STRATEGIES FOR PREPARING THE RESPONDENT'S BRIEF ON THE MERITS IN THE TEXAS SUPREME COURT

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EDUCATION AND CLERKSHIPS

- J.D., Yale Law School, 1998, Editor, *Yale Law Journal*
- B.A., University of Pennsylvania, 1994, *summa cum laude*; Phi Beta Kappa
- Law Clerk, the Honorable Lee H. Rosenthal, United States District Judge for the Southern District of Texas (1998-99)

ADMISSIONS

- Texas

COURT ADMISSIONS

- United States Supreme Court
- U.S. Court of Appeals for the Fifth Circuit
- U.S. Court of Appeals for the Ninth Circuit
- U.S. Court of Appeals for the Eleventh Circuit
- U.S. District Court for the Southern District of Texas
- U.S. District Court for the Eastern District of Texas

Mark Trachtenberg, recognized in 2016 as one of the top 100 lawyers in Houston by *Texas Super Lawyers*, Thomson Reuters, has been involved in many high profile cases in Texas, recently serving as lead counsel at trial and on appeal for a coalition of 88 school districts in a lawsuit challenging the constitutionality of the state's school finance system. His list of major accomplishments for clients include:

- Obtaining a summary judgment in a False Claims Act case in which the plaintiffs had sought billions in damages against a major oil company and successfully defending the appeal of the take-nothing judgment in the Fifth Circuit
- Successfully defending a Fifth Circuit appeal of a $3.6 billion bankruptcy plan of reorganization
- Obtaining a reversal in the Texas Supreme Court of a $14 million products liability judgment
- Successfully resolving a prior school finance lawsuit that resulted in an infusion of more than $2 billion for public schools in Texas

Mark heads the firm's Houston office as its administrative partner. He is also a partner in the firm's appellate section and is board certified in civil appellate law by the Texas Board of Legal Specialization.

Mark serves by appointment on the Executive Committee of the Yale Law School Association and was selected as a member of the American Law Institute. He has been recognized by *The Best Lawyers in America*, Woodward/White, Inc., for Appellate and Commercial Litigation, 2016; named a Texas Super Lawyer, Thomson Reuters, in appellate law, 2013-2016; a "Future Star" by *Benchmark Litigation*, Euromoney Institutional Investor PLC, 2013-2017; and was profiled in the cover article of the 2010 *Texas Super Lawyers* magazine - Rising Stars Edition, Thomson Reuters.

Mark also is a leader in the bar and in his community. He serves as chair of the Appellate Subcommittee of the Business and Corporate Litigation Committee of the American Bar Association's Business Law Section. He is the vice-chair of the Appellate Practice Section of the Houston Bar Association. Outside the office, Mark serves as a vice-chair of the Southwest Region of the Anti-Defamation League and on its National Civil Rights Committee.

- U.S. District Court for the Western District of Texas

Mark also writes and speaks prolifically on a wide variety of topics, with a recent focus on arbitration issues, oil and gas law, and Texas Supreme Court trends. In the last year alone, he has spoken before the State Bar's Advanced Civil Appellate Practice Course, the State Bar's Advanced Personal Injury Course and Advanced Trial Strategies Course, the University of Texas School of Law's Annual Conference on State and Federal Appeals, the Houston Bar Association's Appellate Section, and the Association of Corporate Counsel (Houston chapter).

Professional Recognition

- Recognized in *The Best Lawyers in America*, Woodward/White, Inc., for Appellate and Commercial Litigation (2016-2017)
- Board Certified in Civil Appellate Law, Texas Board of Legal Specialization
- Recognized as one of the top 100 lawyers in Houston by *Texas Super Lawyers*, Thomson Reuters (2016)
- Selected for inclusion in *Texas Super Lawyers*, Thomson Reuters (2013-2016)
- Selected for inclusion in *Texas Super Lawyers* - Rising Stars Edition, Thomson Reuters (2004-2013)
- Named a Future Star in *Benchmark Litigation,* Euromoney Institutional Investor PLC (2013-2017)
- Profiled in cover article of *2010 Texas Super Lawyers* magazine - Rising Stars Edition, Thomson Reuters (2010)
- Named as a Top Lawyer in Houston by *H Texas* magazine, H Texas Partners (2009, 2010, 2012, 2013, 2014)
- Named a "Top Professional on the Fast Track" (2005) and a "Lawyer on the Fast Track" (2004) by *H Texas* magazine, H Texas Partners

