

ANALYSIS OF A SUCCESSFUL PETITION FOR REVIEW

Robert M. (Randy) Roach, Jr.
&
Sean R. Cox

Cook & Roach, L.L.P.

Houston Office

ChevronTexaco Heritage Plaza
1111 Bagby, Suite 2650
Houston, Texas 77002
713-652-2800
713-652-2029 (fax)

Austin Office

1004 West Avenue
Austin, TX 78701
By Appointment Only
512-656-9655
512-479-5910 (fax)

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CHAPTER 2

EDUCATION:

Georgetown Univ., BA in Philosophy (1977) (magna cum laude)
University of Texas School of Law, JD (1981) (Texas Law Review; Hildebrand Moot Court Champion)

PROFESSIONAL ACTIVITIES:

Board Certified in Civil Appellate Law and Board Certified in Personal Injury Trial Law
Former Chair of Appellate Practice Section, Houston Bar Association
Treasurer of Appellate Practice and Advocacy Section, State Bar of Texas (2002-)
Director of Appellate Advocacy, University of Houston Law Center (1994-)
Adjunct Professor of Law, Appellate Advocacy, University of Texas School of Law (2000-)
Adjunct Professor of Law, Appellate Advocacy, University of Houston Law Center (1990-)

LAW RELATED PUBLICATIONS AND PRESENTATIONS:

Author/Speaker for State Bar of Texas CLE Programs on the following Appellate topics: Supreme Court Advocacy - 2004, 2003, 2002, 2001; Federal Appeals - 2004; Appellate Procedure - 2001; Mandamus - 2003, 1999; Appellate Briefs - 2003, 1998; Appellate Lawyers at Trial - 1997; Error Preservation - 1997; Daubert Challenges - 1997; Oral Argument - 2003, 2002, 1995, 1994, 1992, 1991; Attorneys Fees - 1996; Motions for Rehearing - 1995, 1993; ADR - 1994

Author/speaker for University of Texas CLE programs on the following Appellate topics: Oral Argument before the Supreme Court of Texas - 2002; Oral Argument Preparation - 2001; Briefwriting- 2003; Appellate Ethics - 2000; Hot Tips - 1997; Appellate Lawyers at Trial - 1996; Oral Argument Questions - 1995; Oral Argument Survey of Texas Appellate Judges - 1993

Author/Speaker for Houston Bar Association CLE programs on the following Appellate topics: Oral Argument - 2000, 1998, 1996, 1997, 1995; Appellate Lawyers at Trial - 2002, 1998; Construction Law- 2003; Appellate Rules - 1997; Error Preservation - 2001; Motions for Rehearing - 2001; Texas State Survey of Appellate Judges - 1997; Evaluating Potential Appeals - 1993; Statewide Appellate Court Funding and Redistricting - 2003

Author/Speaker for American Bar Association CLE programs on the following Appellate topics: Appellate Lawyer at Trial - 2001; Appellate ADR; Appellate Oral Argument - 1997; Insurance Appeals - 2001

Author/Speaker at over 30 CLE programs Trial Procedure topics including discovery strategy, ethics, insurance coverage litigation, budgets, post verdict motions, investigating catastrophic accidents, evidence, ADR, Mary Carter agreements, bifurcating punitives, and products liability - 1990-2004

Author/Speaker for South Texas College of Law CLE programs on the following topics: Appellate ADR - 2002; Appellate Oral Argument- 1999; Discovery - 1993, 1989

Author/Speaker on Insurance Coverage topics at CLE programs sponsored by: State Bar - 2004, 2003, 2002; University of Texas - 2003, 2002, 2000, 1999, 1998; American Bar Association - 1997, 1996; Univ. of Houston - 2004, 2003, 2002; South Texas College of Law - 2004, 1999; Houston Bar Association 2003; Dallas Bar Association 2004; Anderson Kill - 1995; Houston Intellectual Property Law Association - 2002

Co-author of "Technology Risks and Liabilities: Are You Covered?" SMU Law Review; Volume 54, No. 4, Fall, 2001

PROFESSIONAL MEMBERSHIPS:

Product Liability Advisory Council; International Association of Defense Council; Federation of Defense and Corporate Counsel; Fifth Circuit Bar Association; District 4I Grievance Committee, 1993-1998.

PROGRAM CHAIR:

Annual Meeting Committee, Appellate Advocacy Section, ABA Tort and Insurance Practice Section 2000-2001; Judicial Liaison Committee, Insurance Section of State Bar of Texas, 2000-2001; University of Texas Insurance Law Seminar, 1998

PROFESSIONAL LISTINGS:

Texas Super Lawyer "Texas Monthly"; Who's Who in American Law; Who's Who in the World; AV rated by Martindale-Hubble

Sean R. Cox
COOK & ROACH, L.L.P.

