ Jane Smith

Jane Smith

TEX. R. APP. P. 9.1(c)(1). As an alternative to a typed “signature,” the e-filer may include an electronic image of the e-filer’s physical signature. *Id.* 9(c)(2).

#### 7. Certificate of Service

**TEX. R. APP. P. 9.5(e)** *Certificate requirements. A certificate of service must be signed by the person who made the service and must state:*

- (1) *the date and manner of service;*
- (2) *the name and address of each person served; and*
- (3) *if the person served is a party’s attorney, the name of the party represented by that attorney.*

An example of the lead sentence to a certificate of service reflecting electronic service is as follows:

On February 19, 2016, I electronically filed this Petition for Review with the Clerk of the Court using the eFile.TXCourts.gov electronic filing systems, which will send notification of such filing to the following (unless otherwise noted below).

#### 8. Certificate of Compliance

**TEX. R. APP. P. 9.4(i)(3)** *Certificate requirements. A computer-generated document must include a certificate by counsel or an unrepresented party stating the number of words in the document. The person certifying may rely on the word count of the computer program used to prepare the document.*

This rule was added as part of the Court’s new word-count limitations. An example of a certificate of compliance is as follows:

Based on a word count run on Microsoft Word 2013, this Petition for Review

contains 4,495 words, excluding the portions of the Petition exempt from the word count under Rule of Appellate Procedure 9.4(i)(1).

/s/ Jane Smith

Jane Smith

#### D. **Appendix**

As reflected in the rules quoted below, the appendix to a petition for review includes both necessary and optional contents.

##### **TEX. R. APP. P. 53.2 (k). Appendix.**

(1) **Necessary contents.** *Unless voluminous or impracticable, the appendix must contain a copy of:*

- (A) *the judgment or other appealable order of the trial court from which relief in the court of appeals was sought;*
- (B) *the jury charge and verdict, if any, or the trial court’s findings of fact and conclusions of law, if any;*
- (C) *the opinion and judgment of the court of appeals; and*
- (D) *the text of any rule, regulation, ordinance, statute, constitutional provision, or other law on which the argument is based (excluding case law), and the text of any contract or other document that is central to the argument.*

(2) **Optional contents.** *The appendix may contain any other item pertinent to the issues or points presented for review, including copies or excerpts of relevant court opinions, statutes, constitutional provisions, documents on which the suit was based, pleadings, and similar material. Items should not be included in the*

*appendix to attempt to avoid  
the page limits for the  
petition.*

The appellate rules require the petition and appendix to be combined into a single computer file, unless that file would exceed the size limit prescribed by the electronic filing manager. TEX. R. APP. P. 9.4(j)(4). Before mandatory electronic filing, several Justices expressed their displeasure at parties filing particularly bulky appendices. With electronic filing, however, the size of and number of items in an appendix are generally no longer problems.<sup>118</sup>

An electronically filed appendix must contain bookmarks to assist in locating each item. TEX. R. APP. P. 9.4(h). When the petition refers to materials in the appendix, be sure to include the tab number or letter in the citation for ease of reference. Specifically, in the statement of the case, refer the Court to the tab numbers or letters where the order of the trial court and the opinion and judgment of the court of appeals are attached.

Include copies of constitutional provisions, statutes, regulations, and ordinances only if the petition may require the Justices to look at the text of the statute. TEX. R. APP. P. 52.3(k)(1)(D). As a general rule, though, do not include copies if the argument is not based on the interpretation of the text of these provisions. On the other hand, if the resolution of an issue requires the interpretation of a controlling statute, regulation or ordinance—and most especially one that has been superseded and, thus, is difficult to find—a copy should be included in the appendix.

The rule specifically excludes case law from the necessary contents of the appendix. But with the transition to e-filing, it can be helpful to include key cases in the appendix that can be readily accessed through the inclusion of hyperlinks in the text. Chief Justice Hecht has even expressed his preference for hyperlinking throughout the brief to key documents in the appendix, such as the jury's charge or a contract at issue.<sup>119</sup>

If the argument turns on the language of a contract or other document, it is sufficient to include the text of the pertinent provisions; it is not necessary to attach the entire document. However, if it is important to view the controlling language in context, counsel should include a copy of the entire document at issue, rather than merely quote the pertinent text. If the Court is being asked, for example, to interpret a clause in an insurance policy, it helps to see a copy of the entire policy.

With mandatory electronic filing, counsel should be mindful of another recurring problem—PDFs of

documents such as contracts and leases are frequently barely legible. Thus, counsel must be mindful to review electronic appendices before the brief is e-filed. If it is worth attaching to your brief, it is worth making sure it can be read. If only a portion of a lengthy oil and gas lease is relevant to your case, think about retyping that portion under a separate appendix tab, or with within a text box added to the original document. The Justices and staff will always appreciate efforts to ensure that the content of the appendix is readable.

All electronically filed appendix sources must be text-searchable. TEX. R. APP. P. 9.4(j)(1). Counsel should ensure that optical character recognition (OCR) software is run on any scanned document that must be included within an appendix. Otherwise, the scanned document will not be text-searchable. Also, it is helpful to the Justices if each reference to an appendix in the text is hyperlinked to the appendix itself.

## VII. RESPONSE TO PETITION

A party may, but is not required to, file a response to a petition for review. TEX. R. APP. P. 53.3. The petition will not be granted without a response being filed or requested by the Court. *Id.* Thus, one does not risk a grant of review by failing to respond to a petition. The expressly voluntary nature of the response under petition for review practice raises a number of strategic issues, which are addressed below.

### A. Whether to File a Response

The Justices of the Supreme Court are accustomed to parties electing not to file a response to the petition unless requested. Thus, a party need not fear offending the Justices or appearing to concede the merits of the petition by electing not to file a response. Many petitions are disposed of by the Justices simply reviewing the petition and the court of appeals decision, without a response having been filed or requested by the Court. Moreover, one should not view with alarm a request for a response—it takes the vote of only one Justice to request one.

Because there is no material downside to declining to file a response, and the responding party can save attorneys' fees by not filing one, the presumption should be against filing one. However, there are a number of “stopper” factors that may rebut this presumption—factors which, if available, should preclude the Court from reaching the merits of the case. The late and legendary appellate practitioner Rusty McMains referred to these as the “pillars of affirmance.”<sup>120</sup>

If the petition self-evidently involves no issue of substantial jurisprudential importance, the presumption

<sup>118</sup> *Internal Operating Procedures*, at 10.

<sup>119</sup> Hecht Interview.

<sup>120</sup> Russell H. McMains, *Drafting a Respondent's Brief*, TexasBarCLE, Practice Before the Supreme Court of Texas Course, ch. 8 at 1 (2002).

should remain not to file a response. If, on the other hand, the petition appears to involve a jurisprudentially important issue and one or more of the “stopper” factors are legitimately available, counsel should seriously consider filing a response to address them. Each of the factors is addressed below.

