

MOTIONS FOR REHEARING ON DENIAL OF PETITION

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PRACTICE BEFORE THE TEXAS SUPREME COURT

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CHAPTER 10

Justice Wallace B. Jefferson

- Justice Wallace B. Jefferson was appointed to the Court in 2001, by Gov. Rick Perry.
- Justice Jefferson, who won the two cases he argued to the U.S. Supreme Court, had been a partner in San Antonio's Crofts, Callaway and Jefferson, an appellate specialty law firm. He is a graduate of the James Madison College at Michigan State University and the University of Texas School of Law. Justice Jefferson is certified in civil appellate law by the Texas Board of Legal Specialization.
- Justice Jefferson practiced law in San Antonio from 1988 with Groce, Locke & Hebdon until he helped found Crofts, Callaway & Jefferson in 1991. He served as the San Antonio Bar Association president in 1998-99 and was the San Antonio Young Lawyers Association's Outstanding Young Lawyer in 1997.
- Justice Jefferson was among the "40 Under-40 Rising Stars" named by the San Antonio Business Journal in 1996 and received the "Pillars of the Foundation" award by the Northeast Independent School District in San Antonio. He has served as a director of the San Antonio Public Library Foundation, the Alamo Area Big Brothers/Big Sisters, and on the education committee of the San Antonio Area Foundation.
- The term to which Justice Jefferson was appointed and subsequently elected ends in December 2006.

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MOTIONS FOR REHEARING ON DENIAL OF PETITION

I. INTRODUCTION¹

The views expressed in this paper are those of the author only. The Court's rulings on motions for rehearing are based on a complex dynamic that any individual justice may influence, but certainly not control. I offer these insights as one of the nine justices; I encourage the reader to solicit the views of the other eight.

A. The Rules

Texas Rule of Appellate Procedure 64.1 provides that a motion for rehearing may be filed with the clerk of the Court within 15 days from the date the Court renders judgment or makes an order disposing of a petition for review. The motion must specify the points relied on for the rehearing. TRAP 64.2. The motion must not exceed 15 pages. TRAP 64.6. The Court will not consider a second motion for rehearing. TRAP 64.4.

B. Internal Practice

Motions for rehearing are circulated among all members of the Court. If no justice marks the case for discussion, the motion will be denied summarily. If, however, one or more justices mark the case for discussion (or to grant), the matter will be debated during a Monday morning conference. 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.

C. Contents

A motion for rehearing must not simply repeat, with added emphasis, arguments briefed at the petition-for-review stage. The Court has already determined that arguments presented in the petition do not merit a grant. The Court is not more likely to grant the petition because it is clothed in exclamation points and italics. You should exclude from the motion many of the issues upon which the petition was based, unless you are truly able to demonstrate that every issue raised before is of grave importance. Even then, however, a motion for rehearing that merely condenses the petition for review is rarely effective.

D. The Effective Motion

Effective motions for rehearing have in common one or more of the following characteristics:

- \$ The motion describes changes in the law occurring after the petition for review was filed. The motion may demonstrate, for example, that a conflict exists among courts of appeals that did not exist at the time of filing of the petition for review. Or the motion may identify a newly enacted statute that exacerbates an error committed by the court of appeals, or a recent decision from the Supreme Court of the United States that bears directly on the question presented.
- \$ The motion presents arguments, involving important jurisprudential issues that were preserved but not directly addressed in the petition for review.
- \$ The motion refines a point that was obscured in the original briefing.
- \$ The motion explains how the court of appeals' opinion will dramatically alter well-settled precedent or conflicts with long-standing agency interpretation.
- \$ If sufficient time has passed between publication of the court of appeals' opinion and the Supreme Court's denial of review, there is a chance that other appellate courts have cited favorably the holding that is subject to review. In that case, the litigant should demonstrate that the court's error has infected the law in other appellate districts. When it is clear that a problem is likely to recur at an intolerable rate, the chance that the Court will be inclined to grant review is enhanced.
- \$ The motion must be clear, concise, and (if possible) riveting. A forceful motion, even one taking the Court to task, may ultimately prove successful if the legal analysis is sharp and the claims of jurisdictional importance well supported.