1111 Bagby, Suite 2650
Houston, Texas 77002
Telephone (713) 652-2800
Facsimile (713) 652-2029

EDUCATION:

University of Texas at Austin, B.A. in Psychology (1997).
University of Houston Law Center, J.D. (2001) (Order of the Barristers; Federal Bar Association Moot Court Champion;
Justice Bud Warren Appellate Advocacy Award recipient).

PROFESSIONAL ACTIVITIES:

Adjunct Professor of Law, Appellate Advocacy, University of Houston Law Center, 2002- present.
Coach, Moot Court Team, University of Houston Law Center, 2001-present.
Member: State Bar Texas and Houston Bar Association.

EXPERIENCE

Cook & Roach, L.L.P., Associate in Appellate Group 2001 - present.

LAW RELATED PUBLICATIONS AND PRESENTATIONS:

“Transitioning from Trial to Appeal and Post Trial Motions,” co-author, Federal Court Practice, State Bar of Texas, 2004.

“Strategic and Ethical Considerations in Pursuing and Responding to a Mandamus of Discovery Rulings,” co-author,
Advanced Civil Discovery, University of Houston Law Center, 2003.

“The Appellate Advocate,” The State Bar of Texas Appellate Section Report, quarterly contributor, 2003 Ed. Vol. XV,
Number 4; Vol. XVI, Number 1; Vol. XVI, Number 2; and Vol. XVI, Number 3.

“Appellate Case Update,” author/presenter, Houston Bar Association Appellate Practice Section, October 2002.

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ANALYSIS OF A SUCCESSFUL PETITION FOR REVIEW

I. INTRODUCTION

There are many strategic decisions to be made in drafting an effective petition for review. This paper addresses how advocates can design a petition to increase the chances of obtaining review by the Texas Supreme Court.

This paper will discuss persuasive techniques utilized by successful advocates in drafting a petition for review and will analyze a recent petition granted review by the Supreme Court of Texas (*see* appendix). The sample petition comes from *Mission Petroleum Carriers, Inc. v. Solomon*, 106 S.W.3d 705 (Tex. 2003). In that case the petitioner obtained a reversal of a trial court judgment that had been affirmed on appeal. This paper will focus on analyzing the portions of that sample petition that were used as vehicles for persuasion, indicating the specific techniques used by the advocates, as well as suggesting other possible approaches that might be useful in other cases.

II. FORMAL REQUIREMENTS OF A PETITION FOR REVIEW

Texas Rule of Appellate Procedure 53.2 addresses the formal requirements for a petition for review. The required contents of a petition for review are as follows:

- (a) Identity of Parties and Counsel
- (b) Table of Contents
- (c) Index of Authorities
- (d) Statement of the Case
- (e) Statement of Jurisdiction
- (f) Issues Presented
- (g) Statement of Facts
- (h) Summary of the Argument
- (i) Argument
- (j) Prayer
- (k) Appendix

TEX. R. APP. P. 53.2. In addition to the formal content and filing requirements, specific formatting is also required. For instance, the petition must be printed in 13-point font, except footnotes, which must be no smaller than 10-point font. TEX. R. APP. P. 9.4(e). The text must be double-spaced, but footnotes, block quotations, short lists, and issues or points of error may be single-spaced. TEX. R. APP. P. 9.4(d). Margins must be at least one-inch on both sides and at the top and bottom. TEX. R. APP. P. 9.4(c).

Petitioners should be aware that the use of footnotes, smaller or condensed typeface, or compacted or compressed printing in order to avoid the limits of the

formatting rules are grounds for the Court to strike a petition. TEX. R. APP. P. 9.4(i).

A petition must be bound and should have durable front and back covers. TEX. R. APP. P. 9.4(f). The front cover must contain the case style, the case number, contain the title “Petition for Review”, the name of the petitioner, and the name, mailing address, telephone number, fax number, if any, and State Bar of Texas identification number of the lead counsel for the petitioner. TEX. R. APP. P. 9.4(g).

A petition for review must be submitted in an original and 11 copies and be accompanied by the \$75.00 filing fee. TEX. R. APP. P. 9.3(b).

Deadlines applicable to petition practice.

There are numerous deadlines that must be followed with respect to a petition for review. The petition must be filed within 45 days of (1) the date that the court of appeals rendered judgment, if no motion for rehearing was timely filed, or (2) the date of the court of appeals’ last ruling on all timely filed motions for rehearing. TEX. R. APP. P. 53.7(a). A petition filed before the last ruling on all timely filed motions for rehearing is treated as having been filed on the date of, but after, the last ruling on any such motion. TEX. R. APP. P. 53.7(b).