Professional and Community Activities

- Chair, Appellate Subcommittee of the Business and Corporate Litigation Committee of the American Bar Association's Business Law Section
- Vice-Chair of the Appellate Practice Section of the Houston Bar Association
- Member, Executive Committee of the Yale Law School Association
- Member, American Law Institute (ALI)
- Board member, *The Houston Lawyer* editorial board (2005-2011)
- Fellow, Texas Bar Foundation
- Young Leader, United Way of Greater Houston
- Frequent speaker at State Bar and Houston Bar Association Continuing Legal Education programs, on a variety of topics, including arbitration-related litigation, the Texas Supreme Court, school finance litigation, and oil and gas law
- Vice Chair, Anti-Defamation League, Southwest Region
- Special Assistant Disciplinary Counsel, Texas Commission for Lawyer Discipline

Selected Publications and Speeches

- “Preservation of Error,” presentation to the State Bar of Texas, 6th Annual Advanced Trial Strategies Course, New Orleans, Louisiana, February 10, 2017.
- "Arbitration-Related Litigation in Texas," presentation to the State Bar of Texas, 30th Annual Advanced Civil Appellate Practice, September 8-9, 2016.
- "Texas Supreme Court Update: Focus on Business, Energy and Interesting Cases," presentation to the Association of Corporate Counsel Houston, April 22, 2016.
- "*Recent Developments in Business and Corporate Litigation* Chapter 2: Appellate Practice," co-author, American Bar Association, June 2016.

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STRATEGIES FOR PREPARING THE RESPONDENT'S BRIEF ON THE MERITS IN THE TEXAS SUPREME COURT

I. INTRODUCTION

If you are preparing a respondent's brief on the merits, it means that at least three Texas Supreme Court justices already have determined that the opposing Petition for Review is worthy of additional scrutiny.[1] If the petitioner holds on to those justices during the briefing stage, he or she will need just one more vote to obtain a grant and two more votes to obtain a reversal. (Of course, the petitioner already may have received four, five, or more votes for additional briefing already.)

According to Pam Baron's most recent study, once the Texas Supreme Court has requested full briefing, the odds of a petition grant are in the range of 42-45% for paid (i.e., non-pro se) cases.[2] And if a grant occurs, Baron calculates the chances of reversal at 82%.[3]

In light of these statistics, a respondent has two overarching tasks in drafting its merits brief. The first task is to try to persuade the Court not to grant review, aiming to fit within the 55-58% of briefed cases that do not advance further. The second task is, if review is granted, to win the case on the merits by helping the Court write an opinion in your favor.

The Court's request for briefing puts the respondent in a very different position than he or she was in at the petition stage. Whereas the overwhelming focus of a response to a petition for review is on attempting to avoid review, a brief on the merits must manage the delicate balancing act of persuading the Court both that it should not take the case, and that the respondent should prevail if review is granted.

These dual missions are explored further below, after a brief discussion of the basic requisites of the respondent's brief.

II. REQUIREMENTS OF THE RESPONDENT'S BRIEF ON THE MERITS

A. Required Contents

Rule 55.3 of the Texas Rules of Appellate Procedure sets out the requirements for the contents of the respondent's brief on the merits. Like the petitioner's brief, this brief *must* include the following items:

- *Table of Contents*, which "must indicate the subject matter of each issue or point, or group of issues or points";
- *Index of Authorities*;
- *Summary of the Argument*, which is a "succinct, clear and accurate statement of the arguments made in the body of the brief";
- *Argument*, which "must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record," and which "must be confined to the issues or points presented in the petitioner's brief or asserted by the respondent in the respondent's statement of the issues"; and
- *Prayer*, which "must contain a short conclusion that clearly states the nature of the relief sought."

TEX. R. APP. P. 55.3, 55.2.

The Rules also require the inclusion of other items in certain situations:

- *Identity of Parties and Counsel* – this section should be included if "necessary to supplement or correct the list contained in the petitioner's brief";
- *Statement of the Case* – this section, which describes the procedural history of the case (as more fully set out in Rule 55.2(d)), should be included if the respondent is "dissatisfied with that portion of the petitioner's brief";
- *Statement of the Facts* – this section, which "must state concisely and without argument the facts and procedural background pertinent to the issues or points presented" and be "supported by record references," should be included if the respondent is "dissatisfied with that portion of the petitioner's brief";
- *Statement of Issues* – this section, which requires a concise statement of "all issues or points presented for review," should be included if:
  - "(1) the respondent is dissatisfied with the statement made in the petitioner's brief,
  - (2) the respondent is asserting independent grounds for affirmance of the court of appeals' judgment, or
  - (3) the respondent is asserting grounds that establish the respondent's right to a judgment

[1] While Rule 55.1 contemplates that the Supreme Court could request briefing and grant a petition simultaneously, it is not the Court's practice to do so. TEX. R. APP. P. 55.1. This paper will focus on the respondent's strategies for preparing a merits brief after briefing has been requested but before the Court has ruled on the petition.

