GETTING YOUR FOOT IN THE DOOR:
THE ART OF CRAFTING A SUCCESSFUL PETITION FOR REVIEW

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Based on several previous versions of:

THE ULTIMATE PETITION FOR REVIEW

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State Bar of Texas
TEXAS SUPREME COURT:
HISTORY & CURRENT PRACTICE
April 14, 2021

CHAPTER 10

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ACKNOWLEDGMENTS

The authors wish to thank Chief Justice Nathan L. Hecht and former Chief Justice Thomas Phillips, as well as former Justices Governor Greg Abbott, the late James A. Baker, U.S. Senator John Cornyn, Craig T. Enoch, Raul A. Gonzalez, Deborah Hankinson, Fifth Circuit Chief Judge Priscilla R. Owen, and Rose Spector. The authors also wish to recognize the invaluable assistance from the following present and former Court staff members, whose present or former position(s) with the Court are denoted parenthetically: Blake A. Hawthorne (Clerk), Andrew Weber (former Clerk), Elizabeth A. Saunders (former Chief Deputy Clerk), Christopher A. Griesel (former Procedural Rules Attorney), Lee Parsley (former Procedural Rules Attorney), former Justice Robert H. Pemberton (former Procedural Rules Attorney), Darin Darby (former Staff Attorney to Justice Baker), Elana Einhorn (former Staff Attorney to Justice Hankinson), Sylvia Herrera (former Staff Attorney to Chief Justice Hecht), Bill Hill (former Staff Attorney for Justice Jefferson and Justice Gonzalez), Spikes Kangerga (former Staff Attorney to Chief Justice Phillips), Dana Livingston (former Staff Attorney to Judge Owen), Chip Orr (former Staff Attorney to Justice Enoch), Rocky Rhodes (Staff Attorney to Governor Abbott), Ginger Rodd (former Staff Attorney to Justice O'Neill), Matthew Ploeger (Law Clerk to Chief Justice Hecht), and Nadine Schneider (Administrative Assistant). For recent updates to this paper, special thanks are due former Justice now-Fifth Circuit Judge Don R. Willett, Zachary Bowman (former Law Clerk to Justice Paul W. Green), Don Cruse (former Law Clerk to Chief Judge Owen), Michael A. Heidler (former Law Clerk to Chief Judge Owen), and Dylan O. Drummond (former Law Clerk to now Chief Justice Nathan Hecht).

The authors also borrowed from a number of excellent papers on petition for review practice which are acknowledged in the footnotes. The views expressed in this article are ultimately those of the authors and do not necessarily reflect those of the Supreme Court or the individual Justices.

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GETTING YOUR FOOT IN THE DOOR: THE ART OF CRAFTING A SUCCESSFUL PETITION FOR REVIEW

This paper is adapted from a paper that Doug Alexander and Lori Mason originally presented when the petition for review practice was adopted in Texas in 1997, and which has been updated numerous times since then. It provides a comprehensive overview of petition for review practice before the Supreme Court of Texas. The paper includes: (1) a description of each part of the petition for review; (2) formatting and filing requirement; (3) internal operating procedures at the Supreme Court; and (4) statistics for every aspect of the petition practice. It also offers practical recommendations, many of which come from the appellate rules themselves. Others are based on several rounds of interviews that the authors have been conducting over the last quarter century with the Justices, Staff Attorneys, Clerk, Chief Deputy Clerk, and Administrative Assistant of the Supreme Court. Finally, the authors have incorporated recommendations from other papers on petition practice.

The presentation that accompanies this paper will primarily focus on big picture concepts regarding the purpose, goals, and strategy behind the petition for review, which in some ways differs from all other appellate briefs.

I. THE GOAL, FOCUS, AND STRATEGY OF CRAFTING A PETITION.

The art and craft of drafting a petition for review are driven by three considerations that will be developed more fully later in this paper. For present purposes, they boil down to these three facts:

- **Procedurally**, the two-tiered briefing system in the Texas Supreme Court means that a petition cannot get granted unless and until the court requests briefs on the merits, and in the majority of cases briefs on the merits are not requested.
- **Philosophically**, the decision to request briefs on the merits, and ultimately to grant petitions, is driven by shaping the jurisprudence of the state on recurring questions of law, rather than by correcting unjust outcomes in individual cases.
- **Practically**, the Justices receive 15-20 petitions a week, and must make decisions about requesting briefs on the merits without devoting significant time to reading each petition.

These three realities significantly impact strategy decisions for drafting a petition. The first means that the goal of the petition should be to persuade the court to request briefs on the merits — not necessarily to win the case in this brief. The second means that the focus of the petition should be on demonstrating that the case is grant-worthy, rather than on justice demanding a reversal. The third means that the compelling reasons for requesting briefs on the merits must be presented in a way that is clear and discernible by a reader scanning the brief quickly. Each of these concepts merits further development.

A. The Goal of the Petition is to Convince the Court to Request Briefs on the Merits.

The Texas Supreme Court has a two-tiered briefing system.

Petitioners first must file a relatively short petition for review, after which the court may deny the petition at that stage, as it does for roughly three-fourths of all petitions.

If the petition is not denied at that stage, the court then requests longer briefs on the merits. After briefs on the merits, the court still may deny the petition, as it does for over half of the cases that make it to the merits brief stage. But the Court also may, for the first time in the process, grant the petition and move forward toward deciding the case.

Thus, unless the Petitioner is able to convince the court to at least request briefs on the merits, the petition cannot get granted. Accordingly, Petitioner's goal at the petition for review stage is straightforward: getting your foot in the door by persuading the Supreme Court to request briefs on the merits. Persuading the Supreme Court that the client should prevail on the merits is a secondary consideration at this stage. That does not mean that the likelihood of prevailing on the merits is completely irrelevant. That may be a factor in a justice deciding whether to request briefs on the merits. But advocacy on the merits must take a back seat to persuading at least three justices to vote to request further briefing.

B. The Focus of the Petition Should Be on Demonstrating That the Case is Grant-Worthy.

Persuading the Court to request briefs on the merits requires demonstrating that the case presents an issue that is worthy of the Court's consideration. In TRAP 56.1(a) the Court has provided a list of factors considered in determining whether to grant review.