The filing of a motion for rehearing in the court of appeals is no longer required before seeking relief in the Supreme Court. It should be noted that a petitioner may not file a motion for rehearing in the court of appeals once a petition for review has been filed in the Supreme Court, unless the court of appeals has modified its opinion or judgment after the petition for review is filed. The filing of a petition for review by one party, however, does not preclude another party from filing a motion for rehearing. TEX. R. APP. P. 53.7(b).

Any other party required to file a cross-petition may do so within 45 days after the last timely motion for rehearing is overruled or within 30 days after any preceding petition is filed, whichever date is later. TEX. R. APP. P. 53.7(c). A response must be filed within 30 days after the petition is filed, and any reply must be filed within 15 days after the response is filed. TEX. R. APP. P. 53.7(d) & (e).

The Clerk’s office is now in charge of ruling on routine extension motions. Andrew Weber, *Internal Procedures of the Supreme Court*, State Bar of Texas, Practice Before the Texas Supreme Court (2004), Chapter 2, at 5. Generally, for good cause, the Clerk’s office will routinely grant a motion for extension of time to file a petition for review. An extension may only be granted, however, if a party files a motion no later than 15 days after the last day for filing the petition. TEX. R. APP. P. 53.7(f). An extension may also be granted to extend the time to file a response or reply upon request of a party. *Id.*

III. WHAT DOES IT TAKE TO GET A PETITION GRANTED?

What are the chances of getting a petition granted?

Based on statistics from the last few years, a petition generally stands a 10% to 12% chance of being granted. Justice Deborah G. Hankinson, Warren W. Harris, & Tracy C. Temple, *Issue Drafting/Issue Spotting*, State Bar of Texas, 17th Annual Advanced Civil Appellate Practice Course (2003), Chapter 12, at 5. Although the number of petitions filed in 2003 dropped somewhat from previous years, the chances of the Court granting a petition has remained relatively unchanged.¹

What factors do the Justices consider in deciding to grant or deny a petition?

The process and manner of reviewing a petition is different for each Justice. The extent of the review varies greatly and can range from a cursory review of the issues presented or summary of the argument, to a full review of the entire petition. See Douglas W. Alexander & Lori Ploeger, *Crafting Your Petition for Review*, State Bar of Texas, Practice Before the Supreme Court of Texas (2004), Chapter 5 at p. 3, 9. Generally speaking, the Justices will often spend no more than 10-15 minutes reviewing a petition, and sometimes far less. *Id.* at 2; see also Pamela Stanton Baron, *Drafting Issues in the Texas Supreme Court*, State Bar of Texas, Advanced Civil Appellate Practice Course (2001), Chapter 6, at 2.

In deciding to grant a petition, the Supreme Court of Texas considers the following factors:

- (1) whether the justices of the court of appeals disagree on an important point of law;
- (2) whether there is a conflict between the courts of appeals on an important point of law;
- (3) whether a case involves the construction or validity of a statute;
- (4) whether a case involves constitutional issues;
- (5) whether the court of appeals appears to have committed an error of law of such importance to the state's jurisprudence that it should be corrected; and

¹This information is derived from the Supreme Court of Texas annual report maintained on the Texas Office of Court Administration website at the following address: http://www.courts.state.tx.us/publicinfo/AR2003/sc/caseload_trends.pdf

(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(a). Even if jurisdiction may be proper under such grounds as a conflict among the courts of appeals, the Court generally will not grant a petition unless it satisfies one of these above factors and is deemed an appropriate vehicle for expressing the Court's declarations of law. See Elizabeth V. Rodd, *What is Important to the State's Jurisprudence?*, State Bar of Texas, Practice Before the Supreme Court of Texas (2003), Chapter 6, at 1; see also TEX. R. APP. P. 56.1(a) (1), (2); TEX. R. APP. P. 53 (comment). In addition to the factors listed above, the quality of the briefing can also affect the Court's decision to grant or deny a petition. See Rodd at 4. Therefore, the goal of any petition is to highlight one or more of these factors, in the most clear and organized manner possible, in order to persuade the Supreme Court that the petition is worthy of being granted. The remainder of this paper will focus on how to accomplish these goals.

What themes should be emphasized, or avoided, when attempting to persuade the Court?

Although there are many reasons the Court may choose to grant a petition for review, the most important factor is whether the case presents a question of importance to the jurisprudence of the state. The following are a few themes a petitioner might want to emphasize:²

- An issue of first impression that is likely to recur.³
- An issue for which statewide uniformity is important.⁴
- Issues on which courts of appeals are likely to be misled or confused by the court of appeals' opinion.

