PETITION PRACTICE BEFORE THE SUPREME COURT OF TEXAS

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Acknowledgments

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PETITION PRACTICE BEFORE THE SUPREME COURT OF TEXAS

In September 1997, the Supreme Court of Texas adopted a new set of appellate rules that fundamentally transformed the way in which discretionary review is sought from the Supreme Court of Texas. Since then, the rules governing petition practice have not changed appreciably. However, the internal operating procedures of the Court have evolved as the Court has continued to grapple with the increased workload ushered in with the new rules.

The purpose of this paper is to provide a comprehensive overview of petition practice before the Supreme Court of Texas, with a particular focus on **petition for review** and **mandamus** practice. The petition for review and mandamus petition, while different in many respects, share an important characteristic in common—they both represent a means to persuade the Supreme Court to exercise its discretionary jurisdiction. Not surprisingly, the rules governing the petition for review share more commonalities than differences with the rules governing the mandamus petition. This paper explores the various aspects of petition practice in general, noting the differences between these two types of petitions where appropriate. In addition to describing the rules and internal operating procedures governing petition practice, the paper offers practical recommendations.

Many of the recommendations are drawn straight from the appellate rules themselves. Others are based on several rounds of discussions — one several months before the new rules went into effect and the others periodically thereafter — that the authors had with the Justices at the Supreme Court, various Staff Attorneys for the Justices, the Clerk and Chief Deputy Clerk for the Court, and the Court's Administrative Assistant. These invaluable sources provided insights into petition practice in general and critiqued the sample petition for review the authors prepared. The sample petition, which has evolved through the various rounds of discussion and through practical experience, is attached as Appendix 3. Finally, the authors provide recommendations from a number of papers on petition practice, which are listed in the Bibliography.

I. INTERNAL PROCEDURES

The internal operating procedures at the Court changed substantially to accommodate the new petition practice. And those procedures remain in a process of evolution as the Court continues to wrestle with the unique challenges created by the increased volume of work burdening each of the Justices. Following is an overview of the general procedures currently in place.[1] A flowchart summarizing the general procedures for petitions for review is attached as Appendix 1.

A. Routing of Petitions

1. Petitions for Review

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

Once a petition is ripe, the file will be sent to the Justices the next Tuesday morning between about 10:00 a.m. and noon. In order to trigger the forwarding of a petition to the Justices on any given Tuesday, the response or waiver must arrive in the Clerk's office 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 Court's Administrative Assistant is responsible for distributing the packages to each of the Justices' chambers. The package for each matter is placed in a redrope, which includes the petition for review, the appendix, the response or response waiver (if filed), letters, and amicus submissions. The package also includes a pink vote sheet for the case. *See* § I.C.1, *infra*.

[1] For a more exhaustive discussion of the Court's internal procedures, *see* Andrew Weber, Ginger Rodd, Blake Hawthorne & Douglas W. Alexander, *Supreme Court of Texas Internal Operating Procedures*, University of Texas School of Law 16th Annual Conference on State and Federal Appeals (2006), Tab 14. This paper borrows liberally from that one.

In addition to the package for each matter, the Administrative Assistant distributes to each member of the Court a "purple vote sheet" – listing 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* § I.C.2., *infra.*

The collective volume of materials delivered to the chambers each Tuesday morning is daunting—the delivery includes, on average, 16-17 petition for review packages,[2] plus mandamus petitions, habeas filings, motions for rehearing, etc.

This reflects a marked change from the previous application for writ of error procedure under which each application was randomly assigned to a single Justice who made a recommendation on the application to the rest of the Court. Under the former system, each Justice received on average only two applications each week.

2. Mandamus Petitions

Unlike a petition for review, a mandamus petition is not held in the Clerk's office, but rather is forwarded to the Justices without awaiting the filing of a response. The mandamus petition is also immediately routed to the Staff Attorney for Original Proceedings, usually referred to as the Mandamus Attorney ("MA") for screening. The MA determines whether emergency relief is sought and, if so, the degree of the emergency. Counsel should assist the MA with that screening process. If emergency relief is not required, that should be made clear at the very outset of the mandamus petition. If emergency relief is required, counsel should take a number of concrete steps, outlined below.

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

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

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

After the initial screening, the MA will route the emergency motion to whichever Justices are available. To assist with this process, counsel is advised to e-mail a set of the papers to the Supreme Court Clerk in Word, Word Perfect or searchable PDF format with security features disabled, so that whoever is working with the filings can readily cut and paste and otherwise manipulate them.

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

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

B. Action on Petitions – "Conveyor Belt" System

The Court employs a "conveyor-belt" system in acting on petitions for review and non-emergency mandamus petitions. Once a petition is placed in the hands of the Justices on a given Tuesday, it begins moving along the conveyor belt. Unless it is affirmatively removed from the belt by one or more of the Justices, the petition is

[2] *See* Pamela Stanton Baron, *Texas Supreme Court Docket Analysis: September 1, 2007*, State Bar of Texas, 21st Annual Advanced Civil Appellate Practice Course (2007), Ch. 4, p. 2 (documenting 897 petition for review filings in fiscal year 2006 and 826 filings in 2007).

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.

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. More recently, the Court has moved to using a computerized system to record their votes—a move that has had some impact on the dynamics of the Court's deliberations on whether to grant review. However, for purposes of understanding how the process works, it remains useful to refer to "pink," "purple," and "yellow" vote sheets, even if those physical sheets are ultimately rendered obsolete by the ever-developing use of technology at the Court.

1. Pink Vote Sheet

A pink vote sheet is placed in each petition and rehearing package and is the vote sheet for that particular case. An exemplar is attached as Appendix 2. The sheet is intended to be used by each of the Justices reviewing the petition. It provides blanks for the reviewing Justice to indicate the action deemed appropriate: deny; request response; request record; discuss at conference; request study memo; issue *per curiam* opinion; grant; dismiss for want of jurisdiction; refuse petition; hold; dismiss petition on motion of party. The pink vote sheet also provides space for "remarks" by the reviewing Justice—essentially space for notes the Justice can use to refresh recollections about the case when the petition proceeds to conference. If briefs on the merits are requested in a particular case, the assigned law clerk is provided the pink vote sheets of the Justices to assist the clerk in preparing the study memo.

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. An exemplar purple vote sheet is attached as Appendix 2.

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.

Under the Court's increasing use of technology, Justices may also cast their votes electronically. As that method of voting has been gaining more adherents, it has been having 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.

3. Yellow Vote Sheet

The yellow vote sheet assists the Court's disposition of petitions and rehearings 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. If the Justices mark their purple vote sheets for something other than "response requested," "record requested," or "deny," the matter goes directly to the next scheduled conference.

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 for 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 Justice 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 increased workload.

The most significant development since the Court switched to petition practice has been the Court's adoption of the "study memo" procedure. When at least three Justices agree that a petition merits further internal study, the petition is assigned in rotation to one of the Chambers, where a study memo is almost invariably prepared by one of the law clerks. The record is automatically requested when this occurs.

The study memo procedure has evolved over time. When the procedure was first adopted, a matter would simply be assigned to a Chambers for preparation of the memo, without further involvement of the parties at that pre-grant stage. However, the Justices soon determined that this approach did not provide sufficient assistance to those charged with preparing the memo. Therefore, the Court took the additional step of requesting briefs on the merits whenever a study memo is requested.

The law clerk assigned to prepare the study memo is charged by the Court, not the individual Justice for whom he or she works, to study the case and prepare a memorandum addressing the pertinent law and facts. The memo generally must be prepared within 30 days of the filing of the respondent's brief on the merits. At the Court's direction, the memo may focus on either isolated issues or the entire case.

The author of the study memo is charged with laying out the issues and the arguments on

each side. 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. The law clerks are encouraged to recommend either granting or denying the petition. Additionally, if the law appears to solidly support a particular disposition, the authors are given the freedom to provide their recommendation. These recommendations are not rigidly adhered to – it is not unknown for a Justice to note disagreement with the recommended disposition in a study memo emanating from his or her own chambers.

For many years, the Court requested a study memo and, hence, full briefing on the merits, in about 1 in 4 cases, and granted the petition in about 35-45% of the cases in which it requested full briefing.[3] More recently, however, the Court has tightened up on its requests for full briefing, by internally agreeing to eliminate the practice of trading votes for full briefing—a practice known as "I'll trade you a third [vote]." This change is being reflected in the statistics—there has been about a 25% decrease in the number of cases in which the Court requests full briefing. Because the Court draws its granted cases from those going to full briefs, this drop has caused the grant rate among fully briefed cases to go up, slightly above 50%.

E. Votes Required for Specific Actions

Following are the votes required for the Supreme Court to take specific actions on petitions for review and mandamus petitions:

Request Response	1
Request Record	1
Discuss	1
Request Briefs on the Merits/Memo	3
Grant Petition for Review	4
Grant Mandamus	5
Dismiss Petition WOJ	5
Refuse Petition	6
Hold Petition	6
Deny Petition as Improvidently Granted	6
Issue *Per Curiam* Opinion	6
Issue Majority Opinion	5
Grant Rehearing of Denial of Petition	4
Grant Rehearing of Cause	6
Deny Petition	Automatic unless at least 1 vote for something other than "deny"

F. Odds of the Court Taking Specific Actions

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**.[4] Following are the odds of the Court:

- Requesting response to petition for review if none is voluntarily filed:
  1 in 3
- Requesting briefs on the merits:
  1 in 5
- Granting petition for review, generally:
  1 in 8
- Granting petition for review if briefs on the merits are requested:
  1 in 2
- Affirming or reversing case if review is granted:
  Affirming – 12%
  Reversing –79%
  Other – 9%
- Granting motion for rehearing of denial of petition for review:
  1 in 27
- Granting motion for rehearing of cause:
  1 in 20

G. CaseMail

Once a number is assigned to the petition, counsel should register to receive CaseMail from

[3] *See* Baron, *supra* note 2, at 3.

[4] These statistics 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: Baron, *supra* note 2; Pamela Stanton Baron & Stacy R. Obenhaus, *The Texas Supreme Court by the Numbers: A Statistical Survey*, University of Texas School of Law 11th Annual Conference on State and Federal Appeals (2001), Tab 18; Chief Justice Thomas R. Phillips, *Thinking Inside the Box: A Review of the Supreme Court's Caseload Statistics and What Those Numbers Mean in Real Life*, State Bar of Texas, Practice Before the Supreme Court of Texas (2002), Chapter 1; Texas Office of Court Administration website– http://www.courts.state.tx.us/pubs/annual-reports.asp.

the Court. The Court's automated information system will send registrants emails 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: ://www.supreme.courts.state.tx.us/common/cmail_basics.asp#What%20It%20Is.

II. GOAL OF THE PETITION

Whether counsel is filing a petition for review or a mandamus petition, petitioner's ultimate goal at the petition stage is straightforward: getting through the door. Persuading the Supreme Court that the client should prevail on the merits is a secondary consideration at this stage. The petitioner must persuade at least four (**petition for review**) or five (**mandamus petition**) Justices that the case is worthy of review.

A. Demonstrating Substantial Importance

Unless the petitioner is angling for a *per curiam* opinion to correct error on a narrow legal point, getting through the door requires persuading the Court that the case involves a legal issue of substantial importance to the jurisprudence of the state. The task is complicated by the fact that the sheer volume of petitions the Justices must review each week means, in all likelihood, that very little time will be devoted by the Justices to any given petition. One former Justice has observed that due to the volume of petitions, "the review is necessarily cursory."[5] Another 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."[6] Although it may vary somewhat, most Justices say they spend a maximum of 15 minutes per petition package, which includes reviewing the petition, court of appeals opinion, response (if any), and any amicus submissions.

B. Grabbing the Court's Attention – the "Hook"

With so little time being devoted by the Justices to actually reviewing any given petition, the petitioner's initial goal must be to grab the Court's attention. This challenge is exacerbated by the fact that there is no guarantee that all of the Justices will actually read every section of the petition or will read front to back. Some start with the court of appeals' opinion (if any), since the Court is reviewing the opinion for error. Some start with the issue statements and then look at the court of appeals' opinion. Some start with the summary of the argument and then read only those portions of the court of appeals' opinion relevant to the issues presented. This practical reality calls for a fundamental shift in strategy from briefing to the court of appeals, where there is an assurance that the case will be heard and that the entire brief will be read by at least one of the Justices and, in all probability, by all three.

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

The sample petition for review illustrates this technique. The hook is: "personal jurisdiction over a foreign manufacturer cannot be based on the manufacturer's mere knowledge that its product would be shipped to Texas." This basic sentence,

[5] Justice Craig T. Enoch & Michael S. Truesdale, *Issues and Petitions: The Impact on Supreme Court Practice*, 31 ST. MARY'S L.J. 565, 568 (2000).

[6] Remarks of 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*, State Bar of Texas 15th Annual Advanced Civil Appellate Practice Course (2001), Tab 6, at 2).

with only minor variation, appears no less than 12 times in various sections of the sample petition.[7]

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

III. BREVITY IS THE SOUL OF AN EFFECTIVE PETITION

Above all, the petition should be short. The body of the petition for review (statement of facts, summary of the argument, argument, and prayer) as well the mandamus petition may contain no more than 15 pages. TEX. R. APP. P. 52.6, 53.6. Because many required sections of the petition do not fall within the 15-page limit, the temptation to use the preliminary sections to circumvent that page limitation may be strong. Resist that temptation. On average, the Justices will have about three to four petitions to review each weekday, 52 weeks a year, to keep up with the inflow of petitions. Their time is valuable, and an effective petition will reflect respect for that fact. Attaching briefing in the appendix to circumvent the page limitations will ensure the appendix getting struck.

Moreover, since a given petition is likely to receive no more than a cursory review, it is ultimately counterproductive to file a bloated instrument. A streamlined, tightly focused petition is more likely to grab the attention of the Justices. A former Chief Justice of the Supreme Court has emphasized that the 15-page limit "is a maximum, not a recommendation or suggestion."[8] 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.'[9]

The Chief Justice's view is shared by the other Justices: "I rarely heard from other members of the court that the petition was too short."[10]

Technically, on motion, the Court may permit a longer petition, response, or reply. *See* TEX. R. APP. P. 52.6, 53.6. As a practical matter, however, the Court routinely denies such motions. Accordingly, counsel should comply with the page limitations on the initial filing since, virtually without exception, these limitations will ultimately be enforced.

