

PLANNING AND DRAFTING THE PETITION FOR REVIEW

CHRISTINA CROZIER, *Houston*
Haynes and Boone, LLP

State Bar of Texas
**TEXAS SUPREME COURT:
HISTORY & CURRENT PRACTICE**
April 12, 2019
Austin

CHAPTER 7



Christina Crozier

Counsel

christina.crozier@haynesboone.com

Houston

1221 McKinney Street

Suite 2100

Houston, Texas 77010

T +1 713.547.2268

F +1 713.236.5439

Practices and Industries

Appellate

Litigation

Appellate Case Evaluation and Advice

Energy Appeals

Tort and Products Liability Appeals

Education

J.D., University of Houston Law Center, 2005

B.S., University of Texas at Austin, 2001, *with highest honors*

Bar Admissions

Texas, 2005

Court Admissions

United States Supreme Court

U.S. Court of Appeals for the Fifth Circuit

U.S. Court of Appeals for the Ninth Circuit

U.S. Court of Appeals for the Eleventh Circuit

U.S. District Court for the Southern District of Texas

U.S. District Court for the Eastern District of Texas

U.S. District Court for the Western District of Texas

Christina Crozier's appellate practice is centered around persuasive writing and practical litigation strategy. She is board certified in civil appellate law by the Texas Board of Legal Specialization. A natural oral advocate, Christina has argued cases before the Texas Supreme Court and numerous Texas courts of appeals. She has also authored legal briefing in the Fifth, Ninth, and Eleventh Circuits and the United States Supreme Court.

In addition to her work in appellate courts, Christina is regularly chosen to serve as appellate counsel on trial teams. By taking a strategic approach to legal briefing—including for example, motions for summary judgment, motions to strike experts, and motions to exclude evidence—Christina's work can significantly impact the value of a case before trial even begins. When cases proceed to trial, Christina handles the jury charge, arguments to the court, and error preservation, freeing trial lawyers to devote their time to the presentation of the evidence.

Christina is a regular speaker and writer on a variety of topics, including error preservation, the jury charge, arbitration-related litigation, and attorney's fees.

A native Houstonian, Christina is active in her community. Christina is on the executive board of the Women's Fund for Health Education and Resiliency, an organization dedicated to teaching local women and girls about health and resilience. Christina is also on the council of the Houston Bar Association Appellate Section, where she has served as editor in chief of the Appellate Lawyer and chair of the pro bono committee.

Professional Recognition

- Board Certified in Civil Appellate Law by the Texas Board of Legal Specialization (2019)
- Recognized by Texas Super Lawyers Rising Stars, Thomson Reuters, 2010-2015

Professional and Community Activities

- Houston Bar Association Appellate Section, Council Member (2016-present); Judicial Reception Committee Chair (2018-2019); Appellate Lawyer Editor in Chief (2017-2018); Pro Bono Committee Chair (2016-2017)
- Board of Trustees and Executive Committee, The Women's Fund for Health Education and Resiliency (2013-present)

TABLE OF CONTENTS

I. THE TEXAS SUPREME COURT PROCESS 1
 A. The Petition for Review 1
 B. Briefs on the Merits..... 1
 C. Oral Argument and Opinion..... 1

II. PETITION DEADLINES 2

III. THE RECORD..... 2

IV. SELECTING YOUR ISSUES 2
 A. Jurisdiction 2
 B. Factors Suggesting Importance 2
 C. Determining the Proper Number of Issues 3
 D. Reserving Issues 3

V. DRAFTING AND FILING THE PETITION FOR REVIEW 3
 A. Parts of the Petition for Review 3
 B. Word Limits 4
 C. Formatting 4
 D. Filing 5

VI. AMICUS SUPPORT..... 5

VII. RESPONDING TO THE PETITION 5
 A. Waiver of Response 5
 B. Cross Petitions..... 5
 C. Parts of a Response to the Petition for Review 6
 D. Common Arguments in Response..... 6

VIII. WRITING TIPS FOR PETITIONS FOR REVIEW 6
 A. Stand out..... 6
 B. It’s not all about you. 7
 C. Do not be aggressive in your tone. 7
 D. You can be aggressive about the issues you pursue..... 7
 E. Headings should tell a story. 7