² These examples are drawn from a paper by Court Staff Attorney, Elizabeth "Ginger" Rodd. Elizabeth V. Rodd, *What is Important to the State's Jurisprudence?*, State Bar of Texas, Practice Before the Supreme Court of Texas (2003), Chapter 6.

³ Some Justices prefer that novel issues first "percolate" through the courts of appeals. Rodd at 2.

⁴ The concern has been raised that this requires the Court to engage in an undesirable amount of error correction. Rodd at 3.

- An issue that allows the Court to decide whether Texas will follow a national trend in a developing area of the law.
- An issue that provides the opportunity to the Court to clarify one of its previous opinions that is being misapplied by the lower courts.
- An issue on which the courts of appeals are divided.
- An issue for which the court of appeals' opinion conflicts with long-standing precedent.

A special emphasis on issues such as the above might increase the likelihood that the court will grant a petition. Additionally, a petitioner should be wary of including issues that, either the Court will not find important, or that might actually discourage the Court from granting the petition. For instance, the Court is not likely to find a case important if it involves a highly fact specific complaint that is unlikely to recur, or the legal sufficiency of particular evidence. Baron at 2.⁵

IV. STRATEGY IN DRAFTING THE DIFFERENT PARTS OF A PETITION

It is imperative that the advocate grab and maintain the attention of the Justice upon first glance of the petition, and be as concise and persuasive as possible. Because sections of the petition other than the argument section can have persuasive force (i.e. the table of contents, summary of the argument, and issues presented), these other sections cannot be drafted as a mere afterthought. The advocate should pay as much attention to the drafting of the non-argument sections of the brief as to the argument section.

Maintaining the interest of the Court

Although a petition is limited to 15 pages, the interest in the petition may wane before the reader reaches the halfway point. There are a variety of methods for holding a reader's attention. For instance, focusing on some of the more colorful facts of a case can break up the sometimes monotonous tone of a petition. Robert B. Dubose, *Legal Writing: Tools for Helping the Court*, State Bar of Texas, 27th Annual Advanced Civil Trial Course (2004), Chapter 34, at 9-

10. Even if the case presents a rather dry factual picture, analogizing the factual scenario of a petition to a case involving more interesting facts may provide a more entertaining or provocative reading experience. *Id.* at 10.

Additionally, describing the debate between courts or legal scholars on a particular issue can provide a broader context for the analysis, while also presenting the issue to the Court in a more interesting manner. *Id.* An attempt to persuade the Court that the issues presented would provide an intellectually stimulating experience can go far in persuading the Court that the petition is worth the Court's time to review.

An additional tool that should not be ignored is the use of visual aids. Often, a simple diagram outlining the possible outcomes of a particular decision, or a chart of the positions various courts have taken on an issue, can provide added impact to a petition, while crystallizing the petitioner's position. *Id.*

A. A Persuasive Table of Contents

TEX. R. APP. P. 53.2(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.*

A persuasive table of contents should outline the arguments that will follow. The outline in the table of contents is not only an organizational tool, but a method to convey the logic of the argument.

An effective outline conveys the structure of the argument in a reduced fashion that also highlights the connections between the arguments. With an effective outline structure, the logic of the petitioner's argument is clear from the outset. The reader can easily see the main points, and the supporting substructure. An effective outline structure itself can serve as an additional summary of the argument. A reader should be able to see the structure of the argument in the outline and conclude that the petition is worthy of deeper consideration.

An outline should provide enough layers of detail so that the Court can understand the argument without referring to the rest of the petition. The sample petition provides a brief, yet effective outline in the table of contents. The sample petition conveys the substance of the issues presented within a logical framework. The outline is also eye catching. Suggesting that the court of appeals has created a new tort, undermined the employment at-will doctrine, and has drawn Texas out of the mainstream of American jurisprudence are assertions demanding attention.

A series of unremarkable assertions of error can result in the petition being cast aside with only the most cursory examination. See Justice Craig T. Enoch & Michael S. Truesdale, *Issues and Petitions: The Impact on Supreme Court Practice*, 31 ST. MARY'S L.J. 565, 590-

⁵ The views are mixed among the Justices as to whether a legal sufficiency complaint can be important to the jurisprudence. Rodd at 5. Additionally, legal sufficiency issues have been increasingly reviewed by the Court in recent years, but usually only in conjunction with other important issues. *Id.* at 8.

