

HOW TO BE A PETITIONER IN THE SUPREME COURT

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CHAPTER 6

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HOW TO BE A PETITIONER IN THE SUPREME COURT

“The real trick is to get the court to grant your petition.”

– RUGGERO ALDISERT, WINNING ON APPEAL 11 (1992)

INTRODUCTION.

In virtually every appellate court in the country, the practice of law involves certain features that attorneys all recognize as going with the territory:

- A multi-judge tribunal,
- A closed factual record,
- Rules of deference or inertia (*e.g.*, standards of review, *stare decisis*),
- Formal prerequisites to action (*e.g.*, rules about jurisdiction and preservation),
- Technical rules about physical production of the briefing, and
- Stylistic customs.

These features all have a place in appellate practice before the Supreme Court of Texas. But the petitioner in the Supreme Court of Texas faces one challenge above all others: getting review granted. Failing to win review spells the end of the appeal. Without review, there cannot be reversal.

Unfortunately, most petitioners fail to win review. The Supreme Court takes only a small fraction of the cases that come to its door. Historically, the court has granted review at a rate of about 10-12%. According to the Office of Court Administration’s statistics for Fiscal Year 2004, the court granted 82 out of 791 petitions for review – translating to a grant rate of about 10.3%.

This low grant rate looks like a fact of life. The 10-12% rate has remained remarkably stable over time. During the final decade of practice under the old “application for writ of error,” the court granted review at a rate of about 12%. *See* 6 R. McDONALD & E. CARLSON, TEXAS CIVIL PRACTICE § 22:1, at 612 n.5 (2d ed. 1998) (“Of 10,053 applications for writ of error filed from 1988 through 1997, 1223 were granted.”). Moreover, this kind of rate is typical of American courts with the power of discretionary review. *See* RUGGERO ALDISERT, WINNING ON APPEAL 12-13 (1992) (collecting statistics).

Why such discouraging odds? Part of the reason relates to limits on resources. The court has over 1000 cases per year, only nine justices, and only so much funding from the public. There simply is not enough time in the day for nine justices to issue full opinions in 1000 cases per year. Even if one filtered out half of those 1000 cases as having no hope whatsoever of getting granted, there would still be more cases than the court could handle on the merits.

Another part of the reason is structural. No one wants a Supreme Court with more than nine justices. Such a court would become dysfunctional, and it would cost the public more to boot. Nor does anyone want to add any additional intermediate courts between the Supreme Court and the courts of appeals. Taxpayers will pay for one level of plenary appellate review, but they will not pay for more.

For all these reasons, the low grant rate from prior years will probably persist far into the future. That low grant rate gives every petitioner one overriding task: make the case stand out as one deserving of review. Make your case the one case out of nine:

The goal of the appellate practitioner is to make it as easy as possible for the court to rule in his or her favor. One of the most important (if not the most important) aspects of a successful appeal to the court is the brief. Probably more than ninety to ninety-five percent of the cases in the court are granted or acted upon based on the briefs and without oral argument. Obviously, the value of your brief in getting you past the “grant” threshold cannot be overestimated. This is especially true now that petitions for review and original proceedings are limited to fifteen (15) pages.

James A. Vaught & R. Darin Darby, *Internal Procedures in the Texas Supreme Court Revisited: The Impact of the Petition for Review & Other Changes*, 31 TEX. TECH. L. REV. 63, 73 (2000). This task of getting the case past the “grant” threshold is the central theme of the rest of this paper.

This paper comes at the subject with a non-technical and impressionistic approach. First, the approach is non-technical, because the technical aspects of putting together a petition for review have been covered in recent years by a variety of very good articles. *E.g.*, Pamela Stanton Baron, *Texas Supreme Court Practice*, in STATE BAR OF TEXAS, ADVANCED PERSONAL INJURY LAW COURSE (2002); Douglas W. Alexander & Lori Ploeger, *The Ultimate Petition for Review*, in STATE BAR OF TEXAS, ADVANCED CIVIL APPELLATE PRACTICE COURSE (2002). Rehashing those articles here would serve no purpose. Second, the approach in this paper is impressionistic, in that it

tries to convey a sense of the mindset that a petitioner should have in coming to the court.

It is tempting to dispense advice in the form of nuggets, along the lines of Irving Younger's "Ten Commandments of Cross-Examination" or the Wall Street investor's adages "Don't fight the Fed and don't fight the tape." For example:

- "The petitioner is there to assist the Court, not vice versa."
- "Think jurisprudentially."
- "Carve away the non-essential."
- "Go for the jugular."
- "If you can't go for the jugular, try to clog up the left anterior descending artery."
- "Visualize preserved error."

But it may be more useful to walk through the life cycle of a Supreme Court appeal. The following discussion breaks the process into seven parts, starting with the process of preservation in the lower courts and ending with the process of oral argument.

I. LAY THE GROUNDWORK LONG BEFORE ARRIVING AT THE SUPREME COURT.

Lay the groundwork early. Do not wait until the last minute. If the Supreme Court took every appeal and did not care about preservation, there would be no reason to worry about making your case a good candidate for review. But given the low odds of review being granted in any specific case, it is never too early to give at least a little thought to the grant-worthiness of your case.

Suppose you saved all your money for an expensive vacation to some exotic land. Suppose you thought (but were not sure) that you might want to have dinner at the country's finest gourmet restaurant, *La Cour Supreme*, a restaurant that turns away most of those who show up at the door. Would you show up at the door unannounced? Would you not try to make reservations long in advance? Perhaps you might cancel the reservations later, if you found yourself contented with the cuisine at the other local eating establishments. But surely you would at least think about doing some advance planning, just in case. In the same way, it is useful to plan ahead so as to lay the foundation for Supreme Court review.

This does not mean that all hope will be lost if no one thinks about the Supreme Court until the deadline for the petition for review has almost arrived. Supreme Court review can still be had in cases where no one thought about it until late in the game. But waiting until the ninth inning tends to make the job harder.