The sample petition for review provides an example of a streamlined instrument. The body of the petition comprises only 11 of the permitted 15 pages.

IV. BASIC REQUIREMENTS

A. Formatting

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

1. Margins

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

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).

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[7] Table of contents (three times); issues presented (first issue); first paragraph of the body of the petition (second sentence); summary of the argument (first sentence); argument (Section I – first sentence of first paragraph; second sentence of second paragraph; Section II – heading for entire Section; first paragraph of Section; heading for Subsection A; fifth paragraph of Subsection A, sixth sentence).

[8] Chief Justice Thomas R. Phillips, *Thinking Inside the Box: A Review of the Supreme Court's Caseload Statistics and What Those Numbers Mean in Real Life*, State Bar of Texas, Practice Before the Supreme Court of Texas (2002), Chapter 1 at 5.

[9] *Id.*

[10] *Id.*

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 13-point or larger. TEX. R. APP. P. 9.4(e). Go with 13-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.

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, 34.6. The abbreviations "CR" for clerk's record and "RR" for reporter's record are now familiar to the Court. Volume and page number citations to the reporter's record are usually sufficient, e.g., "RR 3:181-82." 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.

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. If footnotes are absolutely necessary, they may be single-spaced. TEX. R. APP. P. 9.4(d). We recommend using at least 12-point font. Although the rules allow the use of 10-point font in footnotes, even 11-point font is simply too small for comfortable reading. Picture the Justices reading the document in a car or in bad light – use type anyone can read anywhere. The footnote that appears on page 6 of the sample petition is in 12-point font. 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. Page Limitations

All briefs filed under the petition for review and mandamus system exclude the following sections from the page limitations: identity of parties and counsel, table of contents, index of authorities, statement of the case, statement of jurisdiction, issues presented, signature, certificate of service, and appendix. Exclusive of such sections, the page limitations are as follows:

a. Petition for Review and Mandamus: 15 pages. TEX. R. APP. P. 52.6, 53.6.

b. Response to Petition: 15 pages. TEX. R. APP. P. 52.6, 53.6.

c. Reply to Response: 8 pages. TEX. R. APP. P. 52.6, 53.6.

d. Petitioner's Brief on the Merits: 50 pages. TEX. R. APP. P. 55.6.[11]

e. Respondent's Brief on the Merits: 50 pages. TEX. R. APP. P. 55.6.

f. Reply Brief on the Merits: 25 pages. TEX. R. APP. P. 55.6.

g. Motion for Rehearing: 15 pages. TEX. R. APP. P. 52.9, 64.6.

B. Filing

1. Location

All briefs filed under the petition for review and mandamus system must be filed with the Clerk of the Supreme Court. The P.O. Box, physical address, and telephone number are:

[11] Unlike the rules governing petitions for review, the rules regarding mandamus petitions make no mention of briefs on the merits. However, the Court has adopted practices regarding mandamus petitions that parallel those for petitions for review. On the vote of three Justices, the Court may request full briefing on the merits. In that event, the page limitations for the merits briefs are the same as for the mandamus petition in the court of appeals—50 pages, exclusive of the matters described above.

Mr. Blake Hawthorne, Clerk
P.O. Box 12248
Austin, Texas 78711
201 W. 14th St., Room 104
Austin, Texas 78731
(512) 463-1312

2. Copies

a. Hardcopies

A party must file the original and 11 copies of most documents addressed to the Court. TEX. R. APP. P. 9.3(b). For all motions, responses to motions, and replies in support of motion only the original and one copy need be filed. Include an extra copy of the document, along with a self-addressed stamped envelope, to receive a file-stamped copy.

b. Electronic copies

A party must e-mail electronic copies of the following documents to the Clerk of the Court on the same day the original paper documents are filed: (1) petitions; (2) responses to petitions; (3) replies to responses to petitions; (4) briefs on the merits, including respondents' briefs on the merits and petitioners' reply brief on the merits; (5) amicus briefs; (6) post-submission briefs; and (7) all motions, responses to motions, and replies in support of motions, except for motions for extension of time.

Electronic copies must be in text-searchable portable document format (PDF) compatible with the latest version of Adobe Reader. Original documents should not be scanned, but must be directly converted into PDF files. Appendix materials may be scanned if necessary, but scanning creates larger file sizes with images of lesser quality and is to be avoided when possible. Any scanned materials must be made searchable using optical-character-recognition software, such as Adobe Acrobat. The use of bookmarks to assist in locating appendix material is encouraged.

Electronic copies must be e-mailed to the Clerk of the Court at @txcourts.gov and, simultaneously, to lead counsel. The Court has adopted very specific rules regarding how documents being transmitted to the Court are named. The specifics can be found in paragraph 10 of the Order at the following link: ://www.supreme.courts.state.tx.us/miscdocket/10/10918900.pdf.

3. Fees

Fees may be paid in cash, by check or money order. Checks and money orders should be made payable to "Clerk, Supreme Court of Texas." Credit cards are not accepted at this time. The following are filing fees pertaining to petition for review and mandamus practice.

Petition for Review	$125.00
Additional Fee if Granted	75.00
Waiver of Response	0.00
Response	0.00
All Other Briefs	0.00
Petition for Writ of Mandamus	$125.00
Motion for Extension of Time to File	10.00
Motion for Rehearing	15.00
Miscellaneous Motions	10.00
Exhibits Tendered for Oral Argument	25.00

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. The Court's current fee schedule can be found on the Court's website at ://www.supreme.courts.state.tx.us/court/filing.asp#feetable.

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. The appellate rules set forth no time limit within which mandamus relief must be sought. However, mandamus relief can be denied to those who do not timely request it.[12]

1. Petition for Review: 45 days from the later of the date of the court of appeals' judgment or its

[12] *See* Douglas W. Alexander, *Mandamus: The Practitioner's Guide*, State Bar of Texas 28th Annual Advanced Civil Trial Course (2005), Tab 25, at 3.

last ruling on a timely filed motion for rehearing or rehearing en banc. TEX. R. APP. P. 53.7(a).

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

3. Response to Petition: 30 days after the petition is filed. TEX. R. APP. P. 53.7(e).

4. Reply to Response: 15 days after the response is filed. TEX. R. APP. P. 53.7(e).

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

6. Respondent's Brief on the Merits: 20 days after receiving petitioner's brief. TEX. R. APP. P. 55.7.

7. Reply Brief: 15 days after receiving respondent's brief. TEX. R. APP. P. 55.7.

8. Motion for Rehearing: 15 days from the date when the Court renders judgment or makes an order disposing of a petition for review. TEX. R. APP. P. 64.1.

D. Motions to Extend Time ("METs")

The Court has assigned METs to the Clerk for disposition. Motions should have a certificate of conference and make clear in the body of the motion whether the motion is opposed or unopposed. TEX. R. APP. P. 10.1(a)(5). If the motion is unopposed, that should also be noted in the title of the motion to assist the Clerk in expediting it. Also, it is helpful to the Clerk for the first paragraph of the motion to state (1) when the document is due; (2) the length of the extension sought; and (3) the new deadline if the extension is granted. If a 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. Following are deadlines involving **petition for review** filings, and the Clerk's general rules applicable to unopposed METs:

1. Petition for Review: No later than 15 days after the last day for filing the petition. TEX. R. APP. P. 53.7(f). If the MET is unopposed, the first extension will generally be granted for up to 30 days. A second will also be granted for up to 30 days, but the grant letter will include "standard" language informing the movant that further requests for extension will be disfavored.

2. Response to Petition: At any time before or after the response is due. TEX. R. APP. P. 53.7(f). If the response was requested by the Court, the requesting Justice(s) will be asked if they want to grant the extension. If so, it will be granted. If the response was not requested by the Court, an unopposed MET will be granted for up to 30 days; the grant letter will include the standard language about further requests being disfavored.

3. Reply to Response: At any time before or after the reply is due. TEX. R. APP. P. 53.7(f). Through a recent change in internal operating procedures, an extension of up to 15 days for filing the reply will routinely be granted. The Court will adjust the date for action on the petition to accommodate the Justices' consideration of the reply under the extended deadline.

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

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

6. Reply Brief on the Merits: At any time before or after the brief is due. TEX. R. APP. P. 55.7. The Clerk's office will inform the chambers to which the study memo is assigned about the MET and will grant the MET unless instructed not to do so. If granted, the letter the order will contain the standard language about further requests being disfavored.

7. Motion for Rehearing: No later than 15 days after the last date for filing a motion for rehearing. TEX. R. APP. P. 64.5. If rehearing is sought of a cause or *per curiam* decision, the chambers that

authored the majority or *per curiam* opinion will decide whether to grant the MET. If rehearing is sought of the denial of a petition, the Clerk's office processes the MET. The first unopposed MET is granted for up to 30 days; the letter includes the standard language about further requests being disfavored.

E. Amendment

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

V. ANATOMY OF PETITION

With minor exception, a petition for review or mandamus petition 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
- Appendix

TEX. R. APP. P. 52.3, 53.2. Only the bolded sections are included in the petition's 15-page limit. TEX. R. APP. P. 52.6, 53.6. The actual contents of each of these sections may vary as between a petition for review and mandamus petition, and these differences are noted below.

Because the sections before the statement of facts do not count toward the 15-page limit in either type of petition, we recommend starting the first Arabic-numbered page of the petition with the statement of facts. If this format is followed, the statement of facts should be preceded by the salutation "TO THE HONORABLE SUPREME COURT OF TEXAS" followed by a brief introductory paragraph, which should be aimed at grabbing the Court's attention and orienting the Court to the issues presented by the petition. *See* Sample Petition for Review at 1. The pages preceding the statement of facts should be numbered with lower case roman numerals; the rest of the petition, beginning with the statement of facts, should be numbered with Arabic numerals.

A. Cover of Petition

TEX. R. APP. P. 9.4(f). Binding and covering. *A document must be bound so as to ensure that it will not lose its cover or fall apart in regular use. A document should be stapled once in the top left-hand corner or be bound so that it will lie flat when open. A petition or brief should have durable front and back covers which must not be plastic or be red, black, or dark blue.*

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, 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). The e-mail address of lead counsel should also be included on the cover.

The appellate rules formally incorporate the role of "lead counsel." Lead counsel for a petitioner is the first attorney to sign a pleading in the Supreme Court. TEX. R. APP. P. 6.1. Although the rule technically requires only that identifying information for lead counsel appear on the cover, the cover may also contain other counsel of record for the petitioner. 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. Finally, where 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. _____" And the Clerk's office reports that they will "love you" for including this information conspicuously.

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).

The appearance of the cover is not inconsequential. Although using a light color for the cover has long been the preferred practice, the governing rule specifically prohibits red, black, or dark blue covers. The rule also expressly forbids the use of plastic covers. TEX. R. APP. P. 9.4(f). These proscriptions have a practical foundation — many of the appellate courts use file stamps that are red, black, or dark blue; the stamps do not stand out if the covers are of the same color or are plastic. The Clerk's office will strike a brief with a proscribed cover.

B. Preliminary Sections

1. Identity of Parties and Counsel

TEX. R. APP. P. 53.2(a). *The* ***petition [for review]*** *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.*

TEX. R. APP. P. 52.3(a). *The* ***[mandamus] petition*** *must give a complete list of all parties, and the names and addresses of counsel.*

It is not necessary under the rules 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. In **mandamus petitions**, it is not necessary to draw this distinction.

Under the rules governing **mandamus petitions,** a real party in interest in the mandamus proceeding is one "whose interest would be directly affected by the relief sought." TEX. R. APP. P. 52.2. Under this definition, the parties to the mandamus proceeding may be fewer in number than the parties to the underlying action. For example, in a mandamus proceeding involving a discovery dispute in a multi-party case, it is conceivable that certain parties would be directly affected by the relief sought while others would not be affected at all. In such a case, the affected parties should be clearly identified as "Real Parties in Interest" and the names and addresses of their counsel provided pursuant to Rule 52.3(a). Although not required by the rule, the Clerk's office appreciates as much contact information for counsel as possible—office phone, cell phone, and e-mail—so that counsel can be readily contacted as needed. Although also not required by the rule, the names of any remaining parties to the underlying proceeding, together with the names of their counsel, should be separately listed under the category "Parties and Counsel in the Underlying Action who are not Parties to the Mandamus Proceeding." This may be of assistance to the Justices evaluating potential recusal.

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 15-page limit. TEX. R. APP. P. 53.6.

2. Table of Contents

TEX. R. APP. P. 52.3(b), 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 Section II.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 flip to 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 52.3 (mandamus petition) or Rule 53.2 (petition for review) 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. 52.3(b), 53.2(b). We suggest reproducing in full those issues that are actually briefed (unless too voluminous), as well as the headings and subheadings from the argument section. *See* Sample Petition for Review at ii-iii. Excluding from the table of contents those issues that are preserved but not briefed will avoid the confusion of having more issues than argument headings and will also streamline the appearance of the table of contents.

The table of contents does not count against the 15-page limit. TEX. R. APP. P. 53.6.

3. Index of Authorities

TEX. R. APP. P. 52.3(c), 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. 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 Blue Book and Green Book citation form meticulously. Many Staff Attorneys and Law Clerks are former law review and journal editors to whom citation mistakes may be distracting and even credibility-reducing. Be particularly mindful to provide accurate subsequent histories.

The index of authorities does not count against the 15-page limit. TEX. R. APP. P. 52.6, 53.6.

4. Statement of the Case

The rule regarding the statement of the case for a petition for review differs sufficiently from the rule regarding the statement for a mandamus petition that both rules are set forth in their entirety below.