1. Respond if the Petitioner Failed to Preserve Error and Waived the Legal Issue Being Asserted

The Supreme Court has substantially relaxed the technical requirements for preserving legal issues for review by the Court. Nonetheless, it is not unknown for overzealous petitioner’s counsel to seek relief in the Supreme Court by presenting legal complaints that were not presented to the court of appeals. In such a case, the lack of preservation should be cleanly presented to Court as a factor that precludes its review.

2. Respond if the Correct Standard of Review Does Not Permit the Result that the Petitioner Advocates

In some cases, the petitioner will advocate a position which, at least superficially, sounds compelling, but which cannot survive appellate scrutiny when the correct standard of review is applied. For example, petitioner may argue that a particular issue presents solely a legal question governed by a de novo standard of review, when, in fact, the issue was one relegated to the trial court’s sound discretion, and the much more exacting abuse-of-discretion standard applies.

3. Respond if, Though the Courts Below May Have Erred, the Error is Harmless

It is not uncommon for a petition for review to argue how the court of appeals erred in affirming the trial court but to fail to take the additional step of demonstrating how the error was reversibly harmful. *See* TEX. R. APP. P. 44.1 (“No judgment may be reversed on appeal on the ground the trial court made an error of law unless the court of appeals concludes that the error complained of: (1) probably caused the rendition of an improper judgment; or (2) probably prevented the appellant from properly presenting the case to the court of appeals.”).

In arguing harmless error, counsel should not merely state in conclusory fashion that the petitioner has failed to demonstrate how the error is reversibly harmful. Counsel should go further and provide the Court with sufficient context to demonstrate how the result in the case probably would have been the same even if the claimed error had not occurred.

4. Respond if Stare Decisis Compels Affirmance of the Court of Appeals’s Decision or Denial of Mandamus

Angling for a grant, the petition may argue that the case presents a legal issue of first impression when, in fact, controlling precedent compels affirmance of the court of appeals’ decision. In making a stare decisis argument, however, counsel should exercise caution. First, the Texas Supreme Court does not view decisions by intermediate courts of appeals as binding on the Court. As one sitting Justice put it, cite Court authority to the Court. Second, even if there is Supreme Court precedent supporting denial of review or mandamus, it may not be enough to point out, in conclusory fashion, that the precedent exists and compels that result. It is more effective to point out the controlling effect of the precedent and explain why the Court should decline to depart from that precedent.

5. Respond if There is an Independent Ground for Affirmance that Petitioner Failed to Address

Assume, for example, that petitioner has made a superficially compelling argument for reversal of a summary judgment based on ground X, but simply ignores independent grounds for affirmance Y and Z. This affords a ripe opportunity for the respondent to argue that regardless of what the Court might feel about ground X, the Court should decline to grant review on that basis because other grounds compel affirmance. In every case, the responding party should analyze whether the petitioner has overlooked a ground for affirmance that torpedoes the petition.

**B. When to file a Waiver of Response to Petition for Review**

Under the rules, the response or response waiver is due 30 days after the petition for review is filed. TEX. R. APP. P. 53.7(d). Alternatively, the respondent can elect to do nothing in response to the petition. It is the filing of the response or response waiver, or allowing 30 days to pass without filing either, that triggers the petition being forwarded to the Justices for review. If the respondent elects to file a response waiver, the question arises of when to file it.

If the respondent desires the Court to review and dispose of the petition as quickly as possible, a response waiver should be filed immediately.

If, on the other hand, the respondent would like to take as long as possible to prepare and file the response, the respondent can wait until the last day of the 30-day deadline to file the waiver. The clock will not start ticking anew on the deadline for filing the response unless and until the Court requests a response.

The Justices agree that the response waiver need not be elaborate. A simple letter to the Clerk, filed electronically, stating that the respondent waives the filing of a response will suffice.

### C. How to Respond

In the event the respondent elects to file a response, or if the Court requests one, the next issue counsel faces is how to respond. The initial goal of the response is to dissuade the Court from granting review. The secondary goal is to persuade the Court that the court of appeals reached the correct result on the merits. These two goals serve the same ultimate purpose—to persuade the Court that it should decline to exercise its discretionary jurisdiction.

Arguments aimed at dissuading the Court from exercising its discretionary jurisdiction are discussed in Part VII(C)(1) below. Strategies for developing various portions of the response in a persuasive fashion are discussed in Part VII(C)(2) below.

#### 1. Additional Arguments to Dissuade the Court from Granting Review

As discussed above, if a “stopper” argument is available—one of the “pillars of affirmance”—such argument(s) should be included in the response. But there are other arguments that can be made as well. The principal additional dissuasive arguments are discussed below.

##### a. The Case is Fact-Intensive and is Important Only to the Parties to the Appeal

If the case is fact-intensive—that is, if its outcome turns not on some over-arching legal dispute that is likely to recur, but rather on how the fact finder weighed and resolved the disputed evidence or discretionary issue in this isolated case—the likelihood of the Court granting review is substantially diminished. However, counsel must be judicious in making this argument, given that at least some Justices believe there is still an error-correction role for the Court in cases involving what is perceived to be truly egregious error. Thus, arguing that the case is not “jurisprudentially important” may not be sufficient—counsel should go further and explain how at least rough justice was achieved in the decision below so that it should not be disturbed.

##### b. The Purported Conflict Among Appellate Courts is Illusory

It is common for a petitioner to argue that the Supreme Court should grant review to resolve a purported conflict among appellate court decisions. If, in fact, the purported conflict is illusory, counsel should forcefully demonstrate this point as a ground for the Court to deny review. For example, if two courts of appeals reached different results simply because differing facts compelled those results, this should be explained to the Court.

##### c. Even if the Issue is One of First Impression in Texas, it Should be Allowed to “Percolate” Through the Intermediate Appellate Courts

The petitioner may well argue that the case presents an issue of first impression in Texas when, in fact, it does not. But what if the case does genuinely present an issue of first impression? In that case, the responding party may be able to persuasively argue that the issue should be allowed to “percolate” by being addressed by more than one intermediate appellate court before being addressed by the Supreme Court.

The “percolation” argument should be made when the legal issue, while interesting, is not of immediate importance to the state’s jurisprudence. In evaluating whether it is important, counsel should consider two key questions.

- *If the decision below is left undisturbed, is that likely to serve as a beacon to other litigants, encouraging similar suits?* For example, if the court of appeals’ decision recognizes a new tort duty in Texas that is likely to give rise to a whole new arena of litigation, it will usually be implausible to argue that the Supreme Court should simply disregard the issue until other courts have weighed in.
- *Have other jurisdictions confronted and resolved the legal issue?* If the issue is one that has received attention in a large number of other courts throughout the country, it is more difficult to argue that the Supreme Court should stay out of the debate until other intermediate courts of appeals in Texas have expressed their views. However, if the court of appeals’ decision adopts what is a clear majority position, or one that is part of an unmistakable trend, it becomes more plausible to argue that other intermediate courts of appeals should address the issue before the Supreme Court does, particularly if the issue is not one that arises with great frequency. If the argument can credibly be made, it can be effective to show why this particular case is not the best case to resolve the question.