A. Follow the moving target of grant-worthy issues.

Chief Justice Calvert once wrote that the most important part of the written filing to the Supreme Court is the selection of issues. His terminology sounds dated, but the message remains as true today as it was when he wrote it: "No other part of the application is of more importance than the Points of Error." Robert W. Calvert, *Commentary to Tex. R. Civ. P. 469* (Vernon 1985). A modern writer would put it this way: "No other part of the petition for review is of more importance than the issues presented."

A petitioner must know what legal issues are worth preserving in the lower courts. There is no magic formula, but certain kinds of issues tend to recur in the Supreme Court. Try to familiarize yourself with those issues. Otherwise, you may end up like the driver who does not know the neighborhood and hears those discouraging words from his spouse, "The exit we just passed – *that* was the exit we wanted."

Note that grant-worthy issues often go in waves, over the course of several years. The court might spend several years developing the law of punitive damages, or the law of premises liability, or the law of parental rights. This means you should spend some time in the library, or at least stay on speaking terms with somebody who does. (There are people in Fort Worth who do this for a living, some of whom need the money.) Keep up with the trends. Read the opinions. Read the Texas Supreme Court Journal (1957-), which lists the issues in the granted cases. Listen to seminar speeches. Issue selection is the most important part of appellate practice in general, and it is certainly a crucial part of practice in the Supreme Court.

B. Set up the issue in the lower courts.

Armed with this qualitative feel for what makes an issue worthwhile, make it a point to start thinking about preservation in the trial court. Preserve legal issues in abundance at trial. This job starts with the pleadings, and it carries through the course of the trial. It is better to preserve too much than too little.

In the court of appeals, write the briefing in such a way as to "set up" the issues. The appellant has an easy job of setting up the issues, because the appellant has the right to select and present the first set of issues. The appellee has a slightly different task, because the appellee must react to the other side's issues. Still, a well-constructed appellee's brief will formally preserve (or at least informally invite the court to rule on) the advocate's preferred issues.

Use rehearing appropriately in the court of appeals. Rehearing gives you one last opportunity to put your preferred issues into print. The job of creating a good motion for rehearing is probably the only aspect of appellate practice that is more difficult than the job

of creating a good petition for review, so this paper will leave the subject of rehearing to others. Suffice it to say that you should not skip rehearing merely because the rules say that you can. If a motion for rehearing would improve your predicate for Supreme Court review, file one.

C. Consider getting a good amicus for help in an appropriate case.

Amicus briefs have now become a recognized part of Supreme Court practice. A good amicus brief can greatly increase your chances of getting review granted. But beware of the bad amicus brief; not all amicus briefs cut the mustard. A good amicus brief has two basic characteristics: (1) it comes from a reputable source, and (2) it genuinely helps the court by supplying something new. Reputable sources include trade associations, law professors, government agencies, others with some kind of special expertise in the subject matter, or even individuals or non-parties who might have a stake in the decision. As long as an amicus has something to add, a friend of the court brief can have a place.

Unfortunately, amicus practice frequently falls short of the ideal. All too often, an amicus brief has nothing new to say and merely repeats the contentions found in the principal briefs. This kind of repetition does not help anyone. Such repetition can, in fact, be counterproductive; it tends to suggest that the amicus brief is only a sham that has been ghost-written by one of the litigants, even in cases where that is not true. A petitioner who wants amicus support from a reputable source should not hesitate to request it. But a petitioner who has his brother-in-law file a “me too” brief has not done himself any favors.

Bear in mind that many of the most reputable filers of amicus briefs are large groups. These groups often have a slow and formal committee process for deciding whether to submit a brief, and, if so, what the brief should say. Do not delay in asking for help from such groups. Time can be of the essence.

II. START FRESH IN THE SUPREME COURT WITH AN APPROACH DESIGNED FOR THAT COURT.

One of the easiest mistakes to make in Supreme Court practice is treating the case as though you were in some other court. Some lawyers – especially trial lawyers or inexperienced appellate lawyers – proceed as though they were still in the trial court. Some act as though they were still in the court of appeals. A few act as though they were in the U.S. Supreme Court. All three of these approaches miss the mark. The Supreme Court of Texas is a unique institution, and the petitioner in that court needs a mindset unique to that court.

A. Don’t re-enact the last war: you are not in the court of appeals.

First, the petitioner must let go of the court of appeals mindset. Do not reflexively repeat your briefing or analysis from the court of appeals. No matter how beautifully crafted your court of appeals handiwork may have been, you should not simply repackage it for the Supreme Court. For one thing, if the arguments failed in the court below, perhaps they deserve another look. For another, you owe it to the process to take off your court of appeals hat and start fresh.

Besides, even if you remain convinced that your analysis in the court of appeals cannot be perfected, you still have a page limit problem to consider. A brief in the court of appeals can reach 50 pages, whereas a petition for review cannot exceed 15, so you will almost certainly have to start fresh when you begin working on your petition for review.

Starting fresh may require dropping some issues. After all, not every issue deserves Supreme Court review. Starting fresh might also mean adding new issues, if the opinion of the court of appeals has added matters that were not present in the trial court. The point here is to make yourself refocus on the appeal and on the way it will look to the Supreme Court.

This means you should resist the urge to base your Supreme Court appeal on nothing more than a list of purported mistakes by the court of appeals. The Supreme Court does not sit for the purpose of doing routine error correction. Although error correction has its place – maybe even an important place – Supreme Court practice at its best involves so much more. Do not treat a Supreme Court appeal like another trip to a court of appeals. Do not start your analysis by merely counterpunching every utterance of the court of appeals.

B. Don’t follow the U.S. Supreme Court model either.

The U.S. Supreme Court has its own unique model for adjudication. Do not adopt that model wholesale for the Supreme Court of Texas. Over many decades, the U.S. Supreme Court has developed a set of practices and preferences for the way it handles appeals. The federal model has some features in common with the Texas model, but the differences are striking.

First, the U.S. Supreme Court grants review to resolve individual issues – not entire cases – and it does so before full briefing. Not so in Texas. The Supreme Court of Texas does not grant review on individual issues; it grants entire cases, with every issue included, no matter how many issues there are. Nor does the Supreme Court of Texas grant review before full briefing; it grants only after calling for the record and receiving merits briefing.