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

(1) a concise description of the nature of the case (e.g., whether it is a suit for

damages, on a note, or in trespass to try title);

(2) the name of the judge who signed the order or judgment appealed from;

(3) the designation of the trial court and the county in which it is located;

(4) the disposition of the case by the trial court;

(5) the parties in the court of appeals;

(6) 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.

TEX. R. APP. P. 52.3(d). *The* ***[mandamus] petition*** *must contain a statement of the case that should seldom exceed one page should not discuss the facts. The statement must contain the following:*

(1) a concise description of the nature of any underlying proceeding (e.g., a suit for damages, a contempt proceeding for failure to pay child support, or the certification of a candidate for inclusion on an election ballot);

(2) if the respondent is a judge, the name of the judge, the designation of the court in which the judge was sitting, and the county in which the court is located; and if the respondent is an official other than a judge, the designation and location of the office held by the respondent;

(3) a concise description of the respondent's action from which the relator seeks relief;

(4) if the relator seeks a writ of habeas corpus, a statement describing now and where the relator is being deprived of liberty;

(5) if the petition is filed in the Supreme Court after a petition requesting the same relief was filed in the court of appeal:

(A) the date the petition was filed in the court of appeals;

(B) the district of the court of appeals and the names of the justices who participated in the decision;

(C) the author of any opinion for the court of appeals and the other of any separate opinion;

(D) the citation of the court's opinion, if available, or a statement that the opinion was unpublished;

(E) the disposition of the case by the court of appeals, and the date of the court of appeals' order.

The statement of the case provides one the greatest invitations for abuse under petition practice. Rules 53.2(d) and 52.3(d) provide 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 15-page 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. *See* Sample Petition for Review at v. 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 tabular format suggested by the authors closely resembles the study memo format that the Court's staff is currently 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 disposition; court of appeals; parties in the court of appeals; and, court of appeals' disposition. *See* Sample Petition at v.

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).

· *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.

· *Trial Court's Disposition*, Rule 53.2(d)(4): A one-line statement of the trial court action suffices.

· *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, if available, or a statement that the opinion was unpublished. Although it is best to identify the trial judge by his or her full name, including the first names of court of appeals justices is unnecessary unless there is more than one judge with the same last name on the court. Be sure to indicate if a lower court judge was sitting "by designation."

· *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).

The items required by Rule 52.3(d) to be included in the statement of the case in a **mandamus petition** can easily be collapsed into three headings: (1) nature of underlying proceeding; (2) respondent; (3) action from which relief requested; appellate court proceedings.

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 [for review]*** *must state, without argument, the basis of the Court's jurisdiction.*

TEX. R. APP. P. 52.3(e). *The* ***[mandamus] petition*** *must state without argument, the basis of the court's jurisdiction. If the Supreme Court and the court of appeals have concurrent jurisdiction, the petition must be presented first to the court of appeals unless there is a compelling reason not to do so. If the petition is filed in the Supreme Court without first being presented to the court of appeals, the petition must state the compelling*

reason why the petition was not first presented to the court of appeals.

Jurisdiction for purposes of a petition for review is fundamentally different from jurisdiction for a mandamus petition. Each is discussed separately below.

The six potential bases for the Court's jurisdiction over the **petition for review** appear in Texas Government Code section 22.001(a):

> (1) a case in which the justices of a court of appeals disagree on a question of law material to the decision;
>
> (2) a case in which one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court on a question of law material to a decision of the case;
>
> (3) a case involving the construction or validity of a statute necessary to a determination of the case;
>
> (4) a case involving state revenue;
>
> (5) a case in which the railroad commission is a party; and
>
> (6) any other case in which it appears that an error of law has been committed by the court of appeals, and that error is of such importance to the jurisprudence of the state that, in the opinion of the supreme court, it requires correction, but excluding those cases in which the jurisdiction of the court of appeals is made final by statute.

TEX. GOV'T CODE § 22.001(a) (Vernon 1988).

In most cases, a single sentence will suffice for the statement of jurisdiction. For example: "The Supreme Court has jurisdiction of this suit under Government Code section 22.001(a)(6), because this case presents an important issue of constitutional law of first impression to this Court that is likely to recur in future cases."

If the Court has jurisdiction because of a conflict in courts of appeals' decisions, the petition should include a sentence indicating that the Court has jurisdiction under Government Code section 22.001(a)(2); a single sentence stating the point on which the courts of appeals disagree; and citations to the conflicting opinions with appropriate signals. For example:

> "The Supreme Court has jurisdiction of this suit under Government Code section 22.001(a)(2). The courts of appeals are divided on [ISSUE]. *Compare* [CASE CITE] *with* [CASE CITE].**"**

If one or more of the conflicting decisions is also pending before the Court on petition for review, the Supreme Court cause number should be given parenthetically after a full cite to the court of appeals' opinion.

With regard to jurisdiction for a **mandamus petition**, the Texas Constitution provides that the Supreme Court and the Justices thereof have the power to issue writs of mandamus to enforce the Court's jurisdiction and "to issue writs of . . . mandamus in such cases as may be specified, except as against the Governor of the State." TEX. CONST. art. V, § 3. In addition, section 22.002(a) of the Texas Government Code confers jurisdiction on the Supreme Court to issue writs of mandamus against a statutory county court judge, a court of appeals or a justice of the court of appeals, or an any other officer of state government except the governor, the court of criminal appeals, or a judge of the court of criminal appeals. TEX. GOV'T CODE § 22.002(a)

The statement of jurisdiction should recite the section of the Government Code conferring on the Supreme Court the power to issue a particular writ: *e.g.*, "This Court has jurisdiction pursuant to TEX. GOV'T CODE § 22.002(a)." Unless the court of appeals is the respondent, the statement should additionally recite that the mandamus petition was first presented to the court of appeals and describe the disposition by that court, or explain the "compelling reason" why the petition was not first presented to the court of appeals.

The statement of jurisdiction, whether in a petition for review or a mandamus petition, is specifically excepted from the 15-page limit. TEX. R. APP. P. 52.6, 53.6. 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 15-page limit and could result in the petition being struck. *See Daimler-Benz Aktiengsellschaft v. Olson*, 53 S.W.3d 308 (Tex. 2000) (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 [for review]*** *must state concisely all issues or points presented for review. The statement of an issue or point will be treated as covering every subsidiary question that is fairly included. If the matter complained of originated in the trial court, it should have been preserved for appellate review in the trial court and assigned as error in the court of appeals.*

TEX. R. APP. P. 52.3(f). *The* ***[mandamus] petition*** *must state concisely all issues or points presented for relief. The statement of an issue or point will be treated as covering every subsidiary question that is fairly included.*

The governing rules allow the petitioner or relator to present the Court with either points of error or issues. TEX. R. APP. P. 52.3(f), 53.2(f). 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.[13] On the other hand, "an issue presented can also attract judicial attention and encourage a justice to spend more time reviewing the case."[14]

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.[15] Much has been written on issue practice.[16] 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 page 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 Justice has put it, "the best points, and only the best points, should be in the petition."[17]

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[13] *Accord* Enoch & Truesdale, *supra* note 6, 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.").

[14] *Id.* at 591.

[15] *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*, State Bar of Texas, Practicing Under the New Texas Appellate Rules (1997), Tab I, at 4).

[16] *See, e.g.*, Enoch & Truesdale, *supra* note 5; Pamela Stanton Baron, *Drafting Issues in the Texas Supreme Court*, State Bar of Texas 15th Annual Advanced Civil Appellate Practice Course (2001), Tab 6; Bryan A. Garner, *Issue-Framing: The Upshot of It All*, State Bar of Texas 11th Annual Advanced Civil Appellate Practice Course (1997), Tab O.

[17] Enoch & Truesdale, *supra* note 5, at 587; *id.* at 603 ("[G]iven the page constraints of a petition, a party can only adequately brief one or two issues at most."); "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

The petitioner or relator 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 in a **petition for review** proceeding to address in argument every issue listed in the issues presented. *See* TEX. R. APP. P. 53.2(i). No comparable provision appears in the rules regarding **mandamus**. If one or more issues in the petition for review are not addressed in the argument, in order to preserve them petitioner should include in the list of issues presented the bracketed reference "[unbriefed]" immediately following each such issue. The sample petition for review presents three issues, only two of which are actually briefed.

c. Listing Issues

Simply listing the issues numerically is sufficient. *See* Sample Petition for Review at v. It is not necessary to follow the traditional format for points of error, *e.g.*, "Issue No. 1." 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."[18]

(i) Frame to Demonstrate Importance

Pam Baron, an experienced Texas Supreme Court practitioner, has developed a number of thoughtful suggestions for preparing issues. First, she observes that "[t]here are significant differences between the intermediate courts of appeals and the Texas Supreme Court that should be taken into account when drafting issues."[19] 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."[20] 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."[21] 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."[22]

(ii) Frame Neutrally

Baron recommends that, at the petition stage, the issue should be stated neutrally because the answer does not matter – yet.[23] 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 has 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."[24]

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important issues." Justice Deborah Hankinson, *Framing Issues Under the New Rules: A View from the Supreme Court*, 5 THE APPELLATE LAWYER 4 (Houston Bar Ass'n Appellate Practice Section Winter 1998-1999) (quoted in Baron, *supra* note 17, at 3).

[18] Enoch & Truesdale, *supra* note 5, at 593.

[19] Baron, *supra* note 16, at 1.

[20] *Id.* at 2.

[21] *Id.* at 4.

[22] *Id.*

[23] *Id.* at 7.

[24] *Id.* (quoting Enoch & Truesdale, *supra* note 5, at 588).

(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.[25] "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."[26]

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. Although somewhat dated, a survey of the 123 cases in which the Supreme Court granted review and set the case for submission during the Court's 1997 and 1998 terms illustrates the split. Of the petitions in these cases, 93 (76%) contained issues using more than one sentence – 5 used issues with more than 5 sentences each, 6 used issues with 5 sentences, 9 used 4 sentences, 32 used 3 sentences, and 40 used 2 sentences.[27]

The most prominent proponent of the multi-sentence issue is Bryan Garner.[28] 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."[29] As the statistics above demonstrate, Garner clearly has many adherents. And they have been successful in obtaining review from the Supreme Court.

The sample petition for review prepared by the authors, with input from the Justices, employs single-sentence issues. For example, the first issue is framed as follows: "Can personal jurisdiction over a foreign manufacturer be based solely on the manufacturer's knowledge that its product would be shipped into Texas, under either the formulation of the stream-of-commerce doctrine articulated by Justice O'Connor or the one articulated by Justice Brennan in *Asahi Metal Industry v. Superior Court*?"

Despite Garner's criticism of the single-sentence approach, the authors remain persuaded that this approach is preferable at the petition stage. The single-sentence issue quoted above, for example, (1) is stated broadly enough to encompass *any* foreign manufacturer that has *mere knowledge* that its product would be shipped to Texas, thus illustrating the potential widespread impact of the issue; (2) calls the Court's attention to the fact that a *constitutional* issue is involved, which is one of the subject matters considered by the Justices to be important to the jurisprudence of the state; and (3) demonstrates that the issue is *interesting* by indicating that there is a split of opinion even among the Justices on the United States Supreme Court as to the proper formulation of an important personal jurisdiction doctrine—the stream-of-commerce doctrine.

Another reason that the authors prefer the single-sentence approach is that it conforms with the format that the law clerks employ in preparing the study memo. In the study memo, the law clerk is instructed to the list the issues presented. This list of issues is almost invariably presented in a single-sentence format. 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.

Yet another argument against multi-sentence issues in the petition is that, given the constraints of time, the reader is unlikely to take 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

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[25] *Id.* at 1.
[26] *Id.* at 3.
[27] Enoch & Truesdale, *supra* note 5, at 597, 599.
[28] *See* Garner, *supra* note 16.
[29] *Id.* at 5.

to skip to the Table of Contents to divine what the case is actually about.

The authors are additionally concerned with Garner's multi-sentence approach to issues because it fails to account for the fundamental distinction between issue-framing in the court of appeals and issue-framing in the Supreme Court. In the authors' view, the multi-sentence approach lends itself to being too case-specific. This detracts from demonstrating the importance of the issue to the jurisprudence of the state. The lead example of a 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?[30]

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*."[31] 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*."[32]

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.

While the authors, like Baron, prefer the single-sentence approach to issue framing, a majority of practitioners follow the Garner approach. Following are some suggestions for those who prefer the multi-sentence approach. First, Garner suggests limiting the issues to 75 words apiece, even where multiple sentences are used.[33] This suggestion is particularly important at the petition stage where the petitioner cannot reasonably expect more than a "cursory" review. Second, avoid making the issue sound too fact-specific, which is particularly challenging when multiple sentences are used. Third, incorporate the concept of importance.

A paper co-authored by a Supreme Court Justice provides an example of an effective multi-sentence issue in a petition. This two-sentence issue "identifie[s] for the court not only the importance of the issue, but also the existence of both a dissent and a split among courts considering the issue at hand":

> Contrary to precedent established by both the United States Court of Appeals for the Fifth Circuit and a sister court of appeals, and over the dissent of its Chief Justice, the majority of the El Paso Court of Appeals' panel held that Dr. Rennels, who never had nor sought an employment relationship with Sierra Medical Center, nevertheless had standing under the Texas Commission on Human Rights Act ('TCHRA' or 'the Act') to sue the Hospital for employment discrimination. Is the existence of an employment relationship between the plaintiff and the defendant a jurisdictional prerequisite to the maintenance of an employment discrimination action under TCHRA, or does TCHRA confer standing to sue

[30] *Id.* at 4.
[31] *Id.* at 7 (emphasis added).
[32] Baron, *supra* note 16, at 7 (emphasis added).
[33] Garner, *supra* note 16, at 6.

> employers other than one's own for employment discrimination?[34]

At 119 words, this issue is not tightly framed, but it does satisfy the basic criteria for attracting the interest of the Justices.

C. Body of Petition

1. Salutation

The governing rule requires only that the petition for review be addressed to "The Supreme Court of Texas." TEX. R. APP. P. 53.1. Go ahead and address it to "The *Honorable* Supreme Court of Texas." Although some of the Justices with whom we spoke did not care, a few stated, quite simply, that they "like it." Although nowhere mentioned in the rules, this same salutation should be used in a mandamus petition.