IX. CONCLUSION..... 7

TABLE OF AUTHORITIES

Page(s)

Cases

Adams v. Starside Custom Builders, LLC,
547 S.W.3d 890 (Tex. 2018) 6

Exxon Mobil Corp. v. Rincones,
520 S.W.3d 572 (Tex. 2017) 5

Fort Worth Transp. Auth. v. Rodriguez,
547 S.W.3d 830 (Tex. 2018) 3

Hughes v. Tom Green County,
No. 17-0409, __S.W.3d__, 2019 WL 1119904 (Tex. Mar. 8, 2019) 2

Mar. Overseas Corp. v. Ellis,
977 S.W.2d 536 (Tex. 1996) 3

Sw. Bell Tel. Co., L.P. v. Mitchell,
276 S.W.3d 443 (Tex. 2008) 7

Texas Mut. Ins. Co. v. Ruttiger,
381 S.W.3d 430 (Tex. 2012) 7

Statutes and Rules

TEX. GOV'T CODE § 22.001 2

TEX. R. APP. P. 53.7(g) 5

TEX. R. APP. P. 9.2(c)..... 5

TEX. R. APP. P. 9.4..... 1, 4, 5

TEX. R. APP. P. 9.4(i)(1)..... 1, 4

TEX. R. APP. P. 9.4(i)(2)..... 4

TEX. R. APP. P. 9.4(i)(2)(B) 4

TEX. R. APP. P. 9.4(c)..... 5

TEX. R. APP. P. 9.4(d) 5

TEX. R. APP. P. 9.4(e)..... 5

TEX. R. APP. P. 9.4(j) 5

TEX. R. APP. P. 10.5(b)..... 2

TEX. R. APP. P. 11 5

TEX. R. APP. P. 53.1 1, 5

TEX. R. APP. P. 53.2 4

TEX. R. APP. P. 53.2(i) 3

TEX. R. APP. P. 53.3 5, 6

TEX. R. APP. P. 53.7 2, 5

TEX. R. APP. P. 53.7(a)(1) 2

TEX. R. APP. P. 53.7(a)(2) 2

TEX. R. APP. P. 53.7(c) 2, 5

TEX. R. APP. P. 53.7(d) 5

TEX. R. APP. P. 53.7(f) 2

TEX. R. APP. P. 54.1 2

TEX. R. APP. P. 54.2 2

TEX. R. APP. P. 54.3 2

TEX. R. APP. P. 55.2 1

TEX. R. APP. P. 55.3 1

TEX. R. APP. P. 55.4 1

TEX. R. APP. P. 56.1 1, 3

TEX. R. APP. P. 56.1(a) 1

TEX. R. APP. P. 56.1(b) 1

TEX. R. APP. P. 59.1 1

TEX. R. APP. P. 59.2 1

Secondary Sources

Annual Statistical Report for the Texas Judiciary (2018), 1

Blake A. Hawthorne, *Supreme Court of Texas Internal Operating Procedures* 1, 5

Pamela Stanton Baron, *Texas Supreme Court Docket Update 2016*,
 State Bar of Texas Advanced Civil Appellate Practice (2016). 1

PLANNING AND DRAFTING THE PETITION FOR REVIEW

The petition for review is your tool for gaining entry into the Texas Supreme Court. An intriguing petition for review can help you cut through the clutter and convince the Texas Supreme Court that your case is worth taking. This article aims to help you plan and draft effective petitions for review.

I. THE TEXAS SUPREME COURT PROCESS

Before seeking review in the Texas Supreme Court, you should inform your client that full review in the Texas Supreme Court involves a lengthy process and an uphill battle. Because the Texas Supreme Court is a court of discretionary jurisdiction, it grants review in only a fraction of cases—roughly 12 percent. *See* TEX. R. APP. P. 56.1(a); *Annual Statistical Report for the Texas Judiciary, Court-Level-4* (2018).¹

The process can be time consuming and expensive. Assuming that there is no cross-appeal, the full process generally involves six briefs—four filed by the petitioner, and two filed by the respondent—plus an oral argument.