Second, the U.S. Supreme Court has a different view of what makes an issue worthy of review. The U.S. Supreme Court cares greatly about conflicts in the lower courts over issues of national importance. *See, e.g., WILLIAM H. REHNQUIST, THE SUPREME COURT 265-66 (1987)*. A circuit split is almost essential as a prerequisite to review. *See, e.g., ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 162-94 (7th ed. 1993)*. Although the court occasionally takes cases to do pure error correction, this is rare. To the contrary, review usually results from a division in the lower courts about some question that might be regarded as close or difficult. *See, e.g., DAVID C. FREDERICK, SUPREME COURT & APPELLATE ADVOCACY 73, 84-85 (2002)*.

Finally, the U.S. Supreme Court exhibits great discipline in turning down cases that contain factors that might complicate the decisional process. For example, it can be the kiss of death if a case contains certain “vehicle problems” such as preservation uncertainty, procedural clutter, doubts about the ability to reach an issue, or other untidiness in the way the relevant question comes to the court. Many a petition for certiorari has died on the vine because it was thought to raise only “fact-bound” questions rather than any clean legal issue of broader importance. Many others have died because they came to the court before the issue had percolated long enough in the lower courts. Still others have failed at the certiorari stage because of the court’s preference for avoiding issues that arise before a trial and might go away after the case is tried.

These kinds of vehicle problems do not pose a serious deterrent to review in the Supreme Court of Texas, at least if the case appears to contain a serious error. This does not mean you should ignore vehicle problems entirely. If your case has the appearance of having a vehicle problem, deal with it head-on; tell the reader why the posture of the case does not prevent the main issues from being reached. No human being wants to waste time on dead ends or rabbit trails.

C. Think about both the form and the substance of your case.

For all these reasons, practice before the Supreme Court of Texas comes with its own unique characteristics. Two characteristics deserve mention. First, a petitioner has to abide by certain formal rules, in order to avoid having the case fail on purely technical grounds. Second, a petitioner must win the votes of the human beings who sit as justices.

The formal rules act mainly as technical constraints within which the petitioner must present the case. The most important of the formal rules are the requirements of jurisdiction and preservation. Jurisdiction, while essential, is not normally interesting or worthy of much attention. The Supreme Court has

jurisdiction over issues of law only, not issues of fact. *See TEX. CONST. art. V, § 6; TEX. GOV’T CODE § 22.001*. Although there are a few quirks in the Supreme Court’s jurisdictional scheme, the vast majority of cases on appeal after a final judgment fall within the court’s jurisdictional reach.

The history of the Supreme Court’s jurisdiction has been addressed elsewhere. *See, e.g., James P. Hart, The Appellate Jurisdiction of the Supreme Court of Texas, 28 TEX. L. REV. 285 (1951)*. The jurisdiction originates in the state constitution. *See TEX. CONST. art. V, §§ 1, 3, 3-c, 31*. The statutory basis for the court’s jurisdiction is found, for the most part, in *TEX. GOV’T CODE §§ 22.001-22.010*. The key statute for most cases is *TEX. GOV’T CODE § 22.001(a)*. This statute contains six pigeonholes:

1. Dissent jurisdiction.

The Supreme Court has jurisdiction when the justices of the court of appeals have disagreed over a material question of law. *See BMC Software Belgium v. Marchand, 83 S.W.3d 789, 793 (Tex. 2002); American Type Culture Collection, Inc. v. Coleman, 83 S.W.3d 801, 805 (Tex. 2002)* (supreme court jurisdiction can rest on a dissent from denial of en banc rehearing in the court of appeals).

2. Conflicts jurisdiction.

The problem of conflicts jurisdiction was once a huge problem, because the courts construed the statutory term “conflict” narrowly. *See State v. Wynn, 157 Tex. 200, 301 S.W.2d 76 (1957)*. This problem no longer matters very much to most petitioners, because the Legislature has broadened the statutory definition of “conflict” so as to give the Supreme Court nearly unfettered discretion to grant review.

3. Construction and validity of statutes.

A rule of procedure is considered a “statute” for purposes of this pigeonhole. *See Price v. Couch, 462 S.W.2d 556, 558 (Tex. 1970)*.

4. Revenue of the state.

5. Railroad Commission as a party.

6. Any other case with an error of law of importance to the jurisprudence.

This sixth category acts as a catch-all. It effectively permits the court to grant review in almost any case that the court wants. Generally speaking, as long as the court has jurisdiction because of one issue in the case, it can hear the entire case. *See Stafford v. Stafford, 726 S.W.2d 14, 15 (Tex. 1987)*. These six categories cover the vast majority of appeals. Although it is possible to find a few statutes that confer

jurisdiction over very special cases, those statutes do not arise in normal civil practice.

This notion that the court can hear almost any case it wants has practical significance for petitioners. A petitioner can effectively count on jurisdiction so long as there is a final judgment from the court of appeals. Jurisdiction no longer requires the effort from petitioners that it once did. The old scheme forced a petitioner to devote great care to the issue. *See* Ted Robertson & James Paulsen, *Rethinking the Texas Writ of Error System*, 17 TEX. TECH. L. REV. 1 (1986); Ted Robertson & James Paulsen, *The Meaning (If Any) of an "N.R.E."*, 48 TEX. B.J. 1306 (1985); Ted Robertson & Christa Brown, *Number Crunching in the Supreme Court of Texas*, 50 TEX. B.J. 698, 700 (1987); Ted Robertson & James Paulsen, *Discretionary Jurisdiction for the Texas Supreme Court*, 49 TEX. B.J. 210 (1986); Elaine A. Carlson & Roland Garcia, *The New Discretionary Review Powers of the Texas Supreme Court*, 50 TEX. B.J. 1201 (1987). But the current approach makes jurisdiction over final judgments essentially plenary. The current approach closely resembles the federal model.