2. Grabber

Open the petition with a brief "grabber" paragraph, orienting the Court to the core issues presented and the argument. If the practitioner starts the body of the petition with the statement of facts as the first section, the "grabber" paragraph will be especially important to provide some context. *See* Sample Petition for Review at 1. The single most common complaint among the Justices has been that many, if not most, petitions "lack focus." The "grabber" paragraph should avoid this complaint by incorporating the "hook" and setting the hook early. *See* Section II.B., *supra*. This will not only provide the focus that the Justices desire at the outset but also force the practitioner to identify and crystallize the core complaint, which should serve as the touchstone for the balance of the petition. The Justices themselves employ this technique in drafting their opinions. Reviewing the initial paragraph of several recent decisions by the Supreme Court will provide a useful guide to preparing this initial paragraph in the petition.

3. Statement of Facts

TEX. R. APP. P. 53.2 (g). *The* ***petition [for review]*** *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.*

TEX. R. APP. P. 52.3(g). *The* ***[mandamus] petition*** *must state concisely and without argument the facts pertinent to the issues or points presented. The statement must be supported by references to the appendix or record.*

The statement of facts is the first required section that counts against the petition's 15-page limit. TEX. R. APP. P. 53.2(g), 53.6.

With regard to the **petition for review**, 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.

In both the petition for review and mandamus petition, 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 (if any) 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 jurisdiction, the statement of facts must not include any argument, TEX. R. APP. P. 52.3(g), 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.

[34] Enoch & Truesdale, *supra* note 5, at 599-600.

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 should (and, in a petition for review, 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 along with the date that the court of appeals acted on the motion.

4. Summary of the Argument

TEX. R. APP. P. 53.2(h). *The* ***petition [for review]*** *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. TEX. R. APP. P. 53.2(h). The rules governing **mandamus** do not require a summary of the argument. Nonetheless, because the Justices find them helpful, relator in a mandamus proceeding should seriously consider including a summary.

Because of the page limitations for both the petition for review and mandamus petition, 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. 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.

5. Argument

TEX. R. APP. P. 53.2(h). *The* ***petition [for review]*** *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.*

TEX. R. APP. P. 52.3(h). *The* ***[mandamus] petition*** *must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the appendix or record.*

In both the petition for review and mandamus petition, the space actually available for the argument will be 15 pages, *less* whatever space is consumed by the salutation and "grabber," statement of facts, summary of the argument, and prayer, all of which also count toward the page limitation. TEX. R. APP. P. 52.6, 53.6. Moreover, given that the Justices would prefer to receive petitions of fewer than 15 pages, if possible, the argument should ultimately be even shorter still. In the sample petition for review, the argument section comprises a total of only 8 pages, in 13-point type.

The rule regarding petitions for review expressly states that "[t]he argument should state the reasons why the Supreme Court should exercise jurisdiction . . . ." Tex. R. App. P. 53.2(h). The rule regarding mandamus petitions contains no comparable provision. *See* TEX. R. APP. P. 52.3(h). This does not mean, however, that a mandamus relator can simply ignore arguing to the Court that the case is jurisprudentially important. Just as in the case of petitions for review, it lies within the discretion of the Supreme Court whether to exercise jurisdiction over a mandamus proceeding. The Court will decline to exercise its discretionary

jurisdiction unless it is persuaded that the proceeding presents an issue of such importance to the jurisprudence of the state as to warrant review. *See Tilton v. Marshall*, 925 S.W.2d 672, 682 (Tex. 1996) (relator must show that "the [mandamus] petition raises important issues for the state's jurisprudence."); *Walker v. Packer*, 827 S.W.2d 833, 839 n.7 ("this Court will not grant mandamus relief unless we determine that the error is of such importance to the jurisprudence of the state as to require correction.").

Given the importance of showing jurisprudential importance in both the petition for review and mandamus petition, the argument section is logically divisible into two subsections, each of which is addressed below.

a. Reasons why Supreme Court Should Exercise Jurisdiction

To comply with the requirement of demonstrating jurisprudential importance, we recommend that the argument section begin with a sub-section setting forth such grounds. The heading of this section should be in narrative form, articulating the core reason that the Court should care to hear the case. *See* Sample Petition for Review at 4.

The rules enumerate specific factors that 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. Many of these factors can also be invoked to demonstrate the importance of a **mandamus petition**. 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:

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.

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 Supreme Court Staff Attorney, provides excellent guidance on this point.[35] 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."[36] While there is no unanimity of opinion by the Justices on this question, the following are factors identified by the Justices themselves as weighing in favor of a grant:[37]

> 1. The case presents an issue of first impression for the Court, particularly if the issue is likely to recur. Since 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.[38]
>
> 2. 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.
>
> 3. The case presents an issue where statewide uniformity is important.
>
> 4. The court of appeals' opinion is likely to mislead or confuse other courts of appeals if the petition were denied. Rodd writes that

[35] *See* Elizabeth V. Rodd, *What is Important to the Jurisprudence of the State?*, State Bar of Texas, Practice Before the Supreme Court of Texas (2002), Chapter 4.
[36] *Id.*
[37] *See id*. at 3-4.
[38] *See id.* at 3.

> "[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."[39] 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.
>
> 5. The case presents a genuine constitutional issue for review. "Uniformly, the Justices consider constitutional issues generally important."[40]
>
> 6. 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 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."[41]
>
> 7. 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."[42]

Another useful paper identifies factors which make a case more worthy of review. *See* Elaine A. Carlson & Roland Garcia, Jr., *Discretionary Review Powers of the Texas Supreme Court*, 50 TEX. BAR J. 1201, 1204 (1987). More particularly, these authors have outlined six possible ways to persuade the Court to exercise discretionary jurisdiction:

> (1) Illustrating that the issues raised by the application will affect persons or entities beyond the named litigants; (2) Demonstrating that the case is one of first impression before the court or should be readdressed due to recent developments; (3) Demonstrating issues pertaining to a public entity affect the public in general; (4) Demonstrating the adverse impact of the lower court judgment on the public in general; (5) Demonstrating that while the court of appeals' judgment may be correct, its statements of legal principles are erroneous and constitute a serious departure from established legal principles so as to be misleading and require correction; and (6) Demonstrating that other pending cases before the court on discretionary review present the same or similar issues which the court has already recognized to be of importance to the jurisprudence of the state.

Id.

Yet another excellent reference for identifying jurisprudentially important issues is Justice Hecht's dissent from denial of petition for review in *Maritime Overseas Corp. v. Ellis*, 977 S.W.2d 536, 536 (Tex. 1996) (Hecht, J., dissenting to denial of petition for review). In his dissenting opinion, Justice Hecht lists various factors that he considers as supporting the grant of a petition for review.

Another argument for a "grant" identified by Staff Attorneys with whom we spoke 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.

Recent statistics suggest that many of the Justices believe that the Court has an error correction responsibility. *Per curiam* opinions,

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[39] Rodd, *supra* note 34, at 3 (emphasis in original).
[40] *Id.* at 4.
[41] *Id.*
[42] *Id.*

which are an ideal vehicle for error correction, have been on the rise in recent years. In a recent term of the Court, 54% of the decided opinions were *per curiam*.[43] And as one of the Staff Attorneys put it, "PCs have always been about reversals." 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 Justices with whom we spoke disagree about whether it is ever appropriate to suggest to the Court directly that a *per curiam* opinion would be appropriate to correct the court of appeals' error. Although some members of the Court with whom we spoke favored the idea, others were strongly opposed to it. Given the strong opposition expressed by some, it is probably best 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. As one of the Staff Attorneys we spoke with pointed out, there could be an unintended downside to directly arguing that the case should be resolved by *per curiam* opinion—such an opinion requires 6 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.

b. Argument on the Merits

Rule 53.2(h) (petition for review) and Rule 52.3(h) (mandamus petition) state that the petition "must contain a clear and concise argument for the contentions made . . . ." We recommend that the argument on the merits—as distinguished from the argument regarding jurisprudential importance—should be presented in a separate sub-section of the argument.

The heading of this section, too, should be in narrative form. In a **petition for review**, the heading should identify the core reason that the court of appeals erred. *See* Sample Petition for Review at 6. In a **mandamus petition**, the heading should identify why the court of appeals erred (if the court of appeals issued an opinion) or why the trial court could not properly issue the order it did. Mandamus counsel must also demonstrate in this section why the relator has no adequate remedy at law.

The principal subheadings in this section should correspond to the issues presented. 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. The sample petition for review illustrates this selection process. The two issues that are briefed are independently dispositive; deciding either in petitioner's favor would make it unnecessary to discuss the third, unbriefed issue. In addition, the unbriefed issue is more fact-specific than the first two, making it less of a candidate as an issue of statewide importance.

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 (petition for review) or under the Court's internal operating procedures (mandamus petition). 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 major sections of the argument. They are ultimately inextricably related. Collectively, they should be calculated to persuade the Court to hear the case.

6. Prayer

TEX. R. APP. P. 52.3(i), 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. *See Continental Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 455 (Tex. 1996). The petitioner must consider carefully what the Court must do to grant the petitioner effective relief and then request just that.

In a **petition for review**, 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. *See id.* In those cases in which various issues give rise to various dispositions, the

[43] *See* Baron, *supra* note 2, at 2.

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.

In a **mandamus petition**, the prayer should not request, in conclusory fashion, that a writ of mandamus be issued against respondent; it should clearly explain what the reviewing court should direct respondent to do.

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. Nevertheless, we hesitate to suggest its omission.

7. 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 which, in most cases, will be the petition. 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.

The signature does not count against the 15-page limit. TEX. R. APP. P. 53.6.

The Clerk's office strongly encourages signing documents in blue ink so that they can distinguish the original from copies. It is difficult to distinguish copies of felt-tip black signatures from the original.

8. 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.

The rule requires detailed information in the certificate of service. *See* Sample Petition for Review at 14. The certificate of service does not count against the 15-page limit. TEX. R. APP. P. 53.6.

9. Appendix

As reflected in the rules quoted below, the appendix to a petition for review includes a different set of documents than an appendix to a mandamus petition.

TEX. R. APP. P. 53.2 (k). Appendix [to petition for review].

(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.

TEX. R. APP. P. 52.3(j). Appendix [to mandamus petition].

(1) Necessary contents. *The appendix must contain:*

(A) a certified or sworn copy of any order complained of, or any other document showing the matter complained of;

(B) an order or opinion of the court of appeals, of the petition is filed in the Supreme Court;

(C) unless voluminous or impracticable, the text of any rule, regulation, ordinance, statute, constitutional provision, or other law (excluding case law) on which the argument is based; and

(D) if a writ habeas corpus is sought, proof that the relator is being restrained.

(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 appendix should not contain any evidence or other item that is not necessary for a decision.*

The rules permit the appendix to be bound with or separately from the petition. In one of the earlier editions of this paper, we reported that the "overwhelming preference" of the Justices and their Staff Attorneys was that appendices be attached to petitions. With additional practical experience under the petition system, opinions on whether "to attach or not to attach" became more mixed. In fact, some Justices suggested that the appendix should always be bound separately from the petition. This view stemmed from the common complaint among the Justices that the appendices being filed, attached or not, are simply "too big." Despite this complaint, several Justices said they still prefer the appendix to be attached to the petition, unless it is overly bulky. The authors' recommendation is to attach the appendix to the petition, but to be extraordinarily judicious as to what to include in the appendix so as not to unnecessarily annoy the reader.

The rules require that the materials in the appendix be separated by tabs. 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 (if any) are attached.

Counsel should never attach a legal-sized document in an appendix — this is a pet peeve of the Court. If the original record in the court of appeals includes legal-sized documents, the copies should be reduced to letter-sized before being attached as part of an appendix.

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). For example, in the sample petition for review, we opted not to include the text of the Due Process clause or the Texas long-arm statute. Although these provisions are central to personal jurisdiction in Texas, the argument was not based on the interpretation of the text of these provisions. The Justices and Staff Attorneys with whom we spoke unanimously agreed that these provisions should not be attached and would not be required under Rule 53.2(k)(1)(D). 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. Yet, many

practitioners attach cases as part of the appendix, to the annoyance of the reader. As one of the Staff Attorneys we spoke to put it: "Do they think we don't have a law library?"

If the argument turns on the language of a contract or other document, it is sufficient to include the text of the pertinent provisions; it is not necessary to attach the entire document. However, there is a caveat. If it is important to view the controlling language in context, counsel should include a copy of the entire document at issue, rather than merely quote the pertinent text. As the Staff Attorneys explained, 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.

The decision whether to include optional contents in the appendix requires the petitioner to exercise restraint and good judgment, especially in light of the concerns that the Justices have expressed about voluminous appendices. *See* TEX. R. APP. P. 52.3 (k)(2), 53.2(k)(2). The petitioner should include optional materials only if the materials are difficult to locate and central to the argument. As noted above, it is seldom, if ever, appropriate to attach a copy of a published opinion. Much of the unnecessary bulk in appendices results from the inclusion of case law. Attach a copy of an opinion only if the matter before the Court turns on that opinion and frequent reference to the text of that opinion will be required.

VI. RESPONSE TO PETITION

A party may, but is not required to, file a response to a petition for review or mandamus petition. TEX. R. APP. P. 52.4, 53.3. The petition will not be granted without a response being filed or requested by the Court. *Id.* In a mandamus proceeding, however, the Court may grant temporary relief before a response has been filed or requested. TEX. R. APP. P. 52.4. Accordingly, if the real party in interest is opposed to temporary relief being granted, counsel should immediately inform the Clerk of that fact and file a response in opposition to the motion as soon as practicable.

Temporary relief aside, however, one does not risk a grant of review or mandamus by failing to respond to a petition. The expressly voluntary nature of the response under petition practice raises a number of strategic issues, which are addressed below.