[2] Pamela Stanton Baron, *Texas Supreme Court Docket Update 2016*, at 18, State Bar of Texas, 30th Annual Advanced Civil Appellate Course (2016).

[3] *Id.* at 6.

> that is less favorable to the respondent than the judgment rendered by the court of appeals but more favorable to the respondent than the judgment that might be awarded to the petitioner (e.g., a remand for a new trial rather than a rendition of judgment in favor of the petitioner)"; and

- *Statement of Jurisdiction* – this section should be "omitted unless the petition fails to assert valid grounds for jurisdiction."

TEX. R. APP. P. 55.3.

Seasoned appellate practitioners almost always include their own Statement of the Case, Statement of Facts, and Issues Presented in their respondent's briefs, and typically attack the petitioner's Statement of Jurisdiction if there is any basis at all to do so.

Warren Harris's accompanying paper, *Strategies in Preparing Petitioner's Brief on the Merits*, State Bar of Texas, Practice Before the Texas Supreme Court Course (2017), provides excellent advice for how to comply with the requirements above (e.g., present the Statement of the Case in a table format, make sure the Table of Contents lists your arguments in a logical and organized format, etc.). This advice applies equally to both petitioners' and respondents' merits briefs.

If a respondent's brief fails to conform to any of the foregoing requirements, the Supreme Court may require the brief to be revised or may return it to the respondent and consider the case without further briefing. TEX. R. APP. P. 55.9.

B. Other Rules Pertaining to Respondent's Briefs

A respondent's brief must be filed in accordance with the schedule stated in the clerk's notice of the Court's briefing request. TEX. R. APP. P. 55.7. If no schedule is stated in the notice, the respondent must file a brief within 20 days after receiving the petitioner's brief. *Id.* A respondent may also ask for an extension to file the brief by filing a motion complying with Rule 10.5(b). *Id.*

Computer-generated briefs must be printed in conventional typeface no smaller than 14-point except for footnotes, which must be no smaller than 12-point. TEX. R. APP. P. 9.4(e). 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). The brief must have at least one-inch margins on both sides and top and bottom. TEX. R. APP. P. 9.4(c).

The length of a respondent's brief must not exceed 15,000 words if computer-generated, "including headings, footnotes, and quotations," except not counting words in the following sections: "caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, statement of jurisdiction, statement of procedural history, signature, proof of service, certification, certificate of compliance, and appendix." TEX. R. APP. P. 9.4(i)(1), (2)(B).

Other formatting requirements are specified in Rule 9.4. A failure to comply with these requirements can result in the court striking your brief. TEX. R. APP. P. 9.4(k).

It is also worth noting that Rule 55.5 allows a respondent "to file the brief that the party filed in the court of appeals" as a substitute for its merits brief, TEX. R. APP. P. 55.5, but I have never seen that rule utilized before.

III. PERSUADING THE COURT NOT TO REVIEW THE PETITION

The following discussion about strategies for avoiding review is equally applicable to drafting the response to the petition for review. The only difference is that the respondent has a smaller margin of error once the case has reached the merits stage.

A. The Meaning of "Important To the Jurisprudence"

The central review-avoidance strategy for the respondent is persuading the Texas Supreme Court that its resolution of the case would *not* be "important to the jurisprudence of the state." To do that, it is important to understand what factors the Court considers in determining whether a case is important to the jurisprudence of the state. This section attempts to shed some light on the meaning of this important phrase. I highly recommend Marcy Hogan Green's article on this topic, which covers the points made below (and other points) well and in more detail. *See* Marcy Hogan Greer, *What is Significant to the Jurisprudence of the State*, State Bar of Texas, Practice Before the Texas Supreme Court (2013).

Rule 56.1(a) provides that "[a]mong the factors the Supreme Court considers in deciding to grant a petition for review" are:

> (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
> (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).