The Supreme Court still retains jurisdiction to entertain a few exotic modes of appeal. For example, it can hear certain narrow kinds of direct appeals. *See* TEX. GOV'T CODE § 22.001(c). The court can take cases by certified question from a Texas court of appeals, although it rarely does so. *See Willis v. City of Fort Worth*, 380 S.W.2d 813 (Tex. 1964); *Barrington v. Cokinos*, 161 Tex. 136, 338 S.W.2d 133, 139 (1960); *Weaver v. Board of Trustees of Wilson I.S.D.*, 143 Tex. 152, 183 S.W.2d 443, 444 (1944). On rare occasions, the court has been known to create innovative modes of interlocutory appeal. *See Banales v. Jackson*, 610 S.W.2d 732 (Tex. 1980); *Sears v. State*, 610 S.W.2d 734 (Tex. 1980). But these exotic avenues of appeal have no practical importance. The most significant one for practitioners is the certified question procedure that allows the court to take legal issues from a federal appellate court, pursuant to the 1985 amendments to TEX. CONST. art. V, § 3-c. *See* TEX. R. APP. P. 58.

In the era when the six pigeonholes were thought to have strict limits, there was a controversy over the court's authority to take jurisdiction on the basis of "inherent" powers. *See Eichelberger v. Eichelberger*, 582 S.W.2d 395, 400 (Tex. 1979) (recognizing inherent jurisdiction); *Pope v. Ferguson*, 445 S.W.2d 950, 952 (Tex. 1969) (contra: "This court was created by the Constitution of the State of Texas and has only such jurisdiction as is conferred upon it by the Constitution and statutes of the state. The court has no 'inherent power.'"); *see also* Robert W. Calvert, *Jurisdiction of the Supreme Court in Divorce Cases*, 33 BAYLOR L. REV. 50 (1981). The controversy no longer matters. Today, the practitioner can generally

assume that the court has jurisdiction in virtually all appellate cases involving a final judgment.

Like jurisdiction, preservation was once a matter of high importance. Uncounted numbers of litigants lost in the Supreme Court because of a lack of adequate preservation. But that era has passed. The court's current attitude toward preservation is more relaxed. Over the past two decades, the court has deliberately and consistently retreated from a posture of strictness with regard to preservation. No one can fairly criticize today's court as being excessively rigid in the area of preservation. The concept of preservation is still well respected, but not well liked.

The other formal rules relating to Supreme Court practice involve the mechanics and formatting of written briefing. These rules appear in the rules of appellate procedure. Most important among these formal rules are the page limits. A petitioner has only 15 pages in which to present a petition for review.

All of these formal rules give a texture to practice in the Supreme Court, but they have less significance than the intangible human factors beneath the surface. The nine justices are human beings with their own individualized life experiences and attitudes. It is crucial to align oneself with their collective mindset. Better to have to refile a well-conceived petition because of a formatting problem than to file a well-formatted document with an argument aimed at the wrong set of judges. Human motivations come in all shapes and sizes: everyone has his or her own politics, ideology, life experiences, and ambitions. This fact should be kept in mind by any petitioner who is serious about seeking relief from the Supreme Court.

In other words, all human institutions have their own buttons. Anyone who wants favorable action from such an institution should focus on finding what the buttons are and how to push them. A petitioner in the Supreme Court of Texas has the same tasks. This paper does not undertake to detail the current court's specific views and preferences, because its author lacks the necessary insight to do so with much confidence, but a wise petitioner will think hard about these matters before filing.

III. OBSESS OVER THE GRANT: YOU NEED A GRANTABLE ISSUE.

If the message of this paper has not come through, let the message be summed up in simple words: the hard part is getting in the door. The court only takes a small fraction of the cases that come to it, so the advocate's number one mission should be to put his or her case into that small group. Do not worry about winning the bowl game until you have actually arrived as one of the teams in the bowl game.

It is true that a few cases on the extremes are inevitably headed for a certain grant or a certain denial. For example, suppose the lower court strikes down the

Texas school financing scheme, or orders the Governor to pay punitive damages to a prison inmate, or strips the University of Texas of its football program. In one of those truly exceptional cases, the petitioner will obtain a grant of review no matter how poor the briefing. But advocacy can matter a great deal to the attractiveness of most cases.

A. Find at least one issue worthy of review.

The Supreme Court of Texas takes cases, not issues. But it typically takes a case because of an issue or cluster of issues. So if the appeal contains five issues and the court has an interest only in one of the issues, the court will grant review on the whole case in order to consider that one issue.

This practice differs from the federal model. The U.S. Supreme Court would never grant review in a five-issue case merely to consider one issue; instead, that court would either deny review outright (because of the clutter) or limit its grant of review to the one issue of interest. Given the Texas approach, the prudent petitioner need not abandon all the issues except the most grant-worthy. Rather, the petitioner should highlight the most attractive issue or issues, while preserving the others as accompaniment.

Being right about the merits of an issue does not guarantee a grant because of that particular issue. A petitioner may have a strong position when it comes to the merits of some issue about legal sufficiency, or document interpretation. But that strong position might hold no interest for the high court. A petitioner in such a case should try to obtain review on a more interesting issue, while including the less interesting but arguably more meritorious issue. If all goes well, that petitioner might obtain review on the basis of one issue and obtain reversal on the basis of another.

This is a good place to introduce the concept of internal operating procedures. For a practitioner, the most important aspect of those procedures is the “conveyor belt” system that moves a case through the court. *See generally* Andrew Weber & Douglas W. Alexander, *Inside the Supreme Court of Texas: How Petitions for Review Are Acted On Behind the Scenes*, in STATE BAR OF TEXAS, ADVANCED CIVIL APPELLATE PRACTICE COURSE (2003). Under the current system, a copy of the petition for review goes to each of the nine justices. Like the U.S. Supreme Court, the Supreme Court of Texas holds regular conferences at which the justices vote on which cases to take. Like the U.S. Supreme Court, the Supreme Court of Texas has an internal rule requiring the vote of four justices before a case can be granted.