A. The Petition for Review

The process begins when the petitioner files a petition for review. TEX. R. APP. P. 53.1. Unlike a typical brief, a petition for review focuses more on why a case is significant, and less on why the petitioner should win.

After the petition is filed, the respondent will usually file a waiver of response. *See* Part VII.A. If the Texas Supreme Court is not interested in the petition, it can deny the petition without any further briefing after the petition has been on file for 30 days. TEX. R. APP. P. 56.1(b).

In roughly 39% percent of cases, the Texas Supreme Court will request a response. *See* Pamela Stanton Baron, *Texas Supreme Court Docket Update 2016*, State Bar of Texas Advanced Civil Appellate Practice, p. 5 (2016). If you are a respondent, this is no cause for alarm because it takes only one vote from a Texas Supreme Court justice to request a response. *See* Blake A. Hawthorne, *Supreme Court of Texas Internal Operating Procedures*, p. 12.²

A well-crafted response will signal that the case is unimportant to the jurisprudence of Texas or a poor vehicle for deciding the issue.

After the respondent files its response, the petitioner should file a reply.

Once the reply is filed, the Texas Supreme Court can either deny review or request briefs on the merits. TEX. R. APP. P. 55.1.

B. Briefs on the Merits

The Texas Supreme Court requests briefs on the merits in approximately 25% of cases. Blake A. Hawthorne, *Supreme Court of Texas Internal Operating Procedures*, p. 13. If the Texas Supreme Court requests briefs on the merits, the parties will file three more briefs. First, the petitioner will file its brief on the merits. *See* TEX. R. APP. P. 55.2. Second, the respondent will file its brief on the merits. *See* TEX. R. APP. P. 55.3. Third, the petitioner will file its reply. *See* TEX. R. APP. P. 55.4.

You should resist the temptation to recycle your petition for review when drafting your brief on the merits. The documents serve different purposes. Unlike the petition—which is designed to grab the attention of the Texas Supreme Court—the brief on the merits is the persuasive tool that urges reversal. Additionally, the word limits for briefs on the merits are substantially more generous—allowing for a deep dive into the issues presented in your case. *See* TEX. R. APP. P. 9.4(i)(1).

After full briefing, the court will generally either (1) grant the petition, if four or more justices vote to do so, or (2) deny the petition. Although the rules permit the court to grant the petition before full briefing on the merits is complete, it rarely does so. *See* TEX. R. APP. P. 55.4; Blake A. Hawthorne, *Supreme Court of Texas Internal Operating Procedures*, p. 13.

C. Oral Argument and Opinion

If the court grants review, it may issue an opinion with or without an oral argument. TEX. R. APP. P. 59.1, 59.2. If the court sets the case for argument, the clerk will notify all parties of the submission date. TEX. R. APP. P. 59.2.

The court releases opinions at 9:00 a.m. on Fridays.

Typically, the entire Texas Supreme Court process—from filing the petition for review to entering an opinion—lasts between one and two years. *Annual Statistical Report for the Texas Judiciary, Detail-3* (2018).

¹ Available at <http://www.txcourts.gov/media/1443455/2018-ar-statistical-final.pdf>.

² Available at <http://www.txcourts.gov/media/1438423/supreme-court-of-texas-internal-operating-procedures.pdf>.

II. PETITION DEADLINES

The deadline for a petition for review depends upon whether you file a motion for rehearing or motion for en banc reconsideration in the court of appeals.

If you *do not* file a motion for rehearing or motion for en banc reconsideration, your petition for review will be due 45 days after the court of appeals renders judgment in your case. TEX. R. APP. P. 53.7(a)(1).

If you *do* file a motion for rehearing or motion for en banc reconsideration, your petition for review will be due 45 days after the date of the court of appeals' last ruling on all timely filed motions for rehearing or en banc reconsideration. TEX. R. APP. P. 53.7(a)(2).