##### d. The Issue of Jurisprudential Importance Cannot be Cleanly Reviewed by the Court

It is not uncommon for an issue of jurisprudential importance to be properly preserved for the Supreme Court’s review, but, nevertheless, the Court cannot cleanly reach and resolve that issue. For example, there may be alternative grounds for affirmance that preclude the court from reaching the “interesting” ground. In such a case, counsel should argue in the response that the

Court should await another case that more cleanly presents the “important” issue for the Court’s review.

e. The Court of Appeals Correctly Resolved the Legal Issue and there is No Sound Reason to Disturb its Decision

This is the last-ditch argument that should be resorted to in seeking to dissuade the Court from taking the case. This argument should be made when a candid review of the petition leads to the conclusion that none of the other dissuasive arguments can legitimately be asserted. When the other arguments are not available, and the respondent is the fortunate beneficiary of a solid court of appeals’ decision, counsel should forcefully argue that the court of appeals not only reached the right result on the merits, but that its legal analysis is sound and should stand as the correct statement of Texas law on the point. Properly asserted and supported in the right case, this argument can dissuade the Court from taking the case, even when all other factors appear to point toward a grant.

2. Developing a Persuasive Response

Should the practitioner elect to file a response, or if the Court requests one, the contents are the same as that of the petition, with enumerated exceptions. *See* TEX. R. APP. P. 53.3. Like the petition, the response is limited to a total of 4,500 words, exclusive of the same specified sections. TEX. R. APP. P. 9.4(i)(1), (2).

The various sections of the response should be developed in a fashion that creates a persuasive whole. Selected sections of the response are discussed below with discussion of the strategy considerations associated with each.

a. Table of Contents

The response must include a table of contents. *See* TEX. R. APP. P. 53.3. The headings should be in narrative format, and when read as a whole should clearly convey why the case does not merit the Court’s review and why the responding party prevails on the merits.

b. Statement of the Case

Technically, the response need not include a statement of the case “unless the responding party is dissatisfied with that portion of the petition.” TEX. R. APP. P. 53.3. As a practical matter, however, the responding party should rarely be “satisfied” with the petitioner’s statement.

The re-tooled statement of the case should be in tabular form. *See* Part VI(B)(4), *supra*. It should be brief and non-argumentative. However, the various elements of the statement should be drafted in such a fashion that the case sounds unexceptional and does not warrant review.

c. Statement of Jurisdiction

The rule regarding the response to a petition for review provides that “a statement of jurisdiction should be omitted unless the petition fails to assert valid grounds for jurisdiction, in which case the reasons why the Supreme Court lacks jurisdiction must be concisely stated.” TEX. R. APP. P. 53.3(d). Whether to include a jurisdictional statement presents a strategy decision on which there is a split of opinion.

Under one school of thought, including a jurisdictional statement in the response should be reserved for that relatively rare case which is a bona fide candidate for dismissal for want of jurisdiction. Under another school of thought, the statement of jurisdiction should be used by the responding party as a means to dissuade the Court from granting review.

As a general rule, the authors of this paper incline toward the first view, which is the view shared by the Staff Attorneys with whom we spoke. As they explained, it is “irritating” when a respondent abuses the reader’s valuable time by using the jurisdiction section to make arguments that should be reserved for the argument section of the brief. In their view, contesting jurisdiction should be reserved for the exceptional case where it would be worth a separate motion to dismiss for want of jurisdiction. If conflict of decisions among the court of appeals is a basis for granting review invoked by the petitioner and the conflict is illusory, it suffices to say in the statement of jurisdiction in the response that the conflict is illusory and will be discussed in greater detail in the argument section.

d. Issues Presented

The rule regarding issues in a response to a petition for review is complicated—“a statement of the issues presented need not be made unless: (1) the respondent is dissatisfied with the statement made in the petition; (2) the respondent is asserting independent grounds for affirmance of the court of appeals’ judgment; or (3) the respondent is asserting grounds that establish the respondent’s right to a judgment that is less favorable to the respondent than the judgment rendered by the court of appeals but more favorable to the respondent than the judgment that might be awarded to the petitioner (e.g., a remand for a new trial rather than a rendition of judgment in favor of the petitioner).” TEX. R. APP. P. 53.3(c).

Each of these exceptions is addressed below.

(i) Dissatisfaction with the Statement of Issues in the Petitioner’s Brief

In most cases, the party responding to a petition for review will want to recast the issues framed by the petitioner. A possible exception is where the petitioner is the beneficiary of a favorable standard of review—for example, when the court of appeals has affirmed a summary judgment against the plaintiff-petitioner. In such a case, if the petitioner has fairly framed the issue,

it may be more powerful for the respondent to argue that, even with the standard of review favoring the petitioner, the respondent nonetheless wins.

Where the exception does not apply, the responding party should recast the issue in a manner designed to dissuade the Court from granting review. In this regard, it is useful to revisit the list of arguments militating against the Court's exercise of discretionary jurisdiction, set forth in Parts VII(A), (C)(1), *supra*.

(ii) Asserting Independent Grounds for Affirmance

The “pillars of affirmance” addressed above implicate the second of the reasons for the respondent to present issues—“asserting independent grounds for affirmance.” An example was provided above—the petitioner makes a compelling argument for reversal of a summary judgment on ground X, but ignores independent grounds for affirmance Y and Z. *See* Part VII(A)(5), *supra*.

(iii) Entitlement to Judgment Less Favorable than that Rendered by the Court of Appeals but more Favorable than that Sought by Petitioner

The third of the reasons for a petition for review respondent to present issues is more technical than the first two. The following hypothetical illustrates its operation: Assume (1) respondent was the defendant in the trial court, (2) the jury returned a verdict in favor of the plaintiff for \$1 million, (3) the trial court granted defendant's motion for judgment n.o.v. that plaintiff take nothing, (4) the court of appeals affirmed the take-nothing judgment, and (5) the petitioner complains to the Supreme Court that the take-nothing judgment was erroneous and that the Court should reverse and render judgment in favor of petitioner on the jury's verdict.

Under these circumstances, in addition to arguing that the take-nothing judgment was proper, the respondent may wish to argue that even if the take-nothing judgment were set aside, rather than reversing and rendering judgment in favor of the petitioner, legitimate grounds exist to remand for a new trial. If this path is taken, the respondent should set forth as issues in response those grounds entitling the respondent to a new trial in the event the Supreme Court sets aside the take-nothing judgment.

e. Introduction to Body of Response

As a matter of strategy, the responding party will generally want to include on the first page of the body of the response an introduction that hits the Court between the eyes with why the Court should decline to take the case. Respondent may want to accomplish this through a stand-alone introductory section entitled: “Reasons to Deny Review.”

f. Statement of Facts

The governing rules provide that a statement of facts need not be included unless the responding party is dissatisfied with that portion of the petition. TEX. R. APP. P. 53.3(b). Rarely should the responding party be satisfied with the petitioner's statement of facts. The response will generally include a newly crafted statement of facts that frames the issues from the responding party's perspective. It can be effective to point out where the parties disagree on the facts.