Among the factors the Supreme Court considers in deciding whether to grant a petition for review are the following:

(1) whether the justices of the court of appeals disagree on an important point of law;
(2) whether there is a conflict between the courts of appeals on an important point of law;
(3) whether a case involves the construction or validity of a statute;
(4) whether a case involves constitutional issues;
(5) 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
(6) 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.

Tex. R. App. P. 56.1(1).

Some of these factors are objective and easy to apply. Whether the court of appeals justices disagreed should be readily discernible from the dissenting or concurring opinions, although there could be room for argument about whether it was an important point of law. Whether a case involves the construction of a statute or constitutional issues should be objectively determinable. Parties may disagree about whether there is truly a conflict between courts of appeals, and whether the case is one of first impression, but those debates take place within a fairly limited universe.

But the almost limitless grab bag in this list of factors — and the grounds upon which the majority of petitions get granted — is 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." Because of its importance in supreme court practice, this reason for granting review merits further scrutiny by breaking down its component parts.

First, this reason is limited to errors committed by "the court of appeals." At this point in the process the Court is not concerned with what happened in the trial court unless the court of appeals addressed the trial court's action in an opinion and addressed it incorrectly. An error in a court of appeals opinion can disturb the jurisprudence of the state (as described in more detailsubsequently). If it is an error that only occurred in the trial court, that damage to the jurisprudence is avoided, and any residual errors affecting only the parties to that litigation get swept under the rug.

Second, there must be an "error of law." Not a factual error, not an incorrect resolution of disputed evidence that the Supreme Court would resolve differently from the way the court of appeals did. The Supreme Court's jurisdiction is limited to correcting errors of law; for factual errors the court of appeals is the court of last resort.

Third, the error of law must be "of importance to the state's jurisprudence." This means that it must be an error in the court of appeals opinion that mis-states the law in a way that creates incorrect statements of law on the books that might mislead other litigants, lawyers, and judicial officials who rely on it in subsequent cases.

Finally, the error of law by the court of appeals must disrupt the jurisprudence in a way that "is of such importance . . . that it should be corrected." If the error of law involves an unusual set of circumstances that is unlikely toto reoccur, then it is not worth expending the limited resources to developing jurisprudence around an issue that will never arise again. On the other hand if the case requires the court to interpret a form insurance policy or oil and gas services contract that is used for hundreds or thousands of transactions, and interpretation of the same contractual clause is highly likely to be required in multiple cases in the future, then that is of such importance to the jurisprudence that it should be corrected. Most cases fall somewhere between the extremes of not-likely-to-ever-happen-again and definitely-will-arise-in-hundreds-of-cases, but advocates who can fairly frame their cases as closer to the latter scenario than the former will have a much better chance of having their petitions granted.

The final consideration of grant-worthiness is to note a factor that it ***not*** listed in Rule 56.1(a): that the court of appeals opinion produces an outcome that results in a grave injustice to the petitioner. Let that sink in for a moment. Lawyers are so programmed to lead with arguments that a horrible injustice has been perpetrated on their client that it is difficult and almost counter-intuitive to disengage that justice reflex in practicing before the Supreme Court.

I am not saying that justice-based arguments can never be effective in the Supreme Court, or may not unconsciously or subliminally motivate a justice to look for a jurisprudential reason to grant a petition for review or decide a case. But the frequently heard refrain from Supreme Court justices at CLE courses that "we are not an error correction court" is not just an expression of culture. Instead, it is baked into the reasons for granting review in Rule 56.1(a), which do not mention correcting errors, righting wrongs, or delivering parties from injustice. Our system relies on courts of appeals for that role, and if that role were duplicated in the Supreme Court the caseload would be so overwhelming that the Court could not execute its basic functions. The practical compromise is to reserve to the Supreme Court the role of resolving conflicts and molding the jurisprudence of the state in important areas of the law.

C. The Strategy for Drafting the Petition Should Emphasize Brevity, Clarity, and Readability.

The advocate's task of persuading at least three justices that the court of appeals opinion contains errors of law that are so important to the jurisprudence of the state that they require correction is complicated by the sheer volume of petitions the Justices must review each week. 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. Because of that volume, the Justices are limited in the time they are able to devote to any given petition. One former Justice has observed that, due to the volume of petitions, "the review is necessarily cursory."[1] 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."[2] Although time estimates may vary somewhat, most Justices say they are able to spend a ***maximum of 15 minutes*** per petition package, which includes reviewing the petition, the court of appeals' opinion, the response (if any), a reply brief in support of the petition (if any), and any amicus submissions.

With so little time being devoted by the Justices to reviewing any given petition, the petitioner's goal must be to consciously and effectively 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 every petition or that they 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 statement of issues 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 in the court of appeals, where there is an assurance that the case will be heard and a much greater likelihood that the entire brief will be read by at least one of the Justices and, possibly by all three.

Given these challenges, advocates are advised to craft petitions for review with three qualities in mind: Brevity, clarity, and readability.

1. Brevity

The petition should be as short as possible while still conveying enough information and argument to convince the justices to request the longer, more exhaustive brief on the merits. The body of the petition for review (statement of facts, summary of the argument, argument, and prayer) is limited to no more than 4,500 words. Tex. R. App. P. 9.4(i)(2)(D). A former Chief Justice of the Supreme Court has emphasized that the length limit "is a maximum, ***not a recommendation or suggestion***."[3] 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.'"[4] The former Chief Justice also noted that this view is shared by other Justices: "I rarely heard from other members of the court that the petition was ***too short***."[5]

Because many required sections of the petition are not included within the word limit, advocates may be tempted to use the preliminary sections to circumvent that page limitation. ***Resist that temptation***. The Justices see through that ruse and resent the transparent avoidance of word-count restrictions and the abuse of their limited time. Similarly, attaching some form of briefing in the appendix in order to circumvent the page limitations will ensure the appendix getting struck.

Moreover, because petitions only receive a cursory review, it is counterproductive to file a bloated instrument that obscures or buries the critical arguments. A streamlined, tightly focused petition is much more likely to grab the attention of the Justices.

2. Clarity

Because Justices have limited time to review each petition, you want to make sure that your critical argument is communicated so clearly that a reader will unmistakably discern it on a quick review. This is not a time for subtlety or for dense, serpentine prose that requires several readings to grasp the full meaning. You will not get several readings at this stage; you get one, hurried shot, and you can't afford to miss.