A party may request an extension of time to file a petition of review by filing a proper motion no later than 15 days after the last day for filing the petition. TEX. R. APP. P. 53.7(f); *see also* TEX. R. APP. P. 10.5(b) (setting forth requirements for motions for extension). A sample motion for extension is available at the Texas Supreme Court's website.³

Cross-petitions are due 30 days after a petition for review is filed, or 45 days after the last timely motion for rehearing is overruled, whichever date is later. TEX. R. APP. P. 53.7(c); *see also* Part VII.B.

III. THE RECORD

The court of appeals will not forward the appellate record unless the Texas Supreme Court requests it. TEX. R. APP. P. 54.2. The Texas Supreme Court may request the record with or without granting the petition for review. TEX. R. APP. P. 54.1.

If requested, the petitioner must pay for the cost of mailing or shipping the record. TEX. R. APP. P. 54.3.

IV. SELECTING YOUR ISSUES

Issue selection is often what separates a successful and unsuccessful petition. There are multiple factors that you should consider when choosing which issues to raise in your petition.

A. Jurisdiction

You should begin the issue selection process with an understanding of the Texas Supreme Court's jurisdiction.

Until recently, there was a long list of grounds for Texas Supreme Court jurisdiction—including for example, disagreement within a court of appeals, conflicts among the courts of appeals, and statutory construction. Effective September 1, 2017, that list has been repealed and replaced with a simpler jurisdictional statute. TEX. GOV'T CODE § 22.001; *Hughes v. Tom Green County*, No. 17-0409, __S.W.3d__, 2019 WL 1119904, at *3 (Tex. Mar. 8, 2019).⁴

Now, the scope of the Texas Supreme Court's jurisdiction is set forth in a single sentence. The Texas Supreme Court has jurisdiction "of an appealable order or judgment of the trial courts if the court determines that the appeal presents a question of law that is *important to the jurisprudence of the state*." TEX. GOV'T CODE § 22.001 (emphasis added).

For the most part, the new jurisdictional statute has not significantly changed Texas Supreme Court practice. Rather, the revision comports with the court's long-standing practice of taking cases that are important to Texas jurisprudence and rejecting cases that are not.

One noteworthy difference, however, is that the Texas Supreme Court now has general appellate jurisdiction over interlocutory appeals. *Hughes*, 2019 WL 1119904, at *3.

B. Factors Suggesting Importance

So, what kinds of issues are important to Texas jurisprudence? Classic examples include questions of first impression that are likely to recur, procedural holdings that affect an entire class of cases, and issues that are the subject of national debate.

Additionally, the Texas Supreme Court considers several factors, which are suggestive of jurisdiction:

- (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;

³ See <http://www.txcourts.gov/supreme/self-help-resources/>.

⁴ The new jurisdictional rule applies even if the underlying order that you are challenging was entered before September 1, 2017. See *Hughes*, 2019 WL 1119904, at *3.

- (5) whether the court of appeals appears to have committed an error of law of such importance to the state's jurisprudence that it should be corrected; and
- (6) whether the court of appeals has decided an important question of state law that should be, but has not been, resolved by the Supreme Court.

TEX. R. APP. P. 56.1.

The court might also be swayed by the size of the underlying damages award and the quality of the legal briefing on both sides of the case. *See Mar. Overseas Corp. v. Ellis*, 977 S.W.2d 536, 537 (Tex. 1996) (Hecht, J., dissenting).

C. Determining the Proper Number of Issues

Once you have ensured that your issues are substantively appropriate for Texas Supreme Court review, you should consider the form in which you present them.

A petition for review must state each issue presented for review. *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 849 (Tex. 2018). If an issue is not presented in the petition for review, it is waived. *Id.* A party cannot raise an issue for the first time in the brief on the merits. *See Id.*

This does not mean, however, that you should present a deluge of issues in your petition for review. Most successful petitioners present between one and five issues in their petition for review, and there is a strong argument to be made that less is more. The court liberally construes issues presented—allowing you to frame issues broadly so that you can further explore the subject matter in the argument sections of your petition for review and brief on the merits. *Id.*

D. Reserving Issues

If you do not have adequate space in your petition for review to brief each issue, the rules allow you reserve issues for later argument in your brief on the merits. *See* TEX. R. APP. P. 53.2(i). To reserve an issue, you should list all issues in the “Issues Presented” section of your petition for review. List the unbriefed issues last with the notation “Unbriefed.” If the court requests full briefing, you would then present your reserved issues in your brief on the merits.