E. The Ineffective Motion

As previously noted, the most common pitfall is that the motion for rehearing simply rehashes arguments previously raised and rejected. Other characteristics of ineffective motions include:

- \$ The motion addresses numerous issues that should have been left on the cutting room floor rather than focusing thoroughly on one significant issue.
- \$ Some practitioners utilize motions for rehearing to vent frustration or to launch a withering attack on the Court or its judgment. Hyperbole is not effective. A measured tone that respects opposing counsel and the Court has a greater chance of success than one expressing hysteria and spite.
- \$ The error asserted in the motion has not been preserved. A new argument may catch the Court's attention, but if the issue has never been preserved for review, the motion is doomed for denial.
- \$ Finally, some lawyers believe that attention grabbing formatting, i.e., bolding, italicizing, and underlining will, by presenting a visual sense of urgency, cause the Court to modify its prior legal analysis. These lawyers are wrong.

¹Prepared by Supreme Court of Texas Justice Wallace B. Jefferson, Roland Quintana, and Eric Strom.

F. Determining Whether to File a Motion for Rehearing

There is no easy way to distinguish cases worthy of reconsideration from those that are not. That determination depends upon a lawyer's considered judgment about the strengths and weaknesses of the case. Nevertheless, it seems clear that some factors, in combination with the *Aright@* case, counsel in favor of filing a motion for rehearing.

When a justice dissents from the denial of the petition for review, that justice may become an advocate for rehearing. With an advocate on *Athe inside,@* the arguments presented in the motion will have a full airing around the conference table.

If the case has lingered on the Court's docket for what seems an unreasonably long period of time, it may well be because several justices have expressed a significant interest in the issue, but were ultimately unable to land on a compelling argument to grant *this* case at *this* time. It may prove worthwhile to attempt on rehearing to exploit that interest.

When the Court's composition has changes, the new justice or justices may have an interest, which, combined with others, will produce the magic *Afour@* necessary to grant the petition.

G. Role of Amicus Briefs

In considering whether to file an amicus brief, practitioners should consider whether the brief will add to the case or will simply rehash the arguments presented by the parties. Thus, the same characteristics that make a party's motion for rehearing effective or ineffective apply equally to amicus briefs. If used appropriately, amicus briefs can be influential and may mark as the difference between a grant and a denial. Three of the most recent successful motions for rehearing were accompanied by at least one amicus brief. In *In re Nitla de C. V.*, University of Texas Professor Charles Silver filed an amicus brief. In *Bragg v. Edwards Aquifer Authority*, Texas Farm Bureau filed an amicus brief. And in *Yzaguirre v. KCS Resources, Inc.*, six different amicus briefs were filed. However, it is important to note that the Court is interested in the quality, and not the quantity, of any amicus briefs supporting the petitioner. On too many occasions, amicus briefs take up space on the shelf, but contribute nothing to the argument.

H. Statistics on Grants of Rehearing Motions

In fiscal year 2001, forty-three motions for rehearing of causes were ruled on by the Court. Thirty-six motions (84%) were denied, six (14%) were granted, and one was returned. Two hundred twelve motions for rehearing of petitions for review were ruled on. Two hundred three motions (96%) were denied, six (3%) were granted, one was dismissed for want of jurisdiction, one was returned, and one was struck. Furthermore, twenty-eight motions for rehearing of petitions for writ of mandamus were ruled on.

Twenty-seven motions (96%) were denied, one was denied in part, and none were granted. In sum, the Court ruled on 283 motions for rehearing and granted only twelve (about 4%). See TEXAS JUDICIAL SYSTEM ANNUAL REPORT 2001.

II. CONCLUSION

Persuading the Court to grant a motion for rehearing is a daunting and difficult task - as well it should be if the advocates and the Court have done their job the first time around. However, understanding and incorporating the characteristics of an effective motion for rehearing will aid practitioners and increase the probability of success.