91 (2000)(“A justice reviewing a petition may be able to tell immediately, based on review only of the issue presented, that the case is not one warranting supreme court review.”). The sample petition grabs attention in a very short and concise outline of the argument. The outline of the argument in the sample petition does not include throwaway statements such as, “The court of appeals erred.” Rather, the sample petition boils down the entire argument to a few key phrases that are easily digested, and it encourages the Court to read further into the petition.

Although some petitions include the issues presented in the table of contents, this is often unnecessarily redundant with the statement of issues presented, which appears a few pages after the table of contents. TEX. R. APP. P. 53.2(f). The outline of the argument in the table of contents should adequately convey the substance of each issue.

B. Statement of the Case

TEX. R. APP. P. 53.2(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 of the case is designed to provide the Court with a quick reference tool for the most basic information of a case. It is not an opportunity to argue the merits. The statement must contain the following:

- (1) a concise description of the nature of the case;
- (2) the name of the judge who signed the order or judgment appealed from;
- (3) the designation of the trial court and the county in which it is located;
- (4) the disposition of the case by the trial court;
- (5) the parties in the court of appeals;
- (6) the district of the court of appeals;
- (7) the names of the Justices who participated in the decision in the court of appeals, the author of the opinion for the court, and the author of any separate opinion;
- (8) the citation for the court of appeals’ opinion, if available, or a statement that the opinion was unpublished; and
- (9) the disposition of the case by the court of appeals.

TEX. R. APP. P. 53.2(d). The sample petition’s statement of the case appropriately apprises the Court of the necessary procedural information without argument.

Although the statement of the case may be in narrative or tabular format, the Justices have indicated they prefer the tabular format, as utilized by the sample petition. Alexander & Ploeger at 7. Factors weighing against a narrative format are that a narrative format is not as easily referenced and may be more difficult to restrict to a single page, as suggested by Rule 53.2(d).

C. Statement of Jurisdiction

TEX. R. APP. P. 53.2(e) – Statement of Jurisdiction:

The petition must state, without argument, the basis of the Court’s jurisdiction.

The Supreme Court of Texas has jurisdiction as prescribed by Texas Government Code section 22.001. That section provides that the Supreme Court has jurisdiction of cases arising from the courts of appeals in the following situations:

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

TEX. GOV’T CODE §22.001(a). Generally, the statement of jurisdiction is simply the section in which the petitioner informs the Court of the basis of its jurisdiction (i.e. conflict in the courts of appeals, an error important to the jurisprudence, statutory interpretation, etc.) without any elaboration. TEX. R. APP. P. 53.2(e).

The sample petition provides only a brief statement of jurisdiction, which is all rule 53.2(e) requires. The petition provides two bases for jurisdiction: 1) a conflict

exists in the courts of appeals, and 2) the court of appeals has committed an error of law of such importance to the state's jurisprudence that it should be corrected. Petitioner then cites to the cases that conflict with the court of appeals' opinion.

In order to highlight the conflict among the lower appellate courts, a tool often used by the authors of this paper is to state the holding of the court of appeals on which the petitioner has based its petition, and then include a very brief parenthetical after each conflicting case stating the holding of the case. Parenthetical explanations can be helpful to explain briefly why a conflict exists. Alternatively, if there is a case that is squarely in conflict and is based on similar facts, the petitioner might want to briefly state in one sentence how that opinion specifically conflicts with other cases, and merely reference other cases with less direct conflicts. So long as they do not lapse into an argument, these approaches can persuasively highlight both the conflict in the courts of appeals' holdings and the issues of importance to the jurisprudence of the state.

D. Issues Presented

TEX. R. APP. P. 53.2(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.*

Narrowing the issues presented

Generally, a petition for review should only present the petitioner's one or two best issues. Baron at 3. One or two issues can be effectively briefed within the 15 page limit for petitions. See Justice Deborah Hankinson, *Framing Issues Under the New Rules: A View from the Supreme Court*, 5 THE APPELLATE LAWYER 4 (Houston Bar Ass'n Appellate Practice Section Winter 1998-1999). Raising a larger number of issues to be briefed in the petition diminishes the available space for presenting the one or two best issues in the best possible manner. Additionally, the impact of the one or two best issues may be lost among a large number of jurisprudentially less important issues.

Another reason to limit the issues presented is that a petitioner is less likely to adequately brief a multitude of issues if full briefing is granted because of the 50 page limit for briefs on the merits. See Hankinson at 4. Although the petitioner may believe the court of appeals erred in many ways, it hinders the likelihood of the petition being granted if all those ways are presented for review.

Although the drafters of the sample petition chose to include a third issue in the sample petition, the issue

did not significantly reduce the available space for briefing the first and second issues. Also, the third issue gave the drafters an opportunity to argue the injustice of the court of appeals' holding, and provided an additional contextual link to the effect of the court of appeals' opinion on Texas jurisprudence. Consequently, the benefits of including the third issue presumably weighed in favor of its inclusion.

