STATE BAR LITIGATION SECTION REPORT

THE ADVOCATE

THE "BEST OF" CONQUERING THE COURTROOM 2026

VOLUME 115

SUMMER

2026

Empowering Advocates, Promoting Justice, and Preserving the Rule of Law
THE LITIGATION SECTION OF THE STATE BAR OF TEXAS

STATE BAR LITIGATION SECTION REPORT
THE ADVOCATE

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LONNY HOFFMAN

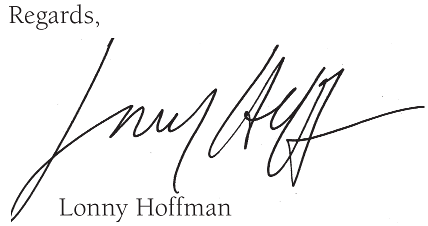
FOR MANY YEARS, THIS ISSUE OF THE ADVOCATE WAS OUR "BEST OF" ISSUE in which we reprinted articles from the Litigation Section's annual *Litigation Update* CLE program. But this January the section didn't put on the program. We're still sticking with the "Best Of" theme but the volume instead reprints articles offered at another CLE event the section put on for newer lawyers, *Conquering the Courtroom: Practical Techniques to Elevate Your Courtroom Success*. The event was held in Austin in January 2026.

What's also special about this issue is that we have two contributions from Dylan Drummond. In addition to his regular Procedure Evidence Update, Dylan has also prepared an excerpted update to Doug Alexander and Professor Lori Mason's seminal Texas Supreme Court practice paper. The full version—which weighs in at 100-pages and 1,000-footnotes—will be presented at this Fall's TexasBarCLE Civil *Appellate Practice 101* course in Austin on September 8, 2026.

As usual, we email this issue to all Litigation Section members and make it available on the Litigation Section's website (www.litigationsection.com). You can also find this issue, and all our previous issues, on Westlaw and Lexis.

As always, I welcome your questions or comments. My email address is LHoffman@uh.edu.

Regards,



Lonny Hoffman
Editor in Chief

CHAIR'S REPORT

"The first thing we do, let's kill all the lawyers."

— William Shakespeare, *Henry VI, Part 2*

RAYMOND L. THOMAS

THIS PITHY PHRASE IS OFTEN USED TO DISPARAGE LAWYERS. To understand its true meaning, context matters. The line is spoken by a character called Dick the Butcher, a conspirator plotting to overthrow the established order. Before he can destroy freedom, before he can seize power unchecked, before he can replace law with force, he knows what must happen first: the lawyers must be eliminated. Supreme Court Justice John Paul Stevens addressed this quote in Walters v. Radiation Survivors, 473 U.S. 375 (1985), writing, "As a careful reading of that text will reveal, Shakespeare insightfully realized that disposing of lawyers is a step in the direction of a totalitarian form of government."

Shakespeare's lesson is as urgent today as it was four centuries ago. Lawyers—and particularly trial lawyers—stand between power and abuse, between order and chaos, between the rule of law and the rule of force. Every day, in courtrooms across Texas, litigators defend constitutional rights, protect property, vindicate contracts, hold wrongdoers accountable, and ensure that disputes are resolved through evidence and reason rather than anger and violence.

A license to practice law comes with extraordinary power and privileges. Lawyers enjoy many benefits and opportunities that are not available to most people:

- **The privilege to serve others in their most important and vulnerable moments.** Lawyers are invited into people's lives when their liberty, livelihood, family, business, reputation, or future is at stake.

- **The privilege of being an officer of the court.** Lawyers play a direct role in the administration of justice and the functioning of a constitutional democracy.

- **The privilege of advocacy.** We are entrusted to speak on behalf of others, often when they cannot effectively speak for themselves.

- **The privilege of access.** Lawyers have direct access to courts, judges, legal processes, and decision-makers that is unavailable to most people.

- **The privilege of influence.** Lawyers help shape laws, public policy, businesses, communities, and institutions.

- **The privilege of trust.** Clients entrust lawyers with their confidences, secrets, hopes, fears, and often their life's savings and most important relationships.

- **The privilege of earning a comfortable livelihood.** Society rewards lawyers not for physical labor or capital investment, but for our wisdom, skill, and professional judgment.

- **The privilege of self-regulation.** Few professions enjoy the degree of independence and self-governance that lawyers do.

- **The privilege of protecting freedom.** Whether representing plaintiffs, defendants, businesses, individuals, or governmental entities, lawyers help ensure disputes are resolved by law rather than through power, wealth, or force.

- **The privilege of leaving a legacy.** Lawyers have the opportunity to mentor younger lawyers, strengthen institutions, and improve the justice system for future generations.

No other profession is entrusted with the combination of greater responsibility, greater influence, and greater opportunity to serve others. That is why our profession is not merely a business—it is a public trust. The public trust granted to lawyers comes with enormous responsibility. So, at the beginning of this Bar year, I challenged our Litigation Council with an important reminder:

To whom much is given, much is expected.

I am proud to report that our Litigation Council answered that challenge with an epic year of accomplishment and advancement. Most notably, we launched an entirely new flagship program: the **Litigation Section's Trial Academy**. Timely communication matters. The Litigation Section revived the quarterly **News of the Bar**, bringing timely announcements, developments, wellness resources, and relevant articles directly to our membership. A vibrant Section requires informed and engaged members, and this publication has quickly become an important vehicle for both.

Meanwhile, through the steadfast stewardship of **Lonny Hoffman**, the **Advocate** remains one of the most anticipated legal journals in the nation, providing thoughtful analysis, cutting-edge scholarship, and discussion of the most significant issues facing litigators in the moment. It remains the gold standard among peer publications and a source of great pride for our Section.

In an era of instant communication, litigators can no longer afford to wait a year for updates. We now employ several means for timely updating our membership on important legal updates, including through e-blasts, News for the Bar, webinars, in person and online CLE programming, and the Advocate. In place of Litigation Update CLE, we launched **Conquering the Courtroom**, a practical, low-cost CLE program focused on what young lawyers need most: guidance, skills, and wisdom from experienced trial lawyers and judges.

This year also marked a truly special moment in the history of our awards programs. We inducted two legends into our **Texas Legal Legends** program: **Luther "Luke" H. Soules III** and **Alistair Dawson**, the very individuals for whom our Outstanding Service to the Practice of Law Award and the Outstanding Young Litigator Award are named.

The awards committee also selected, from a highly competitive pool of nominees, two well deserving lawyers: **David Kitner** for the Luke Soules Award for Outstanding Service to the Practice of Law, and **Maryam Ghaffar** for the Alistair Dawson Outstanding Young Litigator Award.

The Litigation Section partnered with the Appellate Section and the University of Texas - Rio Grande Valley to host a rare appearance of the **Texas Supreme Court in Edinburg, Texas** for oral arguments on two cases highly relevant and important to the people of South Texas. With over 700 people in attendance, mostly students, this was the largest attendance at any oral argument in the Texas Supreme Court's storied history. After the oral arguments, the Justices took some questions from the students. During their visit, the justices were treated to genuine 956 hospitality with our finest regional cuisine and entertainment by award-winning mariachi bands from UT-RGV and McAllen High School. The visit concluded with a tour of Hidalgo County's new flagship courthouse.

While all of these accomplishments occurred during my year, they do not belong not to me, but to an extraordinary Council who generously sacrificed their time, talent, and energy in service to something larger than themselves. To my Executive Committee, every Council member, committee chair, speaker, author, volunteer, and Section member who contributed this year: a heartfelt **THANK YOU!** You embraced the challenge. You answered the call. And you delivered!

A Vision for the Future

As proud as I am of what we accomplished this year, I am even more excited about what lies ahead. The future of the Litigation Section should rest on several foundational principles. First, we must continue investing in the development of young lawyers. Litigators need more than legal education. They need formation.

Aspiring lawyers need support beginning in high school (if not earlier) in the form of career days, application assistance, scholarships for prep courses, and internships. Partnering with others bar associations like TYLA, we can build permanent pipelines that foster and develop future lawyers. Young lawyers need access to mentors and more opportunities to learn, develop and hone their skills. They need experienced lawyers willing to teach, encourage, and guide them. If we want a stronger profession tomorrow, we must invest in the lawyers who will inherit it.

Second, we must continue promoting professional excellence and integrity. Competence matters. Our clients deserve lawyers who strive to be the best versions of themselves. Excellence should never be viewed as optional. It is part of our professional duty.

Third, we should be known as a Section where lawyers find genuine connection. Not networking. Connection. Not transactions. Relationships. The practice of law is demanding and stressful and can be isolating. Lawyers need a professional home where they can find support, mentorship, encouragement, and friendship.

As I leave the office of Chair, the most important message I wish to impart is this: We often talk about civility. And we should. Civility matters. Civility requires that we treat one another with professionalism and respect, even when we disagree. But I strongly urge members to strive for something even greater. **Collegiality**. Civility says, "I will treat you respectfully." Collegiality says, "I care about you." Civility requires professionalism. Collegiality requires relationship. Civility requires courtesy. Collegiality invites friendship.

The best lawyers I know understand this distinction. They fight hard in the courtroom and then break bread afterward. They fiercely advocate for their clients while never forgetting the humanity of opposing counsel.

Too many lawyers wake up dreading their work because they expect conflict not only from opposing parties but from opposing counsel. That should not be the norm. We can compete without being enemies. We can be advocates without sacrificing our humanity.

Our profession is at its best when lawyers treat one another not as enemies, but as colleagues united by a shared commitment to justice, professionalism, and service. A culture of collegiality not only enriches our profession, it strengthens the lives of those privileged to practice it.

Reclaiming the Nobility of Our Calling

At its best, the practice of law is not merely a business. It is a public trust. A calling. An opportunity to serve something larger than ourselves. Every generation of lawyers inherits a profession built by those who came before them. Every generation has a responsibility to leave it stronger than they found it. That responsibility belongs to us now.

The Litigation Section's mission statement is: Empowering Advocates, Promoting Justice, and Preserving the Rule of Law.

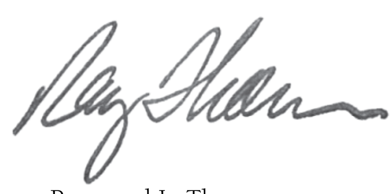
Those are not merely words. They are our charge. Our purpose. Our responsibility. If we remain committed to developing advocates, promoting justice, preserving the rule of law, investing in young lawyers, pursuing excellence, fostering collegiality, and genuinely caring for one another, then the future of the Litigation Section—and the future of our profession—will be extraordinarily bright.

Which brings me back to Shakespeare.

"The first thing we do, let's kill all the lawyers."

History teaches us why. Current events urgently remind us why. Because lawyers matter. Because the rule of law matters. Because freedom itself depends upon men and women willing to stand in courtrooms and insist that disputes be resolved through the rule of law rather than force.

May we never forget the awesome power and privilege we have with a law license. And may we never forget that much has been given to us. Therefore, much is expected of us.



Raymond L. Thomas
Chair, Litigation Section
State Bar of Texas

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PROFESSIONALISM AND BECOMING A BETTER LAWYER IN THE COURTROOM

V. BLAYRE PEÑA, *Round Rock*
VBPeña Law, PLLC

State Bar of Texas
CONQUERING THE COURTROOM: PRACTICAL TECHNIQUES TO ELEVATE YOUR COURTROOM SUCCESS
January 22, 2026
Austin

CHAPTER 1

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CIVIL APPELLATE LAW

V. Blayre Peña

Blayre has practiced civil litigation and has handled civil appeals for over twenty years, covering all aspects of business and construction disputes. She is a legal strategist, with experience in messy litigation with multiple parties or in multiple forums and serves as outside general counsel for a variety of Texas corporations and individuals.

Often, Blayre's aim is to keep her clients *out* of the courthouse by resolving disputes before they escalate. She is confident, capable, and skilled at seeking relief at the courthouse, from the first filing, through trial, and on appeal. In 2020, Blayre became Board Certification in Civil Appellate Law from the Texas Board of Legal Specialization. Although there are over 93,000 lawyers licensed to practice law in the State of Texas, there were only 400 lawyers in the State of Texas with this designation at the time Blayre became certified. She is also the first lawyer with an office in Williamson County who is board certified in Civil Appeals.

Blayre represents both Plaintiffs and Defendants, which gives her a unique perspective in defending cases aggressively. She has also represented all subsets of parties in construction disputes, including general contractors, subcontractors, owners, and sureties. Blayre has first-chaired jury and non-jury trials and received favorable verdicts in her clients' favor. She has handled cases all over the state of Texas including Austin, Dallas, Georgetown, Houston, Lubbock, and McAllen, and has established a strong reputation as a zealous advocate with both judges and her peers.

Blayre has been named a Rising Star (2015) and a Texas Super Lawyer (2024 and 2025). In 2023, Blayre won the Women of the Rock Award, and in 2024, Blayre won the Texas Center for Professionalism Award from the Austin Bar Association. Blayre has been active in various bar associations over her career. She was the president of the Williamson County Bar Association in 2011, the chair of the Civil Litigation Section of the Austin Bar Association in 2022, and currently serves on the Litigation Council for the State Bar of Texas.

Outside of the office, Blayre enjoys spending time with her husband and two sons. They love cooking, gardening, singing karaoke, and traveling.

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PROFESSIONALISM AND BECOMING A BETTER LAWYER IN THE COURTROOM

PROFESSIONALISM AND BECOMING A BETTER LAWYER IN THE COURTROOM: AN EXAMINATION OF THE TEXAS LAWYER'S CREED

Professionalism in Texas is not ornamental rhetoric—it is an expectation embedded in the identity, authority, and historical culture of our legal profession. Long before "civility" and "professionalism" became national buzzwords, the Texas bench and bar recognized that rising hostility, discovery abuse, and gamesmanship threatened the justice system. In 1989, after collaboration between the Supreme Court of Texas and the Court of Criminal Appeals, the profession adopted the Texas Lawyer's Creed: a detailed reminder of what it means to practice law with honor. (Texas Lawyer's Creed - A Mandate for Professionalism, 1989).

More than three decades later, the Creed stands as both a shield and a challenge. It protects the dignity of the system and challenges every practitioner to rise above the temptations of incivility, shortcuts, and ego-driven advocacy. Nowhere is that challenge more evident than in the courtroom. The Creed demands that we transform our conduct, our preparation, and even our mindset—because professionalism is inseparable from effectiveness.

This article explores how the Texas Lawyer's Creed, when lived out rather than merely cited, produces better lawyers, better hearings, and better outcomes.

WHAT IS CIVILITY AND THE CURRENT STATUS?

Merriam-Webster defines civility as "civilized conduct especially courtesy and politeness. (Merrium-Webster Dictionary, 2025). "Courtesy" is behavior marked by polished manners or respect for others, while "politeness" is marked by an appearance of consideration, tact, deference, or a lack of roughness or crudities. *Id*.

Civility is something most of us want. A recent survey found that seventy-three percent (73%) of Americans believe we tolerate outrageous and uncivilized behavior by elected officials more today than in the past, and seventy-two percent (72%) of Americans are interested in being part of the solution to restore civility and find common ground. (Democracy, 2025).

However, politics is not the only area lacking civility. A survey on customer anger found that sixty-four percent (64%) of customers who had a problem with a product felt rage about it, with seven percent (7%) of customers seeking revenge against the business who sold the product. This survey also found that fifty-five percent of Americans believe customer incivility is on the rise, with 28% citing the moral decay of society as the primary cause. (Newswire, 2025).

One problem related to the lack of civility is its effect on mental health. Sixty-seven percent of Americans have reported negative mental health impacts from uncivil behavior in the past year. Some of the causes attributed to uncivil behavior include digital aggression through social media and political polarization. (Group, 2025). When it comes to civility, there are "uniters" and "dividers" in society. "Teachers and educators top the list of uniters (54%), followed by religious leaders (42%), sports coaches (40%) and community elders (39%). In contrast, federal government officials (595), television news (55%), and social media influencers (50%) are viewed as the primary forces dividing Americans." *Id*.

With all this discord in every facet of life, it becomes even more important for attorneys to be the shining beacon of professionalism and civility. We do this through our actions and our words on a daily basis.

Our calling as attorneys is to serve justice, and the Texas Lawyer's Creed contains the timeless principles to help us do so.

COURTESY AND RESPECT ARE STRATEGIC, NOT SYMBOLIC

The Creed directs lawyers to treat opposing counsel with courtesy, to avoid disparagement, and to disagree without invoking personal attacks. For many, this sounds idealistic or "soft." But in practice, courtesy is a strategic asset.

A lawyer who is unfailingly courteous:

- Controls the emotional temperature of the room;
- Avoids unnecessary judicial irritation;
- Signals credibility to the court;
- Gains cooperation on scheduling, stipulations, and procedural matters; and
- Keeps the focus on the merits.

Judges routinely comment—on the record and off—that they listen more closely to lawyers who behave like professionals. Jurors read body language and tone as carefully as they read evidence. Courtesy is not capitulation. It is persuasion through discipline.

In a profession governed by deadlines, adversarial pressure, and competing narratives, the lawyer who remains composed and respectful holds the advantage.

ZEALOUS ADVOCACY REQUIRES PRECISION—NOT HOSTILITY

The Creed rejects tactics that have no purpose except to harass or obstruct.

Lawyers often conflate "zealous" with "combative," but nothing in the Creed, the Disciplinary Rules, or the Texas Rules of Civil Procedure requires hostility to be effective.

A professional courtroom lawyer:

- Frames arguments with clarity;
- Responds to questions directly rather than evasively;
- Challenges legal positions rather than personal integrity; and
- Uses objections sparingly and purposefully.

Judges quickly distinguish between lawyers who are "fighting hard" and those who are merely "fighting." Precision wins hearings. Hostility wins reprimands. The Creed reminds us that true zeal arises from preparation, logic, and skill—not intimidation.

PREPARATION IS BOTH A DUTY AND A COMPETITIVE ADVANTAGE

The Creed instructs lawyers to be punctual, prepared, and ready to address issues efficiently. In practice, preparation is the backbone of courtroom professionalism. It is also the single greatest divider between effective and ineffective advocates.

Preparation shows itself in:

- Clean, focused argument outlines;
- Familiarity with the record and evidence;
- Anticipation of counterarguments;
- Well-crafted exhibits and demonstratives;
- Knowing the judge's rules, preferences, and precedent; and
- Distilling facts into themes rather than reciting chronology.

Prepared lawyers earn judicial trust. They minimize confusion, narrow issues, and shorten hearings. They also reduce their clients' costs and avoid unnecessary disputes. The Creed frames preparation as respect for the court—but it is also one of the most powerful forms of advocacy.

YOUR WORD SHOULD BE YOUR BOND

One of the most uncompromising portions of the Creed requires lawyers to keep their promises. Agreements, representations, scheduling commitments, and informal assurances all carry professional weight.

A lawyer's credibility is their most valuable asset. The moment a lawyer makes a representation that proves inaccurate, evasive, or misleading—even if technically defensible—their credibility with that judge or colleague diminishes permanently.

Credibility allows a lawyer to:

- Secure continuances when needed;
- Resolve conferral disputes efficiently; and
- Persuade the judge more readily on close calls.

The Creed recognizes a truth every seasoned litigator learns: your reputation arrives before you do and stays long after you leave.

COOPERATION IS NOT THE ENEMY OF ADVOCACY

Texas practice often requires collaboration on scheduling, conferral, exhibits, and joint submissions. The Creed requires lawyers to conduct discovery cooperatively and reasonably, not as a battlefield.

Cooperation:

- Saves the client money;
- Reduces motion practice;
- Prevents sanctions;
- Earns judicial appreciation; and
- Improves the pace and fairness of litigation.

Professionalism does not weaken a client's position; it strengthens it by removing distractions and focusing the litigation on real, substantive issues.

PROFESSIONALISM IS A DAILY DISCIPLINE, NOT A ONE-TIME CHOICE

The Creed demands an ongoing commitment to integrity, honesty, and responsibility. These are not traits that activate only in the courtroom; they are habits formed over time. A lawyer cannot be disorganized outside the courtroom and magically poised inside it. Nor can a lawyer be discourteous in emails and then expect the court to view them as credible during argument. Every email should be drafted as if the court will read it. (Although don't include the court or its staff in your back and forth correspondence with opposing counsel.)

Professionalism is a lifestyle:

- The way you speak to staff;
- The tone you use with opposing counsel;
- The clarity of your writing;
- The truthfulness of your statements; and
- The humility with which you accept judicial rulings.

The courtroom magnifies whatever habits a lawyer has already developed.

OTHER PRACTICE POINTERS:

1. Don't insult the Court or Opposing Parties.

While this should be common sense, insulting the court, the judicial system, or your opposition will not win your case. Surprisingly, there are a handful of cases where the litigant did just that.

For example, in *Gleason v. Isbell et. al.*, 145 S.W.3d 354 (Tex. App. – Houston [14th Dist.] 2004), a pro se litigant filed a motion for rehearing wherein he characterized the panel's opinion as "disingenuous, dishonest, and retaliatory." The litigant went on to state that the opinion contained '"sham reasons" for the court's ruling and constitutes 'unlawful, unprofessional, and unethical judicial and attorney retaliation." This litigant also accused the court of appeals of fraudulently misrepresenting facts.

In the concurring opinion, Justice Frost noted that judges are "the guardians of the court as an institution and so they must insist that all who come before the court act with dignity, decorum, and respect." In quoting the San Antonio Court of Appeals, Justice Frost noted that "a distinction must be drawn between respectful advocacy and judicial denigration. Although the former is entitled to a protected voice, the latter can only be condoned at the expense of the public's confidence in the judicial process." *Id*. quoting *In re Maloney*, 949 S.W.2d 385, 388 (Tex. App. – San Antonio 1997, no writ)(en banc)(per curiam). While pro se litigants have not undergone legal training, they "have no less of an obligation than lawyers to act with respect and civility in their dealings with the court and those who participate in the legal process."

Jabary v. McCullough, 325 F.R.D 175 (E.D. Tex. 2018) is an example of disrespect to the court backfiring into sanctions. In this case, the plaintiff's attorney attacked the integrity of the court through its briefing by making statements such as "The Court was Less Than Concerned About this Concealment," and "the Court ignored emails and other documents" in dismissing the plaintiff's case. The attorney also suggested that the court condoned the concealment of documents. Ultimately, the court found the attorney violated Rule 11 of the Rules of Federal Procedure for making statements that had no basis in law or fact. The court noted that had the attorney simply disagreed with the court's rulings, it would not issue sanctions. "Litigants express disagreement with the Court's rulings by filing appropriate motions to reconsider and/or notices of appeal." However, the attorney's conduct in this case was flagrantly disrespectful to the court.

2. Do follow the Rules of Professional Conduct, the Rules of Civil Procedure, the local Rules of any court you're practicing in, and the local-local Rules.

While this article focused on the Texas Lawyer's Creed, there are a number of other rules that lawyers must follow that are intertwined with professionalism and affect our daily conduct.

It is obvious that Texas lawyers must follow the Texas Disciplinary Rules of Professional Conduct. However, these Rules provide the minimum standards of conduct below which no lawyer can fall without being subject to disciplinary action. Contrast that with the Texas Lawyer's Creed which provides that it is primarily aspirational. We should all strive for the higher standards contained in the Texas Lawyer's Creed.

But, we must also inform ourselves of other applicable rules, such as:

- Federal Rule of Civil Procedure 11, which provides that every pleading filed by an attorney is a representation to the court that the document is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation, among other things.
- Texas Rule of Civil Procedure 13, which is similar to the Federal Rule of Civil Procedure 11.
- *Dondi Properties Corp. v. Commerce Sav. & Loan Assoc.*, 121 F.R.D. 284 (N.D. Tex 1988), which formally sets our standards similar to the Texas Lawyer's Creed for attorneys practicing in the Northern District of Texas. This case is included as a reference source, which was obtained from Westlaw for educational purposes and is used with permission of Thomson Reuters. © Thomson Reuters.
- The local rules of many jurisdictions also address civility. For instance, Rule AT-4 of the Western District of Texas' Local Rules provides that "a lawyer's role is to zealously advance the legitimate interests of the client, while maintaining appropriate standards of civility and decorum." The Eastern and Southern Districts of Texas have adopted local rules, which incorporate many of the Texas Lawyer's Creed's principles.
- The local, local rules or each court's judge specific requirements should also be reviewed as it relates to civility. For example, District Judge Mark T. Pittman from the Northern District of Texas requires all counsel and parties to read and comply with the Texas Lawyer's Creed. He's written a number of opinions when lawyers fail to do so. *See, e.g., Six Flags Entertainment Corp., v. Travelers Casualty and Surety Company of America*, 2021 WL 2064903 (N.D. Tex. 2021) and *Greathouse v. Capital Plus Financial, LLC*, 2025 WL 1151751 (N.D. Tex 2024).

CONCLUSION: THE CREED AS A PROFESSIONAL NORTH STAR

The Texas Lawyer's Creed endures because it aligns the goals of the profession with the values that make justice possible: civility, integrity, preparation, honesty, and respect. These are not lofty ideals—they are operational necessities.

When lawyers follow the Creed, hearings run smoother, disputes shrink, and justice becomes more accessible. But more importantly, lawyers become more persuasive, more efficient, and more respected.