V. DRAFTING AND FILING THE PETITION FOR REVIEW

A. Parts of the Petition for Review

The Texas Supreme Court has helpfully provided on its website a template for preparing a petition for review, which is available at <http://www.txcourts.gov/supreme/self-help-resources/>. If you have limited experience in the Texas Supreme Court, it is also helpful to examine successful petitions for review. Petitions for review may be viewed for free on the Texas Supreme Court's website.⁵

Before you begin drafting, you should also consult Texas Rule of Appellate Procedure 53.2, which contains a thorough, plain-text recitation on the parts of the petition for review. The rule requires that petitions for review contain the following headings and content:

- (a) Identity of Parties and Counsel. The petition must give a complete list of all parties to the trial court's final judgment, and the names and addresses of all trial and appellate counsel.
- (b) Table of Contents. 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.
- (c) Index of Authorities. The petition must have an index of authorities arranged alphabetically and indicating the pages of the petition where the authorities are cited.
- (d) Statement of the Case. The petition must contain a statement of the case that should seldom exceed one page and should not discuss the facts. The statement must contain the following:
 - (1) a concise description of the nature of the case (e.g., whether it is a suit for damages, on a note, or in trespass to try title);
 - (2) the name of the judge who signed the order or judgment appealed from;
 - (3) the designation of the trial court and the county in which it is located;
 - (4) the disposition of the case by the trial court;
 - (5) the parties in the court of appeals;
 - (6) the district of the court of appeals;

⁵ To find successful petitions for review, go to the Texas Supreme Court's website. Click on “Orders & Opinions.” From there, click on any recently released opinions. Under “Orders on Causes,” click on “View Electronic Briefs.”

- (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; and
 - (9) the disposition of the case by the court of appeals, including the disposition of any motions for rehearing or en banc reconsideration, and whether any motions for rehearing or en banc reconsideration are pending in the court of appeals at the time the petition for review is filed.
- (e) Statement of Jurisdiction. The petition must state, without argument, the basis of the Court's jurisdiction.
 - (f) Issues Presented. The petition must state concisely all issues or points presented for review. The statement of an issue or point will be treated as covering every subsidiary question that is fairly included. If the matter complained of originated in the trial court, it should have been preserved for appellate review in the trial court and assigned as error in the court of appeals.
 - (g) Statement of Facts. The petition must affirm that the court of appeals correctly stated the nature of the case, except in any particulars pointed out. The petition must state concisely and without argument the facts and procedural background pertinent to the issues or points presented. The statement must be supported by record references.
 - (h) Summary of the Argument. The petition must contain a succinct, clear, and accurate statement of the arguments made in the body of the petition. This summary must not merely repeat the issues or points presented for review.
 - (i) Argument. The petition must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record. The argument need not address every issue or point included in the statement of issues or points. Any issue or point not addressed may be addressed in the brief on the merits if one is requested by the Court. The argument should state the reasons why the Supreme Court should exercise jurisdiction to hear the case with specific reference to the factors listed in Rule 56.1(a). The petition need not quote at length from a matter included in the appendix; a reference to the appendix is sufficient. The Court will consider the court of appeals' opinion along with the petition, so statements in that opinion need not be repeated.
 - (j) Prayer. The petition must contain a short conclusion that clearly states the nature of the relief sought.

TEX. R. APP. P. 53.2.

B. Word Limits

When drafting, you should be cognizant of the word limits for documents filed in the Texas Supreme Court. The following word counts apply in civil cases:

- Petition for review—4,500 words,
- Response to the petition for review—4,500 words,
- Reply in support of the petition for review—2,400 words,
- Petitioner's brief on the merits—15,000 words,
- Respondent's brief on the merits—15,000 words, and
- Reply in support of petitioner's brief on the merits—7,500 words.

TEX. R. APP. P. 9.4(i)(2).