In the Texas system, however, the petition must survive a preliminary screening step before that vote will be taken. The preliminary step requires the vote of three justices to advance the case from the first stage to the next stage of consideration. *See* Craig T. Enoch &

Michael S. Truesdale, *Issue & Petitions: The Impact on Supreme Court Practice*, 31 ST. MARY'S L.J. 565, 588-89 (2000). If three justices so vote, the court will call for full briefing on the merits from the parties and it will call at the same time for transmission of the record from the court of appeals. More about the court's internal operating procedures has been written elsewhere, and this subject comes up again later in this paper. *See* James A. Vaught & R. Darin Darby, *Internal Procedures in the Texas Supreme Court Revisited: The Impact of the Petition for Review & Other Changes*, 31 TEX. TECH. L. REV. 63 (2000); James A. Vaught, *Internal Procedures in the Texas Supreme Court*, 26 TEX. TECH. L. REV. 935 (1995).

The court's procedures have evolved over time and will continue to do so. In the mid-1980s, there was no petition for review, there were no page limits, and a grant of review required only three votes. *See, e.g.*, Robert W. Calvert, *Application for Writ of Error*, in STATE BAR OF TEXAS, APPELLATE PROCEDURE IN TEXAS § 27.9, at 613-14 (2d ed. 1979). By the late 1980s, the court had increased the number of votes required for a grant (to four) and imposed a page limit on briefing (50 pages). By 1997, the court had changed the whole system and imposed a 15-page limit. The point for now is that when you are thinking about your issues, you should keep in mind the court's system for processing your case.

B. Think about the Supreme Court's perspective.

Try to look at the case the way the Supreme Court will look at it. Follow recent trends at the court. Pay attention to the opinions, the dissents from denials of review, and the orders lists. There is a paper trail with a thousand tiny clues about the kinds of issues that the court considers worthy of review.

In addition, pay attention to the way the Supreme Court balances the various values that courts care about: *e.g.*, certainty, finality, efficiency, accuracy, and fairness. If the court's current attitude elevates the role of equity above the role of procedural correctness, shape your case accordingly. Or if the court's current attitude seems preoccupied with certainty, even at the expense of equity in an individual case, keep that attitude in mind when putting together your appeal.

The petitioner must hunt for at least one strong issue. There is no formula for what makes an issue strong, but studies of human psychology indicate that people tend to react to certain impulses. The tools of influence include at least these six: consistency, authority, social validation, liking, reciprocation, and scarcity. *See* ROBERT B. CIALDINI, INFLUENCE: THE PSYCHOLOGY OF PERSUASION (2d ed. 1993).

Take social validation. Suppose issue X is an open question in Texas law. A strong majority of state supreme courts have decided issue X in a certain way. The Supreme Court of Texas will feel a persuasive pull

from the mere fact that there is a national consensus on the issue. The court will feel uncomfortable taking a position that has the disapproval of a strong majority of its peers. If petitioner wishes to raise issue X before the court, it would be sensible to tell the court about this national consensus in the petition for review.

When hunting for a strong issue, think about a test or standard to propose. The Supreme Court tries to keep its focus on “the jurisprudence of the state,” which means that it cares about more than merely your case. *See* Enoch & Truesdale, 31 ST. MARY’S L.J. at 584 (“The purpose of the petition is to establish the importance of the issues raised in a case to the jurisprudence of the state.”).

So if a petitioner can come up with a proposal for a legal test or standard that would apply in all cases, that petitioner has done a great deal of good for his or her petition. Likewise, if a petitioner can show that the court of appeals has announced a faulty legal test or standard in its opinion, that petitioner stands a good chance of getting the Supreme Court’s attention. For this reason, a wise petitioner will pay heavy attention to the court of appeals opinion.

C. Start with the court of appeals opinion.

A petitioner should go through the court of appeals opinion with a microscope. That opinion is the anvil on which the petition should be hammered out. Although the jury verdict and the judgments from the lower courts can have some prominence too, they usually pale in significance to the opinion. Read the opinion over and over again. Read it with the goal of assessing its importance to the state’s jurisprudence.

To put the matter bluntly, the typical Supreme Court fight is not about you. It is not about your case. It is not about your client. Your client may think the Supreme Court cares about him and his case, but he is wrong. Many clients have the idea that invisible forces of supernatural justice will cause the Supreme Court to be magnetically attracted to the unfairness in their case. These clients have a firm conviction that Supreme Court justices will come to their rescue for the sole purpose of curing one individual injustice. Do not fall for this delusion.

Keep your focus on the language of the lower court’s opinion. Language carries immense weight. Look at the lower court’s holdings, its tests, and its legal standards. Worry about what will show up in the books and affect future cases. One short paragraph in the opinion might hold the key to getting in at the Supreme Court. So take care not to treat your case’s result as the only relevant issue. Maybe the result matters to the jurisprudence of the state, but probably not. Far more likely, the opinion is all that really matters.

IV. SELECT YOUR ISSUES & GET THEM INTO SHAPE.

Now sketch out your issues. If you wish, sketch out a very simple version of the legal argument. But get the issues right before worrying about the argument. First, start with the content of the issues. One way to do this is by drafting a large list of candidates, with an eye toward cutting down the list to something smaller. Look at the interplay between issues. Some issues do not play well together. Then streamline the list by reducing the number of issues to the bare minimum.

Second, work on the wording of your issues. Being evenhanded is better than being biased or heavy-handed. In recent years, it has become fashionable to present issues in three-part form: *Statement-Statement-Question*. The responsibility for this development may belong to Bryan Garner. This fad has become tiresome, and it is now starting to interfere with the effectiveness of written advocacy. A common example of the three-part form comes across like this:

Issue 1

My guy good, their guy bad. Lousy lower court all fouled up etc. Doesn’t that just stink?

Some people may find this approach helpful. Many find it annoying. The problem with the three-part form is not one of theory, but of practice. This form sounds like a reasonable idea in theory, but in the real world it leads lawyers to become long-winded and partisan. *See* Enoch & Truesdale, 31 ST. MARY’S L.J. at 584 (complaining that this format has led to verbosity).

The three-part format works best in a one-issue case. When lawyers see this form at seminars or in articles, they almost always see it in the context of a case with a single issue. But most appeals involve more than one issue. In a multi-issue appeal, the three-part form becomes tiresome. No one wants to struggle through five or six or ten instances of the same waltzing rhythm: *bump-set-spike ... bump-set-spike ... block-that-kick ... four-more-years ... rah-rah-ree*. If you have a case with a single issue, feel free to present that issue in the form of a waltz. If not, stick to a single sentence per issue whenever possible.