Becoming a better lawyer in the courtroom does not begin with the law; it begins with the lawyer. The Creed gives us a roadmap. Our daily choices—big and small—determine whether we follow it.

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LITIGATOR'S GUIDE TO *PRO SE* OPPOSITION: TECHNIQUES, TIPS, & TACTICS

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CONQUERING THE COURTROOM: PRACTICAL TECHNIQUES TO ELEVATE YOUR COURTROOM SUCCESS
January 22, 2026
Austin

CHAPTER 2

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LITIGATOR'S GUIDE TO PRO SE OPPOSITION: TECHNIQUES, TIPS, & TACTICS

I. INTRODUCTION

Representing a client against a pro se litigant—a party who chooses to represent themselves without a lawyer—poses unique challenges for litigators across all practice areas. Websites like www.texaslawhelp.org and www.prosecoachtx.com provide easy access to information and content for anyone representing themselves. Now, with endless resources available through artificial intelligence platforms, interactions with pro se parties can be even more complicated.

An individual who is a party to civil litigation has the right to represent himself at trial and on appeal. Tex. R. Civ. P. 7; *Bolling v. Farmers Branch Indep. Sch. Dist.*, 315 S.W.3d 893, 895 (Tex. App.—Dallas 2010, no pet.). However, a self-represented party is bound by the same rules and procedural requirements as an attorney. *Cooks v. Discover Bank*, 2014 Tex. App. LEXIS 11756, at *2 (Tex. App.—Dallas Oct. 27, 2014, no pet.). Courts regularly caution pro se litigants that they will not be treated differently than a party who is represented by a licensed attorney. *Bolling*, 315 S.W.3d at 895. By law, pro se litigants should not be treated any differently than a party represented by a licensed attorney.

However, in practice, the litigation in cases involving pro se parties could be very different from what attorneys are used to. Navigating these cases requires balancing zealous advocacy, adherence to ethical boundaries, and practical courtroom strategies to ensure fair proceedings. The purpose of this paper is to provide some essential techniques, practical tips, and effective tactics every litigator should master when facing pro se opposition in litigation.

II. ETHICAL FOUNDATION: THE LAWYER'S BOUNDARIES

It is important to start with a strong ethical foundation. Texas Disciplinary Rule of Professional Conduct 4.03 is paramount when interacting with a pro se litigant. The rules states:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

See Texas Disciplinary Rules of Professional Conduct. § 4.03, (Texas Center for Legal Ethics, 2025) from https://legalethicstexas.com/resources/rules/texas-disciplinary-rules-of-professional-conduct/dealing-with-unrepresented-person/ (last visited Nov 15, 2025). The rule was amended in 2024 to include the last sentence, which highlights a key difference in interacting with unrepresented parties with interests aligned to the lawyer's client and those with interests that are in conflict. Obviously, in the litigation context, other parties' interests will almost always be in conflict with a lawyer's client. If parties are in conflict, the *only* permissible "legal advice" is to tell the other party to obtain legal counsel.

The ethical limit then becomes an evaluation of whether communication to the pro se litigant could be considered legal advice. Prior to performing any evaluation, a lawyer should consider the sophistication of the non-lawyer, which can vary to a large degree. A lawyer should consider the education level of the pro se litigant, their previous interactions with the legal system, and whether they are receiving assistance from another source. All these things can change the level of understanding and potentially alter the non-lawyer's perception of the communications with the lawyer.

Communication with the non-lawyer can largely be separated into two distinctive classifications—legal information or legal advice. Legal information is a neutral explanation of what the law is and how the legal system works in general. In contrast, legal advice is a tailored opinion applying the law to a specific person's facts and recommending what they should do. Legal information consists of accurate, factual statements about laws, rights, procedures, deadlines, and legal concepts that are expressed in generic terms. It may explain court structure, outline standard procedures, or point to resources, but it stops short of telling a particular person what choice to make. Legal advice applies legal rules and principles to a specific person's facts, taking into account their goals and risks, and then recommends a course of action or predicts likely outcomes. When communicating with a pro se litigant, a lawyer should evaluate this specific distinction.

To ensure a proper ethical foundation remains intact, before any interaction with a pro se litigant, a lawyer should clearly explain they are not giving and cannot give legal advice to the pro se litigant. If a pro se party misunderstands the attorney's role, lawyers are required to correct the misunderstanding promptly. Violation risks both ethical repercussions and subsequent litigation over potential misrepresentation or unfairness. Building your case with a pro se litigant from an ethical foundation can avoid subsequent complications in litigation.

III. KEY TACTICS AND TECHNIQUES FOR LITIGATION

Probably the most challenging aspect of litigation with a pro se party is managing interactions with the person. Lawyers are used to interacting with other lawyers. Even if legal strategies and individual personalities can make a case challenging, lawyers generally understand the "rules of the game," and they follow those rules in their interactions with each other. However, a person representing himself rarely has the same background. Therefore, the responsibility falls on the lawyer in the matter to try to guide the proceedings. The following list represents some key tactics and techniques to employ at each stage of litigation to help move the case along efficiently, effectively, and ethically.

A. Clearly articulate representation.

First and foremost, at every venture, a lawyer should clearly articulate who they represent with a pro se litigant. If possible, a lawyer should get an acknowledgment in writing from the pro se party indicating their understanding of the representation. If things become complicated, a lawyer can ethically encourage them to seek legal representation.

It is also advisable for a lawyer to communicate with their client specifically about this complication in litigation. Courts generally prefer to give everyone their "day in court," so clients need to be aware that a pro se litigant does not equate to an easier path to judgment. Before undertaking any strategy, lawyers should communicate to their clients the ethical standards in their representation and complications from the involvement of the pro se party that may arise.

B. Strategize the initial contact with the pro se litigant.

From the moment a lawyer opens a matter, he needs to be ready for the initial contact from the other side. Whether because they do not understand why they have been sued, have no understanding of how to proceed, or simply do not want to mess with it, the phone calls or emails that follow can be challenging to navigate. It is best to be prepared even at an early stage for these communications.

Aside from encouraging the pro se party to seek legal representation, it may be a good tactic to direct the pro se party to legal resources available online or through the court system. Any information related to the filing system would likely be construed as "legal information" rather than "legal advice," making it appropriate to direct the pro se party to the appropriate clerk's office for filing. In sharing this information, a lawyer benefits her client. There now is official notice of contact information, and the pro se litigant bears the responsibility of updating and notifying the other side and the Court if anything changes.

Occasionally, a party will be in contact but will never file a formal answer. There are many reasons for this, but ultimately, it means a lawyer must tread very carefully before moving the case to default. Legally, a default judgment may be proper, but there may be costly consequences to the client if it is pursued after communicating with a pro se party. Specifically, even if they do not file an answer, a pro se individual can now provide proof of communication with no notice of the default judgment in their request for a new trial. If you must pursue a default judgment, the strongest approach would be to notice the default hearing. If the pro se party shows, the matter will be subject to regular litigation. If not, with the documented communications, the judgment is now better protected from a Motion for New Trial as the failure to appear was based on conscious indifference rather than a simple mistake.

C. Be prepared to manage scheduling.

It is easy to assume that a case with a pro se litigant will end quickly. However, usually these cases go all the way to trial. After all, like many clients, pro se litigants often believe if they can tell their story to a judge, the judge will agree with them and give them what they want. Not to say a lawyer should not attempt settlement, but ultimately, it may not matter what efforts the lawyer makes to resolve the case if the pro se party is determined to have the judge hear the case.

Knowing this, preparation is key to navigating a scheduling order with the pro se litigant. Yes, the law requires an unrepresented party to follow the same procedural rules, but these rules can be confusing for someone with no legal background. If a lawyer can facilitate the movement of the case within the rules, everyone, including his or her own client, will benefit from those efforts. A lawyer should attempt to exchange an Agreed Scheduling Order at the outset of the case to set out the deadlines and discovery clearly for both sides. This is a perfect time to discuss mediation, discovery processes, and trial. Some courts will automatically issue an order when a case is filed, so if the order is generated by a court, it can be helpful to schedule a call to go over the deadlines with the other side and discuss the parameters of the entered order to avoid delays and confusion throughout litigation.

Th discovery process is likely the most difficult phase to navigate, and document exchanges can be especially problematic. A good tactic would be to discuss not only *when* information will be exchanged, but also *how* this process will take place. It may not always be possible to outline deadlines and methods with the other side, but it does put the case on the right trajectory. It also grants the attorney the ability to enforce non-compliance.

In managing scheduling, a lawyer should try to schedule and conduct mediation prior to the pre-trial hearing. This provides an excellent opportunity to avoid trial if possible. The third party neutral can also communicate more freely with the pro se litigant about the strengths and weaknesses in the case. The judge will likely order mediation prior to trial anyway, so scheduling and conducting mediation earlier the process avoids the circumstance where everyone shows up for the trial setting only to be told that they need to go back and mediate.

D. Settlement negotiations will require more documentation than usual.

Negotiating settlements with pro se opponents will likely necessitate some changes in preparation and documentation. Before each round of negotiation, a lawyer should note the date, time, and method of communication. It is advisable to negotiate as much as possible in writing, but if it must take place in person or over the phone, the lawyer should be prepared to document the discussions (including recording a call if necessary) and send written communication in follow-up to the conversation. At the start of each interaction, a lawyer should restate on the record (or in writing) his or her representation and reiterate that they are not providing legal advice to the pro se party. It is also advisable to obtain confirmation of the other party's understanding of their right to consult with independent counsel.

During settlement discussions, a lawyer should keep contemporaneous notes of offers, counter offers, and key issues discussed. It is important to distinguish statements of legal "information" and any statements you declined to make as "advice." If the pro se party asks about strategy ("What should I do…?" or "What would you do…?"), a lawyer should document those questions and their response directing them to seek counsel. It might be helpful to note any concerns about comprehension, confusion, or emotional volatility. As previously mentioned, after each interaction, a lawyer should send a confirming letter or email summarizing the date and method of communication, the proposals made by each side, any tentative agreements or items left open, and your reminder that you do not represent the pro se party and cannot advise them.

For settlement documents, a lawyer should save all versions of drafts exchanged with dates and redlines were feasible. Prior to execution, it would be helpful to record any written recommendation that the pro se party review the document with independent counsel before signing. The parties should also document the circumstances of signing (location, witnesses, time, and any explanation of specific provisions). Maintaining a running log of negotiations and settlement communications will ensure that the lawyer maintains a clear and defensible settlement should anything ever be questioned about the process.

E. Plan for a robust pre-trial hearing to simplify trial.

In any civil matter, a pre-trial hearing is often very helpful for simplifying issues and saving costs, but this is especially true when dealing with an unrepresented party. A pre-trial hearing is an excellent opportunity for a pro se party to familiarize themselves with the courtroom and for the judge to explain what will happen at trial. A well-prepared attorney can use this time to discuss and exchange trial exhibits, evaluating issues and admissibility prior to trial proceedings.

To best utilize the pre-trial hearing, draft your scheduling order to clearly indicate precise procedures, exchanges, and discussions for this hearing. It is also advisable to schedule this hearing for a couple of weeks before trial. This will give the parties additional time if the pro se litigant comes unprepared or other issues come to light. The pre-trial hearing process is typically more informal. Both the attorney and the judge can communicate with the unrepresented party about expectations, procedures, and outstanding discovery issues. The court can then order whatever needs to be addressed and by what date in advance of trial.

F. Be ready for a trial that is different.

In theory, an unrepresented party should be held to the same standards as an attorney at trial, but in reality, the courtroom process may look vastly different. In the past, judges held pro se litigants to strict compliance in the hopes they would find legal representation. However, public sentiment has changed, and now, judges acknowledge and support the right to self-representation and will facilitate pro se participation as much as possible within the confines of the law.

The judge seemingly assisting the pro se person—or not requiring that person to follow the same rules—can present challenges to a lawyer. Prior to trial, lawyers should explain this process to your client. Judges will often provide guidance as to how to ask questions properly and how to admit evidence. Judges can also ask questions of the pro se party to gather information. This can be surprising and somewhat disconcerting for the party paying the lawyer. While it may appear that the judge is "helping" the other side, such guidance can greatly simplify the trial process and avoid error. Broaching this subject before a trial will avoid confusion and frustration in your representation. A lawyer should explain that sometimes the judge will go to extra lengths to make sure the unrepresented party gets a full opportunity to present his or her case. This protects the end result, which is ultimately the most important.

A lawyer should also evaluate and choose their battles wisely at trial. Pro se litigants are prone to asking improper questions and failing to establish evidentiary predicate. They may also be disrespectful or argumentative to the lawyers, the judge, or the other party. There are even instances where the pro se litigant simply wants to read an entire narrative into the record. While having a good judge can alleviate the concerns related to these situations, it still can be difficult to navigate objections and manage client expectations. Lawyers must exercise self-control and avoid the appearance of "bullying" a pro se litigant with overly aggressive courtroom tactics. If the evidence is not harmful to a client, the lawyer should not object to its admission. If a question is objectionable, a lawyer can make the objection if helpful, but she should not get flustered if the judge overrules it. Taking the high road will put you in a better position with the judge, and it will likely increase the likelihood of a good result for your client. As hard as it may be, this is one of those circumstances where being nice may achieve the best results.

Judges increasingly balance the formal rule that pro se parties are held to the same standards as lawyers with a practical commitment to facilitating meaningful self-representation at trial. In practice, that means judges may guide pro se litigants to protect the record and the ultimate result. By preparing clients for this dynamic and choosing objections carefully, focusing only on harmful evidence, lawyers preserve credibility with the court and maximize the chance of a favorable outcome for their clients.

IV. PRACTICAL TIPS

With a strong, ethical foundation and a focused strategy for proceeding through litigation, working with a pro se opponent becomes much less complicated. To simply best practices, the following represents a quick summation of helpful tips to integrate into practice against pro se litigants:

A. Framing the Relationship at the Outset

Again, at first contact, the lawyer should clearly identify whom they represent, explain that their duties run only to that client, and state explicitly that the lawyer does not represent the pro se litigant. If the pro se litigant appears to expect guidance or protection from the lawyer or the court, the misunderstanding needs correcting in plain language and as soon as possible. Lawyers should remind pro se parties that they are free to seek independent counsel and that nothing in the communications creates an attorney–client relationship.

B. Spending More Time Listening

Interactions should begin by inviting the pro se litigant to explain, in their own words, their understanding of the case, goals, and concerns. Close listening helps reveal misunderstandings that may need correction, identifies realistic areas for agreement, and often defuses suspicion or hostility that could derail productive negotiations.

C. Staying on the "Information" Side of the Line

A lawyer may provide accurate legal information about the case status—such as deadlines, scheduled hearings, pending motions, and procedural options—without transforming that information into advice on what the pro se litigant should do. It is helpful to utilize neutral formulations such as "if no answer is filed, the rules allow the court to enter a default judgment". When the discussion shifts toward strategy or recommendations, it is appropriate to decline giving advice and reiterate the need for the pro se party to consult their own lawyer before making decisions.

D. Conducting Negotiations Ethically

Negotiations with a pro se litigant can be robust, but lawyers should conduct negotiations with transparency regarding the lawyer's role. The lawyer should restrain himself from advocating beyond his client's interests. Proposal explanations should describe what each term does in neutral, plain language, avoiding any opinion on whether the deal benefits the pro se party. Written communications should be clear, non-coercive, and include recommendations that the pro se litigant seek independent legal advice before signing.

E. Safeguarding Day-to-Day Practice

A lawyer should consider using standard opening scripts for calls and letters which identify the lawyer's client, disclaim any representation of the pro se party, and note that legal advice cannot be provided to the opposing party. A lawyer should always document key communications and negotiations in writing, including reminders of no legal advice and encouragement to consult counsel. If possible, a lawyer should calibrate tone and explanations to the pro se party's sophistication and vulnerability.

Lawyers can direct pro se litigants to publicly available resources and forms. An opposing counsel should never draft anything (outside settlement documents) for a pro se opponent. All hearings should be noticed with confirmation of service included as part of regular practice.

Communications should remain professional and respectful. If a pro se party expresses a desire to have a “support” person or family members at meetings and mediation, a lawyer should seriously consider permitting this participation. If a lawyer engages in aggressive tactics, he is likely to be perceived as intimidating, so lawyers evaluate this strategy early in litigation.

F. Organizing Discovery and Evidence

Discovery from a pro se opponent may proceed slowly or unevenly and may require structure and creativity. Lawyers should seek agreed or court-ordered scheduling orders to better manage this process. Third-party records and written-questions depositions can supplement discovery if the pro se party resists or mishandles requests.

G. Preparing for the Courtroom

Preparation for judicial flexibility toward pro se litigants is important. When discussing this with her client, a lawyer should frame this interaction as promoting fairness rather than bias. A lawyer should document critical exchanges, exhibits, and proposed orders with the pro se litigant, and such information should be sent well in advance of any deadlines. Attorneys should make selective and strategic objections, to preserve professionalism. Approaching a pro se party with patience in the trial process supports the rule of law and promotes judgments that withstand appellate scrutiny.

H. Working with Legal Staff and Non-Lawyers

When the opposing party employs non-lawyer assistants, communications should focus mainly on logistics and document exchange. Lawyers should direct all substantive legal matters to the pro se party directly. Lawyers should remain vigilant against the unauthorized practice of law by non-lawyers and protect confidentiality safeguards.

V. CONCLUSION

Representing a client against a pro se litigant presents complex challenges that require a blend of ethical diligence, clear communication, and practical courtroom strategies. While pro se parties are legally held to the same standards as licensed attorneys, the realities of self-representation necessitate flexibility and patience from counsel to ensure fair proceedings. By establishing a strong ethical foundation, effectively framing interactions, maintaining professionalism, and employing strategic case management and negotiation tactics, litigators can safeguard their clients’ interests and promote just outcomes. Ultimately, thoughtful preparation and respectful advocacy not only navigate the unique dynamics of pro se litigation but also reinforce the integrity and efficiency of the judicial process.

WRITING MOTIONS THAT WORK: STRUCTURE, JUDGMENT, AND CLARITY

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CONQUERING THE COURTROOM: PRACTICAL TECHNIQUES TO ELEVATE YOUR COURTROOM SUCCESS
January 22, 2026
Austin

CHAPTER 3

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OVERVIEW

Stephen is a seasoned litigator with significant experience representing clients in complex securities, financial services, and commercial disputes. Stephen also serves as Practice Leader of the Firm's Securities Litigation + Governmental Investigations group. With a particular focus on the financial industry, he routinely represents investors, companies, financial institutions, investment firms, broker-dealers, registered investment advisers, asset managers, and corporate officers in high-stakes litigation and regulatory investigations.

Stephen's practice also extends to high-value commercial, real estate, non-compete, business divorce, and intellectual property disputes, particularly those involving sophisticated financial or technical issues. He is recognized for his strategic judgment, precise legal analysis, and ability to craft litigation strategies that align with his clients' legal and business objectives.

In addition to his litigation practice, Stephen is committed to public service, with a focus on disability advocacy. He serves as a Commissioner on the City of Dallas Commission on Disabilities and previously chaired the Dallas Association of Young Lawyers Foundation, which provides financial support to nonprofit organizations throughout the Dallas-Fort Worth area.

MEMBERSHIPS

- Dallas Association of Young Lawyers (President, 2026, President-Elect, 2025; Vice President, 2024; Treasurer, 2023; Secretary, 2022; Board of Directors, 2020-present; Membership Committee Co-Chair, 2018-present; Finance Committee Co-Chair, 2017-present; Leadership Class, 2018-2019)
- Dallas Association of Young Lawyers Foundation (Chair, 2024; Fellow/Trustee, 2018-present)
- Dallas Bar Association
- City of Dallas Commission on Disabilities (Commissioner, 2024-2025)

EDUCATION

- Texas A&M University School of Law, J.D.
  - *Texas A&M Law Review* (Managing Editor)
- The University of Texas at Austin, B.A.

ACHIEVEMENTS

- *D Magazine* – Best Lawyers Under 40 (2023-2026)
- Dallas Association of Young Lawyers – One to Watch (2018)
- *Thomson Reuters* – Texas "Rising Stars" (2019-2025)
- *Woodward/White, Inc.* – Best Lawyers: Ones to Watch, Litigation – Banking and Finance (2023-2026); Best Lawyers: Ones to Watch, Commercial Litigation (2023-2026); Best Lawyers: Ones to Watch, Intellectual Property Law (2023-2026); Best Lawyers: Ones to Watch – Financial Services Regulation Law (2026)

CLERKSHIPS

- The Honorable Justice Mike Willson, Eleventh Court of Appeals of Texas (Briefing Attorney)
- The Honorable Jane J. Boyle, United States Court for the Northern District of Texas (Judicial Extern)

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WRITING MOTIONS THAT WORK: STRUCTURE, JUDGMENT, AND CLARITY

I. INTRODUCTION

I recall sitting in a writing seminar at the University of Texas, listening to a discussion about persuasive writing and rhetoric. At the time, the lesson felt academic—useful but far removed from the practical demands of the "real world." Little did I know that many of those principles would later surface, essentially unchanged, in my daily work as a litigator.

Indeed, those same ideas appear repeatedly in motion practice—not as abstract theory, but as practical realities. Deciding what to argue and what to omit. Organizing facts to make their significance clear. Structuring arguments to guide the court down the path to relief. Motions that tend to succeed are not necessarily the most aggressive or comprehensive. Instead, successful motions require disciplined thought and judgment on how to present the best possible version of your case.

In practice, we routinely see legally sound yet ineffective motions. The problem is rarely the governing law. More often, it is execution: unfocused arguments, overlong briefs, or factual sections that obscure (rather than clarify) the dispute. By contrast, successful motions share a simpler set of traits—careful selection of arguments, clear structure, and succinctness. After all, effective advocacy is making it as easy as possible for the court to grant your requested relief, and judges appreciate not having to parse through dozens of pages to discern why your position prevails.

This article examines those traits from a practitioner's perspective. It focuses on the practical choices strong advocates make to shape effective motions—including how they: structure and select their most compelling arguments, organize facts, apply authority, and use clarity and tone to build credibility. Many of these principles echo lessons taught in writing classrooms, but they endure because they are just as relevant in modern litigation as they are in theory.

II. ARGUMENT SELECTION SETS THE CEILING FOR PERSUASION

Step one in drafting an effective motion should be selecting only the most persuasive arguments. One of the most common weaknesses in motion practice is over-argument. Faced with a complex record or multiple legal theories, counsel often feels compelled to include every potentially viable argument. The instinct to over-include is understandable. Omitting an argument can feel risky—particularly when the stakes are high or the subject matter is dense. Unfortunately, this often results in a brief that is longer, less focused, and ultimately less persuasive.

Over-argument creates several problems. First, it dilutes strong points by placing them alongside weaker ones. Compelling arguments lose force when a writer presents them alongside weaker arguments that invite skepticism. Second, over-argument obscures a motion's core theory—leaving the court to decide which issues actually matter. The court should not have to infer which arguments counsel believes are decisive. Third, it undermines credibility. A motion that argues everything often sounds less confident than one that argues only what is necessary.

Effective advocates approach argument selection as a substantive judgment call. They identify the arguments that actually drive the requested relief and organize their motion around those points. You should consider omitting (or summarily addressing as secondary considerations) marginal arguments—those that are technically available but unlikely to carry the day. In many instances, movants can also include "close calls" as footnotes. Overall, however, selectivity sharpens legal analysis and signals confidence in the strength of your primary arguments.

Importantly, restraint in argument selection provides a strategic advantage—and is not a concession. A focused motion invites the court to engage with the arguments that matter most.

III. THE INTRODUCTION SHOULD FRAME THE MOTION

Any motion over five pages should have an introduction. The introduction to a motion serves a distinct and limited function, though. It frames the dispute and orients the court before it engages in detailed analysis. It is not a substitute for the argument section, nor is it a place to recite the entire record. The introduction should point the court in the right direction, not attempt to prove the case.

Effective introductions do three things. First, they describe the dispute in clear, neutral terms. Second, they state the relief sought. Third, they explain—at a high level—why that relief follows from the facts and governing law. Done well, an introduction shows the court what the motion is about and why it matters within a few paragraphs.

Introductions that attempt to preview every argument or cite extensive authority often weaken the motion's structure. By the time the court reaches the argument section, the brief feels repetitive and unfocused. A restrained opening, by contrast, gives the rest of the motion room to develop and reinforces its organization.

IV. FACTS PERSUADE THROUGH FRAMING, NOT ACCUMULATION

Facts supply the foundation of motion practice, but more facts do not necessarily produce a stronger motion. What matters is how facts are selected, organized, and presented.

Strong factual sections are purposeful. They include the facts the court needs to understand the dispute and decide the motion, while excluding background that adds length without clarity. A point may be accurate and supported, yet still unnecessary to the motion's resolution. Including unnecessary facts imposes a cost: it asks the court to process information that does not advance its analysis.

Organization is equally essential. Facts persuade when arranged to show context and consequence—not when they are listed mechanically. Grouping related facts by issue or theme often makes their significance clearer than a strictly chronological recitation. Chronology can be effective, but only when it advances understanding rather than obscuring it with detail. On a related note, sometimes it can be challenging to determine where to start when you are staring at a blank Word document. When this happens, many practitioners find it helpful to: (1) type the entire universe of (potentially) relevant facts and (2) narrow the facts presented to the most relevant as their arguments coalesce.