There is a considerable overlap between these factors and the bases for Texas Supreme Court jurisdiction set out in Section 22.001(a) of the Government Code:

> (a) The supreme court has appellate jurisdiction . . . coextensive with the limits of the state and extending to all questions of law arising in the following cases when they have been brought to the courts of appeals from appealable judgment of the trial courts:
>
> (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) (emphasis added).

In both Rule 56.1(a) and Section 22.001(a), the "importance to the jurisprudence" test is just one of six separate factors or bases listed. In reality, even if there is another jurisdictional basis for the Court's review, the question of whether a case is "important to the jurisprudence of the state" is central to the Court's exercise of discretionary review, and thus a central battleground in the merits briefing. And the bases are not truly separate. While conflicts between courts of appeals or a dissent provide an independent basis for jurisdiction, they also often signal that the issue presented is significant and likely will have an impact beyond the facts of the particular case.

Chief Justice Hecht provided some insight on factors he considers in determining whether a case is important to the jurisprudence of the state in his famous dissent from the denial of review in *Maritime Overseas Corp. v. Ellis*, 977 S.W.2d 536 (Tex. 1996). There, he identified the following factors as supporting review:

- "The size of the damages award";
- The "central legal issue," which recurs in "hundreds of cases involving millions of dollars," has "not been authoritatively addressed" and was one of first impression;
- "The issue is debated nationally by courts and commentators";
- "The issue has engendered dissents and conflicts in the court of appeals";
- The Court has already granted review in a case raising a similar issue; and
- "The case has been well briefed by very capable counsel."

Id. at 536.

Greer's paper, which itself summarizes an earlier paper from Elizabeth Rodd,[4] also lists a number of factors that implicate the "importance to the jurisprudence analysis," including whether the case involves:

- an issue of first impression, especially one that is likely to recur;
- construction or application of a statute of statewide importance;
- issues requiring statewide uniformity;
- an intermediate appellate court decision that, if left in place, is likely to create confusion or be misleading to other courts;
- constitutional issues;
- issues that are emerging nationally;
- issues in which prior precedents are being misinterpreted or misapplied;
- an opinion establishing a new rule of law or altering an existing rule;
- an opinion applying an existing rule to a novel fact situation that is likely to recur; or
- issues of continuing public interest (e.g., school finance).

Greer, *supra* at pp. 4-5. To that list, I would add cases where the intermediate court's analysis deviates from federal courts' treatment (and in particular, the Fifth Circuit's treatment) of the same or an analogous issue.[5]

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[4] Elizabeth V. Rodd, *What is Important to the Jurisprudence of the State*, State Bar of Texas, Practice Before the Supreme Court (2002).

[5] *See, e.g.*, *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 739 (Tex. 2005) (recognizing that because federal and

B. Factors That Discourage Review

As the respondent, the goal is to try to persuade the Texas Supreme Court that either the issue presented is not substantively important under the factors described above, or that there is some procedural barrier to reaching that issue.

On the substance, if the petitioner argues that there is a conflict among the courts of appeals, the respondent should argue (if he can) that there is a way to reconcile the intermediate court decisions and that the conflict is illusory. Or the respondent can argue that even if there is a conflict between two intermediate court decisions, the Supreme Court should give the issue more time to percolate in the lower courts before stepping in.

If the petitioner argues that the case presents an issue of first impression, the respondent may be able to argue that infrequency of judicial treatment of the issue illustrates that the issue is unlikely to recur again (or very often), making it unworthy of the Court's time. Or the respondent can argue, again, that the issue should percolate for longer in the lower courts before the Supreme Court weighs in (particularly if the lower court in the case at issue "got it right").

Most often, the respondent will be arguing that the lower court's decision rested on the specific facts of the case—facts which are unlikely to recur in many other cases.

Even if an issue, on its face, seems to satisfy the "importance to the jurisprudence" elements described above, the respondent may argue that procedural barriers counsel against review. For example:

- *Preservation of error/waiver*: the respondent may argue that the petitioner's failure to preserve error in the trial court or any subsequent briefing waiver prevents the Court from reaching the issue presented;
- *Harmless error*: the respondent may argue that the alleged error at issue is "harmless" and would not change the outcome in the case. *See* TEX. R. APP. P. 44.1 (reversal of judgment permissibly only where error "(1) probably caused the rendition of an improper judgment; or (2) probably prevented the appellant from properly presenting the case to the court of appeals."
- *Inadequate record*: the respondent may argue that the gaps in the record make the case an unsuitable vehicle to reach the legal issue presented.