Third, word the issues so as to convey substance, not to protect against waiver. There was once a day when lawyers had to make the issues too bulky and too numerous as a way of preventing some piece of the issue from being deemed waived. No longer. The danger of inadvertently waiving a good issue in the current court is remote. *See* Enoch & Truesdale, 31 ST. MARY’S L.J. at 589-90. Waiver by petitioners has become like the smallpox virus: not fully extinct, but

unseen for so long that nobody remembers what it looks like.

Finally, use “unbriefed” issues in a proper case. Some cases contain too many issues to discuss fully in a 15-page petition for review. Some cases contain issues that do not even approach making any difference to the jurisprudence of the state, although they may matter greatly to the litigants. In cases like these, the petitioner may wish to leave some of the issues unbriefed in the petition.

V. WRITE YOUR PETITION FOR REVIEW AROUND YOUR ISSUES.

With the issues finally selected and drafted, design the petition for review around the issues. Rule 53 contains a list of the required elements of a petition for review. *See* TEX. R. APP. P. 53. The elements include a statement of the case, a statement of jurisdiction, a statement of the issues, and so on. The petitioner should create those elements one by one. If the petitioner has done a good job in selecting and drafting the issues to present, writing the rest of the petition will often be straightforward.

The writing of a petition for review involves some “dos” and “don’ts.” First, aim your writing at the justices, not at the law clerks. The petitions go directly to the justices, who read them without filtering by any intermediaries. *See* Enoch & Truesdale, 31 ST. MARY’S L.J. at 578-89.

The justices have little time to give to your case. They see over twenty petitions for review each week, so they cannot slow down much to think deeply about the intricacies of your arguments. *See* Enoch & Truesdale, 31 ST. MARY’S L.J. at 588 (each justice receives about 25 petitions for review per week).

Likewise, the justices have read a large number of legal briefs in the past, and have good reason to be desensitized to exaggeration, hysteria, or name-calling. For this reason, the petition should be simple, direct, and polite. Get to the point. Be as short as possible. Do not drown the reader with trivia or assume that the reader cares about the details. Do not save the best for the last page, because some readers might not get there. Chief Justice Tom Phillips once put it this way: “Avoid the slow buildup.”

There are concrete ways to edit a petition for review so as to make it palatable to a Supreme Court reader. As an exercise, try handling all the facts on one page. In most cases, the facts that really matter can be recited in just a paragraph or two. Consider deleting most of the adverbs and adjectives in your petition. If the sky is falling in some particular area of life, the court should be able to figure that out without the petitioner having to scream. So you should not scream bloody murder unless the court of appeals genuinely deserves it. Just call 911 calmly and report that you

found a small child lying on the floor in the library, wounded but not yet dead.

The rules allow a petitioner to file a reply brief. Candidly, if the petition did its job, there should be little need to file a reply brief. So do not feel obligated to file a reply brief just for the sake of filing one or getting the last word.

If you reply, make sure the reply brief lives up to its name: a reply brief should answer the respondent’s arguments, not just repeat the petitioner’s opening arguments. If the respondent unjustifiably accuses the petitioner of waiving the main issue, a reply brief would be in order. But the best reply is a short reply. If it is possible to keep the reply to only a page or two, that is a goal worth achieving.

VI. WRITE YOUR MERITS BRIEFING.

If the Supreme Court calls for briefing on the merits, the petitioner has survived the first round of triage. The next question for the petitioner is whether to file a merits brief at all. More often than not, the answer to that question should be Yes, but the petitioner should at least think about the question before starting to write.

A. Decide whether to file a brief.

The rules allow a petitioner to stand on the petition for review in lieu of filing a full brief. Given that a petition cannot exceed 15 pages, it is clear that a large and complicated case will probably be impossible to handle on the merits without a full brief. But in a proper case, it is perfectly appropriate to stand on the petition in a case that presents only a single issue. This is especially true if the case presents a pure issue of error correction.

For example, a simple summary judgment case might be a legitimate candidate for standing on the petition. A mandamus could also be an ideal candidate, given that a mandamus necessarily requires some kind of clean and obvious error as a prerequisite to relief. In practice, few petitioners elect to waive the filing of a merits brief. In deciding whether to waive, remember that there will be a study memo prepared for your case. If your petition has not put forward all the necessary legal authorities, waiving a merits brief runs the risk that the law clerk who writes the study memo might rely solely on the petition for legal authorities. So do not waive a merits brief if your petition has left relevant authorities for later.

B. Create a merits brief designed specially for this court.

Assuming that the petitioner wishes to file a brief on the merits, the petitioner should start by revisiting the issues. At this point, the respondent has filed a response, so the petitioner should have a very good idea how the arguments are going to unfold. The

petitioner may want to abandon an issue that had been presented in the petition for review, perhaps because further reflection has led the petitioner to conclude that one of the issues will not play out as anticipated.

The petitioner may also want to reword one or two of the issues. Any rewording should be done with caution. Although there is nothing wrong with rewording an issue for clarity of communication, one should not try to smuggle in entirely new matters of substance.

Unlike the petition for review, the merits brief should be written to a dual audience. Recall that the petition for review should aim only at the justices. But the merits brief should aim at the law clerks and the justices. Under the court's current practice, the court receives the merits brief before deciding whether to grant review. In fact, the court uses the merits briefing as part of its process of studying the case. The court does this by having one of its law clerks analyze all the merits briefing and produce a "study memo" for the justices to read.

So the brief-writer must recognize that the first person to read the brief will be a law clerk. The writer should supply the law clerk with the kinds of materials that will produce a favorable "study memo." For example, in a case about sufficiency of the evidence, the writer should supply detailed references to the record. In a case about some common-law doctrine, the writer should supply a thorough discussion of case law and legal scholarship. In a case about the interpretation of documents, the writer should quote the relevant language and consider attaching the documents to the brief.