One 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 clear statement, ideally a single phrase or sentence, that captures both the essence of the argument and reveals its importance. The hook should be repeated in close to identical

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1 Hon. Craig T. Enoch & Michael S. Truesdale, *Issues and Petitions: The Impact on Supreme Court Practice*, 31 ST. MARY'S L.J. 565, 588 (2000) [hereinafter *Issues and Petitions*].

2 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*]).

3 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).

4 *Id.*

5 *Id.* (emphasis added).

form in every substantive part of the petition: the argument outline that appears in the Table of Contents; the Statement of Issues; the Summary of Argument; the headings of the Argument. That way no matter which section a Justice reads first, the likelihood of the hook being set is increased.

This technique will not appeal to lawyers who write with an open Thesaurus so they can continually find new and creative ways to express the same argument and avoid repeating themselves. Nevertheless, this exercise in repetition and clarity is an effective technique for lawyers whose practical goal is to enhance the likelihood that they will grab the attention of Justices in an inevitably quick read.

Clarity is in the eyes of the beholder, and the author is inherently ill-equipped to judge how their writing will be beheld by others. The author's goal should be that when a reader reads her prose, he has the same thought that the author had in mind when she wrote it. But when the author reads something she has written, she remembers the idea that she had when she wrote the words, rather than being able to objectively evaluate the idea communicated by the words alone. Therefore, it is imperative to have an objective reader read a draft of a petition, or any other writing for that matter. If the words alone do not communicate a clear idea to a cold reader, that should be brought to the author's attention so she can edit and re-draft until those ideas are clear. In that process, the fact that the words are clear to the author is of no relevance; if they are not clear to an objective reader, they should be re-written until they are.

3. Readabilty

Robert Dubose has written an outstanding book about legal writing strategies for audiences who primarily read on screen.[6] (Full disclosure: Robert is a law partner of two of the authors of this paper, and the brother of one of them.) Most of the concepts in this section come from his book, or his related CLE articles and lectures.

Dubose's thesis is that almost all judges now do most of their reading on screens (desktop computers, laptops, tablets) rather than on paper. He reports that numerous studies have shown that screen readers read differently than paper readers, and because most of us now do the majority of our reading on screens, our brains have been rewired for that new reality, so that even when we read on paper we read differently than we previously did. That means that we read quickly, we scan rather than reading every word of every paragraph, we look to headings or topic sentences to gage whether the rest of a paragraph is worth reading; we want our information to be presented in lists or bullet points that provide structure, rather than having to wade through long, dense chunks of prose to extract and mentally compartmentalize our own meaning. To demonstrate, let's present that last sentence in a different way.

That means several things:

- we read quickly;
- we scan rather than reading every word of every paragraph;
- we look to headings or topic sentences to gage whether the rest of a paragraph is worth reading;
- we want our information to be presented in lists or bullet points that provide structure, rather than having to wade through long, dense chunks of prose to extract and mentally compartmentalize our own meaning.

Now, which version of that sentence do you find easier to process? And if the same is true for your readers, doesn't it make sense that you should be aware of these tendencies and adjust your writing to make it easier to read for readers who are frequently in a hurry and distracted when they read your writing?

A lot of scholarship in this field is based on early web usability studies that analyzed how readers read and processed computer websites, so that web designers can use that data to design websites that are easier to read, and, therefore, more likely to be read. Robert Dubose has applied those lessons to legal writing so legal writers can increase the likelihood that their work will be read, comprehended, and processed by legal readers, with particular emphasis on judges.

Supreme Court Justices reading petitions for review fit the stereotype of screen readers. Because of their crushing workload, they are almost invariably in a hurry when they sit down to read a group of petitions. Most report that they do most of their reading on tablets or laptops. Accordingly, lawyers who want to make it easier for Justices to read and appreciate their petition for review in a quick read should avail themselves of the tips gleaned from web usability studies. They include:

- **Front-load critical information**. In earlier times, lawyers were taught to build an argument, almost like the plot of a short story or novel, so that the tension builds and the dramatic conclusion is delivered near the end of the

[6] *See* ROBERT DUBOSE, LEGAL WRITING FOR THE REWIRED BRAIN: PERSUADING READERS IN A PAPERLESS WORLD (2010). Because this book may be hard to find in print, you can also find an article on this subject at https://adjtlaw.com/articles, under the heading "Brief Writing and Research," article titled "Legal Writing for the Rewired Brain."

brief. That does not work for screen readers who may not still be reading by the end of the brief. Key concepts should be clearly articulated as soon as possible. This applies to the early pages of a petition, the early part of a particular argument, even to the topic sentence of a paragraph.

- **Make frequent use of headings that are visually distinguishable from the rest of the text.** Whether formal outline headings or just words or phrases set apart from the rest of the text, headings provide the reader with a preview of what is coming, an organizing principle, and a structure for processing information. They should be set apart from the text by spacing, and by typeface conventions, like bold, underscore, or italics. I prefer bold because it stands out visually more than the others.
- **Use enumerated lists or bullet points**. Nothing is more depressing to a screen reader than looking at a big chunk of dense prose that they know they will have to unravel on their own, using their precious mental resources to impose structure and meaning, rather than spending that same energy on discernment. The writer should deliver the reader from that burden by providing the structure and making it clear. If a list is presented in a way that the order of the items in the list is important to build meaning in a certain way, use numbers or letters for each item in the list. If the order is not important and the list is random, bullet points are preferred.
- **Use short argument sections, short paragraphs, short sentences, short words.** Argument sections should seldom run on for more than 2-3 pages without a new heading. Paragraphs should not be lengthy; readers sub-consciously dread scanning the left-hand margin and not seeing an indentation in the near future because it means there is a big chunk of undisciplined prose to be processed. Every time a new idea is introduced consider starting a new paragraph. There is nothing wrong with a paragraph of 2-3 sentences. Or even a single sentence. There is nothing wrong with using short, plain, clear words.
- **Use white space**. Screen readers hate to see a cluttered screen chock full of information from border to border so that their eyes have to scan the entire screen to discern what is important to read. White space is soothing to the eyes and the mind of the screen reader, providing a break in the action and a more attractive visual image. CLE papers have strict rules about formatting that dates back to a time when conserving paper was a consideration. Those rules make it impossible to demonstrate the power of white space in this paper. The rules for petitions for review are much more conducive to white space, especially since Texas courts switched to word count to monitor length, rather than page restrictions.