A. Whether to File a Response

The Justices of the Supreme Court are accustomed to parties electing not to file a response to the petition unless requested. Thus, a party need not fear offending the Justices or appearing to concede the merits of the petition by electing not to file a response. Many petitions are disposed of by the Justices simply reviewing the petition and the court of appeals decision (if any), without a response having been filed or requested by the Court. Moreover, one should not view with alarm a request for a response—it takes the vote of only 1 Justice to request one.

Because there is no material downside to declining to file a response, and the responding party can save attorneys' fees by not filing one, the presumption should be against filing one (unless opposing temporary relief is an issue). However, there are a number of "stopper" factors that may rebut this presumption—factors which, if available, should preclude the Court from reaching the merits of the case. The late and legendary appellate practitioner Rusty McMains referred to these as the "pillars of affirmance." [44]

If the petition self-evidently involves no issue of substantial jurisprudential importance, the presumption should remain not to file a response. If, on the other hand, the petition appears to involve a jurisprudentially important issue and one or more of the "stopper" factors are legitimately available, counsel should seriously consider filing a response to address them. Each of the factors is addressed below.

1. Respond if the petitioner failed to preserve error and waived the legal issue being asserted.

The Supreme Court has substantially relaxed the technical requirements for preserving legal issues for review by the Court. Nonetheless, it is not unknown for overzealous petitioner's counsel to seek relief in the Supreme Court by presenting legal complaints that were not presented

[44] Russell H. McMains, *Drafting a Respondent's Brief*, State Bar of Texas, Practice Before the Supreme Court of Texas (2002), Chapter 8 at 1.

to the court of appeals. In such a case, the lack of preservation should be cleanly presented to Court as a factor that precludes its review.

2. Respond if the correct standard of review does not permit the result that the petitioner advocates.

In some cases, the petitioner will advocate a position which, at least superficially, sounds compelling, but which cannot survive appellate scrutiny when the correct standard of review is applied. For example, a petitioner in a mandamus action may argue that a particular issue presents solely a legal question governed by a *de novo* standard of review, when, in fact, the issue was one relegated to the trial court's sound discretion, and the much more exacting abuse-of-discretion standard applies. A periodically updated article on standards of review by appellate specialist Wendell Hall can be referred to as a useful guide in conducting this analysis of the governing standard of review.[45]

3. Respond if though the courts below may have erred, the error is harmless (or, in mandamus practice, the petitioner has an adequate remedy by appeal).

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

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

A **mandamus petition** typically does not present an issue of harmful error. However, a closely analogous issue frequently arises in mandamus practice—whether the relator has an adequate remedy by appeal. As a general rule, a relator must demonstrate the lack of an adequate appellate remedy to obtain mandamus relief. *See Walker*, 827 S.W.2d at 842 ("The requirement that mandamus issue only where there is no adequate remedy by appeal is sound, and we reaffirm it today."). In recent years, the Court has revisited and relaxed the *Walker v. Packer* standard. *See In re Prudential Ins. Co.*, 148 S.W.3d 124, 136 (Tex. 2004); *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 464-466 (Tex. 2008). Nonetheless, this remains an issue that one should scrutinize in deciding whether to file a response to a mandamus petition.

4. Respond if *stare decisis* compels affirmance of the court of appeals' decision or denial of mandamus.

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

5. Respond if there is an independent ground for affirmance that petitioner failed to address.

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

[45] W. Wendell Hall, *Standards of Review in Texas*, 38 St. Mary's L.J. 47 (2006).

affirmance. In every case, the responding party should analyze whether the petitioner has overlooked a ground for affirmance that torpedoes the petition.

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

The rules regarding **mandamus** provide the real party in interest with an unfettered choice about whether to file a response to the mandamus petition—the petition will not be granted before a response has been filed or requested by the Court. TEX. R. APP. P. 52.4. The governing rule sets no deadline for filing a response or a response waiver. Moreover, under the Court's internal operating procedures, the mandamus petition is forwarded immediately to the Justices once it is filed—the petition is not held in the Clerk's office until the filing of a response or response waiver, or the expiration of 30 days, as in the case of petitions for review. *See* § I.A.1., *supra*. As a result, the real party in interest is not faced with a strategy question regarding when to file a response waiver, if the decision is made not to file a response.

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

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

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

An intermediate approach is to wait some "tasteful" period of time (e.g. two weeks) before filing the response waiver, so as not to give the appearance to the Justices of trying to drag out the process as long as possible. Even under this intermediate approach the clock will not start ticking anew unless and until the Court requests a response.

The Justices agree that the response waiver need not be elaborate. A simple letter to the Clerk (send an original and 11 copies), stating that the respondent waives the filing of a response will suffice. A form waiver is attached as Appendix 4.

C. How to Respond

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

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

1. Additional arguments to dissuade the Court from granting review.

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

a. The case is fact-intensive and is important only to the parties to the appeal.

If the case is fact-intensive—that is, if its outcome turns not on some over-arching legal dispute that is likely to recur, but rather on how the fact finder weighed and resolved the disputed evidence or discretionary issue in this isolated case—the likelihood of the Court granting review or mandamus is substantially diminished.

However, counsel must be judicious in making this argument, given that at least some Justices believe there is still an error-correction role for the Court in cases involving what is perceived to be truly egregious error. Thus, arguing that the case is not "jurisprudentially important" may not be sufficient—counsel should go further and explain how at least rough justice was achieved in the decision below so that it should not be disturbed.

b. The purported conflict among appellate courts is illusory.

It is common for a petitioner or relator to argue that the Supreme Court should grant review or mandamus relief to resolve a purported conflict among appellate court decisions. If, in fact, the purported conflict is illusory, counsel should forcefully demonstrate this point as a ground for the Court to deny review.

c. Even if the issue is one of first impression in Texas, it should be allowed to "percolate" through the intermediate appellate courts.

The petitioner or relator may well argue that the case presents an issue of first impression in Texas when, in fact, it does not. But what if the case does genuinely present an issue of first impression? In that case, the responding party can argue either that the court below "got it right," and/or that the issue should be allowed to "percolate" by being addressed by more than one intermediate appellate court before being addressed by the Supreme Court.

The "percolation" argument should be made when the legal issue, while interesting, is not of immediate importance to the state's jurisprudence. In evaluating whether it is important, counsel should consider various questions. If the decision below is left undisturbed, is that likely to serve as a beacon to other litigants, encouraging similar suits? For example, if the court of appeals' decision recognizes a new tort duty in Texas that is likely to give rise to a whole new arena of litigation, it will usually be implausible to argue that the Supreme Court should simply disregard the issue until other courts have weighed in. Have other jurisdictions confronted and resolved the legal issue? If the issue is one that has received attention in a large number of other courts throughout the country, it is more difficult to argue that the Supreme Court should stay out of the debate until other intermediate courts of appeals in Texas have expressed their views. However, if the court of appeals' decision adopts what is a clear majority position, or one that is part of an unmistakable trend, it becomes more plausible to argue that other intermediate courts of appeals should address the issue before the Supreme Court does, particularly if the issue is not one that arises with great frequency.

d. The issue of jurisprudential importance cannot cleanly be reviewed by the Court.

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

e. The court of appeals correctly resolved the legal issue and there is no sound reason to disturb its decision.

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

2. Developing a persuasive response

Should the practitioner elect to file a response, the contents are the same as that of the petition, with enumerated exceptions. *See* TEX. R.

APP. P. 52.3, 53.3. Like the petition, the response is limited to a total of 15 pages, exclusive of the same specified sections. TEX. R. APP. P. 52.6, 53.6.

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

a. Table of Contents

The response must include a table of contents. *See* TEX. R. APP. P. 52.3(d), 53.3. The headings should be in narrative format, and when read as a whole should clearly convey why the case does not merit the Court's review and why the responding party prevails on the merits.

b. Statement of the Case

Technically, the response need not include a statement of the case "unless the responding party is dissatisfied with that portion of the petition." TEX. R. APP. P. 52.4(b), 53.3. As a practical matter, however, the responding party should rarely be "satisfied" with the petitioner's statement.

The re-tooled statement of the case should be in tabular form. *See* Sample Petition for Review at v. It should be brief and non-argumentative. However, the various elements of the statement should be drafted in such a fashion that the case sounds unexceptional and as not warranting review.

c. Statement of Jurisdiction

The rules regarding the response to a petition for review or mandamus petition both provide that "a statement of jurisdiction should be omitted unless the petition fails to assert valid grounds for jurisdiction, in which case the reasons why the Supreme Court lacks jurisdiction must be concisely stated." TEX. R. APP. P. 52.4(c), 53.3(d). Whether to include a jurisdictional statement presents a strategy decision on which there is a split of opinion.

Under one school of thought, including a jurisdictional statement in the response should be reserved for that relatively rare case which is a bona fide candidate for dismissal for want of jurisdiction. Under another school of thought, the statement of jurisdiction should be used by the responding party as a means to dissuade the Court from granting review. As a general rule, the authors of this paper incline toward the first view, which is the view shared by the Staff Attorneys with whom we spoke. As they explained, it is "irritating" when a respondent abuses the reader's valuable time by using the jurisdiction section to make arguments that should be reserved for the argument section of the brief. In their view, contesting jurisdiction should be reserved for the exceptional case where it would be worth a separate motion to dismiss for want of jurisdiction. If conflict of decisions among the court of appeals is a basis for jurisdiction invoked by the petitioner and the conflict is illusory, it suffices to say in the statement of jurisdiction in the response that the conflict is illusory and will be discussed in greater detail in the argument section.

d. Issues Presented

The rule regarding issues in a response to a **mandamus petition** is simple and straightforward—"the response need not include . . . a statement of the issues presented . . . unless the responding party is dissatisfied with that portion of the petition." TEX. R. APP. P. 52.4 (b).

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

The first of the reasons for presenting issues in response to a petition for review is the same as the reason recited in the mandamus rule. All three of the reasons in the petition for review rule are addressed below.

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

In most cases, the party responding to a **petition for review** or **mandamus petition** will want to recast the issues framed by the petitioner or relator. A possible exception is where the petitioner is the beneficiary of a favorable standard of review—for example, where the court of appeals has affirmed a summary judgment against the plaintiff-petitioner. In such a case, if the petitioner has fairly framed the issue, it may be more powerful for the respondent to argue that, even with the standard of review favoring the petitioner, the respondent nonetheless wins.

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

(ii) Asserting independent grounds for affirmance

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

(iii) Entitlement to judgment less favorable than that rendered by the court of appeals but more favorable than that sought by petitioner

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

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

e. Introduction to Body of Petition

As a matter of strategy, the responding party will generally want to include on the first page of the body of the response an introduction that hits the Court between the eyes with why the Court should decline to take the case. Usually, this can best be accomplished through a "grabber" paragraph.

f. Statement of Facts

The governing rules provide that a statement of facts need not be included unless the responding party is dissatisfied with that portion of the petition. TEX. R. APP. P. 52.4(b), 53.3(b). Rarely should the responding party be satisfied with the petitioner's statement of facts. The response will generally include a newly crafted statement of facts that frames the issues from the responding party's perspective.

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

g. Summary of the Argument

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

h. Argument

The responding party's argument should follow the same basic format as that suggested for the petition. The argument must be confined to those issues raised in the petition or those raised by the respondent in the statement of issues section of the response. TEX. R. APP. P. 52.4 (d), 53.3(e). The overarching objective of any response is, of course, to persuade the Court that the relief requested in the petition should be denied. In developing the argument section of the response, the responding party should consider each of the various arguments discussed above for dissuading the Court from taking the case.

i. Prayer

The rules provide that the response "must contain a short conclusion that clearly states the nature of the relief sought." TEX. R. APP. P. 52.3(i), 52.4., 53.2(j), 53.3. In most cases, the response's prayer will simply request the Court to deny the petition for review or petition for writ of mandamus. Where, however, the respondent to a **petition for review** is asserting grounds that establish the respondent's right to a judgment less favorable than that rendered by the court of appeals but more favorable than the disposition sought by the petitioner, the prayer should include an appropriate alternative request for relief.

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

j. Appendix

The burden falls on the petitioner to prepare an appendix that includes the "necessary" contents prescribed by the governing rules, as well as any "optional" ones. *See* section V.C.9., *supra*. In many, if not most, cases the responding party will elect not to include any additional matters in the response. The responding party must be mindful of the potential backfiring effect of independently providing a lengthy appendix: it may make an otherwise ungrantworthy case appear "weighty" and therefore "important."

That cautionary note aside, a well-focused appendix can be effective in the right case. For example, in a case involving a contract dispute, if a particular provision of the contract blow's the petitioner's argument out of the water, not only should that provision be quoted in the argument section of the response, it should also be attached as an appendix. In the view of many of the Staff Attorneys, the entire contract should be attached as an appendix, if practicable, given that the meaning of the particular provision in question may be impacted by its context.

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

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

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

VII. REPLY TO THE RESPONSE

The rules provide no guide as to what should be included in the reply. As a practical matter, it need include nothing more than argument — a complete petition will have provided the Court with everything else necessary to furnish the requested relief. Rather than repeat matters already set forth in the petition, the reply should hone in directly on matters set forth in the response begging attack. The 8-page limit encourages focused attack. *See* TEX. R. APP. P. 52.6, 53.6. Like the response, the filing of a reply is not mandatory. If nothing meaningful would be added to the Court's consideration of the petition by filing a reply to the response, none should be filed. This, however, will infrequently be the case. The Court is free to act on the petition before receiving the reply. *See* TEX. R .APP. P. 53.5. To ensure that the reply is actually considered by the Court, the petitioner should not unduly delay in filing it, though, as noted in section IV.D.3., *supra*, an extension of up to 15 days will be routinely granted if additional time is needed.

VIII. BRIEFS ON THE MERITS

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

A. Internal Procedures and Deadlines

Technically, the Court can grant the **petition for review** without first requesting full briefing on the merits. *See* TEX. R. APP. P. 55.1. As a practical matter, however, this rarely, if ever, occurs under the Court's internal operating procedures – the Court requests full briefing as part of its continuing evaluation of whether to grant review. The rules regarding the **mandamus petition** make no provision whatsoever for full briefing on the merits. However, under the Court's internal operating procedures, the Court generally requests full briefing before granting a mandamus petition as part of its evaluation of whether to grant.