Unfavorable facts deserve particular attention. Advocates who attempt to minimize, obscure, or bury unfavorable facts often only draw attention to the weaknesses of their argument and/or undermine their credibility. In most instances, it is exceedingly likely that opposing counsel will alert the court to any relevant omissions or mischaracterizations of unfavorable facts. Choosing instead to address unfavorable facts directly allows an advocate—not their opponent—to frame the legal significance of those facts and control the narrative. Courts are far more receptive to arguments that acknowledge and explain inconvenient facts.

A factual section that forces the court to assemble relevant facts haphazardly misses an opportunity to frame the narrative. The most effective factual presentations do the organizational work for the court. A good motion does not require the court to look elsewhere to discern the relevant facts.

V. STRUCTURE IS A SUBSTANTIVE COMPONENT OF PERSUASION

Organization goes beyond formatting. It is a substantive part of persuasion. A well-structured motion guides the court through the analysis and reinforces the motion's theory at every stage.

Clear, outcome-oriented headings drive your message. Headings that state conclusions—rather than merely labeling topics—allow the court to grasp arguments even when reading selectively. They also impose discipline on the writer by requiring each section to advance a specific point. Along with headings and subheadings, occasionally using bold, italics, or underlining can be effective. However, effective advocates use these tools very sparingly because they can distract the court to the detriment of otherwise compelling arguments.

Logical sequencing matters as well. Arguments should unfold in a way that builds toward the requested relief. Excessive fragmentation through sub-arguments and nested headings and subheadings can obscure logic and burden the court. Ultimately, when a reader has to search for the point, the motion loses traction.

In addition, consider adding a table of contents if the motion is over a set number of pages—even if the local rules do not require one. Some judges like a table of contents for any motions over ten pages, while others like them for motions over fifteen or twenty pages. If there is a way to find out what the judge's preference is, find out. Obviously, always check the local rules for the applicable jurisdiction. Most federal courts have strict rules regarding the inclusion of a table of contents, as well as other structural/formatting requirements (i.e., page limits, font sizes, and required content).

VI. AUTHORITY SHOULD BE APPLIED, NOT ACCUMULATED

Almost all motions should contain legal authority—which I feel strange suggesting, but I see authority-free motions enough that this point bears repeating. Even so, the persuasive value of legal authority lies not in quantity, but in relevance and application. Lengthy string citations or unanalyzed block quotations rarely persuade courts.

Effective motion practice involves selecting authority that aligns with the dispute (factually or legally) and explaining why that authority controls the outcome. This explanation often carries more weight than a quotation. However, take care when paraphrasing authority to ensure the case you cite supports your proposition. Nothing kills credibility faster than opposing counsel—or the court—noticing that a case does not support your proposition. Once this happens, the court will not trust that anything else in your motion is accurate or reliable.

When determining where to place authority, remember to integrate it into the analysis rather than inserting it mechanically. It should support the argument, not substitute for it. When reviewing your analysis sections, consider whether the authority enhances or eclipses your substantive arguments. If the latter, more editing is needed.

Lastly, most motions should include a "standard of review" section that explains who bears the burden of proof on the issues, the type of analysis the court should apply, and (occasionally) the appellate review standard. Less effective motions make this section either too lengthy or eliminate it entirely. For example, the standard of review for motions for summary judgment is well known, and it is not necessary to detail it over several paragraphs/pages. Many practitioners cite a recent decision from the court considering their motion that details the applicable standard.

For less common motions, however, ensure that you include mandatory authority to guide the court. The court should be able to determine the standard/burden when reviewing your motion quickly. Failing to (concisely) provide this information distracts from your substantive arguments.

VII. CLARITY IS A PRACTICAL ADVANTAGE

Clarity is not a stylistic preference; it is a practical advantage. Motions are read under time constraints, often by multiple readers with varying levels of familiarity with the case. Difficult-to-parse writing imposes costs that detract from persuasion.

Clear writing favors short sentences, concrete verbs, and direct structure. Excessive legal jargon and convoluted syntax slow comprehension and obscure meaning. Editing should focus on reduction rather than expansion—cutting redundancy, tightening sentences, and confirming that each paragraph advances the argument. As Mark Twain famously observed, "I apologize for such a long letter—I didn't have time to write a short one." The same holds true for effective motion writing. Concision is the product of time, editing, and judgment.

VIII. TONE AND PROFESSIONALISM MATTER MORE THAN FORCE

Tone directly impacts credibility. Overstatement, sarcasm, and unnecessary hostility rarely strengthen arguments and often detract from them. Courts regularly see adversarial advocacy; they are commonly less receptive to briefs that appear antagonistic or performative. While some firms have a culture of filing briefs that include "jabs" at opposing counsel or the opposing party, remember your reputation is everything in this profession. Not only will these comments undermine your arguments, but they will also lessen your credibility. If your brief supports a position that is contrary to opposing counsel's (which is likely), there is a civilized way to convey distinctions in the law and disagreements on the facts.

Ultimately, professional, measured writing conveys confidence and respect for the court's role. It allows the substance of the argument to carry the motion without distraction. The most persuasive motions do not sound angry. They sound certain.

IX. RECOMMENDED READING: WHY WRITING STILL DESERVES DELIBERATE PRACTICE

The emphasis on clarity and discipline in motion writing is neither new nor accidental. During my clerkship, the Honorable Justice Mike Willson made a point of focusing on writing as a core skill. New clerks were routinely given writing manuals and books—not as a formality, but as a signal that precision, focus, and restraint mattered as much as substantive knowledge.

That emphasis carried into practice. Early in my career, I began buying many of the same books for young associates. The habit has slowed over time, though it is one worth resuming. Good legal writing is not absorbed passively. It is learned, refined, and reinforced through deliberate attention.

The best writing guides do not teach tricks or stylistic flourishes. They emphasize fundamentals: saying less, organizing ideas clearly, cutting what does not advance the point, and respecting the court's time. Those lessons map directly onto effective motion practice and reinforce the habits discussed throughout this article. Two books I commonly recommend to lawyers interested in fine-tuning their writing are:

- Point Made: How to Write Like the Nation's Top Advocates by Ross Guberman, and
- Making Your Case: The Art of Persuading Judges by Antonin Scalia and Bryan Garner.

To this day, dog-eared copies of both—received initially as gifts from Justice Willson—are always sitting within an arm's reach of my desk.

For lawyers who regularly draft motions—or who supervise those who do—investing time in writing itself is not ancillary to practice. It is part of the work. The payoff is not academic. It appears in briefs that are tighter, clearer, and more persuasive.

X. KEY TAKEAWAYS

Effective motion writing reflects judgment at every stage: deciding which facts to include, which arguments to press, how to organize the analysis, and how to present the law clearly and professionally.

The strongest motions are not the longest or the loudest. They are the ones that focus the court on what matters and make the path to the requested relief easy to follow. In summary, practitioners interested in writing more effective motions should:

- **Choose the strongest arguments.** Identify the arguments that actually drive the requested relief, not every potentially viable argument.
- **Use the introduction to frame the dispute.** A focused opening orients the court and sets the stage for your motion.
- **Choose and structure your supporting arguments/facts intentionally.** Strong motions rely on decisive and compelling arguments/facts. Overinclusion of either distracts from your purpose.
- **Let structure do the work.** Clear headings and logical sequencing strengthen persuasion by keeping the court on track.
- **Explain authority.** Relevance and application matter more than volume.
- **Edit ruthlessly.** Concision is the product of time and judgment.
- **Maintain a professional tone.** Confidence persuades more than aggression.
- **Continually hone your craft.** Never stop fine-tuning your legal writing!

PREPARING YOURSELF FOR THE COURTROOM & VIRTUAL HEARINGS

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CONQUERING THE COURTROOM: PRACTICAL TECHNIQUES TO ELEVATE YOUR COURTROOM SUCCESS
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Austin

CHAPTER 4

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Abigail is an associate attorney practicing civil litigation and civil appeals at VBPena Law, PLLC. She was licensed in October 2021 and enjoys representing clients in a variety of civil matters such as cases involving breach of contract, deceptive trade practices violations, breach of fiduciary duty, civil fraud claims, and more. Abigail represents both plaintiffs and defendants and has experience in administrative law areas as well, including representing insurance carriers against workers compensation claims and handling environmental disputes. Abigail graduated cum laude and received her Bachelor of Arts in Mass Communication: Multiplatform Journalism from Sam Houston State University. Thereafter, Abigail attended Thurgood Marshall School of Law in Houston, Texas, where she graduated summa cum laude and in the top 5 percent of her class, served as Lead Articles Editor for Law Review, served as a research assistant and writing advisor, and worked in the legal clinic representing indigent members of the Houston community facing criminal charges or needing expunctions. Abigail is a Director of the Austin Young Lawyers Association and co-chairs the community service days committee. She also serves as an assistant editor of the Austin Lawyer magazine publication of the Austin Bar and is a member of the Civil Litigation Section. In addition, Abigail is a member of the Williamson County Inn of Court and a Fellow of the Texas Bar Foundation. Recently, Abigail enjoyed being part of the State Bar's 2024-2025 leadership class and part of the 2024-2025 leadership academy of the Austin Young Lawyers Association. Outside of work and law-related activities, Abigail loves to spend time with her husband, Ross, their daughter, Halle, who was born in November 2025, their pets, other family, and friends.

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PREPARING YOURSELF FOR THE COURTROOM & VIRTUAL HEARINGS

I. GENERAL PREPARATION TIPS: GOOD TECHNIQUES TO BE A SUCCESSFUL ADVOCATE

There are many qualities that make an attorney a successful advocate, but implementing simple techniques can help you become more effective in achieving positive outcomes for your clients.

In this Article, we aim to provide you with some useful techniques for getting yourself ready for the courtroom that will improve your practice and your overall presentation in the courtroom whether in-person, virtual, at trial, or at a hearing. This Article will provide a broad overview of considerations for your preparation as well as provide advice on implementing certain practices to ensure you are ready to "conquer the courtroom."

A. Setting Yourself Up for Success

There are simple practices that you can implement to ensure that you are set up for success at your next court appearance. It starts with knowing the court and any administrative nuances. Second, knowing what you are striving to accomplish at the appearance and how to best achieve the desired outcome is key.

Whether you are a newer attorney who needs to spend significant time reviewing the rules and policies and thoughtfully piecing together your entire argument, or you are a more seasoned attorney who can simply do a quick refresher and is good-to-go, preparation is key. Take the time to confirm you are correct about the current rules and policies and that you have at least reflected on the main points of your argument. Additionally, you should always verify you have complied with the applicable notice requirements and any local announcement requirements before showing up for your hearing.

Requesting a sufficient amount of time for your hearing and knowing how to estimate that is important. In Travis County, you must indicate how long you need for your hearing when you set the hearing. In other counties, you should be prepared to announce how much time you will need at docket call. When estimating the length of time you will need for the hearing, you should consider the amount of time needed for your full presentation, your opponent's response, a reply, and questions from and discussion with the court. If you do not estimate time accordingly, you may find yourself having to return, reprepare, and refresh the judge on the work you have already done, or even worse, you may frustrate the judge. Remember, the judge is relying on you to accurately assess the amount of time you need so he or she can efficiently manage his or her docket.

Simple practices like bringing a business card with you for the court reporter are good ways to start off a hearing and demonstrate that you are a prepared and experienced courtroom attorney. You may also find it helpful to bring the relevant statutes and rules with you, so you can easily refer to them during the hearing without having to rely solely on your memory or order of your presentation. Remember that your presentation may be interrupted or the court may take issues up in a different order than you anticipated. Anything you can do to mentally prepare for your argument and to adapt if things do not go as you envision them will only improve your confidence and minimize stress.

1. <u>Knowing the Court</u>

You have likely heard it time and time again, but it is worth repeating that you must know local rules and practices or engage local counsel who does. Knowing whether the court has local rules or even its own specific rules is important for effective advocacy. If you submit a proposed order incorrectly, fail to upload exhibits in the required or preferred way, or fail to recognize that the motion you set for a hearing could have been more easily handled at agreed order docket, you are not being an efficient and effective advocate. Know the local rules and practices so you can make the best use of your time and be as an effective advocate as you can be for your client. Certain courts may even have preferred forms or templates that you are expected to use, or they could have standing orders, such as a standing order in limine, that already accomplish what you are seeking. Be sure to familiarize yourself with these items as part of your preparation process.

Another tip is to figure out who your judge will be (if you are able to find out ahead of time) and brush up on any recent cases that may relate to your case. This may help you ascertain what worked or did not work and to focus your presentation and argument in a way that will resonate more favorably with your particular judge. Talk to lawyers in your firm or other colleagues who may have appeared before your judge. You may be able to find out from court staff or a colleague whether it would be worthwhile to prepare a hard-copy hearing binder for the judge or whether the judge is likely to take motions under advisement. Understanding these logistics will make you better prepared and help you set your client's expectations accordingly.

Of course, it is also crucial to make sure you know how to utilize the technology available in the courtroom before the hearing begins. Some courts may allow you to come practice with courtroom technology at certain times. Doing so will help you know whether you need to bring a specific adapter or if you need anything else to effectively operate the technology. Planning and practicing sets you up to give your best presentation without technical hiccups. When you only have a limited amount of time to advocate for your client, you want to avoid spending any amount of time working on technology issues. Wasting time on technology issues may frustrate the judge particularly if the court has previously made the courtroom available to test technology or otherwise provided training on how to operate the technology in the courtroom.

2. Knowing Your Purpose

Why are you there, and what are you asking the court to do? Preparing a proposed order and having it handy for the judge at the hearing is a great way to both: (i) identify the relief you are seeking; and (ii) ensure the wording on the order is to your liking. Having to agree to language in an order on the fly can lead to confusion or failure to request all possible relief if you have not thought through these issues in advance by preparing a draft order. Evaluating whether you want or need a reporter's record of the hearing before you go to court is a good idea so you are prepared to request a record before the hearing begins. Whether you need a reporter's record depends on several factors such as the type of hearing being undertaken and your client's financial means or interest in appealing an outcome from the trial court.

PowerPoint is an effective tool to consider using for your argument and presentation. PowerPoint can streamline your presentation and keep your presentation and argument on track. The process of creating a PowerPoint alone forces you to prepare for the hearing because it makes you think about the main arguments, rules, case law, evidence and responses. Essentially, creating the PowerPoint is a way to organize and compartmentalize the information that you want to get across to the judge and allows you to do a practice run of your presentation. Now, there are also AI platforms that can help create a template or an outline for organizing a presentation. While reliance on AI is cautioned, utilizing it as a resource for organizational purposes can reduce the amount of time you would otherwise spend creating a presentation from scratch. Even for simpler motions like motions to compel, being able to provide a visual, such as a screenshot of the written request and response, can assist the judge in following or understanding your position.

II. IN-PERSON V. VIRTUAL HEARINGS

Since the pandemic, virtual hearings have become popular and are still utilized by many courts. However, there are some attorneys and judges who may still prefer in-person appearances. As discussed below, preparation between the two types of hearings may look different, but many of the same general principles continue to apply to both.

A. In-Person Hearings

In-person hearings are naturally more formal than virtual hearings and require you to think about certain logistical situations that you will encounter when attending court in-person instead of from the comfort of your own office. There are pros and cons to in-person hearings. They require more time and preparation but also have some benefits. When you attend an in-person hearing, you observe other hearings that occur before and after your hearing, interact with other attorneys and court staff, and accomplish other tasks while at the courthouse (e.g., getting an agreed order in another case signed by the judge).

1. Logistical Considerations

For an in-person hearing, first, you should identify what items you will need to physically bring and carry or roll on a dolly cart to and from the courtroom. Second, be sure you understand the parking situation near the courthouse and how to get through security. You must bring a driver's license to federal court. Some courts also allow you to obtain a badge that lets you skip security lines. Third, you should consider your entire outfit (not just the top half!) and practice your body language and public speaking skills with your presentation as compared to looking at your laptop. Additionally, as previously discussed, think about the courtroom technology, which may include your access to Wi-Fi and whether you need a hot spot.

With virtual hearings more readily available, the logistical considerations associated with an in-person hearing may be overwhelming and unnecessary for simple motions like continuances or agreed orders. More complex motions or trials may warrant in-person advocacy to be most effective.

B. Virtual Hearings

Although virtual hearings first surfaced during the pandemic, they appear to be here to stay in most courts. Virtual hearings provide several benefits. Judges may be able to fit more into their schedule with the ability to be remote, which is especially beneficial for larger counties with crowded dockets and multi-party cases that involve multiple lawyers in different locations. It is easier for witnesses to attend court without having to make special arrangements with their jobs or figure out childcare. The option to hold remote hearings and the flexibility they offer has certainly changed the game.

1. Logistical Considerations

The logistical considerations for virtual hearings are different from in-person hearings. While you do not encounter issues like battling unfamiliar parking and getting through security, there are other relevant logistical considerations that are at play for virtual appearances.

These considerations include: (i) background and lighting; (ii) noise of your environment; (iii) internet connectivity; and (iv) your ability to be just as effective with your exhibits, witnesses, and authorities as you would be if you were appearing in person. It is important to make sure that you are not in a distracting environment, your technology is working, and that you are able to smoothly operate the virtual platform.

Once you can navigate the virtual platform successfully, you may prefer virtual hearings in some instances. The convenience and cost-effectiveness of a virtual court appearance are often recognized as the perks of being virtual. Clients can save significant funds by not having to pay for travel time of attorneys and witnesses. Additionally, appearing virtually can be far less nerve-racking than physically standing up in front of the judge and everyone in attendance in open court. You also may be able to dress more comfortably for a virtual appearance, have your notes up on a screen nearby, and avoid stress-inducing events like finding parking at an unfamiliar courthouse or having to operate courtroom technology.

2. Avoiding Mishaps

As we have all seen, there are certain mishaps that can occur when attending court virtually. This can include cat filters, unprofessional attire, attending court from a moving vehicle, technical difficulties such as audio incompatibility and lags caused by insufficient network service, forgetting to mute or unmute audio, and difficulties sharing screens to display exhibits. These mishaps can cause the attorneys and the judge to become flustered or irritated and take away from the quality of your presentation and distract from your argument.

When expecting to use an unfamiliar virtual platform or when planning to use a new device to attend a virtual hearing, it is worth it to do a practice round with a friend, family member, or colleague. Practicing using the virtual platform ahead of time and becoming generally familiar with its functions will make you appear more confident and reduce the risk of having issues when in court. If you are going to want to show a PowerPoint presentation or if you need to show exhibits, you should consider creating a folder on your computer that contains only the files you expect to need for court and practice sharing your screen with a coworker. The planning of your arguments, the quality of your presentation, and the effectiveness of your advocacy should be the same no matter the platform. All in all, being adequately prepared for any courtroom appearance should be a priority in your practice.

III. PREPARING CLIENTS AND OTHER WITNESSES FOR COURT

A. Deciding Who Should Attend

The client or a client representative should typically attend the trial but may or may not testify as a fact witness. You may also need to call other fact witnesses as well as expert witnesses. Regardless of who attends, the lawyer should ensure that all clients and witnesses are dressed professionally and conservatively and are compliant with the rules and decorum of the courtroom.

The lawyer should identify what facts need to be proven at trial and then think about which witnesses can testify to each element. Eyewitnesses are people who actually saw or heard the events relevant to your case. Character witnesses are people who can testify about someone's reputation or behavior, which is only allowed in certain circumstances. Expert witnesses are qualified experts who can give specialized opinions such as doctors, engineers, and accountants. Fact witnesses are persons with first-hand knowledge of relevant facts such as an employee, bystander, or family member. This Article focuses on fact and expert witnesses.

In selecting witnesses, the lawyer should evaluate the witness's credibility including consistency of testimony, bias or interest in the case, ability to recall events clearly, demeanor and communication skills. When possible, select witnesses who are reliable, competent, and neutral. A witness's availability and willingness may play into their selection as well.

B. Preparing Witnesses for Testimony

1. Fact Witnesses

Preparing a fact witness to give testimony is important for several reasons. First, you want to make sure the fact witness (who is typically a lay person) understands the deposition or courtroom process to ensure they understand what to expect. Most stress comes from not knowing what to expect. Make sure you cover who will be present, oath and affirmation, order of examination, how objections work, not to speak when an attorney is objecting and the importance of clear audible answers.

Second, take the time to explain the witness's role with the witness. Make sure you understand what the witness personally saw, heard, did or experienced, any things the witness recorded or handled in the course of their duties, and their own recollection or refreshed recollection. Tex. R. Evid. 602. The witness should understand how their testimony fits into the overall case. The fact witness should not offer legal conclusions, speculate, or testify about things they heard from others. Spending time with your witness discussing his/her knowledge, will help you understand how the witness fits into the case and the scope of the witness's testimony.

Third, you should show the witness any documents relevant to their testimony. This may include the witness' own notes, emails or reports, business records they created or handled, photos, timelines, and deposition excerpts, if taken. The lawyer may use documents to help refresh a witness's memory by stating, "Review this to help recall what happened" as opposed to telling the witness what to say. Tex. R. Evid. 612.

Fourth, the lawyer should teach testifying skills—think procedure coaching not substance coaching. A lawyer may coach how to testify but not what to testify. The lawyer may teach the witness to listen to the full question before answering, answer only the question asked, and keep answers factual and concise. A witness should say "I don't know" or "I don't remember" when appropriate as opposed to guessing or speculating. The witness should take his/her time (pauses are ok) and ask for clarification when needed. The lawyer should also discuss sequestration rules with the witness. Tex. R. Evid. 614.

Fifth, the lawyer should review potential questions and then conduct mock examination. The lawyer should review likely direct-examination questions and expected cross-examination areas. The lawyer should identify impeachment documents or inconsistencies and review those with the witness. If there are inconsistencies, memory gaps or damaging facts, discuss truthful explanations and clarify timelines. Avoid coaching the witness on how to "fix" their story. Conducting mock examination will reduce the witness's anxiety about testifying as well as ensure their testimony is clear and concise. Take breaks in between series of questions to coach the witness on how to stay calm, handle aggressive cross, deal with compound or misleading questions and maintain creditability. The witness should be truthful and accurate and not make misleading statements. The lawyer cannot tell a witness what to say or encourage false, incomplete, or rehearsed testimony, but the lawyer can provide advice on how to answer questions and conduct mock examination. Providing a one-pager on techniques to use in testifying is helpful for the witness to review in advance of testimony. The witness should avoid providing character evidence unless instructed to do so. Tex. R. Evid 403,404.

Last, make sure the witness has the correct date, time, and place to go as well as parking and building entry information. Instruct the witness on proper courtroom attire, what to bring (usually nothing unless instructed otherwise), and who will meet them at the courthouse or deposition location. On the day of the testimony, remind the witness to silence electronics, avoid discussion in the hallways, do not answer questions from opposing counsel outside formal examination, take breaks if needed and always tell the truth, even if harmful.

2. Expert Witnesses

When preparing expert witnesses, the lawyer should clarify the scope of the expert testimony. First, define exactly what opinions the expert will offer and confirm those opinions are within the expert's qualifications. Tex. R. Evid. 702. Review all reports, disclosures, data relied on, and any supplemental materials provided by the expert. Then discuss those materials with the expert to ensure the expert can explain the methodology used to form the opinions clearly and consistently. Tex. R. Evid 703, 705.

As part of the expert's preparation, the expert should be provided with and review relevant case materials thoroughly. The expert should understand the key facts in your case and should be provided with relevant documents, depositions and exhibits. The expert should also review the opposing expert reports and known weaknesses. Any limitations or assumptions used in forming opinions should be identified and discussed.

Another important step in preparing your expert for trial is to convert the expert's technical knowledge into jury-friendly language. Prepare your expert to use plain, simple language and analogies. The expert should be able to define terms without sounding condescending and explain the "why" behind conclusions in clear steps. The expert should avoid over-explaining or volunteering unnecessary information. A good rule of thumb is that if a high school student cannot follow it, it's too technical for trial.

Once you've got the expert to convert his or her technical knowledge into laymen's terms, then practice direct and cross-examination with the expert. The lawyer's direct testimony of the expert should have a logical flow, include confident explanations of methodology, and anticipate demonstratives or visuals the expert will use. The expert should stay calm and teach rather than advocate. For cross, the expert should listen fully before answering, keep answers short and factual, never guess, overstate, or argue, stay within expertise, and maintain professional composure (even if provoked). The lawyer should help the expert prepare specific responses to tactics commonly utilized by opposing counsel including boxing the expert into yes/no responses, taking quotes out of context, highlighting compensation or bias, and attacking methodology, assumptions, or data selection. The mock examination preparation should focus on common weak spots such as how to handle unknowns, defend assumptions, prior inconsistent statements, clarify accepted methods, and avoid advocacy. An "I don't know" answer is better than speculation.

The lawyer will want to work with the expert on tone, pacing, and confidence as well as posture, body language, eye contract, using visuals effectively and handling interruptions gracefully. The lawyer should instruct the expert to never shape opinions to help the case and ensure the expert understands which materials are confidential and how to avoid inadvertently disclosing privileged communications. The lawyer should make sure the testimony matches the report with no new opinions unless allowed.