Authors are encouraged to think creatively about other ways that to make the petition easier to read for Justices who are skimming quickly through a batch of petitions.

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In sum, keep in mind that your paramount goal is to persuade the Court to request briefs on the merits in your case. The way that you achieve that goal is to convince the Court that the court of appeals opinion contains errors that are significant to the jurisprudence of the state. And the best way to increase the likelihood that the Court will read and process your argument is to follow principles of readability.

II. CONTENTS OF THE 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, 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.[7]

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.[8]
- 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.[9]
- 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.[10] 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

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[7] 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).

[8] 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*].

[9] *See Confederates & Carpetbaggers*, 51 TEX. B.J. at 920; *see also Citation Writ Large*, 20 APP. ADVOC. at 92–93.

[10] 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].

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- Always be sure to double-check 1997 intermediate appellate court opinions to determine whether they were issued before 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.[11]
- Any intermediate appellate court opinion issued before January 1, 2003 that was also affirmatively designated, "do not publish," has no precedential value but may cited with the parenthetical notation, "(not designated for publication)."[12] It is without precedential effect if a court of appeals mistakenly affixes a "do not publish" designation to a case after January 1, 2003.[13]
- 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."[14] 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.[15] 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.[16]
- 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.[17] 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.[18]
- Always denote any procedural information specific to the handling of the case cited ((per curiam),[19] (orig. proceeding),[20] (not designated for publication),[21] (op. on reh'g), (mem. op.),[22] 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*.[23]

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.[24]

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:*

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11 GREENBOOK at 26–27 (4.4.1), 124–33 (App'x D).

12 TEX. R. APP. P. 47.7(b).

13 TEX. R. APP. P. 7.2(c), 47.7(b).

14 GREENBOOK at 61–62 (10.3.1).

15 TEXAS LEGISLATURE ONLINE, https://capitol.texas.gov/, (last visited July 14, 2020).

16 LEGISLATIVE REFERENCE LIBRARY OF TEXAS, DIRECT SEARCH, https://bit.ly/2AQm4ZK (last visited July 14, 2020).

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

18 THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 58–60, 1.2 (Columbia Law Review Ass'n et al. eds., 20th ed. 1st prtg. 2015) [hereinafter BLUEBOOK].

19 *See* TEX. R. APP. P. 47.2(a), 59.1; BLUEBOOK at 108 (10.6.1(b)); GREENBOOK at 18 (4.1.2(a)).

20 *See* GREENBOOK at 38–41 (6.1–.2.5(b)).

21 TEX. R. APP. P. 47.7(b); GREENBOOK at 19 (4.1.2(c)).

22 *See* TEX. R. APP. P. 47.2(a), 47.4; BLUEBOOK at 108 (10.6.2); GREENBOOK at 18 (4.1.2(a)).

23 GREENBOOK at 138–39 (App'x H.1).

24 Dylan O. Drummond, *Texas Citation Writ Large(r): Consequential Necessity or "Tyranny of the Inconsequential"?*, 26 APP. ADVOC. 24, 35 (Fall 2013). For a 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.

(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.[25]

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 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,

[25] Hecht Interview.

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' 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.[26] 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.[27] 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."[28]

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).[29] *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 Aktiengsellschaft 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.

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*

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26 Tex. H.B. 1761, § 1, 85th Leg., R.S. (2017), *codified at* TEX. GOV'T CODE § 22.001(a).

27 *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.

28 TEX. GOV'T CODE § 22.001(a).

29 *See* TEX. R. APP. P. 56.1(a)(1)–(6).

> *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.[30] On the other hand, "an issue presented can also attract judicial attention and encourage a justice to spend more time reviewing the case."[31]

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.[32] Much has been written on issue practice.[33] 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."[34]

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."[35]

(i) Frame to Demonstrate Importance

Pam Baron, an experienced Texas Supreme Court practitioner, has developed a number of thoughtful suggestions

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30 *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.").

31 *Id.* at 591.

32 *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)).

33 *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*].

34 *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.").

35 *Issues and Petitions*, at 593.

for preparing issues. First, she observes that "[t]here are significant differences between the intermediate courts of appeals and the Texas Supreme Court that should be taken into account when drafting issues."[36] 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."[37] 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."[38] 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."[39]

(ii) Frame Neutrally

Baron recommends that, at the petition stage, the issue should be stated neutrally because the answer does not matter—yet.[40] 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."[41]

(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.[42] "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."[43]

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.[44] 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."[45]

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

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36 *Drafting Issues*, at 1.
37 *Id.* at 2.
38 *Id*. at 4.
39 *Id.*
40 *Id.* at 7.
41 *Id.* (quoting *Issues and Petitions*, at 588).
42 *Id.* at 1.
43 *Id.* at 3.
44 *See Upshot of it All*.
45 *Id.* at 5.

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 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?[46]

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***."[47] 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***."[48]

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

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46 *Id.* at 4.

47 *Id.* at 7 (emphasis added).

48 *Drafting Issues*, at 7 (emphasis added).

point.[49] 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."[50] Although the Court's composition has changed since those interviews were conducted, the types of cases that will interest Justices remain the same. The following are factors identified by the Justices as weighing in favor of a grant:[51]

- 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.[52]
- 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."[53] 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."[54]
- 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."[55]
- 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.[56]

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,[57] 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 and demonstrating that the court of appeals's decision on that point is clearly erroneous and requires reversal, rather than arguing that the

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49 *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).

50 *Id.*

51 *See id*. at 3–4.

52 *See id.* at 3.

53 *Id*.

54 *Id.* at 4.

55 *Id.*

56 *Id.*

57 *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).

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.[58] 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.

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[58] *See Cont'l Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 455 (Tex. 1996).

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 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).