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

Unless the Court sets a different schedule, under the rules the petitioner's brief on the merits will be due 30 days after the Court's request for full briefing, the respondent's brief on the merits will be due 20 days after the petitioner's brief is filed, and the petitioner's reply brief will be due 15 days after the respondent's brief is filed. TEX. R. APP. P. 55.7. It is important to note that the Court almost invariably states in the request for full briefing that the parties cannot rely on the mailbox rule in filing briefs. *See* TEX. R. APP. P. 9.2(b). Thus, counsel must make sure that requested briefs are physically on file with the Court the day they are due.

Almost invariably, a law clerk will be assigned the task of preparing the study memo and will generally be given 30 days after the filing of the respondent's brief on the merits to complete the memo. Although the Justices are in no way bound by the recommendation, the study memo will typically recommend a "grant" or "deny," and, in some cases, specific disposition of the petition. At this stage of the proceeding, the Justices usually will review the study memo, not the briefs themselves. Thus, the target audience at this stage is someone who, while bright, is fresh out of law school. The briefing should be sensitive to the relative inexperience of the law clerk, in whose hands the fate of the case largely rests. However, the briefing also should be careful not to offend the law clerk. One law clerk we spoke to provided as an example of an offensive argument one that declared, "this issue is so simple that even a recent law grad could figure it out," ignoring that a "recent law grad" was preparing the study memo for the Court.

Counsel should also make every effort possible to assist the law clerk. One suggestion we heard is to make an especial effort to include detailed and accurate cites to the appellate record. Law clerks understandably become frustrated if

they must dig through a voluminous record in addressing a legal issue, with little guidance from counsel as to where to find the record support for legal arguments.

Another helpful suggestion that we heard concerned electronic briefing. At the time the Clerk's office sends out the notice requesting full briefing, counsel is requested to file their briefing both physically and electronically. Instead of just submitting a simple PDF of the brief, counsel should submit a PDF in searchable format with the security feature disabled so that the law clerk can cut and paste from the brief. The law clerk and Staff Attorneys with whom we spoke to also made clear that electronic briefs with hyperlinks to cases and record materials are also very much appreciated.

B. To File or Not to File

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

Interestingly, many petitioners have elected not to file a brief but have decided, instead, to stand on their petitions. There is nothing inherently wrong with such a decision; indeed, a number of Justices seem to be impressed with the confidence this communicated with respect to the initial filing. However, in most cases something additional can be done to improve on the petition, and counsel should take the opportunity to do so. There are exceptions. For example, if a mandamus petition addressed a single, narrow issue that was fully addressed in the initial filing, there may no good reason to file a brief on the merits that merely covers the same ground. Similarly, if the petition for review constitutes nothing more than a "me too" filing—advising the Court that the controlling issue on appeal is governed by another case on which the Court has granted review and that remains pending—there may no call to provide additional briefing. In cases falling outside these exceptions, however, counsel should consider the following guidelines before deciding to forego an opportunity to provide full briefing. If counsel ultimately elects to stand on the petition without further briefing, the Court should be informed of that intention.

1. Unbriefed Issues

Under the rules governing the **petition for review,** the petitioner can preserve certain issues for review by raising them in the petition but reserving briefing on them for the brief on the merits. *See* TEX. R. APP. P. 53.2(f), (i). No comparable provision exists regarding a **mandamus petition**. Of course, just because the petitioner has preserved an unbriefed issue for review does not mean that the petitioner is required to forever cling to that issue and address it in the brief on the merits. The issue should be closely scrutinized afresh at this stage in the proceeding. Weak issues that could materially detract from the strength of others should be abandoned at this point. However, if the petitioner would like to further preserve an issue for review, that issue must be fully briefed and argued, not merely raised, in the brief on the merits. Otherwise, the issue is deemed waived.

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

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

In further developing these arguments, however, counsel should not wear out their welcome. The opportunity to brief up to 50 pages should in no sense challenge counsel to fill up those pages. As always, the tighter the brief is, the better.

C. Supplement to Petition or Stand-Alone Document

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

Technically, the rules allow the petitioner or respondent to file in lieu of a brief on the merits the brief that the party filed in the court of appeals. *See* TEX. R. APP. P. 55.5. While the authors strongly recommend against this practice, should the party choose this course of action, 12 copies of the brief must be filed with the Court.

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

The rules setting forth the contents of the **petition for review** on the one hand and the brief on the merits on the other hand are almost identical. *Compare* TEX. R. APP. P. 53.2 *with* TEX. R. APP. P. 55.2. As noted above, the rules make no provision for briefs on the merits with respect to a **mandamus** proceeding. However, the Court has adopted internal operating procedures for full briefing in mandamus proceeding that closely track the rules for full briefing in petition for review proceedings. The relatively few differences between the rules applicable to a petition for review and those applicable to the brief on the merits are discussed below. This discussion should be considered equally applicable to a mandamus proceeding, unless noted otherwise.

1. Issues Presented

In most cases, the issues presented in the brief on the merits will be identical to those presented in the petition. The petitioner may elect, however, to abandon issues in the brief that were presented in the petition. The petitioner also may elect to word one or more issues differently, so long as the substance remains the same and no new issues are added. *See* TEX. R. APP. P. 55.2(f) ("The phrasing of the issues or points [in the brief on the merits] need not be identical to the statement of issues or points in the petition for review, but the brief may not raise additional issues or points or change the substance of the issues or points presented in the petition."). In her paper on drafting issues, Pam Baron suggests that "[the petitioner may want to rewrite the issues in the brief to make them more argumentative."[46] That will often be the case if the issues in the petition are stated neutrally as Baron suggests. *See* Section V.B.6.d(ii), *supra*.

2. Argument

The argument section of the petition must include a statement of the reasons why the Supreme Court should exercise jurisdiction to hear the case. TEX. R. APP. P. 53.2(i). The attached sample petition includes this discussion in section I on pages 4-6. The rules contain no comparable requirement with respect to the brief on the merits. The provision concerning argument in the brief on the merits simply states: "The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 55.2(i).

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

In preparing the argument section of the brief on the merits, counsel should also be mindful of the fact that the law clerks are instructed to include in their study memos a section addressing preservation of error. Petitioner's counsel can assist the law clerk by addressing preservation in the merits brief, with detailed citation to those portions of the record showing that the issue

[46] Baron, *supra* note 16, at 8.

presented to the Supreme Court for review was preserved in the courts below. Because many law schools do not devote much teaching to the issue of preservation, counsel are advised to present the preservation argument in a readily understandable fashion.

3. Appendix

The rules governing the petition contain a relatively lengthy section concerning the appendix. *See* TEX. R. APP. P. 53.2(k). In contrast, the rules governing the brief on the merits contain no provision whatsoever concerning an appendix. *See* TEX. R. APP. P. 55.2. The explanation for the discrepancy is relatively straightforward. The appendix to the petition serves essentially as a substitute for the record which will not be before the Court at the time it initially reviews the petition. By the time the Court receives the briefs on the merits, however, not only will the Court have the appendix to the petition before it, but also it will have the record itself—whenever the Court sets a briefing schedule for briefs on the merits, the Court also requests the record from the court of appeals. Thus, counsel should ordinarily not include an appendix as part of the filing of the brief on the merits. This is another pet peeve of the Justices—anything that might logically be attached as an appendix to a brief on the merits should already appear in the appendix to the petition or response, or otherwise be a part of the record now before the Court.

E. Response Brief

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

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

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

F. Reply Brief

The petitioner may file a reply brief addressing any matter in the brief in response. TEX. R. APP. P. 55.4. The Court may proceed, however, unaffected by the filing, or non-filing, of a reply brief. *Id.* The reply need not include the multifarious sections contained in the initial brief on the merits; argument alone is sufficient.

IX. SUBMISSION AND ARGUMENT

A. Submission without Oral Argument

By the vote of six of the nine Justices, the petition may be granted and the case decided without oral argument. TEX. R. APP. P. 59.1. Such cases are typically, but not invariably, disposed of by *per curiam* opinion. Summary disposition without oral argument provides a means for the Court to engage in error correction in cases not involving issues of substantial jurisprudential importance. It also provides a means for the Court to resolve cases involving a narrow legal question, such as the applicability or inapplicability of a particular rule in a given set of circumstances.

B. Submission with Argument

If the Court decides to take the case and determines that argument would be helpful, it will set the case for oral argument and notify the parties

of the submission date. TEX. R. APP. P. 59.2. In the unlikely event that the Court has not already requested briefs on the merits, it will provide the parties with the opportunity to fully brief the case before argument.

C. Time for Argument

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

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

D. Number of Counsel

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

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

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

E. Argument by Amicus Curiae

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

F. Purpose of Argument

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

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

G. Oral Argument Exhibits

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

1. Charts

Generally speaking, charts do not materially assist with argument; handouts are better. If charts are used, care should be taken to ensure that they will be legible from the bench and will not

interfere with the argument. The charts must be presented to the Clerk's office before the argument, together with a $25 filing fee. The Clerk will deliver the charts to the courtroom. After the argument, the charts must be removed by counsel. If charts are used, they should also be duplicated as handouts for the Court (12 copies); no additional fee will be required in this event.

2. Handouts

If handouts for the individual Justices are used, an original and 11 copies must be filed with the Clerk, together with a $25 filing fee, before the argument. The Clerk is responsible for placing the handouts on the bench; counsel submitting the handouts is responsible for delivering copies to opposing counsel. Care should be taken not to use too many handouts because, again, the Justices are typically active in their questioning, leaving little time for discussion of individual handouts. A useful technique is to spiral bind the handouts in the same fashion as a brief, with each handout appearing under a separately numbered tab. The cover should look the same as the brief, and be properly labeled, e.g., "Petitioner's Oral Argument Exhibits." By using separately numbered tabs, counsel can readily refer the Justices to a particular handout during the course of argument.

X. MOTION FOR REHEARING

Chief Justice Jefferson has described the task of convincing the Court to grant rehearing as "daunting and difficult."[47] The statistics in his CLE paper on motions for rehearing vividly bear out that assessment: in fiscal year 2001, the Court granted only 4% of all motions for rehearing (12 out of 283). The Court granted only 3% of motions for rehearing of petitions for review, and 14% of motions for rehearing on causes.

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

A. Motions for Rehearing Generally

1. Internal Procedures

Motions for rehearing are sent directly to the chambers of every member of the Court once they are filed. The following Tuesday, they are listed on the cumulative ballot sheet—the "purple vote sheet"—along with petitions for review, original proceedings, and other matters requiring disposition by the entire Court. Like petitions, a motion for rehearing is thereby placed on a "conveyor belt"—if no Justice takes an interest, the motion will be summarily denied in the orders issued by the Court four weeks following its initially being placed on the conveyor belt. Absent an order, rehearings are overruled by operation of law 180 days after filing.

It takes the vote of only one Justice to pull a motion for rehearing to be discussed at the Court's weekly Monday morning conference; it takes four votes to grant a motion for rehearing on denial of petition, and five votes to grant a motion for rehearing on a cause. If any Justice marks the case as a "grant," it will also be placed on the conference agenda.

The Justice who authored the majority opinion is charged with circulating a memorandum on any motion for rehearing of a cause. With respect to the motions for rehearing of petitions, Chief Justice Jefferson observed: "Depending on the quality of the rehearing motion or the gravity of the subject matter at issue, the conference may be preceded by significant deliberations among the various chambers about the merits of granting the petition. On rare occasions, formal memoranda analyzing the merits of a grant or denial may accompany these largely informal deliberations."[48]

2. Deadline

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

[47] Justice Wallace B. Jefferson, *Motions for Rehearing on Denial of Petition*, State Bar of Texas, Practice Before the Supreme Court of Texas (2002), Chapter 9, at 3.

[48] *Id.* at 1.

3. Extensions of Time

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

B. Page Limitations

The motion or response may not exceed 15 pages. TEX. R. APP. P. 52.9, 64.6. Unlike the rules governing the petition for review and mandamus petition, the rules currently make no provision excluding particular sections from the page limitation of a motion for rehearing, nor do they make any provision for moving to extend the page limitation. *See id.* Accordingly, unless this Rule is ultimately amended by the Court, prudent counsel should confine the entire motion or response to 15 pages, regardless of content.

C. No Successive Motions

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

D. Motion for Rehearing on Denial of Petition

1. Whether To File

Perhaps the most difficult strategic call with regard to a motion for rehearing is whether to file at all. As set forth above, the chances of garnering rehearing on a denial of a petition are quite small. On the other hand, the stakes are high—the client has just lost the final opportunity for judicial review, and the pressure to file a motion for rehearing can be intense. A typical client also wants an assessment of the likelihood of success on the petition. Chief Justice Jefferson has written: "There is no easy way to distinguish cases worthy of reconsideration from those that are not. . . . Nevertheless, it seems clear that some factors, in combination with the 'right' case, counsel in favor of filing a motion for rehearing."[49] He identifies the following three factors:

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

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

- Additional, conflicting authority since the petition was filed
- Additional authority applying the opinion subject to review, demonstrating the issue is likely to recur.

2. Strategy

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

Don't rehash the petition. The Justices' most common complaint about motions for rehearing is that the motion "simply rehashes arguments previously raised and rejected."[50]

Update your research. The focus of post-denial research should not be to dig up a new argument, but to identify any intervening changes in the law that might change the Court's perspective on the petition. The practitioner should research whether the adverse court of appeals' decision has been applied by or criticized by other courts of appeals since the petition was filed. Research should also focus on whether any newly enacted statute or United States Supreme Court decision bears on the issues raised in the petition.

Describe changes in the law. If the practitioner is fortunate enough to uncover a subsequent legal development, the motion for rehearing should take full advantage by describing

[49] *Id.* at 2.

[50] *See, e.g., id.* at 2.

the change and how it makes the petition more grant-worthy.