Implementing the preparation techniques discussed herein should boost your confidence and your witnesses' confidence in the courtroom. Better preparation should also lead you to achieve more favorable outcomes. We hope that you find the information provided herein to be helpful next time you conquer the courtroom.

EXHIBIT "A" –
A TRIAL LAWYER'S GUIDE TO OFFERING, OBJECTING TO, AND ADMITTING EVIDENCE

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State Bar of Texas
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CHAPTER 6

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"EXHIBIT A – A TRIAL LAWYER'S GUIDE TO OFFERING, OBJECTING TO, AND ADMITTING EVIDENCE."

I. OVERVIEW

The battle for Earth rages.[1] One hero stands against the triumph of evil. The hero raises the ax, and he aims for the…chest? And, from that poorly aimed blow, the battle is lost and the Earth destroyed. The few survivors lament the hero's failure and ask, "how did you not know to go for the head?" The hero replies, "They taught it at [insert law school]. It was an elective."[2]

Knowing the Texas Rules of Evidence is no longer optional. You, as a trial lawyer, are a hero fighting for a cause with stakes as high as the Earth itself.[3] Knowing how to admit and object to evidence is as important as Thor knowing how to wield Mjölnir, Tony Stark knowing how to build things, and Scarlet Witch knowing how to create the best Disney+ series ever.[4] To be an effective, persuasive, and winning trial lawyer, you must know how to offer, object to, and get admitted evidence.

In this paper, I am going to talk about offering, objecting to, and getting evidence admitted in Texas State Court. I am going to address common documentary and testimonial evidence. This paper is intended to be a practitioner's guide, not a treatise on evidence. This is merely a few pages from *The Book of the Vishanti*; it is not the whole Library of Kamar-Taj.[5] However, if you heed it well and do the necessary legal research to back it up, you will be able to fight the battles and win without hoping your appellate lawyer is an Avenger.

II. THREE KEY QUESTIONS TO ANSWER

"I am burdened with glorious purpose." – Loki, *The Avengers*

To prevail in a civil case as the party with the burden of proof, you must have evidence to support your claims and causes of action. A trial – whether to the Court or to a Jury – is the persuasive presentation of evidence to convince the fact-finder you should prevail. This means that your goal must be to admit evidence that persuasively supports your case and why you should win. As such, being able to get evidence admitted is a crucial part of winning your case.

There are three key questions to ask yourself about the case winning evidence you need before you go into battle.

1) What evidence do I need to get admitted to win?
2) How do I get the evidence I need to win admitted?
3) How do I keep out evidence that I do not need to win?[6]

Only the case-law and specifics of your case can answer the first question. For example, if you represent the plaintiff in a car wreck case, you're going to need evidence of liability, causation, and damages. So, that means you'll need testimony, maybe a police report, medical and billing records, and some pictures. That set of evidence would be different in a breach of contract case, or a land title case, or a family law case. As such, the answer to the first question is always case-specific.

The second question is not case-specific. The Texas Rules of Evidence are made for all evidence in all civil cases. How you get a picture into evidence or get your witnesses to say a thing is governed by an agnostic[7] set of rules that apply in every civil case. You can answer question two in a very formulaic, check-list fashion that should become second nature to the true hero trial lawyer. Captain America always has his shield. You must always make sure you run your evidence through *The Analysis* to ensure it can be admitted. If it fails *The Analysis*, it is not coming in, no matter how many gamma rays you subject it to. (See below for *The Analysis*.)

The third question about keeping out evidence you don't need to win is something you should address. However, in most cases, if the evidence passes *The Analysis* and is not kept out for case-law-specific or fact-specific reasons, the evidence is going to be admitted. I'll address this issue in Part Six below.

Back to question number two, "How do I get in the evidence I need to win?" We're going to answer that now, starting with *The Analysis*.

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[1] SPOILER ALERT: This paper will ruin most Marvel movies. #SorryNotSorry.
[2] Thor, *Avengers: Infinity War*.
[3] Well, maybe not quite the whole Earth, just your part of it.
[4] *Wanda Vision*. *Contra*, *The Mandalorian*.
[5] *Dr. Strange*.
[6] You won't, most of the time, but it's a good question.
[7] Meaning not-case-specific, not whether the Rules believe in a higher power or not.

III. THE ANALYSIS

"Faith is my sword. Truth is my shield. Knowledge my armor." – Dr. Stephen Strange, *Doctor Strange*

For stuff and things:

Relevance, Authentication, Hearsay.

For words from a witness:

Relevance, Competence, Hearsay.

This is *The Analysis*.

Every piece of evidence and every word from a witness's lips must pass *The Analysis*. If it doesn't, the evidence does not come in and the words are never spoken. Whatever your plan is, always start with *The Analysis*.

Why?

Because the three parts of the analysis are the Texas Rules of Evidence in a nutshell. If the evidence can get through *The Analysis*, you most likely pass all the Texas Rules of Evidence. Thus, you most likely get the evidence you are offering admitted.

First, *Relevance*.

Why?

Because the Texas Rules of Evidence start there. Relevance is the threshold question for every piece of evidence and every word out of a witness.[8] Relevance is the first "real" rule of evidence in the TREs.[9]

Only relevant evidence is admissible.[10] Said another way, and right of out of the rule, "irrelevant evidence is not admissible."[11]

Thus, if what you want to admit is not relevant, it fails *The Analysis*, and you do not get it in.

A word (or dozen) about relevance. Relevance is a low bar. Under Tex. R. Evid. 401, evidence is relevant if it has "**<u>any tendency</u>** to make a fact more or less probable…" and "the fact is of consequence in determining the action."[12] All you need to make something relevant is a logical connection "directly or indirectly" between the evidence offered and the fact to be proved.[13] You went to law school. You've learned stuff. I'm pretty sure you can come up with an actually logical link between the evidence you're offering and the fact you're trying to prove. Hence, relevance is a low bar.

With relevance being a low bar, do you think your adversary also has the capacity to create an actually logical link between the evidence *they* are offering and the fact *they* are trying to prove? (Everyone should say yes.) So, objecting to admissibility on the basis of relevance is likely a very weak objection. This is especially true when you are live at trial with a witness on the stand and the jury in the box. Think of it:

Defense Counsel: Your honor, we offer Defense Exhibit 10.

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[8] *See* Tex. R. Evid. 104, 401, 402.
[9] Who really uses Judicial Notice anyway? And, we don't have a 300 section!
[10] Tex. R. Evid. 402.
[11] *Id.*
[12] Tex. R. Evid. 401(a),(b) (emphasis added).
[13] *Rhey v. Redic*, 408 S.W.3d 440, 460 (Tex. App.—El Paso 2013, no pet.).

> Plaintiff's Counsel: Your honor, we object to relevance.
>
> The Court: Response.
>
> Defense Counsel: Your honor, this is a personal injury case alleging the Plaintiff can't use his left leg. Exhibit 10 is a picture of the Plaintiff mowing his lawn after the collision. It is relevant to Plaintiff's claim for damages and tends to show what the Plaintiff is claiming is not true.

And, who heard all of that? The Jury. OK, but you'd never do that, right? You'd ask to approach. Assuming the Judge lets you, which is not guaranteed, you've just tried to argue to the Judge that a picture of your client walking where you're alleging paralysis is not relevant? How's your credibility now?

Another pitfall, in a less extreme case. The opposition is attempting to admit evidence that is admissible, but you're trying to object to it for one tactical reason or another. Objecting to relevance allows the other side to argue why what they want to put in is relevant. It's a gift to the other side! Now, the other side has monologued to the Jury or the Judge about why their evidence is relevant, all because you objected to relevance. Low bar, it's coming in. Raising relevance because you just want to object gives the other side a gift. Don't live-fire object to relevance, except in the rarest, guaranteed to win, times.

And, most importantly, just because you think the evidence is irrelevant does not mean it is irrelevant under the Texas Rules of Evidence. Don't give the gift of a relevance objection to the other side because you think something is irrelevant. It has to be irrelevant under the Rules, and evidence is rarely going to be irrelevant given the low bar for relevance. As Radiohead says, "just 'cuz you feel it, doesn't mean it's there."[14]

The better way to address relevance is with pre-trial motions, which we'll talk about later. But assume, unless there is no logical connection between the evidence and any fact in your case, that the evidence is relevant and coming in.

So, the first question is *Relevance*. Is this evidence relevant under the Rules? If yes, move to the next step in *The Analysis*.

Second, *Authentication* for Stuff and Things, *Competence* for Witnesses.

After determining if something is relevant, you must convince the Court that the thing you want in is the thing that it purports to be. The same is true for witnesses. Can this witness really say that? Thus, you must assess whether stuff and things are *Authentic* or if a witness is *Competent*.

For stuff and things, you must authenticate them. Tex. R. Evid. 901 is the rule on how to authenticate a stuff or a thing using testimony or evidence. This rule allows the prudent advocate to use other stuff and things (and testimony) to prove that the evidence offered is the evidence you say it is.

Tex. R. Evid. 902 describes how a stuff or a thing can be "self-authenticating." This means that the stuff or thing itself can be admitted just as it is. Self-authenticating stuff and things are admissible because what they are inherently is admissible. If it is what it is, it's in. For example, a birth certificate from the county with all the seals and signatures is self-authenticating.[15]

For authentication, the offering party has the burden to show evidence sufficient to demonstrate that the stuff or thing is what the offering party claims it is.[16] If what you are offering is not the thing you say it is, why should it come in? We understand this intuitively. Authenticity for stuff and things is simple to understand, but often hard to prove. If the stuff or thing is authentic, then you've passed the second part of *The Analysis.*

Testimony is not authenticated. A witness must be competent to testify.

The Analysis gets muddier with testimony. The TREs say loud and clear that "every person is competent to be a witness" unless you're "insane" or lack "sufficient intellect."[17] To be competent to testify, a witness must have perceived and had the ability to perceive the event they are going to testify about, can recall and tell us about those events at trial, and understands the obligation of an oath to tell the truth.[18]

But wait, there's more! The witness must also have personal knowledge on the information about which they are going to testify.[19] To show that a witness has personal knowledge, you need to admit evidence to show they have personal knowledge.[20]

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[14] *There there. (The Boney King of Nowhere)*, Radiohead, Hail to the Thief, 2003.
[15] Tex. R. Evid. 902(1),(2), (4).
[16] *Fleming v. Wilson*, 610 S.W.3d 18, 20–21 (Tex. 2020).
[17] Tex. R. Evid. 601(a).
[18] *In re R.M.T.*, 352 S.W.3d 12, 25 (Tex. App.—Texarkana 2011, no pet.).
[19] Tex. R. Evid. 602.
[20] *Id.*

What? I need evidence to prove that I can put on evidence? Yes.[21]

To show that your witness is competent they need to not be one of the disqualifying types of people (jurors, Judges, the insane, etc.).[22] Then, to stay competent on the issue they are testifying about, they must have personal knowledge. To show a witness has personal knowledge, you must introduce "sufficient" evidence to "support a finding" that the witness knows what he's talking about.[23] A witness's own testimony can be the sufficient evidence you need to prove that they can testify.[24]

Whether a witness is competent and has personal knowledge is fact- and case-specific. However, knowing that you must do this to get your witness's testimony through *The Analysis* allows you to structure your witness's testimony in an admissible way. For example, asking the witness about where they were and what they were doing before asking them if the light was red helps to show that the witness was at the scene and could and did look at the light. Craft your witness examination to demonstrate *competence* and personal knowledge. This way, you will pass this second part of *The Analysis*.[25]

Third, *Hearsay*.

The final step in *The Analysis* is determining whether the evidence you are intending to offer is inadmissible hearsay. Most documentary evidence (stuff and things) will encounter a hearsay objection because they are always created outside of court. Medical records? At the hospital. Pictures? At the scene. Emails and text messages? On the internet. Most, if not all, of the documentary evidence you're going to try to admit will encounter and must survive a hearsay objection.

To get over these hearsay objections, you need to assess what your evidence is and why you are offering it. Not only does the evidence have to pass the first two parts of *The Analysis*, but it must also fit through a hearsay exception (e.g. Tex. R. Evid. 803) or not be hearsay (e.g. Tex. R. Evid. 801(e)). Your case facts will determine how you can get around hearsay. If you want to admit a medical record to show your client was injured, you will need to get around a hearsay objection. A medical record has statements for medical diagnosis, right? Then it's admissible under Tex. R. Evid. 803(4). However, if you're trying to offer a medical record to show that a family member was in the room when something was done, the medical record is likely hearsay because it does not meet an exception to the hearsay rule. Context and case facts really matter for hearsay.

As to testimony, hearsay is most encountered when a witness tries to say what someone else said or what that witness said outside of court. But, it is not just that, hearsay from a witness is also a witness attempting to regurgitate what an inadmissible document says or means. Hearsay can apply to most of what a witness wants to say if all a witness is doing is reporting other events.

You must be careful with hearsay in structuring your examination of a witness. The best practice is to demonstrate the exception to hearsay prior to or at the time you ask about something that could be hearsay. For example, if you're going to ask the Plaintiff about something the Defendant said at the scene of the collision, you should ask the Plaintiff about their personal knowledge to hear what was said. Then, ask the Plaintiff if the person who made the statement is the Defendant. This gets around hearsay by showing that it is a statement of a party opponent.[26] Just asking what the Defendant said draws the objection. Laying the exception foundation first defeats the objection before it comes (or slams it down when it comes).

In the end, if the evidence or testimony passes through *The Analysis*, the evidence is likely getting admitted. There are many exceptions to *The Analysis*. However, *The Analysis* is a trusted framework that gets you most of the way there to getting your evidence admitted.

Now, let's turn to some common evidence and get them admitted.

IV. DOCUMENTARY EVIDENCE

"I have nothing to prove to you." – Captain Marvel, *Captain Marvel*

Here are some common documentary evidence items, and how I would get them admitted.

[21] "The city is flying. We're fighting an army of robots. And, I have a bow and arrow? None of this makes sense." – Clint Barton, *Avengers: Age of Ultron.*
[22] Tex. R. Evid. 601, 605, 606.
[23] Tex. R. Evid. 602.
[24] *Id.*; *see Copeland v. Mayers*, 657 S.W.3d 599, 615 (Tex. App.—El Paso 2022, pet. denied).
[25] This paper will not cover expert witnesses. To allow an expert to testify, they must also satisfy Tex. R. Evid. 701, et seq. That is beyond the scope of this paper.
[26] Tex. R. Evid. 801(e)(2).

Emails, Letters, & Text Messages

Does anyone actually use the phone to call anyone anymore? Emails, text messages, and yes, letters (usually attached as PDFs to emails) are very often presented in Court as evidence. Assume in a personal injury case, where you represent the Plaintiff, you want to admit a text message from the Plaintiff to a friend wherein the Plaintiff says they are not injured.

First, run *The Analysis*.

Yes, it's relevant.

No, it's not self-authenticating. I will need a witness.

Since you need a witness, you'll need them to be competent and with personal knowledge.

Yes, it's hearsay, but what the Plaintiff says gets in as an exception for statement of a party opponent (Tex. R. Evid. 801(e)). What the friend says does not matter, so we are not offering it for the truth of the matter asserted. Therefore, what the friend says is not hearsay.[27]

OK, so in *The Analysis*, you're going to have to authenticate the message using Tex. R. Evid. 901. Look at Rule 901. The best and easiest way to get this message in is to use testimony of a witness with knowledge.[28] Who would have knowledge and is likely to testify at trial? The Plaintiff! So, to authenticate this, on cross, you need to ask questions to show what the evidence is, why the witness has personal knowledge of what the evidence is, and that the evidence is what it says it is. Here's an example set of questions, and, remember, you're on cross, so you get to lead.

1) Exhibit A is a text message, right?
2) You sent this message, right?
3) You sent it to Plaintiff Friend?
4) You sent it on the date of the collision?
5) Right after the collision, right?
6) And, you were telling Plaintiff Friend about what had just happened to you, right?
7) Your Honor, we offer Exhibit "A."

This line of questioning established what the evidence was, who sent it, how the witness has knowledge of it and the events it reports, and gets over the hearsay objection with a statement of a party opponent.

Yes, opposing counsel will want to leave out the friend stuff. Tactically, you could do that because the Plaintiff says what they say. But, you could also argue that the friend's statements are subject to hearsay exceptions like effect on the listener or they are not hearsay at all because what Plaintiff Friend is not offered for the truth – what the Plaintiff says is what is being offered for the truth of the matter asserted.

You've passed *The Analysis*, the evidence is likely in.

Now, let's say you represent the Plaintiff rental company in a breach of contract case, and you want to prove that your agent sent notice to the Defendant about overdue rent. To do that, you want to offer an email that your client's agent sent to the renter notifying them of the need to pay rent. How does it come in? Run *The Analysis.*

Yes, it's relevant.

No, it's not self-authenticating. I will need a witness.

Since you need a witness, you'll need them to be competent and with personal knowledge.

Yes, it's hearsay. I'll need to address this.

Just like the text message, you're going to have to authenticate the message using Tex. R. Evid. 901. Look at Rule 901. The best and easiest way to get this message in is to use testimony of a witness with knowledge.[29] However, the hearsay objection is going to be stickier. The Defendant won't offer it, and the email is from your company's agent. So, it's not a statement of a party opponent. You are offering it for the truth of the matter asserted, so it is hearsay.

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[27] Tex. R. Evid. 801(d)(2).
[28] Tex. R. Evid. 901(b)(1).
[29] Tex. R. Evid. 901(b)(1).

It's an email from your company, right? Doesn't that make it a business record? Tex. R. Evid. 803(6) is the business records exception.

Your trial strategy? Get the agent who sent it to testify that the email is a business record. You have a sponsoring witness who can 901 authenticate it and 803 hearsay exception it.

With your agent on the stand, ask them,

1) I hand you what's been marked as Exhibit 1.
2) Can you identify it?
3) What is it?
4) Were the records contained in Exhibit 1 made by, or from information transmitted by, a person with knowledge of the events or conditions recorded?
5) Were the records made at or near the time of the events or conditions recorded?
6) Were these records made in the regular course of your company's business?
7) Were these records kept in the regular course of your company's business?
8) Your honor, we offer Exhibit 1.

You authenticated it, you got around hearsay, and you got it in.

Now, *The Analysis* is not the only thing that may impact how you admit something. Tex. R. Evid. 403 keeps evidence out for various reasons. A case specific issue may keep something out. The various 400 rules like subsequent remedial measures, settlement negotiations, etc. may keep something out. You may want the dead to speak.[30] Those specific situations will call for specific analysis. For the most part, *The Analysis* will get you where you need to go and shape what you need to do.

Pictures and Videos

No photos no proof, right? Pics or it didn't happen! Every case has photos. Every Ring camera is always recording. Every bystander is recording you on their phone. So, this means that photos and videos will be in every one of your cases.

No matter the civil case, run *The Analysis* on your pictures and videos.

Relevant? Always.

Authentic? Pictures and videos are not self-authenticating, most of the time, so you'll need a witness.

Since you need a witness, you'll need them to be competent and with personal knowledge.

Hearsay? Depends on what's in the pictures. If the question is about what did a sign say? Maybe. If it's the picture of two smashed cars, probably not. For a video, if you don't need the sound, just turn it off. No sound, no hearsay. But, if you need what is in the video, then you need to find an exception. For a personal injury case, police body camera is most likely going to need the audio. Therefore, you'll need a hearsay exception – for everything you want to show in it.

Alright, you've run *The Analysis*. Let's talk about admitting the photos.

You get a witness to the collision on the stand. Here's what you ask them:

1) Where were you on date and time?
2) That was the time of the wreck we're here about today, right?
3) Where was the wreck?
4) (Other questions to establish the witness has personal knowledge)
5) What color was the car you saw Plaintiff driving?
6) What color was the car you saw Defendant driving?
7) I hand you what's been marked as Exhibit 6. Can you identify it?
8) What is it?
9) Is Exhibit 6 a fair and accurate depiction of the collision on date and time?

And, now your pictures are in.

Alright, police body cam. You can do this a couple ways. The best is to have the police officer testify. They can authenticate the video and will have personal knowledge – it's her camera, she recorded it, she turned it over to evidence, she was there, she investigated the scene, she spoke with the parties, etc. You can also try using a Tex. Civ. Prac. & Rem. Code § 18.002 affidavit from the custodian of record saying the video is a business records. Does that get the video in? Maybe. Let's assume you have a really big issue with hearsay and want all the words said in the video into evidence.

[30] Tex. R. Evid. 601(b).

For example, you represent the Defendant and want the video to come in because it shows the Plaintiff doing jumping jacks at the scene and chanting "I'm not hurt, I'm not hurt, I'm not hurt."[31] Let's add that the police officer says in the video, "No, sir, I think you really need to see a doctor." And, then in the video, a bystander says "OMG! He's bleeding from the ears!" You can argue the entire video comes in under the public records exception.[32] But, that likely doesn't get you all the way there.

With the police officer on the stand and using the predicate we laid out above, get the video authenticated and the police officer proven as competent and with personal knowledge. Then, you need to get around hearsay.

You're the Defendant. You want to offer what the Plaintiff says. Statement of a party opponent. Plaintiff wants the police officer and bystander statements in now. As the Defendant you object to those statements on hearsay.

How does the rest of the video come in? If the police officer is on the stand, you could ask her what she saw. Assuming she saw the Plaintiff bleeding from the ears, you could argue that what the police officer said is admissible as a present sense impression.[33] But what about what the bystander said? Did the police officer say what she said based on what the bystander said? You could argue the statement is admissible for the effect on the listener, meaning it's not hearsay under Tex. R. Evid. 801. With the proper foundation, you could even argue it's an excited utterance by the police officer given the fact she's investigating a car wreck and seeing a person doing jumping jacks and chanting.

Moral of the story? You have to handle the hearsay on multiple levels. The first level is how is what the person in the video is saying not hearsay. The second level is who is going to offer the evidence, what witness is going to testify about it, and what exceptions can they prove up. The two levels have to match. If they don't, you're not getting your evidence in. Hearsay is a Rubix Cube. Figure it out before you get there. If you don't, you'll never get it right.

Medical & Billing Records

For civil cases involving injuries, medical bills and medical records are relevant.

A medical bill can be self-authenticating under Tex. R. Evid. 902(2) and using the affidavit that is set out in Tex. Civ. Prac. & Rem. Code § 18.002.

Hearsay? Well, it depends. The medical record often contains many things. Nurses' notes. Patient complaints. Pastoral counseling. Lab results. If there is a particular issue with a part of the record, you need to find it and argue it in with a hearsay exception or argue it out because it's hearsay.[34] Generally, Tex. R. Evid. 803(4) gets most medical records and billing records in. Tex. R. Evid. 803(6) gets billing records in, too.

Police Reports

Police reports are almost always relevant in personal injury cases. Some civil cases may involve them, so research what you're trying to do with it and make sure it passes the relevance standard.

Police reports are also self-authenticating.[35] Use the Tex. Civ. Prac. & Rem. Code § 18.002 affidavit.

Police reports also come in, mostly under the Tex. R. Evid. 803(8) hearsay exception. The police narrative is more tricky and fact-specific. You could argue it's an expert opinion and needs an expert witness. You could argue it includes reference to a citation that is inadmissible. The narrative generally comes in under the 803(8) exception, but the facts of your case may make that not true. Research the issue and make sure you're prepared to argue the hearsay whichever way you want it to go.

Social Media

Is it a post on a wall? Use the text, email, letter method described above. Is it a picture with a caption? Admit it like it's a video – it has an image and text. So, you'll need authentication and a hearsay exception. Is it a DM (without a picture)? Use the text, email, letter method above. Does that DM have a, um, picture? Use both the letter and the picture method described above.

Social media is not new anymore, and it will be in all cases. However, the methods to get social media admitted are substantially similar to how you get all the "old" stuff in, too.

V. TESTIMONY

"You do understand, Senator, that reading a single paragraph out of context does not reflect the summary of my final…"

"Just read it, Colonel." – Lt. Col. James Rhodes and Senator Stern, *Iron Man 2.*

[31] This will never happen, but I feel like people are always searching for that video.
[32] Tex. R. Evid. 803(8).
[33] Tex. R. Evid. 801.
[34] Address the hearsay within hearsay.
[35] Tex. R. Evid. 902(4)

That is not how to impeach a witness. That is not how to refresh a witness's recollection. Also, those two things are different. What you do to impeach a witness is different than what you do to refresh a witness's recollection.

To make sure you don't treat a refresh like an impeachment and vice verse, you need to ask yourself these questions to make sure you do the right thing at the right time.

Question No. 1 – friendly, neutral, or adverse witness?
Question No. 2 – Is the witness forgetting something? Then, refresh.
Question No. 3 – Is the witness saying something inconsistent on the stand with a prior out of course statement, e.g. a deposition? Then, impeachment.
Question No. 4 – If refresh, execute Tex. R. Evid. 612.
Question No. 5 – If impeachment, execute Tex. R. Evid. 613.

You must do the refresh and impeachment the way the TREs require. Failing to do that will not only get you objections and lose the evidence, it will also lose persuasive effect with the factfinder.

Refreshing Recollection

Witnesses forget things. You prepared them to testify, but they still forget things. Assume you're at trial, and you have your client on the stand to testify about what happened in a car wreck.