Notably, under the Court's internal operating procedures, law clerks are specifically directed to address error preservation in their study memos, which justices often rely on in deciding whether to grant a petition. *See* Blake A. Hawthorne, *Supreme Court of Texas Internal Operating Procedures*, State Bar of Texas, Practice Before the Texas Supreme Court (2015), at 14.

C. Strategies for Arguing Review-Avoidance in Your Merits Brief

The respondent should be looking for opportunities to weave the arguments outlined above into most sections of the brief. For example:

Statement of Jurisdiction. This section offers the first opportunity to explain why a claimed conflict does not exist, why the Court cannot reach the issue presented, or why the issue presented is not important to the jurisprudence of the state. A partial example from a successful respondent's brief is below, with emphasis added to highlight the non-reviewability themes:

> This is a contract interpretation case involving a *unique* Letter of Intent negotiated between Orca and the Trust. It is *not a case setting forth broadly applicable legal standards* that apply to the oil and gas industry. There are *no conflicts* in authorities or issues of importance to the jurisprudence of this State that warrant review. Thus, the court of appeals resolved this case through a *Memorandum Opinion* . . . .
>
> *Although Orca complains that the court of appeals opinion conflicts* with this Court's decisions in *Taylor v. Harrison*, 47 Tex. 454, 461 (1887); *Richardson v. Levi*, 3 S.W. 444, 447 (1887), and *White v. Dupree*, 40 S.W. 962, 964 (1897), *it does not*. The court of appeals expressly addressed those cases, explaining "[t]hese cases . . . merely stand for the proposition that the absence of warranty of title will not *by itself* preclude bona fide purchaser status." Op. at 10 (emphasis in original). . . . Ultimately, the court of appeals decided this case on the *narrowest possible grounds*, focusing on the language contained within the *specific contract at issue*—the Letter of Intent.[6]

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state courts have concurrent jurisdiction to enforce the Federal Arbitration Act, "it is important for federal and state law to be as consistent as possible in this area"); *accord Perry Homes v. Cull*, 258 S.W.3d 580, 594 (Tex. 2008) ("We have noted before the importance of keeping federal and state arbitration law consistent.").

[6] Respondents' Br. at 2-3, *Orca Assets, G.P., LLC v. Burlington Res. Oil & Gas Co.*, No. 15-0161, in the Texas Supreme Court (filed Aug. 25, 2015) (emphasis added), *available at* http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=5f94f537-0813-4748-99b3-

Issues presented. The issues presented section offers another opportunity to flag reasons why the Court should not review the case. On some occasions, it will make sense to raise the absence of jurisdiction or lack of importance as a separate issue, as done in this example:

> 1. Jurisdiction. Does this case present an issue of importance to the jurisprudence of Texas?
>
> a. Does this case present an issue of importance to Texas jurisprudence where all parties agree that New Mexico, not Texas, law governs their dispute?
> b. Does this case present an issue of importance to Texas jurisprudence where the preferential right issue presented by Petitioner (whether Respondents]must exercise their rights to buy all the interests offered) does not exist here (where Respondents agreed to buy all the interests included in the Original Offer)?[7]

In other cases, the respondent should consider framing the petitioner's issue in terms of whether it merits the Court's review in light of substantive or procedural obstacles raised in the briefing, as done in this example:

> 7. Does [Petitioner's] argument that the trial court engaged in material misconduct during deliberations *merit this Court's review*, considering that [Petitioner]:
>
> (a) waived any error by failing to object to the trial court's communication before the verdict was accepted,
> (b) presented no evidence that the trial court consciously concealed jury notes or that the content of the notes was relevant,
> (c) failed to show that it suffered harm from any allegedly improper communication, and
> (d) did not preserve its request for a new trial?[8]

Introduction/Summary of Argument. Many seasoned appellate practitioners often insert an Introduction or Preliminary Statement (even though one is not required under the rules) to help frame the brief and provide context for the justices as they review the statement of facts. Both the Introduction and Summary of Argument are critical opportunities to explain why Supreme Court review is unnecessary. In fact, prominent appellate advocates from the Alexander Dubose firm often include an introductory section entitled "Reasons to Deny Review" before the Statement of Facts in their respondent's briefs.[9] It is also a good idea to carry the same themes through to the summary of argument, as the respondent did in the following excerpt:

> A case involving application of Louisiana law to a fact-specific claim involving a Louisiana asset is of questionable importance to Texas jurisprudence. This Court's intervention is not necessary for that reason, but also because the court of appeals correctly rejected Plains' arguments.[10]

Argument. Seasoned appellate practitioners will weave the same themes throughout the argument. In some circumstances, it may be advantageous to dedicate an entire heading and section to the topic, as the respondent did in this example:

> I. The petition does not raise an issue of importance to Texas jurisprudence.