The Court's clerk has publicly noted several different options for certificates of service that he favors:

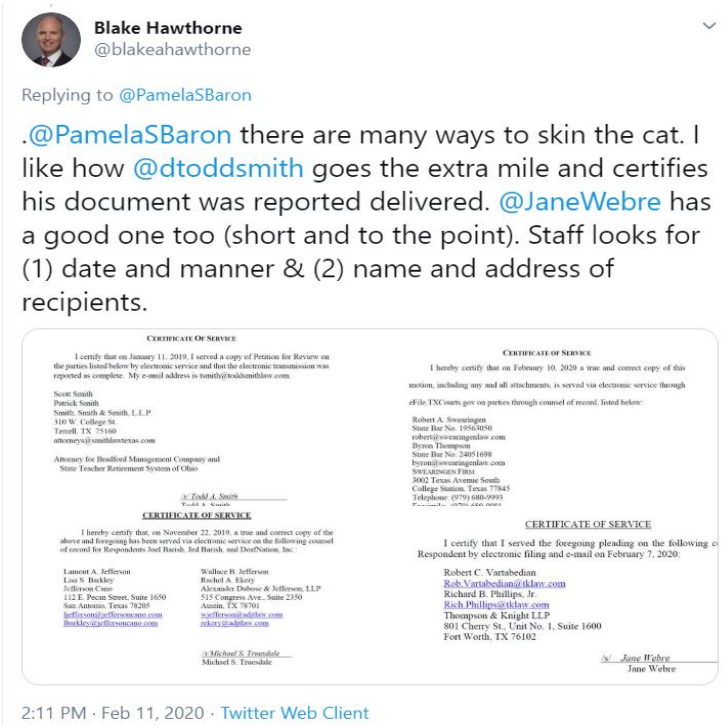

Fig. 22 – Hon. Blake A. Hawthorne (@blakeahawthorne), TWITTER, Feb. 11, 2020, https://bit.ly/3eOVM8V.

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.[59]

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), 53.2(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.[60]

If the argument turns on the language of a contract or other document, it is sufficient to include the text of the

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59 *Internal Operating Procedures*, at 9.

60 Hecht Interview.

pertinent provisions; it is not necessary to attach the entire document. However, if 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.

III. FORMATTING AND FILING THE PETITION.

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.[61]

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.[62] The Georgia font is designed for reading on a screen and may be a good choice for electronic briefs.[63] 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*.[64]

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

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[61] 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 July 14, 2020); *see also Internal Operating Procedures*, at 6 (recommending *Typography for Lawyers*).

[62] *Internal Operating Procedures*, at 6.

[63] *Id.*

[64] *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).

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,[65] 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.[66] Particularly on these smaller screens, scrolling back and forth between body and footnote text is jarring and annoying, as several Justices have p confirmed at numerous bar presentations.[67]

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.

6. Word Limitations

Word count limitations for appellate briefs in Texas exclude the following sections: 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 those sections, the word limitation for the Petition for Review is 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.[68]

The Clerk of the Court has authored an excellent step-by-step guide for creating electronic briefs,[69] as has one of his former deputy clerks.[70] The Court also provides a video tutorial explaining in detail how to create electronic briefs.[71] Chief Justice Hecht and Justice Boyd have also both recorded and posted interviews regarding their favored e-briefing

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65 *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), https://bit.ly/2ZO9apq hereinafter *Never Ending Debate*]; Rich Phillips, *The Great Footnote Debate (A Response to Bryan Garner)*, TEXAS APPELLATE WATCH (Jan. 28, 2014), https://bit.ly/39jU0ve [hereinafter *Great Debate*].

66 *See* Hon. 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*.

67 *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.

68 *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").

69 Blake A. Hawthorne, *Guide to Creating Electronic Appellate Briefs 2019*, *available at* https://bit.ly/3jzXdLW (Jan. 1, 2014).

70 *See Substance and Style*.

71 SUPREME COURT OF TEXAS, E-BRIEFS GUIDE, *available at* https://my.adobeconnect.com/p72935018/ (last visited July 14, 2020).

and e-formatting practices.[72] 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.[73] Indeed, there are four publicly 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.[74]

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. 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. 18 – Requisite filing fees at the Court.[75]

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[72] Interview by Michael A. Cruz with Hon. Nathan L. Hecht, *available at* https://bit.ly/2LTG8zk (last visited July 14, 2020) [hereinafter Hecht Interview]; Interview by Michael A. Cruz with Hon. Jeff S. Boyd, *available at* https://bit.ly/2nfTeIv (last visited July 14, 2020).

[73] 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.

[74] 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 July 14, 2020); 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 July 14, 2020); 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 July 14, 2020); 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 July 14, 2020);

[75] SUPREME COURT OF TEXAS, FREQUENTLY ASKED QUESTIONS: WHAT IS THE FILING FEE?, *available at* https://bit.ly/2Mp38m7 (last visited July 14, 2020).

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).

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.

Keep in mind when considering whether to oppose an MET that the Court's clerk has repeatedly advised against opposing such motions, even going as far as to remind counsel that doing so may violate the Texas Standards of Appellate Conduct:

Fig. 19 – Hon. Blake A. Hawthorne (@blakeahawthorne), TWITTER, Feb. 8, 2017, https://bit.ly/2E8UdpJ.

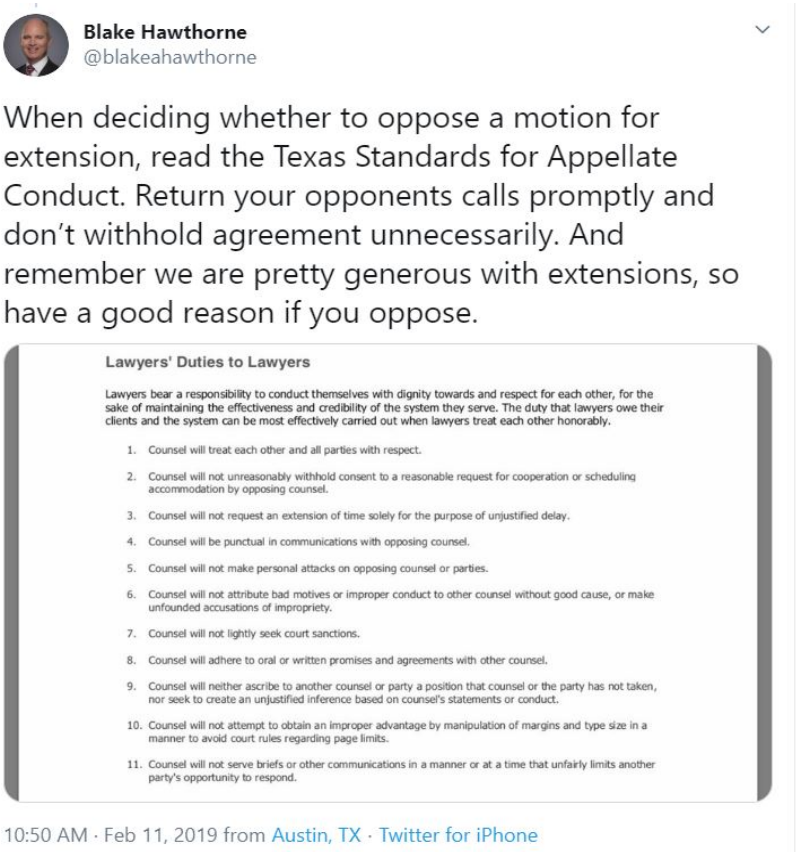

Fig. 20 – Hon. Blake A. Hawthorne (@blakeahawthorne), TWITTER, Feb. 11, 2019, https://bit.ly/39g990y.