You: What time did the wreck happen?

Witness: That was 3 years ago. Maybe 10am, could have been later in the afternoon?

You prepared them on this. They reviewed the police report. But, now they've forgotten. Here's how you refresh them:

1) Can you remember right now the time the wreck happened?
2) Would it <u>refresh your memory</u> if I show you the (document you want to refresh with)?
3) Please read (document you want to refresh with) to yourself.
4) Have you read it?
5) Do you now recall the time the wreck happened?
6) Tell the jury, what time the wreck happened.

Simple, right? You do the same thing with an adverse witness but just use leading questions.

Pro-tip: Do not treat this as an impeachment. They haven't said anything inconsistent. They don't remember. So, make them remember. That's it. Don't pull out the deposition and start the impeachment predicate. It's a memory issue, not an impeachment. Don't treat a memory issue as an impeachment. They literally have different rules.

Now, under Tex. R. Evid. 612, if you refresh your witness's recollection with a writing while they are testifying, the opposing side gets to see it.[36] When does the other side get to see it? When they ask for it. However, they do not get to examine the witness about it until it's their turn to examine the witness. The other side also gets to introduce any related part of the document.[37] So, if you show the witness the first page of the police report, the second page is coming in, too. You better like what's on page two. With all this in mind, make sure you only refresh on what you really need refreshed and know that whatever you refresh with is likely coming in in its entirety.

Impeachment by Prior Inconsistent Statement

We live for these, right? Skewering a witness on the stand with a lie. "Were you lying then or are you lying now?!" "I want the truth! You can't handle the truth!" "You're out of order, this whole courtroom is out of order!!!"

That's what most lawyers' brains sound like when they hear a testifying witness make an inconsistent statement. Turn off the TV in your head. Focus on doing this right, under the TREs, for maximum legal and persuasive effect.

Assume you have a bystander on the stand in a car wreck case. You represent the Defendant. In the bystander's deposition, he said the light was green when the Defendant entered the intersection.

You: What color was the light when my client, Defendant, entered the intersection?

Bystander: It was red.

You: What color was it?

[36] Tex. R. Evid. 612(b).
[37] *Id.*

Bystander: It was red.

You: Do you not remember what color the light was?

Bystander: No, I remember, it was red.

(*A Time to Kill* starts playing in your head….)

PAUSE, take a breath. Run through those first questions we discussed. This is a non-party witness, who is making a statement that is inconsistent with a prior statement. You want to impeach them. Use Tex. R. Evid. 613.

Why would you want to impeach them? Isn't this a refresh recollection situation? That's a tactical question that requires you to know the difference between an impeachment and a refreshing recollection. This witness is saying something harmful for your case, and it is materially different than what they said earlier. This is an impeachment. Why else is it an impeachment? If you gave them a chance to "not remember" and fix it with a refresh and they don't, you're in impeachment-land.

So, impeach the witness. How? Tex. R. Evid. 613. You must do everything the rule requires.

You: You remember giving a deposition in this case?

Bystander: Yes.

You: It was on [Date] at [Location] at [Time]?

Bystander: If you say so, I just showed up where the letter said to be.

You: I was there, the lawyer for the Plaintiff was there.

Bystander: Yeah, he asked a lot of questions.

You: Now, in that deposition on [page number line number] I asked you, "what color was the light when my client entered the intersection?" You said, "green." Do you remember saying that?

Bystander: Oh, yeah, I said that. The light was green.

You've successfully impeached a witness using Tex. R. Evid. 613. Remember, Tex. R. Evid. 613(a)(1) is the foundation you must lay for every witness who is not an opposing party when you want to impeach them. Do not fail to lay this foundation. If you do, you have not properly impeached.

Other key things to remember about an impeachment. The person you are impeaching does not need to see the statement before you impeach them with it.[38] Opposing counsel gets to see it when opposing counsel asks for it, though.[39]

What happens if there is not a deposition, rather it is a recorded statement from an insurance company? You do everything the same.

Does evidence about the inconsistent statement come into evidence? Only if the witness does not unequivocally admit they made the prior statement.[40] If the witness admits they said the light was green in the prior statement, then you don't admit the prior statement. You don't admit the insurance recorded statement or deposition. If the witness dissembles or, worse, denies they made the statement, then you get to admit the deposition page or the part of the insurance statement.[41]

What can the other side do about it? Seek to admit more of the deposition or the recorded statement or whatever writing you're trying to admit under Tex. R. Evid. 106. If the statement was an oral statement that somehow came in through another witness, put the statement in context through Tex. R. Evid. 107.

Refreshing recollection is different than impeachment. Follow the rules, lay the foundations, and know the difference. This will give you maximum effect with the witness, the jury, and the court of appeals.

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[38] Tex. R. Evid. 613(a)(2).
[39] *Id.*
[40] *Id.* at (a)(4).
[41] *Id.*

VI. OBJECTING TO EVIDENCE

"Nothing goes over my head. My reflexes are too fast. I would catch it." – Drax, *Guardians of the Galaxy*

If you want to keep out evidence, you must object. Per Tex. R. Evid. 103, you must "timely" object.[42] What is timely? Let's let the appellate lawyers figure that out. For your purposes, you must object when the thing you want to object to is offered or the witness is about to talk about something you don't want them to talk about. Be Drax. Catch it.

You also must be specific.[43] This means, at trial or an evidentiary hearing, you can't object to "form." You must say what you are objecting to. If the document offered is not authenticated, you must say "You honor, we object as this document has not been authenticated." If the witness is being asked about an out of court statement, you must say, "Objection, hearsay." If you say "Objection, form" you have not met the requirements of Tex. R. Evid. 103.[44] You have waived your objection for failing to be specific, you have waived an appeal point, and "bad" evidence has come in. Be specific.

If the evidence is offered again and it's still objectionable, you must object again. Do not stop objecting. If you do, you waive your objection. You must be relentless.

You can get a running objection, but you need a specific ruling from the Court that that is granted. You must also be specific about what it is that is objectionable and why. To get a running objection, you might say:

> "Your honor, we request a continuing objection to any testimony from [witness] concerning [exact thing you don't want them to talk about] on the basis that it [why it's objectionable and inadmissible.]"

Beware of running objections. Opposing counsel is wise. They may find a way to get around your running objection. Stay vigilant.

Finally, you must get the Judge to rule on your objection. If the Judge does not, then you have not preserved your objection for appeal. Insist on a ruling. Why? Because Tex. R. App. P. 33.1(a) requires the Court to either rule or refuse to rule in order to preserve a complaint for appeal. So, you need that ruling or refusal to rule on the record. Everyone is going to be mad at you. Except your client.[45] Be nice about it, but get what you need.

All of this is also true if your objections are overruled. You must keep objecting and getting rulings or refusals when your objections are overruled.

Alright, but how do I handle that relevance objection you told me never to make?

File a *Motion in Limine*. Get the Court to make a pretrial ruling on the admissibility of a piece of evidence or testimony. This way, you can brief it, you can explain it, and the Judge can ask questions to understand the issue. If the *Motion in Limine* is granted, then the evidence is not coming in unless the Court allows it in.

Warning! A *Motion in Limine* does not preserve error. If a party attempts to offer something subject to the *Motion in Limine* you must object to the evidence on substantive grounds (as well as being a violation of the *Motion in Limine*). As an example, let's play "Bad idea, Good idea."

> Pretrial - Court grants Plaintiff's *Motion in Limine* to keep out the Plaintiff's prior collision.
>
> At trial -
>
> Opposing Counsel: Mr. Plaintiff's Expert, would whether or not the Plaintiff had been in a car wreck right before this one be relevant to your analysis…
>
> Mr. Plaintiff Expert: It could be, but I don't have any information about that in my file.
>
> (Bad idea) You: (No objection.)
>
> (Good idea) You: Your honor, may we approach?

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[42] Tex. R. Evid. 103(a)(1)(A).
[43] *Id.* at (1)(1)(B).
[44] "Objection, form" is a discovery tool to cut down on lawyers doing speaking objections and getting into fights at depositions. It's not an evidentiary practice. In the courtroom, with the Judge, you don't use discovery tools, you use real objections under the Texas Rules of Evidence. #NoForm.
[45] And your appellate lawyer. And the Court of Appeals. And your law professor who taught you this. And me. So, I guess not everyone will be mad at you.

(At the bench)

You: Your honor, I believe opposing council is attempting to go into prior collision, which violates the *Motion in Limine* you already granted, and is [insert your objections].

The Court: Well, I want to hear what the witness has to say, I'll allow opposing counsel to ask about the wreck right before this because it's close in time, and testimony is different from what I understodd at the pre-trial.

(Back at the tables)

Opposing Counsel: Were you aware that Plaintiff had been in a car wreck a month before this one?

(Bad idea) You: (no objection, relying on the *Motion in Limine* and what the Judge said at the bench but is not on the record).

(Good idea) You: Your honor, we object as this testimony is [insert your objections].

Judge: Overruled.

Under Tex. R. Evid. 103, you preserved error if you followed the "Good idea" path. You didn't if you followed the "Bad idea" path.

The best practice is also to file a *Motion to Exclude* if the *Motion in Limine* is denied, or the issue is so important as to be game-ending even if it comes up a trial. You still need to object at trial even if someone tries to violate the a granted *Motion to Exclude*. Always. Be. Objecting.

Privileges are another way to keep out evidence. Those come with specific ways to prove them up and require support under their individual rules, e.g. 509(c) physician-patient privilege.

What about the magical Tex. R. Evid. 403? This rule only excludes evidence if the probative value is "substantially outweighed" by five specific things in the rule.[46] Rule 403 only applies to those five things. The one everyone uses and uses too much is "unfair prejudice." You know that virtually everything the opposing side offers is going to be prejudicial to your case.[47]Then what is "unfair prejudice."

That is a fact-specific inquiry for your case. The general rule is that "unfair prejudice" means an "undue tendency to suggest a decision on an improper basis, commonly…an emotional one."[48] We're not robots, we're people, but anyway…Whatever the opposing side offers is bad for you, it just is, that's how the system works. Rule 403 is used to keep evidence "within the lines."

A great example is with pictures. The burn victim's scars. The grieving widow over the open casket. The crash scene with cars piled on top of cars. At some point, pictures can go beyond being probative and go into being "unfairly prejudicial." For pictures (and visual media) refer to *In re E.A.G.* for the four-part test to determine whether a picture has become "unfairly prejudicial."[49]

Only the facts of the case and the case-law that applies to it can determine whether 403 applies to your case. This means that you must use 403 carefully, accurately, and not just to keep out stuff that is bad for your case. It has to go "outside the lines." And, those lines are drawn by the particulars of your case.

VII. GETTING IT IN (AGAIN)

"Even if everyone is telling you something wrong is something right, even if the whole world is telling you to move, it's your duty to plant yourself like a tree, look them in the eye and say, 'No. You move.'" – Peggy Carter*, Captain America: Civil War*

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[46] Unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence. Tex. R. Evid. 403.
[47] *JBS Carriers, Inc. v. Washington*, 564 S.W.3d 830, 836 (Tex. 2018).
[48] *Id.*
[49] 373 S.W.3d 129, 147 (Tex. App.—San Antonio, 2012, pet. denied).

You did everything right. The document you wanted in passed *The Analysis*. You had the right sponsoring witness. You asked all the questions. Your witness answered perfectly. You offered the document, and the Court…sustains opposing counsel's objection. Your document is out.

What do you do?

Under Tex. R. Evid. 103(c), you can make an *Offer of Proof*. An offer of proof is where you tell the Judge what you wanted to offer and why it's admissible. You must put this on the record for the appellate court. You make the *Offer of Proof* to preserve error and to let the Judge have one more chance to change their mind. An *Offer of Proof* must be made before the charge is read to the jury. An *Offer of Proof* must be allowed to be done outside the presence of the jury.

Practically, it goes like this.

The Court excludes an email because it lacks authenticity. You say,

> "Your honor, [witness] testified that [personal knowledge about the email]. [Witness] also testified that [how Rule 901/902 was met]. This evidence is admissible because [everything you just said]. We ask that the Court admit [Exhibit]."

Get a ruling.[50] Then say, "That concludes our *Offer of Proof*."

Another example, the Court won't let your witness testify about something. You can either do this in narrative format, or in a question-and-answer format.[51]

In a narrative format, you say,

> "Your honor, if allowed to answer this question, the witness would testify to the following: [Say what the witness will say and things that establish admissibility]. This evidence is admissible cause [say the reasons the testimony is admissible]. We ask that the Court allow the witness to testify on [topic].

Get a ruling.

In a question-and-answer format, you ask the questions of the witness just as if you were examining them in front of the jury. Don't forget to ask the questions to show what you want in is admissible. Before you start, make sure you tell the Judge you're doing an *Offer of Proof*. Then, after you get the answers for your offer of proof, tell the Judge,

> "Your honor, we offer this question and answer as an *Offer of Proof*. May the record reflect [opposing party] objected on the basis of [their objection] and you sustained their objection. This evidence is admissible because [your basis]. We ask that you allow the witness to testify on [issue] and allow this testimony's admission."

Get a ruling. Then say, "this concludes our offer of proof."

All of that must be on the record.

Once you've made your *Offer of Proof*, you can be done.[52] You've set it up for the Judge to change their mind. It either comes in now or it stays out. And, then you can take it up with the court of appeals.

VIII. CONCLUSION

"I can't control their fear. Only my own." – Wanda Maximoff, *Captain America: Civil War.*

Presenting evidence is a fundamental and essential skill for the Trial Lawyer. It is also very complex. Being able to correctly and persuasively present evidence at trial is a case-winning power. Think through what you want to present and why with *The Three Questions*. Then, make sure all of your evidence passes *The Analysis*. When something you want out comes up, object. When something you want in is ruled out, make an *Offer of Proof*. Everywhere in between, make sure you know how you're going to get your evidence in with the right questions, right witnesses, under the right Texas Rules of Evidence.

Remember, if this is hard for you, practice it. If it's easy for you. Practice it. As Princess Shuri in *Black Panther* says, "Just because something works doesn't mean it can't be improved."

If you can master offering, objecting to, and getting evidence admitted, you will defeat Thanos every time.

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[50] Tex. R. Evid. 103.

[51] Tex. R. Evid. 103(c).

[52] I wouldn't stop trying to get it in, though.

HELP FOR THOSE HANGING NEW SHINGLES:
A GUIDE TO STARTING A LITIGATION PRACTICE

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ELEVATE YOUR COURTROOM SUCCESS
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CHAPTER 9

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HELP FOR THOSE HANGING NEW SHINGLES: A GUIDE TO STARTING A LITIGATION PRACTICE

I. INTRODUCTION

Launching a new litigation practice is among the most challenging and rewarding ventures an attorney can undertake. It demands a fusion of legal skill, entrepreneurial vision, financial discipline, and operational expertise. The path from experienced associate to successful firm owner is paved with decisions that extend far beyond the courtroom. A thriving practice is not built on legal victories alone, but on a meticulously constructed and professionally managed business.

This article provides a practical framework for attorneys establishing a new litigation practice in Texas. We will move sequentially from high-level strategic planning to the granular details of daily operations and ethical compliance, offering actionable guidance at every stage.

II. PART ONE: THE BLUEPRINT – PRE-LAUNCH STRATEGIC PLANNING

Before filing formation documents or signing a lease, you must create a strategic blueprint. Answering these foundational questions will guide every subsequent decision.

A. The Business Plan: Your Firm's Constitution

A formal business plan is not just for securing loans; it is your firm's strategic roadmap. It forces you to translate vision into concrete, measurable objectives. Key components should include:

- **Executive Summary:** A concise overview of your firm's mission, practice areas, and core value proposition.
- **Firm Description:** Define your niche. Are you a general civil litigator, or do you focus on a specific area like construction disputes, employment law, or personal injury? A clear focus simplifies marketing and builds expert reputation.
- **Market Analysis:** Who are your target clients (e.g., small businesses, individuals, other law firms needing local counsel)? Who are your primary competitors? What makes your firm the better choice?
- **Marketing & Sales Strategy:** A detailed plan for how you will acquire your first five clients, and then your next twenty. (See Section IV).
- **Financial Projections:** Develop a realistic 12-month and three-year budget. Project your startup costs, monthly overhead, and anticipated revenue. Critically, calculate your "survival number"—the minimum monthly revenue needed to keep the doors open. Be conservative in revenue estimates and liberal in expense estimates.

B. Financial Modeling and Capitalization

- **Startup Costs:** Itemize all one-time expenses: entity formation fees, initial insurance deposits, computer hardware, office furniture, website development, and initial marketing collateral.
- **Operating Capital:** You will need a significant capital reserve to cover operating expenses for at least the first 6-12 months, as revenue will be inconsistent initially. This buffer prevents desperate decisions and allows you to be selective about the cases you accept.
- **Funding Sources:** Determine how you will fund this initial period. Options include a business line of credit from a bank that understands law firm financials or personal savings. Document all loans properly.

III. PART TWO: THE FRAMEWORK – ENTITY, FINANCE, AND TECHNOLOGY

With a strategic plan in place, you can now build the operational infrastructure of your firm.

A. Corporate Armor: Entity Selection and Governance

Your choice of business entity dictates your personal liability exposure and tax obligations.

- **Professional Limited Liability Company (PLLC):** The most common choice for solos and small firms. It provides a liability shield for business debts and the malpractice of firm members other than yourself. It offers pass-through taxation by default (profits and losses are passed to the members and reported on their personal tax returns), avoiding the "double taxation" of a C-Corp.
- **Professional Corporation (PC):** Offers similar liability protection but requires more corporate formalities (board of directors, officers, annual meetings, bylaws). A key advantage of the PC is its ability to elect S-Corporation tax status.
- **Tax Election (S-Corp vs. Pass-Through):** A PLLC or PC can elect to be taxed as an S-Corp. This allows the owner-attorney to be paid a "reasonable salary" (subject to payroll taxes) while taking remaining profits as distributions (not subject to self-employment taxes). This can result in significant tax savings but requires

disciplined payroll management. Consultation with a CPA is essential to determine if an S-Corp election is advantageous for your projected income.

- **Governing Documents:** For a PLLC, you must have a Company Agreement. For a PC, you need Bylaws. These documents govern the firm's operations, management, and dissolution. Even for a single-member entity, a thorough governing document is critical for financing, insurance, and long-term planning.

B. The Financial Bedrock: Accounts and Insurance

- **Bank Accounts:** Open at least two separate accounts upon formation and before collecting any money:

1. **IOLTA (Interest on Lawyers' Trust Account):** For all client funds. Non-negotiable.
2. **Operating Account:** For firm revenue and all business expenses.

- **Optional - Business Savings/Tax Account:** To regularly transfer a percentage of all revenue from the operating account into this savings account to cover quarterly estimated tax payments and build a capital reserve.

C. The Digital Law Office: A Technology Stack for Efficiency

- **Core Platform (Case Management):** Clio, MyCase, PracticePanther. This is the firm's central hub. Choose a platform that integrates billing, IOLTA accounting, calendaring, and document management.
- **Financial Suite:** QuickBooks Online is the standard. Choose a version that allows for class tracking or other methods to properly manage IOLTA sub-accounts.
- **Communication & Collaboration:**
    - **Email/Office Suite:** Microsoft 365 or Google Workspace. Use your professional domain. These suites offer secure, business-class email, cloud storage, and collaboration tools.
    - **Phone System:** A Voice over IP (VoIP) system projects a professional image with an auto-attendant and multiple lines, and allows you to take business calls from anywhere without giving out your personal cell number. Ex: Zoom VoIP System.
- **Legal-Specific Tools:**
    - **Legal Research:** Budget for Westlaw of LexisNexis. If you are not doing research often, you could use the State Bar's free Fastcase benefit.
    - **AI:** There are AI legal programs that can help with specific tasks such as billing and/or discovery. Ex: AI Billables.
    - **Document Automation:** Use the mail-merge and template features in your case management software to automate repetitive document creation.

IV. **PART THREE: THE PARTNERSHIP DIMENSION: AGREEMENTS FOR CO-FOUNDERS**

While many attorneys hang a shingle alone, many others launch a firm with partners. This adds a layer of complexity that must be addressed from day one. A well-drafted partnership or company agreement is the "prenup" for your business. It is far easier to agree on these terms while everyone is excited about the new venture than it is to resolve disputes later. The absence of such an agreement means you are subject to the default, and often undesirable, provisions of the Texas Business Organizations Code.

Your governing document (Company Agreement for a PLLC or Bylaws/Shareholder Agreement for a PC) must be robust and address these key issues:

1. <u>Business Operations & Governance</u>

- **Management & Decision-Making:** Who has the authority to make decisions? Will there be a single managing partner, a management committee, or will all major decisions require a vote? Define what constitutes a "major" decision (e.g., taking on debt, hiring, firing, signing a lease).
- **Capital Contributions:** How much money and/or property will each owner contribute at the outset? What happens if more capital is needed later?
- **Compensation & Profit Distribution:** This is a critical discussion. Will owners receive a base salary? How will profits be divided—by ownership percentage, origination credit, hours billed, or a combination? How will overhead be allocated among partners?
- **Personnel:** How will you make decisions about hiring, setting salaries, and managing employees?

- **Practice Areas:** What are the firm's official practice areas? What is the process for adding or eliminating a practice area?

2. Planning for "Inevitable Changes": The Buy-Sell Agreement

A Buy-Sell Agreement, which can be part of your governing document or a standalone contract, dictates what happens to an owner's interest upon certain trigger events. It protects the firm from instability and provides a clear exit path.

- **Trigger Events:** The agreement should specify what events require an owner to sell their interest, such as:
- Death
- Long-term Disability
- Divorce (to prevent an ex-spouse from having a claim on ownership)
- Loss of law license
- Voluntary withdrawal or retirement
- Termination for cause
- **Valuation:** The agreement must contain a clear formula or process for valuing the departing owner's interest. This valuation can differ based on the trigger event (e.g., a voluntary retirement may be valued differently than a termination for cause).
- **The Buyer:** The agreement should specify whether the firm itself or the remaining owners have the option or obligation to purchase the interest.

3. Conflict Resolution: The Deadlock Mechanisms

For firms with an even number of partners, or where voting blocs can create a 50/50 split, a deadlock is a real possibility. Your agreement should anticipate this and provide a mechanism to break the impasse.

- **Mediation:** A provision requiring partners to engage a neutral mediator before resorting to litigation.
- **Designated Tie-Breaker:** The partners can agree in advance on a trusted neutral third party (e.g., a mentor or CPA) who is empowered to make a binding decision.
- **"Dynamite" or Dissolution Provision:** A clause stating that if a deadlock persists for a specified period (e.g., 30-60 days), it triggers a mandatory dissolution and winding up of the firm.

The key is to have an agreed-upon process before it is needed. See Penny Robe's article titled "Partnership Agreements" from the 2025 State Bar of Texas Annual Meeting for more information on this topic.

V. PART THREE: THE ENGINE – CLIENT ACQUISITION AND ONBOARDING

A brilliant legal mind is useless without clients. A systematic approach to marketing and intake is essential for sustainable growth.

A. Building Your Brand and Marketing Funnel

- **Referral Networks (The Foundation):** Your primary source of initial business will be other lawyers. Intentionally cultivate these relationships. Take other lawyers to lunch. Send them cases that are outside your niche. When you receive a referral, provide exceptional service and keep the referring attorney updated (with client consent).
- **Digital Presence (The Storefront):**
  - **Website:** Your website must be professional, mobile-friendly, and clearly articulate who you are, what you do, and who you help. Include a clear call to action.
  - **LinkedIn:** Your LinkedIn profile is not an online resume; it is a networking and publishing platform. Post updates about your practice, share insightful articles, and engage with connections.
  - **Content Marketing:** Write articles or blog posts on niche legal topics that your target clients are searching for. This demonstrates expertise and improves your website's search engine optimization (SEO).
  - **Branding:** Work with someone to create a logo, stationary, etc.

- **Targeted Networking (The Handshake):** Go beyond bar association happy hours. Join industry trade groups where your ideal clients congregate. The goal is to become a known and trusted resource within a specific community.

B. The “Bulletproof” Intake and Engagement Process

Your intake process is your firm’s primary risk management tool.

1. **Structured Inquiry:** Use a standardized intake form to capture essential information from every potential new client (PNC).
2. **Conflict Check:** Run the PNC, adverse parties, and key known witnesses against your firm’s database of current, former, and declined clients before any substantive conversation.
3. **The Consultation:** The purpose is twofold: to assess the merits of the case and to assess the client. Is this a client you can work with? Are their expectations realistic? Clearly explain your process and potential fee structures.
4. **The Engagement Letter—Essential Clauses:** This contract must be signed before you take any action on the case. It should include everything from the prior version of this article, plus:

- **Scope:** State the clear scope of the work you will be providing for the client. Ex: Litigation on X matter; appeal of X final judgment.
- **Client Representation:** Provide who the client representative will be with their contact information
- **Rates and Billing:** Clearly provide the hourly rate for every attorney who will work on the file; state when invoices will be sent out and when they must be paid.
- **No-Guarantee Clause:** Explicitly state that the firm has made no promises or guarantees about the outcome of the matter.

VI. PART FOUR: THE COCKPIT – DAILY PRACTICE & CASE MANAGEMENT

Systems run the firm, and people run the systems. Efficient daily operations are key to profitability and competence.