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a15f708e950a&coa=cossup&DT=BRIEFS&MediaID=e466d58b-9685-4e61-a4b9-7fbd4c2b408c.

[7] Respondent's Br. at x, No. 15-0883, in the Texas Supreme Court (filed Oct. 31, 2016), *available at* http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=a8696951-b41d-41a0-877d-71a2fc70f3ff&coa=cossup&DT=BRIEFS&MediaID=c2c8bf28-2cf6-44d8-aec8-edb67fc83c55.

[8] Respondent's Br. at xvii, *HMC Hotel Prop. II v. Keystone-Tex. Prop. Holding Corp.*, No. 12-0289, in the Texas Supreme Court (filed Dec. 6, 2012), *available at* http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=32423592-6e5e-4dc6-b131-27e9695963b8&coa=cossup&DT=BRIEFS&MediaID=a45cbe09-d03e-4fb4-a62d-bb8895e8c85d.

[9] *See, e.g.*, Respondent's Br. at 1, *Tesco Corp. v. Steadfast Ins. Co.*, No. 15-0441, in the Texas Supreme Court (filed Jan. 27, 2016), *available at* http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=43edb9a1-08cc-46d7-b5fb-89d4d785dc5b&coa=cossup&DT=BRIEFS&MediaID=d77b7ad8-b53d-43d0-ae73-40c51ca1b494; Respondent's Br. at 4, *Plains Pipeline, L.P. v. BP Oil Pipeline Co.*, No. 15-0904, in the Texas Supreme Court (filed Nov. 14, 2016), *available at* http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=3dd89926-2554-4c4a-9573-fb77cef923e7&coa=cossup&DT=BRIEFS&MediaID=dd99a3aa-3c28-486f-ad11-3f494845c462.

[10] Respondent's Br. at 19, *Plains Pipeline, L.P. v. BP Oil Pipeline Co., supra* note 9.

> The petition should be denied because it asks the Court to opine about another state's law, not clarify Texas jurisprudence. Further, this case does not present the preferential right issue on which the petition is based.[11]

Prayer. Finally, the prayer in a respondent's brief should include a request that the petition be denied, and only alternatively, that the court of appeals' opinion be affirmed.

IV. PERSUADING THE COURT TO AFFIRM THE COURT OF APPEALS

The second overarching task is to persuade the Court, if it grants review, that it should affirm the court of appeals. This task is not easy, as the Court seldom takes a case to affirm. But the respondent must do its best to explain why the court of appeals got it right and help the Court write an opinion in its favor.

A. General Brief-Writing Advice

Much of the advice for writing a strong merits brief is common to all briefs. Thus, the excellent advice provided by Warren Harris in his accompanying paper on petitioner's briefs is also applicable to respondent's briefs (be concise, be clear, be credible, etc.). *See* Harris, *supra*, at pp. 5-10.

There are many other great CLE papers dedicated solely to how to improve your brief-writing. Papers by Chad Baruch and Robert Dubose stand out, including these:

- Chad Baruch, *Legal Writing: Lessons from the Bestseller List*, State Bar of Texas, 6th Annual Advanced Trial Strategies (Feb. 2017);
- Robert Dubose, *Legal Writing for the Re-Wired Brain*, State Bar of Texas, Legal Writing to Win Course (2015).

Books on brief-writing by Bryan Garner and others also can be extraordinarily helpful.

B. Advice Specific for Respondents

1. Utilize the "four pillars of affirmance" if you can.

Respondents should try to take advantage, when possible, of what David Keltner calls the "Four Pillars of Affirmance": (1) Preservation of Error/Waiver, (2) the Harmless Error Doctrine, (3) Standards of Review, and (4) Stare Decisis. Each of these doctrines favors upholding the trial court judgment.

I strongly recommend Keltner's article, *Respondent's Best Strategies in the Supreme Court*, State Bar of Texas, Practice Before the Texas Supreme Court (2013), which covers these pillars in great depth, but I will summarize them briefly here.