Fig. 21 – Hon. Blake A. Hawthorne (@blakeahawthorne), TWITTER, Feb. 11, 2019, https://bit.ly/2ZOzv6L (citing THE SUPREME COURT OF TEXAS, STANDARDS FOR APPELLATE CONDUCT, *available at* https://bit.ly/39j1pev (last visited July 14, 2020)).

In addition, 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.

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.

IV. INTERNAL PROCEDURES

The following is an overview of the Court's internal operating procedures.[76] 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 sent to the Justices 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,[77] plus mandamus petitions, habeas filings, motions for rehearing, etc.

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.[78]

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[76] For a more exhaustive discussion of the Court's internal procedures, *see Internal Operating Procedures*. This paper borrows liberally from that one.

[77] *See, e.g.*, 2019 OCA REPORT, at Court-Level 2, Detail 4 (documenting 981 petitions for review filed during FY 2019, which was a 4% increase from the previous FY).

[78] Blake Hawthorne, *Conference at the Supreme Court of Texas with Chief Justice Hecht*, YOUTUBE (May 7, 2015), https://bit.ly/3fQB0a5.

Fig. 14 – The Court's conference room.[79]

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.[80]

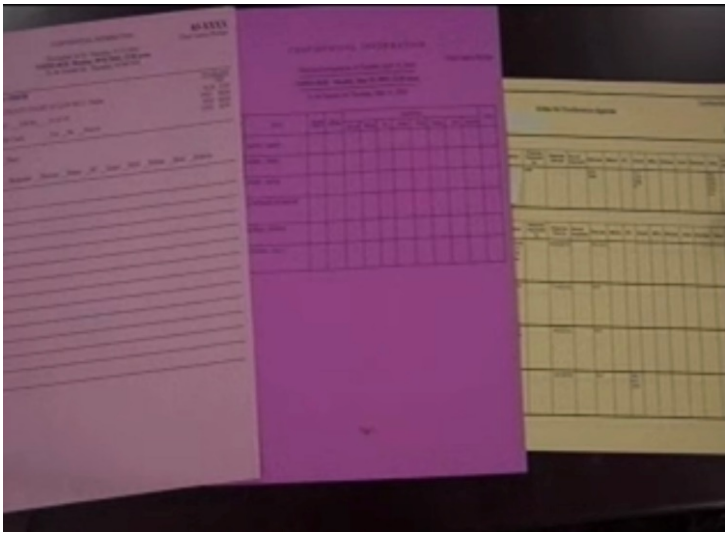

Fig. 15 – Picture of the old pink, purple, and yellow vote sheets.[81]

1. <u>Pink Vote Sheet</u>

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

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79 *See id*.

80 Interview with Nadine Schneider, Administrative Assistant to the Supreme Court of Texas, *available at* https://bit.ly/2MjDqmg (last visited July 14, 2020).

81 *Id.*

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 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

				Conference								
Petition #	Style	Response Requested	Record Requested	Discuss	Memo	Brief	P C	Grant	WOJ	Refuse	Hold	Deny
Pets 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	BINUR, M.D. v. JOCOBO											
02-0427	WEST ORANGE-COVE v. ALANIS											
02-0440	YARI v. LIGIA REVUELTA GILES											
02-0483	EL PASO REFINING v. SCURLOCK PERMIAN											

Fig. 16 – Copy of a purple vote sheet from the Court's 2002 term.[82]

[82] 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).

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 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."[83] 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 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.[84]

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. 17 – Requisite votes for a given Court action.[85]

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[83] *See* McKay Cunningham, *Study Memos and Their Impact*, TexasBarCLE, Practice Before the Texas Supreme Court Course, ch. 5 at 3 (2009).

[84] *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).

[85] *Internal Operating Procedures*, at 13–14; *Supreme Court Practice*, at 3–4.

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.

V. DOCKET STATISTICS

Statistical metrics about Supreme Court practice may inform the way that petitions for review are drafted.

A. 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.[86] 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	(12%)[87]
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	(5%)[88]
Grant motion for rehearing of cause:	1/33	(3%)[89]

Fig. 5 – Approximate likelihood of a given Court action.[90]

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[86] 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 Hon. 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.

[87] This is the average grant rate over the past 22 years from FY 1998–2019 since the inception of the petition for review. *See* Appendix 1, SCOTX Cause and Petition Statistics: FY 1998–2019, *infra.*

[88] This is the average rehearing grant rate for petitions for review over the past 15 years from FY 2005–19. *See* Appendix 4, SCOTX Rehearing Statistics: FY 2005–19, *infra.*

[89] This is the average rehearing grant rate for causes over the past 15 years from FY 2005–19. *See* Appendix 4, SCOTX Rehearing Statistics: FY 2005–19, *infra*.

[90] *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*

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 the likelihood of a grant after a response is filed (22% or roughly 1 in 5), to the 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 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.