A. Litigation Workflow Management

- **The Master Calendar:** Your calendaring system is the heart of a litigation practice. Use your case management software to create deadline templates for common events (e.g., when a petition is filed, automatically calendar the deadline for an answer, disclosures, etc.). Always double-check against the relevant rules of procedure.
- **Discovery Management:** For document-intensive cases, you will quickly outgrow simple folders. Consider entry-level e-discovery software (e.g., Logikcull, Everlaw) that allows for processing, reviewing, and producing electronically stored information (ESI) efficiently and defensibly.
- **Client Communication Protocol:** Set a recurring “client update” task for every active file. Even a brief email stating “No new updates this week, but we are monitoring the docket” provides immense value and manages client anxiety.

B. Your First Hire: Staffing and HR

Hiring your first employee—whether a paralegal or an administrative assistant—is a major step.

- **Job Description:** Write a detailed job description that outlines the specific tasks, skills, and qualities you are looking for.
- **Legal & Financial Obligations:** As an employer, you must obtain an EIN, set up payroll withholding (federal income tax, Social Security, Medicare), pay federal and state unemployment taxes, and secure workers’ compensation insurance.
- **Onboarding:** Create a checklist for onboarding new employees, including providing an employee handbook, setting up technology access, and training on firm procedures, especially with respect to ethics and confidentiality.

C. Attorney Well-Being

The pressure of running a solo or small litigation practice is immense. Burnout is a serious threat to you and your practice.

- **Set Boundaries:** Defend your personal time. Make time for family and friends.
- **Build a Support Network:** Cultivate relationships with other solo/small firm attorneys. They are your colleagues, not just your competitors, and can provide invaluable advice and moral support.
- **Utilize TLAP:** The Texas Lawyers’ Assistance Program (TLAP) provides confidential help for lawyers struggling with stress, substance abuse, and mental health issues. Know their number and do not hesitate to use it or recommend it.

VII. PART FIVE: THE NORTH STAR – FOUNDATIONAL ETHICAL OBLIGATIONS

Ethical diligence must be woven into every system and procedure of your firm. The following rules are paramount for a new litigation practice.

A. Rule 1.01: Competent and Diligent Representation

Competence is more than knowing the law; it is having the legal knowledge, skill, and preparation to handle a matter effectively. Tex. Disciplinary Rules Prof'l Conduct R. 1.01(a). For a new practitioner, this means:

- **Honest Self-Assessment:** Be brutally honest about the complexity of a case. Taking on a matter you are not competent to handle is a disservice to the client and a direct violation of your ethical duties.
- **Ethical Association:** If a great case is just beyond your experience level, the ethical and smart business move is to associate with more experienced co-counsel. This is expressly permitted, provided you obtain the client's informed consent. Tex. Disciplinary Rules Prof'l Conduct R. 1.01 cmt. 8.

B. Rule 1.03: Communication

This is a leading source of bar grievances and is easily avoided. A lawyer "shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." Tex. Disciplinary Rules Prof'l Conduct R. 1.03(a). Furthermore, you must explain matters to the extent reasonably necessary to permit the client to make informed decisions. Tex. Disciplinary Rules Prof'l Conduct R. 1.03(b). Proactive communication is the solution.

C. Rule 1.05: Confidentiality of Information

Your duty of confidentiality is far broader than attorney-client privilege. It applies to all "confidential information," which includes both privileged information and "unprivileged client information"—all information relating to a client acquired during the representation. Tex. Disciplinary Rules Prof'l Conduct R. 1.05(a). This duty dictates your technology choices, communication habits, and staff training.

D. Rule 1.06: Conflicts of Interest

Failure to properly identify and handle conflicts can lead to disqualification, fee forfeiture, and disciplinary action. Your duties extend to current and former clients. Tex. Disciplinary Rules Prof'l Conduct R. 1.06. A robust conflict-checking system that is used for every potential matter—including consultations that do not result in engagement—is non-negotiable.

E. Rules 7.01-7.07: Information About Legal Services

As you market your firm, you must adhere strictly to the advertising rules.

- **False or Misleading Communications:** Your marketing cannot promise results or create an unjustified expectation about the results you can achieve. Tex. Disciplinary Rules Prof'l Conduct R. 7.02.
- **Specialization Claims:** You cannot state or imply that you are a "specialist" except as permitted by the rules, which primarily refers to being board certified by the Texas Board of Legal Specialization. Tex. Disciplinary Rules Prof'l Conduct R. 7.04.

VIII. CONCLUSION

Starting a litigation practice, whether solo or with partners, is a monumental undertaking that tests every facet of your professional ability. It is a marathon, not a sprint. Success is the product of strategic foresight, operational discipline, and an unyielding commitment to ethical practice. By building your firm on the solid foundation outlined in this guide—from the business plan to the partnership agreement to the IOLTA ledger—you create the conditions for not just survival, but for sustainable, profitable, and professionally fulfilling success. Your reputation for integrity, competence, and diligence will always be your most valuable asset.

WAR STORIES:
THE WORST I'VE EVER SEEN WHAT JURY-TRIAL DISASTERS TEACH TEXAS CIVIL LITIGATORS ABOUT ETHICS, JUDGMENT, AND CREDIBILITY

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WAR STORIES: THE WORST I'VE EVEN SEEN WHAT JURY-TRIAL DISASTERS TEACH TEXAS CIVIL LITIGATORS ABOUT ETHICS, JUDGMENT, AND CREDIBILITY

I. INTRODUCTION

In Texas civil litigation, jury trials amplify every strength and every mistake made in the courtroom. Jurors evaluate not only the evidence, but the lawyers presenting it, the witnesses delivering it, and the overall professionalism of the proceedings. While procedural rules and evidentiary standards are well-defined, or at least should be, many of the most damaging courtroom moments occur not because lawyers misunderstand the law, but because judgment falters under pressure.

This paper hopes to reframe so-called "war stories" from jury trials into ethical and strategic lessons. These examples demonstrate how courtroom disasters frequently arise from lapses in preparation, restraint, and ethical awareness — and how young civil litigators can avoid repeating them.

II. WHEN JUDGES GO OFF THE RAILS

In jury trials, judicial conduct carries outsized influence. Jurors tend to treat the judge as the ultimate authority, and even subtle cues may shape how jurors view counsel and the merits of the case. Texas courts have repeatedly cautioned that judicial comments in the presence of the jury can improperly influence deliberations. Things like public berating of counsel in front of the jury, hard leaning on one side versus the other, or off the record directives that later become disputed or problematic.

For trial lawyers, the challenge lies in protecting the record without magnifying the harm in front of the jury or antagonizing the judge. Confrontation might benefit the ego, but it rarely benefits the client. Strategic restraint, coupled with quiet preservation of error outside the jury's presence, is often the most effective response. Remember there is a difference between unfavorable rulings and improper conduct. The practical reality is appellate relief is pretty rare- so you've got to handle things effectively at the front end.

In *Metzger v. Sebek*, the court recognized that judicial remarks conveying an opinion on the merits may constitute reversible error when they probably caused the rendition of an improper judgment. 892 S.W.2d 20 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

Texas Code of Judicial Conduct, Canon 2 (Avoiding Impropriety and the Appearance of Impropriety in All of the Judge's Activities) and Canon 3 (Performing the Duties of Judicial Office Impartially and Diligently) provide further insight and are worth a read. See appendix A.

Practical options for ethical and strategic responses include:

- requesting a sidebar or recess
- making a concise record without argument
- seeking clarification rather than confrontation
- preserving error while avoiding escalation

III. LAWYER MISCONDUCT AND JURY PERCEPTION- WHEN LAWYERS BECOME THE PROBLEM

Jurors evaluate lawyers as part of the evidence. Too often, we see examples of improper advocacy, excessive or speaking objections, arguing with the judge, and visible hostility against opposing counsel, to name a few. This conduct can undermine a lawyer's credibility almost instantly.

When should you **not** object?

- Objecting to every minor issue can alienate jurors
- Silence can be strategic—but it can also waive error
- Jury trials are not depositions—do not object to every question, do not object to form
- When preparing final depo cuts for trial (after the court has ruled on objections), do not include objections on the video to be played to the jury.

It's a Balancing act: Professional judgment vs. preservation of the record

Improper argument and conduct can inflame jurors and compromise the integrity of the verdict.

Abusive or harassment of the witness during cross examination will often alienate one or more of the jurors.

Texas Disciplinary Rule of Professional Conduct 3.04 requires fairness in adjudicatory proceedings, while Rule 8.04 prohibits conduct prejudicial to the administration of justice. See appendix B.

From a practical perspective, even when conduct does not rise to formal discipline, jurors see what is going on and the offending lawyer runs the risk they will ultimately punish the client for counsel's behavior. Moreover, the conduct itself is certainly going to influence discretionary rulings and likely damage counsel's reputation with the court.

IV. WITNESS FAILURES BEFORE THE JURY

Civil trials regularly feature witnesses who:

- volunteer harmful information
- contradict prior testimony
- stray beyond disclosed opinions
- become defensive or argumentative

These moments are rarely spontaneous. They often reflect inadequate preparation or unrealistic expectations about witness performance. Civil litigators are responsible not only for what witnesses say, but for what counsel should have anticipated. The inability to control a witness does not excuse a lack of preparation or strategic foresight.

Witness preparation is *critical* in jury trials, but *over-preparation* can be just as damaging as neglect. Jurors are highly sensitive to scripted testimony and evasiveness. Texas courts have made clear that lawyers may not interfere with truthful testimony.

Texas Disciplinary Rule of Professional Conduct 3.03 (Candor toward the Tribunal) and 3.04(b) (assisting a witness to testify falsely) are instructive here.

Expert witnesses pose additional risks. Opinion drift, advocacy disguised as expertise, and reliance on unsupported demonstratives can erode credibility. Moreover, even without objection, what amounts to an expert's conclusory or speculative opinion is not going to support a judgment in the end. *See, e.g. Coastal Transport Co. v. Crown Central Petroleum Corp*., 136 S.W.3d 227 (Tex. 2004).

V. DEMONSTRATIVE EVIDENCE GONE WRONG

Demonstrative evidence can be powerful, but misleading visuals or technological failures can severely damage credibility.

Examples:

- Animations that overpromise and underdeliver
- Demonstratives that confuse jurors
- Technology failures that destroy credibility

Risk management principles:

- Always assume the tech will fail
- Have backup means for presenting…hard copies, document presenter, blow up boards, etc
- Never introduce a visual you cannot explain without it
- Avoid exaggeration that invites impeachment

Demonstratives that mislead can become grounds for reversible error—or worse, disciplinary scrutiny.

Texas courts caution that demonstratives must fairly represent the evidence and not mislead the jury. The admission of demonstrative evidence rests within the sound discretion of the trial court, and the court may permit a demonstration of the plaintiff's injuries to the jury "so long as the demonstration is not conducted in such a manner as to pass beyond the limits of introducing proof of the extent and nature of the injury and become merely a method of inflaming the minds of the jury." See, e.g. *Parkway Hosp., Inc. v. Lee*, 946 SW2d 580 (1997), rehearing overruled (Jun 19, 1997), writ denied (Jan 16, 1998).

In jury trials, technology failures are rarely neutral. Jurors often equate technical mishaps with lack of preparation.

VI. PROFESSIONAL SURVIVAL IN JURY TRIALS

Jury trials magnify every mistake. Credibility loss is immediate and recovery is difficult. Successful trial lawyers maintain composure, protect credibility, and understand that they themselves are part of the evidence.

In the event of a serious mishap, accept responsibility, apologize to the court, counsel and jury as may be appropriate.

In Texas civil jury trials, judgment, restraint, and credibility often matter as much as legal knowledge. War stories endure because they reveal how quickly juries can turn — and how difficult it is to regain their trust. By learning from these failures, young litigators can better protect their clients, records, and reputations.

Tips & Tricks for Effective Cross-Examination and Witness Impeachment

Chari L. Kelly

The following is based on an oral presentation given by the Honorable Chari L. Kelly at the Conquering the Courtroom: Practical Techniques to Elevate Your Courtroom Success, held in Austin, Texas on January 22, 2026. Her presentation and oral remarks have been adapted and edited for readability.

Cross-examination is what we all imagine when we think about trial advocacy: a sharp, effective, even "sexy" moment in the courtroom. But its purpose is often misunderstood. The goal of cross-examination is to argue your case through the witness. You are not arguing with the witness. That distinction matters.

The Aims of Cross-Examination

Cross-examination should be guided by three core aims.

First, obtain agreements. This is often your only opportunity to put helpful facts into the record through the opposing witness. You should identify what information the witness can give you that advances your theory of the case and secure those admissions clearly and efficiently.

Second, limit testimony. Not every witness will help your case, and many will attempt to expand their testimony to hurt your case. Your role is to demonstrate that their testimony either does not matter or does not contradict your theory.

Third, impeach credibility. This is a direct attack on the reliability or consistency of the witness. It must be done carefully and methodically.

The Structure of Effective Cross-Examination

A well-executed cross-examination is controlled, deliberate, and tightly structured. It is not a line-by-line retelling of the witness's deposition, instead it should be laser-focused on the areas that are helpful to your case. Every question should be leading, seven words or less, and focused on one discrete fact.

Leading questions allow you to maintain control. When you ask open-ended questions, you surrender that control. Questions that are short and contain one fact made it hard for the witness to argue with you. In my experience the longer the question, the longer the answer. Ideally, you want to get your witness into a rhythm of yes or no answers. You should put innocuous questions up front, before they have the urge to argue with you as the cross goes on and becomes potentially more heated.

A great cross-examination requires a lot of preparation. Plan your questions and divide them by topical area. For each question, put a reference to any enforcement tool you may have, such as a page and line number from a deposition. If you do this, then you will immediately know if you can impeach your witness effectively with a prior statement or if you were making an inference during your questioning. Remember, cross-examination is not the place to explore. It is the place to confirm. This also means knowing when to stop. You are unlikely to "win" your case by a cross-examination, particularly one of a credible expert. Instead, you should get what you can and get out. Less is often more.

The Mechanics of Impeachment

Impeachment occurs when someone says something different then before or they try to avoid a prior statement with "I don't know." Refreshment occurs when a witness says "I don't remember." Most lawyers don't appreciate the distinction and start an impeachment with "Do you remember saying X at your deposition?" That approach is technically incorrect and misses the opportunity for a clean, effective impeachment.

Impeachment follows a specific and disciplined structure: commit, credit, and confront. And don't forget to lead as you impeach.

First, commit the witness to their current testimony. Establish clearly what they are saying now. "You testified on direct that the light was green?" "But that hasn't always been your testimony, has it?" If they admit to the inconsistency, the impeachment is complete.

Second, credit the prior statement. You can spend as much or as little time as your style permits reinforcing the credibility of that prior statement. "You took a deposition in this case? And at that deposition you swore to tell the truth? And you did tell the truth, didn't you?"

Third, confront the witness with the inconsistency. You show them the prior statement, and you read the statement out loud, because you control how the statement is said. ""I'm going to read aloud your statement and you let me know if get even one word incorrect. 'The light was red.' Did I get that right?"

Recognizing When Impeachment Is Complete

It is important to recognize when impeachment has already occurred. If the witness admits the inconsistency at the first step, the impeachment is complete. There is no need to press further.

Additionally, once you have completed the impeachment, stop. It is not effective to accuse the witness of lying. That argument belongs in closing. A witness is unlikely to agree that they are lying, and pressing the point risks diminishing the effectiveness of the impeachment you have already achieved. Rather, doing so invites the witness to explain their answer during your cross examination, an opportunity you should not afford.

Practical Considerations in Impeachment

Impeachment is not always straightforward. Questions often arise about how to present prior statements to the jury. For example, displaying deposition testimony on a screen may be effective, but it is often dependent on the judge and subject to objection.

Opposing counsel may insist on identifying the precise page and line before allowing the statement to be shown, and may object on the grounds that there is no true inconsistency. Many impeachment issues are not clear-cut, and the line between consistency and inconsistency can be difficult to draw.

Additional complications arise with forms of evidence such as video recordings that have not been transcribed. In such cases, impeachment may require alternative approaches, including refreshing recollection or introducing the material under another evidentiary theory.

Understanding the Limits of Impeachment

Impeachment is a powerful tool, but it has limits. It is offered to show inconsistency, not necessarily to establish the truth of the prior statement. If the underlying fact is critical to your case, you may need to introduce the prior statement into evidence independently rather than relying solely on impeachment.

This distinction is particularly important for preserving the record and meeting your burden of proof.

Common Evidentiary Mistakes

Effective cross-examination also requires a clear understanding of evidentiary rules. Lawyers often confuse hearsay and authentication. These are distinct objections. Hearsay concerns an out-of-court statement offered for its truth. Authentication concerns whether the evidence is what it purports to be.

Similarly, statements by an opposing party are generally admissible as admissions of a party opponent, which are categorized as non-hearsay. Lawyers sometimes mistakenly analyze these statements as "statements against interest," which imposes additional requirements for admissibility under the state and federal rules.

The best evidence rule is not the better evidence rule. If there is a video, writing, or recording of something, a witness should not testify about their contents unless they have personal knowledge of the underlying information. For example, if someone witnessed a car accident, and the car accident was also on video, the best evidence rule would not prevent the witness from testifying about the car accident. However, if someone derived their knowledge solely from a video, then that would be subject to a best evidence objection.

The rule of optional completeness is not an objection. It is a rule of inclusion, not exclusion. This occurs when somebody is using a portion of a statement, usually a part of a deposition, and by not showing the full context of the statement, it leaves a mischaracterization with the jury.

Understanding these distinctions allows you to make more precise objections and to respond effectively when opposing counsel raises them.

Conclusion

Effective cross-examination is not about confrontation for its own sake. It is about control, precision, and restraint. The lawyer who leads every question, structures impeachment carefully, and knows when to stop is the lawyer who maintains credibility with the jury and advances the client's case.

The discipline required is substantial. But when done well, cross-examination becomes exactly what it should be: a focused, persuasive method of telling your client's story through the opposing witness.

Getting and Keeping the Win: Preparing Your Record

Jay Spring

The following is based on an oral presentation given by Mr. Spring at the Conquering the Courtroom: Practical Techniques to Elevate Your Courtroom Success, held in Austin, Texas on January 22, 2026. His presentation and oral remarks have been adapted and edited for readability.

One of the recurring challenges in trial practice is ensuring that the record is properly preserved for appellate review. This becomes especially difficult in the fast-moving, high-pressure environment of trial, where decisions must be made quickly and often without the benefit of reflection. Yet it is precisely in these moments that careful attention to the record matters most.

Offers of Proof and Preserving Excluded Evidence

When evidence is excluded, the burden shifts to counsel to ensure that the substance of that evidence is preserved in the record. The most effective way to do this is through an offer of proof by questioning. This method allows the appellate court to see exactly what the excluded testimony would have been, rather than forcing it to speculate.

There are, however, situations in which questioning is not feasible. For example, if a witness is uncooperative or unreliable, an offer of proof by summation may be appropriate, assuming there is no objection. Even then, caution is required. A conclusory statement such as, "If allowed to testify, the witness would have shown that the defendant did not meet the standard of care," does not preserve error because it fails to reveal the substance of the testimony.

A more effective summation would describe the testimony with specificity. For instance, the witness would testify that a reasonable doctor would not have taken the actions at issue, or would have followed a different course of treatment. Even this approach only minimally preserves error. The best practice remains to develop the record fully, detailing everything that was excluded so that the appellate court has a complete picture.

Timing and Practical Constraints

Offers of proof present logistical challenges during trial. They cannot be made in front of the jury, which means the court must excuse the jury before they are conducted. Judges are understandably reluctant to do this repeatedly, particularly when multiple offers are anticipated. As a result, courts often defer offers of proof until a break.

At that point, the responsibility shifts entirely to counsel. It is not the court's job to remember to revisit the issue. In the flow of trial, it is easy to forget. When that happens, counsel may be forced to resort to a bill of exception, a rarely used but still available mechanism for preserving error after the fact.

A bill of exception must set forth the objection, the excluded evidence, and must be signed by the judge. Although it remains a viable tool, it is not one counsel should plan to rely on. The better course is to make the offer of proof at the appropriate time and ensure the record is complete before moving on.

Building the Record Through Trial Presentation

Record preservation is not limited to objections and offers of proof. It also includes how evidence is presented. Using exhibits in a way that is interactive and visually meaningful not only enhances persuasion before the jury but also ensures that the testimony is clearly reflected in the reporter's record.

A well-developed record serves both audiences: the jury in the moment and the appellate court later. Trial lawyers must keep both in mind simultaneously.

The Strategic Use of Objections

One of the more difficult judgment calls in trial practice is determining when to object. Excessive objections can alienate jurors, who often perceive them as attempts to hide information. At the same time, a failure to object can result in the waiver of error.

This tension reflects a broader principle. While constant objection is not in the client's best interest, the duty of competence requires that appropriate objections be made when necessary. Whenever possible, issues should be resolved in advance through stipulations or pre-admission of evidence.

Ultimately, when a close call arises, the better course is to err on the side of preserving the record. Raising an objection will not violate an ethical duty, but failing to do so may.

Conclusion

Preparing the record is not a discrete task but an ongoing responsibility throughout trial. It requires attention to detail, awareness of procedural requirements, and the discipline to act even in the midst of trial's pressures. The goal is not simply to win in the moment, but to ensure that the win can be defended on appeal.

That requires foresight. It requires structure. And above all, it requires remembering that every ruling, every exclusion, and every objection must be captured in a way that allows another court, later, to understand exactly what happened and why it mattered.

PRACTICE BEFORE THE SUPREME COURT OF TEXAS PREVIEW: RECENT DOCKET STATISTICS AND VOTES REQUIRED FOR CERTAIN COURT ACTIONS

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PRACTICE BEFORE THE SUPREME COURT OF TEXAS PREVIEW: RECENT DOCKET STATISTICS AND VOTES REQUIRED FOR CERTAIN COURT ACTIONS

I. INTRODUCTION

This is an excerpt from the update to Doug Alexander and Professor Lori Mason's seminal Texas Supreme Court practice paper, the full—100-page and 1,000-footnote—version of which will be presented at this Fall's TexasBarCLE Civil Appellate Practice 101 and Advanced Civil Appellate Practice courses in Austin in September 2026.[1]

This excerpt focuses on the most recent docket statistics observed at the Court as well as recent updates to the requisite votes required for certain Court actions.

II. RECENT SUPREME COURT DOCKET STATISTICS

A. The "New" Pattern of Opinion Issuance

For the first time, beginning during its 2015 term, the Court began to issue its opinions in argued causes[2] within the same term each case was argued.[3] To accomplish this unprecedented feat, the Court cut in half the time it traditionally allowed Justices to circulate a majority opinion—down from four to two months.[4] As the end of the end of the Court's term approaches in the summer, these timelines grow even shorter.[5] To keep the Court on track to issue opinions in all argued causes from the term by the end of July, all proposed initial writings are due by the date of the last conference in April and all proposed writings are due by the date of the last conference in May.[6] The Court's goal—which it has consistently met each year for more than a decade now—is to issue opinions in each case argued that term by the end of June.[7]

This increase in the pace of issuing opinions resulted in a changed temporal distribution in argued causes during the Court's fiscal year—which begins on September 1st and ends on August 31st. Prior to 2015, argued opinions generally "trickl[ed] out" throughout the year, hit a pause in July, and then enjoyed a final burst in August as the Court's fiscal year concluded.[8] From 2015 onward, however, far fewer (if any) argued opinions are issued during the early part of the

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[1] *See* TEXASBARCLE, CIVIL APPELLATE PRACTICE 101: 2026, *available at* https://www.TexasBarCLE.com/new/?TransferTo=L24266 [https://perma.cc/W38C-NRGS]; TEXASBARCLE, ADVANCED CIVIL APPELLATE PRACTICE 2026, *available at* https://www.TexasBarCLE.com/new/?TransferTo=L24268 [https://perma.cc/5JE9-HJ3U].

[2] In the Court's internal parlance, a cause refers to a case in which review has been granted. *See*, *e.g.*, Hon. Blake A. Hawthorne, *Supreme Court of Texas Internal Operating Procedures*, TEXASBARCLE, 35TH ANNUAL ADVANCED CIVIL APPELLATE PRACTICE COURSE, ch. 17 at 19 (2021) [hereinafter "*SCOTX Internal Procedures*"].

[3] *See* Hon. Don R. Willett and Don Cruse, *Supreme Scuttlebutt*, Judiciary Committee, Dallas Bar Association (Oct. 6, 2016) [hereinafter *Supreme Scuttlebutt*] (citing Chuck Lindell, *Texas Supreme Court Hits Milestone: All Opinions Issued*, AUSTIN AM.-STATESMAN, at July 9, 2015 [hereinafter *Court Hits Milestone*].

[4] *Supreme Scuttlebutt* (citing *Court Hits Milestone*).

[5] *Id.*

[6] *See SCOTX Internal Procedures*, at 20.

[7] Don Cruse, *Texas Supreme Court By the Numbers*, TexasBarCLE, 39th Annual Advanced Civil Appellate Practice, ch. 11, at slide no. 29 (2025) (powerpoint slides) [hereinafter *SCOTX by the Numbers*].