Preservation of Error/Waiver. Except for certain "fundamental" errors, most errors made by a trial court can be raised on appeal only if the appellant made a timely, specific objection and secured a ruling from the trial court. An appellant's failure to do so results in a "waiver" of the appellate point. The purpose of the waiver doctrine is to make sure the trial court has an opportunity to review the error about which a party complains before it is presented to an appellate court. A waiver argument goes both to the reviewability of a case (as noted above) and to the merits of the petitioner's arguments. But as Keltner points out, questionable claims of waiver can detract from the merits arguments.

The Harmless Error Doctrine. Even if the trial court made an error and the petitioner preserved it, the error can provide a basis for reversal only if the error (1) "probably caused the rendition of an improper judgment" or (2) "probably prevented the appellant from properly presenting the case on appeal." TEX. R. APP. P. 44.1. In connection with evidentiary error, the Texas Supreme Court has instructed courts evaluating the harmfulness of the error to consider (1) the whole case from voir dire to oral argument; (2) whether the verdict was supported by sufficient evidence; (3) the nature of the erroneously admitted or excluded evidence; (4) the emphasis placed on the evidence by the prevailing party; and (5) whether the evidence dealt with such suspect classes as by "race, religion, gender and wealth." *Reliance Steel & Aluminum Co. v. Sevcik*, 267 S.W.3d 867, 871-75 (Tex. 2008).

As Keltner observes, the rigor of the Supreme Court's application of this doctrine has ebbed and flowed, with recent decisions finding that the erroneous admission of evidence caused harm. *See, e.g., Kia Motors Corp. v. Ruiz*, 432 S.W.3d 865, 883 (Tex. 2014); *Serv. Corp. Int'l v. Guerra*, 348 S.W.3d 221, 236-27 (Tex. 2011). Still, the doctrine remains a useful tool for the respondent to try to avoid review or, failing that, prevail on the merits, by explaining why the error did not change the outcome of the proceedings below.

Standards of Review. Unless the issue presented is subject to *de novo* review, the standard of review should favor the respondent. If the petitioner is raising an issue subject to an "abuse of discretion" standard, the respondent should argue that even if the Texas Supreme Court would have reached a different result, the trial court's decision must stand unless it was "arbitrary, unreasonable, and without reference to guiding principles." *Mercedes-Benz Credit Corp. v. Rhyne*, 925 S.W.2d 664, 666 (Tex. 1996). Likewise, if the petitioner is raising a legal sufficiency challenge, the respondent should call the petitioner to task if the petitioner offers an incomplete discussion of the factual

[11] Respondent's Br. at 13, Case No. 15-0883., *supra* note 7.

record on a contested issue, ignores that it "is the province of the jury to resolve conflicts in the evidence," or ignores that conflicting inferences from undisputed evidence must be resolved in favor of the verdict. *City of Keller v. Wilson*, 168 S.W.3d 802, 820-21 (Tex. 2005).

To determine the appropriate standard of review and how best to utilize it as a respondent, I recommend consulting the "bible" on this topic: W. Wendell Hall, et al., *Standards of Review in Texas*, 42 ST. MARY'S L. J. 3 (2010).

Stare Decisis. The principle of *stare decisis*—that a court should stand by and adhere to existing precedent—can work to a respondent's advantage when the petitioner is asking the Supreme Court to reverse settled law. But the Court may not see *stare decisis* as a major obstacle if the precedent was rendered by a very different court, or if the Court is persuaded that the challenged precedent is wrong. And different justices may give different weight to the doctrine.

For example, in *Southwestern Bell Telephone Co. v. Mitchell*, 276 S.W.3d 443 (Tex. 2008), the Court, in a 5-3 decision, overturned its previous construction of a section of the Texas Workers Compensation Act in *Continental Casualty Co. v. Downs*, 81 S.W.3d 803, 804, 807 (Tex. 2002). The majority concluded that the Legislature's non-acquiescence in the Court's construction meant that "judicial adherence to the decision in the name of *stare decisis* may actually disserve the interests of 'efficiency, fairness, and legitimacy' that support the doctrine." *Southwestern Bell*, 276 S.W.3d at 448. Three dissenting justices, citing the importance of *stare decisis*, urged: "A willingness to abandon precedent merely because we no longer believe the decision is correct 'substitute[s] disruption, confusion, and uncertainty for necessary legal stability.'" *Id.* at 449 (Jefferson, J., dissenting) (internal citation omitted).