In calculating the word count, you must include headings, footnotes, and quotations. TEX. R. APP. P. 9.4(i)(1). But do not include the: caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, statement of jurisdiction, statement of procedural history, signature, proof of service, certification, certificate of compliance, and appendix. TEX. R. APP. P. 9.4(i)(1).

Also, note that in the brief on the merits phase, the aggregate of all briefs filed by a party cannot exceed 27,000 words. TEX. R. APP. P. 9.4(i)(2)(B).

C. Formatting

Your petition for review must comply with the formatting rules set forth in Texas Rule of Appellate Procedure 9.4. The rule requires that:

- margins must be least one inch on both sides and at the top and bottom;
- text must be double spaced, but footnotes, block quotations, short lists, and issues may be single spaced;

- font must be a “conventional typeface”; and
- font size must be no smaller than 14-point, except for footnotes, which must be no smaller than 12 point.

TEX. R. APP. P. 9.4(c), (d), & (e).

Additionally, the petition for review must be formatted as an e-brief. *See* TEX. R. APP. P. 9.4(j). The brief must be a text-searchable PDF. *Id.* The Texas Supreme Court has provided several guides for formatting e-briefs on its website.⁶

Some practitioners also choose to insert hyperlinks to citations. This practice is helpful, but not required. The Texas Supreme Court’s system automatically hyperlinks to Westlaw for statutes, cases, and regulations. Currently, the system does not create hyperlinks to the record. Thus, it can be helpful to the court if you include record excerpts in your appendix and provide hyperlinks to those appendix citations.

D. Filing

The petition for review in any civil case must be electronically filed. TEX. R. APP. P. 9.2(c).

The petition should be filed with the Supreme Court clerk—not the court of appeals. TEX. R. APP. P. 53.7. If, however, a petition is mistakenly filed in the court of appeals, the petition will be deemed to have been filed on the same day with the Supreme Court clerk, and the court of appeals clerk will immediately send the petition to the Supreme Court. TEX. R. APP. P. 53.7(g).

VI. AMICUS SUPPORT

Amicus support can be an extremely effective way to show that your case is important to the jurisprudence of Texas. Amicus briefs are most persuasive when filed at the petition stage, before the respondent files its brief. *See* Blake A. Hawthorne, *Supreme Court of Texas Internal Operating Procedures*, at 15.

An amicus brief must:

- (a) comply with the briefing rules for parties;
- (b) identify the person or entity on whose behalf the brief is tendered;
- (c) disclose the source of any fee paid or to be paid for preparing the brief; and
- (d) certify that copies have been served on all parties.

TEX. R. APP. P. 11.

VII. RESPONDING TO THE PETITION

While the role of the petitioner is to play up the importance of the case, the role of the respondent is to do the opposite. Every step of the way, the respondent should communicate that the case is not worthy of review.

A. Waiver of Response

When a petition for review is filed, a respondent may do one of three things: (1) file a response within 30 days, (2) file a waiver of response, or (3) do nothing. *See* TEX. R. APP. P. 53.7(d). All three options are considered safe practices because the Texas Supreme Court will not grant a petition without first requesting a response. TEX. R. APP. P. 53.3.

Most experienced practitioners choose to file a waiver letter. A waiver letter is usually the best option because it respects court procedures, saves the client money, and attracts no unnecessary attention to the case. The Texas Supreme Court provides a useful form waiver letter on its website.⁷

B. Cross Petitions

A respondent must also think beyond its response and consider whether to file its own cross petition. A cross petition is necessary if the respondent seeks to “alter” the court of appeals’ final judgment. TEX. R. APP. P. 53.1; *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 587 (Tex. 2017). Cross-petitions are due 30 days after a petition for review is filed, or 45 days after the last timely motion for rehearing is overruled, whichever date is later. TEX. R. APP. P. 53.7(c).

⁶ Available at <http://www.txcourts.gov/supreme/practice-before-the-court/>.

⁷ *See* <http://www.txcourts.gov/media/392568/samplewaiverletter.pdf>.