One exception is when the governing standard of review effectively compels the Court to review the record facts in the light most favorable to the petitioner. In such a case, it can be strategically powerful to expressly accept the petitioner's statement of facts (assuming it fairly characterizes the record) and argue that the petitioner loses as a matter of law in any event. On the other hand, if the standard of review precludes the petitioner's reliance on contested or contradicted facts, the responding party should use the statement of facts to establish that the petitioner's statement does not meet that standard, by pointing out the disputed facts on which the petitioner relies.

g. Summary of the Argument

The response to the petition for review *must* include a summary of the argument. TEX. R. APP. P. 53.3, 53.2(h). The summary should succinctly explain why the case is not worthy of the Court's exercise of its discretionary jurisdiction or, failing that, why the decision below was correct. Due to word-count constraints, the responding party should endeavor to limit the summary to one page.

h. Argument

The responding party's argument should follow the same basic format as that suggested for the petition. The argument must be confined to those issues raised in the petition or those raised by the respondent in the statement of issues section of the response. TEX. R. APP. P. 53.3(e). The overarching objective of any response is, of course, to persuade the Court that the relief requested in the petition should be denied. In developing the argument section of the response, the responding party should consider each of the various arguments discussed above for dissuading the Court from taking the case.

i. Prayer

The rules provide that the response “must contain a short conclusion that clearly states the nature of the relief sought.” TEX. R. APP. P. 53.2(j), 53.3. In most cases, the response's prayer will simply request the Court to deny the petition for review. When, however, the respondent is asserting grounds that establish the respondent's right to a judgment less favorable than that rendered by the court of appeals but more favorable than the disposition sought by the petitioner, the prayer

should include an appropriate alternative request for relief. *See* Part VI(C)(2)(d)(iii), *supra*.

A strategy question associated with the prayer is whether to include any argument that serves as a final punctuation of the core reason(s) that the Court should deny review. Properly crafted and kept short, such a concluding statement right before the requested relief can make for an effective conclusion to the response.

#### j. Appendix

The burden falls on the petitioner to prepare an appendix that includes the “necessary” contents prescribed by the governing rules, as well as any “optional” ones. *See* Part VI(D), *supra*. In many cases the responding party will elect not to include any additional matters in the response. The responding party must be mindful of the potential backfiring effect of independently providing a lengthy appendix: it may make an otherwise “ungrant-worthy” case appear “weighty” and therefore “important.”

That cautionary note aside, a well-focused appendix can be effective in the right case. For example, in a case involving a contract dispute, if a particular provision of the contract blows the petitioner’s argument out of the water, not only should that provision be quoted in the argument section of the response, it should also be attached as an appendix.

### D. Filing a Cross-Petition As Well As a Response

Any party that seeks to alter the court of appeals’ judgment must file a petition for review. TEX. R. APP. P. 53.1. Under the rules, if one party has filed a petition, any other party may file a successive petition within 30 days thereafter or within 45 days after the overruling of the last timely filed motion for rehearing, whichever is later. TEX. R. APP. P. 53.7(c). There may well be occasions when a respondent elects to file both a response to a petition and a cross-petition independently complaining of some portion of the court of appeals’ judgment—for example, where the court of appeals affirms a judgment in the respondent’s favor for actual damages but strikes an award of attorneys’ fees.

In those circumstances when the respondent elects to file both, the question arises whether the response should be filed with the cross-petition in a single document or whether the two should be filed separately. The rules provide no guidance on this point. But the Clerk’s office has—the documents should be separately filed.

## VIII. REPLY IN SUPPORT OF PETITION FOR REVIEW

The rules provide no guide as to what should be included in the reply. As a practical matter, it need include nothing more than argument—a complete petition will have provided the Court with everything else necessary to furnish the requested relief. Rather

than repeat matters already set forth in the petition, the reply should hone in directly on matters set forth in the response begging attack. The 2,400-word limit encourages focused attack. *See* TEX. R. APP. P. 9.4(i)(2)(E).

An important exception to this general rule is when the response fails to join issue on an important argument made in the petition. In such a case, the response should highlight the argument(s) to which the respondent failed to meaningfully respond.

Like the response, the filing of a reply is not mandatory. If nothing meaningful would be added to the Court’s consideration of the petition by filing a reply to the response, none should be filed. This, however, will infrequently be the case. The Court is free to act on the petition before receiving the reply. *See* TEX. R. APP. P. 53.5. To ensure that the reply is actually considered by the Court, the petitioner should not unduly delay in filing. If more time is needed to prepare the reply, the petitioner should timely move for an extension of time so that the Clerk’s office will, if necessary, reassign the matter to a later conference agenda so that the Justices have an opportunity to review the reply.

## IX. BRIEFS ON THE MERITS

The initial goal of the petition for review is to get the Court to take the next step—request the parties to file full briefs on the merits. The petitioner’s receipt of such a request is cause for cautious celebration—the odds of the Court taking the case are increased. However, there is still no guarantee of a grant and, in recent years approximately half of the petitions are denied even after full briefs have been filed. Thus, the client should be cautioned against becoming unduly optimistic at this stage.

### A. Internal Procedures and Deadlines

Technically, the Court can grant the petition for review without first requesting full briefing on the merits. *See* TEX. R. APP. P. 55.1. As a practical matter, however, this rarely, if ever, occurs under the Court’s internal operating procedures—the Court requests full briefing as part of its continuing evaluation of whether to grant review.

Before full briefing is granted, certain Justices may take an interest in a petition and circulate memoranda recommending the Court take a certain action. Sometimes, even after a petition receives six votes to be denied, a Justice may pull the petition from orders and issue a memorandum or speak at conference in an effort to convince the other Justices of another course of action.

It requires the vote of three Justices to request full briefing. Simultaneously with the request for briefing, the Court also: (1) requests the court of appeals to transfer the record to the Court; and (2) assigns the case in rotation to one of the chambers for the preparation of

a study memo. The study memo procedure is described in Part II(D), *supra*.

Unless the Court sets a different schedule, under the rules the petitioner's brief on the merits will be due 30 days after the Court's request for full briefing, the respondent's brief on the merits will be due 20 days after the petitioner's brief is filed, and the petitioner's reply brief will be due 15 days after the respondent's brief is filed. TEX. R. APP. P. 55.7.

### **B. Preparing the Brief in a Manner that is Sensitive to the Study Memo Procedure**

At this stage of the proceeding, the Justices usually will review the study memo, not the briefs themselves, in deciding whether to grant or deny review, although some Justices taking an interest in the case will review the briefs as well. Thus, the primary target audience at this stage is someone who, while bright, is fresh out of law school. The briefing should be sensitive to the relative inexperience of the law clerk, in whose hands the fate of the case largely rests. However, the briefing also should be careful not to offend the law clerk. One law clerk we spoke to provided as an example of an offensive argument one that declared, "this issue is so simple that even a recent law grad could figure it out," ignoring that a "recent law grad" was preparing the study memo for the Court.

Because the study memo plays such a central role in the Justices' decision whether to grant or deny review, in preparing briefs on the merits, counsel should be mindful of what actually goes into the study memo. To that end, counsel are advised to review Part II(D), *supra*, which outlines the study memo procedure.

