SEEKING AND AVOIDING SUPREME COURT REVIEW

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CHAPTER 11

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I. THE PETITION FOR REVIEW PROCESS.

To determine one's chances of obtaining Supreme Court review, it is important to understand the Court's review process. The court began the current petition for review process in 1997. Under that process, the first step in obtaining Supreme Court review is the filing of a petition for review. *See* Tex. R. App. P. 53.1 ("A party who seeks to alter the court of appeals' judgment must file a petition for review.").

A. The petition for review and response.

A petition for review must contain the following items:

- A list of all parties and counsel;
- A table of contents;
- An index of authorities;
- A statement of the case;
- A statement of jurisdiction;
- A statement of the issues presented for review;
- A statement of facts;
- A summary the argument;
- An argument;
- A prayer for relief; and
- An appendix containing specified items including the trial court's judgment and the opinion and judgment of the court of appeals.

Tex. R. App. P. 53.2.

The petition for review is short, no more than 15 pages, not including the list of parties, the table of contents, the index of authorities, the statement of the case, the statement of jurisdiction, the statement of the issues, the signature and certificate of service, and the appendix. Tex. R. App. P. 53.6. Absent leave of court, a party's statement of facts, summary of the argument, argument, and prayer for relief must be set forth in 15 pages. *Id.*

"A petition for review, need not address every issue or point included in the statement of issues and points." *Id.* at 53.2(i). Thus, the party seeking review has a great deal of discretion to select the arguments it wishes to emphasize in its allotted 15 pages—without fear of waiving anything identified in the statement of issues. Virtually every appellate practitioner speaks of the petition for review as a "marketing" document, a document drafted to attract the supreme court's interest and attention. The Rules of Appellate Procedure in fact require the petition to "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)." Tex. R. App. P. 53.2(i)(discussing the contents of the argument section of a petition for review).

Rule 56.1(a) states first that "[w]hether to grant review is a matter of judicial discretion." Tex. R. App. P. 56.1(a). The Rule then provides a non-exclusive list of six factors that "the Supreme Court considers in deciding whether to grant a petition for review . . . ." *Id.* These six factors are:

- whether the justices of the court of appeals disagree on an important point of law;
- whether there is a conflict between the courts of appeals on an important point of law;
- whether a case involves the construction or validity of a statute;
- whether a case involves constitutional issues;
- 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
- 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.

Id.

Once a petition for review is filed, any other party "may file a response to the petition for review, but it is not mandatory." *Id.* at 53.3. If a party chooses to file a response, the response is due 30 days after the petition is filed. *Id.* at 53.7(d). A party who elects not to respond to a petition may file a waiver of response, or he may simply let the time for filing a response expire.

If a response is not filed, the Supreme Court will consider the petition without a response. *Id.* at 53.3. Nonetheless, a "petition will not be granted before a response has been filed or requested by the Court." *Id.* Thus, a party may wait to file a response until the Court requests one—safe in the certainty that the Court may deny, but will not grant, the petition before calling for a response.

The response to a petition for review must contain the same items as the petition except:

- The list of parties need not be repeated unless corrections are required;
- The statement of the case and statement of facts may be omitted unless the respondent is dissatisfied with the petitioner's statements;
- The statement of issues may be omitted unless the respondent is dissatisfied with the

petitioner's issues or wishes to raise issues of its own (but remember, a response cannot raise issues that seek more favorable relief than that granted by the court of appeals; a separate petition must be filed to request more favorable relief);
- The statement of jurisdiction should be omitted unless the respondent believes the supreme court lacks jurisdiction; and
- The appendix should not duplicate items included by the petitioner.

Id. at 53.3(a)-(f)

Like the petition, the response is limited to 15 pages, with the same exclusions from the page count. *Id.* at 53.6. The Rules require the respondent's argument "be confined to the issues or points presented in the petition or asserted by the respondent in the respondent's statement of the issues." *Id.* at 53.3(c). The respondent's goal, of course, is to persuade the Court that it should not exercise jurisdiction; and like the petitioner, the respondent should not overlook on the factors listed in TRAP Rule 56.1(a).

B. Briefs on the merits.

"A brief on the merits must not be filed unless requested by the Court." Tex. R. App. P. 55.1. As discussed in the next section, the Court will request briefs on the merits upon the vote of three or more justices.

The petitioner's brief on the merits must contain the same items, in the same order, as the petition for review. *Id.* at 55.2. The brief on the merits, however, may be as long as 50 pages, not including the list of parties, the table of contents, the statement of the case, the statement of jurisdiction, the statement of the issues, the signature and certificate of service. While the Rules provide that the Court may request briefs on the merits "[w]ith or without granting the petition for review," Tex. R.. App. 55.1, the Court's practice is to request briefs on the merits "without" grating the petition. Consequently, since the petition has not been granted, it remains important for the petitioner to address the reasons why the supreme court should expend its time and energy on the particular case.

The petitioner's brief on the merits "must be filed with Supreme Court clerk in accordance with the schedule stated in the clerk's notice that the Court has requested briefs on the merits." Tex. R. App. P. 55.7. Ordinarily, the Court requires the petitioner's brief to be filed within 30 days of the date of the notice. The respondent's brief on the merits is required to be filed 20 days after the petitioner's brief, and the petitioner's reply brief is due 15 days after the respondent's brief is filed.