Further, the writer should bear in mind that the law clerk may have attended law school in another state and thus may lack a deep understanding of some intricate feature of Texas law. For example, if the case is about the *Stowers* doctrine, the *Duhig* doctrine, or the Texas version of the rule of capture, the writer should not assume that the reader comes to that issue with any prior background or understanding. It is wise to start from first principles in discussing such issues. One commentator puts the point like this:

Remember your audience! Although each office processes cases differently, a case usually is assigned to a staff attorney, a briefing attorney, or an intern. After studying a case, reading the briefs, reviewing the record and conducting additional research, one of the attorneys will prepare a conference memorandum. Most cases are initially processed by briefing attorneys, who are recent law school graduates, or interns, who are still law students. One cannot assume that the briefing attorneys or the interns are knowledgeable with the area or

areas of law discussed in the brief. Although the briefing attorneys and interns are very bright, they usually have had no experience in the area or areas of law discussed in your brief.

Vaught, 26 TEX. TECH L. REV. at 944.

But the most important function of the merits brief is to make a strong showing that the case deserves review. Where there is no review, there is no reversal. So the arguments for grant-worthiness from the petition for review should probably be included in the merits brief.

A cautionary note may be in order here: *do not mislead the reader*. Nothing can kill a petitioner's case faster than playing fast and loose with the record or the law. Law clerks detest being misled. Judges do not exactly enjoy being misled, but most judges have been misled so many times that they become somewhat battle-hardened to the experience. A petitioner who feeds the law clerk misinformation is asking for trouble. This obligation of candor covers more than a duty to refrain from making affirmative misstatements; it also obliges the petitioner to disclose certain kinds of shortcomings in the case. It is often better to concede weak points in one's case than to hide them and have the respondent or the law clerk ferret them out later.

The merits brief also serves a second purpose, which is to make a conventional argument on the merits. In this respect, the brief should aim at the nine justices who will read it after review is granted. The job of the petitioner in the Supreme Court does not differ greatly from the job of the litigant in any appellate court. The petitioner should follow the same familiar advice that most appellate advocates know by heart: organize your arguments; tell the truth; avoid calling names; edit out extraneous material; and so on. Although the Supreme Court will happen to have its own preferred set of values and public policy concerns, that fact is just as true in every court of last resort.

C. Use the reply brief properly.

When creating a reply brief, start by giving yourself a psychological reality check. It is human nature to see the case from your own perspective, which is the perspective of a partisan, who sees the case in a particular way. By the time a Supreme Court reply brief comes into being, the case will have been going on for years, and many of the same arguments and authorities will have received attention for most of those years. The natural tendency is to tune out the other side's arguments and to lapse automatically into repeating your arguments from the opening brief. This tendency can result in disaster.

Do not let your own arguments blind you to the other side's arguments. Pay close attention to precisely

what the other side has said. Step outside the skin of an advocate and try to look at the case as an umpire.

First, look for the key propositions which the respondent has left unmentioned or undisputed. Take those propositions to the bank by pointing them out in a way that leaves no doubt about the superiority of your position. If the respondent has refused to engage you on certain issues, capitalize on the respondent's silences by calling the court's attention to them.

Second, look for the key pieces of the syllogism or syllogisms in the other side's position. Focus your energy on the critical components in the logic chain. You do not need to rebut every single aspect of the respondent's brief. In many cases, the respondent will have a decent position to defend, and you may not want to bother arguing yourself to a tedious stalemate on an issue that is not critical to the case. Instead, spend your pages fighting hard on the things that matter most. For a fine paper about the composition of reply briefs, see Mike Hatchell & Molly Hatchell, *"Reply! Don't Repeat": The Art of the Reply Brief*, in STATE BAR OF TEXAS, ADVANCED CIVIL APPELLATE PRACTICE COURSE (2003).

It is fine to relax your tone a little. But do not let your tone become something that steps on the message. A posture of outrage will not serve you well. If the respondent has egregiously misstated the record, you have every right to demonstrate that fact. What you should not do is launch a barrage of hostile adjectives and adverbs as your opening salvo. Far better to punish the respondent with cold, unrelenting quotations from the record, closely flanked by quotations from the respondent's misleading brief. The court can be trusted to draw its own conclusions.

VII. GIVE A CLEAN ORAL ARGUMENT.

Oral argument in the Supreme Court of Texas has much in common with oral argument in other appellate courts. First, most of the received wisdom about how to argue any generic appeal applies in the Supreme Court:

- Answer the question,
- Don't interrupt the questioner,
- Stay within the record,
- Read the court's latest opinions.

The Supreme Court depends most heavily on the briefing, rather than the argument. Here, as in other jurisdictions, oral argument once played an enormous role in the process, but its importance has been diminishing for decades.

A. Remember that the reversal rate dwarfs the affirmance rate.

Beyond these familiar points of practice, here are a few observations that may deserve special weight with this court. First, you should think about the big picture of where your case is in the judicial pipeline. If you get to oral argument, you have made it beyond the greatest hurdle, which is the decision whether to grant review. Statistically speaking, once the court takes a case, the petitioner's odds of winning far outrun the respondent's odds. The court appears to believe that its resources should be spent mainly on cases that present error. This is good news for the petitioner, but a word of warning is appropriate.

The other side of this coin is that the court has already invested a considerable amount of energy in the case by the time it votes to grant review. Most of the justices are likely to come into the argument with some reasonably well-formed views about the case. They may not have a view about who should win, but they might well have strong views about which side has the equities, or about which specific issues hold the key to the case. If the justices happen to have formed a misguided view about the case, the petitioner may come to the podium expecting a cakewalk and end up with a pie in the face.

Remember the "study memo"? That memo is now the one document in the case that every justice has seen and that you will never get to see. When the justices come into the courtroom to hear the oral argument, they have already discussed the case twice and have had the benefit of the study memo, so you should prepare yourself for the possibility that the justices see the case through the lens of a document that might be misguided. They may think your case is about rule X or doctrine Y, when the case has little to do with that. A petitioner must prepare for the possibility that the court will come in contaminated by a faulty study memo.

With this one caveat aside, the petitioner should take heart from this fairly high rate of reversal. That high reversal rate suggests that the petitioner should probably "dance with what brought him." After all, the petition got review granted on the basis of a certain set of arguments. Those arguments should probably be the ones that the court hears in the courtroom.