2. Help the Court write an opinion in your favor

The respondent must make it as easy as possible for the Court to write an opinion in his or her favor. Be clear and concise about why each of the petitioner's challenges fails and on what basis. Use the issue presented and argument headings in conjunction with each other to ensure that the Court understands how the responsive arguments fit together and to which of the petitioner's arguments they address. Edit relentlessly to ensure that each sentence in your brief—and indeed, each word—serves a purpose and advances your argument.

C. Other Strategic Considerations for Obtaining An Affirmance: Cross-Issues

If the court of appeals ruled in favor of the respondent on an issue without reaching alternative grounds that also supported the same outcome, the respondent should raise these grounds as cross-issues in its brief. For example, if the respondent is a defendant that suffered an adverse judgment and obtained a reversal based on the first of four independent arguments on appeal, it should be sure to raise the second, third, and fourth issues as alternative grounds for affirmance in the Texas Supreme Court. The respondent may ask the Supreme Court to reach these alternative grounds on the basis of efficiency. In the alternative, and at a minimum, the respondent should ask for a remand to the court of appeals to consider the unreached grounds presented previously. Either way, including these alternative issues may also have the benefit of signaling to the Court that it should not review the case because the outcome is unlikely to change anyway.

The respondent should identify these cross-issues in the "issues presented" section of the brief, address them in the argument, and carefully articulate the alternative pathways to victory in the "prayer."

V. OTHER TIPS FOR RESPONDENTS

A. Include and Hyperlink to an Appendix

Unlike the rules governing court of appeals briefs and petitions for review, the rules governing a petitioner's and respondent's brief do not require the parties to include an appendix. *Compare* TEX. R. APP. P. 38.1(k) *and* TEX. R. APP. P. 53.2(k) *with* TEX. R. APP. P. 55.2 *and* TEX. R. APP. P. 55.3.

Nevertheless, a respondent should almost always include one, and should consider including the contents specified in Rule 53.2(k). This would include the court of appeals opinion; trial court judgment; findings of fact and/or jury verdict; text of any key statute, regulation or contractual provision; critical trial exhibits; and the key cases on which the respondent is relying. The key cases that are included should have key passages highlighted and should be presented in single-column format, which improves their readability when reading on a computer or tablet (as several justices have specifically suggested).

Including these items in an appendix allows the respondent to build hyperlinks to these documents in the brief itself, giving the justices easy access to them and allowing the justices to toggle effortlessly between the brief and supporting materials. Even if these items were previously included in appendices at the petition for review stage, the justices may not have that briefing in front of them when they are reviewing the merits briefs.

B. Consider Whether to Solicit Amicus Support

One question a respondent often faces is whether to solicit amicus support for his or her position. On the one hand, amicus filings may create or reinforce an impression that the case is important to the

jurisprudence to the state. On the other hand, if the petitioner is making grandiose claims about the impact that the lower court opinion might have on a particular industry, for example, an amicus brief from that industry rebutting those claims could prove very helpful. Whether to solicit amicus support and from whom usually must be determined on a case-by-case basis.

Ideally, any amicus briefs would be submitted "no later than the date the respondent's brief is filed or very shortly thereafter," so that they will be referenced in the study memo that is circulated to the justices before the conference on the petition. *See* Blake A. Hawthorne, *Supreme Court of Texas Internal Operating Procedures*, at 14-15, State Bar of Texas, Practice Before the Texas Supreme Court (2015). The study memo will identify on its first page the names of any amici and which side the amici supports, and typically will include a detailed discussion of any "independent analysis" of the amici that is different than what has appeared in the parties' briefing. *Id.* at 15. While amicus briefs submitted during the merits stage are forwarded immediately to the justices, some justices rely heavily on the study memo's treatment of the amicus briefs rather than the amicus briefs themselves. *Id.*

VI. CONCLUSION

Drafting a respondent's brief after full briefing has been ordered is a challenging task, requiring the advocate to argue both that the case should not be reviewed and why the respondent should prevail if review is granted. Hopefully, this paper sheds some light on how to accomplish both goals.

VII. BIBLIOGRAPHY

This papers relies on the great work of many other Texas appellate practitioners, including the following articles listed below:

- Pamela Stanton Baron, *Texas Supreme Court Docket Update 2016*, State Bar of Texas, 30th Annual Advanced Civil Appellate Course (2016);
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