Counsel should also make every effort possible to assist the law clerk. In this regard, a special effort should be made to include detailed and accurate cites to the appellate record. Law clerks understandably become frustrated if they must dig through a voluminous record in addressing a legal issue, with little guidance from counsel as to where to find the record support for legal arguments. Hyperlinks to key cases and record materials are also very much appreciated. And the law clerks appreciate counsel's flagging other petitions and causes pending before the Court with similar issues.

### **C. To File or Not to File**

Just because the Justices have requested the parties to file briefs on the merits does not mean the parties are required to do so. But if the Court calls for briefing, it is virtually certain that someone at the Court wants to know something. In the authors' view, confirmed by discussion with Staff Attorneys, the strong presumption should be in favor of filing a brief on the merits if the Court requests one.

Interestingly, many petitioners have elected not to file a brief but have decided, instead, to stand on their petitions. There is nothing inherently wrong with such a

decision; indeed, a number of Justices seem to be impressed with the confidence this communicated with respect to the initial filing. However, in most cases something additional can be done to improve on the petition, and counsel should take the opportunity to do so. There are exceptions. For example, if the petition for review constitutes nothing more than a "me too" filing—advising the Court that the controlling issue on appeal is governed by another case on which the Court has granted review and that remains pending—there may be no call to provide additional briefing. In cases falling outside these exceptions, however, counsel should consider the following guidelines before deciding to forego an opportunity to provide full briefing. If counsel ultimately elects to stand on the petition without further briefing, the Court should be informed of that intention.

#### **1. Unbriefed Issues**

The petitioner can preserve certain issues for review by raising them in the petition but reserving briefing on them for the brief on the merits. *See* TEX. R. APP. P. 53.2(f), (i). Of course, just because the petitioner has preserved an unbriefed issue for review does not mean that the petitioner is required to forever cling to that issue and address it in the brief on the merits. The issue should be closely scrutinized afresh at this stage in the proceeding. Weak issues that could materially detract from the strength of others should be abandoned at this point. However, if the petitioner would like to further preserve an issue for review, that issue must be fully briefed and argued, not merely raised, in the brief on the merits. Otherwise, the issue is deemed waived.

#### **2. Authorities from Other Jurisdictions, Treatises, and Public Policy Issues**

Even issues that were briefed in the petition often merit further briefing beyond the scope permitted by the tight word-count limits of the petition. The more generous page limits for the brief on the merits allow for that more extended discussion. According to the Justices, if either side's brief would benefit from a 50-state search of authorities and a discussion of the instant case in the context of the law in other jurisdictions, the brief on the merits is the ideal place to develop such a discussion. Similarly, if a discussion of treatises would be helpful, the brief on the merits affords the opportunity for such a discussion. Finally, if public policy issues can be legitimately developed beyond the scope of the petition, the brief on the merits is the place for that further development.

In further developing these arguments, however, counsel should not wear out their welcome. The opportunity to brief up to 15,000 words should in no sense challenge counsel to fill up those pages. As always, the tighter the brief, the better.

## D. Supplement to Petition or Stand-Alone Document

The rules themselves provide no answer to another question that inevitably arises: Should the brief on the merits merely supplement the petition, in order to avoid repetition, or should it be a stand-alone document, even if it is repetitive? With the evolution of petition practice, the answer today is clear: The brief on the merits should be a stand-alone document that is complete in itself, even if it incorporates wholesale entire portions of the petition.

Technically, the rules allow the petitioner or respondent to file in lieu of a brief on the merits the brief that the party filed in the court of appeals. *See* TEX. R. APP. P. 55.5. But the authors strongly recommend against this practice.

## E. Differences (besides length) Between Petition and Brief on the Merits

The rules setting forth the contents of the petition for review on the one hand and the brief on the merits on the other hand are almost identical. *Compare* TEX. R. APP. P. 53.2, *with* TEX. R. APP. P. 55.2. The relatively few differences are discussed below.

### 1. Issues Presented

In most cases, the issues presented in the brief on the merits will be identical to those presented in the petition. The petitioner may elect, however, to abandon issues in the brief that were presented in the petition. The petitioner also may elect to word one or more issues differently, so long as the substance remains the same and no new issues are added. *See* TEX. R. APP. P. 55.2(f) (“The phrasing of the issues or points [in the brief on the merits] need not be identical to the statement of issues or points in the petition for review, but the brief may not raise additional issues or points or change the substance of the issues or points presented in the petition.”). In her paper on drafting issues, Pam Baron suggests that “[t]he petitioner may want to rewrite the issues in the brief to make them more argumentative.”<sup>121</sup> That will often be the case if the issues in the petition are stated neutrally as Baron suggests. *See* Part VI(B)(6)(d)(ii), *supra*.

### 2. Argument

The argument section of the petition must include a statement of the reasons why the Supreme Court should exercise jurisdiction to hear the case. TEX. R. APP. P. 53.2(i). The rules contain no comparable requirement with respect to the brief on the merits. The provision concerning argument in the brief on the merits simply states: “The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record.” TEX. R. APP. P. 55.2(i).

The variance between the two provisions is explained by the different purposes of the petition and the brief. The petition is calculated to persuade the Court to exercise its discretionary jurisdiction to hear the case. The brief on the merits is intended to flesh out the discussion of the merits. But because the brief will almost invariably be filed before the Court has decided whether to exercise its discretionary jurisdiction, it remains important to continue to persuade the Court to take the case. Accordingly, the authors recommend that, like the petition, the petitioner’s brief on the merits include a stand-alone section in the argument addressing why the Court should hear the case. *See* Part VI(C)(1), *supra*.

In preparing the argument section of the brief on the merits, counsel should also be mindful of the fact that the law clerks are instructed to include in their study memos a section addressing preservation of error. Petitioner’s counsel can assist the law clerk by addressing preservation in the merits brief, with detailed citation to those portions of the record showing that the issue presented to the Supreme Court for review was preserved in the courts below. Because many law schools do not devote much teaching to the issue of preservation, counsel are advised to present the preservation argument in a readily understandable fashion.

### 3. Appendix

The rules governing the petition contain a relatively lengthy section concerning the appendix. *See* TEX. R. APP. P. 53.2(k). In contrast, the rules governing the brief on the merits contain no provision whatsoever concerning an appendix. *See* TEX. R. APP. P. 55.2.

The explanation for the discrepancy is relatively straightforward. The appendix to the petition serves essentially as a substitute for the record which will not be before the Court at the time it initially reviews the petition. By the time the Court receives the briefs on the merits, however, not only will the Court have the appendix to the petition before it, but also it will have the record itself—whenever the Court sets a briefing schedule for briefs on the merits, the Court also requests the record from the court of appeals. Thus, an appendix is not required as part of the filing of the brief on the merits.

Nonetheless, including an appendix with key documents may prove helpful to the law clerk preparing the study memo and the Justices reviewing the brief. Thus, the mere fact that an appendix is not required for a brief on the merits should not dissuade counsel from critically evaluating whether one would be helpful to the review process. Almost invariably, an appendix will be helpful. Indeed, Chief Justice Hecht has indicated a

<sup>121</sup> *Drafting Issues*, at 8.

preference for having the contents of the appendix to a merits brief mirror that of the petition for review.<sup>122</sup>

## F. Response Brief

The rules governing the contents of the response brief on the merits are virtually identical to those governing the contents of the response to the petition for review. *Compare* TEX. R. APP. P. 53.3, *with* TEX. R. APP. P. 55.3. The same basic criteria for deciding what matters to agree with or dispute with respect to the response to the petition apply equally with respect to the respondent's brief on the merits.