What does all this mean for the oral advocate? To my mind, it means that the petitioner should try to carve down to the heart. Go straight to the substance. In fact, limit your points and leave at least something to the brief. The court does not need you to go through every aspect of your merits brief; the court can read. The court has already granted review on the basis of your brief, so the court probably understands the central arguments in that brief.

What the oral advocate should try to do is to shine the light on the important aspects of the argument.

There is no requirement that an advocate use up all the time just for the sake of filling up 20 minutes. An advocate can properly stop the argument after only one or two points. If the court has questions, it will ask. Remember: the grant rate is low, and the reversal rate for granted cases far outruns their affirmance rate. This suggests that most cases are won on the briefs, not in oral argument.

B. Prepare fully.

Good preparation is a key part of litigation generally, and appellate practitioners routinely stress the importance of preparing for oral argument. While the main event of a Supreme Court case is the briefing, not the oral argument, preparation is as important in the Supreme Court of Texas as in any appellate court. Yet many practitioners do not seem to appreciate the kind of preparation that will do them the most good in this court.

Preparing means more than knowing the record. Obviously, counsel should know the record, but the Supreme Court does not sit to nitpick fine points of the record in most of the cases it hears. Preparing also means more than just practicing your delivery ahead of time. A good moot court is a beautiful thing, but polishing your forensics will do you no good if you fail to prepare for the right kind of argument.

In my judgment, preparing for the right kind of argument means coming to court with at least a crude understanding of how this court thinks and behaves. The best way to get this understanding is to watch a few oral arguments, or to listen to recordings of oral arguments. The court's questions and comments will teach you volumes about how this court looks at life and sees its role in society.

If you have not thought about public policy questions that go beyond the boundaries of your case, you have not done your homework. The court probably did not take your case just to decide the rights of your client; it probably took the case to decide the rights of an entire class of parties. You should think hard about the policy concerns that matter to this court.

C. Be flexible.

Do not chain yourself to a script. One of the most common mistakes made by petitioners is to stick too doggedly to a preplanned agenda. No one created oral argument for the purpose of having advocates read from their briefing or inflict scripted speeches on the listeners. Oral argument has only one purpose, which is to let the court have group time with counsel.

Outline your oral argument ahead of time, by all means, but make the outline flexible. Put break points in the outline. Plan a 1-paragraph argument and a 1-page argument. The court will have questions. Deal with the questions as they come, and do not worry if you have to skip large parts of your outline.

Remember: you have a high reversal rate on your side. You do not have to do anything dramatic during your oral argument. In fact, you are better off giving an oral argument that is short and plain-vanilla than an oral argument that is too long and too risky.

D. Save some rebuttal time.

Rebuttal does not deserve much of your attention or concern. By the time the respondent sits down, it is usually pretty clear where the clash points are and how the two sides differ on the various issues. A truly strong rebuttal can be a welcome thing, but the vast majority of rebuttals amount to a waste of time. Be prepared to waive rebuttal. No one will penalize you for giving back time.

At a minimum, come to rebuttal with a mindset of severe economy. Think triage. Limit your points. Pick one killer point to make and put it at the top of your list. Even if you have a list of four points to make, do not stand up and tell the court you have four points. Just go straight to your killer point and beat the other side's brains in with it. If you get the opportunity to go to your next points, fine, but do not count on that.

If you have the opportunity, it can be effective to fill in gaps by supplying key citations or answering prior questions that remain incompletely addressed. "Justice X, you asked me during my opening where you could find that ruling in the record. The answer is on page 5 of volume 4. Justice Y, you asked the respondent how many states have taken this step through legislation as opposed to judicial decree. The answer is ..."

Be prepared to spend the entire rebuttal period off-message. The court may want to use the rebuttal time on some issue that you find unimportant. If that happens, there is nothing you can do. This is why your strongest material belongs at the start of your rebuttal. You may never get the chance to come back to it.

Finally, be cautious about spending rebuttal time on issues that never came up during the earlier parts of the argument. Frequently, a petitioner will run out of time during opening argument and never have a chance to reach a particular issue at all, *e.g.*, a tag-along issue such as attorneys fees or calculation of damages. It is only natural for such a petitioner to feel the need for closure. ("On the X issue, we never got to talk about that earlier, so I want to make a couple of points about that now."). Beware. Although the court is very courteous and will probably let such a petitioner deliver that argument, there is good reason to question the wisdom of such advocacy.

First, everyone will recognize that such an argument is not really a rebuttal. The very fact of the argument suggests that the advocate was not up to the job of managing his time wisely during the opening. Second, there is something mildly unfair about making an argument that the other side will have no

opportunity to answer. Finally, if the issue never came up at all until the rebuttal period, there is a reasonable chance that the court just does not care about the issue. After all, the court usually raises issues on its own if it finds them worthy of discussion. So this kind of argument sends some disconcerting messages. As a result, counsel should resort to this tactic only if the value of the argument is worth the cost of delivering it.

VIII. CONCLUSION.

This paper has harped on the uphill battle facing any petitioner who wants to become part of the favored 10-12%. Getting in the door is hard. But the difficulty in winning review should not cause the advocate to lose heart. For one thing, practice before the Supreme Court is often exhilarating and is almost always a cordial experience. The justices and the clerk's office treat lawyers with exceptional courtesy; they never give attorneys the brusque reception that their federal counterparts have been known to do. The Supreme Court of Texas is extremely user-friendly.

More importantly, the system does not put all the burden on the advocate. In a trial before a jury, the advocate may feel the pressure to push aggressively and create a win by brute force. A trial lawyer may have no choice but to act like a salesman who really wants that commission. Not so in the Supreme Court. This court does its own work. Much of the analysis will come from the court itself – no matter what the lawyers do – and usually at a high intellectual level. As a result, the fact that an advocate misses a piece of the analysis will not necessarily doom the case. Cheer up. The appeal will sell itself if you let it.

Where the court most needs counsel's help is in stripping away the clutter, simplifying the various complexities, and shining the light onto the right questions. If counsel will present the court with one or two good issues in an understandable package, counsel will not have to bludgeon the court into doing the right thing with the ultimate decision. The court will get there on its own.