[8] *Supreme Scuttlebutt*.

Court's fiscal year, and with the remainder issuing in increasing tranches from November through the end of June.[9]

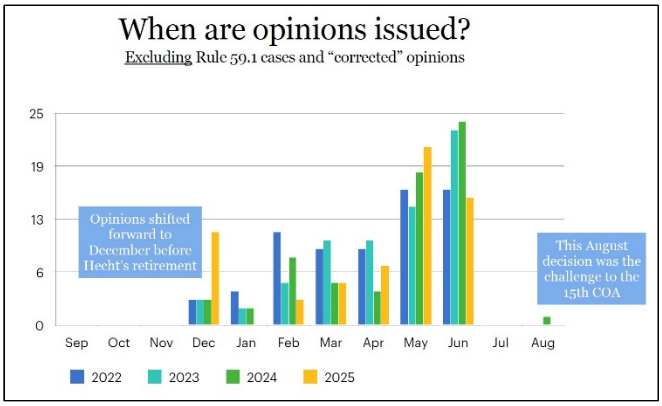

Fig. 1 *– Comparison of the number of Court opinion distribution in argued cases throughout the Court's fiscal year from 2022 through 2025.*[10]

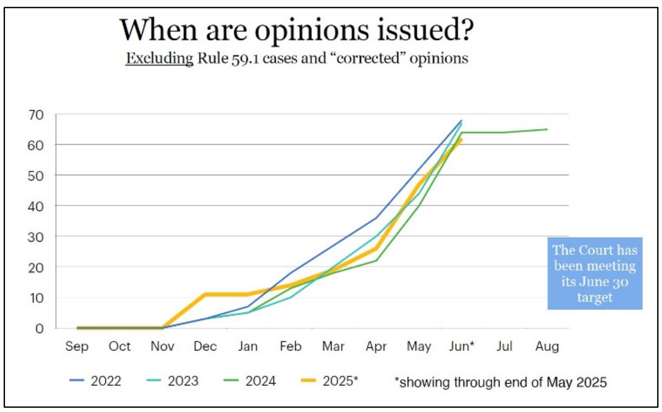

Fig 2 *– Comparison of the pattern of Court opinion distribution in argued cases throughout the Court's fiscal year from 2022 through 2025.*[11]

While this new pattern has continued through today,[12] the Court's new grant procedures made effective January 1, 2026 may affect it going forward.[13]

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9 *Id.*; *SCOTX by the Numbers*, at slide nos. 28–29.

10 *SCOTX by the Numbers*, at slide no. 28.

11 *Id.* at slide no. 29.

12 *Compare id.* at 28–29, *with* Hon. Blake A. Hawthorne & Don Cruse, *How the Supreme Court of Texas Operates Today*, UTCLE, ANNUAL CONFERENCE ON STATE AND FEDERAL APPEALS, at slide no. 22 (June 15, 2018), *available at* https://speakerdeck.com/doncruse/how-the-supreme-court-of-texas-operates-today [https://perma.cc/3LWH-TC2D].

13 TEX. R. APP. P. 53, 2026 cmt. ("[Texas Appellate] Rule [of Appellate Procedure] 53 is amended to eliminate the Court's practice of requesting merits briefs before granting a petition for review"); *see* SUPREME COURT OF TEXAS, SUPREME COURT PROCEDURES SUMMARY, at 28, *available at* https://txcourts.gov/media/1461814/259104.pdf [https://perma.cc/BGW7-5MMR] [hereinafter PROCEDURES SUMMARY]; *see generally also* Order of Dec. 23, 2025, Misc. Docket No. 25-9104 (eff. Jan. 1, 2026), *available at* https://txcourts.gov/media/1461814/259104.pdf [https://perma.cc/BGW7-5MMR].

As a result of these concerted efforts, the Court has been able to maintain its record pace of issuing opinions in all argued cases every term since 2015.

B. Odds of a Given Outcome[14]

Although the statistics vary some from year to year, it has historically been possible to provide some approximation of the odds of the Court taking various actions on petitions for review.

In the Court's very helpful *Procedures Summary* issued as part of the January 1, 2026 rule amendments, the Court has indicated that "ordinarily merits briefs are no longer solicited in aid of the Court's decision to grant the petition."[15] Because the Court has now eliminated its former practice of routinely requesting merits briefing before granting review, going forward, the relative probabilities of Court action examined herein may change.[16] To this end, because merits briefing will now ordinarily be ordered only once the Court has already granted review, the authors have removed the odds formerly tabulated of a grant after merits briefing has been ordered.

The following chart details the historical likelihood of a given outcome at the Court:

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[14] The statistics in this section are not based on any independent study conducted by the authors. Rather, they were derived from a compilation of statistics drawn from a variety of sources, including the following: *SCOTX by the Numbers* at slide nos. 35–49; Joe Greenhill III, Douglas W. Alexander, Lori R. Mason & Dylan O. Drummond, *Practice Before the Supreme Court of Texas*, TexasBarCLE, Civil Appellate Practice 101, ch. 13 (2023) [hereinafter *2023 SCOTX Practice*]; Warren W. Harris & Yvonne Y. Ho, *Strategies in Preparing Petitioner's Brief on the Merits*, TexasBarCLE, Practice Before the Texas Supreme Court Course, ch. 8 at 1 (2017) [hereinafter *Merits Brief Strategies*]; Pamela Stanton Baron, *Texas Supreme Court Docket Update*, TexasBarCLE, 30th Annual Advanced Civil Appellate Practice Course, ch. 15 at 5 (2016) [hereinafter *Docket Update*]; Pamela Stanton Baron, *Annual Review: The Texas Supreme Court*, TexasBarCLE, 27th Annual Advanced Civil Appellate Practice Course, ch. 21 (2014); Hon. Melissa Davis Andrews & Hon. Brantley Starr, *The What, When, Where, How, and Why of Amicus Briefing in the Supreme Court of Texas*, TexasBarCLE, 26th Annual Suing & Defending Governmental Entities Course, ch. 8 at 2 (2014) [hereinafter *SCOTX Amicus*]; Pamela Stanton Baron, *Ten Things Your Client Needs to Know About Taking a Case to the Texas Supreme Court*, UTCLE, 22d Annual Conference on State and Federal Appeals, at 2 (2012) [hereinafter *Ten Things*]; Pamela Stanton Baron, *Texas Supreme Court Docket Analysis" July 1, 2008*, TexasBarCLE, Advanced Personal Injury Law Course, ch. 2 at 2 (2008) [hereinafter *Docket Analysis*]; Pamela Stanton Baron, *The Chair's Report*, APP. ADVOC., Summer 2005, at 2–4; Pamela Stanton Baron & Stacy R. Obenhaus, *The Texas Supreme Court by the Numbers: A Statistical Survey*, UTCLE, 11th Annual Conference on State and Federal Appeals, ch. 18 (2001); Hon. Thomas R. Phillips, *Thinking Inside the Box: A Review of the Supreme Court's Caseload Statistics and What Those Numbers Mean in Real Life*, TexasBarCLE, Practice Before the Supreme Court of Texas Course, ch. 1 (2002); Hon. David Keltner et al., *Respondent's Strategies in the Supreme Court*, TexasBarCLE, Practice Before the Texas Supreme Court Course, ch. 8 (2009); TEXAS OFFICE OF COURT ADMINISTRATION, STATISTICS & OTHER DATA, ANNUAL STATISTICAL REPORTS, https://txcourts.gov/statistics/annual-statistical-reports/ [https://perma.cc/48X5-3VTF] (FY 2020 through FY 2025) [hereinafter OCA ANNUAL REPORTS].

[15] PROCEDURES SUMMARY, at 30, *available at* https://txcourts.gov/media/1461814/259104.pdf [https://perma.cc/BGW7-5MMR]; *see also id*. at 31 ("The Court reserves the authority to order merits briefing before issuing a per curiam opinion" because the "need for flexibility in handling per curiam opinions is one of the reasons the Court has maintained the language in [Texas Appellate] Rule [of Appellate Procedure] 55.1 that allows the Court to order merits briefing before granting review").

[16] TEX. R. APP. P. 53, 2026 cmt.; PROCEDURES SUMMARY, at 28, *available at* https://txcourts.gov/media/1461814/259104.pdf [https://perma.cc/BGW7-5MMR].

Approximate Likelihood of Court Action	
Court Action	**Relative Odds**
Deny without either a response or response request	56%[17]
Request response:	1/3 (40–45%)[18]
Request merits briefing:	1/4 (25–39%)[19]
Request merits briefing after Response waived:	(5%)
Request merits briefing after petition amicus briefing	(82%)
Grant petition:	1/10 (11.5%)[20]
Grant petition after response:	1/5–1/4 (22%)
Grant after petition pending for > 1 year:	(60+%)
Grant motion for rehearing of petition denial:	1/25 (3.3%)[21]
Grant motion for rehearing of cause:	1/33 (1.1%)[22]

***Fig. 3** – Historical approximate likelihood of a given Court action.*[23]

Most notable in these statistics is the dramatic change of statistical position a petitioner experiences from the odds of an initial grant (roughly 12% or 1 in 10) to the likelihood of a grant

[17] *SCOTX by the Numbers*, at slide no. 47 (analyzing data from FY 2021–24).

[18] *Id.* at slide nos. 37, 39 (analyzing 2025 data).

[19] *Id.* at slide 40.

[20] This is the average grant rate over the past half-decade from FY 2020–25, the data underlying which was compiled from the past half-decade of Office of Court Administration ("OCA")'s annual statistical reports and statistical supplements from FY 2020 through FY 2025. OCA ANNUAL REPORTS, https://txcourts.gov/statistics/annual-statistical-reports/ [https://perma.cc/48X5-3VTF].

[21] This is the average rehearing grant rate for petitions for review over the past half-decade from FY 2020–25. *See generally* OCA ANNUAL REPORTS, https://txcourts.gov/statistics/annual-statistical-reports/ [https://perma.cc/48X5-3VTF]. This figure did not materially change when measured from FY 2021–24, when it was 2.7%. *SCOTX by the Numbers*, at slide no. 49.

[22] This is the average rehearing grant rate for causes over the past half-decade from FY 2020–25. *See generally* OCA ANNUAL REPORTS, https://txcourts.gov/statistics/annual-statistical-reports/ [https://perma.cc/48X5-3VTF]. This figure did not materially change when measured from FY 2021–24, when it was 0.9%. *SCOTX by the Numbers*, at slide no. 49.

[23] *See*, *e.g.*, *SCOTX by the Numbers*, at slide nos. 37, 39–40; Douglas W. Alexander & Lori Mason, *Petition for Review Practice Before the Supreme Court of Texas*, TexasBarCLE, Petition Practice Before the Texas Supreme Court Course, ch. 6.1 at 4 (2017) [hereinafter *2017 SCOTX Practice*]; *Merits Brief Strategies*, at 1; *Docket Update*, at 5; *SCOTX Amicus*, at 2; *Ten Things*, at 2; *Docket Analysis*, at 2.

after a response is filed (22% or roughly 1 in 5). In other words, a petitioner's odds of a grant roughly double after a response is filed.

C. Grant and Reversal Rates[24]

1. <u>Grant Rates by Court of Appeals</u>

Grant rates for a given court of appeals fluctuate annually, but examining these percentages over time provides some valuable insight. Below are the average grant rates for each court of appeals for the past half-decade, from FY 2020–25:

Average Grant Rates by Court of Appeals, FY 2020–25	
Court of Appeals	**Average Grant Rate**
1st—Houston:	9.2%
2d—Fort Worth:	7.4%
3d—Austin:	17.9%
4th—San Antonio:	11.5%
5th—Dallas:	12.8%
6th—Texarkana:	7.5%
7th—Amarillo:	11.0%
8th—El Paso:	***20.1%***
9th—Beaumont:	5.7%
10th—Waco:	7.0%
11th—Eastland:	7.4%
12th—Tyler:	***5.0%***
13th—Corpus Christi:	14.2%
14th—Houston:	13.1%

Fig. 4 *– Average grant rates by intermediate court of appeals during FY 2020–25 (extreme averages—both high and low—are emphasized).*[25]

During this period, the Eighth Court of Appeals in El Paso had the highest average grant rate (20.1%), and the Twelfth Court of Appeals in Tyler had the lowest (5.0%). Of the major metro courts of appeals (Austin, Dallas, Fort Worth, Houston, and San Antonio), the First Court of Appeals in Dallas had the lowest grant rate (9.2%) and the Third Court of Appeals in Austin had the highest (17.9%).

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[24] The statistics in this section are compiled from the past half-decade of OCA annual statistical reports and statistical supplements from FY 2020 through FY 2025. *See generally* OCA ANNUAL REPORTS, https://txcourts.gov/statistics/annual-statistical-reports/ [https://perma.cc/48X5-3VTF].

[25] *See id.*

2. Reversal and Affirmance Rates

One of the most common questions from clients before the Court is, "what are my odds" of prevailing?[26] While a precise answer to this question is difficult—if not impossible—to provide, there are some general, empirical odds that inform this inquiry.

From FY 2021 to FY 2024, the overall reversal rate of granted petitions was 80%.[27] This reversal rate fell to 74% in argued causes and rose to 100% in causes disposed of by per curiam opinion.[28]

D. Time to Disposition[29]

Next to the odds of success at the Court, one of the next most common questions from litigants is, "How long is this going to take"?[30]

Reviewing the past half-decade of data published by the OCA, the following average disposition times emerge:

Average Court Processing Time, FY 2005–19	
Court Action	**Average Time**
From filing to denial without either a response or response request	46 days (1.5 months)[31]
From Filing to Petition Disposition	118 days (3.9 months)[32]
From Petition Grant to Oral Argument	96 days (3.2 months)[33]
From Oral Argument to Disposition	127 days (4.2 months)[34]
From Filing to Argued Disposition	342 days (11.4 months)[35]

Fig. 5 *– Average Court processing time during FY 2020–25.*

[26] *SCOTX by the Numbers*, at slide no. 46.

[27] *SCOTX by the Numbers*, at slide no. 48. Prior to 2021, the likely reversal rate in granted petitions was similar, ranging from 82 to 92%. *See 2017 SCOTX Practice*, at 4; *Docket Update*, at 5–6; *Ten Things*, at 2.

[28] *SCOTX by the Numbers*, at slide no. 48.

[29] The statistics in this section are compiled from the annual statistics published by the OCA, from FY 2020–25. *See generally* OCA ANNUAL REPORTS, https://txcourts.gov/statistics/annual-statistical-reports/ [https://perma.cc/48X5-3VTF].

[30] *SCOTX by the Numbers*, at slide no. 46.

[31] *Id.* at slide no. 47 (analyzing FY 2021–24).

[32] *See generally* OCA ANNUAL REPORTS, https://txcourts.gov/statistics/annual-statistical-reports/ [https://perma.cc/48X5-3VTF].

[33] *Id.*

[34] *Id.*

[35] *Id.*

Incredibly, over this span, it only took the Court—on average—a little less than a year to dispose of an argued case.[36]

The timing of petition grants has also changed in recent years. Below is the distribution of petition grants throughout the Court's fiscal year (excluding per curiam opinions) from 2022 to 2025:

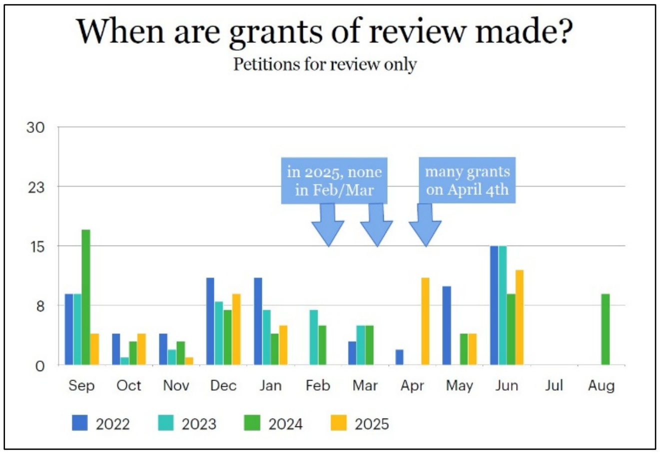

Fig. 6 *– Comparison of the number of and when grants of review were made throughout the fiscal year from 2022 to 2025.*[37]

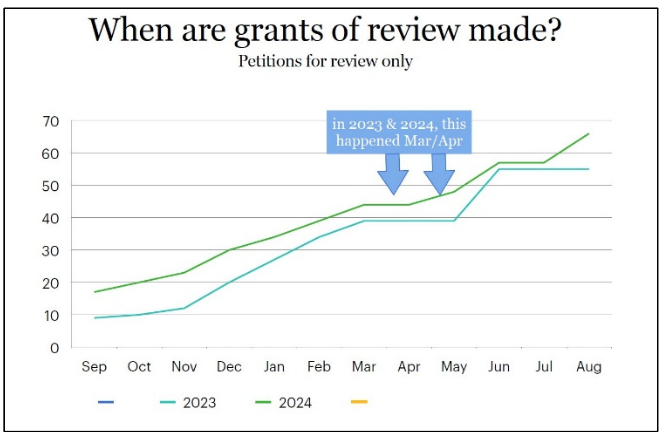

Fig. 7 *– Comparison of when grants of review were made throughout the fiscal year during 2023 and 2024.*[38]

Noticeably, the grants during 2023 to 2024 flatten out during the periods when proposed initial writings are due by the last conference in April and all proposed writings are due by the last conference in May:[39]

[36] *Id.*

[37] *SCOTX by the Numbers*, at slide no. 30.

[38] *Id.* at slide no. 31.

[39] *SCOTX Internal Procedures*, at 20.

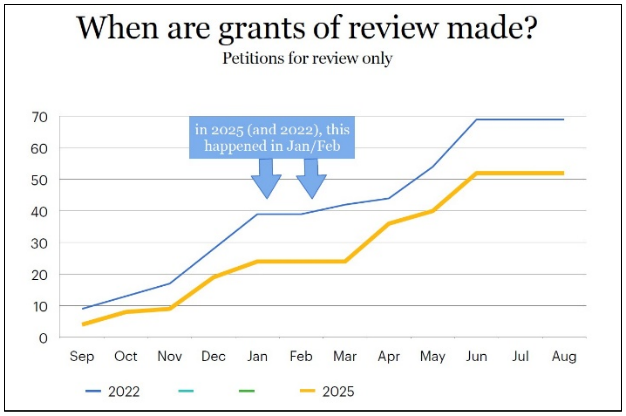

Fig. 8 *– Comparison of when grants of review were made throughout the fiscal year during 2022 and 2025.*[40]

Regardless, the authors caution that, because the Court has now eliminated its former practice of routinely requesting merits briefing before granting review, when it typically grants review during its fiscal year may change going forward.[41]

To reduce the overall time from filing to disposition, the Court has eliminated its former practices of waiting: (1) for the filing of a response or response waiver[42] before forwarding petitions to chambers; and (2) until the initial vote deadline had passed before issuing a response order.[43]

To this end, the January 1, 2026 amendments eliminated the provisions permitting the filing of a response waiver[44] and a recent notice from the Court in a case proceeding under the new appellate rules confirms that: a "response to the petition for review need not be filed unless ordered by the Court" and a "response waiver is no longer recognized or included in the [R]ules."[45]

III. VOTES REQUIRED FOR SPECIFIC COURT ACTIONS

Historically, each Justice reviews a petition and casts an initial vote by noon on Tuesday within four weeks of circulation.[46] A Justice may vote to deny relief, to request a response, or to discuss the case at conference, among other options.[47]

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40 *SCOTX by the Numbers*, at slide no. 32.

41 TEX. R. APP. P. 53, 2026 cmt.; PROCEDURES SUMMARY, at 28, *available at* https://txcourts.gov/media/1461814/259104.pdf [https://perma.cc/BGW7-5MMR].

42

43 PROCEDURES SUMMARY, at 29, *available at* https://txcourts.gov/media/1461814/259104.pdf [https://perma.cc/BGW7-5MMR].

44 Order of Dec. 23, 2025, Misc. Docket No. 25-9104, at 17 (eff. Jan. 1, 2026), *available at* https://txcourts.gov/media/1461814/259104.pdf [https://perma.cc/BGW7-5MMR].

45 Notice in Cause No. 26-0054 (Jan. 16, 2026), *available at* https://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=504435c8-c487-40cb-8816-9f6c557f1e19&coa (last visited May 18, 2026).

46 *SCOTX Internal Procedures*, at 12.

47 *Id.*

The votes required for the Supreme Court to take specific actions on petitions for review are listed below:

Court Vote Matrix	
Court Action	**Votes Required**
Deny petition for review or original proceeding petition[48]:	0 Automatic unless at least 1 vote for something other than "deny"
Request response to petition for review or original proceeding:	1
Request record:	1[49]
Discuss at conference:	1
Request study memo	3[50]
Order briefs on the merits:	4[51]
Set cause for oral argument	4[52]
Grant rehearing of denial of petition for review:	4
Grant petition for review:	4[53]
Grant original proceeding:	5
Grant rehearing of a cause	5[54]
Grant rehearing of original proceeding petition:	5[55]
Set original proceeding for oral argument	5[56]
Dismiss for want of jurisdiction a petition for review or original proceeding petition:	5
Grant temporary relief:	5
Issue majority opinion:	5
Issue per curiam opinion:	6[57]
Refuse petition for review or original proceeding petition:	6
Hold petition for review or original proceeding petition:	6
Dismiss petition for review as improvidently granted:	6

***Fig. 16** – Requisite votes for a given Court action.*[58]

By far the most common dispositions are to "grant," "deny," or issue a "per curiam" opinion.[59] Less common is a decision to dismiss the case for want of jurisdiction.[60] Even more rare is a decision to "refuse" the petition.[61] Although not a formal disposition, the Court may also vote to "hold" the petition pending issuance of a per curiam opinion or the decision of a cause.[62]

And, even though no vote tally has yet been identified by the Court to "GVR"—i.e., grant, vacate, and remand—a petition, Justice Kyle Hawkins, joined by Justices Evan Young and James Sullivan, recently encouraged litigants to request such a disposition when appropriate in light of the new appellate rule revisions.[63]

IV. CONCLUSION

Following the COVID-19 pandemic, the establishment of the first new intermediate court of appeals in nearly six decades, and the Court's recent change regarding when it grants review, the Texas bar has witnessed the rapid acceleration of the pace of change and modernization in both the procedural mechanisms the Texas Supreme Court employs as well as the substantive matters over which it has jurisdiction.

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48 Both the constitution and the Government Code empower the Court to issue writs of mandamus, habeas corpus, procedendo, certiorari, and quo warranto, as well as any such other writs as may be necessary to enforce its jurisdiction. TEX. CONST. art. V, § 3(a); TEX. GOV'T CODE § 22.002(a).

49 *See* TEX. R. APP. P. 54.1.

50 PROCEDURES SUMMARY, at 30, *available at* https://txcourts.gov/media/1461814/259104.pdf [https://perma.cc/BGW7-5MMR].

51 *Id.* Prior to January 1, 2026, if three or more Justices voted to do so, merits briefing would be requested and a study memo would be assigned. *SCOTX Internal Procedures*, at 12–13. Now, however, the Court has clarified that it may order merits briefing upon the vote of four Justices. *See id.*, *available at* https://txcourts.gov/media/1461814/259104.pdf [https://perma.cc/BGW7-5MMR].

52 *Id.*

53 *Id.*

54 *SCOTX Internal Procedures*, at 21.

55 *Id.* at 20.

56 PROCEDURES SUMMARY, at 30, *available at* https://txcourts.gov/media/1461814/259104.pdf [https://perma.cc/BGW7-5MMR].

57 *Id.* at 31.

58 *See SCOTX Internal Procedures*, at 13; *2023 SCOTX Practice*, at 12–13.

59 *SCOTX Internal Procedures*, at 16.

60 *Id.*

61 *Id.* Indeed, the most recent civil case the authors are aware of in which the Court refused review was issued over three decades ago—before petitions for review were established. *See Zuniga v. Groce, Locke &Hebdon*, 878 S.W.2d 313, 318 (Tex. App.–San Antonio 1994, writ ref'd).

62 *Id.*

63 *Noyes v. State*, No. 24-0023, 2026 WL 1390770, at *21 (Tex. May 15, 2026) (Hawkins, J., concurring, joined by Young & Sullivan, JJ.) ("I write separately to highlight why this case is well suited to the GVR mechanism—that is, a brief opinion of the Court that *grants* the petition for review, *vacates* the lower court judgment, and *remands* the case to a lower court in light of some intervening circumstance. When used correctly, GVRs can advance the law and conserve party and judicial resources. Although our Court has rarely issued GVRs, I would encourage litigants to request them when appropriate—especially in light of our recent modifications to Texas Rule of Appellate Procedure 53.").

To learn more about how these changes impact practice before the Court, the authors encourage readers to attend this Fall's TexasBarCLE Civil Appellate Practice 101 and Advanced Civil Appellate Practice courses in Austin in September 2026, where the full—100-page and 1,000-footnote—version of this paper will be presented.[64]

[64] *See* TEXASBARCLE, CIVIL APPELLATE PRACTICE 101: 2026, *available at* https://www.TexasBarCLE.com/new/?TransferTo=L24266 [https://perma.cc/W38C-NRGS]; TEXASBARCLE, ADVANCED CIVIL APPELLATE PRACTICE 2026, *available at* https://www.TexasBarCLE.com/new/?TransferTo=L24268 [https://perma.cc/5JE9-HJ3U].

