

# **MOTIONS FOR REHEARING**

Prepared by:

**CHIEF JUSTICE WALLACE JEFFERSON**  
Supreme Court of Texas

Presented by:

**JUSTICE DALE WAINWRIGHT**  
Supreme Court of Texas

State Bar of Texas  
**PRACTICE BEFORE THE TEXAS SUPREME COURT**

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**CHAPTER 9**





**Justice Dale Wainwright**

Justice Dale Wainwright was elected to the Supreme Court of Texas on November 5, 2002, after serving as presiding judge of the 334th Civil District Court in Harris County.

Justice Wainwright was appointed to the civil district court in 1999 by then-Gov. George W. Bush. The Houston bar gave Judge Wainwright a 90 percent approval rating in the 2001 judicial evaluation poll, with almost two-thirds of that rating being "outstanding." He resolved over 3,000 cases and reduced his docket by approximately 20 percent. He served as chair of internal procedures for the Harris County civil district courts and was responsible for supervising the ancillary docket and scheduling trials of mass tort cases for the 25 civil district courts. In 2001, Gov. Rick Perry appointed Wainwright to a temporary commission as justice on the Supreme Court. Wainwright is a member of the American Law Institute.

Before his appointment to the bench, Justice Wainwright practiced in the trial sections of the firms of Haynes and Boone and Andrews & Kurth in Houston, Texas. He earned his law degree from the University of Chicago Law School in 1988, studied at the London School of Economics in 1981 and earned his undergraduate degree from Howard University, *summa cum laude*, in 1983. He was valedictorian of his high school graduating class in 1979.

Justice Wainwright has a long history of public service, having co-founded the Aspiring Youth Program, a national program to assist inner-city youth; served on the board of directors of the Houston Bar Association, the Houston Volunteer Lawyers Program and the Texas Young Lawyers Association; and served as president of the Houston Young Lawyers Association. He received the Legal Excellence Award in 2000 from the NAACP and was recognized for outstanding legal service by the Houston Lawyers Association. In 1995, Chief Justice Tom Phillips appointed him to a task force of the Texas Commission on Judicial Efficiency. He has also volunteered at the YMCA and coached Little League baseball.

He and his wife, Debbie, have three sons – Jeremy, Phillip and Joshua – and are members of the Second Baptist Church in Houston.



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## MOTIONS FOR REHEARING

### I. INTRODUCTION

Persuading the Supreme Court of Texas to grant a motion for rehearing is difficult. More is required than merely to re-urge the arguments already rejected by the Court. This chapter's author, the current chief justice of the Court, offers insights and suggestions that will aid practitioners in drafting an effective motion for rehearing.<sup>1</sup>

#### A. The Rules

A motion for rehearing “may be filed with the Supreme Court clerk of the Court within 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. In exceptional cases—if justice requires—the Court may shorten the time within which the motion may be filed or even deny the right to file it altogether. *Id.* The motion must be in the form required of all motions and must specify the points relied on for the rehearing. TEX. R. APP. P. 9.4, 10.1, 64.2. The motion must not exceed 15 pages. TEX. R. APP. P. 64.6. A certificate of conference must accompany the motion, and it must be served on all parties to the proceeding. TEX. R. APP. P. 9.5, 10.1(a)(5).

A response to the motion is not required unless the Court requests one, but a motion for rehearing will not be granted unless a response has been filed or requested by the Court. TEX. R. APP. P. 64.3. However, in exceptional cases—if justice requires—the Court may deny the right to file a response and act on a motion any time after it is filed. *Id.* The Court will not consider a second motion for rehearing. TEX. R. APP. P. 64.4.

The Court must take some action on the motion for rehearing within 180 days of filing, or it is denied by operation of law. TEX. CONST. art. V, §31(d).

#### B. Internal Practice

Motions for rehearing are circulated to 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 cause for discussion (or to grant it), 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 motion. On rare occasions, formal memoranda analyzing the merits of a grant or denial may accompany these largely informal deliberations.

### II. THE MOTION

#### A. 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 did not merit a grant of review. The Court is no more likely to grant the motion because it is clothed in exclamation points and italics. Exclude from the motion many of the issues upon which the petition was based, unless it can be truly demonstrated 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.

#### B. 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 practitioner 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.

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<sup>1</sup> 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 consider the views of the other eight.

- 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.

### C. The “Ineffective” Motion

Common pitfalls:

- As previously noted, the most common pitfall is that the motion for rehearing simply rehashes the arguments previously raised and rejected.
- 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 frustrations 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 or spite.
- 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 practitioners believe that attention grabbing formatting, (bolding, italics, and underlining) will, by presenting a visual sense of urgency, cause the Court to modify its prior legal analysis. These practitioners are wrong.

### D. 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 the practitioner’s considered judgment about the strengths and weaknesses of the case. Nevertheless, some factors, in combination with the “right” case, favor the filing of 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 “the 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 changed, the new justice or justices may have an interest, which, combined with others, will produce the magic “four” necessary to grant the petition.

### III. THE ROLE OF *AMICUS CURIAE*

In considering whether to file an *amicus* brief to support a motion for rehearing, 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 the case of *In re Nitla de C. V.*, 92 S.W.3d 419 (Tex. 2003) (*per curiam*), University of Texas School of Law Professor Charles Silver filed an *amicus* brief. In *Bragg v. Edwards Aquifer Authority*, 71 S.W.3d 729 (Tex. 2002), Texas Farm Bureau filed an *amicus* brief. And in *Yzaguirre v. KCS Resources, Inc.*, 53 S.W.3d 368 (Tex. 2001), 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.