B. 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.[91] Below are the average grant rates for each court of appeals for the past 15 years, from FY 2005–19:

Average Grant Rates by Court of Appeals, FY 2005–19	
Court of Appeals	**Average Grant Rate**
1st – Houston:	9%
2d – Fort Worth:	12%
3d – Austin:	13%
4th – San Antonio:	12%
5th – Dallas:	9%
6th – Texarkana:	9%
7th – Amarillo:	11%
8th – El Paso:	16%
9th – Beaumont:	9%
10th – Waco:	12%
11th – Eastland:	***7%***
12th – Tyler:	13%
13th – Corpus Christi:	***19%***
14th – Houston:	12%

Fig. 6 – Average grant rates during FY 2005–19 for each court of appeals (extreme averages are emphasized).[92]

During this period, the Thirteenth Court of Appeals experienced the highest average grant rate (19%), and the Eastland Court of Appeals possessed the lowest (7%). Of the major metro courts of appeals (Austin, Dallas, Fort Worth, Houston, and San Antonio), the First and Fifth Courts of Appeals had the lowest grant rate (9%) and the Third Court of Appeals had the highest (13%).

Over the past two decades since the inception of the petition for review (FY 1998–2019), the Court's average grant rate has hovered at 12%.[93] During this same time, the Court examined an average of 885 petitions per year. Overall, the number of petitions for review filed at the Court during FY 2019 (981) increased by 4% from FY 2018 (943), and is the highest in nearly 20 years since FY 2002 (986).[94]

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.[95] In recent years, however, affirmance rates have been climbing—

Brief Strategies, at 1; *Docket Update*, at 5; *Supreme Court Amicus*, at 2; *Ten Things*, at 2; *Docket Analysis*, at 2; *see also* Appendix 4, SCOTX Rehearing Statistics, FY 2005–19, *infra* (the data in Appendix 4 are tabulated from OCA ANNUAL REPORTS).

91 The statistics in this Part I(C) are compiled from the annual data published by OCA from FY 2005–19. *See* Appendix 2, SCOTX Grant Rate by Court of Appeals, FY 2005–19, *infra* (the data in Appendix 4 are tabulated from OCA ANNUAL REPORTS).Where they are not, the source is noted.

92 *See id*.

93 *See* Appendix 1, SCOTX Cause and Petition Statistics: FY 1998–2019, *infra*.

94 TEXAS OFFICE OF COURT ADMINISTRATION, ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY, FISCAL YEAR 2019, at Court-Level 2, *available at* https://bit.ly/30FWKPA (last visited July 14, 2020) [hereinafter 2019 OCA REPORT].

95 *Supreme Court Practice*, at 4; *Docket Update*, at 5–6; *Ten Things*, at 2.

from somewhere consistently below 10% to roughly double that at around 20%.[96]

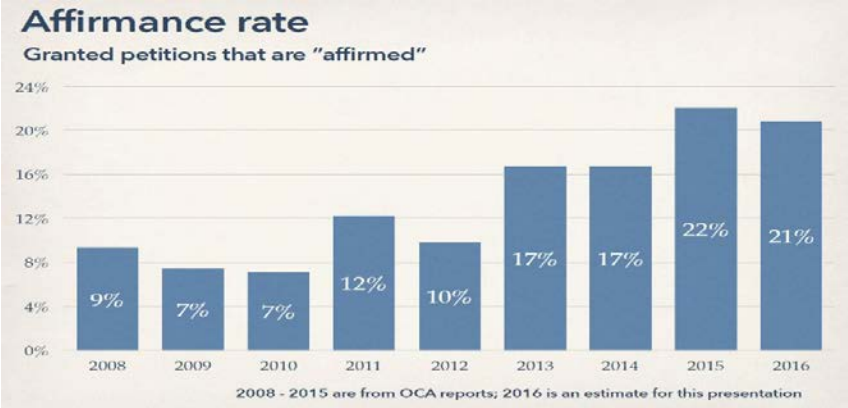

Fig. 7 – Court affirmance rate during 2008–16.[97]

C. 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 15 years of data published by the Office of Court Administration ("OCA"),[98] the following average times to disposition emerge:

Average Court Processing Time, FY 2005–19	
Court Action	**Average Time**
From Filing to Petition Disposition	143 days (4.8 months)
From Filing to Per Curiam	484 days (16.1 months)
From Petition Grant to Oral Argument	100 days (3.3 months)
From Oral Argument to Disposition	260 days (8.7 months)
From Filing to Argued Disposition	503 days (16.8 months)

Fig. 8 – Average Court processing time during FY 2005–19.[99]

Over this span, it has typically taken the Court some 16 months to issue a per curiam decision from the date of filing.[100] But it only took the Court only about a little less than 17 months to dispose of an argued case.[101]

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.[102]

Average Time to Court Disposition in Argued Causes, 2012–16			
YR	**Filing to Submission**	**Submission to Issuance**	**Filing to Issuance**
2012	15 months	7 months	22 months
2013	15 months	7 months	22 months
2014	14 months	8 months	22 months
2015	17 months	5.5 months	22.5 months
2016	15 months	5 months	20 months
AVG	**15.2 months**	**6.5 months**	**21.7 months**

Fig. 9 – Average time to Court disposition in argued causes during 2012–16.[103]

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96 *Supreme Scuttlebutt*; *see Docket Update*, at 5–6.

97 *Supreme Scuttlebutt*.

98 The statistics in this Section I(D) are compiled from the annual statistics published by the OCA, from FY 2005–19. *See* Appendix 3, SCOTX Processing Time In Days, FY 2005–19, *infra* (the data in Appendix 3 are tabulated from OCA ANNUAL REPORTS).

99 *See* Appendix 3, SCOTX Processing Time In Days, FY 2005–19, *infra*.

100 *Id.*

101 *Id.*

102 *Docket Update*, at 3.

103 *Id.*

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 (250 days) to 3.8 months in FY 2019 (114 days)).[104] Overall, from filing to issuance, the Court's processing time in argued causes has dropped from 16.1 months in FY 2014 (483 days) to just 11.5 months in FY 2019 (345 days)—a decrease of nearly ***half a year***.[105] From its height a decade ago in FY 2008 (24 months), the Court's time to dispose of an argued case has dropped by ***over a year***.[106]

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	
YR	**Filing to Issuance**
2012	18 mos.
2013	17 mos.
2014	22 mos.
2015	16 mos.
2016	19 mos.
AVG	**18.4 mos.**

Fig. 10 – Average time to Court disposition in nonargued causes during 2012–16.[107]

Since FY 2005, the average time between a petition grant and oral argument was 100 days.[108] But it can be as short as 21 days.[109]

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 2014–18):