EVIDENCE & PROCEDURE UPDATES

UPDATES ON CASE LAW pertaining to procedure and evidence as compiled by

Dylan O. Drummond of
Langley & Banack, Inc.

THE "BEST OF"
CONQUERING THE COURTROOM 2026

EVIDENCE UPDATE

BY DYLAN O. DRUMMOND

To best serve the statewide membership of the Litigation Section, this update focuses on decisions from the three courts that possess statewide civil jurisdiction in Texas: the Supreme Court, the Fifteenth Court of Appeals, and the Business Court.

ATTORNEY'S EYES ONLY DESIGNATION

Westlake Longview Corp. Eastman Chem. Co., 2025 Tex. Bus. 19, 712 S.W.3d 103 (11th Div. 2025). The principal purpose of attorney's eyes only ("AEO") designations is to "prevent a *party* from viewing the sensitive information while nevertheless allowing the party's lawyers to litigate on the basis of that information." While AEO designations are perhaps most common in cases involving trade secrets, AEO protection may be available for other commercially sensitive information as well—including customer lists.

Here, a chemical company sought a protective order to shield its customer and sales information from a competitor. In granting in part and denying in part, the Eleventh Division of the Business Court addressed the applicable legal tests and evidentiary burdens for deciding whether discovery material may be designated as AEO under a protective order.

When dealing with the disclosure of commercially sensitive information to competitors, courts deciding whether any specific information is entitled to AEO protection must balance the risk of harm from disclosure against an opposing party's need for the information to properly litigate the case.

To this end, courts employ a burden-shifting paradigm whereby the designating party bears the initial burden of proving that the designated information is entitled to AEO protection and must put forward evidence that: (1) the information is trade secret or other confidential research, development, or commercial information; and (2) there is a risk the party will suffer harm if the information is disclosed to the other party. Such evidence must be specific and concrete—vague, conclusory allegations will not suffice.

If the designating party meets its initial burden, the burden shifts to the opposing party to demonstrate why the party needs access to the information to prosecute or defend the suit and why providing the information to the party's outside counsel and experts will not suffice. The party must demonstrate the specific purposes for which it needs the information—a bald assertion that the party needs the information to advise and direct outside counsel is inadequate. Typically, the party must show that the denial of access will actually prejudice its presentation of the case, rather than merely increase the difficulty of managing the litigation.

Although the Business Court concluded that the chemical company demonstrated a sufficient basis for including an AEO provision in the protective order, it determined that neither party presented sufficient evidence to enable the Court to perform the requisite balancing test.

COMPETENCY OF UNCHALLENGED PORTIONS OF MEDICAL COSTS UNDER TEXAS CIVIL PRACTICES AND REMEDIES CODE SECTION 18.001

Ortiz v. Nelapatla, ___ S.W.3d ___, 2026 WL 1189969 (Tex. 2026). Texas Civil Practice and Remedies Code section 18.001 provides a pretrial process by which a party may avoid the need to adduce expert testimony at trial by serving affidavits attesting to the reasonableness and necessity of medical costs the party is attempting to recover. If a party chooses that route, the opposing party can file a counteraffidavit challenging the reasonableness and necessity of those medical costs.

During a pretrial hearing, a personal-injury defendant objected to the admission of the plaintiff's medical-cost affidavits from medical providers as evidence, arguing that, because the defendant countered the reasonableness and necessity of the plaintiff's costs from those providers, the plaintiff was required to support the costs with expert testimony. The plaintiff disagreed, claiming that the uncontroverted portions of the affidavits were still admissible and that the plaintiff was not required to present other evidence to prove the reasonableness and necessity of those uncontroverted charges.

The trial court sustained the defendant's objection, determining that—once a counteraffidavit is served as to a medical-cost affidavit—all costs discussed in that affidavit must be supported by expert testimony at trial. The Fifth Court of Appeals affirmed, holding that—because the defendant's counteraffidavits were made by qualified persons—they were compliant and therefore rendered the plaintiff's affidavits insufficient on their own to establish the reasonableness and necessity of the providers' expenses.

Faced with the question of what to do when a counteraffidavit only partially challenges the costs identified in the initial affidavit, the Supreme Court reversed and remanded. It held that a partially controverted affidavit may not be excluded from evidence in its entirety solely because portions are controverted. Therefore, the unchallenged portions of the medical costs identified in the plaintiff's initial affidavit remained competent evidence and could be submitted to the factfinder.

EXCLUSION FOR UNTIMELY DISCLOSURE UNDER TEXAS RULE OF CIVIL PROCEDURE 193.6

Diamond Hydraulics, Inc. v. GAC Equip., LLC, 731 S.W.3d 901 (Tex. 2026). Shortly before trial and after its originally-designated causation expert changed jobs, moved out of state, and refused to testify, a hydraulics company attempted to substitute the testimony of untimely-identified expert.

Under Texas Rule of Civil Procedure 193.6, a party cannot offer the testimony of an expert who wasn't timely identified. Consequently, the trial court denied the substitution and the hydraulics company proceeded to trial without a causation expert. After the jury found against the hydraulics company, the Third Court of Appeals affirmed.

The Supreme Court reversed and remanded for a new trial, holding that the trial court abused its discretion when it found the hydraulics company lacked good cause for its untimely designation. While the Court allowed that the "good cause" standard is demanding, the Court determined the hydraulics company nevertheless met it because the company lacked control over the original expert's unavailability, attempted to find alternatives, and relied on this critical testimony.

USE OF PRESUIT DEMAND LETTERS IN DETERMINING JURISDICTION UNDER TEXAS RULE OF EVIDENCE 408

DrinkPAK, LLC v. PRIII/Crow Building C, LP, 2026 Tex. Bus. 27, 2026 WL 1347499 (8th Div. 2026) (mem. op.). The Business Court has civil jurisdiction concurrent with district courts in qualified transactions where the amount in controversy exceeds $5 million.

Relevant here, if removal to the Business Court is contested, the removing party must file its removal notice within thirty days of the date the party requesting removal of the action discovered—or reasonably should have discovered—facts establishing the amount in controversy.

In determining the latter, the Business Court may consider not only the petition as a whole, the nature of the claims asserted, and the underlying transaction, but other evidence bearing on the amount in controversy.

In this case, a canned-beverage manufacturer sued a commercial real estate development broker regarding a commercial lease. Prior to suit, the beverage manufacturer sent a demand letter to the real estate broker claiming damages nearly ten times higher than the Business Court's $5 million jurisdictional threshold.

The beverage company later opposed the real estate broker's removal to the Business Court and one of the bases in the beverage manufacturer's subsequent remand motion was that the real estate broker discovered or reasonably should have discovered from the beverage company's demand letter that the amount in controversy "soared above the Business Court's threshold." The real estate broker argued that the parties' presuit demand letters were inadmissible correspondence under Texas Rule of Evidence 408 because such correspondence cannot be admitted to prove the amount in controversy.

But the Business Court held that, because Rule 408 does not bar the admission of compromise offers and negotiations when offered for another relevant purpose, the Court could consider the beverage company's presuit demand letter to determine when the real estate broker discovered the amount in controversy.

Because the real estate broker failed to remove the action within thirty days of receiving beverage manufacturer's demand letter, the Business Court granted the beverage company's remand motion.

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PROCEDURE UPDATE

BY DYLAN O. DRUMMOND

To best serve the statewide membership of the Litigation Section, this update focuses on recently-enacted statutory provisions and decisions from the three courts that possess statewide civil jurisdiction in Texas: the Supreme Court, the Fifteenth Court of Appeals, and the Business Court.

ALTERNATE SECURITY FOR JUDGMENT DEBTORS WITH NET WORTHS OF $10 MILLION OR MORE

In re Kay, 715 S.W.3d 747 (Tex. 2025) (per curiam) (orig. proceeding). In a suit for breach of their divorce agreement, one former spouse obtained a $54 million judgment against the other, who held shares in a privately-owned startup.

The judgment debtor sought to suspend the judgment and filed an affidavit of net worth and two cashier's checks totaling half of his asserted net worth. At the net worth hearing, the parties principally contested the value of judgment debtor's startup shares. Accepting the valuation testimony of judgment creditor's experts over that of judgment debtor's expert, the trial court found that the judgment debtor's shares were worth $182 million and set $25 million as the required bond amount.

After the Fourteenth Court of Appeals upheld the trial court's bond order, the judgment debtor sought mandamus relief in the Supreme Court—which conditionally granted it.

While the Court did not disturb the trial court's finding regarding the value of the startup shares, it reversed the court of appeals's determination that Rule 24.2(e) deprives trial courts of the discretion to allow alternate security for judgment debtors with a net worth over $10 million. Because Rule 24.1(a) continues to contemplate supersedeas as ordered by the court, trial courts are not limited to the alternative security that Rule 24.2(e) requires in certain cases. Instead, trial courts retain discretion to allow alternative security under Rule 24.1(a)(4) for judgment debtors with net worths of $10 million or more.

Accordingly, the Supreme Court directed the court of appeals to determine whether the trial court abused its discretion in refusing the judgment debtor's offer to tender his startup stock certificate as alternate security.

ANALYSIS OF LIKELY SUCCESS ON THE MERITS REQUIRED WHEN DETERMINING WHETHER TO ISSUE TEMPORARY ORDERS

In re Paxton, 727 S.W.3d 490 (Tex. 2025) (per curiam) (orig. proceeding). The Attorney General issued administrative rules imposing reporting requirements on local prosecutors. A group of counties and prosecutors sued, and the trial court temporarily enjoined the rules' enforcement.

The Attorney General appealed, which automatically superseded the injunction. But the Fifteenth Court of Appeals issued an order under Rule 29.3 leaving the injunction in place as to the named parties.

The Attorney General sought mandamus relief from the Supreme Court, which conditionally granted relief. The Court reiterated that appellate courts must determine whether the party seeking a stay under Rule 29.3 is likely to succeed on the merits. It concluded that the court of appeals erred by granting the stay without considering the merits despite the complexity of the issues and the court's limited time to determine who was likely to succeed on the merits. The Court directed the court of appeals to evaluate the merits and determine whether a Rule 29.3 stay was warranted.

APPELLATE WAIVER BASED UPON DISPUTED AGREEMENT

1 Coventry Ct., LLC v. The Downs of Hillcrest Residential Ass'n, 728 S.W.3d 711 (Tex. 2026) (per curiam). An LLC sued a residential association over a dispute about a fence. Moments before trial, the parties executed a written document that included a provision stating that the parties would subsequently "execute a full and final settlement agreement." Two months later, the parties still had not signed a final settlement agreement.

So the trial court entered judgment incorporating the pretrial agreement and ordered the parties to sign a final settlement agreement. Both parties proposed settlement agreements, which each side refused to sign. The residential association moved to hold the LLC in contempt for refusing to sign the residential association's version of the settlement agreement, which the trial court granted. After being ordered to sign the residential association's version of the settlement agreement, the LLC complied and appealed.

The Fifth Court of Appeals dismissed the appeal, holding that the LLC waived its right to appeal by executing the final settlement agreement.

The Supreme Court reversed and remanded, holding that the court of appeals erred by accepting the settlement agreement at face value and treating its appellate waiver as conclusive. Because the LLC contested the validity of the final settlement agreement that purported to waive its appellate rights, the court of appeals had an obligation to review the record to ascertain whether there was a valid waiver.

DEATH-PENALTY SANCTIONS FOR DISCOVERY ABUSES

In re Newkirk Logistics, Inc., 718 S.W.3d 240 (Tex. 2025) (per curiam) (orig. proceeding). Following a motor-vehicle accident involving a tractor trailer, the injured plaintiffs sued the truck driver's company and the freight company whose load he was hauling.

In discovery, the plaintiffs sought contracts between the driver's company and the freight company. While the driver's company claimed it found no responsive contracts, the freight company produced two contracts between it and the driver's company. The trial court subsequently struck the pleadings of the driver's company after the plaintiffs sought sanctions against it.

After the Second Court of Appeals denied mandamus relief to the driver's company, the Supreme Court conditionally granted it. The Court held that the trial court abused its discretion in imposing death-penalty sanctions against the driver's company. Although the driver's company signed the contracts between it and the freight company years earlier, there was insufficient evidence that the driver's company intentionally concealed or failed to produce the contracts. The Court also rejected the trial court's other justifications for the death-penalty sanctions, finding insufficient evidence existed that the driver's company had possession of or intentionally withheld other requested documents.

As a result, the sanctions lacked a direct relationship to the alleged conduct, and the sanctions were excessive because the record lacked evidence of flagrant or extreme bad faith. And because the trial court did not consider lesser sanctions before striking the pleadings of the driver's company, the Court directed the trial court to vacate its order striking the pleadings.

DEFECTIVE SERVICE REGARDING DEFAULT JUDGMENT

Shamrock Enters., LLC v. Top Notch Movers, LLC, 728 S.W.3d 693 (Tex. 2026). A Texas mover sued its Alabama-based corporate client for failing to pay for moving services provided in Alabama and Louisiana.

The Texas mover requested substituted service of process on the Texas Secretary of State, alleging that the Alabama client failed to maintain a registered agent for service in Texas. The Texas mover's filings identified the address in the citation as the Alabama client's "principal office" and "last known address." After the Secretary of State certified the forwarded service to the Alabama client at the address provided by the Texas mover, it was returned with the notation "Return to Sender, Vacant, Unable to Forward." As a result, the Alabama client never appeared, and the default judgment—which was mailed to the Alabama client at the same address the service was returned from—was similarly returned as undeliverable.

On restricted appeal, the Thirteenth Court of Appeals affirmed, finding no error apparent on the face of the record.

But the Supreme Court unanimously reversed and vacated the judgment. Without deciding whether the Alabama client was amenable to substituted service, the Court held that the default judgment was improper because the record did not reflect that process was forwarded to the address the statute required—the defendant's "most recent address on file with the Secretary of State." As a result, the Secretary of State's certification was conclusive only as to the facts stated therein—but the lower courts erred in presuming the forwarding address was the one the statute required when nothing in the record or certification indicated that it was. No presumptions in favor of valid service are entertained following a no-answer default judgment.

LOSS-OF-CHANCE INSTRUCTIONS AND NEW TRIAL ORDERS

In re Lapuerta, ___ S.W.3d ___, 2026 WL 969263 (Tex. 2026) (orig. proceeding). A plaintiff sued a doctor for malpractice who treated his finger, which was later amputated.

The jury was given a "loss of chance" instruction stating that the finger must have had a greater than 50% chance of survival for the doctor's negligence to be a proximate cause of injury. During deliberations, the jury sent out the following question: "Does the charge relate to the whole finger or partial finger?" The jury eventually returned an 11-1 defense verdict and the trial court rendered a conforming judgment.

The plaintiff moved for new trial, attaching a letter from the lone dissenting juror that purported to reveal the contents of the jury's deliberations—which the plaintiff offered to show that the jury was uncertain whether the loss-of-chance instruction referred to all or part of the finger, as evidenced by the jury's question. While the trial court granted Torres's amended motion for new trial, it did not specifically rely on the juror's letter, but did base its ruling on its determine that the loss-of-chance doctrine is not recognized in Texas law.

After the doctor unsuccessfully sought mandamus relief from the First Court of Appeals, the Supreme Court directed the trial court to vacate the new-trial order and render judgment based on the verdict. The Court first noted that the juror's letter invaded the privacy of jury deliberations and should not have been considered. The Court also confirmed that loss of chance is not only a recognized doctrine in Texas, it is not limited to death cases. The Court also reasoned that, contrary to the new-trial order, that even if an ideal instruction might have distinguished between the whole finger and the partial finger, the record did not show that the jury probably would have reached a different result with a more nuanced instruction.

REMAND IN THE INTEREST OF JUSTICE VERSUS RENDITION

Valk v. Copper Creek Distribs., Inc., ___ S.W.3d ___, 2026 WL 1041612 (Tex. 2026). An individual doing business as a construction entity sued a distributor based on an alleged labor-theft scheme. The distributor appealed following a verdict and judgment in favor of the construction entity.

On appeal, the distributor raised several issues, some of which would have entitled the distributor to rendition of judgment. But the Fifth Court of Appeals considered only whether the trial court erred by giving a spoliation instruction. The court of appeals reversed and remanded for a new trial in the interest of justice, reasoning that the erroneous instruction prevented full development and presentation of the evidence.

Reasoning that remanding for a new trial without first considering appellate issues that might result in rendition was improper, the Supreme Court reversed and remanded. The Court explained that only those cases where the governing law changed during the life of the case or where the trial court's error precluded a party from presenting a necessary aspect of its case are ones in which a remand for further development or in the interest of justice is appropriate instead of rendition.

Because the Court concluded there was no change in the law and the record did not suggest that the instruction precluded presentation or development of the evidence, it held the court of appeals could have rendered a judgment if it had determined that the rendition points were meritorious. The Court also noted that the court of appeals's failure to first consider the rendition points erroneously limited its harm analysis.

SUMMARY JUDGMENT PRACTICE AND PROCEDURE

Tex. R. Civ. P. 166a. Pursuant to the revisions to Texas Government Code section 23.303 made during the 89th Legislature's second called session, which became effective December 4, 2025, the Texas Supreme Court finally approved on February 27, 2026 conforming changes to Texas Rule of Civil Procedure 166a. These revisions represent a complete rewrite of the rule and are effective March 1, 2026.

Due to the regular and two called sessions of the 89th Legislature in 2005, practitioners should be aware that there are now four regimes governing the filing and resolution of summary-judgment motions in Texas. Summary-judgment motions filed through August 1, 2025 are governed under the former version of Rule 166a. Summary-judgment motions filed from September 1, 2025 through December 3, 2025 are governed under SB 293. In turn, those filed between December 4, 2025 and February 28, 2026 are governed under HB 16. And finally, summary-judgment motions filed on or after March 1, 2026 are governed under the new version of Rule 166a.

While a complete summary of the new Rule is beyond the scope of this update, some of the major revisions are summarized below:

Rule 166a(d)(1) provides that responses to summary-judgment motions are now due within twenty-one (21) days of the summary-judgment motion's filing. In turn, Rule 166a(e)(1) now requires replies in support of a summary-judgment to be filed within seven (7) days of the response's filing.

Rule 166a(g)(1) provides that hearings on or submissions of summary-judgment motions cannot be set within thirty-five (35) days after the motion is filed. Hearings on or submissions of summary-judgment motions are now be required to be set within either: (1) sixty (60) days of the motion's filing; or (2) ninety (90) days of the motion's filing: (a) if the court's docket so requires; (b) on a showing of good cause; or (c) if the movant agrees.

Rule 166a(g)(3) also now requires both summary-judgment movants and nonmovants to submit proposed orders before the hearing or submission date.

And finally, Rule 166a(i) now requires trial courts to sign, file, and serve a copy of a written summary-judgment ruling on the parties within (90) days of the hearing or submission date.

TEXAS SUPREME COURT PRACTICE AND PROCEDURE

The following is a reprint of the Texas Supreme Court's excellent four-page Procedures Summary that it published as part of its December 23, 2025 Order finally adopting revisions to Texas Rules of Appellate Procedure 9, 52, 53, 54, 55, 56, 57, 58, and 64, effective January 1, 2026:

> In Misc. Dkt. No. 25-9104, the Court amends the Texas Rules of Appellate Procedure to eliminate the Court's practice of requesting merits briefs before granting a petition for review, effective January 1, 2026. The amendments apply to a case in the Court in which the petition—or the first petition for review, in a case involving multiple petitions—is filed on or after January 1, 2026. The purpose of this summary is to explain how the Court's processes will change—and, in many cases, remain the same—to accomplish this objective. This summary is shared to document the Court's ordinary practices for the benefit of the bar and public and is not intended to bind the Court. On occasion, strict adherence to these procedures may undermine rather than effectuate the underlying goal of effective judicial administration or may be impractical for other reasons.
>
> **Petition for Review**
>
> - A petition for review remains the primary means to seek the Court's review of the decision of a court of appeals. Before filing a petition for review, one should carefully review Texas Rule of Appellate Procedure 9, which establishes word and page limits, margins, font sizes, and other format requirements. One should also carefully review Texas Rule of Appellate Procedure 53, which sets out the necessary contents of and deadlines for filing a petition for review.
> - In Rule 9.4(i), a 2,000-word increase to the word limit for a petition for review will allow the Court to decide whether to grant a petition for review based entirely on the petition-stage briefing.
> - The word-limit increase is intended to accommodate the expanded focus of a petition for review. Rule 53.2 now requires a petition for review to address more robustly the merits of the appeal and error preservation. It also eliminates the practice of "unbriefed" issues to avoid the Court improvidently granting review.
> - Rule 53.2 also reorganizes a petition for review's contents to place a greater emphasis on the introduction. The goal of petitioner's introduction section is to explain enough about the case, its importance, and the merits to illustrate its plausible inclusion within the Court's merits docket. A well-framed introduction will motivate members of the Court to read beyond that section with care. Conversely, clear introductions help the Court more readily understand when a petition for review should be denied. The introduction is limited to 1,000 words that must be counted within the petition's overall word count.
>
> **The Court's Initial Review**
>
> - The Court Clerk and Court Administrator circulate the petition to the Court on the Tuesday following its filing. The Court Clerk and Court Administrator will no longer wait for the filing of a response or waiver or for the response deadline to pass before circulating a petition for review for the Court's initial review. This change in practice should help reduce the overall time from filing to disposition.
> - Each Justice reviews the petition and casts an initial vote within four weeks of circulation. A Justice may vote to deny relief, to request a response, or to discuss the case at conference, among other options.
> - A petition for review receiving no votes other

than to deny by the initial vote deadline will be denied on the next orders list, which issues on Friday.

- If any Justice votes other than to deny, the case will be placed on the Court's agenda for discussion at the next conference, except that a petition receiving a vote for a response will either: (a) if no response is filed, be placed on the Court's conference agenda after the deadline for filing the response has passed; or (b) if a response is filed, be placed on the Court's conference agenda after the reply is received or the deadline for filing the reply has passed, whichever is earlier.

- A vote for a response triggers the Supreme Court Clerk to immediately convey the Court's order that a response be filed. The Clerk will no longer wait until the initial vote deadline to pass before issuing the order for a response. Again, this change in practice should help reduce the overall time from filing to disposition.

Response to Petition for Review

- A party need not file a response to a petition for review unless ordered by the Court and ordinarily is not well-served by filing a response without such an order. The Court will not grant a petition without first ordering a response or receiving a response from a party voluntarily. This practice remains unchanged.

- The changes to the response practice in Rule 53.3 track the changes to Rule 53.2 regarding petitions for review. The word limit is increased by 2,000 words and the contents are rearranged to emphasize the introduction.

- Because the Court intends to grant review on petition-stage briefing, the responding party should be fully incentivized to flesh out jurisdictional or other problems at the outset.

Conference at Petition Stage

- The Court's deliberative process remains unchanged.

- For each case on the conference agenda, the Court will act or defer the case for further development and consideration.

- A Justice may circulate a memo in a case at any time.

- The Court may request that Court staff prepare a "study memo" upon the vote of 3 Justices. Study memos are assigned by rotation to each chambers in seniority order.

Argued Cases

- The Court may grant review, set the case for oral argument, and order briefing on the merits upon the vote of 4 Justices. It takes 5 votes to set an original proceeding requesting extraordinary relief for oral argument.

- The Court may set oral argument when it announces its decision to grant review, so it is important for attorneys to file any vacation notices as soon as possible.

- As reflected in Texas Rule of Appellate Procedure 55, a responding party now has the same amount of time to file merits briefing as the petitioner: 30 days. This change also makes briefing deadlines in the Court consistent with the deadlines in the courts of appeals.

- Before the Court hears oral argument, each case will be randomly assigned to a Justice as the presumptive author of the majority opinion, with the aim of evenly distributing cases among the Court.

- When feasible, the Court will leave sufficient time between the grant announcement and oral argument to allow each side 1 full extension if needed and to ensure that all briefing is completed at least 2 weeks in advance of oral argument.

Time Extensions

- The Court intends to remain generous in granting motions for extensions of time to file a petition, a response to a petition, or a reply.

- However, because oral argument is closely tied to the merits briefing schedule, the Court's generosity in granting extensions of time to file merits briefs will be more limited. Because ordinarily merits briefs are no longer solicited in aid of the Court's decision to grant the petition, when they are ordered, counsel may expect that the Court will rule on the merits, which now may be the briefs' exclusive focus.

- The Court will not grant a request for a merits brief extension if the request would push the briefing deadline into the 2-week window before oral argument.

Per Curiam Opinions

- The Court may dispose of a petition on the merits without hearing oral argument upon the vote of 6 Justices.

- The Court may issue a per curiam opinion without requesting merits briefing. In such cases, the Court may rely in part on the court of appeals briefs.

- The Court reserves the authority to order merits briefing before issuing a per curiam opinion.

- The need for flexibility in handling per curiam opinions is one of the reasons the Court has maintained the language in Rule 55.1 that allows the Court to order merits briefing before granting review.

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