Go back to basics. The ultimate goal of a motion for rehearing is essentially the same as that of the petition: grab the Court's attention and explain why the issue is important to the jurisprudence of the state. Take a cold look at the petition to see whether the petition missed an opportunity to explore the broader implications of the court of appeals' decision.

Get a second opinion. Ask another lawyer to give you a second opinion to gain a fresh perspective. Although a motion for rehearing is not a place for new arguments, a second opinion can help the practitioner re-frame or refine an issue that catches the Court's attention in a way that the initial approach did not.

Use a respectful tone. To paraphrase Justice Hecht's advice in a CLE presentation, if you are filing a motion for rehearing for the therapeutic value, draft it, vent as much as you want, and then put it in your desk drawer. If you file a motion the tone of which is "desk drawer" material, you risk irreparably damaging your professional reputation with the Court and will inevitably do a disservice to your client. As Chief Justice Jefferson has observed: "A measured tone that respects opposing counsel and the Court has a greater chance of success than one expressing hysteria and spite."[51] Being on the losing end is understandably frustrating, but the motion for rehearing should not be used to attack the Court.

Don't put to pen an excited utterance. "The Court is no more likely to grant the petition because it is clothed in exclamation points and italics."[52] In other words, saying the same thing, but saying it louder, is not an effective strategy.

Don't take a kitchen-sink approach. As in the petition itself, the practitioner should use good professional judgment in advancing only the strongest argument. In the case of a motion for rehearing, the authors suggest that this means focusing on a single issue, rather than attempting to re-urge each of the issues raised in the initial petition.[53]

Evaluate unbriefed issues. As discussed above, a **petition for review** may include unbriefed issues for review. If the petition included unbriefed issues, consideration should be given as to whether any of those issues provides a basis for rehearing. Chief Justice Jefferson identified as a characteristic of an effective motion one that "presents arguments involving important jurisprudential issues that were preserved but not directly addressed in the petition for review."[54]

Don't raise issues not preserved for review. No matter how brilliant an argument is, if it was not preserved for review, the Court will not consider it.

Seek out amici curiae. Obtain support of amici curiae when appropriate. "If used appropriately, amicus briefs can be influential and may mark as the difference between a grant and a denial."[55]

E. Motion for Rehearing of Cause

Though the Court is more likely to grant rehearing of a cause than denial of rehearing, the odds are still against the movant. By the time the Court issues an opinion, the authoring Justice and his or her staff have spent weeks or, in some cases, months working on the opinion. The Justices have discussed the opinion in at least one conference and in some cases at many conferences. As Justice Hecht recently put it: "The difficulty is in convincing Justices who have already thought hard about the case to take a new look."[56] Because the Court has already carefully considered the arguments advanced in the briefs on the merits, a party seeking rehearing will get nowhere by simply re-asserting those arguments.

[51] *Id.* at 2.
[52] *Id.* at 1.
[53] *Id.* at 3 (An ineffective motion "addresses numerous issues that should have been left on the cutting room floor rather than focusing thoroughly on one significant issue.").
[54] *Id.* at 2.
[55] *Id.* at 3.
[56] Justice Nathan L. Hecht, *Motions for Rehearing of Causes in the Texas Supreme Court: Making the Last Bullet Count*, State Bar of Texas, Practice Before the Supreme Court of Texas (2002), Chapter 11, at 5.

Instead, a motion for rehearing of a cause should focus specifically on some aspect of the Court's decision and use the decision as the starting point for any argument. An effective motion for rehearing will expose any material facts that the Court has misstated or appears to have misapprehended, identify errors in the Court's legal analysis, and identify any adverse or unintended consequences of the Court's decision.[57] Justice Hecht advises counsel to "probe the Court's opinion for weakness, gaps in logic, misunderstood or misused precedent, misstated facts."[58] A motion for rehearing should also highlight any new authority that bears on the issue decided in the decision.

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

F. Response

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

XI. CONCLUSION

The rules governing petition practice have not changed appreciably since 1977. 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.

[57] *See* Mike A. Hatchell, *Motion for Rehearing Checklist*, University of Texas School of Law 12th Annual Conference on State and Federal Appeals (2002), Tab 10, at 1.

[58] *See* Hecht, *supra* note 63, at 4.

Bibliography

Douglas W. Alexander, *Mandamus: The Practitioner's Guide*, State Bar of Texas Annual Advanced Civil Trial Course (2005), Tab 25

Pamela Stanton Baron, *Drafting Issues in the Texas Supreme Court*, State Bar of Texas Annual Advanced Civil Appellate Practice Course (2001), Tab 6

Pamela Stanton Baron, *Help! The Other Side Has Filed a Petition for Review—What Do I Do Now?*, State Bar of Texas, Practice Before the Supreme Court of Texas (2002), Chapter 6

Pamela Stanton Baron, *Texas Supreme Court Docket Analysis: September 1, 2007*, State Bar of Texas, Annual Advanced Civil Appellate Practice Course (2007), Ch. 4

Pamela Stanton Baron & Stacy R. Obenhaus, *The Texas Supreme Court by the Numbers: A Statistical Survey*, University of Texas School of Law Annual Conference on State and Federal Appeals (2001), Tab 18

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

Bryan A. Garner, *Issue-Framing: The Upshot of It All*, State Bar of Texas Annual Advanced Civil Appellate Practice Course (1997), Tab O

W. Wendell Hall, *Standards of Review in Texas*, 38 St. Mary's L.J. 47 (2006)

Justice Deborah Hankinson, *Framing Issues Under the New Rules: A View from the Supreme Court*, 5 THE APPELLATE LAWYER 4 (Houston Bar Ass'n Appellate Practice Section Winter 1998-1999)

Mike A. Hatchell, *Motion for Rehearing Checklist*, University of Texas School of Law 12th Annual Conference on State and Federal Appeals (2002), Tab 10

Justice Nathan L. Hecht, *Motions for Rehearing of Causes in the Texas Supreme Court: Making the Last Bullet Count*, State Bar of Texas, Practice Before the Supreme Court of Texas (2002), Chapter 11

Justice Wallace B. Jefferson, *Motions for Rehearing on Denial of Petition*, State Bar of Texas, Practice Before the Supreme Court of Texas (2002), Chapter 9

Charles B. Lord, *Understanding the New Petition for Review Process*, State Bar of Texas, Practicing Under the New Texas Appellate Rules (1997), Tab I

Russell H. McMains, *Drafting a Respondent's Brief*, State Bar of Texas, Practice Before the Supreme Court of Texas, (2002), Chapter 8

E. Lee Parsley & Julie Caruthers Parsley, *Texas Supreme Court Internal Procedures and Statistics*, University of Texas School of Law Annual Conference on State and Federal Appeals (1999), Tab 3

Robert H. Pemberton, *One Year under the New TRAP: Improvements, Problems and Unresolved Issues in Texas Supreme Court Proceedings*, State Bar of Texas Annual Advanced Civil Appellate Practice Course (1998), Tab B

Chief Justice Thomas R. Phillips, *Thinking Inside the Box: A Review of the Supreme Court's Caseload Statistics and What Those Numbers Mean in Real Life*, State Bar of Texas, Practice Before the Supreme Court of Texas (2002), Chapter 1

Elizabeth V. Rodd, *What is Important to the Jurisprudence of the State?*, State Bar of Texas, Practice Before the Supreme Court of Texas (2002), Chapter 4

Andrew Weber, Ginger Rodd, Blake Hawthorne & Douglas W. Alexander, *Supreme Court of Texas Internal Operating Procedures*, University of Texas School of Law Annual Conference on State and Federal Appeals (2006), Tab 14

FLOWCHART FOR PETITION FOR REVIEW FILINGS

Clerk's Office

Petition received and tracked in Case Management

Votes required for the Supreme Court to take specific actions:

Request Response	1
Request Record	1
Request Briefs	3
Grant	4
Dismiss WOJ	5
Refuse	6
Hold	6
Improvident Grant	6
Per Curiam	6
Majority Opinion	5
Rehearing - Denial	4
Rehearing - Cause	6

Filings sent to Administration for distribution to Justices' Chambers

Petitions forwarded to Justices each Tuesday afternoon after earliest of one of following:
(1) 30 days has expired;
(2) response filed; or
(3) response waiver filed.

*Rehearing of Causes – sent directly to Justices, included on purple vote sheets with weekly forwarding of Petitions, and memo due from author of majority opinion.

*Rehearing of Petitions – sent directly to Justices and included on purple vote sheets with weekly forwarding of Petitions.

**Rehearings overruled by operation of law 180 days after filed.*

Miscellaneous Motions – sent directly to Motions Judge

Decisions reported back to Administration

Purple vote sheets due by noon on 4th Monday after forwarding.

Agenda

Sent to conference for discussion. Unless one or more Justices request discussion or other action, Petition or Rehearing Motion automatically denied on next Thursday's orders.

Conference

Court discusses drafts of Opinions, Per Curiams, Rehearings, Petitions, and assigns study memos (which triggers (1) request for Briefs on the Merits, and (2) request for Record).

Justice's Chambers

Justice/Staff rewrite opinions/per curiam drafts, review pulled Petitions, write study memos.

Orders

Final disposition of filing

APPENDIX 1

APPENDIX 2

CONFIDENTIAL INFORMATION

Petitions Forwarded as of: Tuesday, 5/13/2008

VOTES DUE : Tuesday, 6/10/2008, 12:00 noon

To Be Denied On: Friday, 6/13/2008

Chief Justice Jefferson

Petition for review

Case #	Style	Response Requested	Record Requested	Conference								Deny	Not sitting	Currently Not Sitting
				Discuss	Memo	PC	Grant	WOJ	Refuse	Hold	Dismiss			
08-XXXX	HAWTHORNE v. HARVEL													
08-YYYY	GOLIATH OIL v. DAVID JONES													
08-XXXY	COWBOYS v. EAGLES													
08-YYYX	UNIV.TEXAS v. TEXAS A&M UNIV.													
Rehearing														
07-XXXX	HAMBY v. SONEGO													
07-XXXX	SCHNEIDER v. HAWTHORNE													
Original proceeding														
0-XXXX	IN RE WILLIAMS													

APPENDIX 3

No. 04-0243

IN THE
SUPREME COURT OF TEXAS

CMMC,
Petitioner,

v.

AMBROCIO SALINAS,
Respondent.

On Petition for Review from the
Third Court of Appeals at Austin, Texas
03-02-00685-CV

PETITION FOR REVIEW

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INDEX OF AUTHORITIES

Cases

Constitutional Provisions, Statutes, and Rules

STATEMENT OF THE CASE

Nature of the Case and Parties:	This is a product liability personal injury suit by Ambrocio Salinas against CMMC, a French corporation.
Trial Court:	The Honorable Burt Carnes, 368th Judicial District Court, Williamson County.
Trial Court's Disposition:	Dismissed for lack of personal jurisdiction (App. 1).
Court of Appeals:	Third Court of Appeals; Justice Smith, joined by Justices Powers and Kidd. *Salinas v. CMMC*, 106 S.W.3d 138 (Tex. App.—Austin 2003, pet. filed) (App. 2).
Court of Appeals' Disposition:	Reversed and remanded.

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction of this case under Government Code Section 22.001(a)(6) because this case presents an important issue of constitutional law of first impression to this Court that is likely to recur in future cases.

ISSUES PRESENTED

1. Can personal jurisdiction over a foreign manufacturer be based solely on the manufacturer's knowledge that its product would be shipped to Texas, under either the formulation of the stream-of-commerce doctrine articulated by Justice O'Connor or the one articulated by Justice Brennan in *Asahi Metal Industry v. Superior Court*?

2. Assuming that such knowledge were sufficient for personal jurisdiction to attach under Justice Brennan's broad formulation, should Texas follow his formulation or Justice O'Connor's narrower one?

3. Does the exercise of personal jurisdiction over the foreign manufacturer here, CMMC, offend traditional notions of fair play and substantial justice? [unbriefed]

TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioner, CMMC, a French manufacturer of winery equipment, submits this Petition for Review of the decision of the Third Court of Appeals at Austin, which reversed the trial court's dismissal of the claims against CMMC for lack of personal jurisdiction. The court of appeals erroneously concluded that personal jurisdiction over a foreign manufacturer can be based on the manufacturer's mere knowledge that its product would be shipped to Texas.

STATEMENT OF FACTS

The court of appeals correctly stated the nature of the case with one critical exception. Contrary to the court of appeals' opinion, CMMC, a French manufacturer of wine equipment, did not sell, ship, or market either the winepress that allegedly caused Salinas' injuries or any other CMMC product to a Texas resident. The press was in Texas as a result of KLR Machines, Inc.'s unilateral purchase of the press for resale to Hill Country Cellars.

CMMC manufactures and sells winery equipment, principally in Europe, and more particularly, in France. CR 19. CMMC's principal office is located in Chalonnes, France. *Id.* CMMC has never maintained a place of business in Texas nor had any employee or representative in Texas. CR 9, 20-21. CMMC has never marketed or advertised any product in Texas. CR 21. CMMC has made only a few isolated sales of equipment in Texas. CR 20. CMMC wired this press for use in the United States, but not for use in any particular state. CR 30.

KLR, a New York corporation, is an independent distributor of equipment used in the production of wine and other beverages. RR 3:12–13. CMMC sold the press to KLR. RR 3:15. Like CMMC, KLR has no office in Texas nor does it employ anyone in Texas. RR 3:17-18. In the past ten years, KLR has made only three sales of equipment to Texas residents, including this one. RR 2:88, 89, 128; 3:19. KLR directs its marketing primarily toward the Sonoma and Napa Valleys of California, although it has advertised CMMC products in two wine magazines with national circulation. RR 3:10. CMMC did not specifically approve or authorize these advertisements. *Id.* CMMC and KLR have no business relationship other than that of buyer and seller. *Id.* The two companies share no employees and have no contractual relationship. RR 3:28–29, 135.

Hill Country Cellars, a small winery in Cedar Park, Texas, contacted the California offices of KLR Machines, Inc., to purchase the press. CR 25. KLR ordered the press from CMMC. CR 30. KLR drafted the purchase agreement between Hill Country and KLR, Hill Country paid KLR for the press, and KLR in turn paid CMMC. CR 33. KLR arranged and paid for the press to be shipped to the port of Houston. CR 25. CMMC never had any direct contact with Hill Country. CR 26.