Notably, if the petitioner elects not to file a brief on the merits requested by the Court, under the language of the governing rule the respondent is seemingly precluded from filing one—the respondent files a brief in response only “[i]f the petitioner files a brief on the merits ....” TEX. R. APP. P. 55.3. Nonetheless, the Staff Attorneys with whom we spoke expressed strong reservations about the respondent failing to file a brief in the event the petitioner chooses not to file one. Because the Court's request for briefing on the merits indicates a strong interest in the case and, in all probability, an interest that favors the petitioner, the respondent cannot afford to forgo the opportunity to brief the merits fully, particularly if the respondent did not fully brief the issues in response to the petition. In this circumstance, the respondent should simply file a brief on the merits, without seeking leave of court to do so.

Like the petitioner's brief on the merits, the respondent's brief need not include an appendix. *Id.* But it may be helpful to the Court to include one. The response should continue the effort to persuade the Court that the case does not merit its exercise of discretionary review. Additionally, the respondent should use the more generous page limits of the brief to further respond to the petitioner's argument on the merits.

## G. Reply Brief

The petitioner may file a reply brief on the merits addressing any matter in the brief in response. TEX. R. APP. P. 55.4. Under the Court's revised internal operating procedures, the study memo will not be circulated until the reply brief has been filed or the deadline for filing that brief has passed.

According to the law clerks who prepare study memos, the reply brief on the merits is very important. It provides counsel for petitioner the chance to distinguish the respondent's authority, cite new case law, and point out what the respondent could not refute. Thus, counsel for petitioner should take great care in preparing the reply.

## X. SUBMISSION AND ARGUMENT

### A. Submission without Oral Argument

By the vote of six of the nine Justices, the petition may be granted and the case decided without oral argument. TEX. R. APP. P. 59.1. Such cases are typically, but not invariably, disposed of by per curiam opinion. 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 a narrow legal question, such as the applicability or inapplicability of a particular rule in a given set of circumstances.

### B. Submission with Argument

If the Court decides to take the case and determines that argument would be helpful, it will set the case for oral argument and notify the parties of the submission date. TEX. R. APP. P. 59.2. In the unlikely event that the Court has not already requested briefs on the merits, it will provide the parties with the opportunity to fully brief the case before argument.

### C. Time for Argument

Each side is allowed only as much time for oral argument as the Court orders. TEX. R. APP. P. 59.4. Typically, the Court allows twenty minutes per side, of which the petitioner may reserve up to half the allotted time for rebuttal. While rarely granted, by motion filed before the day of argument, the Court may extend the time for argument. *Id.* The Court may also align the parties for purposes of presenting argument. *Id.*

A red and a green light are on the podium to signal counsel as to the expiration of time. The green light is turned on when five minutes remain for the argument. The red light is turned on when time has expired. In a case in which the Court's interest has been sufficiently piqued, it is not uncommon for the Justices to continue to address questions to counsel after the red light has gone on and counsel will be afforded the opportunity to respond. Nonetheless, counsel should be careful not to unduly protract the argument and should be prepared to stop arguing immediately if the Court has no further questions after the allotted time has expired.

### D. Number of Counsel

The Court prefers that only one attorney argue per side. TEX. R. APP. P. 59.5. Except on leave of Court, no more than two counsel on each side may argue. *Id.* And only one counsel may argue in rebuttal. *Id.*

Although nowhere stated in the rules, only two counsel may sit at counsel table without leave of court. A motion must be filed for additional counsel to sit at counsel table. As a practical matter, no more than three counsel can comfortably sit at the table.

<sup>122</sup>

Hecht interview.

Strategically, splitting an argument by distinct subject matter is almost always a bad idea. If, for instance, the Court has little or no interest in addressing one aspect of the case and profound interest in another, splitting argument by subject matter can run the risk of annoying the Court. Similarly, the Justices may not feel constrained to confine their questions to the particular subject matter being presented, in which case, again, it can be annoying should counsel request the Court to defer the question until the other counsel speaks. In short, counsel should avoid, if at all possible, splitting argument. If time is split, counsel should be prepared to address any question that might be raised by the Court.

#### **E. Argument by Amicus Curiae**

An amicus may share allotted time with a party only with that party's consent and with leave of Court obtained before the argument. TEX. R. APP. P. 59.6. Otherwise, counsel for amicus curiae will not be permitted to argue. *Id.* As discussed above, counsel should hesitate before deciding to split argument and, if a decision is made to split, be prepared to present argument in a fashion that will be helpful rather than cumbersome for the Justices.

#### **F. Purpose of Argument**

Oral argument should clarify the written arguments in the briefs. TEX. R. APP. P. 59.3. Reading from a prepared text is discouraged and impractical in any event; generally, the Court is active at oral argument, and counsel must be prepared to answer questions. *Id.* Counsel should assume that Justices have read the briefs before argument, although the level of preparation may vary among the Justices.

Because the Court is, at least generally speaking, a "hot" court, it is not necessary to provide extensive factual background before turning to the actual arguments in the case. As a practical matter, because the Justices are prone to be active in their questioning, it is best to get into the substantive arguments as quickly as possible.

#### **G. Oral Argument Exhibits**

Counsel may use exhibits to assist with a presentation of oral argument.

##### **1. Charts**

Generally speaking, charts do not materially assist with argument; handouts are better. If charts are used, care should be taken to ensure that they will be legible from the bench and will not interfere with the argument. Copies of the charts should be e-filed with the Court one or more days before the argument, and physically presented to the Clerk's office no later than the morning of the argument. There is a \$25 filing fee.

The Clerk will deliver the charts to the courtroom. After the argument, the charts must be removed by

counsel. If charts are used, they should also be duplicated as handouts for the Court (12 copies); no additional fee will be required in this event.

##### **2. Handouts**

If handouts for the individual Justices are used, an original and 11 copies must be filed with the Clerk, before the argument, and they must be e-filed as well, together with a \$25 filing fee. The Clerk is responsible for placing the handouts on the bench; counsel submitting the handouts is responsible for delivering copies to opposing counsel.

Care should be taken not to use too many handouts as, again, the Justices are typically active in their questioning, leaving little time for discussion of individual handouts. A useful technique is to spiral bind the handouts in the same fashion as a brief, with each handout appearing under a separately numbered tab. The cover should look the same as the brief, and be properly labeled, e.g., "Petitioner's Oral Argument Exhibits." By using separately numbered tabs, counsel can readily refer the Justices to a particular handout during the course of argument.

##### **3. Telestrator**

In certain cases, counsel may find it helpful to use the Court's telestrator to assist with oral argument. The telestrator is a sophisticated electronic device located on the podium. It not only permits electronic exhibits to be displayed on a large monitor in the courtroom, but also permits counsel, by the drag of a finger on a screen, to manipulate the exhibits by highlighting, circling, or crossing out certain language.

