

# The Texas Lawbook

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## The Texas Supreme Court's Revamped Review Process

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The Texas Supreme Court recently adopted extensive amendments to the Texas Rules of Appellate Procedure that will have a dramatic effect on litigation before the Court.

Most notably, the Court all but eliminated its practice of requesting merits briefs before deciding whether to grant review of a case. Going forward, the Court will ordinarily decide whether to grant review, request merits briefs and schedule oral argument based on the petition-stage briefing alone. This combined decision now requires a minimum of four votes, whereas requesting merits briefing previously required only three.

The Court's new procedures — which apply to petitions filed after Jan. 1 — align more closely with the U.S. Supreme Court's certiorari practice.

**Old process:** petition-stage briefing → merits briefing → grant or deny → oral argument

**New process:** petition-stage briefing → grant or deny → merits briefing and oral argument

These amendments will have a material impact on high-stakes business litigation in Texas — significantly altering appellate strategy, resource allocation and timing.

Because the Court will ordinarily decide whether to grant review without the benefit of merits briefing, the petition now carries greater weight. Parties seeking review must fully develop, refine and streamline their arguments at the out-

set, anticipating and addressing threshold issues such as jurisdiction, preservation and vehicle concerns in the initial filing.

Now more than ever, effective advocacy requires presenting a clear, compelling case for review from the start.

### The Petition for Review Alone Now Often Determines Whether a Case Proceeds

Under the amended rules, the Court will nearly always decide whether to grant or deny review based on the petition-stage briefing alone. This marks a significant departure from the Court's prior routine practice of requesting merits briefs before deciding whether to grant review.

To accommodate the increased importance of the petition for review, the Court has expanded that filing's length. The amended rules increase the word limit from 4500 to 6500 and stress the need for an introduction of up to 1000 words summarizing the reasons the Court should grant review.

To avoid improvident grants, the amended rules require that the petition's description of the issues presented include record citations indicating where each issue was preserved for appellate review. The amended rules also eliminate the practice of "unbriefed" issues, requiring parties to fully brief every issue presented for review in the petition itself.

As a result of these changes, petitions for review will carry far greater weight than before. Weak petitions can no longer be rehabilitated by merits briefing. Peti-

tions must garner the votes of four justices to avoid denial instead of the three votes required for merits briefing under the old rules. And petitions can secure review before the submission of merits briefs — allowing those briefs to focus on the merits rather than rehashing issues related to review. These changes elevate the importance of early strategic focus in Texas Supreme Court litigation.

## **Initial Review Is Streamlined and Accelerated**

To expedite the decision-making process, the Court has streamlined its internal review procedures.

Petitions will now be circulated to the Justices on the first Tuesday after filing — instead of after the filing of a response or waiver that could take up to 30 days. Following circulation, the Justices have four weeks to review the petition and cast an initial vote to deny, request a response or flag the case for conference discussion.

If a petition fails to garner any votes during that four-week period, it will be denied on the following Friday's orders list. If a Justice votes to request a response, the Court will issue that order immediately, and the case will be placed on the conference agenda once petition-stage briefing is complete.

These amendments reduce administrative lag by ensuring that petitions are promptly denied or advanced to conference.

## **Responses Take on a Heightened Gatekeeping Function**

Like petitions, responses also have a greater significance under the amended rules. Because the Court will not typically consider merits briefing before deciding whether to grant or deny review, responses must persuasively explain why the case is unworthy of the Court's review. Waiting for merits briefing to highlight jurisdictional defects, vehicle problems or preservation issues is no longer a viable option. As with petitions, the Court expanded responses to 6500 words and

highlighted the importance of including a substantive introduction of up to 1000 words.

## **Merits Briefing and Oral Argument Are More Closely Linked**

In addition to revising the petition-stage process, the Court has also made significant changes to merits briefing.

The Court has indicated that it may begin setting cases for argument at the same time it grants review and orders merits briefing. To keep things moving and ensure the Justices have enough time to review the merits briefs before argument, the Court has indicated that — although it will continue to be generous in granting parties one 30-day extension to file a merits brief — it will deny extension requests that push the reply brief deadline into the two-week window preceding oral argument. The Court also extended the response-brief deadline to 30 days after the opening brief is filed, while the reply brief remains due 15 days after the response brief is filed.

In addition, now that merits briefing will usually come after a decision to grant review, the parties can focus their merits briefs on the merits rather than rehashing whether review is warranted in the first place.

## **What It Means**

For companies litigating in Texas, the petition for review now plays a decisive role. To win at the petition stage, parties seeking review must fully develop, refine and streamline their arguments even earlier in the lifecycle of the litigation. And the Court's emphasis on introductions only underscores the importance the Justices place on clear and concise writing.

Responses have also taken on far greater importance. No longer a procedural speedbump on the road to merits briefing, responses now serve as a critical opportunity to stop a case in its tracks. A party receiving a call for a response must prioritize developing comprehensive and com-

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elling arguments that leave no doubt that review is unwarranted.

All told, these consequential rule changes will only increase the premium on farsighted appellate strategy and persuasive up-front advocacy for parties hoping to succeed before the Texas Supreme Court.

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