Generally if more than one issue is raised in the petition, the issue that is the most likely to persuade the Court to grant the case should be the first issue raised. Alternatively, an issue that has a reasonable chance of disposing of the entire case, without the necessity of addressing any other issue, might also be raised first. The first issue in the sample petition has both of these characteristics. The assertion that the court of appeals created a new tort that would trump a longstanding principle of Texas law is likely to grab the attention of the Court and is very persuasive. Additionally, if the Court ruled in favor of the Petitioner on that issue, it would have been unnecessary for the Court to address the other issues presented. In fact, the opinion issued by the Supreme Court in the case involving the sample petition ultimately addressed only the first issue, never reaching the other issues raised in the petition. *Mission Petroleum Carriers, Inc. v. Solomon*, 106 S.W.3d 705, 716 (Tex. 2003). Had the Court ruled differently on the first issue, however, it would have been necessary for the Court to address the remaining issues.

Selection of the issues presented

Certain issues may be more attractive to the Court than others. An issue that provides the Court an opportunity to prevent a radical change in Texas law is much more likely to be granted than an issue that appears more like error correction. Hankinson, et al. at 6, (“A number of the justices on the Texas Supreme Court believe that the primary purpose of the supreme court is *not* error correction, but to focus on the state's jurisprudence.”). For instance, in the sample petition the drafters have chosen issues that 1) alert the Court to the recognition of a new tort by the court of appeals that threatens to undermine a long-protected doctrine of employment law, 2) raises the threat of the expansion of mental anguish recoveries, and 3) raises the question of what evidence is sufficient to show malice under this newly recognized tort. These issues are likely to grab and hold the Court's attention and encourage a more thorough consideration.

If there are issues that the advocate believes should be raised, but are not truly important to the jurisprudence of the state, the issues can be preserved for full briefing by listing them as unbriefed in the issues presented. Baron at 3. The sample brief provides a good example of this practice.

Crafting the issues presented

There is debate among the appellate bar regarding the most effective format for an issue presented. Alexander & Ploeger at 10. One approach consists of a question to be answered by the Court, preceded by two or three sentences providing a glimpse at the factual and legal underpinnings of the issue. *Id.* at 10-11. A second approach consists of a concise one sentence question for the Court. *Id.* A third approach consists of a one sentence question crafted with sufficient detail to interest the Court. *Id.*

Regardless of the approach utilized, the drafter must be careful not to constrain the question to the specific facts of the case so that the answer to the question would only resolve the case at hand. Alexander & Ploeger at 10. Such an answer would not impact the jurisprudence of Texas and is less likely to be considered by the Court. *Id.* Whichever approach is employed, the advocate should endeavor to connect the issues in the case with the effect they will have on future cases, as well as on Texas law generally. *Id.* at 11.

An additional consideration in crafting the issues presented is the framing of the issues. Some advocates prefer to frame an issue so that there can be only one answer – the one the drafter is advocating. *Id.* at 10-11. Other advocates prefer a more broad issue for which there may be more than one answer. *Id.* at 9-10.

The purpose of this latter approach is simply to interest the Court in the case with a more neutral posture. *Id.* at 11 (citing Baron at 7). Essentially the issue presents the question as an important one to be answered, regardless of the impact on the petitioner. The “neutral” issue approach may be more useful at the petition for review stage, when the sole purpose is to persuade the Court to take the case, than in briefs on the merits, when advocates are also seeking to persuade the Court on the merits. Alexander & Ploeger at 7-8.

“Frequently, a justice may decide to deny a petition based solely on a review of the issue presented by the petition.” Enoch & Truesdale, at 588. The issues should be framed in a manner that provides a broad view of how the issue will affect the law of Texas. Hankinson, et al. at 6. The sample petition accomplishes this goal by framing each issue in terms of what effect the court of appeal’s opinion will have on Texas law generally, not the petitioner specifically.

Careful selection of the language in an issue can convey to the Court the importance of that issue. “Because petitions are denied by default . . . the statement of issues must be framed in a way that convinces at least one justice that further review is warranted.” Hankinson, et al. at 7. Without careful issue framing and language selection, the issue could appear mundane and not worthy of review.

The sample petition’s “issues presented” section

effectively conveys the importance of the issues by emphasizing particular results that will flow from the court of appeals’ opinion and by the selection of particular language that grabs the attention of the Court. For instance, the sample petition suggests that a new tort was created by the court of appeals. The sample petition also alerts the Court that the new tort recognized by the court of appeals brings with it the relatively hard to contain element of “mental anguish.” Both of these issues will draw the attention of the Court.