Ambrocio Salinas, a Hill Country employee, injured his arm, allegedly while cleaning the press bought by his employer from KLR. CR 12. He brought this suit for damages against CMMC. CR 1. CMMC filed a special appearance, CR 6-8, which the trial court sustained. CR 60; App. 1. The court of appeals reversed and remanded, and subsequently overruled CMMC's motion for rehearing on January 19, 2004. By this petition, CMMC seeks this Court's review of the court of appeals' judgment.

SUMMARY OF ARGUMENT

The court of appeals erroneously held that personal jurisdiction can be exercised over a foreign manufacturer like CMMC by the Texas courts based on the manufacturer's mere knowledge that its product would be shipped to Texas. This constitutional error raises issues of fundamental importance to the jurisprudence of the state.

Personal jurisdiction cannot be exercised over CMMC under the stream-of-commerce doctrine. Jurisdiction does not attach under that doctrine here under either the narrower formulation of the doctrine articulated by Justice O'Connor or the broader one articulated by Justice Brennan in *Asahi Metal Industry v. Superior Court*, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987). Justice O'Connor's expression of the doctrine does not permit the exercise of jurisdiction because CMMC never engaged in any action purposefully directed at Texas. Justice Brennan's view of the doctrine would not allow jurisdiction to attach because this isolated shipment was not part of a regular and anticipated flow of products from CMMC to Texas.

Even if this Court were to conclude that Justice Brennan's broad formulation of the stream-of-commerce doctrine would permit the exercise of personal jurisdiction over CMMC, this Court should decline to adopt his view. The court of appeals erroneously concluded that prior precedent of this Court compelled such a result. To the contrary, precedent from this Court, if anything, supports the adoption of Justice O'Connor's narrower formulation. Moreover, her formulation more closely comports with the fundamental purpose underlying the due process guarantee in this context.

ARGUMENT

I. This Court should exercise jurisdiction to resolve the important constitutional question that this case presents concerning the scope of personal jurisdiction over foreign manufacturers.

This petition presents an important core issue concerning the scope of personal jurisdiction under the Texas long-arm statute: Does the Fourteenth Amendment permit a Texas court to take personal jurisdiction over a foreign manufacturer merely because it knew that its product would be shipped to Texas? The court of appeals answered this question "yes." CMMC respectfully submits the correct answer is "no." This Court should exercise its discretionary jurisdiction by granting this petition and definitively resolving this legal question.

The court of appeals' published opinion involves an important error of constitutional dimensions that merits correction by this Court. *See* TEX. R. APP. P. 56.1(a)(4), (5). If mere *knowledge* that one's product will end up in Texas is sufficient for personal jurisdiction to attach, as the court of appeals held, then many other foreign manufacturers will find themselves in precisely the same predicament as CMMC: forced to defend a lawsuit thousands of miles from home in a forum where the foreign manufacturer never purposefully directed any business activities. This cannot be the law in Texas.

Controlling authority of the United States Supreme Court precludes such a result. *See Asahi Metal Indus. v. Superior Court*, 480 U.S. 102 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Int'l Shoe*

Co. v. Washington, 326 U.S. 310 (1945). In order to conform Texas law on this important jurisdictional point with the constitutional principles articulated by the United States Supreme Court in these decisions, this Court should grant this petition for review and correct the error of the court of appeals. *See* TEX. R. APP. P. 56.1(a)(4)–(6).

The due process guaranteed by the United States Constitution limits the reach of the Texas long-arm statute, TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1997). U.S. CONST. amend. XIV, § 1; *Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 226 (Tex. 1991). By defining the outer boundaries of personal jurisdiction in this case, the Court can provide trial courts with clear guidance in this area of profound constitutional importance. Defining the contours of personal jurisdiction is important to the jurisprudence of this state. *See CSR Ltd. v. Link*, 925 S.W.2d 591, 594-96 (Tex. 1996).

The Court has never addressed the issue presented here. This Court should address this issue for a simple reason: Foreign manufacturers are entitled to know under what circumstances they can be subjected to the jurisdiction of a Texas court. As this Court has stated, "[m]inimum contacts are particularly important when the defendant is from a different country because of the unique and onerous burden placed on a party called upon to defend a suit in a foreign legal system." *CSR Ltd.*, 925 S.W.2d at 595 (citation omitted).

The court of appeals' opinion itself illustrates the continuing confusion over the standard by which personal jurisdiction is measured. As that court itself correctly recognized, "a definitive standard remains elusive." *Salinas*, 76 S.W.3d at 142. Because

the factual circumstances of this case are of a nature likely to recur again and again, the application of the governing standard here merits clarification by this Court. *See* TEX. R. APP. P. 56.1(a)(6).

II. The court of appeals erred in reversing the trial court's dismissal of the claims against CMMC for lack of personal jurisdiction because, as a matter of law, personal jurisdiction over a foreign manufacturer cannot be based on the manufacturer's mere knowledge that its product would be shipped to Texas.

The linchpin of the court of appeals' minimum contacts analysis is simply this: "CMMC *knew* that the press was being sent to Hill Country for use in Texas." *Salinas*, 76 S.W.3d at 141 (emphasis added). This is true. But such knowledge, in itself, is insufficient to establish personal jurisdiction over CMMC. Other factual findings by the court of appeals in support of its jurisdictional analysis are either incorrect or unsupported by the record.[1]

The touchstone of the jurisdictional analysis in this case is the decision of the United States Supreme Court in *Asahi*, 480 U.S. at 105-21, 94 L. Ed. 2d at 100-11. As demonstrated in Section II. A., below, under either Justice O'Connor's or Justice

[1] CMMC's involvement with the press consisted of nothing more than setting it out on the loading dock in Chalonnes, France. RR 85, 70-71. The press was bought by KLR, which, in turn, sold it to Hill Country. CR 30. *All* of the shipping arrangements and payment for same were made by KLR, not by CMMC. CR 25. Given these uncontroverted facts, the following findings by the court of appeals are simply wrong: that CMMC sent the press FOB to the Port of Houston; that CMMC shipped the press directly to Texas; that CMMC sold a completed press to a known user in Texas; that this was a single, direct shipment of an item purchased from CMMC by Hill Country; that CMMC's extraterritorial conduct was specifically directed at Texas; that CMMC placed its product into the stream of commerce in Texas; and that CMMC chose to deliver its product into this state's stream of commerce. *See Salinas*, 76 S.W.3d at 140, 144, 145.

Brennan's formulation of the stream-of-commerce rule in *Asahi*, mere *knowledge* that one's product would be shipped to the forum state is insufficient to establish jurisdiction over the foreign manufacturer. As demonstrated in Section II. B, below, even if this case required this Court to take sides in the *Asahi* debate, Texas should follow the narrower formulation articulated by Justice O'Connor rather than the broader one articulated by Justice Brennan.

A. Under either formulation of the stream-of-commerce rule in *Asahi*, jurisdiction cannot be exercised over CMMC merely because it *knew* that its product would be shipped to Texas.

The United States Supreme Court recognized the so-called stream-of-commerce doctrine as a basis for personal jurisdiction in *World-Wide Volkswagen*, 444 U.S. at 297-98. Seven years later, in *Asahi*, the Court split down the middle in its formulation of the scope of the doctrine. *Asahi*, 480 U.S. at 105-16; *id*. at 116-21(Brennan, J., concurring in part and concurring in judgment); *id.* at 121-22(Stevens, J., concurring in part and concurring in judgment).

In *Asahi*, Justice O'Connor, writing a plurality opinion for four members of the Court, squarely concluded that mere "awareness that the stream of commerce may or will sweep the product into the forum State" is insufficient to establish personal jurisdiction over the foreign manufacturer of that product. *Asahi*, 480 U.S. at 112. Rather, for jurisdiction to attach, the defendant must "purposefully avail itself of the market in the forum State." 480 U.S. at 110. More particularly, the "'substantial connection' between the defendant and the forum State necessary for a finding of minimum contacts must

come about by *an action of the defendant purposefully directed toward the forum State*." 480 U.S. at 112 (emphasis in original) (internal citations omitted).

Justice Brennan, also writing for four members of the Court in a concurring opinion, expressed a different view as to the scope of the stream-of-commerce doctrine. In his view, no showing of additional conduct by the defendant directed toward the forum should be required for jurisdiction to attach. *Asahi*, 480 U.S. at 117 (Brennan, J., concurring in part and concurring in the judgment). Nonetheless, even under his formulation, regular sales of the product in the forum state would be required:

> The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as the participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise.

Id.

Here, under either formulation, personal jurisdiction cannot be exercised over CMMC by a Texas court. First, CMMC never took any action purposefully directed toward Texas within the meaning of Justice O'Connor's formulation. Merely placing the press on its own loading dock in France cannot even properly be characterized as CMMC's placement of the press into the "stream of commerce." And even if it could be, that action, alone, would be insufficient for jurisdiction to attach under Justice O'Connor's explanation of the doctrine: "The placement of a product into the stream of commerce, *without more*, is not an act of the defendant purposefully directed toward the forum State." *Asahi*, 480 U.S. at 112 (emphasis added). In short, CMMC's conduct falls

far short of that necessary for personal jurisdiction to attach under the view expressed by Justice O'Connor.

Nor can jurisdiction be exercised over CMMC under the view expressed by Justice Brennan. The press manufactured by CMMC did not find its way to Texas through any regular activity of CMMC, or of KLR, for that matter. Other than by advertisements in magazines with national circulation, neither CMMC nor KLR marketed their products in Texas. RR 2:10; CR 21. Hill Country's purchase was a one-time transaction. Neither CMMC nor KLR contacted Hill Country; Hill Country contacted KLR. CR 25. Indeed, no one at Hill Country had any contact whatsoever with CMMC. CR 26. Even under Justice Brennan's formulation, CMMC's mere *knowledge* that its press would be shipped to Texas would not be sufficient for jurisdiction to attach. That isolated shipment was not part of a "regular and anticipated flow of products" from CMMC to Texas. *Asahi*, 480 U.S. at 117 (Brennan, Jr., concurring in part and concurring in the judgment). In short, what CMMC placed its product into was no "*stream* of commerce" flowing into Texas; at most, it was a trickle.

B. Should it reach the issue, this Court should adopt Justice O'Connor's narrow formulation of the stream-of-commerce rule rather than Justice Brennan's broader one.

As demonstrated above, this Court need not take sides in the *Asahi* debate over the proper formulation of the stream-of-commerce doctrine; under either view, personal jurisdiction cannot properly be exercised over CMMC. But should it reach the issue, this Court should adopt Justice O'Connor's formulation.

The court of appeals itself reached this issue and elected to follow Justice Brennan's formulation. *See Salinas*, 903 S.W.2d at 143-44. CMMC respectfully submits that the court of appeals' reasoning on this point is flawed. The court predicated its conclusion to follow Justice Brennan's analysis on this Court's decision in *Keen v. Ashot Ashkelon, Ltd.*, 748 S.W.2d 91 (Tex. 1988), *cited in Salinas*, 76 S.W.3d at 143.

In *Keen*, this Court cited both *Asahi* and this Court's opinion in *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199 (Tex. 1985) (per curiam), stating: "A defendant's delivering of its product into the stream of commerce with the expectation that the product will enter the forum state will ordinarily satisfy the due process requirement of minimum contacts so as to afford that state personal jurisdiction over the defendant." *Keen*, 748 S.W.2d at 93 (other citations omitted). By this statement, however, this Court did not purport to adopt Justice Brennan's view, as the court of appeals concluded. To the contrary, the *only* formulation of the doctrine that this Court cites in *Keen* is Justice O'Connor's; no mention is made of Justice Brennan's. Thus, if anything, *Keen* suggests that this Court would follow Justice O'Connor's view.

Moreover, that view is the better one because it more closely comports with the purpose underlying the "minimum contacts" requirement. "Minimum contacts" is the first of two elements of the Fourteenth Amendment due process inquiry, the other being "fair play and substantial justice." *Burger King*, 471 U.S. at 476. The "minimum contacts" element is designed to ensure that the non-resident defendant has "fair warning that a *particular activity* may subject [the defendant] to the jurisdiction of a foreign sovereign. . . ." *Id.* at 472 (emphasis added) (citation omitted). Justice O'Connor's

formulation ensures that this "fair warning" is given. Unless the defendant takes action *purposefully directed* at the forum state, as her view of the doctrine requires, the foreign defendant, like CMMC, may well find itself haled into court in a foreign jurisdiction through precisely the type of "random, fortuitous, or attenuated" contacts that *Burger King* decries. *Id.* at 475; *see also CSR*, 925 S.W.2d at 594 (quoting *Burger King*). To preclude such a result, this Court, if it reaches the issue, should squarely reject the court of appeals' decision to adopt Justice Brennan's broad formulation and, instead, adopt the narrower view of the stream-of-commerce doctrine expressed by Justice O'Connor.

PRAYER

Because CMMC did not have minimum purposeful contacts with Texas, the court of appeals' decision that CMMC can be haled into a Texas court is inconsistent with basic due process guarantees. Accordingly, CMMC asks this Court to grant its Petition for Review, reverse the judgment of the court of appeals, and affirm the judgment of the trial court dismissing the suit against CMMC. CMMC also requests such further relief, general or special, to which it may show itself justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Review was served in accordance with the Texas Rules of Appellate Procedure by service listed to the following parties on March 4, 2004:

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APPENDIX 4

[Date]

Mr. Andrew Weber
Clerk, Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Re: No. _____; [*Style of Case*]; In the Supreme Court of Texas

Dear Mr. Weber:

This letter is in response to the Petition for Review filed by Petitioner, _____, on [date]. Pursuant to TEX. R. APP. P. 53.3, Respondent, _____, hereby waives the filing of a response unless and until one is requested by the Court.

Respectfully submitted,

_____
[Name]
Counsel for Respondent

[Add Certificate of Service]