To use the telestrator, counsel will need to load the exhibits onto a thumbdrive and bring a laptop computer to argument to be connected to the telestrator. Because oral argument can be fast paced, counsel should plan on practicing with the telestrator one or more days before the argument. Counsel should contact the Clerk's office to set up the practice session.

#### **H. Webcasts of Oral Argument**

Both live and archived webcasts of the Court's oral arguments can be accessed on the Court's website or through the *TexasBarCLE* website at <http://www.texasbarcle.com/CLE/TSC.asp>.

Webcasts enable clients and other interested parties to view the oral argument of a particular case live, without actually having to come to Austin for the argument. Viewing the archives of oral argument can also be helpful for several different purposes. First, counsel who has presented oral argument should always make a point of viewing the video recording of the argument afterword to evaluate whether a post-submission letter brief should be submitted. Invariably, counsel will pick up something from watching the video that went unnoticed during the presentation of

argument. Also, where counsel has a pending case that involves issues similar to another case that has been orally argued to the Court, insights about the Court's views on those issues can be greatly informed by watching the oral argument of the other case.

### I. Post-Submission Brief

The appellate rules make no provision for the filing of post-submission briefs. Yet, such briefs frequently are filed with the Court and no leave of Court is required to do so. Thus, whether or not to file such a brief ends up presenting a pure strategy question, about which several suggestions can be offered.

The rebuttable presumption should be *against* filing a post-submission brief since it can signal “weakness” or lack of confidence in the offering party’s position. But there are a number of factors that can rebut the presumption. First, if one or more of the Justices in their questioning at oral argument requested a post-submission brief on a particular point, counsel should honor that request. Second, if debriefing of the argument, which should include review of the video recording of the argument, reveals that a material question by one or more of the Justices was answered incorrectly or incompletely, a post-submission brief can provide the full and correct answer(s). Third, if the opposing party made an argument that merits a response and either no response was made, or the response was incorrect or incomplete, a post-submission brief can clear up the confusion.

The post-submission brief should be as short as reasonably possible. At some point, a party can cross the line from being helpful to the Court to being annoying. Caution should be exercised to avoid the latter.

Finally, the timing of any post-submission brief is important. The Court will discuss the case at the first Conference following the oral argument. Counsel should consult the calendar on the Court’s website to determine the date of the next scheduled conference, and should aim to file the post-submission brief sufficiently in advance of the Conference for it to be meaningfully considered.

## XI. MOTION FOR REHEARING

Former Chief Justice Jefferson has described the task of convincing the Court to grant rehearing as “daunting and difficult.”<sup>123</sup> The statistics vividly bear out that assessment: in FY 2017, the Court granted only 3.5% of all motions for rehearing (7 out of 203).<sup>124</sup> Specifically, the Court granted only 3.5% of motions for

rehearing of causes (1 out of 33), and 3.5% of motions for rehearing on petitions for review (6 out of 170).<sup>125</sup> Indeed, over the past six years from FY 2012–17, the rehearing grant rate of causes, petitions, and overall has remained remarkably consistent—3.5%.<sup>126</sup> Even more glaring is that there have only been 2 rehearing grants of causes in the past 4 years.<sup>127</sup>

Against the backdrop of these stark statistics, the decision whether to file a motion for rehearing requires a candid and searching cost-benefit analysis. If the practitioner and client decide to go forward, the practitioner will also need to give careful thought as to how to maximize the likelihood that the motion will be granted.

### A. Motions for Rehearing Generally

#### 1. Internal Procedures

Motions for rehearing are sent directly to the chambers of every member of the Court once they are filed. The following Tuesday, they are listed on the cumulative ballot sheet—the “purple vote sheet”—along with petitions for review, original proceedings, and 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 four weeks following its initially being placed on the conveyor belt. Absent an order, rehearings are overruled by operation of law 180 days after filing.

It takes the vote of only one Justice to pull a motion for rehearing to be discussed at Conference; it takes four votes to grant a motion for rehearing on denial of petition, and five votes to grant a motion for rehearing on a cause. If any Justice marks the case as a “grant,” it will also be placed on the Conference agenda.

The Justice who authored the majority opinion is charged with circulating a memorandum on any motion for rehearing of a cause. With respect to the motions for rehearing of petitions, former Chief Justice Jefferson observed: “Depending on the quality of the rehearing motion or the gravity of the subject matter at issue, the conference may be preceded by significant deliberations among the various chambers about the merits of granting the petition. On rare occasions, formal memoranda analyzing the merits of a grant or denial may accompany these largely informal deliberations.”<sup>128</sup>

<sup>123</sup> Hon. Wallace B. Jefferson, *Motions for Rehearing on Denial of Petition*, TexasBarCLE, Practice Before the Supreme Court of Texas Course, ch. 9 at 3 (2002) [hereinafter *Motions for Rehearing*].

<sup>124</sup> See Appendix D, SCOTX Rehearing Statistics, FY 2012–17, *infra*.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Motions for Rehearing*, at 1.

## 2. Deadline

A motion for rehearing may be filed with the Clerk of the Court no later than 15 days after the date when the Court renders judgment or issues an order disposing of the petition. TEX. R. APP. P. 52.9, 64.1. In exceptional cases, the Court is authorized to shorten the time within which the motion may be filed or even deny the right to file it altogether. *Id.*

## 3. Extensions of Time

“The Court may extend the time to file a motion for rehearing in the Supreme Court, if a motion complying with Rule 10.5(b) is filed with the Court no later than 15 days after the last date for filing a motion for rehearing.” TEX. R. APP. P. 64.5.

## B. Word Limitations

The motion or response may not exceed 4,500 words. TEX. R. APP. P. 9.4(i)(2)(D). The usual matters are excluded from the word count. *Id.* 9.4(i)(1).

## C. No Successive Motions

The Court will not consider a second motion for rehearing. TEX. R. APP. P. 64.4.

## D. Motion for Rehearing on Denial of Petition

### 1. Whether To File

Perhaps the most difficult strategic call with regard to a motion for rehearing is whether to file at all. As set forth above, the chances of garnering rehearing on a denial of a petition are quite small. On the other hand, the stakes are high—the client has just lost the final opportunity for judicial review, and the pressure to file a motion for rehearing can be intense. A typical client also wants an assessment of the likelihood of success on the petition. Chief Justice Jefferson has written: “There is no easy way to distinguish cases worthy of reconsideration from those that are not. . . . Nevertheless, it seems clear that some factors, in combination with the ‘right’ case, counsel in favor of filing a motion for rehearing.”<sup>129</sup> He identifies the following three factors:

- A dissent from denial of the petition
- Lengthy time from filing to denial
- Changed Court composition

Chief Justice Jefferson’s discussion of an effective motion for rehearing reveals two additional factors:

- Additional, conflicting authority since the petition was filed

- Additional authority applying the opinion subject to review, demonstrating the issue is likely to recur.