Additional language that might have been used in the issues presented to further grab the attention of the Court might have been an explicit reference to punitive damages in issue 3, or alerting the Court that the at-will employment doctrine is in jeopardy.

E. Statement of Facts

TEX. R. APP. P. 53.2(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.*

The statement of facts, although generally not the most important part of the petition, provides the necessary context for understanding the actions of the trial and appellate courts, as well as for understanding the complaints of the petitioner. The statement of facts must include record citations for every factual assertion made. An assertion without cited support could be interpreted as inappropriate argument, or may be disregarded entirely. In either situation, the petitioner’s credibility is diminished and the persuasive opportunity lost.

Accuracy is extremely important. A petitioner’s credibility can be destroyed through inaccurate citations or an unreasonable spin placed on the facts. It is very important that the drafter verify the accuracy of all citations. It is also advisable that the drafter have someone else review the portions of the record cited, in order to give an unbiased evaluation.

The statement of facts should never include argument. TEX. R. APP. P. 53.2(g). This does not mean, however, that the statement of facts cannot be persuasive. The sample petition provides an excellent example of characterizing the underlying facts of the case in a manner supportive of the petition, without arguing.

First, the sample petition’s statement of facts portrays the underlying accusations in terms of defamation, rather than negligence. The statement of facts also points out that the case was originally filed as a defamation case, and then describes the allegedly tortious conduct in defamation terms, such as the accusation that “the disclosure of the test results to other employers ruined his name.” These facts portray the case

as one not properly raised in negligence.

Second, the sample petition's statement of facts points to specific facts in support of the "no evidence of malice" argument contained in issue 3 of the petition. The statement of facts specifically emphasizes that the drug testing was done "for safety reasons" and that, although petitioner regretted it, the respondent had to be fired.

Third, the sample petition's statement of facts includes closing argument material arguing that an employer must owe a duty of fairness to an employee and indicating that the goal of the lawsuit was to undermine the employment at will doctrine. These facts highlight the assertion that the respondent is attempting to change Texas law.

Although the above facts do not necessarily impact the case's importance to the jurisprudence of the state, they do establish a necessary contextual framework, and it also provides a glimpse at the type of outcome that might be expected if the court of appeals' opinion is not reversed.

F. Statement of Jurisprudential Importance

The jurisprudential importance of a case must be addressed in the argument section of the petition. TEX. R. APP. P. 53.2(i). The drafters of the sample petition also chose to include a separate section on the jurisprudential importance of the case. Although an unorthodox approach, the sample petition's separate statement of jurisprudential importance certainly grabs the attention of the reader. Not only is the statement a separate section, it also is referenced in the table of contents, which may cause the reader to proceed directly to this important discussion.

The statement of jurisprudential importance in the sample petition presents a picture of the case in the abstract, pointing out to the Court the effect that the case will have outside the specific facts of the case. Later in the argument section, the sample petition ties this abstract effect into the specific factual circumstances of the case, giving a compelling context to persuade the Court that this case is the best vehicle for reviewing the issues presented.

G. Summary of the Argument

TEX. R. APP. P. 53.2(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.*

The summary of the argument should include: (1) the one or two most persuasive arguments for granting the petition, which should focus on the jurisprudential importance of the issues; and (2) a roadmap of the arguments. The summary of the argument should

seldom be more than one page in length. The summary should strike at the heart of the argument in as few words as possible. The summary cannot be a mere general overview. It should identify specific reasons for granting the petition, and leave further development and support for the argument section of the petition.

The summary of the argument in the sample petition reduces the argument to the following points:

- The court of appeals recognized a negligence theory that eviscerates the at-will rule.
- The court of appeals mishandled mental anguish in a manner inconsistent with Texas law.
- The court of appeals has blurred the lines between negligence and other causes of action.
- The Court might want to take the opportunity to rule on the economic loss rule.

The sample petition's argument section contains an additional argument, not included in the summary of the argument, addressing the legal sufficiency of the evidence on the malice element of punitive damages. This argument is not a necessary element to be included in the summary of the argument because it is not central to the arguments for the Court to take the case. The issue is essentially a no evidence argument that is probably fact specific and not important to the state's jurisprudence.

H. Argument

TEX. R. APP. P. 53.2(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.*

The argument section of a petition for review is generally structured in one of two ways. The drafter may choose to divide the argument into one section addressing the reasons the Court should grant the petition, and another addressing the merits of the case. *See* Alexander & Ploeger at 12-14. The drafter also might choose the method favored by the authors of this paper which

involves combining both of these tasks in a single argument section. The former method highlights the reasons the Court should take the case by placing those arguments in a separate, independent section that is easily referenced and clearly stands out to the Court. The latter method, however, affords a greater opportunity to persuade the Court that the petition provides an appropriate vehicle for the Court to speak on the issues. It does so by providing the context of the case alongside the reasons why it is important for the Court to speak on the issues.