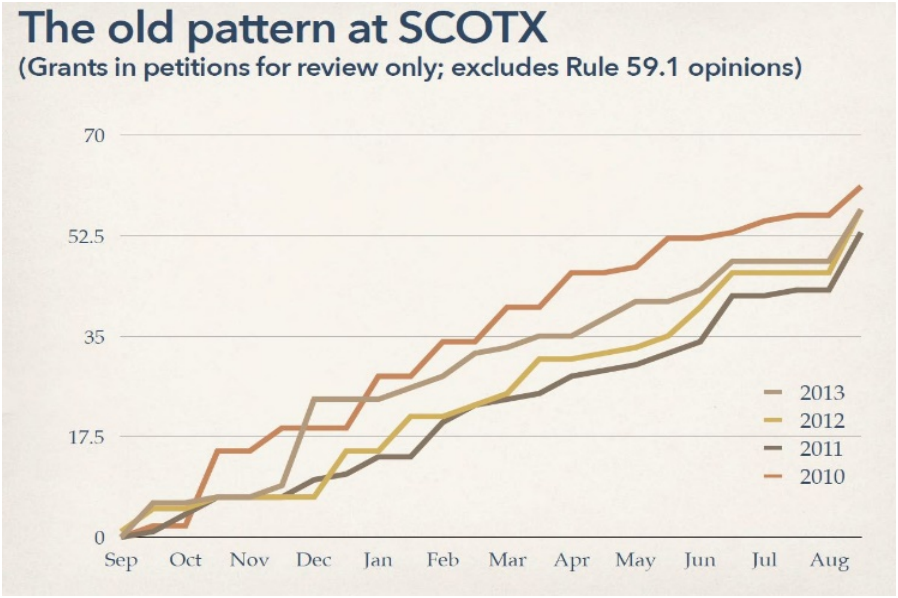

Fig. 11 – Excluding per curiam opinions, the old pattern of petition grant distribution throughout the calendar year during 2010–13.[110]

104 *See* Appendix 3, SCOTX Processing Time In Days, FY 2005–19, *infra*.
105 *Id.*
106 *Id.*
107 *Docket Update*, at 4.
108 *See* Appendix 3, SCOTX Processing Time In Days, FY 2005–19, *infra*.
109 *Supreme Scuttlebutt.*
110 *Id.*

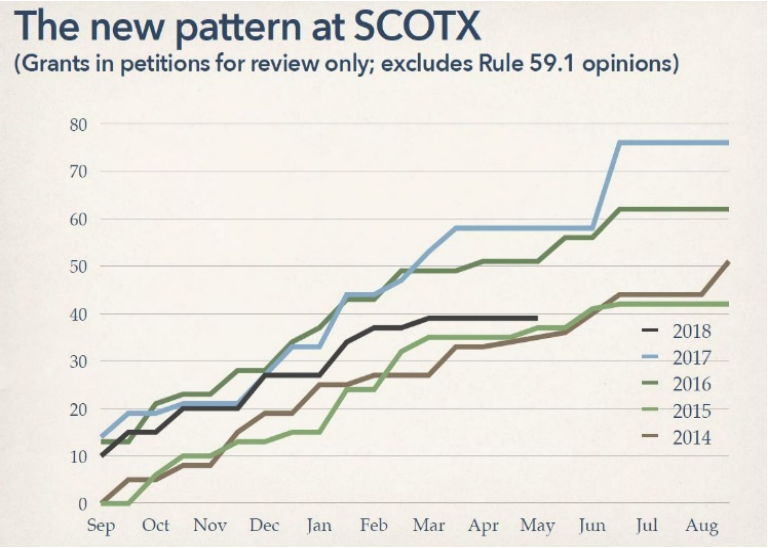

Fig. 12 – Excluding per curiam opinions, the new pattern of petition-grant distribution throughout the calendar year during 2014–18.[111]

Noticeably, the grants flatten out during the periods when proposed initial writings are due by the last conference in April and all proposed writings are due by the last conference in May:[112]

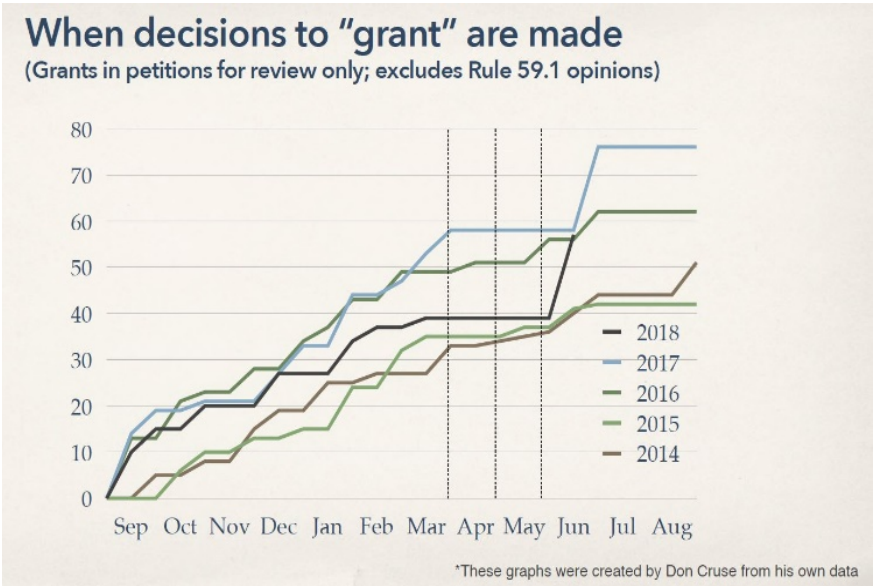

Fig. 13 – Excluding per curiam opinions, the pattern of petition-grant distribution throughout the calendar year from 2014–18, noting the deadlines for proposed writings by vertical hashmark.[113]

Regardless of the calendar timing of grants, however, the Court nearly always asks for full merits briefing before granting a petition.[114]

VI. 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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111 *Seventh Inning Stretch*, at slide no. 13.

112 *Internal Operating Procedures*, at 22.

113 Hon. Blake A. Hawthorne & Don Cruse, *How the Supreme Court of Texas Operates Today*, UTCLE, Annual Conference on State and Federal Appeals, at slide no. 22 (June 15, 2018) [hereinafter *How SCOTX Operates Today*], *available at* https://bit.ly/3ergJ9O (last visited July 14, 2020).

114 *Supreme Scuttlebutt.*