C. Parts of a Response to the Petition for Review

The structure of the response largely mirrors the petition for review, except that:

- (a) the list of parties and counsel is not required unless necessary to supplement or correct the list contained in the petition;
- (b) a statement of the case and a statement of the facts need not be made unless the respondent is dissatisfied with that portion of the petition;
- (c) 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);
- (d) 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;
- (e) the respondent's argument must be confined to the issues or points presented in the petition or asserted by the respondent in the respondent's statement of issues; and
- (f) the appendix to the response need not contain any item already contained in an appendix filed by the petitioner.

TEX. R. APP. P. 53.3

Most experienced practitioners opt to draft their own statement of the case, statement of facts, statement of jurisdiction, and issues presented, even if they are not required to do so under the rules. These sections provide a valuable opportunity for a respondent to reframe the issues in a light that is more favorable to its position.

D. Common Arguments in Response

The response should communicate that the case is not important to Texas jurisprudence or that it would be a poor vehicle for deciding an otherwise-important issue. For example, the response may effectively argue that:

- the court of appeals decided the issue correctly,
- any error was harmless,
- other issues in the case require affirmance,
- the outcome of the case hinges on unique facts, or
- any conflict alleged by the petitioner is illusory.

A respondent may also argue that the issue presented was waived. But keep in mind that the Texas Supreme Court tends to apply error preservation rules liberally in favor of reaching the merits of a case. *See, e.g., Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 896 (Tex. 2018) (holding that a petitioner was not required to rely on the same case law or statutory subpart in the trial court and the Texas Supreme Court).

VIII. WRITING TIPS FOR PETITIONS FOR REVIEW

Although good writing is a universal language—whether in the trial court, the court of appeals, or the Texas Supreme Court—there are a few writing tips that are especially helpful for drafting petitions for review.

A. Stand out.

First off, make your best effort to draw your reader in. It's a simple fact that most petitions are not granted. The petition that gets plucked from the conveyor belt needs to stand out from the crowd. This does not mean that you should employ a cheesy gimmick (don't). But it does mean that you should be thoughtful when framing your issues and write to the best of your ability.

Because the court has limited time to devote to your petition, you should take extra care to make the issues as clear and understandable as possible. If a petition is difficult to understand, it is less likely to grab the attention of a busy justice.

B. It's not all about you.

Throughout your petition, you should convey the message that your case will impact other litigants, statewide. This requires taking a big step back and thinking beyond the facts of your case.

Your statement of jurisdiction, issues presented, and summary of the argument are all good places for illustrating that the implications of your case reach beyond your client.

C. Do not be aggressive in your tone.

If you're accustomed to writing for the trial court, you may need to adjust your tone a bit in the Texas Supreme Court. The proper tone for a petition for review is measured, fair, and thoughtful.

It probably goes without saying—but just in case it doesn't—that name calling, all caps, and exclamation points have no place in courts of appeals. In the same vein, resist the urge to use catty adverbs to attack your opponent's argument, such as “unbelievably,” “disingenuously,” and “conveniently.”

D. You can be aggressive about the issues you pursue.

Although you should avoid being aggressive in your tone, you can be aggressive in your issue selection. It is permissible to advance an argument that is a long shot—provided that your argument is honest and grounded in the law. Sometimes challenging arguments are successful, and that is how new law gets made and past cases are overruled. *See, e.g., Texas Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430 (Tex. 2012) (overruling prior Texas Supreme Court authority); *Sw. Bell Tel. Co., L.P. v. Mitchell*, 276 S.W.3d 443 (Tex. 2008) (same).

Of course, you will cross the line if you misrepresent the holdings of opinions or the facts of your own case. Do not take a position that is directly contrary to binding authority unless there has been a significant development—such as a new statute or major cultural shift—that warrants a change to the common law. If that is the case, you must disclose the adverse authority and openly argue why it should be overruled.

E. Headings should tell a story.

Headings are a powerful tool which many practitioners overlook. Your headings should be complete conclusory sentences. When extracted from the text and inserted in the table of contents, your headings should tell a story and provide an understandable preview of your arguments.

IX. CONCLUSION

With thoughtful planning and drafting, you will position your client for the best possible outcome in the Texas Supreme Court. Good luck.