## 2. Strategy

The only technical requirement for the contents of a motion for rehearing is that the motion must specify the points relied on for rehearing. TEX. R. APP. P. 64.2. Drafting a petition for rehearing of a denial of a petition for review is particularly difficult because there will be no written decision with which to take issue. Instead, the practitioner faces a true black box, with no indication of why the petition was not granted. Presumably, the practitioner took the best shot in the petition, so how best to angle for a rehearing? Of course, if there is a dissent from denial, that can provide a powerful starting point. If not, here are some suggestions:

- **Don’t rehash the petition.** The Justices’ most common complaint about motions for rehearing is that the motion “simply rehashes arguments previously raised and rejected.”<sup>130</sup>
- **Update your research.** The focus of post-denial research should not be to dig up a new argument, but to identify any intervening changes in the law that might change the Court’s perspective on the petition. The practitioner should research whether the adverse court of appeals’ decision has been applied by or criticized by other courts of appeals since the petition was filed. Research should also focus on whether any newly enacted statute or United States Supreme Court decision bears on the issues raised in the petition.
- **Describe changes in the law.** If the practitioner is fortunate enough to uncover a subsequent legal development, the motion for rehearing should take full advantage by describing the change and how it makes the petition more grant-worthy.
- **Go back to basics.** The ultimate goal of a motion for rehearing is essentially the same as that of the petition: grab the Court’s attention and explain why the issue is important to the jurisprudence of the state. Take a cold look at the petition to see whether the petition missed an opportunity to explore the broader implications of the court of appeals’ decision.

<sup>129</sup>

*Id.* at 2.

<sup>130</sup>

*See, e.g., id.* at 2.

- **Get a second opinion.** Ask another lawyer to give you a second opinion to gain a fresh perspective. Although a motion for rehearing is not a place for new arguments, a second opinion can help the practitioner re-frame or refine an issue that catches the Court's attention in a way that the initial approach did not.
- **Use a respectful tone.** To paraphrase Chief Justice Hecht's advice in a CLE presentation, if you are filing a motion for rehearing for the therapeutic value, draft it, vent as much as you want, and then *put it in your desk drawer*. If you file a motion the tone of which is "desk drawer" material, you risk irreparably damaging your professional reputation with the Court and will inevitably do a disservice to your client. As Chief Justice Jefferson has observed: "A measured tone that respects opposing counsel and the Court has a greater chance of success than one expressing hysteria and spite."<sup>131</sup> Being on the losing end is understandably frustrating, but the motion for rehearing should not be used to attack the Court.
- **Don't put to pen an excited utterance.** "The Court is no more likely to grant the petition because it is clothed in exclamation points and italics."<sup>132</sup> In other words, saying the same thing, but saying it louder, is not an effective strategy.
- **Don't take a kitchen-sink approach.** As in the petition itself, the practitioner should use good professional judgment in advancing only the strongest argument. In the case of a motion for rehearing, the authors suggest that this means focusing on a single issue, rather than attempting to re-urge each of the issues raised in the initial petition.<sup>133</sup>
- **Evaluate unbriefed issues.** As discussed above, a petition for review may include

unbriefed issues for review. If the petition included unbriefed issues, consideration should be given as to whether any of those issues provides a basis for rehearing. Chief Justice Jefferson identified as a characteristic of an effective motion one that "presents arguments involving important jurisprudential issues that were preserved but not directly addressed in the petition for review."<sup>134</sup>

- **Don't raise issues not preserved for review.** No matter how brilliant an argument is, if it was not preserved for review, the Court will not consider it.
- **Seek out amici curiae.** Obtain support of amici curiae when appropriate. "If used appropriately, amicus briefs can be influential and may mark as the difference between a grant and a denial."<sup>135</sup>

### E. Motion for Rehearing of Cause

Though the Court is ever so slightly more likely to grant rehearing of a petition than a cause, the odds are still dramatically against the movant—by some **96%** over the past six years.<sup>136</sup> By the time the Court issues an opinion, the authoring Justice and his or her staff have spent weeks or, in some cases, months working on the opinion. The Justices have discussed the opinion in at least one conference and in some cases at many conferences. As Justice Hecht put it: "The difficulty is in convincing Justices who have already thought hard about the case to take a new look."<sup>137</sup> Because the Court has already carefully considered the arguments advanced in the briefs on the merits, a party seeking rehearing will get nowhere by simply re-asserting those arguments.

Instead, a motion for rehearing of a cause should focus specifically on some aspect of the Court's decision and use the decision as the starting point for any argument. An effective motion for rehearing will expose any material facts that the Court has misstated or appears to have misapprehended, identify errors in the Court's legal analysis, and identify any adverse or unintended consequences of the Court's decision.<sup>138</sup> Justice Hecht advises counsel to "probe the Court's

<sup>131</sup> *Id.* at 2.

<sup>132</sup> *Id.* at 1.

<sup>133</sup> *Id.* at 3 (an ineffective motion "addresses numerous issues that should have been left on the cutting room floor rather than focusing thoroughly on one significant issue").

<sup>134</sup> *Id.* at 2.

<sup>135</sup> *Id.* at 3.

<sup>136</sup> See Appendix D, SCOTX Rehearing Statistics, FY 2012–17, *infra*.

<sup>137</sup> Justice Nathan L. Hecht, *Motions for Rehearing of Causes in the Texas Supreme Court: Making the Last Bullet Count*, TexasBarCLE, Practice Before the Supreme Court of Texas Course, ch. 11 at 5 (2002) [hereinafter *Last Bullet*].

<sup>138</sup> See Mike A. Hatchell, *Motion for Rehearing Checklist*, UTCLE, 12th Annual Conference on State and Federal Appeals, ch. 10 at 1 (2002).

opinion for weakness, gaps in logic, misunderstood or misused precedent, misstated facts.”<sup>139</sup> A motion for rehearing should also highlight any new authority that bears on the issue decided in the decision.

Most of the authors’ recommendations regarding of motions for rehearing of petitions apply with equal force to motions for rehearing of causes.

#### **F. Response**

No response to the motion need be filed unless the Court requests one. TEX. R. APP. P. 64.3. The Court will not grant the motion unless a response has been filed or requested by the Court. *Id.* In “exceptional cases,” the Court may deny the right to file a response and act on the motion any time after it is filed. *Id.* Because no response is required to the motion, just as no response is required to a petition, the same considerations should be made in evaluating whether to file one. The rebuttable presumption should be against filing one, although the “exceptional cases” exception should at least give pause to counsel. The authors suggest this rule of thumb: If no response is initially filed, and five or more sets of weekly orders have been issued without the motion being denied, counsel should seriously consider weighing in with a response—such a passage of time suggests that the motion has at least captured someone’s attention to the point of causing it to be pulled off the conveyor belt.

#### **XII. CONCLUSION**

The rules governing petition practice have not changed appreciably since the Court shifted to that practice in 1997. However, the Supreme Court’s internal operating procedures have changed and will doubtless continue to evolve. These procedures have practical implications for Supreme Court practitioners seeking to invoke or resist the Court’s exercise of discretionary jurisdiction. Thus, the effective practitioner will monitor changes in the procedures and adapt advocacy before the Court accordingly.

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*See Last Bullet*, at 4.