The sample petition uses a hybrid of these two methods by including a Statement of Jurisprudential Importance separate from the argument section. The argument section then proceeds on the path of combining a discussion of the merits along with the reasons it is important for the Court to grant the petition.

The argument section in the sample petition attempts to persuade the Court that it should grant the petition by continually drawing the Court back to the reasons the court of appeals' opinion will reach far beyond the confines of this one case. The petition stresses the importance of the issues by using the following language:

- "This holding creates a new exception to the at-will rule." Sample petition at 6.
- "The decision below stands in direct conflict with the decision of the other courts of appeals." *Id.* at 7.
- The court of appeals' opinion recognizes "a cutting edge legal theory that plaintiffs have been trying in recent years, all across the State." *Id.*
- "The ensuing litigation not only will burden the courts, but it will chill the right to terminate employees" *Id.* at 8.
- "Given the important purposes served by the at-will rule, the Beaumont court's assault on the rule should be repelled." *Id.*
- The court of appeals "has effectively created a new basis for recovery of mental anguish damages" *Id.* at 10.
- "This doctrinal mix-and-match simply underscores the damage that will be done to Texas jurisprudence if the court of appeals' opinion is not corrected." *Id.* at 12.
- The Court's intervention is required to

"repair the split between the Beaumont court's decision and a pair of 1993 decisions from Austin and San Antonio." *Id.* at 13.

The above quotations are designed to demonstrate to the Court the far reaching and damaging effects of the court of appeals' opinion. A petition for review that combines the merits and jurisprudential importance elements in one argument section should include language of a similar character, woven throughout the argument.

The argument section also provides support for the position that the case is an appropriate vehicle for the Court to express its views on the issues by using language such as, "This case presents a suitable vehicle for drawing lines and confining Texas tort-law to its proper sphere" and "This case provides a suitable vehicle for [addressing the economic loss rule], if the Court chooses to address that larger doctrinal issue." Sample petition at 5 and 13. Although the Court ultimately did not choose to address the economic loss rule, it was still advisable to bring that issue to the Court's attention, because the particular issue raise had not been resolved by the Court, and the Court might be seeking an appropriate case in which to address it.

The drafters of the sample petition also emphasize the importance of the case by effectively communicating that the court of appeals has thrown open the door on negligence law, mental anguish recoveries, and punitive damages. This increases the sense of urgency in the petition by essentially telling the Court, "If you do not act now, all may be lost."

The drafters of the sample petition also portray the court of appeals as a rogue among courts in Texas, and suggest that the result would have been different if only the appeal had been brought in a different court of appeals. The drafters have done so by specifically pointing out that, "If this appeal had gone to Austin or San Antonio, Solomon would have lost." Sample petition at 14. The argument that the court of appeals in this case must be reined in is an appeal to the desire for uniformity among the courts of appeals, which is not only important to the jurisprudence, but also is a specific ground for the Court's jurisdiction. *See* Rodd at 3; TEX. GOV'T CODE §22.001(a).

In sum, the argument section in the sample petition continually returns to the most central theme of a persuasive petition for review: if the Court does not step in now, the effect of the court of appeals' decision will irreparably harm Texas law.

I. Prayer

TEX. R. APP. P. 53.2(j) – Prayer: *The petition must contain a short conclusion that clearly states the nature of the relief sought.*

The TRAPs require a prayer that clearly states the

nature of the relief sought. TEX. R. APP. P. 53.2(j). Generally, a simple request that the petition be granted, as is contained in the sample petition, may be sufficient to fulfill this requirement. It may also be advisable, however, to inform the Court of the specific relief requested if the Court should grant the petition (for example, "Petitioner asks this Court to grant its Petition for Review, reverse the judgment of the court of appeals, and render judgment in Petitioner's favor.").

Court, State Bar of Texas, 27th Annual Advanced Civil Trial Course (2004), Chapter 34.

V. CONCLUSION

Because a petitioner only has a small window in which to grab the Court's interest, careful attention must be paid to all sections of the petition for review. With careful selection, framing, and presentation of the issues as important to the jurisprudence of the state, the petitioner can increase the chances that the Court will grant review. By following the example of the sample petition analyzed in this paper, a petitioner will have in their hands the tools necessary to accomplish this difficult task.

VI. BIBLIOGRAPHY

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APPENDIX