The respondent's brief on the merits may also be as long as 50 pages. Tex. R. App. P. 55.6. The respondent's brief follows the same format as the response to the petition for review. *Id.* at 55.3. Again, since the petition has not been granted, the respondent's brief on the merits should emphasize the reasons the Court should not exercise its discretion to review the case.

The petitioner may also file a reply brief on the merits. This brief if limited to 25 pages. As discussed below, it should be noted that the Supreme Court does not wait on the reply brief to continue its consideration of the case.

C. The Court's internal operating procedures.

The Supreme Court's handling of petitions for review is referred to as a "conveyor-belt" system. This is because once a petition for review is filed, it moves through to denial as if it were on a conveyor belt unless someone—a judge—takes some action to lift the petition off the conveyor belt.

When a petition for review is filed, it is held in the clerk's office until a response or waiver is filed, or until the time for a response has passed. Once a week, the clerk's office gathers all the petitions that are ready for judicial review and delivers them to the justices. A copy of each petition and any response is delivered to each of the Court's nine (at the moment, eight) justices, together with a vote sheet. The vote sheet identifies the case and allows the judge to select from a set of options: request response, request record, discuss, request study memo, request briefs on the merits, recommend per curiam, recommend grant, recommend dismissal for lack of jurisdiction, recommend refusal, and recommend hold for another case. The selection of any of these options by any of the justices is sufficient to remove the petition from the conveyor belt leading to automatic denial and ensures that the petition will be placed on the Court's conference agenda.

If any of the justices requests that a response be filed, the clerk's office sends a letter requesting a response, and consideration of the petition is held for a response. Once the response is filed, the petition is returned to the Court's conference agenda.

If three or more justices request further briefing, then the clerk's office directs the parties to file briefs on the merits. The request for further briefing likewise triggers the Court's study memo procedure. When briefs are requested, one of the Court's staff or briefing attorneys is assigned to prepare a study memo for the

entire Court. The memo analyzes the issues raised in the petition, addressing the pertinent law and the facts. Ordinarily, the study memo is due 30 days after the respondent's brief on the merits is filed.

Once the study memo is completed and circulated to the Court, the petition is returned to the Court's conference agenda. Upon the vote of four or more justices, a petition is granted and scheduled for oral argument. Six votes or more are required to issue a per curiam opinion.

II. COURT STATISTICS.

The latest period for which we have official statistics from the Office of Court Administration is Fiscal Year 2004. In FY 2004, there were 810 petitions for review filed. This was 158 fewer petitions filed than in FY 2003, and continued a downward trend in filings that began in FY 2000. There were 1,069 petitions for review filed in FY 2000, 259 more than were filed in FY 2004.

In FY 2004, the Supreme Court disposed of 791 petitions for review. Of those 791, the Court granted review in 82. In percentage terms, then, the Court granted 10.4 percent of the petitions for review that it considered.

The Court also disposed of 237 petitions for writ of mandamus in FY 2004. Of those 237 mandamus petitions, the Court accepted 8. That works out to only a 3.4 percent acceptance rate.

There is no official record of how often the Court requests a response to a petition for review or how often the Court requests briefs on the merits. Pam Barron recently reported on her study of the first 100 cases filed in calendar year 2004 (the middle of FY 2004, which rums from September 1, 2003 through August 31, 2004). *See* Pamela Stanton Barron, "The Chair's Report," The Appellate Advocate, vol. xviii, no. 1 (State Bar of Texas Appellate Section Report, Summer 2005). According to her review, the Supreme Court received a response—either voluntarily or by request—in almost 50 percent of the cases filed. *Id.*

Assuming that Pam's statistics held true over the entirety of FY 2004, and the Court requested or received a response in approximately one-half of the cases it reviewed, then the Court received a response in approximately 400 cases. Because the Court cannot grant a petition without having a response, *See* Tex. R. App. P. 53.3, we know that the Court's grants came from the pool of cases in which responses were filed. Thus, in rough terms, the Court granted 82 petitions for review out of the approximately 400 in which responses were filed. In very general terms, then, the court granted about 20 percent of cases involving responses.

Pam Barron also reported that the Supreme Court requested briefs on the merits in 15 out of the 71 cases initiated by petition for review. *Id.* This amounts to a percentage rate of approximately 21 percent.

Because the sample size is small, extrapolations can be misleading. Nonetheless, assuming the Court requests briefs on the merits in 20 to 25 percent of the cases filed, this would mean the Court requested briefs on the merits in approximately 160 to 200 of the petition for review cases it considered in FY 2004. The Court granted 82 cases in FY 2004, which would represent roughly 40 to 50 percent of the approximately 160 to 200 petition for review cases in which the Court requested briefs on the merits. Thus, even after briefs on the merits are filed, the chance of obtaining review is likely no better than about 50 percent.

The question for discussion is how can one maximize his chances of being within or without that 50 percent of cases the Court grants after receiving briefs on the merits. Former Chief Justice Tom Phillips and former Justice Deborah Hankinson will offer their opinions.